

1986

Harold C. Hurst, v. Board of Review of the Industrial Commission of Utah, Department of Employment Security: Respondent's Brief

Utah Supreme Court

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**UTAH SUPREME COURT
BRIEF**

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**IN THE SUPREME COURT
OF THE STATE OF UTAH**

HAROLD C. HURST,

Claimant-Petitioner,

vs.

Case No. 860058

BOARD OF REVIEW OF THE INDUSTRIAL
COMMISSION OF UTAH, DEPARTMENT OF
EMPLOYMENT SECURITY, and TERRA
DIAMOND INDUSTRIAL, INC.,

Category 6

Respondents.

RESPONDENTS' BRIEF

**Petition for Review of a Decision of the
Board of Review of the Industrial Commission
Unemployment Insurance Division
State of Utah**

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Board of Review and
Department of Employment
Security

LIST OF PARTIES

Claimant-Petitioner

Harold C. Hurst

Respondents

Board of Review of the
Industrial Commission
of Utah

Department of Employment
Security

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IN THE SUPREME COURT OF THE STATE OF UTAH

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COMMISSION OF UTAH, DEPARTMENT OF
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Category 6

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RESPONDENTS' BRIEF

STATEMENT OF ISSUES PRESENTED ON APPEAL

The issue presented on appeal is whether or not the Petitioner was properly denied unemployment benefits under §35-4-5(a), Utah Code Annotated, 1953, as amended (Pocket Supplement, 1983), on the grounds that he had voluntarily left his work at Terra Diamond without good cause and that a denial of benefits would not violate principles of equity and good conscience.

STATEMENT OF THE CASE

This is an action before the Supreme Court of the State of Utah pursuant to ¶35-4-10(i), Utah Code Annotated, 1953, seeking judicial review of the unanimous decision of the Board of Review, Industrial Commission of Utah, Case No. 85-BR-668, dated January 3, 1986, (see Appendix A), which affirmed the decision

of the Administrative Law Judge ("ALJ" hereinafter) in Case No. 85-A-5189, dated June 14, 1985. (See Appendix B) The ALJ disqualified the Claimant/Petitioner ("Claimant" hereafter) from the receipt of unemployment insurance benefits pursuant to §35-4-5(a) of the Utah Code Annotated, 1953, as amended, ("the Act" hereinafter), on the grounds that he had voluntarily left his employment at Terra Diamond without good cause and that a denial of benefits did not violate equity and good conscience. The ALJ's decision affirmed the decision of the Department representative which had also denied benefits pursuant to §35-4-5(a) of the Act. (See Appendix C)

STATEMENT OF FACTS

The facts recited in the Claimant's Brief are correct, with the following additions.

Within the first month of his employment at Terra Diamond, the Claimant understood that no commission base existed. Nevertheless, he elected to remain with the company because he considered the job to have a promising future. R. 70

With respect to the housing subsidy provided by the employer, such subsidy was to last for only 6 months. R.90 In addition to the 6 months of rent subsidy, the employer also paid the Claimant's rent for the first and last month, his cleaning deposit, and moving expenses. R. 73

Throughout the period of the Claimant's employment, his commission income increased steadily and the Claimant believed

that within a few months his income would be sufficient to meet his expenses. R. 67, 90

Now that the Claimant and his family have returned to Utah, the Claimant's wife may seek work to help meet the family's expenses. The Claimant had no work arranged at the time he moved back to Utah, nor any prospects of work. He is willing to accept employment paying \$6 to \$7 per hour. His current living expenses include rental payments of \$450 per month. R. 89

SUMMARY OF ARGUMENT

In reviewing the Board's decision, the Court will decide issues of general law without deference to the Board's determinations, while affirming the Boards' determinations of basic fact if supported by evidence of any substance. With respect to issues of ultimate fact, mixed fact and law, and interpretations of the operative provisions of the Utah Employment Security Act which the Board is empowered to enforce, the Court will affirm the Board's determination if within the limits of reasonableness and rationality.

§35-4-5(a) of the Act permits payment of unemployment benefits if the applicant has voluntarily left work with good cause. "Good cause" is such cause as would similarly affect persons of reasonable and normal sensitivity, and is so compelling as to justify a prudent person in taking the same action. Good cause not established if the applicant could have continued to work while seeking other employment.

The Act also permits payment of benefits if a denial would violate principles of equity and good conscience. To meet this standard, the applicant must show that he acted reasonably, that the denial of benefits would be inconsistent with the purposes of the unemployment insurance program, and that the applicant has a continuing attachment to the labor force.

In the present case, the evidence supports the independent determinations of the Department Representative, the ALJ, and the Board of Review that the Claimant did not have good cause within the meaning of the Act for leaving his work with Terra Diamond. The Claimant has also failed to establish that his actions were "reasonable" so as to justify payment of benefits under the standard of equity and good conscience. Therefore, the Board correctly disqualified the Claimant from eligibility for benefits.

ARGUMENT

POINT I

IN REVIEWING A DETERMINATION OF THE BOARD OF REVIEW, THE COURT WILL APPLY DIFFERENT STANDARDS OF REVIEW TO QUESTIONS OF FACT, QUESTIONS OF BASIC LAW, AND QUESTIONS OF MIXED FACT AND LAW OR INTERPRETATION OF OPERATIVE STATUTORY PROVISIONS.

A. REVIEW UPON QUESTIONS OF FACT.

Section 35-4-10(i) of the Act provides in part:

In any judicial proceeding under this section the findings of the Commission and the Board of Review as to the facts if supported by evidence shall be conclusive and the jurisdiction of said Court shall be confined to questions of law.

The Court affords the greatest degree of deference to the Commission's findings on questions of basic fact. Utah Department of Administrative Services v. Public Service Commission, Utah, 658 P.2d 601 (1983). The Quantum of evidence required upon questions of fact before the Industrial Commission in unemployment compensation matters is ". . . evidence of any substance whatever which can reasonably be regarded as supporting the determination made . . .". Kennecott Copper Corporation Employees v. Department of Employment Security of Industrial Commission, 13 U.2d 262, 372 P.2d 987 (1962), reaffirmed in Taylor v. Department of Employment Security, Industrial Commission, Utah, 647 P.2d 1 (1982). Therefore, a finding of basic fact which is supported by evidence of any substance whatever must be affirmed, unless the finding is so without foundation as to be deemed arbitrary and capricious.

B. REVIEW UPON QUESTIONS OF LAW.

The Court applies a "correction of error" standard in reviewing the Commission's interpretations of general questions of law. Deference to the expertise of the Commission is not extended, given the Court's duty to correct misconstruction or misapplication of general law. Utah Department of Administrative Services, supra at p. 13; McPhie v. Industrial Commission, Utah, 567 P.2d 153 (1977).

C. QUESTIONS OF ULTIMATE FACT, MIXED FACT AND LAW OR INTERPRETATION OF OPERATIVE PROVISIONS OF THE UTAH EMPLOYMENT SECURITY ACT.

A third standard of review seeks to assure that administrative adjudication falls within the limits of reasonableness and rationality. In applying this standard to agency decisions, the Court has invoked the "time honored rule of law . . . that the construction of statutes by governmental agencies charged with their administration should be given considerable weight . . .". McPhie v. Industrial Commission, supra at p. 13. Specifically in Kehl v. Board of Review of Industrial Commission, Department of Employment Security, Utah, 700 P.2d 1129 (1985), the Court held that:

. . . unless the administrative law judge's decision based upon the proposed Rules and Regulations is outside the limits of reasonableness and rationality, we will uphold it.

Thus the rule-making and interpretative authority of an agency falls within the scope of this intermediate level of review. The Court reviews the commission's interpretative rules with due regard for the Commission's authority to adopt such rules. Decisions by the Commission based upon interpretative and implementing rules will be reversed only if shown to be inconsistent with the governing legislation or the decisions of the Court. West Jordan v. Department of Employment Security, Utah, 656 P.2d 411 (1982); also see McPhie v. Industrial Commission, supra at P. 14 and Utah Hotel Co. v. Industrial Commission, 107 p.2d 471 (1944).

D. CONCLUSION

Applying the foregoing standards of review to the present case, the Board's findings of basic fact are supported by substantial evidence, and should be affirmed. The Board's determinations as to issues of ultimate fact, mixed fact and law, and interpretation of the Act are well within the limits of reasonableness and rationality and should also be affirmed. Finally, as to issues of general law, the claimant has identified no instance where the Board has misconstrued or misapplied such law so as to require the Court's intervention.

POINT II

THE BOARD OF REVIEW REASONABLY CONCLUDED THAT THE CLAIMANT/PETITIONER DID NOT HAVE GOOD CAUSE WITHIN THE MEANING OF §35-4-5(a) OF THE ACT FOR VOLUNTARILY ENDING HIS EMPLOYMENT.

§35-4-5(a) of the Act requires that benefits be denied if the Claimant voluntarily left work without good cause, unless a denial of benefits violates principles of equity and good conscience. The elements necessary to establish good cause will be addressed in this portion of Respondent's Brief.

Good cause for leaving work sufficient to justify payment of benefits is established if continuance of the employment would have had an adverse effect on the claimant which could not

be controlled or prevented, and necessitated immediate severance of the employment relationship. The separation must have been motivated by circumstances which made continuance of the employment a hardship or matter of real concern sufficiently adverse to a reasonable person to outweigh the benefits of remaining employed. Despite evidence of an adverse impact on the claimant, good cause for leaving does not exist if the claimant could have continued working while seeking other work or followed alternatives that would have allowed him to preserve his job. See Denby v. Board of Review, 567 P.2d 626 (Utah), 1977, also, Rule A71-07-1:5(I)(B)(1), Rules and Regulations of the Department of Employment Security. The Claimant has the burden of proof and must show that he had good cause for quitting, or that he meets the requirements for allowance under the equity and good conscience provision before benefits can be allowed. Rule A71-07-1:5(I)(E), Rules and Regulations of the Department of Employment Security.

In applying the foregoing standards to determine whether the Claimant had good cause for leaving his work with Terra Diamond, it is noted the sole basis cited by the Claimant for his decision to leave was his short-term financial problems. R. 89 The Claimant had no complaint with the work itself and the employer had fully performed all of its obligations under the Claimant's employment contract. R.78, 79

While economic considerations may, under some circumstances, constitute good cause for leaving employment, it must still be shown that such considerations result in hardship

sufficient to outweigh the advantages of continued employment. By remaining employed, the Claimant continued to receive his regular income, which was in excess of \$1700 per month and rising. He also enjoyed the free use of an automobile provided by the employer, health insurance and other fringe benefits. R. 78, 79 Opposed to these benefits from employment was the Claimant's short-term financial problem. The Claimant contends that he had insufficient funds to remain in California. R. 89 However, the record discloses that just prior to his resignation, he received a salary and commission check in the amount of \$2,842. His projected expenses for the following month were approximately \$2,015. R. 65 While some of this surplus may have been necessary to meet expenses associated with the birth of another child, the remainder could have been used to meet short-term expenses. As noted in the ALJ's decision, the steady increase in the Claimant's commissions would have been sufficient to meet household expenses within a few months. The Claimant himself concedes that within a few months he would have been self-sufficient. R. 67, 86, 88. The record further discloses that the Claimant had been allowed to take draws against commissions in the past. R. 54 This was another source of funds to meet short-term expenses while commissions increased. In establishing the existence of good cause for quitting, the Claimant must also show that he could not have found other work while remaining employed, that no alternatives existed which would have made it possible for him to stay employed, and that he gave the employer reasonable notice of his circumstances

so as to provide the employer with an opportunity to alleviate those circumstances. As an outside salesman in southern California, the Claimant was located in one of the nation's largest job markets. He had sufficient freedom in his day-to-day activities to search for other work either in California or Utah. He has failed to establish that he made a concerted effort to find other work before leaving Terra Diamond. R. 69 As already discussed, the Claimant did not take advantage of available alternative methods for easing his cash-flow problem. The Claimant also failed to unequivocally inform the employer that his situation was so serious as to compel him to quit. R. 75 The employer was willing to entertain suggestions by the Claimant to resolve the problem, and had acted in good faith before as shown by its willingness to subsidize the claimant's housing expense. In view of the foregoing, the ALJ and Board of Review properly concluded that the Claimant did not exhaust the alternatives which a prudent person would explore in a good faith effort to remain employed.

In summary, the sole reason for the Claimant's decision to leave employment at Terra Diamond was his short-term financial condition. His salary, commissions and draws against future commissions provided him with sufficient means to meet his obligations. Even if such means had not been available, the Claimant could have continued to work while seeking other, more lucrative employment in the large southern California job market, or in Utah. Finally, the Claimant did not clearly advise the employer that assistance was necessary. In view of

these circumstances, the Claimant has not established good cause for leaving within the meaning of the Act.

POINT III

THE BOARD OF REVIEW REASONABLY CONCLUDED THAT IT WOULD NOT BE CONTRARY TO EQUITY AND GOOD CONSCIENCE TO DENY BENEFITS.

Unemployment benefits may be paid absent a showing of good cause for voluntary leaving work if a denial of benefits would violate principles of equity and good conscience. §35-4-5(a) of Act provides, in material part, as follows:

A claimant shall not be denied eligibility for benefits if the claimant leaves work under circumstances of such a nature that it would be contrary to equity and good conscience to impose a disqualification.

The commission shall, in cooperation with the employer, consider for the purposes of this act, the reasonableness of the claimant's action, and the extent to which the actions evidence a continuing attachment to the labor market in reaching a determination of whether the ineligibility of a claimant is contract to equity and good conscience.

As the Court has previously concluded, "the 'equity and good conscience' standard does not give the Commission carte blanche authority to confer benefits at will." Salt Lake City Corp. v. Department of Employment Security, Utah 657, P.2d 1312, at 1317 (1982) The Industrial Commission, acting through the Department of Employment Security, has adopted certain regulations to guide the application of the "equity and good conscience" provision of the Act.

When the circumstances of the quit were not sufficiently compelling to justify an allowance of benefits

for good cause but there were mitigating circumstances, and a denial of benefits would be unreasonably harsh or an affront to fairness, benefits may be allowed under the provisions of equity and good conscience if all of the following elements are present:

- a. the decision is made in cooperation with the employer by giving the employer an opportunity to provide information;
- b. the claimant acted reasonably;
- c. a denial would be inconsistent with the intent of the unemployment program; and
- d. the claimant demonstrated a continued attachment to the labor market.

Rule A71-07-1:5(I)(C)(1), Rules and Regulations of the Utah Department of Employment Security

The Claimant has failed to establish that he acted reasonably, and for that reason the ALJ and Board of Review concluded that the denial of benefits in this case does not violate equity and good conscience.

Department regulations define "reasonable" as: ...those actions which make the decision to quit logical, sensible or practical.... There must be mitigating circumstances which, although not compelling, may be considered as motivating a reasonable person to take similar action." Rule A71-07-1:5(I)(C)(2)(b), Rules and Regulations of the Utah Department of Employment Security

In this case, the Claimant chose to leave his employment because his income was allegedly insufficient to meet his living expenses; particularly his rent expense. However, by leaving work and returning to Utah, the Claimant deprived himself and his family of all income. R.88 While his move to Utah may have temporarily resulted in relief from rent expense, by the time of

his appeal hearing he was once again confronted with rent expense, as well as all other expenses of maintaining a family and home. R. 89 Furthermore, the Claimant is now willing to accept employment which will pay approximately half of what he earned with Terra Diamond. R. 88 As to the expense incurred in the birth of his last child, it is noted that medical insurance provided by the employer ultimately covered these costs. R. 101 While neither the Claimant nor the employer knew the costs would be met by insurance at the time the Claimant ended his employment, the Claimant did not **escape** liability for those costs by leaving work, but by leaving work he surrendered any means by which to pay his expenses. The Claimant did not improve his situation by leaving work, and he has not shown that the circumstances of his job would have motivated a reasonable person to take the drastic action of voluntarily quitting.

Continuing attachment to the labor market, standing alone, does not suffice to justify payment of benefits under the equity and good conscience provision the Act. Mitigating circumstances which make the decision to leave work logical, sensible or practical must also be shown. After careful review of the evidence presented by the Claimant and employer, both the ALJ and the Board concluded that the Claimant had not **demonstrated** such circumstances. Consequently, the ALJ and Board of Review properly determined that benefits may not be allowed under the provision of equity and good conscience established by the Act.

CONCLUSION

The decision of the ALJ, as affirmed by the Board of Review, is consistent with the requirement of the Utah Employment Security Act and the precedent decisions of this Court.

§35-4-5(a) of the Act requires that benefits be denied to any individual who has voluntarily left work without good cause, unless a denial of benefits would be contrary to equity and good conscience. In this case, the Claimant has failed to establish of good cause for leaving his work. He has not shown reasons so compelling as would justify an ordinary, prudent person in taking such action, nor did he pursue alternatives which might have allowed him to remain employed. With respect to eligibility under the "equity and good conscience" provision of §35-4-5(a) of the Act, the Claimant's decision to leave work was neither logical, sensible nor practical--he did not improve his situation by leaving a promising job which was his only source of income. As his actions were not reasonable, a denial of benefits is not contrary to equity and good conscience.

The Board's decision to deny benefits was based upon sufficient evidence adduced during a hearing at which the Claimant was afforded every opportunity to provide evidence which would justify his position. Sufficient evidence exists in the record to support the Board's decision, which is well within the limits of reasonableness and rationality.

Respectfully submitted this 16th day of June, 1986.

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By

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BOARD OF REVIEW
The Industrial Commission of Utah
Unemployment Compensation Appeals

WTA/CL/WMF/cd

HAROLD C. HURST
S.S.A. No. 529 82 1344

vs.

DEPARTMENT OF EMPLOYMENT SECURITY

:
:
Case No. 85-A-5189
:
DECISION
:
Case No. 85-BR-668

After careful consideration of the record and testimony in the above-entitled matter, the Board of Review finds the decision of the Administrative Law Judge to be fair and unbiased and supported by competent evidence and, therefore, affirms such decision denying benefits to the claimant effective August 11, 1985, and continuing until he has worked in bona fide covered employment and earned wages equal to at least six times his weekly benefit amount and is otherwise eligible, pursuant to §35-4-5(a) of the Utah Employment Security Act, on the grounds he voluntarily left his employment without good cause and that it would not be contrary to equity and good conscience to impose a disqualification; and relieving the employer, Terra Diamond Industrial, Inc., of benefit charges in connection with this claim. In so holding, the Board of Review hereby adopts the findings of fact and conclusion of law of the decision of the Administrative Law Judge.

This decision will become final ten days after the date of mailing hereof and any further appeal must be made directly with the Utah Supreme Court at the State Capitol Building, Salt Lake City, Utah, within ten days after this decision becomes final. To file an appeal with the Supreme Court you must submit to the Clerk of the Court a Petition for Writ of Review setting forth the reasons for appeal, pursuant to §35-4-10(i) of the Utah Employment Security Act, followed by a Docketing Statement and a Legal Brief.

BOARD OF REVIEW

Dated this 3rd day of January, 1986.

Date Mailed: January 8, 1986.

Arthur L. Whelan
Don White
Ken Groves

UTAH INDUSTRIAL COMMISSION OF UTAH
DEPARTMENT OF EMPLOYMENT SECURITY

APPEALS TRIBUNAL

DECISION OF ADMINISTRATIVE LAW JUDGE

Arnold C. Hurst : S.S.A. No. 529-82-1344
838 Greendale :
Salt Lake City, Utah 84121 : Case No. 85-A-5189

DATE OF APPEAL: September 9, 1985 DATE OF HEARING: September 26, 1985
October 15, 1985
APPEARANCES: Claimant and Employer PLACE OF HEARING: Salt Lake City/
Telephone

The Department's decision dated August 28, 1985, denied unemployment insurance benefits effective August 11, 1985, and continuing, on the grounds the claimant left work voluntarily without good cause and that a denial of unemployment insurance benefits would not be contrary to equity and good conscience. Section 35-4-5(a) of the Utah Employment Security Act is quoted on the attached sheet.

FINDINGS OF FACT:

Prior to filing a claim for unemployment insurance benefits against the State of Utah effective August 11, 1985, the claimant earned \$1,200 per month plus commissions, a company vehicle, and an expense account as a sales representative for Terra Diamond Industrial, Inc., where he was employed from May 1, 1984, to August 8, 1985, when he quit due to the circumstances outlined below.

The claimant was hired while residing in Salt Lake City and was assigned a territory in Southern California. Prior to the time of hire relocation to Southern California was discussed, and the claimant agreed to relocation if necessary. After working the Southern California territory for six months or so by commuting back and forth between Salt Lake City and Southern California, the decision to have the claimant move to Southern California was made, and in November the claimant and his spouse began looking for a suitable housing arrangement in that area.

The claimant subsequently leased a home in Mission Viejo, California, for \$925 per month and moved in in mid-December, 1984. The employer paid the first and last months rent, cleaning deposit, and all moving expenses. Although it had not been discussed prior to the decision to have the claimant permanently relocate in Southern California, after realizing the housing costs were substantially higher there than in Salt Lake, the employer agreed to provide a housing allowance of \$475 for six months with the thought that by the end of the six-month period the claimant's commissions would have increased to the point where he would be able to absorb the additional housing costs.

During the latter part of June the claimant received his salary check for the month of July. However, no housing allowance was included. By that time the

claimant's commissions, although they fluctuated greatly, were averaging approximately \$700 per month and were increasing steadily. However, the claimant still felt unable to meet the financial obligations for himself and a family of a wife and six children without the continuation of the housing allowance. As a result, the claimant traveled to Salt Lake City in early July to meet with the company president and attempt to renegotiate a continuance of the housing subsidy. At first the company president indicated it perhaps would be possible to continue the housing subsidy for another couple of months. However, on July 12, 1985, the claimant was notified the decision had been made not to continue the housing allowance.

With that in mind, the claimant returned to California, reviewed his situation, and as he did not have enough money to meet the lease payment on his house for the month of July, he decided to quit and relocate back to Utah. A letter of resignation dated July 17, 1985, was typed and forwarded to the employer announcing his intention to quit on or about August 15, 1985, and that he had to vacate the home he had leased in California by August 10.

Contributing to the claimant's financial difficulties at the time of separation was the fact that his wife gave birth to their sixth child in early July. Considerable confusion had existed over the term of the claimant's employment with the employer in question concerning his health insurance coverage. Due to the cost of this benefit, the employer does not cover employees immediately upon hire but has a waiting period, which is negotiable to some degree, during which it is determined whether or not the individual in question is likely to be a long-term permanent employee. In the claimant's case, approximately four months subsequent to his date of hire he inquired about his insurance coverage. He was informed he could be added on the company's policy and approximately one month later, in early October, the office manager gave him some insurance papers to complete. This caused the claimant some concern, as he wondered why he was completing the forms a month or so after he had been told he had been added on, but he did not think much more about it and assumed both he and his family had health insurance coverage. In January, 1985, after relocating to California, the claimant's spouse was diagnosed as being pregnant, and in mid-February the claimant checked with the employer to make sure his wife's pregnancy was covered under the insurance plan. The office manager confirmed it was. However, in March, 1985, the claimant was informed that there may be a problem with the insurance coverage of the pregnancy as the conception date apparently preceded the date the claimant's insurance coverage was made effective, which was December 1, 1985. However, the office manager then received confirmation from the insurance company that the claimant was in fact covered. However, when the claimant's spouse's physician's office checked with the insurance company in April, 1985, to verify coverage they were told the claimant's spouse's pregnancy was not covered. This went back and forth for a number of days with the insurance company saying the pregnancy was covered one day and that it was not the next. The final disposition of the insurance matter at the time the claimant elected to quit was that the pregnancy was not covered on the basis that the conception date preceded the effective date of coverage and that he would be liable to pay approximately \$4,000 in medical bills to cover the cost of a C-Section and the other costs associated with childbirth. However, in mid-September, 1985, over a month after the claimant's last day of employment with the firm in question, the claimant and employer were advised that the insurance company had in fact decided to cover the costs associated with his wife's pregnancy and subsequent childbirth.

The claimant began to immediately seek employment following his relocation to Salt Lake City in mid-August and has continued to look for employment on a regular basis each week through the date of the hearing. However, as of the date of the hearing he was still unemployed. The claimant is now willing to accept work at a pay level substantially less than he was earning at Terra Diamond with the thought that his spouse may have to find work in order to maintain the financial integrity of their household.

REASONING AND CONCLUSIONS OF LAW:

Conditions that make a position undesirable for an individual are not necessarily sufficient motivation to give the person good cause for quitting the job within the meaning of the Utah Employment Security Act. The Act is concerned with such elements as wages or salaries below the prevailing level; the requirement that the employee perform illegal acts; working conditions which are injurious to health; violations of the employment contract; excessive production requirements; and other conditions of a similar nature.

In the present case, the difficulty of covering the expenses of a large family in today's economy on the salary of one individual is understood. However, the record does not show there was any violation of the employment contract or that the claimant's compensation package was substandard for the type of work he was performing. Although the incident involving the insurance coverage is regrettable, again there is no evidence that the employer was operating in bad faith with respect to obtaining health insurance coverage for the claimant and his family. This is reinforced by the fact the employer continued to negotiate with the carrier on behalf of the claimant after first becoming aware of the insurance company's position and by the fact the claimant's expenses for his spouse's pregnancy and subsequent childbirth were ultimately paid, albeit beyond his date of separation from the employer in question. The claimant's commissions were increasing on a regular basis, and it appears that if that trend had continued his financial pressures would have subsided considerably within a few months.

In view of the circumstances outlined above, it is held the claimant has not established good cause for his decision to quit his employment with Terra Diamond Industrial, Inc., and that his actions in doing so were not sufficiently reasonable as to warrant a conclusion that a denial of unemployment insurance compensation would be contrary to equity and good conscience.

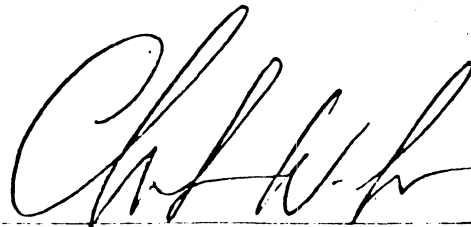
A contributing employer may be considered eligible for relief of benefit ratio charges if the claimant was separated for circumstances which would have resulted in a denial of benefits in accordance with the provisions of Section 35-4-5(a) of the Utah Employment Security Act. Inasmuch as the claimant in the present case was separated under disqualifying circumstances, it is held the employer is eligible for relief of benefit ratio charges in connection with this claim.

DECISION:

The decision of the Department representative which denied unemployment insurance benefits in accordance with the provisions of Section 35-4-5(a) of the Utah

Employment Security Act is affirmed effective August 11, 1985, and continuing until the claimant has performed services in bona fide covered employment and earned wages for those services equal to at least six times his weekly benefit amount.

The employer, Terra Diamond Industrial, Inc., is relieved of liability for charges in connection with this claim as provided by Section 35-4-7(c)(3)(F) of the Utah Employment Security Act.



Christopher W. Love
Administrative Law Judge
DEPARTMENT OF EMPLOYMENT SECURITY

This decision will become final unless within ten days from October 30, 1985, further written appeal is made to the Board of Review, P. O. Box 11600, Salt Lake City, Utah 84147, setting forth the grounds on which the appeal is made.

jsn
Attachment

cc: Terra Diamond Industrial, Inc.
c/o Vincent M. Tilby CPA
7109 Highland Drive
Salt Lake City, Utah 84121

Waine Riches, Attorney at Law
Utah Legal Services, Inc.
637 East Fourth South
Salt Lake City, Utah 84102

Form 615-J UTAH DEPARTMENT OF EMPLOYMENT SECURITY UI DEN
7/85

DECISION OF ELIGIBILITY FOR
UNEMPLOYMENT INSURANCE BENEFITS
Distribution:
#1-CO #2-CL
#3-CR #4-LO

	EMP NOTIF
	EMPLOYER NAME
SOC. SEC. #529-82-1344	Terr Diamond Ind.
NAME AND ADDRESS OF CLAIMANT	OFFICE ADDRESS
Harold C. Hurst 5117 Lori Way Salt Lake City, Utah 84117	Salt Lake Claims 1234 So. Main St. Salt Lake, Utah 84101

NOTICE: THIS DECISION IS MADE ON YOUR CLAIM FOR BENEFITS:

You voluntarily left your job because you were dissatisfied with working conditions.

You have not shown that continuing your employment would have caused sufficient hardship to have made it necessary for you to quit before finding another job or that you had no reasonable alternative to quitting.

This denial is not against equity and good conscience because you have not shown that your actions were sufficiently reasonable and you did not demonstrate a continuing attachment to the labor market.

Benefits are denied under Section 35-4-5(a) of the Utah Employment Security Act beginning August 11, 1985 and ending when you have earned wages in bona fide covered employment equal to at least six times your weekly benefit amount and you are otherwise eligible. You must provide proof of these earnings when you report to Job Service to reopen your claim.

RIGHT TO AN—INTERVIEW--If this decision was based upon written information only, you have the right to an in-person interview. For an interview, you must report in person to the nearest Job Service office within ten (10) days of the date this decision was mailed.

RIGHT TO APPEAL--If you believe this decision is incorrect as to facts or conclusions, you have ten (10) days from the date mailed to file a written appeal. Mail this to the nearest Job Service office or to: Appeals Section; P.O. Box 11600; Salt Lake City, Utah 84147. Please include your Social Security number.

Date Mailed 08-28-85 Repr. D. Jacobs/cj Emp. # 2133 L.O. 21

EXHIBIT 5

STATUTES AND RULES APPLICABLE TO THE CASE

§35-4-5(a), Utah Code Annotated, 1953, as amended, provides as follows:

5. An individual is ineligible for benefits or for purposes of establishing a waiting period:

(a) For the week in which the claimant left work voluntarily without good cause, if so found by the commission, and for each week thereafter until the claimant has performed services in bona fide covered employment and earned wages for those services equal to at least six times the claimant's weekly benefit amount. A claimant shall not be denied eligibility for benefits if the claimant leaves work under circumstances of such a nature that it would be contrary to equity and good conscience to impose a disqualification.

The commission shall, in cooperation with the employer, consider for the purposes of this act the reasonableness of the claimant's actions, and the extent to which the actions evidence a genuine continuing attachment to the labor market in reaching a determination of whether the ineligibility of a claimant is contrary to equity and good conscience.

Rules A71-07-1:5(I)A., B., C., E., and G., Department of Employment Security Rules and Regulations, provide as follows:

A. GENERAL DEFINITION

Voluntarily leaving work means that the employee severed the employment relationship as contracted to a separation initiated by the employer. This is true regardless of how compelling the claimant's reasons were for making the decision to leave the work.

Voluntary leaving will include not only leaving existing work, but also the failure to return to work after a lay-off, suspension, or period of absence. Voluntary leaving also includes failure to renew a contract as in the case of a school teacher or athlete. Benefits may be allowed following a voluntary separation from employment only if the claimant left work with good cause or a denial of benefits would be contrary to equity and good conscience.

B. GOOD CAUSE

1. Good cause is established if continuance of the employment would have had an adverse effect on the claimant which could not be controlled or prevented and necessitated immediate severance of the employment relationship, or if the work was illegal, or unsuitable new work.

a. Adverse Effect on the Claimant. The separation must have been motivated by circumstances which made continuance of the employment a hardship or matter of real concern sufficiently adverse to a reasonable person to outweigh the benefits of remaining employed. There must be a showing of actual or potential physical, mental, economic, personal or professional harm caused or aggravated by continuance in the employment. The claimant's reason(s) for belief of the consequences of remaining on the job must be real, not imaginary; substantial, not trifling. These circumstances must be applied as to the average individual, not the supersensitive.

b. Ability to Control or Prevent. Even though there is evidence of an adverse effect on the claimant good cause is not established if the claimant:

(1) reasonably could have continued working while looking for other employment, or

(2) had reasonable alternatives that would have made it possible for him to preserve his job through approved leave, transfer, or adjustment to personal circumstances, etc. or,

(3) had not given the employer notice of the circumstances causing the hardship so the employer would have an opportunity to make adjustments which would alleviate the need to quit.

C. EQUITY AND GOOD CONSCIENCE

1. When the circumstances of the quit were not sufficiently compelling to justify an allowance of benefits for good cause, but there were mitigating circumstances, and a denial of benefits would be unreasonably harsh or an affront to fairness, benefits may be allowed under the provisions of equity and good conscience if all of the following elements are present:

a. the decision is made in cooperation with the employer by giving the employer an opportunity to provide information;

- b. the claimant acted reasonably;
- c. a denial would be inconsistent with the intent of the unemployment insurance program; and
- d. the claimant demonstrated a continued attachment to the labor market.

2. The elements of equity and good conscience are defined as follows:

a. In Cooperation With the Employer. In administering the unemployment insurance program, the intent of the Department is to maintain a careful balance between claimants and employers to make fairness the uppermost consideration. The employer is given an opportunity to provide information when the Department notified him that a former employee has filed a claim for benefits. Such notice provides an opportunity to explain the reason for separation. The employer is also notified of any appeal with regard to the separation except as provided under Section 35-4-4(e).

b. The Claimant Acted Reasonably. Reasonable is defined as those actions which are consistent with traditional American work practices. The actions which might be acceptable for a member of a subculture are not the norm by which reasonableness is established. There must be mitigating circumstances which make the decision to quit logical, sensible and practical.

c. Consistent with the Purposes of the Act. The intent of the Act is to temper the hardships associated with unemployment and to provide stability for the economy by maintaining purchasing power. Even though there is some fault on the part of the claimant there are mitigating circumstances when the loss of employment is the result of the reasonable exercise of judgement.

d. Continued Attachment to the Labor Market. The claimant establishes his attachment to the labor market by taking positive action(s) which could result in employment such as making contacts with prospective employers, preparing resumes, developing job leads, etc., during the first week after leaving work and continuing each week thereafter. Such a work search should have been undertaken without instructions from the Department. Failure to show attachment to the labor market during the first week of unemployment may be allowed if it was not practical for the individual to seek work in circumstances such as: illness, hospitalization, incarceration, or for other reasons beyond the control of the claimant.

E. EVIDENCE AND BURDEN OR PROOF

Since the claimant is the moving part in a voluntary separation, he is the best source of information with regard to the reasons for the quit. The claimant must show by a preponderance of evidence that he had "good cause" for quitting, or that he meets the requirements for allowance under the equity and good conscience provision before benefits can be allowed.

G. EXAMPLES OR SPECIFIC REASONS FOR SEPARATIONS

In all the following examples, the basic elements of good cause or equity and good conscience must be considered in determination eligibility for benefits. The following examples do not include all reasons for leaving employment.

3. Personal Circumstances.

There may be personal circumstances which are sufficiently compelling or create sufficient hardship to justify leaving work, provided the individual made reasonable attempts to make adjustments or find alternatives.

APPENDIX E: REFERENCES TO THE RECORD.....

ATTACH THIS STATEMENT BEFORE DEPOSITING

TERRA DIAMOND INDUSTRIAL

ACCOUNT OR INVOICE NO.	DESCRIPTION	AMOUNT	DISCOUNT OR DEDUCTION	NET AMOUNT
	\$ 1789 ⁹¹ less draw 360 Commission 2nd Qtr-85			

TERRA DIAMOND INDUSTRIAL

HOURS	RATE	GROSS EARNINGS	FICA	FED WITH TAX	STATE WITH TAX				NET EARNINGS PAID
REG. T.									
O.T.									

DEDUCTIONS

THIS IS A STATEMENT OF YOUR EARNINGS AND DEDUCTIONS FOR PERIOD INDICATED. KEEP THIS FOR YOUR PERMANENT RECORD

ATTACH THIS STATEMENT BEFORE DEPOSITING

TERRA DIAMOND INDUSTRIAL

ACCOUNT OR INVOICE NO.	DESCRIPTION	AMOUNT	DISCOUNT OR DEDUCTION	NET AMOUNT
	June rent Subsidy 475 ⁰⁰ ✓ # 06336	547		

TERRA DIAMOND INDUSTRIAL

HOURS	RATE	GROSS EARNINGS	FICA	FED WITH TAX	STATE WITH TAX				NET EARNINGS PAID
REG. T.									
O.T.									

DEDUCTIONS

THIS IS A STATEMENT OF YOUR EARNINGS AND DEDUCTIONS FOR PERIOD INDICATED. KEEP THIS FOR YOUR PERMANENT RECORD

EX-111111

0054

Attorney During the time you were in California.

Claimant Up until the final commission check, yes.

Attorney And with your housing allowance that equals \$1,731 available. Is that correct that we read your writing here.

Claimant Yes, right.

Attorney So there was a difference at that time of \$234. Is that correct?

Claimant Yes, I had to subsidize my living, or supplement it by \$234 per month.

Attorney Okay, and how long were you in California?

Claimant Eight months.

Attorney Eight months, and how did you continue to, how did you receive your commission Was it on a monthly basis, or quarterly basis or?

Claimant It was quarterly.

Attorney It was quarterly. So prior to receiving a commission check, then you would have also had to expended out of your own money the \$600 and some-odd dollars.

Claimant Yes, we continued to supplement my income roughly \$230 per month, actually that is a little bit of a low figure considering my cost in moving down. The incidentals.

Attorney Then let's get right to the very last month that you were at work. Did your cost of living remain the same for that month?

Claimant Yes.

Attorney Were there any, well, were there any additional costs for that month?

Claimant Yes, right at the last month there was a rent increase of \$50 per month and the cost of the baby which was \$4,000.

Attorney Okay. Now, you have a document that you have prepared entitled cost of living last month of work versus income and you indicate those figures that you just testified to. What was your earnings during that last month, or your projected earnings for that last month?

Claimant With the commission check I just received and salary, less the housing allowance, it was \$2,842.

Attorney So you had at that time comparing the two a total debt for living expenses Well, a total living expense of actually \$2,015, right?

nt approval. And I asked him to let me know as soon as possible and explained again my situation. And on 7-12-85, that Friday, I went back to the office to try and talk with Pat again. I found out he was gone. And the secretary there, the office manager had my salary check again and no housing allowance check, and I asked her. Do you happen to know what Pat O'Day's final decision was on the housing allowance. And she said, yes, I do. They decided not to continue it again. And so I accepted that as their final decision.

ey Okay. While talking with your employer, did you discuss any other alternatives that could be worked out either to make up for the housing allowance or to tide you over until say the commissions picked up to where they were above the place they currently were.

nt At that particular time we didn't really talk about any alternatives as he never brought up any alternatives and I didn't either because, I mean, there just wasn't. My savings were completely gone and there was just really nothing else I could do unless I had some help to continue on for a few months. And I just assumed that they would see it that way also because commissions were on the increase and another four to six months I probably would have been able to handle it. Ah, but then after I returned to California, a couple of weeks after I had returned to California. Well, after I had returned to California, a few days afterwards, I had made my final decision that, well, there is just nothing we can do. We simply can't afford to stay here as my rent was already a week and a half overdue. I had no choice but to inform my landlady that I didn't have the money to make up the difference and that we would have to move on the 8th of the following month, or the 10th of the following month when rent was due. And so I had a letter typed up and sent it to Pat O'Day informing him that I had decided to quit. And then it was after I sent that letter to Pat O'Day, I talked with him on the phone. He expressed his regret that I had made that decision and left it at that and said that he probably would be down in another week or so to talk with me and to get our accounts up to date, information and so-forth, and to pick up the car, the company car. And so when he did come down, our discussion was what little we had talked about the job itself and my continuing was as stated in the letter. He made the statement that he had expected me to be a little more creative as a salesman. And to have worked with him on it and to come back with some counter proposals, and when I asked him like what options do I have for instance. He said, well, it might have been possible to for the company to have lent you the money for another six months and then had you repay it against commissions. And then after that he also made a statement, or made a comment that I might have even gone to the church to get assistance, you know, to fill the gap until my commissions could make up the difference. Of course, I didn't consider that an option at all.

ey Well, of the options you discussed on that day, what were your feelings as to them. Why or why not didn't you take them?

nt Well, at that point I felt like, I mean I knew that they were well aware of my situation. That was obvious. I had talked to them on three separate

Claimant Ah, yes I did look around in the paper and made a few phone calls to potential commission sales jobs and things of that nature. I didn't really pursue labor jobs as there was nothing in the area that would have paid what I needed to live in that environment.

Attorney And what was the result of your inquiries into the sales type jobs?

Claimant Ah, I had determined that with the two weeks I had left before I had to make house payments again that I couldn't have come up with the money. In fact I was already two weeks into our last month's rent. And there was just no way that I could have accepted another job on commissions or anything that would have taken a month or two to catch up.

Attorney Okay. After your employer went to California and discussed with you about maybe perhaps a loan or whatever that discussion was you described earlier did you have any other contacts regarding possible alternatives to quitting discussions with your employer.

Claimant Ah, yes, I talked with him. When he was down there picking up the car for those three days. He was there one day but I was talking him, or I did ask him if he felt it might be possible if I were to move back to Salt Lake and continue working the territory from Salt Lake. And he said, absolutely no at this point.

Attorney Okay. What happened after you quit as far as did you remain in California or did you relocate?

Claimant After I sent the,

Attorney Resignation letter.

Claimant letter in I had to plan immediately to move as I only had another week or a half or two weeks left.

Attorney Okay, and where did you move to?

Claimant We moved back to Salt Lake. I moved in with my sister up in the Cottonwood area or Holladay area. We lived there for several weeks until we could find a home to live in.

Attorney And since that time have you done any job searching at all?

Claimant Yes.

Attorney Okay, and what has been the nature. How many attempts have you made since on a weekly basis to find employment.

Claimant Probably five or six.

Attorney Five or six.

t At least. I have got recorded at least two of them as required in the employment booklet.

y And what did these job searches consist of? Are they phone, are they in person?

t Ah, two to three of them per week have been in person, interviews and turning in applications and probably, like I say, three, four, five others per week are over the phone just filtering out various jobs.

y Applications. Do you have a resume?

t I don't have a professional resume as such, no.

y Okay, do you send out any information for the employer in terms of a resume?

t In person, I fill out an application and attach a job history.

y Okay. Had you known at what, when you were first hired. Let's go back all the way to May 1, 1984, did you know that you would have to relocate?

it Ah, the understanding was that, yes, it would be best to relocate but that that was still an option to be discussed at a future time.

y Okay. Had you known at that time that you would have to expend, what is it, between \$5,000 and \$6,000 of your personal savings, would you have accepted that job?

it No. Within the first month after finding out that the territory I was taking over didn't have any commission base built whatsoever, it was maybe \$50 per month, Ah, that was left over from what a couple of other salesmen had done down there. After knowing that, I could see that I might have made a mistake, but I decided at that point to hang in and try because it looked like it had some real promise.

y Okay. I have no further questions at this time.

Ms. O'Day, do you have questions?

er Um, yes, am I?

It is your turn to ask questions.

er Do I direct them to Mr. Hurst then?

Correct.

er Okay, I understand you to say that you were aware that you needed to relocate or that that was a condition of the job at the time you were hired..

it Ah, yes, it was, ah.

Judge Which meant prior to 11-1-84, right?

Employer Correct. All right, Harold turned in and was reimbursed for all the business expenses that he incurred for the period of time that he was employed with us. And he didn't receive a housing subsidy for the month of July because we had paid the agreed on six months terms, and we had not renegotiated or negotiated any kind of an extension at that time. I was not aware that he regarded it as a negotiable item, the six-month subsidy. As far as the business was concerned was a six-month subsidy to help him get established. It is not to say that we wouldn't have renegotiated it. We have always been extremely flexible and always open to other options. When Harold was in the office July 9, 11, and 12, I did not have any personal contact with Harold because I was, I had ruptured a disc early in July and was doing business by phone at home. I in fact did talk to Harold I think on the 5th or 6th of July and was notified that he had a baby. He did call me to tell me that but I didn't have any personal contact with him subsequent to that, even though I was in touch with the office on a daily basis by phone. And the office in fact called me and we conducted business fairly normally at that point. It was my understanding that Harold on the 11th was told by Pat that it was economically unfeasible for the company to continue to subsidize his housing since his sales weren't covering the cost of his salary and business expenses at this time. They discussed the sales volume that he needed to achieve to put both of us in a profitable situation. And as far as my understanding was that it was left open at that time. Ah, the Friday he came into the office, he came in after Pat had left for the day, so there was no personal contact then. As far as I know, at no time did Harold attempt to contact me about any of these matters or to get, well, to negotiate any of this personally with me. I did indicate to Harold after, when he stopped into the office after we had picked up the company car and all of his inventory, that we were sorry that he hadn't been creative enough to come up with some options other than quitting. That since he was hired as a salesman, we thought it was appropriate that he would have been creative and actually sold us on the fact that he was doing a good job and that things were improving and that the possibility of a loan against commissions was there, and that there had to have been other options. We specifically inquired as to whether or not he had thought about working in Southern California or getting another job down there, and he indicated that he just couldn't afford to live down there. Harold's reference to being squeezed out or choked out of the job in fact is baseless. We obviously are in a worse position now than we were in before in that we have spent, we have gone to considerable time and expense in developing a territory and getting a customer base established and people who know Harold, and now we are having to deal with the fact that we don't have a salesman down in the Southern California area. So obviously it wasn't advantageous to us to have him quit at this point. So there was no reason for him to believe he was being squeezed out or choked out. We are still involved in developing that territory and we would have liked to have had him stay on. I wasn't aware that he had incurred an increased amount in the lease payment. It was my understanding that the lease was a one-year lease and that the payment was a flat payment for the one-year period. I haven't been able to verify that increased amount with the lessor. She hasn't been in touch with me except to indicate that Harold

er had been mistakenly sent the security check. Ah, the salary, commissions, benefits, reimbursed expenses, territory and working conditions were all discussed with Harold in detail. I am sorry that his wife's pregnancy and the addition of a sixth child are financially taxing on him, but they are things that I don't have any control over. The termination of the housing subsidy was known and agreed on at the time it was instituted. We gave him as much or more than we have ever given anyone else in terms of extra effort and consideration for personal circumstances. He quit, it is my understanding that he quit because he wasn't making enough in commission to cover his expenses. But he understood what the salary and commission schedule was before he moved and he had the opportunity. He had six months prior to moving down there to assess the potential market before he relocated. And then he had an additional six months in California to renegotiate his working and living arrangements with us if he felt they were unsatisfactory. And the fact that he did not come in until he was in such dire straits is truly regrettable. But after he had made the decision to quit, we felt that it was a decision that he had made. He obviously doubted our integrity and that there was nothing to be gained by keeping him on.

Okay, anything else?

er No.

Okay, Mr. Riches, questions?

ey Okay. Ms. O'Day, did you actually interview Harold?

er I did.

ey You were the person who did.

er Yes.

ey Okay.

er He also talked with Kim Hagerman on numerous occasions, the office manager who conducted her own sort of interview in the front office, and he also talked to Pat O'Day.

ey Okay. Now you say that there was an individual in, was it 1982 or 3?

er 1982, both.

ey 1982, to worked at larger area including California and some other states.

er Correct.

ey Ah, do you recall what the commission base was at that time?

er I think he was making about \$700 a month.

Employer Were you aware that there would be incidental expenses in relocating?

Claimant Yes.

Employer Would, did these seem excessive to you?

Claimant No. The company was good enough to pay for the other stuff and I just wasn't worried about it.

Employer Okay. In December, 1984, you moved to California. Who, I understand you entered a lease agreement at that time, is that correct?

Claimant December 15, yes. December 10 we entered the agreement.

Employer Okay. And that agreement the lease payment was \$925 a month.

Claimant Yes.

Employer What were you required to do in order to enter into that lease. Was there a requirement for the first month's rent or first and last month's rent?

Claimant First and last month's rent and \$300 deposit.

Employer Okay, and who paid for that first and last month's rent and the \$300 deposit?

Claimant The company did.

Employer In full?

Claimant Yes.

Employer You, in fact, made no contribution in December towards your housing allowance?

Claimant No.

Employer Okay, how about the month of July. Who paid your housing in that month? Did you make any contribution towards your housing allowance in that month?

Claimant Ah, during the month of July the house payment was on the last month's rent.

Employer And who made that last payment then, in fact.

Claimant It was part of the first and last that the company paid.

Employer Okay, and there was this \$300 deposit. Was that returned to the company or to you?

Claimant No. It wasn't. I kept that at the time.

Employer So it was mailed to you and you cashed the check.

Okay. Off record momentarily in the matter of Harold Hurst while I switched the tape. Nothing was discussed while off record. I think that response was properly recorded, so do you want to go on to your next questions, Ms. O'Day?

er Okay. It is my understanding there was no discussion about alternatives during the two meetings that you had with Pat on the 9th and the 11th. Is that correct?

nt Ah, yes. We did talk about alternatives.

er You did.

nt Yes. There was only one that the allowance continue.

er And that was suggested by you.

nt Yes.

er Okay. You made no other alternative suggestions at that time?

nt No. I wasn't as creative as Pat was.

er Okay. Whose suggestion was it the commissions could be used, or that a loan could be extended against future commissions to help you through?

nt That was a direct statement by Pat while he was in California.

er Okay. Did you, did you ever make the company, either myself or Pat or anyone else in the company aware of the subsidy that you were expending each month in terms of personal living expenses?

nt Many times. I had spoke with Pat when we were together that I hoped commissions would eventually catch up, referring to another month or two down the road, because I was having to supplement my income with my own savings. I don't recall the exact number, but it was at least three or four times.

er (Unaudible)

Okay, I have, we need to take about a five minute recess at this point so I can make a phone call concerning a hearing that we are running into, so we will just take a brief recess and we will be back in a couple of minutes. We are back on record in the matter of Harold C. Hurst after a short recess. Why don't we proceed with your direct testimony, Ms. O'Day, on behalf of the company.

er My name is Judith O'Day and I am general manager for Terra Diamond in Salt Lake, a corporation. It is a closely held corporation. My husband, Pat O'Day, is the president of the corporation and I work as general manager

Employer Can I . . .

Claimant \$12,000 before that, \$10,000, \$8,000, \$4,000, \$5,000, \$11,000, \$15,000, \$6,000, \$8,000. That is all the months.

Attorney It sounds like they went up and down.

Claimant They went up and down but were, you know, in crescendo, getting larger.

Attorney What was your understanding after talking with Kim. Do you recall the question you asked Kim at the time you called her concerning the insurance.

Claimant Ah, yes, I do.

Attorney Well, without referring to, do you recall it.

Claimant It went back and forth so many times. Okay, the first time I inquired about insurance was directly to Pat. Pat is the only person I ever really worked with at the company other than getting with Judy a few times for so much information that she knew about. He is the president of the company. Pat said, yes, that you have insurance at three months. He, I might add, didn't state that that he was sure. He said, I believe it is three months. That is what he said. Then shortly after that I even checked with Kim and she said she wasn't sure but would check with Judy. And it was shortly after that that my wife, because of a need--a small one, called up and was wondering about it. And that was at about the 4th month. My wife is out here and she will testify that Judy told her right then at the fourth month of work that yes, or just before the fourth month. She said, yes, insurance is at four months and I will see to it that you are insured. My wife is out here and she will testify to that. And, so I didn't think about it anymore. I mean I just assumed that it would be taken care of.

Attorney You made a specific inquiry, did you not, to Kim as to whether the insurance policy covers either a cesarean or your child or whatever at one time.

Claimant I didn't refer to cesarean necessarily. That was brought up a little late but yes, I made an inquiry to Kim as to after I let them know that my wife was pregnant and that was in the middle of January. And she said she wasn't sure. She asked me the due date and all that kind of stuff and said she would check it out. After she checked it out, roughly three weeks went by and I wasn't worried about it. I just assumed we were because I thought we were way before then and just. Well, anyway at about 2-15-85 Kim checked with Judy and told us that, yes, we were definitely covered. Then in the third month of '85 Kim called and said there might be a problem, asked for the dates again, and a week later she called and said that she had checked with the insurance agent herself and that the insurance agent definitely said we were covered. And so everyone at that point in time concurred that we were covered. Then 3-21-85 is when Pat and Judy were in California. They spent an evening with us and had dinner. When the delivery date and so-for-

nt Well, in the middle of April, sometime in April when they finally found out that we definitely were not insured the only comment in talking with Pat that Pat made was, that is unfortunate that that happened. Because after everything had happened this Julie Beck at Planned Services who administrates their health policies said that, yes, she turned in the paperwork on October 8, and the conceived date was placed at October 16, and she said, yes, technically you should have been insured, but the paperwork wasn't actually turned in soon enough and we didn't get it on the books soon enough.

ey Okay, well, when did you go to the employer the first time and tell him about your problems, either with the insurance or . . .

nt Well, they were aware of all this as it transpired, and it was in mid-April, like I said, that I actually made mention of it to Pat and he said that that is unfortunate that you are not covered.

ey Okay, well, what about your economic problems?

nt Well, I put the baby on the back burner at that time and we decided that we would try and weather it because we felt like commissions would continue to increase well enough that in, you know, six months it probably wouldn't matter. That we would be able to handle it.

ey And that is why you didn't. Well, why did you choose then to go in in July?

nt Ah, well, it was after July, or the end of June that I found out I didn't have any housing allowance coming anymore, that I decided to wait until I get to Salt Lake to talk with Pat.

ey I don't believe I have any further questions.

Where were you employed before you joined the Terra Diamond?

nt I had worked for several months with a brother-in-law paperhanging. And before that I had worked with Camelot Marketing.

What kind of an operation is that?

nt Sales for East Canyon Resort.

What kind of work are you seeking now?

nt Most anything I can get.

What are you telling a prospective employer as to the minimum salary you are willing to accept?

nt Ah, I haven't really set a minimum, but the jobs I have been seeking are on the order of \$6 or \$7 an hour.

Judge Okay, how would you be better off working \$6 or \$7 an hour in Salt Lake than the compensation package you had available to you in Southern California?

Claimant Well, I assume that would be the minimum I would accept to get by up here and that is if my wife went to work. But I am actively seeking jobs that would pay on the order of \$20,000 plus per year.

Judge Have you had any employment subsequent to your separation from Terra Diamond?

Claimant No.

Judge Okay. You have indicated that upon relocation to Salt Lake you lived with some relatives for awhile and now have secured apparently housing for yourself and family. Are you running a home again?

Claimant Yes.

Judge And what, how much are you having to pay to rent a home in Salt Lake now? It would appear to me that the \$450 figure or whatever it was for 2,500 square foot home in Holladay was low even for the Salt Lake area.

Claimant It was a good deal. The average at that time was around \$450 or \$475 though.

Judge So what are you having to pay for the home that you are now in?

Claimant \$450.

Judge What part of the valley is that located in?

Claimant It is about 70th South and 20th East.

Judge And how large a home is that?

Claimant About upstairs and down about 2,000 square feet with a garage. We happened into that. The owner is my wife's sister and her husband. They had just moved into a new home.

Judge Do you think you would still be with Terra Diamond if your wife hadn't, you hadn't had a sixth child?

Claimant Ah, I think I probably would even though we would be getting further behind on some of our bills. Commissions were tending to catch up. But it came to that point in time where commissions were still several hundred dollars a month short and after, when I got that final commission check from Terra Diamond and had to put money toward the baby, then what I normally would have used to help us over the next three months was just basically gone after coming to Salt Lake and putting front money up for doctors and all that kind of stuff. And so basically we had nothing to pay bills with after I went back to California. And in addition to that, the housing allowance was gone and so we were just in a tight spot.

How long had you been without any health insurance coverage prior to the time that you were placed on the policy by Terra Diamond?

nt I had been without health insurance for about two years. Maybe close to two and one-half years. I, can I make a couple of comments here?

Yes, sure.

nt On things that she said. Ah, in reference to when I started the job, Herb, the other person they hired was hired after I had applied at Terra Diamond. The ad was in the paper before they hired Herb or right at about the same time, and so my conversation as to existing commissions, you know, would still apply. I assumed that the commissions, there was some commissions built up in the territory. And after they had interviewed me they hired Herb. I don't know exactly what the decision making process, but anyway, Herb didn't get insurance for six months because they knew he didn't want it. Herb was a friend of the owner, Pat O'Day, and his wife was insured. She is a nurse, and so they didn't need it. In addition to that, there are employees down there, another employee that started just a month or two before me that did get insurance at four months.

Who would that be?

nt Ah, it would be one of two employees in the shop, Cy or the other employee that is in the shop. I believe it is Cy. He was started a month or so or two months before I did and had insurance at approximately four months. And once again, my wife is out here. She can testify that Judy told her just about three and two or three weeks that, yes, he does have, he will be insured at four months. We will take care of it. As far as my discussion with Pat on 7-11 when she claims that Pat said it was not feasible, that is not what Pat told me. He indicated that he probably would continue, but that he would check with Judy who made the decisions. That is after telling me on the 9th that he probably would continue.

Now you are making a reference to the housing allowance. Is that correct?

nt That was based on my suggestion, or my recommendation that, yes, I feel I can continue to get the commissions up there and that in a few months I would probably be all right.

Well, upon relocation did you know that the housing allowance was not an indefinite allowance. That there was a date on or about six months when that was scheduled to . . .

nt When I moved down, there was nothing in writing. I was told that it was a six, that they would give me a housing allowance for six months and help with the move and so-forth because the cost of living down there is so darn much higher. And,