

1986

Vernon C. Young v. Board of Review of the Industrial Commission of Utah, Department of Employment Security : Reply Brief

Utah Supreme Court

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LIST OF PARTIES

Employer - Petitioner

Vernon C. Young M.D., P.C.

Repondents

Board of Review of the
Industrial Commission
of Utah--Respondent

Claimant-Respondent

Jody L. England, Claimant

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IN THE SUPREME COURT OF THE
STATE OF UTAH

VERNON C. YOUNG M.D., P.C.

Plaintiff/Appellant/
Petitioner

vs.

Case No. 860350

BOARD OF REVIEW OF THE
INDUSTRIAL COMMISSION OF
UTAH, DEPARTMENT OF
EMPLOYMENT SECURITY,
Claim Representative,
Jody L. England,

Category 6

Defendants/Respondents.

PETITIONER'S BRIEF

STATEMENT OF ISSUES PRESENTED ON APPEAL

The issue presented in this case is whether the Claimant-Respondent, Jody L. England, was properly allowed unemployment insurance benefits under section 35-4-5(b)(1), Utah Code Annotated 1953, as amended (Laws of Utah, First Special Session, Ch. 20, section 3), on the grounds she was not discharged for just cause or for an act or omission in connection with employment which was deliberate, willful or wanton and adverse to the employer's rightful interests.

A second issue presented in this case is whether the employer, Vernon C. Young M.D., P.C., should be relieved of charges for any benefits paid to the Claimant-Respondent pursuant to section 35-4-7(c)(3)(F)(i), Utah Code Annotated 1953, as amended (Utah , Legislative Report 1985).

PERTINENT RULES

Rules B.1. and 2., Department of Employment Security Unemployment Insurance Rules, pertaining to section 35-4-5(b)(1) of the Utah Employment Security Act, provides as follows:

B. JUST CAUSE

1. The basic factors which establish just cause, and are essential for a determination of ineligibility are:

a. Culpability

There is the seriousness of the conduct or the severity of the offense as it affects continuance of the employment relationship. The discharge must have been necessary to avoid actual or potential harm to the employer's rightful interests. A discharge would not be considered "necessary" if it is not consistent with reasonable employment practices. The wrongness of the conduct must be considered in the context of the particular employment and how it affects the employer's rights. If the conduct was an isolated incident of poor judgment and there is no expectation that the conduct will be continued or repeated, potential harm may not be shown and therefore it is not necessary to discharge the employee.

(1) Longevity and prior work record are important in determining if the act or omission is an isolated incident or a good faith error in judgement. An employee who has historically complied with work rules does not demonstrate by a single violation, even though harmful, that such violations will be repeated and therefore require discharge to avoid future harm to the employer. For example: A long term employee who does not have a history of tardiness or absenteeism is absent without leave for a number of days due to a death in his immediate family. Although this is a violation of the employer's rules and may establish just cause for discharging a new employee, the fact that the employee has established over a long period of time that he complies

with attendance rules shows that the circumstance is more of an isolated incident rather than a violation of the rules that is or could be expected to be habitual. In this case, because the potential for harm to the employer is not shown, it is not necessary for the employer to discharge the employee, and therefore just cause is not established.

b. Knowledge

The employee must have had a knowledge of the conduct which the employer expected. It is not necessary that the claimant intended to cause harm to the employer, but he should reasonably have been able to anticipate the effect his conduct would have. Knowledge may not be established unless the employer gave a clear explanation of the expected behavior or had a pertinent written policy, except in the case of a flagrant violation of a universal standard of behavior. If the employer's expectations are unclear, ambiguous or inconsistent, the existence of knowledge is not shown. A specific warning is one way of showing that the employee had knowledge of the expected conduct. After the employee is given a warning he should be given an opportunity to correct objectionable conduct. Additional violations occurring after the warning would be necessary to establish just cause for a discharge.

(1) For Example: When the employer has an established procedure of progressive discipline, such procedures generally must have been followed in order to establish that the employee had knowledge of the expected behavior or the seriousness of the act. The exception is that very severe conduct, such as criminal actions, may justify immediate discharge without following a progressive disciplinary program.

Rule F.1. and 2., Department of Employment Security pertaining to section 35-4-5(b)(1) of the Utah Employment Security Act, provides in pertinent part as follows:

F. PROXIMAL CAUSE--Relation of Offense to Discharge

1. The cause for discharge is that conduct which motivates the employer to make the decision to terminate the employee's services. If the decision has truly been made, it is generally demonstrated by way of notice to the employee or the initiation of a personnel action. Although the employer may learn of other offenses following the making of the decision to terminate, the reason for the discharge is limited to that conduct of which the employer was aware prior to making the decision. . . .

2. When the discharge does not occur immediately after the employer becomes aware of an offense, a presumption arises that there were other reasons for the discharge. This relationship between the offense and the discharge must be established both as to cause and time. . . .

STATEMENT OF THE 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.

Claimant-Respondent Jody L. England ("England" hereafter) filed a claim for unemployment insurance benefits on January 2, 1986. On February 6, 1986 a representative of the Utah Department of Employment Security ("Department") ruled that England was eligible to receive benefits (See Appendix A). Petitioner Vernon C. Young M.D., P.C. ("Young") appealed that determination. A de novo hearing was held before an Administrative Law Judge, who affirmed the Department's decision. (See Case No. 86-A-973, Appendix B). Young then filed an appeal of that decision with the Board of Review. By its decision issued June 13, 1986,

the Board of Review adopted the Findings and Conclusions of the Administrative Law Judge, held that England was entitled to receive benefits, and also held that Young was liable for charges for benefits paid to England (See Case No. 86-BR-215, Appendix C). (All "R" prefixed notations refer to pages from the record).

STATEMENT OF FACTS

The following facts are set forth to correct statements of facts contained in Respondents' brief.

When the petitioner, Dr. Young, was first asked by the Department to state his reasons for discharging the claimant from employment, the petitioner listed all his reasons on Job Service's form 606. On an attachment to Job Service's form 606 tardiness was one of the main reasons cited for the claimant's dismissal and was not "mentioned only in passing" as the respondent contends. R.0108 through 0110. Of the times England was tardy, most (74 times) involved tardiness of 15 minutes or less, however, 21 times involved 15 minutes or more, 5 times involved 1 hour or more, and 1 time involved an unexcused absence. R. 0087 through 0088. Additionally, the office manager stated that one of the main reasons for terminating the claimant was because the claimant "was . . . late a lot of the time." R. 0039.

The claimant specifically denied petitioner's assertion that she had been advised that she would be discharged if she continued to be tardy. R. 0052. However, on January 1, 1986 the claimant admitted on Job Service's form 615-C that the petitioner

had spoken to her about her tardiness once and only once in late October. R. 0106. Notwithstanding this admission, in April 1986, four month later, in the course of the administrative hearing the claimant stated that the petitioner had spoken to her about her tardiness in the month of August. R. 0052, 0053, 0063.

During the hearing the petitioner's office manager stated that "we decided that, . . . we were going to replace Jody (claimant) but we would wait until after Christmas to replace her." R. 0045. However, at no time prior to December 27, 1985 did the petitioner (Dr. Young) state that he had decided to terminate the claimant. In fact, the office manager stated that Dr. Young (petitioner) had given the claimant a warning concerning her tardiness on December 10, 1985. R. 0046.

SUMMARY OF ARGUMENT

Point I

Regarding the question of evidentiary support, this Court will defer to the Board of Review's findings of fact unless they are without substantial support in the record so as to be arbitrary and capricious. The Board of Review has failed to consider some evidence regarding the claimant's tardiness during the last month that claimant worked and the conduct that was the proximate cause of the claimant's discharge. Additionally, the Board of Review decision is not supported by the record. Since vital evidence was not considered in the decision and the Board of Review's decision lacks adequate support in the record, the decision is not reasonable nor rational and is arbitrary

and capricious, so, it should be reversed.

Point II

The claimant's tardiness was not condoned by the petitioner as was held by the Administrative Law Judge. In addition, the seriousness of the claimant's conduct is supported by the record while the Board of Review's position is not. Therefore, the decision should be reversed in favor of the petitioner.

Point III

There is substantial evidence in the record that proves that the claimant had knowledge of the conduct expected of her. Also, all of the requirements in Rule A71-07-1:5(a)(3)(b) have been met allowing no doubt that the claimant had the necessary knowledge. Therefore, the decision should be reversed in favor of the petitioner.

ARGUMENT

POINT I

A. The Employer proved that the claimant's tardiness occurring after December 10, 1985 was the legal proximate cause of claimant's discharge and that the Board of Review incorrectly determined, as a matter of law, that the tardiness prior to December 10, 1985 was not the proximate cause of claimant's discharge.

Rule F., Department of Employment Security Unemployment Insurance Rules, ("Rules") pertaining to Section 35-4-5(b)(1) of the Act, provides in material part as follows:

F. PROXIMAL CAUSE--Relation of Offense to Discharge

1. The cause for discharge is that conduct which motivates the employer to make the decision to terminate the employee's services. If the decision has truly been made, it is generally demonstrated by way of notice to the employee or the initiation of a personnel action. Although the employer may learn of other offenses following the making of the decision to terminate, the reason for the discharge is limited to that conduct of which the employer was aware prior to making the decision. . . .

2. When the discharge does not occur immediately after the employer becomes aware of an offense, a presumption arises that there were other reasons for the discharge. This relationship between the offense and the discharge must be established both as to cause and time. . . .

This Rule provides a reasonable manner in which the Court may determine the proximate cause for the discharge of the employee. In applying such rule to the specific facts of this case, the Board of Review has not acted reasonably, nor rationally, nor within the scope of its authority under the Utah Employment Security Act.

The Rule just cited in part F. Proximal Cause 2. states,

"When the discharge does not occur immediately after the employer becomes aware of an offense, a presumption arises that there were other reasons for the discharge. However, after the Administrative Law Judge stated in his decision, affirmed by the Board of Review, that "On November 12, 1985, the supervisor at last noted a problem with the claimant's attendance, but the office manager was very busy with personal family matters and she could not let the claimant go." On this evidence the Administrative Law Judge stated that "When the discharge does not follow the commission of the action against the employer's interests in a customary sequence of events, the burden falls on the employer to establish casual relationship." R. 0033, 0034. In the present case no action was taken by the petitioner immediately following the tardy arrivals of the claimant prior to November 12, 1985. Since no action was taken by the employer the presumption in Rule F. Proximal Cause 2. should apply to the present case and not the rule cited by the Administrative Law Judge. Therefore, the Administrative Law Judge's decision is neither reasonable nor rational because an erroneous presumption has been used in his decision.

Additionally, part F. Proximal Cause 1. states, "The cause for discharge is that conduct which motivates the employer to make the decision to terminate the employee's services. If the decision has truly been made, it is generally demonstrated by way of notice to the employee or the initiation of a personnel action." The Administrative Law Judge based proximate cause on his conclusion that the petitioner's office manager had made

a decision to terminate the claimant on November 12, 1985 which is incorrect. R. 0033. The office manager is not the petitioner and in the record there are no facts which show that the petitioner made a decision to terminate the claimant until December 27, 1985. In fact, the petitioner according to the record warned the claimant on December 10, 1985 that if she continued to be tardy she would be discharged. R. 0046. The record also show that at no time prior to December 10, 1985 did the petitioner state that he had decided to terminate the claimant. However, had the petitioner decided to terminate the claimant prior to December 10, 1985 Rule F. Proximal Cause 1. cited above indicates that some personnel action on the petitioner's part should have been taken to prove that a decision had truly been made. No action was taken on November 12, 1985 by the petitioner. Additionally, the respondent presented evidence the claimant presented evidence that no warning was given claimant nor personnel action taken by the petitioner regarding the claimant tardiness prior to November 12, 1985 or prior to the December 10, 1985. R. 0052, 0058. Besides, why would the petitioner warn the claimant about her tardiness on December 10, 1985 if he had already decided to discharge her on November 12, 1985. R. 0046.

Since an incorrect Rule has been applied to the specific facts of the present case, the Board of Review has not acted reasonably nor rationally. The Court has stated ". . . unless the administrative law judge's decision based on the Proposed Rules and Regulations is outside the limits of reasonableness or rationality, we will uphold it." Kehl v. Board of Review

of Industrial Commission, Department of Employment Security,
Utah, 700 P.2d 1129 (1985). Therefore, the conclusions of the
Administrative Law Judge and the Board of Review being outside
the limits of reasonableness or rationality should be reversed.

POINT II

The Record establishes the seriousness of
claimant's conduct sufficient to meet the
culpability requirement.

Rule A71-07-1:5(a)(3)(a), proposed Rules of the Department
of Employment Security, defines culpability as follows:

a. Culpability

This is the seriousness of the conduct
or the severity of the offense as it affects
continuance of the employment relationship.
The discharge must have been necessary to
avoid actual or potential harm to the em-
ployer's rightful interests. A discharge
would not be considered "necessary" if it
is not consistent with reasonable employ-
ment practices. The wrongness of the con-
duct must be considered in the context of
the particular employment and how it af-
fects the employer's rights. If the con-
duct was an isolated incident of poor
judgment and there is no expectation that
the conduct will be continued or repeated,
potential harm may not be shown and there-
fore it is not necessary to discharge the
employee.

The Administrative Law Judge held that " Considering the
substantial tardiness without any action taken by the employer,
it is held the claimant's behavior was condoned." R. 0009. This
holding was affirmed by the Board of Review. R. 0007. Here,
the respondent contends that due to the lack of an apparent
lack of action by the petitioner, the claimant's tardiness was

condoned. This simply is not true. The Petitioner presented evidence that several warnings were given regarding tardiness as well as other problems had been given the claimant. R. 0084-0086, 0039, 0049, 0106, 0107, 0063, 0052. Also, the claimant admitted that she had at least one conversation with the petitioner. In fact, the claimant stated that she had the same conversation with the petitioner in late October and in August. R. 0106, 0053. Possibly the claimant had more than one conversation regarding her tardiness and has conveniently forgotten additional conversation with the petitioner. The statements made by the Administrative Law Judge and the respondent that the Petitioner did nothing is simply not supported by the evidence.

The respondent contends that the claimant's tardiness was not serious. The Rule states that the discharge must have been necessary to avoid potential harm only, therefore, actual harm need not be shown to meet this requirement of fault. Petitioner presented evidence of potential harm to his business had the claimant not been discharged. Petitioner's nurse was threatening to quit because of having to cover for the claimant in addition to performing her own duties, R. 0082, 0042, 0043, patients were often delayed and inconvenienced due to the claimant's tardiness, 0082, and daily appointments were lost because the claimant was not present to answer the telephone, R. 0084. Since the petitioner did in fact attempt to get the claimant to arrive on time, the contentions made by the respondent are simply not supported by the evidence. Remember, Rule A71-07-1: 5(a)(3)(b) states that after the employee/claimant is given

a warning she should be given an opportunity to correct objectionable conduct. The petitioner gave the claimant approximately six months to correct her conduct without success and is now being punished for it by the Board of Review.

In the present case it is necessary that the Board of Review's findings and facts be supported by any substantial evidence before the Court can accept such findings and facts. Kennecott Copper Corporation Employees v. Department of Employment Security, 13 Utah 2d 262, 264-265, 371 P.2d 987, 989 (1962). The question is, therefore, whether the Board of Review's factual determination find any substantial support in the record. The petitioner asserts that no such support can be found in the record, however, the substantial support can be found in the record for the petitioner's factual determination. Therefore, the decision of the Board of Review should be reversed.

POINT III

Knowledge of what conduct was expected of claimant by petitioner is well substantiated in the record.

Rule A71-07-1:5(a)(3)(b), proposed Rule of the Department of Employment Security defines Knowledge as follows:

b. Knowledge

The employee must have had a knowledge of the conduct which the employer expected. It is not necessary that the claimant intended to cause harm to the employer, but he should reasonably have been able to anticipate the effect his conduct would have. Knowledge may not be established unless the employer gave a clear explanation of the

expected behavior or had a pertinent written policy, except in the case of a flagrant violation of a universal standard of behavior. If the employer's expectations are unclear, ambiguous or inconsistent, the existence of knowledge is not shown. A specific warning is one way of showing that the employee had knowledge of the expected conduct. After the employee is given a warning he should be given an opportunity to correct objectionable conduct. Additional violations occurring after the warning would be necessary to establish just cause for a discharge.

The respondent contends that claimant had never been told that her tardiness was unacceptable. R. 0052, 0056, 0057, 0058. However, the Rule states that a clear explanation is needed except in the case of flagrant violation of a universal standard of behavior. The record shows that the claimant was tardy 80% of the time. R. 0087, 0088, 0041. Surely, punctuality is a universal standard of behavior, so, the claimant fits within the exception to the clear explanation requirement to establish knowledge. It should be noted that the claimant admitted that she had no excuse for her tardy behavior. R. 0057. Nevertheless, the record also indicates that the claimant admitted that she had indeed been told that her tardiness was unacceptable to the petitioner on at least one occasion and perhaps two occasions. R. 0106, 0063, 0052. The Petitioner also claims in the record that the claimant had been told several times that her tardiness was unacceptable. R. 0042, 0043, 0082, 0084. The Administrative Law Judge's decision stated "In the present case, there was little doubt the claimant had a tardiness problem." R. 0009. Surely the record shows that the claimant had an understanding of the conduct expected of her by the petitioner.

Additionally the above the Rule states that it is not necessary that the claimant intended to cause harm to the employer, but she should reasonably have been able to anticipate the effect her conduct would have. To be sure, any person with average intelligence would be able to determine what 80% tardiness would have an adverse effect on their employer's business. Especially when several of the daily business appointments were made each morning. Also, such adverse effects of 21 late arrivals in excess of 15 minutes by the claimant and 5 late arrivals in excess of 1 hour would be reasonably anticipated.

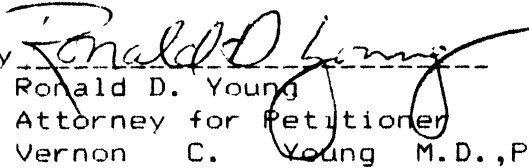
In conclusion the claimant surely had knowledge of the conduct expected and the adverse effect that her tardy conduct had upon petitioner's business. The claimant certainly meets all the requirements of the rule governing knowledge and the Court should certainly conclude that the knowledge requirement was in fact met. Since the Board of Review's and respondent's factual determination is not supported by any substantial evidence in the record the Board of Review's decision should be reversed.

CONCLUSION

For these reasons, petitioner Vernon C. Young M.D., P.C. does hereby respectfully request that this Court reverse the Board of Review's decision granting the claimant unemployment benefits, with instructions to enter an Order for petitioner declaring that the claimant was discharged for just cause and misconduct pursuant to Utah Code Ann. Section 35-4-5(b)(1), and awarding petitioner recovery of all benefits charges assessed against him.

RESPECTFULLY SUBMITTED this 8th day of December, 1986.

Ronald D. Young

By 
Ronald D. Young
Attorney for Petitioner
Vernon C. Young M.D., P.C.

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that I mailed four copies of the foregoing Reply Brief of Petitioner, postage prepaid, to the following:
Ms. Jody L. England, 5491 South State #25, Murray, Utah 84107;
and The Industrial Commission of Utah Department of Employment Security, C/O Alan Hennebold, 174 Social Hall Avenue, Salt Lake City, Utah 84147.

