

1988

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 880703

KEVIN R. JOHNSON,	:	REPLY BRIEF OF
Claimant/Appellant,	:	CLAIMANT/APPELLANT
vs.	:	
DEPARTMENT OF EMPLOYMENT	:	Case No. 88-A-0368
SECURITY OF UTAH and	:	Decision No. 88-BR-428
MORTON THIOKOL,	:	
Defendant/Respondent.	:	COURT OF APPEALS NO. 880703-CA

REPLY BRIEF OF CLAIMANT/APPELLANT

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

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POINT I

THE DRUG FREE WORKPLACE ACT DID NOT GO INTO EFFECT UNTIL MARCH 19, 1989, AND CANNOT BE APPLIED RETROACTIVELY TO THE CASE AT HAND, SINCE THE AUTOMOBILE ACCIDENT WHICH PROMPTED MR. JOHNSON'S INITIAL DRUG TEST AND THE LATER DENIAL OF UNEMPLOYMENT COMPENSATION BENEFITS TOOK PLACE ON SEPTEMBER 21, 1987.

Respondent Morton Thiokol's brief contends that Morton Thiokol must comply with special regulations promulgated by the United States Department of Defense because Morton Thiokol is a contractor for the U.S. Government which deals in highly sophisticated national defense products. The regulation Morton Thiokol is referring to is the Drug Free Workplace Act of 1988, which Act became effective March 18, 1989. Respondent's Brief, p. 9.

This Act did not go into effect until approximately one and one half years after Respondent's initial test for the presence of drugs or alcohol. It is generally known that statutes and acts are not retroactive, and for this reason the Drug Free Workplace Act does not apply to this case.

The U.S. Supreme Court stated: Retroactivity is not favored in the law, thus congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. Bowen v. Georgetown University Hospital, 102 L.Ed 2d 493 at 496 (1988)

This Court further stated that: Even where some

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substantial justification for retroactive rule making is presented, courts should be reluctant to find such authority, absent an expressed statutory grant. Bowen at 496

The Utah Supreme Court took this same position when it decided Okland Construction Co. v. Industrial Commission, 520 P.2d 208 (Utah, 1974) in this case the Court held that a person is entitled to have its rights determined on the basis of the law as it exists at the time of the occurrence; and that a later statute or amendment should not be applied in a retroactive manner to deprive a party of his rights. Okland Construction Co. at 210.

The Drug Free Workplace Act does not expressly state that it should be construed as retroactive nor is there any substantial justification for it to be viewed as retroactive. Therefore, this Act cannot be considered when determining Mr. Johnson's eligibility for unemployment compensation benefits.

POINT II

THE ISSUE OF EQUAL PROTECTION AND SUBSTANTIVE
DUE PROCESS MAY BE REVIEWED ON APPEAL.

There was no equal protection violation until the Board of Review rendered its decision against Mr. Johnson. Which created two separate and distinct categories of employees. One class of employee that can be denied unemployment compensation benefits for testing positive for drugs or alcohol and another class of employee who may be denied unemployment compensation benefits

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using the standard which considered the employee's culpability, knowledge, and control. This standard is set out in Champlin Petroleum v. Dept. of Employment Security, 744 P.2d 330 (Utah App. 1987). Mr. Johnson's first opportunity to address this constitutional issue was in his appellate brief, therefore, this constitutional issue was timely addressed and may be reviewed by the Court of Appeals. There was no substantive due process violation until the Board's arbitrary decision to revoke Mr. Johnson's unemployment benefits. Substantive due process protects individuals from arbitrary actions of state administrative agencies. Wilwording v. Swenson, 502 F.2d 844 (8th Cir. 1974)

Mr. Johnson's constitutional right to substantive due process was not violated until the Board of Review rendered its decision. Mr. Johnson's first opportunity to raise this issue was in his appellate brief, and was thus timely revised, as such this constitutional issue may be reviewed on appeal.

DATED this 8th day of June, 1989.


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JOHNSON v. DEPARTMENT OF
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Reply Brief of Appellant

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CERTIFICATE OF MAILING

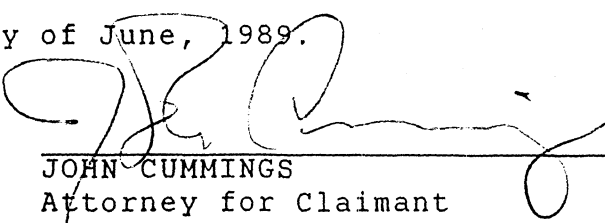
I, the undersigned, hereby declare that I mailed a true and correct copy of the foregoing Reply Brief of Claimant/Appellant to all parties of this Appeal by mailing four (4) copies thereof by First Class Mail, postage prepaid addressed to their attorneys as follows:

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DATED this 8th day of June, 1989.


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ADDENDUM

INTERIM DEFENSE DEPARTMENT REGULATIONS GOVERNING DRUG FREE WORKPLACE PROGRAMS FOR CONTRACTORS

PART 223—ENVIRONMENT, CONSERVATION AND OCCUPATIONAL SAFETY

2. A new Subpart 223.75, consisting of sections 223.7500 through 223.7504, is added to read as follows:

Subpart 223.75—Drug-Free Work Force

Sec.
223.7500 Scope of subpart.
223.7501 Policy.
223.7502 Definitions.
223.7503 General.
223.7504 Contract clause.

Subpart 223.75—Drug-Free Work Force

223.7500 Scope of subpart.

This subpart prescribes policies and procedures concerning drug abuse as it impacts on the performance of defense contracts. Departments may establish special procedures as they determine necessary to satisfy their mission requirements.

223.7501 Policy.

It is the policy of the Department of Defense that defense contractors shall maintain a program for achieving a drug-free work force.

223.7502 Definitions.

"Illegal drugs," as used in this subpart, means controlled substances included in Schedule I and II, as defined by section 802(b) of Title 21 of the United States Code, the possession of which is unlawful under Chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

"Employee in a sensitive position," as used in this subpart, means an employee who has been granted access to classified information; or employees in other positions that the contractor determines involve National Security, health or safety, or functions other than the foregoing requiring a high degree of trust and confidence.

223.7503 General.

(a) The use of illegal drugs, on or off duty, is inconsistent with law-abiding behavior expected of all citizens. Employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism resulting in the potential for increased cost, delay, and risk to the government contract.

(b) The use of illegal drugs, on or off duty, by employees can impair the ability of those employees to perform tasks that are critical to proper contract performance and can also result in the potential for accidents on duty and for failures that can pose a serious threat to national security, health, and safety.

(c) The use of illegal drugs, on or off duty, by employees in certain positions can result in less than the complete reliability, stability, and good judgment that are consistent with access to sensitive information. Use of illegal drugs also creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, and health and safety.

223.7504 Contract clause.

The contracting officer shall insert the clause at 252.223-7500 in all solicitations and contracts that meet the following criteria:

(a) All contracts involving access to classified information;

(b) Any other contract when the contracting officer determines that inclusion of the clause is necessary for reasons of national security or for the purpose of protecting the health or safety of those using or affected by the product of or the performance of the contract (except for commercial or commercial-type products (see FAR 11.001)).

(c) This clause does not apply to a contract, or to that part of a contract, that is to be performed outside of the United States, its territories, and possessions, except as otherwise determined by the contracting officer.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Section 252.223-7500 is added to read as follows:

252.223-7500 Drug-free work force.

As prescribed in 223.7504, insert the following clause:

Drug-Free Work Force (Sep 1988)

(a) Definitions. "Illegal drugs," as used in this clause, means controlled substances included in Schedule I and II, as defined by section 802(b) of Title 21 of the United States Code, the possession of which is unlawful under Chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

"Employee in a sensitive position," as used in this clause, means an employee who has been granted access to classified information; or employees in other positions that the contractor determines involve national security, health or safety, or functions other than the foregoing requiring a high degree of trust and confidence.

(b) The Contractor agrees to institute and maintain a program for achieving the objective of a drug-free work force. While this clause defines criteria for such a program, Contractors are encouraged to implement alternative approaches comparable to the criteria in paragraph (c) below that are designed to achieve the objectives of this clause.

(c) Contractor programs shall include the following, or appropriate alternatives:

(1) Employee assistance programs emphasizing high level direction, education, counseling, rehabilitation, and coordination with available community resources;

(2) Supervisory training to assist in identifying and addressing illegal drug use by Contractor employees;

(3) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues;

(4) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis. Employee drug testing programs shall be established taking account of the following:

(i) The Contractor shall establish a program that provides for testing for the use of illegal drugs by employees in sensitive positions. The extent of and criteria for such testing shall be determined by the Contractor based on considerations that include the nature of the work being performed under the contract, the employee's duties, the efficient use of Contractor resources, and the risks to public health, safety, national security that could result from the failure of an employee adequately to discharge his or her position.

(ii) In addition, the Contractor may establish a program for employee drug testing—

(A) When there is a reasonable suspicion that an employee uses illegal drugs; or

(B) When an employee has been involved in an accident or unsafe practice;

(C) As part of or as a follow-up to counseling or rehabilitation for illegal drug use;

(D) As part of a voluntary employee drug testing program.

(iii) The Contractor may establish a program to test applicants for employment for illegal drug use.

(iv) For the purpose of administering this clause, testing for illegal drugs may be limited to those substances for which testing is prescribed by section 2.1 of Subpart B of the "Mandatory Guidelines for Federal Workplace Drug Testing Programs," (53 FR 11980 (April 11, 1988)), issued by the Department of Health and Human Services.

(d) Contractors shall adopt appropriate

personnel procedures to deal with employees who are found to be using drugs illegally. Contractors shall not allow any employee to remain on duty or perform in a sensitive position who is found to use illegal drugs until such time as the contractor, in accordance with procedures established by

the contractor, determines that the employee may perform in such a position.

(e) The provisions of this clause pertaining to drug testing programs shall not apply to the extent they are inconsistent with state or local law, or with an existing collective

bargaining agreement; provided that with respect to the latter, the Contractor agrees that those issues that are in conflict will be a subject of negotiation at the next collective bargaining session.
(End of clause)

-- End of Text --

-- End of Section E --