1978

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

Utah Supreme Court

Utah Legal Services, Inc.; Attorney for Plaintiff/AppellantK. Allan Zabel; Attorneys for Defendant/Respondent

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 REPLY BRIEF

Appeal from the Third Judicial District Court

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RELIEF SOUGHT ON APPEAL

The relief already sought on appeal, as requested originally in Plaintiff's Brief, is reversal of Defendant's decision denying Plaintiff Unemployment Compensation from February 20, 1977, to April 2, 1977, and a declaration that U.C.A. §35-4-5(a) is invalid insofar as it chills the exercise of religious and other freedoms guaranteed by the United States and Utah Constitutions.

Based upon the cases Plaintiff has examined in replying to Defendant's Brief, Plaintiff now seeks, in the alternative to Plaintiff's original request for relief, a remand to the Industrial Commission of Utah for a new hearing so that the Industrial Commission may receive sufficient competent evidence upon which to decide the entire case.

STATEMENT OF FACTS

The facts in this case are stated in Plaintiff's Brief as originally filed with the Court. For purposes of this Reply Brief, Plaintiff will re-emphasize two sets of facts. First, Plaintiff was employed as Secretary/Stenographer by the University of Utah with the understanding that she would not be required to work on Sundays. Plaintiff made this a requirement of accepting employment because her religious belief is that Sundays are a day of rest to be employed in worship of the Lord. Notwithstanding this provision of Plaintiff's contract, the employer made numerous requests that Plaintiff work on Sundays, and Plaintiff was, in fact, forced to work on three Sundays. It was a demand by the employer that Plaintiff work on Sunday, January 30, 1977, which precipitated Plaintiff's decision not to report to work and ultimately caused Plaintiff's termination of employment

Second, Plaintiff frequently was subjected, in the presence of other employees, to false charges of improper performance. The employer wrote numerous memos charging Plaintiff with faulty work and subjected Plaintiff to verbal criticisms on numerous other occasions. There was no factual justification for these criticisms, Plaintiff's work being competent and of good quality. The only apparent reason for the criticisms was the employer's dissatisfaction with Plaintiff's refusals to work on Sundays and at other unreasonable hours. When the employer realized that Plaintiff would

not accede to such demands, the employer responded by criticizing Plaintiff's work.

These and other reasons made work intolerable for Plaintiff and forced her 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 IS ENTITLED TO REVERSAL OF THE INDUSTRIAL COMMISSION'S DECISION OR TO A REMAND TO THE INDUSTRIAL COMMISSION FOR REHEARING IF THE COMMISSION'S FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

As this Court stated in Martinez v. Board of Review, 25 U.2d 131, 477 P.2d 587, 588 (1970), the Court's review in Unemployment Compensation cases is limited to deciding whether there is "substantial competent evidence to sustain the findings of the Appeals Referee and the Board of Review." Where the decision of the Board of Review is supported by substantial, competent evidence, the Court will affirm the Industrial Commission. Martinez, supra. However, the Court has always recognized its duty to determine whether evidence does support the Board of Review's decision. As stated in Roberts v. Industrial Commission, 97 Utah 434, 93 P.2d 494, 495 (1939):

> Each record of trial under this law should be complete in and of itself. Each element necessary to sustain an order by the tribunal or commission, under this law, should

be supported by testimony, exhibits, or stipulation, introduced at the hearing.

Where the record does not support the Industrial Commission, this Court may elect either of two alternatives. It may reverse the decision of the Industrial Commission. See Roberts, supra; Gocke v. Wiesley, 18 Utah 2d 245, 420 P.2d 44 (1966). Or it may remand the case to the Industrial Commission to take additional evidence on issues about which the record is unclear. This latter course was elected in Johnson v. Board of Review of the Industrial Commission, 7 Utah 2d 113, 320 P.2d 315 (1958), a case involving determination of the plaintiff's income while unemployed. In remanding to the Industrial Commission this Court stated:

> There is another particular about which the record is so uncertain that no satisfactory finding can be made. Mr. Johnson did not operate the farm by himself. Rather, it was a family project. His 15 year-old son and his wife did much of the farm work, even to the extent of running the tractor. The entire farm income should therefore not be attributed to him personally, but there ought to be some fair and reasonable allocation of the income produced by his efforts and that produced by his wife and son.
>
> In view of the uncertainty which exists as to Mr. Johnson's income from self-employment, this cause is remanded for the purpose of making a more definite determination of the income properly assignable to him, and upon the basis thereof to make such order consistent with the views herein expressed, as may seem appropriate. 320 P.2d at 319.

The practice of remand is followed by courts in numerous other jurisdictions in umemployment compensation cases.

See, e.g., Ambridge Savings & Loan Association v. Unemployment Compensation Board of Review, 124 A.2d 513 (Pa. Super. 1956), and Lee v. Brown, 148 So.2d 321 (La. App. 1963), which are both discussed below. The practice also is in keeping with general principles of administrative law. As stated in 2 Am. Jur. 2d, Administrative Law, §764:

> [T]he general rule is that even in the absence of statute, a court which sets aside an administrative determination has the power to remand the case to the administrative agency where such power is necessary to effectuate the demands of justice, and statutes frequently grant such authority to the courts. The court does not encroach upon the administrative function by such procedure, and there is nothing in the principles governing judicial review of administrative acts which precludes the courts from giving an administrative agency an opportunity to meet objections to its order by correcting irregularities in procedure, or supplying deficiencies in its record, or making additional findings where these are necessary, or supplying findings validly made in the place of those attacked as invalid.

This Court has the authority either to reverse the Industrial Commission or to remand for additional hearing by the Commission. In view of the Board of Review's failure to take evidence and make findings on essential factual issues, remand is the minimum relief that this Court should grant Plaintiff.

II THE ONLY COMPETENT EVIDENCE SHOWS THAT PLAINTIFF'S CONTRACT ALLOWED HER NOT TO WORK ON SUNDAYS.

In its Brief, Defendant makes a flat but erroneous assertion: "There is direct testimonial evidence that at

her initial employment interview Plaintiff agreed to work on Sundays. (R.0019)" Defendant's Brief at 6. In fact, there is no competent evidence, testimonial or otherwise, that Plaintiff agreed to work on Sundays. The evidence to which Defendant refers is hearsay. It comes from a document that was neither a sworn affidavit nor attested to under oath at the hearing. The only direct testimonial evidence, both from Plaintiff and from the employer, shows that Plaintiff did not agree to work on Sundays.

The record is replete with evidence that Plaintiff told the employer that Plaintiff would not work on Sundays. Plaintiff clearly stated that this was one condition she insisted on before accepting work with the employer. (R.0010, 0036) Her other testimony shows the reason for this demand, a strong religious conviction against work on Sundays. (R.0010, 0035, 0036) In fact, being forced to work on Sundays upset Plaintiff so much that ultimately she contacted Thomas Hubbard, the employer's Employee Relations Representative, to inquire whether she should file a grievance report. (R.0032) Thus the record contains testimony both proving that Plaintiff requested and was granted the right not to work on Sunday and demonstrating the importance of the reasons which motivated Plaintiff's request.

Defendant contends that there is testimonial evidence to rebut this strong showing in the record that Plaintiff was given the contractual right not to work on Sundays.

But there is nothing in the record to support Defendant's assertion. The employer's testimony specifically shows that the employer also was aware of and even claimed to have "respected" Plaintiff's contractual right to refuse Sunday work. There are two places in the record where the employer specifically discusses this question. In both instances, the testimony supports Plaintiff.

The first statement by the employer is in reponse to a question about the amount of overtime Plaintiff was forced to work, at R.0029:

> Q. So this would be over the regular number of hours, say 40 hours a week?
>
> Ms. Leininger. Uh, seldom ever. Seldom ever did it go over 40 hours, See, for instance, if she helped on Saturday afternoon and that, on her total time there were only two Saturdays and one Sunday that she worked, I'd have to check back for sure on that, I'm sorry I didn't document that part, I have it on my calendar, uh, and then there was another Sunday that she wanted to work and requested to work and said there was no problem, church or otherwise. And I said well now and I'd respected all the way through and anytime she didn't want to and she said no this was the time because she had been gone and she wanted to take a weekend and she'd be back and she'd like to work when it was quiet.
>
> Q. So this then, this work on Sunday was at her option?
>
> Ms. Leininger. This was an agreement [Emphasis added.]

Plaintiff does not concede that she ever "wanted" to work on Sundays. In fact, the supervisor blackmailed Plaintiff into accepting this work by making clear that Plaintiff otherwise could not have that Saturday off when Plaintiff absolutely

had to have that Saturday off to move between apartments. (R.0035) Even so, the supervisor admitted in the above statement that she was aware Plaintiff did not work on Sundays and had "respected" Plaintiff's right not to do so.

The only other testimony by the supervisor discussing work on Sunday is equally favorable to Plaintiff. It shows that Plaintiff told the supervisor that Plaintiff would not work on Sundays and that the supervisor told Plaintiff that she would only have to work one or two Saturdays a month. The supervisor addressed the Referee's question about Sunday work in the following manner, 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.]

This testimony by the supervisor also supports Plainitff's position that she was entitled not to work on Sundays.

Against this sworn testimony, Defendant has found only a statement written on an unsigned document entitled "Anita Robinson - Employment Record." (R.0019) The only purpose for which the document was submitted in evidence was to provide a sequence of dates. (R.0028) Its authenticity was never attested to. The Appeals Referee did not even ask

who prepared the document or whether its preparer had personal knowledge of its statements. The statement on which Defendant relies was not even part of the original document, but was added by unknown persons later on.

This is not the "substantial competent evidence" required by Martinez v. Board of Review, supra. A similar situation was presented in Lee v. Brown, supra, an unemployment compensation case from Louisiana. A finding that the plaintiff had been fired for cause was based on an unauthenticated hearsay letter from another employee to an officer of the plaintiff's employer. The letter there, like the "Employment Record" here, was self-serving. And the Court held the letter insufficient to sustain the decision:

> This hearsay evidence and this ex parte document did not, of course, constitute evidence competent to prove the charged disqualification.
>
> It is true that the statute provides that the "usual rules of evidence" do not govern the admissibility of evidence at the administrative hearing. LSA-R.S. 23:1631. Nevertheless, although normally inadmissible evidence may be received at the hearing, the actual findings of the administrative agency that a claimant is disqualified from benefits must be supported by competent evidence. As stated at 81 C.J.S. Social Security and Public Welfare §221, p. 318: "It is generally held that the decisions and findings of an administrative tribunal in unemployment compensation cases must be supported by competent evidence. The relaxation of the general rules of evidence does not mean that the administrative tribunal can treat as evidence matter which is not evidence and has no probative force, and

> it does not justify orders without a basis in evidence having rational probative force. Findings of fact supported only by incompetent or hearsay evidence are improper, and hearsay evidence will not be considered in determining whether the findings are supported by the evidence,**."
>
> Thus, administrative findings will be set aside on judicial review, if supported only by hearsay or other normally inadmissible evidence of a nature that does not afford the claimant a fair opportunity of rebuttal or cross-examination. Miller v. F.W. Woolworth Co., 359 Mich. 342, 102 N. W.2d 728 (1960); Ault v. Unemployment Compensation Board, 398 Pa.250, 157 A.2d 375; Phillips v. Unemployment Compensation Board, 152 Pa.Super. 75, 30 A.2d 718 (1943).... 148 So.2d at 324-25.

The evidence supporting the Board of Review in this case is identical to the evidence in Lee v. Brown. The disposition of this case also should be the same. The decision of the Board of Review should be reversed for lack of substantial competent evidence.

Indeed, this Court has adhered to the rule that findings cannot be supported wholly by hearsay or other evidence incompetent in a court of law even when the evidence was far more reliable than the unauthenticated letter in Lee or the unsigned record Defendant relies on in this case. In Hackford v. Industrial Commission, 358 P.2d 899 (Utah 1961), the Industrial Commission's findings as to the plaintiff's lumbosacral injuries were based upon the two reports of the plaintiff's treating physician, accompanied by X-rays, and corroborated by the report of a panel of three orthopedic surgeons. Moreover, the panel members were present at the

administrative hearing to testify as to their report, but the plaintiff's attorney expressly rejected an offer to cross-examine them. And against these reports, even the medical witnesses whom the plaintiff produced were equivocal as to the plaintiff's disability. Id. at 900.

The medical assessment of a worker's condition implicates a more sharply focused and easily documented decision than the questions concerning the terms of an agreement or the cause for termination of employment in Plaintiff's case. In Hackford, the decision whether to award disability benefits turned upon routine, standard, unbiased medical reports by physician specialists concerning a subject they had personally examined. In Plaintiff's case, credibility and veracity played a significant role in the Commission's decision, but even when such problems were not a factor, this Court reversed the Commission's decision, stating:

> [T]here must be a residuum of evidence, legal and competent in a court of law, to support an award, and a finding cannot be based wholly upon hearsay evidence. Id. at 901.

III PLAINTIFF'S RIGHT TO FREEDOM OF RELIGION ALLOWED HER NOT TO WORK ON SUNDAYS.

Defendant admits that if Plaintiff's religious belief was sincere, her right to free exercise of her religion was violated by denying her Unemployment Compensation due to her refusal to work on Sunday. Defendant's Brief at 12. Yet

the Appeals Referee disregarded all indications of the sincerity of Plaintiff's belief. Her sincerity was first shown by her statement that she would not work Sunday which she made at her initial interview for the job, before she knew that the job conditions might be undesirable, and at the risk of not being hired. (R.0036) From the outset she stated to the Department of Employment Security that her reason for quitting was the requirement to work on Sunday - long before she knew that her claim would be dependent on the sincerity of her belief. (R.0047)

The Referee questioned whether Plaintiff's refusal to work Sundays was the tenet of a specific church, and in response to her statement that she attended various churches, he considered her not wanting to work Sundays a desire rather than a belief. This questioning was irrelevant and had prejudicial effect, whereas the resultant conclusion is contrary to the rest of the evidence. Plaintiff stated her objection to Sunday work as follows:

> It's for religious purposes. I think that if the Lord has said has said it is a day of rest and I personally believe that no matter what religion we are, whether its, uh, a requirement of the church we go to, whether our church tells us to, I believe personally that it is a day of rest and shouldn't be used for work purposes. R.0035
>
> It is not a desire, it's a belief and a very, uh, it's a very strong belief with me. I think that the Lord said that he made that decree whether it with one church or not. R.0036

The United States Supreme Court has made it clear that the right to free exercise of religion is not confined to traditional or parochial concepts of religion; it is not conditioned upon membership in or adherence to the teachings of any organized religion. As set forth in Davis v. Beason, 133 U.S. 333, 342 (1890):

> With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted....

The United States and Utah Constitutions do not select any one group or any one type of religion for preferred treatment. See United States v. Ballard, 322 U.S. 76, 87 (1944). Otherwise, if only particular beliefs or membership in churches are recognized as those allowed free exercise, the Establishment Clause is violated. In Plaintiff's case, it is apparent that she is a strict fundamentalist whose beliefs derive directly from the Bible, and the best characterization of those beliefs might be that for her churches are only too liberal with ther interpretations of the Scriptures.

The Appeals Referee found that Plaintiff's religious beliefs were not sincere because she worked on two Sundays. Yet the Referee made no finding as to Plaintiff's economic needs at that time which may have compelled her to work so as to gain her employer's favor. In this instance, Plaintiff was forced to choose between following her religious precepts

and risking her employment or abandoning her religious precepts and working on Sunday. A condition of employment where an employee must choose between her job and her religious beliefs cannot be countenanced in keeping with the guiding principle of Sherbert v. Verner, 374 U.S. 398 (1963), under which unemployment benefits may not be denied where employment conditions have imposed a burden on the free exercise of religion.

In applying the eligibility provisions of the Utah Unemployment Compensation law, Defendant concedes that the Utah Industrial Commission is bound by the demands of the Free Exercise Clause as authoritatively conceived by the majority opinion in Sherbert. Defendant's Brief at 12. From the outset of her employment relationship, Plaintiff insisted upon observing her day of rest. After discussing her religious needs with her employer and still being accepted for employment, Plaintiff later acceded to her employer's demand that she work on Sunday. There is no telling under what economic pressure she performed that Sunday work, until eventually her conscience impelled her to assert a positive refusal. Defendant contends that having once strayed from the precepts of her religion by working on Sunday, Plaintiff somehow forfeited her right to freely exercise her religion. Defendant did not even consider the fact that Plaintiff, due to economic necessity, may have had no real choice between

working Sunday and abiding by the precepts of her religion. There can be no waiver when the element of choice is in reality one "between the rock and the whirlpool." Garrity v. New Jersey, 384 U.S. 493, 498 (1967). Nor can important constitutional rights be waived except in a knowing and intelligent manner. See, e.g., Edelman v. Jordan, 415 U.S. 651, 673 (1974); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972). Moreover, the very notion of waiver is novel to considerations of the free exercise of religion and must not be allowed to creep into free exercise doctrine. The preferred freedoms of the United States and Utah Constitutions cannot be so easily curtailed by the cursory application of a waiver theory.

No case dealing with infringement upon the free exercise of religion has found any waiver, actual or implied, of the protections afforded by the Free Exercise Clause. See Wisconsin v. Yoder, 406 U.S. 205 (1972); Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972); Lincoln v. True, 408 F. Supp. 22 (W.D. Ky. 1975). In each of these cases, the court recognized that although one may submit to infringements upon religious freedom to a certain point, at some point further submission is intolerable. At no point may the exercise of religious freedom be "deter[red] or discourage[d]" by denying government benefits due to the assertion of that right. Sherbert, supra, 405; Speiser v. Randall, 357 U.S. 513, 526

(1958). Even when the pressure to forfeit the right is not overwhelming, the United States Supreme Court itself has specifically interpreted the Sherbert principle to encompass such infringements:

> This Court's decisions have prohibited conditions on...jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights. Elrod v. Burns, 427 U.S. 347, 348 n.11 (1976). (Emphasis added.)

Indeed, that Plaintiff may have permitted economic necessity to conquer her conscience on a previous occasion is a slender reed upon which to justify the denial of a government benefit due to the assertion of a fundamental right. As set forth under ARGUMENT II, supra, Plaintiff did not agree to work on Sunday, and the pressure upon her to forego the practice of her religion, as in Sherbert, is unmistakable. Even when Plaintiff inquired whether she could obtain relief from having to work Sunday, the Employee Relations Representative provided no resolution - he needed to "research to find out." (R.0032) From the Representative's testimony, it is hardly clear that Plaintiff could not have been led to believe that further pursuit of a grievance was futile. Nor is it clear that she could not have been led to believe that she had sufficiently presented her grievance. The Representative admitted that an oral presentation was normal procedure. (R.0032) Yet even if Plaintiff felt pressured to forego her

principles without her representative's wholehearted support, Defendant's resurrection of this aberrant interruption of religious principles, to negate Plaintiff's right to ever again adhere to them without denial of government benefits, institutes a novel justification - for which no authority exists - for governmental intrusion into religious liberty.

Unless reversed by this Court, Defendant's decision will result in a serious and detrimental "chilling effect" on the exercise of religious beliefs by both Plaintiff and other workers. See Allee v. Medrano, 416 U.S. 115 (1974). Under Defendant's decision, if employees accede to an employer's demand to violate their religious precepts even once, they may never again be able to abide by them without fear of denial of Unemployment Compensation. Employers on the other hand, will be discouraged from any "reasonable accomodation" of religious beliefs. See Trans World Airlines, Inc. v. Hardison, _____ U.S. _____, 97 S.Ct. 2264 (1977).

IV DEFENDANT VIOLATED FURTHER CONTRACT AND CONSTITUTIONAL RIGHTS.

Defendant attempts to justify other unreasonable working conditions upon the assertion that Plaintiff consented to them. Defendant admits both that Plaintiff was required to work odd hours and that her initial agreement only required her to work from 11:00 a.m. to 7:00 p.m., Defendant's Brief, at 8, but then argues that because she fulfilled the extra work requirements, they were not out of compliance. Again,

there is neither evidence that Plaintiff agreed to new terms nor any finding as to the compelling nature of the employer's demands and Plaintiff's economic needs. Although as Defendant states, Plaintiff was subsequently given overtime pay or compensatory time off, Defendant's Brief at 2, the fact that Plaintiff was only belatedly given her pay and the employer's lack of cooperation in scheduling time off were just further conditions about which Plaintiff might complain, as shown at Defendant's citation to the record and following. (R.0037-38

Defendant cites R.0034 as support for finding that Plaintiff's constitutional right to vote was not infringed. However, R.0034 reveals the glaring fact that the employer required Plaintiff to work 50 minutes overtime. Relying on the terms of her employment contract that her work day ended at 7:00 p.m., which would have allowed ample time to travel to her polling place, Plaintiff had no reason to have tried to obtain time off from her morning job. Furthermore, after Plaintiff expressed her desire to vote, the overtime requirement constituted an intentionl infringement of her right. Neither can Defendant fall back on the 10-minute trip between the University and the polls as support for finding it would not have taken too long to travel there after the morning job, when such a trip would have involved not only a trip between the polls and the University at breakneck speed, but the added distance between the morning job and the polls - when Plaintiff was required to be at the second job immediatel

after the prior job. Even accepting the employer's testimony that Plaintiff did not always arrive immediately after the prior job on other occasions, this only raises an issue of misconduct, which constitutes an entirely separate ground for disqualification from benefits under U.C.A. §35-4-5(b)(1), which only pertains if an employee is discharged, and which was not properly raised as an issue herein, although Plaintiff did proffer evidence of her satisfactory performance, as discussed infra.

To summarize the issue of infringement upon Plaintiff's right to vote, however, the fact that Plaintiff exercised that right by violating traffic laws and risking life and limb, rather than being prevented under any circumstances, hardly resolves the problem of infringement.

V THE APPEALS REFEREE AND BOARD OF REVIEW FAILED TO TAKE EVIDENCE OR MAKE FINDINGS ON THE ISSUE OF HARASSMENT BY PLAINTIFF'S SUPERVISOR.

In her initial Brief, Plaintiff emphasized that she was harassed by unwarranted criticism of her work. Plaintiff's Brief at 12-15. Defendant does not question the authority cited by Plaintiff to the effect that such harassment constitutes good cause for Plaintiff's voluntary quitting of employment. Instead, Defendant contends that the evidence supports the Board's finding that Plaintiff was not harassed. Defendant's Brief at 8-9. The problem with this contention

is that the Appeals Referee not only refused to listen to Plaintiff, but ultimately neglected to make any findings at all on the issue of her harassment. Despite Defendant's attempt to gloss over these problems, there are no findings on harassment which this Court can uphold.

Now Plaintiff can only ask this Court to review the record for itself. The Board of Review merely affirmed the Appeals Referee's decision. (R.0007) The Appeals Referee made no findings on the quality of Plaintiff's work or the validity of the supervisor's criticism of the work. (R.0010-0018) There is no discussion of harassment in either opinion.

However, the record is clear that Plaintiff proferred evidence to the Appeals Referee to show that her work was satisfactory, and this evidence was refused:

> Q. All right, fine. Please continue.
>
> As far as my job performance, I have, uh, we kept copies of all of 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.
>
> Q. Well, the question, question here is not regarding the quality and adequacy of your work, its you voluntarily terminated your employment and we're trying to determine why you terminated that employment. R.0039. [Emphasis added.]

Yet the record contains ample evidence that the supervisor was criticizing Plaintiff's work throughout her employment (R.0022, 0023, 0025), and the fact that the criticism was unwarranted was why she terminated her employment. The Appeals Referee even allowed the supervisor to repeat this criticism at the hearing. (R.0032, 0033) But he did not give Plaintiff a chance to prove that this criticism was unjustified.

Defendant's approach to the continual criticism of Plaintiff's work is to take for granted that the work was "inadequate" and to congratulate the supervisor for not terminating Plaintiff earlier. Defendant's Brief at 9. This argument misses the real issue. If Plaintiff's work was, in fact, adequate, then the numerous derogatory memos and verbal criticisms to which Plaintiff was subjected were grounds for Plaintiff's leaving work. The memos would be unreasonable, no matter how worded, if they falsely accused Plaintiff of poor performance. But the Appeals Referee did not care to examine the evidence offered by Plaintiff at the hearing to disprove the supervisor's criticisms. Defendant continues, before this Court, to overlook the possibility that Plaintiff was doing good work.

The Appeals Referee fell short of his duty to Plaintiff. That duty was expressed in Hicks v. Mathews, 424 F.

Supp. 8, 10 (D. Md. 1976), with respect to Social Security Insurance claims:

> Harp v. Richardson, CCH UIR para. 17,324, p.2413 (D. Md. 1973) (Murray, J.) does impose a duty on the administrative law judge "in appropriate instances affirmatively to probe, inquire and explore the relevant facts", not to "turn every stone or act as an advocate for every unrepresented claimant", but "to attempt to draw out ***[the] potential" strength of a plaintiff's contentions when "the particular circumstances of a case clearly suggest that a claimant's proof of his claim is stronger than what he, on his own, has produced***" (at p.2415). Judge Murray, in remanding, held that those obligations were not sufficiently performed in Harp by the Administrative Law Judge. Nor have they been sufficiently performed herein.

The duty of any administrative hearing officer to an unrepresented claimant certainly does not allow an Appeals Referee to reject evidence that would support a plaintiff's claim for unemployment insurance. Plaintiff was unrepresented at her hearing, so that the Appeals Referee should have met his own obligation to bring to light evidence favorable to Plaintiff. He did not come close to fulfilling this duty. On the contrary, he refused relevant information offered by Plaintiff. He may well have committed this error by accident. Nonetheless it was error. As shown below, it at least requires that the case be remanded to the Industrial Commission to allow Plaintiff the opportunity to present the evidence she originally offered.

VI THE COURT SHOULD REVERSE AND REMAND THE DECISION OF THE BOARD OF REVIEW BECAUSE THE BOARD FAILED TO MAKE NECESSARY FINDINGS OF FACT.

It is clear that the decision made by the Board of Review in this case contains reversible error. The only question is what remedy Plaintiff is entitled to. At a minimum, the case should be returned to the Industrial Commission for a rehearing. That course has been sanctioned by this Court in Johnson v. Board of Review, supra. It also is a practice followed by other state courts in unemployment compensation cases. For example, in Ambridge Savings & Loan Association v. Unemployment Compensation Board of Review, supra, 517, the court remanded an unemployment compensation case for rehearing, stating:

> Where factual questions are not resolved this court will remand the case to the Board for further proceedings.
>
> ***
>
> There is no finding as to whether or not the claimant took the precautions which a reasonably prudent person should take to preserve the employment relationship during her absence and whether or not her conduct was consistent with a genuine desire to work. We cannot assume from the award that the Board made the necessary findings, for to infer the facts from the conslusion would be "an inversion of logical reasoning". Myers Unemployment Compensation Case, 1949, 164 Pa. Super. 150, 63 A.2d 371, 373.
>
> Since it is not the duty of this Court to decide whose testimony is credible and

> which facts are determinative we must refer the matter back to the Board to make findings and appropriate conclusions and to enter an order in conformity with such findings and conclusions. Lavely Unemployment Compensation Case, 1948, 163 Pa. Super. 66, 60 A.2d 352.

The record in Plaintiff's case clearly presents points on which the Board failed to make necessary findings. If this Court finds the record unclear as to the proper findings on those points, then Plaintiff's case should be remanded.

CONCLUSION

On any of the procedural, contractual, and constitutional bases set out above and in Plaintiff's original Brief, Plaintiff should be granted relief from Defendant's decision.

Respectfully submitted,

Lucy Billings
Lucy Billings
Attorney for Plaintiff

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that I mailed a true and correct copy of the foregoing Plaintiff's Reply Brief to K. Allan Zabel, 174 Social Hall Avenue, Salt Lake City, Utah 84111, this 27th day of April, 1978.

Lucy Billings