1988

Shelby L. Brewer v. Board of Review : Petition for Rehearing

Utah Court of Appeals

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DOCKET NO. 880097-CA IN THE COURT OF APPEALS

Shelby L. Brewer,

Claimant-Appellant

V

Board of Review of the Industrial Commission of Utah, Department of Employment Security,

Respondent

PETITION FOR REHEARING

CASE # 880097-CA

THIS PETITION IS SUBMITTED IN GOOD FAITH AND NOT FOR DELAY AND THOUGH THIS IS A PETITION FOR "REHEARING" THERE HAS NOT YET BEEN A FIRST HEARING. THE CLAIMANT PRAYS TO GOD THAT HE MAY BE HEARD BY THIS PETITION.

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TO THE UTAH COURT OF APPEALS AND THE HONORABLE JUDGES THEREOF :

I,Shelby L. Brewer, hereinafter referred to in second and third person as Claimant-Appellant do hereby petition for rehearing.

BACKGROUND

Claimant-Appellant at issue with the Department of Employment Security, hereinafter referred to as "The Department", sat before Administrative Law Judge Norman Barnes on 10-20-87 and was handed a negative finding on 11-13-87 which was subsequently affirmed by the Board of Review. The Claimant-Appellant subsequently prepared a brief for the Utah Court of Appeals and presented it within the time required. The brief was rejected by the office staff at the Court of Appeals on the basis that the Pica type appeared too small and that the brief did not contain an addendum. The Claimant-Appellant was then given (in keeping with rule 27-a-4) five days to make the noted corrections(although 27-a-4 does not specify a time period). At considerable cost to the Appellant the brief was changed and expensive vello bindings were purchased for the second time. But before the Claimant-Appellants 5 days were up he recieved in the mail a notice that the Court of Appeals had made a decision, a negative finding, affirming the position of the

Board of Review without allowing the Claimant-Appellant the benefit of presenting any arguments or facts in his defense. After great cost and effort in the preparation of a brief the Claimant-Appellant was informed that no one would even look at it, that in fact he was to be presumed guilty without the opportunity to present a single argument. The purpose of this instrument is to show why the Claimant-Appellant must be heard.

ARGUMENT

THE CLAIMANT DID IN FACT MAKE A TIMELY APPEAL

The Board of Review only affirmed that the claimant's appeal was not timely by a definition which only honored it's own waiver forms and methods. In fact the Claimant-Appellant knows that of course he did not sign the waiver on time, as required by the waiver. The avoidance of signing it, at all, was a purposeful and intentional act, ex necessitate legis, as per the higher authority of Constitutional dictum. However, the Claimant-Appellant did, in fact, register several early-on protests and appeals to the Department which were completely ignored, this in the form of unanswered letters.

ARGUMENT

THE CLAIMANT IS NOT GUILTY OF INACTION

On 7-30-84 was the last day the Claimant worked.
On 8-16-84 the Claimant applied for unemployment insurance.
On 2-28-85 the claimant applied to JTPA. On 5-13-85 the claimant requested TRA. On 4-22-86 the claimant recieved a decision of eligibility and approval for training. On 5-6-86 the claimant recieved a one week redetermination which billed him for $186.00 for time missed in school.Yet the Claimant does not identify conclusion of training as an improper break in training, and subsequent to his exemplary completion of training the Claimant filled out job search cards for work that he sought out, as per the requirement of the department. Summarily, the Claimant had dutifully met the Department's requirements and was now being billed for $186.00. On 6-6-86 the Claimant recieved the letter with the "re-interpretation of the 26 week period", On 7-31-86 Department of Employment Security mailed a letter wherein they had decided to change their policy decisions toward

the 26 week period and to enforce it's new position retroactively charging the not-at-fault Claimant for their mistake and billing the Claimant for their $1,302.00 debt to the Department of Labor. After recieving this very turbid letter the claimant registered an adamant Constitutional protest among his family, his friends and with his Bishop. Through such public protest it turned out that one of the Claimant's more distant friends shared with him details wherein the friend's mother had won a similar case proving that the money was owed to the Federal government and not to the State of Utah. More compelling than this,however, was the Claimant's own son's insistence that the Department's actions where an infringement of the Ex Post Facto provisions in the United States Constitution. The Claimant was moved by his son Troy Brewer's reminder that in 6 months it would be the 200th anniversary of the United States Constitution. Page 84 & 85 of the official record are actual photocopies from the school book of the Claimant's son Troy. Everyone in the Claimant's family felt that a Constitutional defense was a duty of conscience. Greatly disturbed that he had done nothing whatsoever wrong the Claimant handwrote a letter appealing to the Department of Employment Security, asking them to please confront him with what he had done wrong. This was to be the first of a series of handwritten letters which were all unanswered. On page 73 and 74 of the official record is found a handwritten letter available for record only because the claimant now realized the vital need to photocopy his letters all of which had been heretofore ignored. On page 76 of the official record is another photocopied letter written by the claimant, this one serves as evidence that the department ignored the Appellants letters, wherein on the bottom of the letter is a Post Script which desperately and pleadingly reads ; PLEASE RESPOND TO THIS LETTER

CATAGORICAL CONCLUSION : The Claimant made a seasonal protest of the UnConstitutional process but the Department of Unemployment Security like a great unaccountable machine ignored the Claimant's letters and thus is guilty of inaction.

ARGUMENT

THE AFFIRMATION OF THE BOARD OF REVIEW IS VOID

In the entirety of the hearing with Norman Barnes "timeliness" was never mentioned, rather the majority of all discussions pertained to determining that the Claimant was completely innocent of fault and with Constitutional defense. After an impassioned presentation of issues of importance to the Constitution and to the public interest Norman Barnes ignored his great responsibility to accept argument which is; "Compelling and Reasonable...and for Good Cause", as is required by the Utah Department of Employment Security Unemployment Insurance Rules for section 35-4-6 (c);

H. A late appeal may be considered on it's merits if it is determined that the appeal was delayed for good cause. Good cause is limited to circumstances where it is shown that:

3. The appellant delayed filing the appeal for circumstances which are compelling and reasonable.

It is proper that courts induldge every reasonable presumption against waiver of fundamental Constitutional rights, see;

BROOKHART V JANIS, 384 US 1, 16 L Ed 2d 314, 86 S Ct 1245, 7 Ohio Misc 77, 36 Ohio Ops 2d 141;

JOHNSON V ZERBST, 304 US 458, 82 L Ed 1461, 58 S Ct 1019 146 ALR 357(in which it was said that courts do not presume acquiescence in the loss of fundamental rights)

TAYLOR V UNITED STATES, 99 App DC 183,238 F2d 259

SMITH V UNITED STATES, 337 US 137, 93 L Ed 1264, 69 S CT 1000 (Waiver is not lightly to be inferred).

Very strong proof is necessary to convince the court that a Constitutional right has been waived;

MIRANDA V ARIZONA, 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 Ohio Misc 9, 36 Ohio Ops 2d 237, 10 ALR3d 974.

Secondly, in point, the Board of Review wrote that they "adopted the findings of fact and conclusions of law of the administrative law judge", yet the administrative law judge "concluded that he had"no jurisdiction", in this instance. Given that the administrativ law judge admittedly has no jurisdiction over the matter and the Board of Review endorses the Administrative Law Judge's position,

it follows that both the Administrative Law Judge and the Board of Review have no jurisdiction, are CORAM NON JUDICE, and..... conclusively the judgement is void.

ARGUMENT

THERE ARE TWO TIMELINESS REQUIREMENTS AND IT IS IMPOSSIBLE TO SUIT BOTH

The Claimant is required both to show an early assertion of his Constitutional rights and also to abstain from the process which he is protesting. Yet a timely assertion of rights in the Constitutional sense apparently does not save one from the timeliness infraction brought on by not signing the Department's waiver. Instead the early Constitutional protest of the Department of Employment Security waiver results in a Departmental "non-timely" status. This is a veritable "Catch 22" darned if you do - darned if you don't paradox which serves to remind us, "Impotentia Excusat Legem", impossibility is an excuse in the law.

POINT ONE IN FACT: ... PARTIES ARE ESTOPPED FROM DENYING THE CONSTITUTIONALITY OF AN ILLEGAL STATUTE BY PARTICIPATING AND AQUIESING IN IT.,see .....BOARD OF LEVEE COMMISSIONERS V JOHNSON, 178 Ky 287, 199 SW 8, One may not avail himself of a purely statutory right and at the same time challenge, on the ground of unconstitutionality, the restrictions of the same statute. ATKINS V HERTZ DRIVURSELF STATIONS, INC., 237 NY 352, 185 NE 408, affd 291 US 641, 78 L Ed 1039, 54 S Ct 437.

Failure to obstain from the illegal process which the Claimant deemed illegal would not only have constituted a personal, civic and Federal crime against the public interest but on the technical level could have estopped the Claimant from a later assertion of right. This non-accomplice posture has nonetheless resulted in an attempt by the Department to estop the Claimant from declaring his rights and to further waive the Claimant's Constitutional rights as punishment for his dissention from this very same illegal process. By this means the Department makes people guilty by what they do or guilty by what they don't do in a missapplication where the Claimant loses both ways and the Department wins both ways, yet the true nature of waivers and estoppels are to insure that you can't have it

both ways.CLARK V SMITH 193 Tenn 194, 245 SW2d 197
One can not in the same proceedings both assail a statute and rely upon it. An interjection at this point with regard to estoppel,against having it both ways ; The principles of estoppel developed in constitutional questions apply not only to individuals and corporations, but also to the state, see SWEENEY V STATE , 251 NY 417, 167 NE 519;
STATE EX REL. CLEMMER & JOHNSON CO. V TURNER,93 Ohio St 379, 113 NE 327, as well as municipal corporations, Re Syracuse 224 NY 201, 120 NE 203; PEOPLE EX REL. REYNOLDS V COMMON COUNCIL OF BUFFALO, 140 NY 300, 35 NE 485.
POINT TWO IN FACT:... SEPARATE FROM DEPARTMENTAL TIMELINESS IS THE CLAIMANT'S CONSTITUTIONAL REQUIREMENT FOR TIMELINESS IN ASSERTION OF RIGHT.
Although obliged to abstain from the process which the Claimant deemed illegal he did register early on letters and calls of protest asserting his concern for Constitutional right, which has been the basis of all his assertion.
YAKUS V UNITED STATES 321 US 414m 88 L Ed 834, 64 S Ct 660, 28 Ohio Ops 220;
STATE V LANCASTER, 25 Ohio st 2d 83, 54 Ohio Ops 2d 222, 267 NE 2d 291.
A party who claims that he has been deprived of a constitutional right may have waived his privilege of asserting it's existence by his laches in raising the constitutional quesiton.
WATKINSON V VAUGHN, 182 Cal 55, 186 P 753. I Fla L Rev 460.
In fact,however, the claimant raised the constitutional issue from day one and has documentation of such. Thus it can be said that the Claimant meets timeliness requirements for the Constitutional protest yet he did not satisfy the department's forms as a necessary abstainance, not through laches or inaction. The Department of Employment Security in fact ignored all the Claimant's letters until they forced him through Bills of Attainder threatening great punishment to use the actual word "Appeal", although the Claimant believed that this word offended the Due Process protections as it was used in his not at fault situation The Claimant abhorred the wording of the waiver, which read, My TRA Overpayments when in fact the overpayments are not the not-at-fault Claimants'.

The Claimant indignantly opposed having this illegal and improper debt thrust upon him from day one. The Claimant requested in a timely fashion to be confronted with anything he had done wrong.The Claimant made timely assertion of his rights invalidating non-timeliness charges.
Norman Barnes'negative finding on page 125 of the official record state, "The claimant did not agree with the wording in documents mailed to him by the Department" and "It has been the Claimant's impression that the actions of the Department has infringed on his constitutional rights", Barnes ignored this "Good Cause" and this "Compelling and Reasonable" fact called the United States Constitution , although he knew this to be the Claimant's most compelling and reasonable good cause from the outset.
IT IS AN ESTABLISHED PRINCIPLE THAT NO ONE MAY WAIVE THE PUBLIC INTEREST INVOLVED IN CONSTITUTIONAL PROVISIONS.

CATAGORICAL CONCLUSION:

THE NON-TIMELY FINDING IS UNREASONABLE, ARBITRARY, CAPRICIOUS, UNCONSTITUTIONAL AND DETRIMENTAL TO PUBLIC INTEREST.

IF TO THE CHAGRIN OF THE DEPARTMENT,WE ARE SORRY, BUT WE PROUDLY STATE BELOW CONSTITUTIONAL PROVISIONS WHICH CAN NOT BE WAIVED FOR PUBLIC INTEREST UNLESS WE CHOOSE TO NEXT EMBRACE COMMUNISM.

DUE PROCESS

Claimant-Appellant, Sui Juris, of his own right, having legal capacity to act for himself determined that, ipso facto, by the fact itself, innocence and a "not-at-fault" status protect and dissassociate one from liability or punishment. The Onus Probandi, or Burden of Proof lies with the accuser.In this case there has been no crime, only automatic guilt and a surplus of threats of punishment. It has been a noted manuever to "railroad" an innocent man by attacking him without charging him with a crime thus dissallowing him a jury trial. All the

Claimant has requested from the beginning is to be confronted with his wrongdoing. The 5th amendment protection allowing one to stand by his innocence is only possible through the due process requisite that the Department be disallowed from imposing liability without fault and presuming damages without proof of injury. The process which affronted the claimant was absent of Onus Probandi. No preponderance of evidence has been presented, rather there is no evidence of wrongdoing at all. Instead the Burden of Proof requires a preponderance of evidence.

CALIF. EVID. CODE 115

All the elements of a crime must be prooven by the government beyond a reasonable doubt, In re

Winship, 397 U.S. 358, 90 S. Ct. 1068, 25L. Ed. 2d 368

In the claimant's case, however, there is no crime, only punishment and plenty of it; see line 18-32 on pp 83 of the official record.

ARGUMENT

THE DEPARTMENT'S TRANSFERRAL OF IT'S DEBT TO THE CLAIMANT AND IT'S SUBSEQUENT PUNITIVE ACTIONS TO ENFORCE SAME IS UNREASONABLE, ARBITRARY AND CAPRICIOUS!

Due Process is not merely a procedural safeguard; it reaches those situations where the deprivation of life, liberty, or property is accomplished by legislation which, by operating in the future, can, given even the fairest procedure in application to individuals, destroy the enjoyment of all three;

POE V ULLMAN, 367 US 497, 6 1 Ed 2d 989, 81 S Ct 1752 reh den 368 US 869, 7 L Ed 2d 69, 82 S Ct 21 and reh den 368 US 869 7L Ed 2d 69, 82 S Ct 22 (Opinion of Harlan, J.)

SUBSTANTIVE DUE PROCESS MAYBE ROUGHLY DEFINED AS THE CONSTITUTIONAL GUARANTY THAT NO PERSON SHALL BE DEPRIVED OF HIS LIFE, LIBERTY, OR PROPERTY FOR ARBITRARY REASONS. To the extent that arbitrary action involves procedural arbitrariness, such action is, of course, barred by the principle of procedural due process. It has been said that protection from arbitrary action is the essence of substantive due process;

SLOCHOWER V BOARD OF HIGHER EDUCATION, 350 US 551,100 L Ed 692, 76 S Ct 637, reh den 351 US 944, 100 L Ed 1470 76 S Ct 843

192 OKLA 251, 135 P2d 332. THE TOUCHSTONE OF DUE PROCESS IS PROTECTION OF THE INDIVIDUAL AGAINST ARBITRARY ACTION OF GOVERNMENT;

WOLFF V McDONNELL, 418 US 539 41 L Ed 2d 935, 94 S Ct 2963, 71 Ohio Ops 2d 336, and similarly in substantive law, due process may be characterized as a standard of reasonableness, Re Lutker (Okla Crim) 274 P2d 786, which is similar to the standard or test of "rational grounds" used in determining a claim of unequal protection of the laws.

DUE PROCESS IS A LIMITATION UPON ARBITRARY POWER AND A GUARANTY AGAINST ARBITRARY LEGISLATION DEMANDING THAT THE LAW NOT BE UNREASONABLE, ARBITRARY, OR CAPRICIOUS.,

NEBBIA V NEW YORK,291 US 502m 78 L Ed 940, 54 S Ct 505,89 ALR1469

HEINER V DONNAN, 285 US 312, 76L Ed 772, 52 S Ct 358

POLAR ICE CREAM AND CREAMERY CO. V ANDREWS (ND Fla) 208 F Supp 899, revd on other groundds 375 US 361, 11L Ed 2d 389 84 S Ct 378;

DAVIS V FLORIDA POWER CO., 64 Fla 246, 60 So 759;

SEABOARD A. L. RY. V SIMON, 56 Fla 545, 47 So 1001;

MT. CARMEL PUBLIC UTILITY & SERIVCE CO. V PUBLIC UTILITIES COM., 297Ill 303, 130 NE 693, 21 ALR 571;

WALGREEN CO. V GROSS INCOME TAX DIV., 225 Ind 418, 75 NE2d 784, 1 ALR2d 1014;

ULMAN V MAYOR, etc., of BALTIMORE, 72 Md 587. 20 A 141, affd 165 US 719, 41 L Ed 1184, 17 S Ct 1001;

THURMAN V CHICAGO, M.& S..P.R. Co., 254 Mass 569, 151 NE 63 46 ALR 563;

ALBRITTON V WINONA, 181 Miss 75, 178 So 799, 115 ALR 1436, app dismd 303 US 627, 82 L Ed 1088, 58 S Ct 766;

BRYANT V BROWN, 151 Miss 398, 118 So 184, 60 ALR 1325;

HANSON v UNION P.R. CO., 160 Neb 669, 71 NW2d 526, revd on other grounds 351 US 979, 100 L Ed 1494, 76 S Ct 1044 and reh den 352 US 859, I L Ed 2d 69, 77 S Ct 1044 and reh den 352 US 859, I L Ed 2d 69, 77 S Ct 22;

FIRST NATIONAL BANK V BOVEY, SHUTE AND JACKSON, INC., 49 ND 450, 191 NW 765;

RE LUTKER (OKLA CRIM) 274 P2d 786;
SANDEL V STATE, 115 SC 168, 104 SE 567, 13 ALR 1268 (ovrld on other grounds SIRRINE V STATE 132 SC 241, 128 SE 172)
KELLEHER V MINSHULL, 11 Wash 2d 380, 119 P2d 302.

The courts, as custodians of the judicial powers of government, are not obliged to enforce a statute which, through a rule of evidence, such as we have in this case, arbitrarily deprives a litigant of his rights, or which permits a defendant to suffer conviction without due process of law.;
PEOPLE V JOHNSON, 68 Cal 2d 646, 68 Cal Rptr 599, 441 P2d 111 cert den 393 US 1051, 21 L Ed 2d 693, 89 S Ct 679.

ARGUMENT:

THE DEPARTMENT'S ACTIONS IMPAIRS THE OBLIGATION OF CONTRACTS.

A statute cannot Constitutionally impose an obligation with respect to a transaction which, at the time it took place gave rise to no obligation.
MULLIGAN V HILTON, 305 Mass 5, 24 NE 2d 676, 1333 ALR 376

ARGUMENT:

THE DEPARTMENT MISSAPPLIED POLICY RETROSPECTIVELY

Although retrospectively is analagous to "Ex Post Facto", the term has been used broadly to include any statute which operates retrospectively. Constitutional provision prohibiting retrospective laws covers laws which create a right where none before existed and which relate back so as to confer on a party the benefit of such right and as is applied to this case covers also all such laws as take away or impair any vested right acquired under existing laws, create a new obligation, impose a new duty, or attach a new disability in respect of transactions or considerations already past;
STURGES V CARTER, 114 US 511, 29 L Ed 240, 5 S Ct 1014;
NEW ORLEANS V CLARK, 95 US 644, 24 L Ed 531;
BRITISH AMERICA ASSUR. CO. V COLORADO & S.R. CO., 52 Colo 589 125 P 508;
FRENCH V DEANE, 19 Colo 504, 36 P 609;
BULLARD V HOLMAN, 184 Ga 788, 193 SE 586, 113 ALR 763;
ROSS V LETTICE, 134 Ga 866, 68 SE 734;
SMITH V DIRCKX, 283 Mo 188, 223 SW 104, 11 ALR 510;
STATE V KYLE, 166 Mo 287, 65 SW 763;
HOPE MUT. INS. CO. B FLYNN, 38 Mo 483;
DOW V NORRIS, 4 NH 16;
STATE EX REL. MICHAELS V MORSE (App) 75 Ohio L Abs 536, affd 165 Ohio St 599, 60 Ohio Ops 531, 138 NE2d 592;
COUNTY COM'RS OF HAMILTON V ROSCH, 50 Ohio St 103, 33 NE 408;
CRUMP V GUYER, 60 Okla 222, 157 P 321, 2ALR 331;
LEWIS V PENNSYLVANIA R. CO., 220 Pa 317, 69A 821;
SHIELDS V CLIFTON HILL LAND CO., 94 Tenn 123, 28 Sw 668;
WYNNE'S LESSEE V WYNNE, 32 Tenn 405.

The Constitutional inhibition against retroactive legislation is against such legislation as injuriously affects individuals and their vested rights. NEW ORLEANS CLARK, 95 US 644, 24 L Ed 521.

ARGUMENT

THE DEPARTMENT'S RETROSPECTIVE LEGISLATION EFFECTS IMPAIRMENT OF VESTED RIGHTS

The Claimant is to this day recieving bills totalling nearly $1.500,00 which are the state's debt to the Department of Labor and are not owed by the not-at-fault Claimant. In an effort to force the Claimant to pay this debt which he did not incurr, the State Department of Employment Security has threatened to sell the Claimant's home and all of his possessions at a Sheriff's sale removing his right to life, liberty, the pursuit of happiness, the security of his home, his marriage, his possessions, and everything he has worked hard to earn by the sweat of his brow. Under the restraint which the 14th Amendment to the Federal Constituiton imposes upon retrospective legislation, as well as under the restraints imposed thereon by the Utah State Constitutional provisions expressly prohibiting the enactment of retrospective laws, there can be no divesting of vested rights by legislative fiat without violating the Constitution;

UNITED BAKING CO. V BAKERY AND CONFECTIONERY WORKERS' UNION 257 App Div 501, 1085, 14NY52d 74.

If a retrospective act which is neither an ex post facto law nor one impairing the obligation of a contract should nevertheless operate so as to take away a right or a property, it may still be unconstitutional and void, not because it is retrospective, but by reason of it's repugnancy to the 14th Amendment of the Federal Constitution guarenteeing due process of law;

TRUAX V CORRIGAN, 257 US 312, 66 L Ed 254, 42 S Ct 124, 27 ALR 375;

ETTOR V TACOMA, 228 US 148, 57 L Ed 773, 33 S Ct 428;

ALDRIDGE V TUSCUMBIA, C. & D.R.R. CO. (Ala) 2 Stew & P 199;

FALL RIVER VALLEY IRRIG. DIST. V MT. SHASTA POWER CORP., 202 Cal 56, 259 P 444, 56 ALR 264;

PREVESLIN V DERBY & ANSONIA DEVELOPING CO., 112 Conn 129 511 A 518, 70 ALR 1426;

STANFORD V McCLELLAND, 121 Fla 253, 163 So 513;

PEOPLE EX REL EITEL V LINDHEIMER, 371 Ill 367, 21 NE2d 318 124 ALR 1472, app dismd 308 US 505, 84 L Ed 432, 60 S Ct 111;

STATE EX REL BOYNTON V PUBLIC SERVICE COM., 135 Kan 491, 11 P2d 999;

BOOTH V HAIRSTON, 193 NC 278, 136 SE 879, 57 ALR 1196;

LOWE V HARRIS, 112 NC 472, 17 SE 539;

GREENOUGH V GREENOUGH, 11 Pa 489

ARGUMENT:

THE WAIVER OF THE CLAIMANT'S RIGHTS IS NON-CONSENSUAL AND ILLEGAL

Black's law dictionary defines a waiver as "The intentional or voluntary relinquishment of a known right". Intentional or voluntary are key terms in the definition of waiver and abandonment or or forfieture of rights. The claimant did not wish to waive his not at fault status or his constitutional rights protecting his existing innocence.

CONJUNCTIVE ARGUMENT:

THE CLAIMANT DID NOT WISH TO BE GUILTY OF COMPLICITY AS AN ACCOMPLICE TO SUPPORT, AID, ABET OR TO ENJOIN AN ILLEGAL PROCESS AND THEREBY BE LATER ESTOPPED IN HIS PROTEST OF SAME OR HIS ASSERTION OF RIGHTS

Black's law dictionary defines estoppel as follows;
Estoppel means that party is prevented by his own act from claiming a right to detriment of other party who was entitled to rely on such conduct and has acted accordingly,

GRAHAM V ASBURY 112 Ariz. 184, 540 P 2d 656, 658. An estoppel arises when one is forbidden by law to speak against his own act or deed.

GURAL V ENGLE, 128 NJL 252, 2d 257, 261.

While in the outset the Claimant did not understand the turbid letters which in the face of his innocence appeared to punish him for carefully, properly and correctly following the rules, (the claimant espescially was confused with the fact that the letters said "you are not at fault", and "that no attempt would be made to collect until new Federal TRA program regulations were put into effect, clearly summoning the Claimant to "Go On Hold" As it turned out a U.S. District Court Order was dissallowing the collection of non-fault overpayments until valid guidelines were adopted, and it is no doubt in that same spirit that the Claimant refuses to undersign any waiver, document or paper which reads, "My TRA Overpayments" or My Theft or My Murder or any other capricious and untrue statement when the overpayments are in no way or sense his) the Claimant did not wish to sign any statement which would later estop him from asserting the facts and his vested rights. The appellant did not and does not wish to do anything which could result in the waiving, the compromise or the forfieture of his Federal Constitutional rights. In this connection it has been noted that a originally established by the United States Supreme Court, waiver of Constitutional rights was a consensual concept, depending on INTENTIONAL RELINQUISHMENT OR ABANDONMENT OF A KNOWN RIGHT" ,

JIMINEZ V ESTELLE (CA 5 TEX) 557 F2d 506, referring to JOHNSON V ZERBST, 304 US 458, 82 L Ed 1461, 58 Ct 1019, 146 ALR 357.

FOR A WAIVER TO BE EFFECTIVE IT MUST BE CLEARLY ESTABLISHED THAT THERE WAS AN INTENTIONAL RELINQUISHMENT OR ABANDONMENT OF A KNOWN RIGHT OR PRIVILEGE,

BROBKHART V JANIS, 384 US 1, 16L Ed 2d 314, 86 S Ct 1245, 7 Ohio Misc 77 36 Ohio Ops 2d 141.

CATAGORICAL CONCLUISON:

The waiver system imposed upon the appellant has not met the consent requirement but rather has ignored overt Dissent and even more the Department is re-writing the definition of the legal truth into a false picture so as to make dissent an infraction rather than the legal antithesis of consent which it is. This is capricious and unreasonable and a phenomena which we can not allow to stand or to take root, directly or indirectly.

ARGUMENT

THE DEPARTMENT'S ACTIONS VIOLATE THE EX POST FACTO LAWS

Among the types of retroactively applied changes in the law which the courts have recognized as being violative of the Ex Post Facto clauses are changes which impose or initiate punishment for an act innocent when committed. This could not

better describe the Department's mistake and the transfer of that mistake to a not-at-fault claimant, see;

FLETCHER V PECK, 10 US 87, 3 L Ed 162;
DOBBERT V FLORIDA, 432US, 53 L Ed 2d 344, 97 S Ct 2290,
reh den 434 US 882, 54 L Ed 2d 344, 97 SCt 246;
BOUIE V COLUMBIA 378 US 347, 12 L Ed 2d 894, 84 S Ct 1697;
BEACELL V OHIO, 269 US 167, 70 L Ed 216, 46 S Ct 68;
MALLEY V SOUTH CAROLINA, 237 US 180, 59 L Ed 905, 35 S Ct 507
MALLETT V NORTH CAROLINA, 181 US 589, 45 L Ed 1015, 21 South Ct730
DUNCAN V MISSOURI, 152 US 377, L Ed 485,14 S Ct 570;
KRING V MISSOURI,107 US 221, 27 L Ed 506, 2 S Ct 443;
BURGESS V SALMON, 97 US 381, 24L Ed 1104
GUT STATE, 76 US 35, 19 L Ed 573;
CUMMINGS V MISSOURI, 71 US 277, 18L Ed 356;
CALDER V BULL, 3 US 386, L Ed 648.

ARGUMENT

THE CLAIMANT AND FAMILY ARE BEING VICTIMIZED BY BILLS OF ATTAINDER

The presence of punishment is also important in identifying the Department's subsequent actions as to encroach Constitutional Prohibition of Bills of Attainder. United States Supreme Court Chief Justice Warren once commented that the best available evidence- the writings of the architects of our Constitutional System- indicates that the Bill of Attainder clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safegaurd against legislative excercise of the judicial function, or put more simply , a safegaurd against trial by legislature. See 326 et seq. supra.,

UNITED STATES V BROWN, 381 US 437, 14L Ed 2d 484, 85 S Ct 1707

Thus, legislative acts, no matter what their form, that apply in such a way as to inflict punishment without judicial trial are Bills of Attainder prohibited by the Constitution.

If there is still any form or fashion of events whereby one thinks they can skirt this great dictum by going round robin but yet arriving at the same effect the standard is no,for;

CUMMINGS V MISSOURI, 71 US 277, 18 L Ed 356

reveals that the enactment of a bill of attainder in violation of the Constitution cannot be done by indirection.

Constitutions are designed to cover a great multitude of necessarily unforseen occassions and must be kept in general language unless they are constantly amended. The Claimant feels that the punishment inflicted upon his family infringes on the individual rights guarenteed by the Constitution in unmistakably clear words. We do not wish to enter into a collision with the political departments of the Government. We pray,instead, to be protected by them.For the Claimant and his family the Constitution is not a play on words or a dead letter. The issue of punishment can not be taken lightly. If Bills of Attainder are allowed to go unchecked then next will we witness the abrogation of the Freedom of Religion. Please give this case rational attention, for while this is a petition for re-hearing, in fact there has not been a first hearing yet. The court should overturn any decision which results in attacking the innocent.

ARGUMENT

THE "NOT-AT-FAULT" CLAIMANT IS NOT LIABLE

The Utah Employment Security Act, as-amended, as issued by the Department of Employment Security Industrial Commission of Utah, Section 35, 4, 6 (E), under non-fault overpayments states unequivocally that; "If any person has recieved any sum as benefits under this act to which under a redetermination or decision he was not entitled, and it has been found that he was without fault in the matter, he is not liable to repay such sum...".

POINT 2

The Federal Register is to be the guide for state laws which must be made within it's context. The Department of Labor, Employment and Training Administration, Trade Adjustment Assistance for workers; final rules, 20CFR Part 617.55 entitled, "Overpayments; Penalties for fraud", under section (a)1 makes clear the two guidelines for the state agency to waive individual liability; (a) (1) (i) "The payment was made without fault on the part of such individual; and (II) Requiring such repayment would be contrary to equity and good conscience". It is important to reiterate that state law can only be derived within the margins and the context of the Federal Register quoted above.

POINT 3

In a call to Clarence Zack, the Assistant Director of the Office of Trade Adjustment Assistance Employment and Training Administration, U.S. Department of Labor's Regional office in Denver, Mr. Zack admitted that "nowhere in the context of 20CFR does it intimate or suggest that the state lean on claimants to pay the state debt," but he said, "they've got to get the money somewhere".

REITERATED EXPLANATION

The Department of Employment Security made a mistake in interpreting a 26 week eligibility period(as indicated on page 58 of the official record, as spoken by Byron Davenport) where Chief of Benefits for the Utah Department of Employment Security admitted the Department was "wrong" in interpretting a 26 week period as 26 weeks of payment rather than a 26-week "running clock" period. Then the Department of Employment Security was told by the Department of Labor that they were liable for the monetary repayment incurred by the 26 week misinterpretation dated July 31,'8

CATAGORICAL CONCLUSION

THE DEBT IS OWED THE U.S. DEPARTMENT OF LABOR BY THE UTAH EMPLYMENT SECURITY DUE TO THEIR OWN ERROR.

As is indicated by Clarence Zack's remark, "They've got to get it somewhere" , the department is unreasonably, arbitrarily and capriciously passing the buck to hte "not-at-fault" claimant. The claimant is not only "not-at-fault", but is now a victim of his earlier diligence and cooperation with the department's every directive. The claimant can not be officially "entitled" then and not "entitled" now on a retroactive basis. The "not-at-fault" claimant can not be punished with liability when the department is responsible. It would be more fair to attach the wages of the department's employees who are responisble for misinterpretting the 26 week period than to attack the claimant who is only responsible for dutifully obeying directions and did not get to participate in or to share in the "time-period misinterpretation mistake".

THE NOT-AT-FAULT CLAIMANT IS NOT LIABLE.

WE CONCLUDE;

Jot for Jot, case for case, bag and baggage the Department's attack can not withstand Constitutional scrutiny.

If you fail to support the absolution of the not at fault claimant,and this illegal action is allowed to stand, you will be stabbing at the very heart of the United States Constitution. The UnConstitutional construction of a policy which allows improper debt transfer from the State to the Claimant is repugnant and does not reflect the standards of the people of Utah and the people of Utah should freely exercise their true 9th and 10th Amendment rights to pursuade their elected representatives to investigate how such an Orwellian script could become real life in 1988. The Claimant is not responsible by being not at fault. The responsible party must be held lialbe. The Claimant's innocence estops him from waiving his guilt. The Claimant is guilty of no disqualifying situations such as school absentses or failure in following agency rules. Court transcript reveals that although

the Claimant adressed these issues individually and extensively these vital facts have been entirely ignored by the Department by way of the weak technicality of timeliness. In fact, however, the Department has yet to answer one of the Claimant's letters. Surely the spirit of the law should be given a modicum of consideration. Or consider if you will the behest of Corrinthians 2:2,"The letter killeth, but the Spirit Giveth Life".
The Court can dispose of this case either on narrow technical grounds which will result in it's being tried over again and appealed again, or on broad equitable principles. We hope it will choose the latter and thus effectively put an end to this controversy that has already gone on too long at the expense of the taxpayer.

DATED THIS 22 DAY OF JUNE, 1988.

BY Shelby L. Brewer
SHELBY L. BREWER
CLAIMANT-APPELLANT

CERTIFICATE OF MAILING

SERVED the foregoing Petition for Rehearing by mailing a copy, postage prepaid to the following this 22 day of June, 1988: Board of Review of the Industrial Commission of Utah, Department of Employment Security, 1234 South Main Street P.O. Box 11600, Salt Lake City, Utah 84147.

Shelby L. Brewer