

1979

William D. Millet v. Industrial Commission of the State of Utah-Board of Review : Defendant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM D. MILLETT,

Plaintiff-Appellant,

vs.

Case No. 16385

INDUSTRIAL COMMISSION OF THE
STATE OF UTAH — BOARD OF REVIEW,

Defendant-Respondent.

DEFENDANT'S BRIEF

STATEMENT OF NATURE 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, for the purpose of judicial review of a decision of the Board of Review of the Industrial Commission of Utah, affirming the decision of the Appeal Referee, which denied benefits to the Plaintiff for a period of sixty-two (62) weeks and assessed an overpayment in the amount of \$1,785.00, on the grounds the Plaintiff knowingly withheld material facts regarding work and earnings in order to receive benefits to which he was not

entitled. The questions are whether the Findings of Fact are supported by the evidence and whether the law was properly applied in the instant case.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the decision of the Board of Review that Plaintiff was not eligible for unemployment compensation during the period in question and that the overpayment in the amount of \$1,785.00 be set aside. Defendant seeks affirmation of the decision of the Board of Review.

STATEMENT OF FACTS

Defendant agrees with the dates and sequence of events set forth in Plaintiff's statement of Facts. However, inasmuch as Plaintiff's Statement of Facts also contains considerable comment as to Plaintiff's state of mind and his interpretation of the law, Defendant offers the following summary of the facts: Plaintiff filed his initial claim for unemployment compensation effective January 22, 1978. (R.0001, 0010) He thereafter filed weekly claims for benefits through February 25, 1978. Plaintiff reopened his claim effective July 2, 1978 and continued to file claims through September 30, 1978. Plaintiff received a total of \$2,053.00 in unemployment compensation. (R.0010)

Plaintiff began working for Rhead Realty Construction on February 12, 1979. He earned \$121.00 during the week ended February 18, 1979 and \$220.00 during the week ended February 25, 1979. (R.0004) Plaintiff filed claims for each of the weeks

ended February 18 and February 25, 1978, certifying thereon that he had no work or earnings by placing the word "none" in the space provided on each claim for reporting earnings. (R.0002, 0003) Plaintiff received payment from Rhead Realty Construction for his work during the week ended February 18, 1978 on or before February 24, 1978, as evidenced by the paycheck which was paid by the issuing bank on February 24, 1978. (R.0004, 0005); Plaintiff also admits in his brief at page 3 that he received a check on February 24, 1978. He was paid for the week ended February 25, 1978 on or before March 10, 1978, the date on which the issuing bank paid that check. (R.0004, 0006)

On November 14, 1978, a telephone hearing was conducted by Department Representative at Plaintiff's request. The Department Representative found that Plaintiff had violated Section 35-4-5(e) of the Utah Employment Security Act and disqualified the Plaintiff for a period of 52 weeks from February 12, 1978 to February 10, 1979, and established an overpayment in the amount of \$1,785.00, representing the benefits received by Plaintiff during the disqualification period. (R.0008)

Plaintiff appealed the decision of the Hearing Representative on November 30, 1978. (R.0009) After an in-person hearing before an Appeals Referee, the decision of the Hearing Representative was affirmed. (R.0022, 0023) Upon further appeal, the Board of Review of the Industrial Commission of Utah affirmed the decisions of the Appeal Referee and the Hearing Representative in case number 78-A-3045, 79-BR-04.

ARGUMENT

POINT I

THAT IN REVIEWING DETERMINATION OF THE INDUSTRIAL COMMISSION UNDER THE UTAH EMPLOYMENT SECURITY ACT THE COURT WILL AFFIRM THE COMMISSION FINDINGS IF SUCH ARE SUSTAINED BY SUBSTANTIAL COMPETENT EVIDENCE.

The standard of review in unemployment insurance cases is well established. Section 35-4-10(i), Utah Code Annotated 1953, provides in part:

In any judicial proceedings under this section the findings of the Commission and the Board of Review as to the facts if supported by evidence shall be conclusive and the jurisdiction of said Court shall be confined to questions of law.

This Court has consistently held that where the findings of the Commission and the Board of Review are supported by evidence, they will not be disturbed. *Martinez v. Board of Review*, 25 U. 2d 131, 477 P. 2d 587 (1970). A reversal of an order of the Department denying compensation can only be justified if there is no substantial evidence to sustain the determination and the facts giving rise to a right to compensation are so persuasive that the Department's denial was clearly capricious, arbitrary and unreasonable. *Kennecott Copper Corporation Employees v. Department of Employment Security*, 13 U. 2d 262, 372 P. 2d 987 (1962); *Gocke v. Wiesley*, 18 U. 2d 245, 420 P. 2d 44, 45 (1966). This Court stated in *Members of Iron Workers Union of Provo v. Industrial Commission*, 104, Utah 242, 248; 139 P. 2d 208, 211, (1943), that:

If there is substantial competent evidence to sustain the findings and decision of the Industrial Commission, this Court may not set aside the decision even though on a review of the record we might well have reached a different result.

This Court has adhered to the same standard of review in cases involving violation of Section 35-4-5(e) of the Utah Employment Security Act. *Decker v. Industrial Commission of Utah, Department of Employment Security*, 533 P. 2d 898 (1975); *Whitcome v. Department of Employment Security, Industrial Commission of Utah*, 564 P. 2d 1116 (1977).

POINT II

THE UTAH SUPREME COURT AND THE BOARD OF REVIEW HAVE PROPERLY INTERPRETED THE INTENT OF THE UTAH STATE LEGISLATURE WITH RESPECT TO SECTIONS 35-4-5(e), 6(d) AND 6(e), UTAH CODE ANNOTATED 1953, AS AMENDED.

Sections 35-4-5(e), 6(d), and 6(e), Utah Code Annotated 1953, as amended, provide:

- 35-4-5 - An individual shall be ineligible for benefits or for purposes of establishing a waiting period:
- (e) For the week with respect to which he had willfully made a false statement or representation or knowingly failed to report a material fact to obtain any benefit under the provisions of this act, and for the 51-week period immediately following and until he has repaid to the fund all monies he received by reason of his fraud and which he received during such following 51-week disqualification period, provided that determinations under this subsection shall be made only upon a sworn written admission, or after due notice and recorded hearing; provided that when a claimant waives the recorded hearing a determination shall be made based upon all of the facts which the commission, exercising due diligence, has been able to obtain; and provided further that such determination shall be appealable in the manner provided by this act for appeals from other benefit determinations.
- 35-4-6(d) - Any person who, by reason of his fraud, has received any sum as benefits under this

act to which he was not entitled shall be liable to repay such sum to the commission for the fund. If any person, by reason of his own fault, has received any sum as benefits under this act to which under a redetermination or decision pursuant to this section, he has been found not entitled, he shall be liable to repay such sum, and/or shall, in the discretion of the commission, be liable to have such sum deducted from any future benefits payable to him. In any case in which under this subsection a claimant is liable to repay to the commission any sum for the fund, such sum shall be collectible in the same manner as provided for contributions due under this act.

(e) If any person has received any sum as benefits under this act to which under a redetermination or decision he was not entitled, and it has been found that he was without fault in the matter, he is not liable to repay such sum but shall be liable to have such sum deducted from any future benefits payable to him with respect to the benefit year current at the time of such receipt.

Plaintiff contends that the Department, the Board of Review and the Utah Supreme Court have improperly interpreted the intent of the Utah State Legislature in its enactment of Section 35-4-5(e), Utah Code Annotated 1953, as amended. (See Plaintiff's Brief, Points I, III and IV.) Specifically, Plaintiff contends that prior to 1959, the Section 5(e) disqualification period related to the other disqualification periods contained in the Utah Employment Security Act, such as for voluntary leaving, discharge, or failure to accept suitable work. The Employment Security Act was, in fact, amended in 1949 to change the penalty for fraud from a variable two to ten week disqualification to a uniform fifty-two week disqualification. The Act was also amended to increase the penalty period for discharge for dishonesty constituting a crime from a variable two to ten week disqualification to a uniform fifty-two week disqualification.

The legislative history of the 1949 amendments to the Employment Security Act (designated as House Bill 166) is inadequate to determine whether the legislature intended the penalty period for Section 35-4-5(e) to be co-extensive with the penalty periods provided elsewhere in the Act. (See House and Senate Journals for 1949.) While it is true that a violation of Section 5(e) must be based on a misrepresentation or omission made material by the other provisions of the Act, there is nothing contained in the Employment Security Act which can be construed to require or even suggest that the disqualification for fraud should be limited to a period of time equal to the disqualification period of the section of law from which materiality is derived. On the contrary, all of the disqualification periods set forth in Section 5 of the Employment Security Act remained variable with the exceptions of the penalties for fraud and discharge for dishonesty constituting a crime. It is reasonable to assume, therefore, that the legislature intended to establish only a set and harsh penalty for each of these infractions, without reference to any other disqualification period.

Stated simply, the present interpretation of Sections 35-4-5(e) and 35-4-6(d) is that an individual who commits a fraud upon the Unemployment Compensation Fund invokes the full administrative penalty of fifty-two weeks disqualification. He is further denied the right to receive any unemployment benefits until he has repaid all money received during the fifty-two weeks disqualification.

Although administrative or legislative construction of statutes may provide some aid in interpretation, it is ultimately the responsibility of the judicial branch of the government to construe laws enacted by the legislature. (See 73 Am. Jur. 2nd, Statutes, Section 142.) There is no question that the penalty for fraud can be harsh. This point was well stated in the case of *Decker v. Industrial Commission* (Utah, 1975) 533 P. 2d 898, 899, in which this Court held:

Plaintiff also complains that the deprivation of fifty-two weeks of benefits is a severe penalty. With this we are inclined to agree. However, under the statute it does not appear that the fact finder or this court has the discretion to reduce or forgive any part of the penalty.

The Court then went on to comment that the overpayment is governed by Section 35-4-6(d).

This position was confirmed by the holding of the Court in *Whitcome v. Department of Employment Security* (Utah 1977) 564 P. 2d 1116, 1117, wherein the Court stated:

It should be noted that one known false statement or known failure to report a material fact to obtain a benefit is sufficient to invoke this section of the Act and that the fifty-two week disqualification then takes effect and weekly benefits thereafter received within the disqualification period although pursuant to submission of perfectly honest weekly claim forms are overpayments and must be repaid to the Department.

In this regard it is interesting to note that the Employment Security Act makes no distinction between "simple" fraud and "compound" fraud, as Plaintiff attempts to do at page 14 of his Brief.

In the recent case of *Diprizio v. Industrial Commission*, (Utah,

1977), 572 P. 2d 679, 681, Mr. Chief Justice Ellett, speaking for the majority, wrote:

If a discretion is to be given to the Commission to ignore or modify an unambiguous statute, then that should be done by the legislature and not by this Court.

Although Mr. Justice Crockett dissented in *Diprizio* on the grounds that some exercise of discretion is necessary to achieve individualized justice, (572 P. 2d, at page 682) he has subsequently acknowledged that the decisions in *Decker* and *Diprizio* now constitute the law in this area. Mr. Justice Crockett's position is consistent with the generally acknowledged principle that once a statutory construction has been made and followed it should not be altered. (73 Am. Jur. 2d, Statutes, Section 143.)

It should also be noted in this regard that in construing a statute it is proper to consider the particular evils at which the legislation is aimed. (73 Am. Jur. 2d, Statutes, Section 157.) In responding to this specific issue once before, this Court stated:

Neither are we persuaded by the Plaintiff's further argument that because the order made is so severe and arbitrary that it runs contrary to and defeats the purpose of the Unemployment Compensation Act that it should be unconditionally reversed and no further consideration be given it. It is true of course that the general purpose of that act is to alleviate the burdens that result on individuals and upon the economy generally because of the hardships of unemployment. But it is equally true that the act and the funding which supports it must be protected against unjustified claims of persons who would prefer unemployment benefits to employment, and who engage in various artifices including falsification and fraud to obtain benefits. In order to carry out the salutary purposes of the act, it is necessary not only that there is a means of obtaining reimbursement but also of penalizing those who would so offend. (*Diprizio v. Industrial Commission*, *Supra*, at p. 680.)

Plaintiff's interpretation of Section 5(e) would render a nullity of any penalty except in those cases where the fraud is discovered at its inception, for certainly the individual who is required after the fact to repay only those monies obtained by reason of his fraud suffers no penalty whatsoever. Such would be the situation in the instant case were Plaintiff's interpretation of Sections 35-4-5(e) and 35-4-6(d) to be adopted by this Court.

Plaintiff cites two prior Board of Review cases in support of the proposition that the Industrial Commission does give some interpretation to Section 35-4-5(e). Without belaboring the fact that it is the responsibility of the Industrial Commission to provide some small degree of interpretation to the provisions of law the Commission must administer, it is sufficient to point out that neither case cited by Plaintiff is material to the instant matter. In case No. 65-BR-395 the Hearing Representative erroneously calculated the overpayment. When he tried to correct the overpayment by amending his decision, the Board of Review ruled that the original decision had become final and the Hearing Representative had no jurisdiction to consider the matter further. Thus, Case No. 65-BR-395 involved an issue of jurisdiction, rather than interpretation of Section 35-4-5(e).

Case No. 75-BR-90 involves an attempt by the Board of Review to ameliorate the effects of the penalty contained in Section 35-4-5(e), consistent with the wording of that section and the intent of the statute. The Board of Review held that while a claimant who had been found in violation of Section 35-4-5(e)

could not receive benefits, he could file claims after the initial fifty-two weeks disqualification, which claims, if otherwise eligible, might be used to offset his overpayment. The penalty is not reduced or forgiven in any part. The fifty-two weeks disqualification must be served and the full overpayment must be repaid. However, repayment may be accomplished by filing of valid claims after expiration of the disqualification period. The Industrial Commission recognizes that the Court may, in an appropriate case, conclude that such an approach is or is not consistent with the plain meaning of Section 35-4-5(e). However, adjudication of this question must await an appropriate case in which the Commission's position is actually at issue.

POINT III

SECTION 35-4-5(E), UTAH CODE ANNOTATED 1953, AS AMENDED, IS NOT VIOLATIVE OF THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION OR THE CONSTITUTION OF THE STATE OF UTAH.

Plaintiff cites *Dandridge v. Williams*, 397 U.S. 471 (1971), in reference to the requirement of equal protection that any legislative distinction between classes must bear some rational relationship to a legitimate governmental purpose. Plaintiff asserts that Section 35-4-5(e) creates two classes of individuals: (1) those who receive unemployment benefits during the penalty period and must repay those benefits, and (2) those individuals who receive no such benefits during the penalty period and therefore have no repayment requirement.

In the *Dandridge* case, supra, the United States Supreme Court stated:

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable' basis, it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' 'The problems of government are practical ones and may justify, if they do not require, rough accommodations - illogical it may be, and unscientific.' 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' (Citations omitted, 397 U.S., at p. 485.)

The only two classes of individuals created by the Utah Employment Security Act are those who are eligible to receive unemployment benefits and those who are not eligible. The Legislature has a legitimate concern in preventing fraud on the Unemployment Compensation Fund by penalizing those who engage in such activity. (*Diprizio v. Industrial Commission*, supra.) As in the *Dandridge* case, the effects of the statute may be felt more harshly by some than by others. But, as the U.S. Supreme Court stated in *Dandridge*:

The Equal Protection Clause does not require a State to choose between attacking every aspect of a problem [viz unemployment fraud] or not attacking the problem at all. (*Dandridge v. Williams*, supra, at p. 486.)

In this regard it is important to note that under Plaintiff's proposed interpretation of Section 35-4-5(e), there would be no penalty for fraud except to the extent the fraud can be discovered prior to the expiration of the statutorily set fifty-two weeks disqualification period. In all cases where benefits are received for weeks subsequent to the act of fraud there would be

no repayment requirement. In those instances where the fraud is not discovered until after the expiration of the fifty-two weeks disqualification period, the claimant would be required merely to repay the money obtained by reason of his fraud.

In addition, two classes of claimants would again be established under Section 35-4-5(e): (1) those whose fraud is discovered in time to make them subject to disqualification for the balance of the fifty-two weeks penalty period, (2) and those whose fraud is not discovered until after the fifty-two weeks penalty period has expired. The latter class would have the advantage of being able to receive benefits during the disqualification period while the former class might not.

It is apparent that Plaintiff's interpretation of Section 5(e) provides no meaningful solution to the problems of the legislature in attempting to provide a significant protection for the Unemployment Compensation Fund. This is clearly the type of legislative provision that falls within the doctrine of the *Dandridge* case.

POINT IV

THE DECISION OF THE COMMISSION IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND THE BOARD OF REVIEW AND THE APPEAL REFEREE DID NOT ERR IN DETERMINING THAT PLAINTIFF KNOWINGLY WITHHELD MATERIAL INFORMATION IN ORDER TO OBTAIN BENEFITS TO WHICH HE WAS NOT ENTITLED.

It has previously been held that intention to defraud is inherent in the claims themselves when such claims contain false statements and fail to set forth material information required

by statute. *Martinez v. Industrial Commission*, (Utah, 1978) 576 P. 2d 1295. The filing of such a claim is in and of itself a manifestation of intent to defraud. *Mineer v. Board of Review of the Industrial Commission of Utah*, (Utah, 1977) 572 P. 2d 1364.

In the instant case the Plaintiff contends that he began working for Rhead Realty Construction on a trial basis for which he did not expect to be paid. (R.0017; Plaintiff's Brief, page 3.) Plaintiff received his first paycheck on or before February 24, 1978, (R.0004) and he cashed it on February 24, 1978 (R.0005) Yet, on February 28, 1978, just four days after cashing his paycheck, the Plaintiff filed his claim for unemployment benefits, certifying "none" in the space provided for reporting his earnings. (R.0003)

Furthermore, when asked why he did not report his hours of work as required by Item 2.b. of the claim card, Plaintiff responded:

I was under the impression, because I read that, or that little booklet they gave with us, and I, I didn't know, of course they say ignorance is no excuse either, but I didn't know I was supposed to put down work down there unless I was getting paid for it. And that's why I put none. Because if I would have been, if they would have said no, we don't want you, out of two weeks, then I'd have been outta unemployment for two weeks too. (R.0015) (Emphasis added.)

Thus, the evidence is substantial and compelling that Plaintiff intentionally withheld the fact of his work and earnings to obtain unemployment benefits to which he knew he was not entitled.

CONCLUSION

Plaintiff knew that work and earnings should be reported to the Commission. He received and cashed a paycheck for work

performed during the weeks in question. Despite that knowledge and just four days after cashing his first paycheck, Plaintiff certified to the Commission that he had no work or earnings.

Plaintiff's contentions that Section 35-4-5(e), Utah Code Annotated 1953, as amended, has been previously interpreted in error are without merit. Therefore, the decision of the Commission should be affirmed.

Respectfully submitted this ____ day of September, 1979.

ROBERT B. HANSEN,
Attorney General

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Special Assistants
Attorney General

BY: _____
K. Allan Zabel

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that I mailed two copies of the foregoing Defendant's Brief to Merlin G. Calver, Attorney for Plaintiff, 2651 Washington Boulevard, Suite No. 9, Ogden, Utah, 84401, this ____ day of September, 1979.

BY: _____

K. ALLAN ZABEL