2001

Continental Oil Company v. Board of Review of the Industrial Commission of Utah, and Fred L. Forsyth : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

CONTINENTAL OIL COMPANY,

Plaintiff,

vs.

Case No. 14699

BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, AND FRED L. FORSYTH,

Defendants.

DEFENDANT'S BRIEF

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DEFENDANT'S BRIEF

NATURE OF THE CASE

Continental Oil Company, hereinafter called Continental, pursuant to Section 35- 4 -10(i) Utah Code Annotated 1953, appeals from the decision of the Board of Review of the Industrial Commission of Utah concerning their allowance of unemployment insurance benefits to a former employee of Continental, Fred L. Forsyth, hereinafter called Forsyth, on the grounds he was not discharged for misconduct.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the decision of the Board of Review and the reinstatement of the decision of the Appeals Referee which found that Forsyth was discharged for misconduct in connection with his employment resulting in unemployment insurance benefits being denied him from February 15, 1976, to March 27, 1976. Defendant seeks affirmation of the Board of Review's decision.

STATEMENT OF FACTS

Forsyth was employed by Continental from June 17, 1968, to February 11, 1976, as a District Sales Representative (R0014). He was furnished a company car which he used daily, averaging approximately 25,000 miles a year (R0018). Just prior to February 3, 1975, he received from Continental a five-year safety award for driving (R0034). A part of the job entailed entertaining visiting personnel from Continental's other offices at private drinking clubs (R0019), with the cost paid for by Continental (R0034). After work on February 4, 1976, Forsyth was invited by his supervisors to attend such a party (R0033) along with ten other employees, all of whom were drinking at the party (R0033), from approximately 4:30 to 7:00 p.m. (R0017), with nine of the ten present driving company cars (R0033). Forsyth's supervisor was still at the bar when Forsyth left to pick up his wife to attend a continuation of the party (R0033). It was snowing when Forsyth left and the roads were slippery (R0017). On the way home a woman driver made a right turn in front of him to go into her driveway but because of the snow slipped by the driveway and Forsyth was unable to stop and hit her car (R0017). Forsyth was charged with driving under the influence of alcohol but pleaded innocent with his trial still pending at the time of the Department's appeal hearing on May 3, 1976 (R0017).

On May 20, 1976, Forsyth was acquitted of driving under the influence of alcohol and of causing the accident (R0007). The knowledge of the acquittal was not a part of the hearing, but was subsequently made available to the Board of Review, however this knowledge was not forwarded to Continental. When legal counsel for Continental became aware of the use of this knowledge by the Board of Review, when they referred to it in issuing their decision, he objected to its use. Legal counsel on behalf of the Board of Review offered to have the matter remanded to the Appeals Referee to reopen the record and properly receive the information into the record. Legal Counsel for Continental reported he had no reason to doubt the information and therefore there was no need to reopen the record.

Forsyth reported the accident that day to his supervisor and two days later when they received the written accident report they noticed Forsyth was driving on a restricted license (R0021).

On February 3, 1975, Forsyth had attended another party sponsored by Continental where Forsyth and five other employees, including supervisory personnel, were present. While going home Forsyth had a one-car accident and was convicted of driving under the influence of alcohol and had his license restricted to driving for work and emergencies from March 31, 1975, to March 31, 1976 (R0036). Because no other person or car was involved and Forsyth wanted to preserve his good driving record with Continental, he borrowed the money and had the car repaired himself without telling Continental about it (R0016 and R0034). The method prescribed by Continental at that time for reporting automobile accidents was very "lackadaisical" (R0026). There was no written policy (R0023), just the conveyance of the policy by word of mouth (R0036) and Forsyth was not told by his supervisor of any specific policy (R0028). It was not until February 27, 1975, that a written policy was sent out by Continental to their employees on this matter after it had come to their attention that some of their employees were not properly reporting automobile accidents (R0026).

When Continental received the accident report they pulled Forsyth's personnel records and found the only thing they had concerning his driving record was "a minor accident in 1973" (R0021). This occurred when Forsyth drove his car near the curb and a camper with an overhang of 18 inches hit his bumper. The investigating officer gave no citations (R0015). Based only upon the accident of Februay 3, 1975, and the minor accident of 1973 and the accident of February 4, 1976, which was to go to the courts, Continental discharged the claimant contending they did so because of his poor driving record (R0022 and R0023). However, Continental was also laying off employees at this time in Forsyth's division (R0028). Although it is contended by Continental that Forsyth would be retained because his name was on a reorganization chart, this purported new agreement was never conveyed to him before his discharge (R0038). The majority of the other employees had had accidents in the past but were not discharged (R0032), nor was Forsyth ever told or warned about the number of accidents Continental would allow before he would lose his job (R0024).

Approximately six weeks after Forsyth was discharged a record search was made by Continental with the State Driver's License Division, and it was learned that in addition to

the accident and the subsequent license revocation in February 1975, Forsyth had had only two traffic citations in his eight years of work with Continental (R0045 and R0019). One of these citations was on August 22, 1973, for "failure to obey a traffic sign or control device," and the other was on April 22, 1974, for speeding (R0015).

ARGUMENT

POINT I

THE DISCHARGE OF FORSYTH FOR HIS DRIVING RECORD DID NOT CONSTITUTE MISCONDUCT.

If the record should support the contention by Continental that the only reason Forsyth was discharged was because of his driving record, then we must look to the driving record to determine if the acts contained therein constituted misconduct. The applicable section of law is found in Section 35-4-5(b) (1) Utah Code Annotated 1953, and reads in part as follows:

> 5. An individual shall be ineligible for benefits or for purpose of establishing a waiting period:
>
> (b) (1) For the week in which he has been discharged for misconduct not constituting a crime connected with his work, if so found by the commission, and for not less than one or more than the nine next following weeks, as determined by the commission in each case according to the seriousness of the misconduct.

The leading case in the area of misconduct as it pertains to unemployment insurance benefits is *Boyton Cab Company v. Newbeck,* 237 Wis. 249, 296 N.W. 636 (1941). In this case the court defined misconduct as follows:

> . . . the intended meaning of the term "misconduct" . . . is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute . . .

When Forsyth was discharged his known driving record consisted of a minor accident in 1973 in which no citation was issued; the one-car accident on February 3, 1975, where

Forsyth's driver's license was suspended for one year; and the accident on February 4, 1976. The minor accident in 1973 would certainly not be considered an act of misconduct. As to the accident on February 3, 1975, it could well be Forsyth used poor judgment in failing to properly notify Continental of it, but in view of the lackadaisical methods of reporting accidents allowed by Continental at that time it can hardly be said that Forsyth conducted himself in a wanton or deliberate disregard of the employer's interest, nor had he intentionally failed to follow any specific rule or regulation of Continental on reporting the accident because there were not any at that time. In fact, Forsyth showed a strong concern for what he felt was the best interests of the company when he borrowed the money himself to have the car repaired. Althought his thinking may have been misguided on this point, there is certainly no evidence that there was an act motivated by an intent to inflict injury or damage on Continental. In fact, Forsyth was proud of his driving record and wanted to remain in good standing with Continental on this point.

Although the act of driving while under the influence of alcohol is not defensible and is perhaps a sound basis for a discharge, it is difficult to see how it can be classified as misconduct in this case. A part of Forsyth's job included entertaining and drinking alcohol with supervisors, which was paid for by Continental. Although in both accidents it is acknowledged that Forsyth was drinking, he did so in the presence of supervisors and there is no evidence that they cautioned him or even spoke to him concerning his driving after drinking with them. Because he was doing what was expected of him, it is again difficult to find a wanton or willful disregard of the employer's interests or expectations or an intent to inflict damage on the employer. Rather, we have here an error in discretion or a case of poor judgment by an employee's excessive participation in the employer's expectations. This is consistent with the language in the case of *Boynton Cab Company.*

This case at hand is certainly distinguishable from the case relied upon by the appellant in *Department of Industrial Relations v. Rich,* 42, Ala. App. 80, 152 So. 2d 692 (1963), where an elderly truck driver had an accident as the result of drinking while driving. In that case the claimant was drinking during a time that was clearly a breach of his employment duties which showed a wanton and willful disregard of his employer's interest. In this case

Forsyth was drinking during a time that was fully approved of by his employer and in fact it was expected of him at both times in which the accidents resulted.

It should be noted that there is no evidence to show that either accident was deliberately caused by Forsyth and only in the first accident was it determined that it was the result of his drinking, whereas in the second accident he was subsequently acquitted of wrongdoing. The two traffic citations of August 22, 1973 (failure to obey a traffic sign), and February 22, 1974 (speeding), were not known to Continental at the time of the discharge, and therefore cannot be considered as a reason for the discharge. However, even if they had been available, it is difficult to see how these two traffic violations could possibly constitute misconduct when it is realized Forsyth had been driving for eight years at approximately 25,000 miles a year.

Thus even if Forsyth was discharged only for his driving record, the evidence fails to support the conclusion that the actions evidenced by his driving record constitute misconduct.

POINT II

THE STATUTORY AUTHORITY GIVEN THE BOARD OF REVIEW SUPPORTS THEIR SCOPE OF REVIEW IN THIS CASE.

This is response to appellant's arguments numbers 4 and 5. The appropriate provision of the law is Section 35-4-10(d) (2) Utah Code Annotated 1953, which provides in part as follows:

> . . . Upon appeal the Board of Review may on the basis of the evidence previously submitted in such case, or upon the basis of such additional evidence as it may direct be taken, affirm, modify, or reverse the findings, conclusions, and decision of the appeal referee . . .

The law does not limit the Board of Review to only a review of the record established by the Appeal Referee. It may direct that additional evidence be taken and considered in reviewing the findings, conclusions, and decisions of the Appeal Referee. This was done in this case when Forsyth's acquittal of the charges resulting from the February 4, 1976, accident were considered in reaching their decision. Certainly Continental should have been

made aware of the fact that this new evidence was being entered into the record before the decision was made so as to afford them any rebuttal they might deem necessary. However, when the decision was mailed a copy of the decision was sent to Continental explaining that the decision was made using additional testimony and as soon as they expressed an objection and before the decision became final an opportunity was given to them to reopen the record so the evidence could be received. Legal counsel for Continental stated that he had no reason to doubt the evidence and could see no reason to reopen the record for it. This being the case, it does not now seem appropriate for the appellant to raise the argument of "outside evidence" being illegally used. Although the receipt of the acquittal is part of the overall evidence that should be considered, it should be noted that Forsyth's guilt or acquittal as such should not be controlling in that it is necessary to look to all the circumstances surrounding the discharge in determining whether or not there was misconduct.

POINT III

THE RECORD DOES NOT COMPLETELY SUPPORT THE CONTENTIONS OF THE APPELLANT THAT THE ONLY REASON THEY DISCHARGED FORSYTH WAS DUE TO HIS DRIVING RECORD.

The record indicates that the majority of the other drivers working for Continental had had accidents in the past without being discharged. However, Continental was laying off employees at the time they chose to discharge Forsyth. It was acknowledged that Forsyth's job in Salt Lake City was in jeopardy in that they were considering transferring him to Cedar City. However, they did not talk to him about the transfer but chose to discharge him when they did. Although the evidence is purely speculative with the real reason known only by Continental, it does raise a serious question as to just why the claimant was discharged at that particular time.

CONCLUSION

Forsyth was not discharged for his poor driving record, but rather for the convenience of the employer because of the reduction in force. However, assuming Forsyth was discharged because of his poor driving record, this alone does not support the conclusion

that he was discharged for misconduct. The Utah Supreme Court has on many occasions held that if there is substantial, competent evidence to support the findings of the Commission they will not set aside the decision. (See *Members of Iron Workers Union of Provo v. Industrial Commission,* 104 Ut. 242, 139 P. 2d 208; *Kennecott Copper Corporation Employees v. Department of Employment Security,* 13 Utah 2d 262, 372 P. 2d 987.) There is substantial, competent evidence in this case to support the finding that the claimant's actions in establishing his driving record were not misconduct in that they were not motivated by an intent to inflict injury or damage on his employer nor were they a wanton or willful disregard of his employer's interest, not a deliberate violation of his employer's rules or standards of behavior. Thus the decision of the Board of Review should be affirmed.

Respectfully submitted,

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