1978

Joseph K. Stumph, Jr. v. Carlyle F. Gronning et al : Defendants' Brief

Utah Supreme Court

Robert B. Hansen; Floyd G. Astin; F. Allan Zabel; Attorneys for Defendants;
Joseph K. Stumph, Jr., Pro Se;

IN THE SUPREME COURT

OF THE STATE OF UTAH

JOSEPH K. STUMPH, JR.,

Plaintiff,

vs.

Case No. 15662

CARLYLE F. GRONNING AND THE BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY,

Defendants.

DEFENDANTS' BRIEF

Appeal from a decision of the Department of Employment Security, State of Utah, as upheld by the Appeals Referee and the Board of Review of the Industrial Commission, State of Utah

ROBERT B. HANSEN
Attorney General

FLOYD G. ASTIN
K. ALLAN ZABEL
Special Assistants
Attorney General
174 Social Hall Avenue
Salt Lake City, Utah 84147

Attorneys for Defendants.

Joseph K. Stumph, Jr.
3167 South 7945 West
Magna, Utah 84044

Pro Se

Joseph K. Stumph, Jr.
Attorney Pro se
3167 South 7945 West
Magna, Utah 84044
Telephone 250-5465

IN THE SUPREME COURT OF THE STATE OF UTAH

Joseph K. Stumph, Jr. Plaintiff vs. Carlyle F. Gronning and the Board of Review of The Industrial Commission of Utah, Department of Employment Security, Defendants	**PLAINTIFF'S BRIEF** Case No. 77-A-2626 Decision, Case No. 77BR-212 Joseph K. Stumph, Jr. vs. Department of Employment Security, No, 77-BR-212

Plaintiff was denied unemployment compensation from June 20, 1977 thru June 30, 1977 because the Department of Employment Security, State of Utah contends that plaintiff was entitled to, or could have taken his allotted vacation time from Kennecott Copper Corporation during a scheduled vacation shutdown June 13 thru July 3, 1977. Plaintiff originally scheduled his vacation during March and April (two weeks) for the purpose of trying to establish a business. Financing for the venture failed to materialize and defendant attempted to cancel the March and April vacation period and move it up to the company vacation shutdown in June-July. Kennecott refused to reschedule my vacation. My immediate supervisor at the time, Mr. Joe Dalpaiz, communicated the company's decision of their refusal to reschedule my vacation, to me sometime in March, 1977.

At my last hearing by the Department of Employment Security which was schedul January 17, 1978 I wrote the Department saying I had to work that day and if I should lay off work to attend the hearing it would cost me perhaps half as much as I might expect to gain by a favorable decision by their department.

Plaintiff asks for a reversal of the decision denying plaintiff benefits.

Copies mailed to Robert [illegible], Atty. Gen.
and F[illegible] G. A[illegible], [illegible] Atty. Gen.

Joseph K. Stumph, Jr.

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IN THE SUPREME COURT

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Defendants.

DEFENDANTS' BRIEF

STATEMENT OF NATURE OF CASE

This is an action before the Supreme Court of the State of Utah pursuant to Section 35-4-10(i), Utah Code Annotated 1953, as amended, seeking judicial review of a decision of the Board of Review of the Industrial Commission of Utah, which denied unemployment compensation to the Plaintiff for the period June 19 through July 2, 1977.

DISPOSITION BY LOWER AUTHORITY

Plaintiff initially filed claims for unemployment compensation for the period June 19 through July 2, 1977. A Department Representative denied benefits and Plaintiff appealed. The Appeal Referee affirmed the denial of benefits. On appeal, the Board of Review affirmed the decision of the Appeal Referee by decision dated January 24, 1978, in Case No. 77-A-2626, 77-BR-212.

RELIEF SOUGHT ON REVIEW

Plaintiff seeks reversal of the decisions of the Board of Review and the Appeal Referee, which denied benefits to Plaintiff on the grounds he had received or was entitled to receive remuneration in the form of vacation pay during the period of the plant shutdown by Kennecott Copper Corporation. Defendants seek affirmance of such decisions.

STATEMENT OF FACTS

Plaintiff, an employee of Kennecott Copper Corporation, was denied unemployment benefits during the period of a vacation shutdown in 1977. (R.002 Upon appealing the denial of benefits, two separate hearings were scheduled fo Plaintiff. (R.0019, 0008) Plaintiff failed to appear at either hearing. (R.0017, 0007) The Board of Review affirmed the decision of the Appeal Refere on the grounds that the evidence of record was insufficient to show that Plaintiff took his vacation prior to the vacation shutdown under compelling circumstances over which he had little or no reasonable control. (R.0005, 0006)

ARGUMENT

THAT THE APPEAL REFEREE AND THE BOARD OF REVIEW DID NOT ERR IN REFUSING TO ALLOW BENEFITS TO PLAINTIFF ON THE SOLE BASIS OF HIS UNSWORN LETTER OF APPEAL.

This case is a derivative of the circumstances which led to the primary issues decided by the Court in *Mills, et al, v. Carlyle F. Gronning, et al*, Case No. 15622; and *Brinkerhoff, et al, v. Carlyle F. Gronning, et al*, Case No. 15621; decided by the Court on June 26, 1978. The issues in those cases arose under circumstances surrounding a vacation shutdown by Kennecott Copper Corporation during the summer of 1977. It was held in the *Mills* and *Brinkerhoff* cases that individuals who elect to take vacation at a time other

than a vacation shutdown scheduled in accordance with the terms of a collective bargaining agreement are not eligible for unemployment benefits pursuant to Section 35-4-5(h) U.C.A. 1953, unless the election was made under circumstances over which the individual had little or no control and for which there was no reasonable alternative.

In the instant case Plaintiff scheduled his vacation for a period prior to the vacation shutdown. The only evidence as to the reason Plaintiff elected to take his vacation early is Plaintiff's unsworn letter of appeal, (R.0020) in which Plaintiff alleges that he did so in order to organize and start a business venture of his own. Plaintiff further alleged in his letter of appeal that when financing for his business venture failed to materialize, he requested his vacation be rescheduled to the period of the vacation shutdown, but that company officials denied his request. When Plaintiff failed to appear for his scheduled appeal hearing, the Appeal Referee affirmed the original denial of benefits on the grounds that Plaintiff was entitled to receive vacation pay during the period of the vacation shutdown. (R.0017) This decision was based upon Section 35-4-5(h) of the Utah Employment Security Act, as was the decision of the Department Representative. (R.0021) Plaintiff appealed to the Board of Review, which body remanded the case for a new hearing to obtain further evidence with respect to Plaintiff's contention that he was denied the opportunity to change his vacation to the period of the vacation shutdown. (R.0011) Plaintiff again failed to appear at the scheduled hearing and, although instructed that he could request the hearing be rescheduled if he felt his failure to appear was with good cause, (R.0009) Plaintiff made no such request. Upon Plaintiff's failure to appear at the hearing, the matter was referred to the Board of Review for a decision. The Board's

decision was that the evidence was insufficient to show that the facts of the case come within the exception provision established by the Board, (R.0026) (and subsequently approved by the Court in the *Mills-Brinkerhoff* matters referred to previously).

The issue thus presented is twofold: (1) Is Plaintiff's unsworn letter of appeal admissible, credible evidence; and (2) Has Plaintiff established by reason of such evidence that the company's refusal to reschedule his vacation to the shutdown period constituted a compelling circumstance beyond his control, such as to qualify Plaintiff for the receipt of unemployment benefits?

Section 35-4-10(e), U.C.A. 1953, provides in part:

> The manner in which disputed matters shall be presented, the reports thereon required from the claimant and employing units and the conduct of hearings and appeals shall be in accordance with regulations prescribed by the commission for determining the rights of the parties whether or not such regulations conform to common law or statutory rules of evidence and other technical rules of procedure. . . .

Pursuant to the foregoing statutory authority, the Commission has promulgated the following regulation:

> 4.b.(1) All hearings shall, after due notice to the parties, be conducted informally and in such manner as to ascertain and protect the rights of the parties. All issues relevant to the appeal shall be considered and passed upon. Any party to an appeal shall be given an adequate opportunity to be heard and present any pertinent evidence of probative value and to know and rebut by cross-examination or otherwise any other evidence submitted. Oral or written evidence of any nature whether or not conforming to the legal rules of evidence may be accepted and given its proper weight. . . . (Emphasis supplied.)

There is reason to conclude that the letter of appeal is hearsay evidence, from the fact that it contains a statement upon which Plaintiff relies, which is unsworn and not subject to any type of examination by reason

of Plaintiff's failure to appear at the hearings. (See 2 *Jones, Evidence*, 6th Edition, Section 8:1, page 160.) Whether or not an unsworn statement is hearsay evidence or some other form of incompetent evidence would appear in the instant case to be immaterial. The only evidence available in the case at bar consists of two unsworn statements, the first from Kennecott Copper Corporation (R.0022) and the second being Plaintiff's letter of appeal.

The implication of Regulation R4.b.(1) quoted above, is that all evidence which may have a material bearing on the outcome of an adjudicative matter should be admitted in the administrative hearing, subject to being given appropriate weight by the Hearing Officer in reaching a decision.

This interpretation is consistent with the position of some of the leading authorities on the subjects of evidence and administrative law. (For example, see 1 *Wigmore, Evidence*, 3rd Edition, Section 40, pp. 42-43; 2 *Davis, Administrative Law Treatise*, Section 14.12, as supplemented; 36 A.L.R. 3d, Sections 5, 7, 22, and 27.)

The Board of Review did not err in determining that the unsworn letter, standing by itself, is insufficient to support a finding in favor of Plaintiff. Utah by precedent decision follows what is known in administrative law as the "residual rule." (See 1 *Wigmore, Evidence*, Supra, Section 4c, footnote 71, at p. 90.) The "residual rule" basically provides that hearsay evidence is insufficient in and of itself as a basis for a finding, unless supported by legally competent evidence. Although many authorities object to the use of the residual rule, it remains the law of this jurisdiction. (For detailed discussions of the objections to the residual rule, see the authorities cited in the foregoing paragraph.) The use of hearsay evidence and the applicability of the residual rule is presented in a very careful analysis of the issue by Larsen, J.,

In the case of *Ogden Iron Works, et al, v. Industrial Commission*, 102 U. 492, 132 P. 2d 376 (1942), a Workmen's Compensation case. In explaining the legislative allowance of hearsay evidence in administrative hearings, Justice Larser stated:

> When the Legislature sanctioned the admission of this (hearsay) evidence, it follows by necessary implication that it intended to authorize the commission to act upon it. But since the action of the commission results in a determination of the substantial rights of the parties, this court has long been committed to the position that there must be a residuum of evidence, legal and competent in a court of law, to support a claim before an award can be made, and a finding cannot be based only upon hearsay evidence. (Citations omitted.) To say the commission may receive and consider and act upon hearsay evidence, does not mean that the commission is obliged to act upon all hearsay evidence presented, but only that it may act upon it where the circumstances are such that the evidence offered is deemed by the commission to be trustworthy. (132 P. 2d, at p. 379.)

In the instant matter Plaintiff has alleged that he was compelled to take his vacation early by reason of the company's refusal to allow him to reschedule his vacation to the shutdown period after having originally scheduled it early for business reasons. The Commission was not compelled to act upon that evidence alone in view of the many questions left unanswered by Plaintiff's failure to appear at the hearing scheduled for him, and which might have shed considerable light on the extent to which Plaintiff's circumstances were beyond his control. Those questions may reasonably have included:

1. When did Plaintiff request that his vacation be rescheduled to the shutdown period and did his request allow the employer sufficient time to make any necessary adjustments in the work schedule?

2. Could the request have been made earlier, thus providing the employer more time to adjust to his work schedules?

3. How definite were Plaintiff's plans to enter a business venture? Were such plans formalized and ready for implementation, or were they yet in

an informal, "idea" stage of development upon which the scheduling of vacation would have had no material effect?

4. Was the possible business venture the sole reason for scheduling an early vacation, or were there also in existence at the time other vacation-related reasons?

5. Was there any particular reason the business venture had to have its conception in the March-April period, or could it have been started as easily during the period of the vacation shutdown?

The answers to each of the foregoing inquiries could have had a material bearing on the question of whether Plaintiff had no reasonable alternative other than to take his vacation prior to the shutdown period, and that he was compelled to do so when the company refused to reschedule his vacation to the shutdown period. Plaintiff's failure to appear at the hearings prevented the Commission from inquiring into these areas, thus leaving the Commission to decide the case on the sole basis of Plaintiff's unsworn and self-serving letter of appeal.

CONCLUSION

The rules and regulations of the Commission require that evidence be given "as provided by law." It is clear, however, that the evaluation of hearsay evidence cannot be done in the abstract; rather such evidence must be considered in light of the nature and quality of all other available evidence, [illegible] unchangeable setting of the particular case. Although Plaintiff's letter of appeal may be admissible as evidence, a finding of fact [illegible] solely or such hearsay evidence would [illegible] the lack of other probative [illegible] the requested hearings.

Therefore, the decisions of the Board of Review and the Commission should be affirmed.

Respectfully submitted,

Attorneys for Defendant

ROBERT B. HANSEN
Utah Attorney General

FLOYD G. ASTIN
K. ALLAN ZABEL
Special Assistants
Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a copy of the foregoing Defendant's Brief to Joseph K. Stumph, Jr., Pro Se, 3167 South 7945 West, Magna, Utah 84044, this _____ day of _____, 1978.

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