

1988

Kevin R. Johnson v. Department of Employment Security of Utah and Morton Thiokol : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

.A10 KEVIN R. JOHNSON, :
DOCKET NO. 880703 :
Claimant/Appellant, : APPELLANT'S BRIEF

vs. :
DEPARTMENT OF EMPLOYMENT : Case No. 88-A-0368
SECURITY OF UTAH and : Decision No. 88-BR-428
MORTION THIOKOL, :
Defendant/Respondent. : COURT OF APPEALS NO. 880703-CA

BRIEF OF APPELLANT

Appeal from Board of Review's Decision to Deny
Unemployment Compensation Benefits to Claimant.

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FILED

MAR 8 1989

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

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JURISDICTION

Section 63-46b-16 of the Utah Administrative Procedures Act Confers Jurisdiction Upon the Court of Appeals in This Matter.

NATURE OF PROCEEDINGS

Mr. Johnson was awarded unemployment compensation benefits by Administrative Law Judge Barnes of the Department of Employment Security. Morton Thiokol appealed this decision to the Board of Review of the Industrial Commission of Utah. The Board overturned Judge Barnes' decision. We are appealing the Board of Review's decision.

STATEMENT OF ISSUES

I. Whether or not the presence of any quantity of marijuana in Claimant's system is sufficient to determine that such presence is in violation of section 35-4-5(b)(1) U.C.A. notwithstanding the fact that the evidence indicated that no drugs were consumed on employer's premises, or on employer's time and where claimant was not impaired while at work.

II. Whether or not termination upon the presence of any marijuana in Claimant's system is per se unreasonable.

III. Whether or not the Utah Drug and Alcohol Testing Act violates equal protection for the reason that federal, state and other political subdivision employees are exempt from the effect of this act.

STATEMENT OF CASE

An initial hearing was held on an unemployment insurance matter on February 11, 1988. Mr. Johnson at that particular point had been allowed unemployment insurance benefits by the Department on a claim filed effective December 20, 1987. The Department held the Mr. Johnson was not discharged from his employment with Morton Thiokol for just cause within the meaning of the Utah Employment Security Act. Mr. Johnson was represented at the hearing by David Bert Havas, Attorney at Law. The employer was also represented at that hearing by James Fox. The Administrative Law Judge then issued a decision dated February 17, 1988 which allowed unemployment insurance benefits to Mr. Johnson. The Administrative Law Judge's decision dated February 17, 1988 affirmed the prior Department decision which had allowed unemployment insurance benefits to Mr. Johnson finding that Mr. Johnson was discharged from his employment but for nondisqualifying conduct within the meaning of the Utah Employment Security Act. Also the employer was charged with benefit costs associated with the claim.

The employer thereafter filed an appeal to the Board of Review, that appeal being filed through their unemployment insurance consultant representative, R.E. Harrington. A letter was mailed to the Board of Review dated February 25, 1988. pursuant to that, correspondence as sent to the employer and also Mr. Johnson regarding the fact that the letter had been mailed

and that the initial Administrative Law Judge's decision had been challenged. However, a copy of that letter was not mailed to Mr. Johnson's representative in this matter, David Bert Havas, and the information in the record shows that the correspondence mailed to Mr. Johnson was returned as it was mailed to an incorrect address. The Board of Review then issued a decision dated May 12, 1988 which reversed the Administrative Law Judge's decision denying unemployment insurance benefits to Mr. Johnson effective December 20, 1987.

Again, Mr. Johnson's attorney was not mailed a copy of the Board of Review's decision and the decision that was mailed to Mr. Johnson came back to the Department as it was sent to an incorrect address.

On May 23, 1988, Attorney Havas sent a letter to the Board of Review requesting reconsideration, indicating in his letter that he did not feel that he had been given proper notification of the employer's appeal to the Board of Review nor had he had an opportunity to respond to their appeal. In a letter dated May 25, 1988 the Board granted Attorney Havas' request for reconsideration. On June 8, 1988 Attorney Havas submitted a brief to the Board of Review wherein he requested reconsideration, providing information then regarding why he felt the Administrative Law Judge's decision dated February 17, 1988 should have been affirmed.

On October 14, 1988 the Administrative Law Judge

received a notice from the Board of Review remanding the case, asking the Administrative Law Judge to reopen the hearing and to call as an expert witness in this matter Ellwood Loveridge.

At that hearing, Mr. Fox testified that Mr. Johnson was involved in an accident with a company vehicle in Roy, Utah on September 21, 1987, and under the alcohol and drug policy of Thiokol, any employee that is involved in an accident or incident must be tested. Transcript of Hearing Held February 11, 1988 (hereafter "Transcript I"), Page 5.

Mr. Johnson was tested at that time and the test results were positive for marijuana. Transcript I, Page 5. Mr. Johnson had a reading of 128 nanograms. Second Hearing, Transcript of Hearing Held October 26, 1988 (hereafter "Transcript II"), Page 28. Twenty nanograms or above is considered a positive test result for Thiokol. Transcript II, Page 24.

Thiokol reviewed the situation and discovered that Mr. Johnson was not at fault for this accident and gave him a three day disciplinary suspension. Transcript I, Page 5. Mr. Johnson was told at that time that he would be subject to follow-up testing as is part of Thiokol's drug and alcohol program. Transcript I, Page 5. On November 25, 1987, Mr. Johnson was tested again as part of Thiokol's follow-up program and that result was 25 nanograms which was a positive test. Transcript I, Page 5 and Transcript II, Page 24. This resulted in his

termination on December 11, 1987. Transcript I, Page 5.

Mr. Fox testified that Mr. Johnson was an average employee with no reprimands or adverse information in his employee file (Transcript I, Page 9) and that the sole reason Mr. Johnson was tested was because of an accident in a company vehicle that was determined not to be Mr. Johnson's fault. Transcript I, Page 8. Mr. Fox further testified that there was no claim by the company that Mr. Johnson acted against the interests of the employer, (Transcript I, Page 8) and there was no evidence that Mr. Johnson consumed any marijuana on company time or company premises. Transcript I, Page 10. Mr. Johnson did state that he did not consume marijuana on company time or company premises and never went to work under the influence of marijuana. Transcript I, Page 11.

Mr. Johnson testified that he had not used marijuana after his first drug test and that he believed the second test was positive because of passive inhalation. Transcript I, Page 12. Mr. Johnson further stated that he was exposed to marijuana smoke at least three or four times a day because his roommates smoked marijuana in the house. Transcript I, Page 12. Dr. Kerr testified that Thiokol complies with the requirements of the Utah Drug and Alcohol Testing Statute (Transcript II, Page 23) and they exceed the statutory requirements for chain of custody, (Transcript II, Page 23) and that a second test was performed to confirm the positive reading on the first test. Transcript II,

Page 23. Dr. Kerr first testified that marijuana could stay in an individual's system for up to 81 days, (Transcript II, Page 25) but Dr. Kerr later testified that marijuana would stay in an individuals system for only four to six weeks or forty-two days. Transcript II, Page 27. Dr. Loveridge testified that he had tested individuals for marijuana who had similar quantities of marijuana in their systems as Mr. Johnson and that these individuals still tested positive after three months of abstinence from using marijuana. Transcript II, Page 28.

SUMMARY OF ARGUMENTS

Mr. Johnson should be awarded workman's compensation benefits because Mr. Johnson did not consume marijuana on employer's premises, or employer's time, and Mr. Johnson was not impaired while at work. The use of drugs while off the job is not a sufficient basis to deny unemployment compensation benefits unless the employer can show that the Mr. Johnson's off the job use of drugs adversely affects his ability to do his job or adversely affect the employer's legitimate business interests. Furthermore, Mr. Johnson was discharged from work and consequently denied workman's compensation benefits because he tested positive for marijuana a second time. The amount of marijuana in Mr. Johnson's system was substantially less at his second test approximately two months later than at his first test, Mr. Johnson believes he tested positive because of passive inhalation or because he was tested a second time before his

system could be cleared of marijuana from his prior use.

Finally, the Utah Drug and Alcohol testing act violates equal protection because it does not apply to federal, state or other political subdivision employers and therefore, a large segment of Utah's work force is exempt from the effect of this legislation.

ARGUMENT

I.

WHETHER OR NOT THE PRESENCE OF ANY QUANTITY OF MARIJUANA IN CLAIMANT'S SYSTEM IS SUFFICIENT TO DETERMINE THAT SUCH PRESENCE IS IN VIOLATION OF SECTION 35-4-5(b)(1) U.C.A. NOTWITHSTANDING THE FACT THAT THE EVIDENCE INDICATED THAT NO DRUGS WERE CONSUMED ON EMPLOYER'S PREMISES, OR ON EMPLOYER'S TIME AND WHERE CLAIMANT WAS NOT IMPAIRED WHILE AT WORK.

The Utah Court of Appeals affirmed the allowance of benefits in the case of Champlin Petroleum Company v. Department of Employment Security, 744 P.2d 330 Utah 1987, even though it was a fact that the claimant used marijuana while an employee of Champlin. The Court did not consider the use of drugs while off the job sufficient basis to deny benefits because the drug use did not adversely affect the claimant's ability to perform his work even though the drug use did contribute to the Claimant's mental illness which eventually resulted in absence due to hospitalization. The Court stated:

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Because the critical questions here is whether Robinson was fired for "just cause," we must focus on what that "cause" was. There is no evidence that Robinson's work performance up to his April 30, 1986 hospitalization was anything but acceptable to Champlin, even though Robinson admitted at the hearing that he smoked marijuana twice a week until March, 1986, after finishing his work shift, in order to help him sleep. Indeed, Champlin's District Manager, Robinson's boss, testified unequivocally that Robinson was a satisfactory employee who had no difficulty in maintaining and performing his job. There is also no evidence in the record that Robinson violated company policy by reporting to work under the influence of marijuana or by using it while on the job. Champlin Petroleum Co., at page 332.

Clearly the Champlin Court did not consider off the job use of an illegal drug sufficient grounds for a denial of benefits absent evidence that the drug use adversely affected the worker's ability to do his work. The Board's position in the case at hand is that benefits may be denied for any positive drug results even though the drug use does not clearly affect the employer's legitimate business interests. Such a provisions in the law is inconsistent with the current position of the court and with the basic principles of the unemployment insurance program which is to pay benefits to people who are discharged for reasons not "connected with work".

In the present case the employer clearly does not claim that the presence of marijuana in Mr. Johnson's system is indicative that his conduct is an act or omission in connection with his employment which is deliberate, willful, or wanton and

adverse to the employer's interest.

The employer's sole claim is that Mr. Johnson having had marijuana in his system is sufficient cause to terminate him. Cause for termination in and of itself is not enough to deny benefits to a claimant. The conduct of claimant needs to be viewed to determine whether it is of the type to allow a denial of eligibility for benefits.

Our Court of Appeals has recently reiterated the standard to be followed. The Court thus said that "a claimant is terminated for just cause, and is thereby precluded from receiving unemployment benefits, when his or her culpability, control over the conduct and knowledge that the conduct will likely result in termination is shown. Champlin at 331.

Although Mr. Johnson concedes that he knew that the presence of marijuana in his system would likely result in termination, there is no showing that he was culpable in having any marijuana in his system at the time of the test on November 25, 1987, or had any control thereover. In fact Mr. Johnson's belief of passive inhalation of marijuana presence in his system is not disputed. A more likely reason for such presence in as small a quantity as was testified to at the hearing is that marijuana takes so long to leave a person's system as Professor Dubowski indicated in the National Law Journal article Volume 8, No. 29, Monday, April 7, 1986, Drug Testing: The Scene is Set for A Dramatic Legal Collision. In either event there is no showing

of culpability or control and thus there can be no denial of eligibility.

The department of Employment Security's administrative rule which interprets "just cause" as used in Section 35-4-5(b)(1) U.C.A. was set out in Champlin at 332. The rule gives the following as guidance to the meaning of culpability:

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 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.

...

c. Control

The conduct must have been within the power and the capacity of the claimant to control or prevent.

Unemployment Insurance Rule 35-4-5(b)(1) para. B1 (1986).

Champlin at 332.

The Court in Clearfield City v. Department of Employment Security, 663 P.2d 440, at 441 (Utah, 1983) articulated a three prong test to be used in determining whether there was "just cause" to terminate a claimant's unemployment benefits. This three prong test also requires the finding of some fault or culpability on the part of claimant for him to be ineligible for unemployment compensation. The first prong is, (1) was the conduct in connection with employment; (2) was the conduct adverse to the employer's interests; and (3) whether the conduct evidenced a sufficient degree of culpability or was the conduct deliberate, wilful or wanton. Lane v. Board of Review of Ind. Comm., 727 P.2d 206 at 210, (Utah 1986)

There is no evidence in the record that Mr. Johnson reported to work under the influence of marijuana or used marijuana on the job. Mr. Johnson's use of marijuana was only done after work. Therefore, his acts were not connected to his employment. The employer also stated that Mr. Johnson was a satisfactory worker. Therefore, his acts were not adverse to his employer's interests. Finally, Mr. Johnson's acts were not willful. In Logan Regional Hospital v. Board of Review of the Industrial Commission of the State of Utah, 723 P.2d 427 (Utah 1986) the Claimant was discharged from his job and the Board of Review determined that the Claimant was not discharged for "good cause" and awarded unemployment benefits because the judge found that the circumstances leading to Claimant's discharge were the

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result of inadvertent conditions beyond his power and control, which precluded discharge for just cause.

In the case at hand Mr. Johnson is in a similar situation in that he states that he abstained from using marijuana after his first drug test and that he was victim of passive inhalation. For the reason that his roommates smoked marijuana nightly in the apartment in which he lived while they watched television. Therefore, there is no culpability or fault on the part of Mr. Johnson and where the element of fault is lacking, the employee's conduct may be sufficient for discharge, but it is not necessarily sufficient for a disqualification from benefits under the Unemployment Security Act Logan at 429. Mr. Johnson's good faith error in judgment of sitting in the same room with persons using marijuana does not constitute culpable conduct which precludes a discharged employee from receiving unemployment compensation benefits. Logan at 429.

Therefore, the decision of the Administrative Law Judge should be affirmed as to the eligibility of Mr. Johnson for unemployment compensation. As is stated in Champlin "not every cause for discharge provides a basis to deny eligibility for unemployment compensation," citing Clearfield City v. Dep't of Empl. Sec., 663 P.2d 440, 441 (Utah, 1983), and Board of Education of Sevier County v. Board of Review, 701 P.2d 1064.

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II.

WHETHER OR NOT TERMINATION UPON THE
PRESENCE OF ANY MARIJUANA IN
CLAIMANT'S SYSTEM IS PER SE
UNREASONABLE.

The transcript of the hearing clearly shows that the sole reason for the discharge of claimant was because of his status of having an amount of marijuana in his system. Transcript I, pages 5, 8, 9 and 10.

As to the amount of marijuana in his system, the Claimant indicates that there were 25 nanogram in his system in November, 1987, which is substantially less than the 123 nanogram which were in his system in September, 1987, following the accident. Transcript I, pages 7 and 10. Transcript I, page 12. Claimant has denied any marijuana use between the September, 1987, testing and the November, 1987, testing. His belief is that the presence of marijuana is as a result of passive inhalation of marijuana smoke, which theory was supported by Dr. Loveridge. Transcript II, page 30.

However, the employer did not care about the correctness of this theory since its rule only requires the presence of marijuana in order for an employee to be subject to dismissal. This standard is unreasonable, for the reason that there is no rational basis shown between the rule and the effect that any presence of marijuana may have on the employer's interest. It is well recognized that drug tests cannot show the amount of drug use or

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time of drug use and do not establish impairment. In fact the employer does not claim any conduct adverse to its interest other than the presence of marijuana in claimant's system.

The employer recognizes the fact that marijuana can be detected long after consumption. The employer indicates that marijuana can remain in the system from 21 to 45 days. Transcript I, page 8. In actuality, marijuana can be detected in the system for a much longer period of time. Marijuana can be detected several months after it was used and may be detected as long as 81 days after it was used according to Professor Kurt Dubowski, Professor of Forensic Toxicology at the University of Oklahoma. See The National Law Journal, Volume 8, No. 29, Monday, April 7, 1986, Drug Testing: The scene is set for a dramatic legal collision, page 24.

Dr. Loveridge states that in his test for the Salt Lake City and County Health Department, they have had people who have tested positive in the 120's as Mr. Johnson did, and still tested positive after abstaining from using marijuana for three months. Transcript II, page 28

In light of these facts, a test result some 65 days later which went from 125 nanogram in September down to 25 nanogram in November would certainly indicate a likelihood that the second test would merely show the remnants of any marijuana present at the time of the first test.

The employer's rule that 20 nanogram is a positive test

for marijuana and grounds for dismissal is per se unreasonable because, the Utah Drug and Alcohol Act does not establish minimum standards for the conclusion that a drug test is positive.

In the case of marijuana, there are conflicting opinions as to what constitutes a positive test. The military services consider 100 nanogram as the minimum amount for a positive test determination while some county testing facilities consider 50 monograms a positive test result and some local testing labs, including the lab that tested Mr. Johnson, report a positive result for 20 nanogram.

It is possible that 20 or more nanogram could be found in a person who does not use marijuana, but is in the presence of people who do through passive inhalation. Such is the case with Mr. Johnson. Mr. Johnson testified that his roommates used marijuana in his presence nightly while watching television and that this is the reason Claimant tested 25 nanogram at his second test in November, 1987.

Finally, the validity of any drug test depends heavily on the knowledge and skill of the technician who interprets it. There are no federal or industrial standards for professional competence and almost no state legislation to regulate this critical area. Drug tests cannot show the amount of drug use or time of drug use and do not establish impairment. Studies have shown that marijuana can be detected up to and beyond 81 days after discontinuing use. For the foregoing reasons, termination

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upon the presence of any marijuana in Mr. Johnson's system is unreasonable.

III.

WHETHER OR NOT THE UTAH DRUG AND ALCOHOL TESTING ACT VIOLATES EQUAL PROTECTION FOR THE REASON THAT FEDERAL, STATE AND OTHER POLITICAL SUBDIVISION EMPLOYEES ARE EXEMPT FROM THE EFFECT OF THIS ACT.

Article I, Section 24 of the Utah Constitution states:

"All laws of a general nature shall have uniform operation". The fourteenth amendment of the United States Constitution prohibits the states from enacting laws that deny "any person within its jurisdiction equal protection of the laws". Although their language is dissimilar, these provisions embody the same general principle: persons similarly situated should be treated similarly. Malan v. Lewis, 693 P.2d 661 at 669. (Utah 1984)

The Utah Drug and Alcohol Testing Act does, Section 34-38-2(3) excludes employers who are classified federal, state government or other political subdivisions. A considerable number of individuals in Utah's work force are employed by federal, state or other political subdivision. For this reason, the Utah Drug and Alcohol Testing Act violates equal protection, it denies non-governmental employees the same protection from the Utah Drug and Alcohol Testing Act as the similarly situated governmental employees enjoy.

The Malan Court stated that to determine whether a

statute meets equal protection standards depends upon the objective of the statute and whether the classifications established provide a reasonable basis for promoting those objectives. Malan at 670

Section 34-38-1 of the Utah Code Annotated entitled Purpose and Intent of Chapter states that the purpose of this chapter is to keep the work place free of drugs and alcohol in order to produce a healthy and productive work force and to insure safe working conditions. The fact that governmental employees are excluded under this act has no reasonable basis for promoting this objective.

Finally, when persons are similarly situated, it is unconstitutional to single out one person or group of persons from among a large class on the basis of a tenuous justification that has little or not merit Malan v. Lewis, 693 P.2d 661 at 671 (Utah, 1984) Dodge Town, Inc. v. Romney, 480 P.2d 461 (Utah, 1971)

The Utah Drug and Alcohol Testing Act is arbitrary because it treats differently those employees who are similarly situated. Specifically, there is no legitimate justification for treating governmental employees differently than non-governmental employees. For the foregoing reasons, this act violates equal protection and is therefore unconstitutional.

CONCLUSION

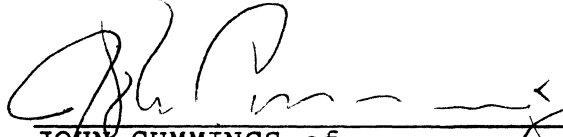
Claimant/Appellant respectfully requests that the

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decision of the Board of Review be reversed and that he be allowed unemployment compensation benefits for the reason that he was not in violation of Section 35-4-5(b)(1) of the Utah Employment Security Act.

Unless an employer can show that an employee is impaired by the consumption of drugs, has consumed drugs on employer's premises or on the employers time or that employer was acting against the employer's rightful interest in a deliberate, willful or wanton manner, Claimant cannot be denied eligibility for unemployment benefits.

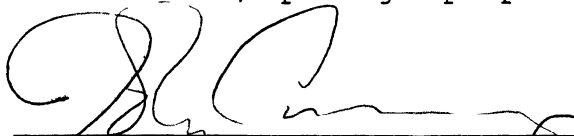
DATED this 8 day of March, 1989.



JOHN CUMMINGS of
DAVID BERT HAVAS AND ASSOCIATES
Attorneys for Claimant

CERTIFICATE OF MAILING

I, the undersigned, hereby declare that I mailed a true and correct copy of the foregoing Appellant's Brief to Winston M. Faux, Board of Review of the Industrial Commission of Utah, Department of Employment Security, 1234 So. Main Street, Salt Lake City, Utah 84147, First Class Mail, postage prepaid this 8 day of March, 1989.



JOHN CUMMINGS
Attorney for Claimant

ADDENDUM

34-38-1 Legislative Findings - Purpose and Intent of Chapter

The Legislature finds that a healthy and productive work force, safe working conditions free from the effects of drugs and alcohol, and maintenance of the quality of products produced and services rendered in this state, are important to employers, employees, and the general public. The Legislature further finds that the abuse of drugs and alcohol creates a variety of workplace problems, including increased injuries on the job, increased absenteeism, increased financial burden on health and benefit programs, increased workplace theft, decreased employee morale, decreased productivity, and a decline in the quality of products and services.

Therefore, in balancing the interests of employers, employees, and the welfare of the general public, the Legislature finds that fair and equitable testing for drugs and alcohol in the workplace, in accordance with this chapter, is in the best interest of all parties.

The Legislature does not intend to prohibit any employee from seeking damages or job reinstatement, if action was taken by his employer based on a false drug or alcohol test result.

34-38-2(3) Definitions.

(3) "Employer" means any person, firm, or corporation, including any public utility or transit district, which has one or more workers or operators employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written. "Employer" does not include the federal or state government, or other local political subdivisions.

35-4-5 Ineligibility for Benefits.

An individual is ineligible for benefits or for purposes of establishing a waiting period:

(b)(1) For the week in which the Claimant was discharged for just cause or for an act or omission in connection with employment, not constituting a crime, which is deliberate, willful, or wanton and adverse to the employer's rightful interest, if so found by the commission, and thereafter until the Claimant has earned an amount equal to at least six times the Claimant's weekly benefit amount in bona fide covered employment.

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV

Section 1. [Citizenship - Due Process of Law - Equal Protection]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

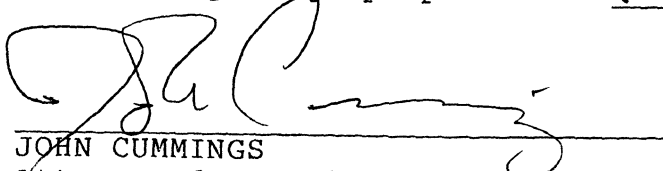
Article I, Section 24

Sec. 24 [Uniform Operation of Laws]

All laws of a general nature shall have uniform operation.

CERTIFICATE OF MAILING

I, the undersigned, hereby declare that I mailed four true and correct copies of the foregoing Appellant's Brief to R.E. Harrington, Inc. for Morton Thiokol, P.O. Box 1160, Columbus, Ohio 43216, First Class Mail, postage prepaid this 8th day of March, 1989.


JOHN CUMMINGS
Attorney for Claimant