1977

Anita J. Robinson v. the Board of Review of the Industrial Commission of Utah : Plaintiff's Brief

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

ANITA J. ROBINSON,

Plaintiff/Appellant,

vs. Case No. 15331

THE BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH,

Defendant/Respondent.

PLAINTIFF'S BRIEF

Appeal from a decision by the Board of Review, Industrial Commission of Utah

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NATURE OF THE CASE

This is an appeal from a decision by the Industrial Commission of Utah finding that Plaintiff had voluntarily left her employment without good cause and denying her Unemployment Compensation for the six weeks from February 20, 1977, to April 2, 1977, under U.C.A. §35-4-5(a).

DISPOSITION BELOW

The Industrial Commission of Utah through its Board of Review affirmed a previous decision of a Department of Employment Security Appeals Referee.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of Defendant's decision. Further, Plaintiff requests the Court to declare U.C.A.

§35-4-5(a) invalid, insofar as it chills the exercise of religious and other freedoms guaranteed by the United States and Utah Constitutions, by denying a public entitlement due to the exercise of these rights.

STATEMENT OF FACTS

Plaintiff was employed by the University of Utah as a Secretary/Stenographer from September 21, 1976, to February 3, 1977, when she left due to unreasonable working conditions. She was originally hired with the mutual understanding of all parties that she was simultaneously employed by the Bureau of Reclamation from 7:00 a.m. to 11:00 a.m. and that her eight-hour day at the University of Utah would begin at 11:00 a.m.

On numerous occasions during the course of her employment, Plaintiff's employer required her to work more than eight hours, not always even paying compensation, and on occasion in spite of physical illness. There were occasions when the employer required Plaintiff to work on Sundays in violation of her religious beliefs. The employer made no attempt to allow Plaintiff to deal with certain personal difficulties such as moving or visiting her sick mother. Plaintiff's personal freedoms apart from that of religion were spitefully and unreasonably infringed by the employer's sudden demands for Sunday and other overtime work. In November, 1976, the employer attempted to prevent Plaintiff from exercising her right to vote. The employer additionally criticized,

chastised, and embarassed Plaintiff with false charges of improper performance in her trade in the presence of other employees.

In the light of these numerous difficulties and unconstitutional restrictions on her freedoms, Plaintiff was required to terminate her employment on February 3, 1977. She was informed she would be fired in any case, on February 4, 1977.

ARGUMENT

I. PLAINTIFF DID NOT LEAVE WORK VOLUNTARILY WITHOUT GOOD CAUSE, BUT LEFT DUE TO INFRINGEMENT OF HER FUNDAMENTAL RIGHT TO FREEDOM OF RELIGION.

This Court's review is limited to deciding whether there is "substantial competent evidence to sustain the findings and decisions of the Appeals Referee and the Board of Review." Martinez v. Board of Review, 25 U.2d 131, 477 P.2d 587, 588 (1970). In the instant case, the evidence presented renders Defendant's final decision unsustainable under the law.

U.C.A. §35-4-5(a), under which Defendant made its decision, provides:

> An individual shall be ineligible for benefits or for purposes of establishing a waiting period:
> (a) For the week in which he has left work voluntarily without good cause, if so found by the commission, and for not less than one or more than the five next following weeks, as determined by the commission according to the circumstances in each case, provided that when such individual has had no bona fide employment between the week in which he

> voluntarily left such work without good cause and the week in which he filed for benefits he shall be so disqualified for the week in which he filed for benefits and for not less than one or more than the five next following weeks.

Various courts have defined "good cause." Defendant's own General Rules of Adjudication 210 provide an excellent summary of the principles found in so many of these cases:

> "Good Cause", as used in the unemployment insurance system, is such a cause as justifies an employee's voluntarily leaving the ranks of the employed and joining the unemployed; the leaving must be for such a cause as would reasonably motivate in a similar situation the average worker to give up employment with its wage rewards to become unemployed. The term suggests, as minimum requirements, real circumstances, substantial reasons, objective conditions, perceivable forces, adequate excuses that will bear the test of reason, just grounds for action. To constitute good cause, the circumstances which compel the decision to leave must be real, not imaginary; substantial, not trifling; and reasonable, not whimsical. There must be some compulsion from some outside and necessitous circumstance. The standard of what constitutes good cause is the standard of reasonableness as applied to the average individual and not to the supersensitive. ...Standing alone, the fact that a worker accepted a particular job does not make the job suitable. After a reasonable trail [sic] he may have found it to be, in fact, unsuitable.
>
> Thus the question of "good cause" is to be determined

from the particular circumstances of each case. Wilton v. Employment Division, 553 P.2d 1071 (Or.App. 1976). Another court went further to say in Sauls v. Employment Security Agency, 377 P.2d 789, 793 (Ida. 1963), citing National Furniture Manufacturing Company v. Review Board of Indiana, 170 N.E.2d 381:

> "We are of the opinion that all the circumstances * * * in each case of voluntary quitting have to be considered, and that if there are other factors involved, such as provocation brought on by unjust reprimands or unjust discrimination between employees or any other evidenciary factors which would have a strong influential effect upon the mind of the employee contributing to or causing him to voluntarily quit his employment, such contributing factors might, under certain circumstances, be considered as good cause within the purview of the Act, sufficient to enable the employee voluntarily quitting his job to secure compensation under the Act * * * ".

Against the backdrop of these considerations, the testimony at the hearing shows that Plaintiff accepted the particular job willing to occasionally work on Saturday but expressly and emphatically stipulating not on Sunday. (R.0028, 0032, 0035, 0036, and 0039). Plaintiff further stated at R.0010:

> However, I made the stipulation when I began working there that I would not or did not wish to work on Sundays. This I made quite clear so that I only came in on Sundays when emergency situation was arising and I needed the Saturday that she had asked me to come in to work on to complete urgent personal business and I asked that liberty because I realized that in order to keep my job that it was imperative that I work for her that weekend. It would have been much to my advantage to have had the entire weekend off but did not ask for it off as I could see that she was making it a crucial "test" that I work that weekend. This was in view of the need for me to complete my move that weekend to another apartment in order not to have to pay double apartment rent. I did, however, make the stipulation quite clear when or before I began working there that I did not wish to work on Sundays. I believe that Sundays are a day of rest and whatever way and mode you may wish to worship is fitting for your conscience.

The employer, while at first attempting to maintain that such a stipulation as to Sunday work had not been made, came around to admitting it at R.0031:

> Q. Did she discuss, ever discuss this matter of Sunday working with you, to the end that it be discontinued?
>
> Ms. Leininger. Never. She never. The first, uh, and really on the first time she said she would be prefer it's true she preferred to work Saturday afternoon and I said that would be fine. I said it would never be any more than one or two Saturdays a month. [Emphasis added.]

In fact, Saturday work appears to have been the norm, with Sundays added. These were such infringements on religious freedom as have been harshly condemned by courts nationwide, led by the United States Supreme Court in Sherbert v. Verner, 374 U.S. 398 (1963) where a Seventh-Day Adventist had been denied unemployment compensation benefits for leaving her employment, because it required her to work on her Sabbath, a Saturday rather than Sunday. At 374 U.S. 403 the Court stated:

> We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. In a sense the consequences of such disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. [Fn. omitted.] For "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." Braunfeld v. Brown, supra (366 US at 607). Here not only is it apparent

> that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forgo that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

To this is added the language of the above-cited General Rules of Adjudication 210: "It might also be said that good cause exists when the work is such that the claimant might have rightfully refused it as unsuitable if it were offered to him while he was unemployed."

More recently, the Sherbert case was relied on in Lincoln v. True, 408 F. Supp. 522 (W.D.Ky. 1975). That court also based its decision on 42 U.S.C. §1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In Utah the individual right and freedom to hold religious beliefs is protected with similar strength. The Utah Constitution, Art. I, §1 declares:

> All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

The Utah Constitution provides further in Art. I, §4:

> The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof.

And in Art. III:

> The following ordinance shall be irrevocable without the consent of the United States and the people of this State:
> First: — Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.

The fundamental right of religious freedom guaranteed in so many places in the Utah Constitution is surely not to be casually disregarded. Requiring Plaintiff to work on Sundays against her express religious belief and making her compliance with such demands a test of continued employment (R. 0010) can hardly be called "perfect toleration of religious sentiment." The right to not have religious beliefs infringed upon in employment is further guaranteed in the General Rules of Adjudication 90: "An individual who in good faith refuses or leaves employment on ethical or religious grounds is considered to have had good cause in so doing."

The sincerity of Plaintiff's beliefs such that they should be protected from infringement is shown not just by the testimony of all parties at the hearing, but also by the fact that Plaintiff felt compelled to initiate a grievance proceeding protesting infringement (R.0032, 0036, 0039). That these procedures were not prosecuted to fruition was clearly a result of Plaintiff believing that further effort would be futile and possibly harmful to her continued employment, as shown at R.0036: "Ms. Robinson. I was told by Mr. Hubbard that there probably wasn't a law that would support my request." R.0039-40 further shows Plaintiff's principles concerning Sunday work and discouragement from the grievance procedure:

> Q. How many Sundays all told, during the five months you were there, did you have to work?
>
> Ms. Robinson. I should not have had to work any.
>
> Q. Uh, that wasn't my question. Let's let my rephrase that. How many Sundays did you work? As a total?
>
> Ms. Robinson. I would say probably two.
>
> Q. Two. And, uh, since you objected to that evidently you talked to the, uh,
>
> Ms. Robinson. Mr. Hubbard.
>
> Q. Mr. Hubbard, the Employer Relations Representative. Why didn't you continue your grievance through him on that matter, reduce it to writing as he requested. He asked you if you would reduce it to writing, you did object to that and that was the right you had you could have exercised do correct this situation.

> Ms. Robinson. It, uh, I talked with Mr. Hubbard and he, uh, seemed to indicate that even if I had requested this and asked that, uh, there be a decision made on this, the decision could still be such that I would be required to work on Sundays. So that it would not have been advantageous to me from my own personal, uh, chosing, or belief, or chosing not to work on Sundays.
>
> Q. But, you could have still reduced this to writing as he requested. He testified that he asked you to make your appeal, or your grievance in writing. This would allow some basis to take action. This is a course open to you.
>
> Ms. Robinson. Well, if I understood it would have done any good so I didn't feel

Although most cases hold that an employee is not required to attempt to work out his grievances, Plaintiff even comes within those cases that do so hold. Glennen v. Employment Division, 549 P.2d 1288, 1289 (Or.App. 1976), states this requirement:

> [T]hat in order to have good cause for leaving work, an employe with grievances about employment must indicate an effort to work out the problem unless the employe can demonstrate that such effort would be futile. [Citations omitted.]

The Department of Employment Security reported its initial interview of Plaintiff as follows, at R.0047:

> Decision: Vol. left work w/good cause. Clmt tried to have situation corrected rather than leave but was required to work Sundays against the conditions of her hire & rel. conviction.
> RS

II. PLAINTIFF DID NOT LEAVE WORK VOLUNTARILY WITHOUT GOOD CAUSE, BUT LEFT DUE TO INFRINGEMENT OF HER FUNDAMENTAL RIGHT TO VOTE.

Defendant has endorsed further harassment of Plaintiff by her employer. 28 U.S.C. §1343 provides a cause of action against the State for infringements of the right to vote. Further, the Utah Constitution, Art. I, §17 provides: "All elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

Plaintiff left work due to an employer who deliberately attempted to prevent her from exercising this right, knowing her desire to vote but giving made-work to keep her late in the office until ten minutes before the polls closed. Plaintiff had to go from the job at the University of Utah to Sugarhouse to Voting District #2482 within that ten minutes, jeopardizing her safety. (R.0012, 0034) She was the very last to vote according to the pollbook. That Plaintiff by seconds was able to exercise her voting right does not obscure the employer's persistent obstruction. The United States Supreme Court has ruled on the protected status of the right to vote time and time again. As stated in Gray v. Sanders, 372 U.S. 368, 380 (1963):

> This court has consistently recognized that all qualified voters have a constitutionally protected right "to cast their ballots and have them counted at congressional elections."

> United States v. Classic, 313 US 299, 315, 85 L ed 1368, 1377, 61 S Ct 1031; see Ex Parte Yarbrough, 110 US 651, 28 L ed 274, 4 S Ct 152; Wiley v. Sinkler, 179 US 58, 45 L ed 84, 21 S Ct 17; Swafford v. Templeton, 185 US 487, 46 L ed 1005, 22 S Ct 783.

Again in Williams v. Rhodes, 393 U.S. 23, 31 (1968), citing a previous United States Supreme Court case:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. [Fn. omitted.]

Even if a constitutional right is not denied absolutely, a chilling effect on the exercise of that right is likewise unconstitutional, as held in Shapiro v. Thompson, 394 U.S. 618, 631 (1969):

> If a law has "no other purpose...than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional". United States v. Jackson, 390 US 570, 581...(1968).

III. PLAINTIFF DID NOT LEAVE WORK VOLUNTARILY WITHOUT GOOD CAUSE, BUT LEFT DUE TO HARASSMENT AND UNREASONABLE WORKING CONDITIONS.

The employer here, also engaged in a constant campaign of criticism, ridicule, and harassment, demonstrated by the nature and number of harsh letters sent from Plaintiff's supervisor, dated Nov. 30 (R.25), Jan. 18 (R.0023), Jan. 31 (R.0024) and Feb. 3 (R.0022). As if this barrage was not enough, the employer insisted on demeaning Plaintiff by making unfounded accusations against her in

front of fellow workers (R.0011, 0012, 0040). The harassment was apparently without just cause as the Plaintiff was never charged with inadequate job performance. Nowhere in relation to Plaintiff's Unemployment Compensation claim are there any allegations of misconduct such as would disqualify her from benefits. Plaintiff stated at R.0039:

> Ms. Robinson. As far as my job performance, I have, uh, we kept copies of all the work that we did, original work, and I had a book of at least I would say, three or four inch, as large as those books that you have on your desk there, book and had started on another one. As far as production, my shorthand was coming along very well, in fact, on one day I took, uh, 28 or 30 pages of legal a typewriter pad, this full, over the telephone, in notes from her and typed, uh, subsequently the notes and I have a copy of that draft of notes showing that the steno and typing was satisfactory.

Harassment is not too harsh a word for undue criticism of perfectly satisfactory work, as is here demonstrated by the letters and exacerbated by embarrassment in front of co-workers. This harassment compelled Plaintiff to leave her job and constituted good cause for leaving, as repeatedly held by the Oregon court:

> There is substantial evidence to support the referee's findings that claimant's supervisor was arbitrarily harassing claimant, that this harassment made claimant's working conditions such that a reasonable prudent workman would find them to be intolerable, and that therefore Claimant had "good cause" to quit her job. Stevenson v. Morgan, 522 P.2d 1204, 1207 (Or.App. 1974).

And in Chamberlee v. Employment Division, 541 P.2d 165, 166 (Or.App. 1975):

> Good cause has been defined as "such cause as would compel a reasonably prudent person to quit under similar circumstances." Brotherton v. Morgan, 17 Or.App. 435, 438, 522 P2d 1210, 1212 (1974). One of the circumstances which may provide good cause to leave employment, is harassment by one's employer.

The employer here further refused to cooperate with Plaintiff when she was trying to move (R.0035) or when she wanted to visit her sick mother (R.0011). Plaintiff was required to work all different hours of the day on an undependable basis (R.0041). The employer kept Plaintiff overtime, knowing that Plaintiff was physically debilitated through illness (R.0040-41):

> Q. How long had you been working that day?
>
> Ms. Robinson. I had been working the same number of hours I had been working any other day.
>
> Q. From 7:00 in the morning?
>
> Ms. Robinson. Right, but I had been ill the day before. I indicated to her that I was very tired, that I hadn't been feeling well the day before. She required me to work until I think it was 9:30, maybe it was later than that, 9:30 10:00 at night and by that time I was so very tired I could almost phys was unable physically completely to drive home.
>
> Q. Uh-huh.
>
> Ms. Robinson. I have checked several people who could attest to this if they would, whatever wish to do so. Uh, I told her that when I went home she required me to work to 10:00 or 9:30 10:00 that night and when she did this

> I decided, uh, I was not going to quit my government job and felt this was absolutely unnecessary for her to require a person to work beyond what they considered, I had been working perhaps when I was tired before, but I was so very tired, completely exhausted at that point I felt it was very unreasonable and inhumane for her to require me to continue working.

The employer also refused to allow Plaintiff to schedule her compensatory time, which was accumulated overtime, (R.0036), as had been agreed under the terms of Plaintiff's hiring.

No reasonable worker would put up with these harassments, noncooperation in every aspect of employment, criticism, and infringement of constitutional freedoms. A worker would be entirely justified in refusing a job with such harassments and restrictions, as stated in the General Rules of Adjudication 210, "It might also be said that good cause exists when the work is such that the Claimant might have rightfully refused it as unsuitable if it were offered to him while he was unemployed." In this case, it would be more reasonable for a person to leave such work than to remain. Only a very abnormal and unusual person would remain under such circumstances.

CONCLUSION

Since there is no substantial evidence to support disqualification of Plaintiff on the grounds of voluntarily leaving without good cause, but overwhelming evidence of

such intolerable working conditions that any reasonable person would leave, Defendant's decision of disqualification should be reversed. If Defendant's decision were left to stand, it would serve to endorse the infringement of constitutional rights as a reasonable condition of work. Judgment should be entered that as a matter of law Plaintiff is entitled to Unemployment Compensation benefits from February 20, 1977, until April 2, 1977.

Respectfully submitted,

Lucy Billings

Lucy Billings
Attorney for Plaintiff

CERTIFICATE OF DELIVERY

I DO HEREBY CERTIFY that I hand-delivered a copy of the foregoing Brief of Plaintiff/Appellant to K. Allan Zabel, Special Assistant Attorney General, Department of Employment Security, 174 Social Hall Avenue, Salt Lake City, Utah 84147, on this 25th day of October, 1977.

Diana M. Hardman

Diana M. Hardman