

2008

Michael Clayton Martin v. Workforce Services : Reply Brief

Utah Court of Appeals

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UTAH APPELLATE COURTS
DEC 09 2008

Michael Clayton Martin
417 M Street
Salt Lake City, Utah 84103

IN THE COURT OF APPEALS

State of Utah

Michael Clayton Martin, Petitioner

Vs.

Workforce Services, Respondent

Appellant's Reply Brief

In the Court of Appeals
State of Utah

Petition for review

Case # 20080052CA

Respondent,

Suzan Pixton #2608
Department of Workforce Services
Appeals Office
P.O. Box 45244
Salt Lake City, Utah 84145

Petitioner,

Michael Clayton Martin
417 M Street
Salt Lake City, Utah 84103

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Supplemental Statement of the Case

These issues of unemployment compensation are a continuation of a persistent history of employment discrimination, illegal employment relationships and the wrongful denial of unemployment benefits to an otherwise eligible applicant.

In September of 2005 in response to a series of claims of illegal employment conditions, the Salt Lake City Police Department in full armor and color of law order the employee to stop all work related activities. Had the issue been properly handled, the department could of resolved the problem.

According to Utah law the correct calculation of unemployment is 65% for claims dating back to 2000 and 62.5% of claimant's highest weekly income for claims dating back to 2004.

Monetary fiscal income is determined upon calculations of gross incomes had the employers been in compliance with the law.

Claimant has suffered a number of illegal employment relationships with wages at rates below statuary minimum wage, with unusually long hours, and illegal work conditions.

For this claimant, retaliation and discrimination in employment is a problem among employers with hourly wages as little as ten cents per hour, or no compensation for thousands of hours worked, and employment conditions that prevented an injured worker fair compensation. The problem is that the department is empowering employers to continue to abuse the employee without enabling the employee to seek new and lawful employment without the loss to a properly calculated unemployment benefit.

The response of the employee after being asked to quit was to strike against the wrongs the claimant had endured by demanding compliance with federal and state labor laws.

The record is wrong about the employee apparently refusing to meet with the employer in effort to work things out. The record shows that the employee subsequently meet with the employer who is unable to rehire the worker due to an economic downturn in his business after the employee had left.

Rehiring the employee is no longer an option, even though wages past due were forgiven and never pursued by the employee. A progressive unplanned lockout from employment was the result of an employer who failed to care about alleged injury and a growing debt that was causing financial problems in employment.

Summary of Argument

The board and the ALJ failed to inquire into factual challenges when brought to the Judge's attention. Unemployment benefits are not to be withheld from a claimant when an employee alleges illegal employment conditions involving wage and hour laws.

Any corrections made to the record are the result of a long and arduous protest of employers who have failed to correctly cover the unemployment issues of this worker. Consequently, liability for the errors of this department, have been wrongfully transferred to the employee's family to compensate for the lack of employment entitlements that would have otherwise been paid by this department had the claims been properly handled.

Point I

Claimants Statement of Quit or Fired

The statement that the claimant quit is incorrect. These are not my thoughts, these words are what my employer asked or directed me to say to avoid apparently liability and employer contractual obligations. See

The corrected statement should read the claimant is protesting the illegal acts of his employers that are harmful to him and his family. See

The public policy R994-405, 401, 408, states, that an employee should not be disqualified from unemployment benefits when a non-compliant employer is violating state or federal laws.

My employment status is neither quit nor fired but rather a claim and right to protest illegal employment conditions.

My demands have been corrective action against harmful employment conditions that are otherwise illegal, unsafe, violate personal privacy, and/or involve unfair compensation practices.

Point II

Clarification of At-will employment

The employee does not dispute the right of an employer to terminated employment at any time in an at-will employment relationship, but challenges the public misperception that contractual debts and consequences for illegal employment events are discharged upon termination of employment.

Point III

Clarification of On-Call Employment

An employer who requires an employee to remain in readiness to work while on call is considered on duty time and is compensable time worked. 49 CFR 395

Failure to compensate is illegal.

Point IV

Clarification of Temporary Merchant Activities or Short Term Employment Contracts

Temporary employment requires special licensure that is not held by those employing the worker on short term assignments or daily labor conditions. These employment relationships are not at-will employment. Illegal employment conditions are not to disqualify the employee from seeking unemployment.

The license required for a temporary merchant activity stipulates that the sponsoring merchant cannot be an exempt employer. The entity must be a qualified firm through a qualified person who is a non exempt individual.

None of the employment relationships presented for appeal involves temporary merchant employment despite the fact that many of the employers have engaged its practice illegally, as a condition of employment adverse to this person's legal rights.

Point V

Clarification of Hostile Work Environment

Discretionary abuse of workforce services in granting unemployment compensation during times of underemployment or other illegal conditions propounded against the employee have only aggravated his employment relationships while transferring financial obligations to other family members such as his wife and children. The Utah Constitution has granted the power for this department to resolve these issues by disbursing financial support in unemployment benefits or other employment relief programs while pursuing the issues.

Point VI

Clarification of General Welfare Benefits

These benefits are administered by this department and whose decisions are the subject of this appeal that including all subsequent acts that relate to the denial of benefits as administered by the department of workforce services.

Point VII

Clarification of Work Suffered or Permitted by Employer

The department has benefited by the employee maintaining a record of employers who have failed to properly report earning to the department. The burden remains the employees until records are corrected.

Point VIII

Clarification on Segregation of Claims

The claimant argues that the other employer's potential wages can be calculated separately and totaled to the weekly benefit amount as required for concurrent work and separate accounting for different entities.

The rule is 65% or 62.5% of the average fiscal weekly wage based on the potential wage had an employer been in compliance with the law.

35A-4-401. Benefits -- Weekly benefit amount -- Computation of benefits -- Department to prescribe rules -- Notification of benefits -- Bonuses.

Relevant parts:

(2) (a) An individual's "weekly benefit amount" is an amount equal to 1/26th, disregarding any fraction of \$1, of the individual's total wages for insured work paid during that quarter of the base period in which the total wages were highest.

i) With respect to an individual whose benefit year commences on or after January 1, 2001, 65% of the "insured average fiscal year weekly wage" during the preceding fiscal year, e.g., fiscal year 2000 for individuals establishing benefit years in 2001, disregarding any fraction of \$1, constitutes the maximum "weekly benefit amount" payable.

(ii) With respect to an individual who files a claim for benefits on or after July 4, 2004, 62.5% of the insured average fiscal year weekly wage during the preceding fiscal year, disregarding any fraction of \$1, constitutes the maximum weekly benefit amount payable.

(B) The new weekly benefit amount shall be determined under this Subsection (2).

(ii) As recomputed the total benefits potentially payable, commencing with the effective date of the recomputation, shall be equal to the recomputed weekly benefit amount times the quotient obtained by dividing the potential benefits unpaid prior to the recomputation by the initial weekly benefit amount, disregarding fractions.

(3) (a) An eligible individual who is unemployed in any week shall be paid with respect to that week a benefit in an amount equal to the individual's weekly benefit amount less that part of the individual's wage payable to the individual with respect to that week that is in excess of 30% of the individual's weekly benefit amount.

4) (a) An otherwise eligible individual is entitled during a benefit year to a total amount of benefits determined by multiplying the individual's weekly benefit amount times the individual's potential duration.

(b) To determine an individual's potential duration, the individual's total wages for insured work paid during the base period is multiplied by 27%, disregarding any fraction of \$1, and divided by the individual's weekly benefit amount, disregarding any fraction, but not less than ten nor more than 26.

Those weeks of employment with earning of less than 30% of the gross weekly benefit amount should to be paid concurrently. Working two or more jobs is allowed and does not disqualify the claimant. This policy allows the employee to earn up to 95% of ones former earnings while unemployed.

In the instance that represents this appeal, a calculation of the benefit according to the above rules amounts to \$1538 for 21 weeks. Yet the department has figured \$185 per week for 13 weeks based on an incorrect record and employers who fail to report full earnings.

Point VIX

Clarification of Employers use of Personal Equipment and Tools

Wages are offset by the cost of tools and personal protective wears that are not reimbursed by and employer. If the wages fall below statutory minimum wages then the use of personal equipment is illegal.

Point X

Clarification of Workers Compensation Injury

Medical Information is private and protected from public disclosure and is protected from open meetings and workplace discussion. Workforce services response to these matters appears as insensitive and a lack of care for an alleged injured person. Calling the event employee fraud, without knowing all facts involved, is irresponsible,

and the light of the whole record will show governmental failure to exercise reasonable care in this matter.

“Joint and Dual Employment”:

Larson’s Workers’ Compensation Law, § 68.02, Joint employment occurs when a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other. In such a case, both employers are liable for workmen’s compensation Joint employment is possible, and indeed fairly common, because there is nothing unusual about the coinciding of both control by two employers and the advancement of the interests of two employers in a single piece of work.

Section 34A-2-201 of the Utah Workers’ Compensation Act requires employers to maintain workers’ compensation coverage for their employees. The Utah Supreme Court has noted that “[t]his section imposes an unconditional obligation on employers to be properly insured.”

Upon events leading up to this appeal, the employee was working for more than one employer in several concurrent work relationships. At the time of the alleged injury the employee was accepting a new employment offer for better wages and work conditions. However, due to privacy violations, information about an alleged injury was unintentional communicated to the prospective employer, and salvaging any relationship would have been futile, because all related employers feared liability for the injury.

The reason the employee was entertaining new employment offers was because his primary employer require the employee to work all hours of the day without overtime compensation. These work conditions were causing economic, physical, mental, personal and professional harm to the employee.

Point XI

Clarification of the Department's Definition of Unemployment

Workforce services denied benefits because the employee has been working full time for multiple employers. This decision is in error even though the employee may be earning less than his weekly benefit amount.

The state of Utah defines unemployment as total, part-total, or even partial unemployment while attached to their regular jobs or even other forms of short-time work when necessary. An employee may be a full time student while also working full time before becoming unemployed. Or an individual may have two or more full time jobs that *requires a condition where the applicant must be considered unemployed due to loss of customary wages*, see 35A-4-207

Secondly, a claimant is allowed to earn to 30% of benefit amount while making an unemployment claim, see 35A-4-401

35A-4-207. Unemployment.

(1) (a) An individual is "unemployed" in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with respect to the week are less than his weekly benefit amount.

(b) The department shall prescribe rules applicable to unemployed individuals making distinctions in the procedure as to total unemployment, part-total unemployment, partial unemployment of individuals attached to their regular jobs, and other forms of short-time work, as the department considers necessary.

(2) The department may by rule prescribe in the case of individuals working on a regular attachment basis the existence of unemployment for periods longer than a week if:

(a) it is a period of less than full-time work;

(b) insofar as possible the loss of wages required as a condition of being considered unemployed in those periods shall be such as to allow comparable benefits, for comparable loss in wages, to those individuals working less than full-time in each week as would be payable on a weekly claim period basis to those individuals working full-time and not at all in alternate weeks.

(3) Unemployment shall in no case be measured on a basis of longer than a four-week period.

Workforce Services will not allow the employee to receive unemployment compensation while employed full time at wages that are zero or otherwise below minimum wage despite the fact the underemployment is equivalent to unemployment when an employee is not being compensated for work at customarily rates or at wage rates that exceed federal and state minimum wage standards. This policy fails to make a distinction between total unemployment or those who may have lost secondary income or work full time in addition to full time regular employment as a volunteer or as a full time student in addition to other full time work.

Although, the employee works full time for more than one employer, when the fact that the wages earned are less than federal and state minimum wages should be a red flag of an illegal employment relationship and should not be used to disqualify the employee from unemployment benefits as long as the employee is willing and able to accept suitable and lawful new employment.

Point XII

Clarification of Employer Retaliation and Discrimination Issues

The employer directing an employee to quit is an employer lockout issue.

The motivation in light of the whole record show that the employer intended to constructively force out the employee to avoid financial obligations to compensate the worker for wages owed and also avoid any unemployment compensation claims appear to be the motive of the employer.

In light of the whole record, the employer asking that the keys, truck, uniforms, tools, company records are all evidence of an employer lockout. Failing to pay full compensation for work performed is a form of employer lockout. Failing to dispatch to work assignments is a form of lockout. Interfering with a new employment relationship, so the employee does not work for the competition is a form of a lockout. Requiring the employee to work all hour of all shifts without rest is a form of employer lockout. Requiring the employee to work without pay for eight weeks is a form of lockout from employment. Requiring the employee to concurrently work for separate entities without any compensation is a form of employer lockout. Failing to correct unsafe workplace policies that prevent workers compensation is a form of employer lockout when children are exposed to unsafe gases due to a customer demand for an illegal vent.

All these events are adverse to the employee's best interest and the employee's reaction to these illegal wages, hours, and work conditions is sensible, logical and practical in light of the whole record.

The employee's reaction to a progressive lockout is reasonable. The employee was protesting his employer(s) by striking against the wrongs that were being propounded against him. When asked to quit his employment, the employee's reaction is reasonable considering the claimant persistent protest of these wrongs that has been carried to the highest levels of government.

Point XIII

Claimant has suffered a number of illegal employment relationships with wages at rates below statutory minimum wage, with unusually long hours, and illegal work conditions.

Retaliation and discrimination in employment is a problem among employers for this claimant with hourly wages as little as ten cents per hour, or excessively long hours amounting to years of overtime without any compensation, or, employment conditions that are unsafe work environments. In order to maintain life, the claimant has endured several unsuitable work conditions empowered by the department's lack of proper discretion.

Summary

State tolerance of \$4.95 per hour when federal wages per hour is \$5.15 is illegal and disqualification of unemployment benefits is against public policy.

State tolerance of 10 cents per hour is illegal and should not disqualify an individual from unemployment benefits.

The judgment of the department of workforce services, the appeals board, the judicial officers, the monetary unit, and welfare services should be reversed in light of the whole record.

The department should not require the claimant to engage an appeal to correct weekly benefit allowances.

The department's demand that these issues to be presented to this court as an exclusive remedy requires the strictest of penalties to be applied upon those involved in the decision making process and the wrongful denial of entitlements that would have been otherwise paid to a qualified individual.

Upon presenting information to the monetary unit of missing wage information, the department refused to correct the record as a discretionary power granted to the department by the Utah Constitution, but chose to delay matters by requiring the claimant process an appeal. Subsequently, the bad faith actions of the department have required appeals at all levels of the department, which has now brought these matters to be presented to this court for full review in light of the whole record under the jurisdiction pursuant to Article 8 section 3 of the Utah constitution.

The federal code of regulations defines on-duty as all time from the time a person begins to work or is required to be in readiness to work until the time the person is relieved from work and all responsibilities for performing the work.

The error that the department of workforce services has made is disqualifying the applicant from unemployment compensation and other financial assistance during the times of employer abuse. The decisions of work force services have empowered employers to violate these rules of fair labor law, and other protections as discussed in this brief.

The employee's current employment pays \$61.43 per day. The claimant is required to pay his own expenses while on the road, such as phone, showers, entertainment, correspondences with family, and food estimated by the employer to cost the employee about \$40 per day. That leaves the employee with \$21.43 per day. The employer requires 168 hour a week while on tour of duty. Federal rules require reasonable off duty time that is currently being circumvented by creative logging methods that would otherwise be against public policy. The employer required 30 days of volunteer time in order to get hired, and now requires on-duty time that amounts to 10 cents an hour. Any promise of future wages is

dependent upon the company hiring new recruits under the same conditions.

The decisions of the department have forced me to continue to work in an otherwise illegal employment environment, or have nothing to live on until these issues are resolved, despite the fact that I continue to look for new work.

The federal rules that regulate my profession state that on-duty time includes all time at a plant, terminal, facility, or other property of the employer or on public property, waiting to be dispatched, or servicing, or attending to disabled vehicles.

On-duty includes time following up, testing, or providing breath or urine specimens; including travel time to and from the collection sites, and all drive time from place to place servicing or delivering goods to consumers.

On- duty includes all time servicing, inspecting, repairing, conditioning, or supervising the maintenance of commercial vehicles. On-duty also involves assisting with the loading, unloading, equipment, freight, baggage, goods, merchandise, or passengers. Paperwork involves giving or receiving receipts, or other travel or transportation documents as required. Compensation is due for all on-duty time in the employ of, or in the service of, or in any other capacity of work suffered or permitted to be performed. These are the rules that have been applied in calculating the customary hours of work time that equates to 10 cents per hour, or \$4.25 per hour for the employer of record.

A handwritten signature in black ink, appearing to read "Michael Martin". The signature is fluid and cursive, with a large initial "M" and a stylized "M" at the end.

Michael Martin

December 9, 2008

I Michael Martin certify that I have hand delivered a copy to the
reply to brief upon the following persons.

Suzan Pixton #2608

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Utah Court of Appeals

A handwritten signature in black ink, appearing to read "Michael Martin". The signature is fluid and cursive, with a long horizontal stroke at the end.

Michael Martin

December 9, 2008