1979

Pepperidge Farm, Inc. v. the Board of Review, Department of Employment Security, Industrial Commission of Utah, John I. Johnson and Austin C. Molisa : Brief of Defendant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

PPERIDGE FARM, INC.,

Plaintiff,

vs.

Case No. 16855

E BOARD OF REVIEW, DEPARTMENT EMPLOYMENT SECURITY, INDUSTRIAL MMISSION OF UTAH; JOHN I. JOHNSON; AUSTIN C. NOLISHA,

Defendants.

DEFENDANT'S B

Appeal from a decision of the Depart
State of Utah, as upheld by the
and the Board of Review of the Ind
State of Utah

ON FISHER
W. ANDERSON
Clendenin
ental Bank Buildin
City, Utah 84101
(801) 531-9900

ve for Plaintiff

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS (CONT'D)

STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

PEPPERIDGE FARM, INC.,

Plaintiff,

vs.

Case No. 16655

THE BOARD OF REVIEW, DEPARTMENT OF EMPLOYMENT SECURITY, INDUSTRIAL COMMISSION OF UTAH; JOHN I. JOHNSON; and AUSTIN C. NOLISHA,

Defendants.

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, reversing the decision of an Appeal Referee, and allowing benefits to two claimants, John I. Johnson and Austin C. Nolisa, on the grounds the claimants had left work voluntarily, but with good cause.

DISPOSITION BELOW

Defendants-claimants, John I. Johnson and Austin C. Nolisa filed claims for unemployment benefits effective December 17, 1978. A representative of the Department of Employment Security found that the claimants left work voluntarily, but with good cause and benefits were allowed. Plaintiffs appealed the allowance of benefits to an Appeal Referee who reversed the decision of the Department Representative and denied benefits to the claimants for 6 (six) weeks, from December 17, 1978, to January 27, 1979, pursuant to Section 35-4-5(a), Utah Code Annotated 1953, as amended, and established an overpayment in the amount of $738.00 for each of the claimants pursuant to Section 35-4-6(e), Utah Code Annotated 1953, as amended. Claimants appealed the decision of the Appeal Referee to the Board of Review of the Industrial Commission of Utah and the Board of Review reversed the decision of the Appeal Referee, allowed benefits to the claimants for the weeks in question and set aside the overpayments of $738.00 for each claimant, in decisions numbered 79-A-209, 79-BR-31, and 79-A-210, 79-BR-30, respectively. In both decisions two members of the Board of Review voted to reverse the decision of the Appeal Referee and one member of the Board of Review dissented. On July 18, 1979, Plaintiff petitioned the Board of Review to reconsider its prior decisions and requested oral argument. Plaintiff's petition was denied by a unanimous Board of Review on August 7, 1979.

RELIEF SOUGHT ON REVIEW

Plaintiff seeks reversal of the decisions of the Board of Review which allowed benefits to the claimants and petitions the Court to determine that the claimants were ineligible to receive benefits for the week in question and reestablishment of the overpayments in the amount of $738.00. Defendants seek affirmance of the decisions of the Board of Review.

STATEMENT OF FACTS

Defendants Board of Review, Department of Employment Security, and the Industrial Commission of Utah substantially agree with the Statement of Facts set forth in Plaintiff's brief, except in the following particulars to wit:

Defendant, Austin C. Nolisa, began work for Plaintiff on May 20, 1976, (R.00090, R.00124) or May 10, 1976. (R.00122) Defendant, John I. Johnson, began work for Plaintiff on June 23, 1976, (R.00090, R.00123), or June 28, 1976. (R.00121)

The reclassification of jobs which occurred in September, 1976, (R.00068, R.00072, compare R.00038) affected seven (7) positions, (R.00097) which were to be filled on the basis of seniority pursuant to the employer's personnel policy. (R.00098) However, neither Defendant Johnson nor Defendant Nolisa, hereinafter referred to as claimants, both of whom had sufficient seniority to qualify for the reclassified positions (R.00068, R.00072) and both of whom are Black, (R.00068, R.00072) were given an opportunity to bid for the new job classification. (R.00098, R.00099)

Claimants Johnson and Nolisa requested reevaluation of their positions and pursued their complaints concerning the reclassification with management for approximately one and a half years, until the claimant Nolisa was told by his area manager that if he did not like it he could leave. (R.00097) Thereafter claimants Johnson and Nolisa filed discrimination complaints with the Anti-Discrimination Division of the Industrial Commission of Utah on August 29, 1978. (R.00108) After reporting to work on that same day, claimants Johnson and Nolisa were placed on a disciplinary suspension. (Plaintiff's Brief, page 4, R.00069, R.00072)

Between August 29, 1978, and September 9, 1978, claimant Johnson was given additional work assignments he had not previously received, was made the subject of

supervisory complaints not previously received, and was accused of interfering with production. (R.00068, R.00069)

When claimant Nolisa returned to work after his suspension he was assigned tedious and/or dangerous jobs, which assignments had not previously been given to members of the general sanitation crew, was ordered to clean out an oven while it was still in operation, and was generally hindered by other employees in completing his work assignments. (R.00073) Claimant Nolisa was also accused of deliberately sabotaging production. (R.00073)

On September 9, 1978, both Nolisa and Johnson tendered their resignations, (R.00117, R.00118) after which the additional assignments and accusations were discontinued. (R.00069, R.00074)

At the time claimants Johnson and Nolisa filed their claims for unemployment benefits the local Job Service office sent a letter to Plaintiff advising of the claims. The local office also telephoned the employer's place of business on two occasions and left a telephone number for a return call. When the employer failed to respond, the local office issued a decision allowing benefits based on the information available. (R.00115, R.00116) The employer subsequently appealed to the Appeal Referee.

ARGUMENT

POINT I

THAT IN REVIEWING DETERMINATIONS OF THE INDUSTRIAL COMMISSION UNDER THE UTAH EMPLOYMENT SECURITY ACT THE COURT WILL AFFIRM THE FINDINGS OF THE BOARD OF REVIEW 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). In analyzing the above referenced review provision, this Court has stated:

> Under Section 35-4-10(i) the role of this Court is to sustain the determination of the Board of Review unless the record clearly and persuasively proves the action of the Board was arbitrary, capricious, and unreasonable. Specifically, as a matter of law, the determination was wrong; because only the opposite conclusion could be drawn from the facts. *Continental Oil Company v. Board of Review of the Industrial Commission of Utah,* (Utah, 1977) 568 P. 2d 727, 729.

POINT II

SECTION 35-4-5(a), UTAH CODE ANNOTATED 1953, AS AMENDED, IS INTENDED TO DISQUALIFY FROM THE RECEIPT OF UNEMPLOYMENT BENEFITS ONLY THOSE INDIVIDUALS WHO ARE UNEMPLOYED BY REASON OF THEIR OWN FAULT.

Section 35-4-5(a), Utah Code Annotated 1953, as amended, provides:

> 35-4-5 An individual shall be ineligible for benefits or for purposes of establishing a waiting period:
> (a) For the week in which he has left work voluntarily without good cause, if so found by the commission, and for not less than one or more than the five next following weeks, as determined by the commission according to the circumstances in each case, provided that when such individual has had no bona fide employment between the week in which he voluntarily left such work without good cause and the week in which he filed for benefits he shall be so disqualified for the week in which he filed for benefits and for not less than one or more than the five next following weeks.

Plaintiff quotes Section 35-4-5(a) as amended by the 1979 legislature. However, the applicable version of Section 5(a) is that quoted above, as it was constituted prior to

the effective date of the 1979 amendments. This being by reason of the facts that the claimants' quit occurred in September, 1978, the claims were filed in December, 1978 and the issues were adjudicated in January, 1979, all prior to the effective date of the 1979 amendments.

This Court has previously held that the purpose of the Employment Security Act is to assist a worker and his family in times when he is out of work **without fault on his part** *Kennecott Copper Corporation Employees v. Department of Employment Security*, 13 U. 2d 262, 372 P. 2d 987 (1962); and that the Department is to determine a claimant's eligibility for unemployment compensation by adhering to the volitional test. *Olah Nelson Construction Company v. The Industrial Commission*, 121 U. 521, 243 P. 2d 951 (1952); *Mills v. Gronning*, (Utah, 1978) 581 P. 2d 1334.

However, a claimant voluntarily leaving work with good cause is in fact unemployed without fault. This Court explained the reason for the good cause exception in the following terms:

> "What is 'good cause' must reflect the underlying purpose of the Act to relieve against the distress of involuntary unemployment. The seeming paradox of allowing benefits to an individual whose unemployment is of his own volition disappears when the context of the words is viewed in that light. The legislature contemplated that when an individual voluntarily leaves a job under the pressure of circumstances which may reasonably be viewed as having compelled him to do so, the termination of his employment is involuntary for the purposes of the Act. In statutory contemplation he can not then reasonably be judged as free to stay at the job..." *Denby v. Board of Review of the Industrial Commission of Utah*, (Utah, 1977) 567 P. 2d 626, 630; *Krauss v. M. Karagheusian, Inc.*, 13 N.J. 447, 100 A. 2d 277, 286 (1953).

The Court further explained "good cause" was limited to those instances where the unemployment was caused by external pressures so compelling a reasonable prudent person, exercising ordinary common sense and prudence, would be justified in quitting under similar circumstances. *Mills v. Gronning, SUPRA.*

In the instant case the claimants voluntarily quit their employment, but under circumstances constituting good cause, as shall be more fully explained in Point III hereof.

The cases cited by plaintiff with regard to the disqualification of individuals who quit work to attend school are substantially correct and the defendants agree with the principle ennunciated within those cases. This Court has held on two occasions that attendance at school is disqualifing unless one of the statutory exemptions is met. *Norton v. Department of Employment Security*, 22 U. 2d 24, 447 P. 2d 907 (1968); *Townsend v. Board of Review of the Industrial Commission*, 27 U. 2d 94, 493 P. 2d 614 (1972). However, claimants did not quit work for the purpose of attending school, as is explained in detail in Point III hereof, and did meet the statutory exemption of having earned the major portion of their base period wages while attending school, (R.00119, R.00120) as provided in Section 35-4-5(g), Utah Code Annotated, 1953, as amended.

POINT III

THE BOARD OF REVIEW DID NOT ERR IN DETERMINING THAT CLAIMANTS HEREIN HAD GOOD CAUSE FOR LEAVING WORK.

Plaintiff has contended throughout the appeal process that the claimants left work in order to attend school. The claimants contend, on the other hand, that they were compelled to leave work when acts of discrimination against them intensified after they filed a discrimination complaint. Thus, the issue before the Court is whether the evidence of record supports the findings of the Board of Review that the problems the claimants had been experiencing during the sixteen months prior to their separation began to intensify after August 29, 1978, the date on which they filed their discrimination complaint, until claimants were no longer able to perform their jobs without conflicts with their lead workers and supervisors.

The initial determination of good cause for voluntarily leaving work is a mixed question of law and fact to be made by the administrative agency; the claimant has the burden of showing good cause; and he must indicate an effort to work out the problems

unless he can demonstrate that such efforts would be futile. *Denby v. Board of Review of the Industrial Commission of Utah, SUPRA.*

For sixteen months the claimants attempted to resolve their concern about a job reclassification initiated by the employer. (R.00068, R.00072, R.00095, R.00096 R.00097) The Plaintiff states in his petition for reconsideration to the Board of Review (R.00021) that no formal grievance was filed by the claimants and refers to the Plaintiff's grievance procedure. Yet, that very grievance procedure is couched in language of discussing problems, and does not require or even suggest that a formal grievance is required. (R.00025)

Plaintiff's personnel manager states in his affidavit "...There was never a complaint of discrimination or any adverse response to work assignment..." until after the claimants were suspended by the employer. (R.00039) Yet, claimant Nolisa testified

> "Yes, I have something to say. Uh, according to the plant policy and the rules (inaudible) there were seven vacant positions they created by reassessing the jobs. And among these seven positions, I have the most seniority among the people who that was suppose to get the job. I was supposed to get a job. They didn't tell me these jobs were, these jobs were open. They just filled them and when I questioned why that happened, they told me my, my area manager told me that they had given the job to the people they thought were able to do the job. And then I asked, 'How, do you determine who is able and who is not able?' He said that some jobs need..uh..some sort of education or degree. I said, 'I have a B.S. degree. That most people who is working on that line, none of them have attended a college. Then, you think I can not do the job and they are the people who can do it?' Then, he didn't give me any answer. Second time, he is, second time I went in again because I was the only person willing to discuss with the management, I went in again and he told me the production manager told me, 'If you don't like what happening, you have been fighting this for a year and six months, and if you don't like it, you can leave.' "

In the face of such testimony, supported by overwhelming evidence as referenced above, the Board of Review reasonably rejected the employer's statement and found the claimants had in fact pursued a grievance for approximately sixteen months.

without success. Finally, they filed their discrimination complaints with the Industrial Commission. The merits of those discrimination complaints are not at issue herein. What is pertinent to the instant case is the fact that the evidence of record is abundant and convincing that after the claimants filed their discrimination complaints conditions deteriorated to the point the claimants were finally compelled to leave work.

On August 29, 1978, the claimants filed the above mentioned discrimination complaints. Inasmuch as the claimants worked the afternoon shift (R.00097, R.00099) it may be assumed that the complaints were filed before the claimants reported to work. Claimant Nolisa stated in his affidavit the events that followed in this manner.

> "On the very day that John Johnson and I filed our racial discrimination claim against Pepperidge Farm, I was called to the office of the plant manager. He said, 'After all we have done for you this is what you are trying to pay us back with.' He then suspended me..." (R.00072)

The claimants were thereupon suspended from work as a disciplinary measure.

The claimants also specifically stated under oath that after filing their complaints the supervisors made alterations in claimant Johnson's work assignment which required accessive overtime; additional work assignments were given which had not previously been required of Johnson; Johnson's supervisors began to follow him around complaining that assignments were being done inadequately, which was previously not done; and Johnson was accused of interfering with production. (R.00068, R.00069) Upon tendering his resignation, the problems alleged by Johnson ended. (R.00069)

Claimant Nolisa stated that after returning to work from being on suspension he was given tedious yet dangerous jobs which had not previously been assigned to the general sanitation crew; he was directed to enter and clean a baking oven while in

operation on three separate occasions, although such had not been previously required; he was assigned to collect plant garbage, which assignment had not previously been given to anyone else in his section; other workers intentionally hindered him in completing his work assignments and management did not respond to this interference; parts were removed from his car while in the plant parking lot; and he was accused of deliberately sabotaging production. (R.00073) Upon tendering his resignation the problems charged by claimant Nolisa no longer occurred. (R.00074)

In response to the foregoing specific charges by the claimants, the Plaintiff submitted the hearsay statement, under oath, of the personnel manager who did not have personal knowledge of any of the incidents charged, but who did make a general denial based on an investigation conducted by him. Under such circumstances, the Board of Review could consider the specific direct statments under oath of the claimants to be more credible than the hearsay statements under oath made by Plaintiff's personnel manager.

In light of the facts recited above, it is obvious that the claimants' comments on the day of their suspension with regard to returning to school were statements made in exasperation at the manner in which they were being treated and did not constitute the actual reason for their quit. This conclusion is supported by the fact that both claimants attended school during most of the time they were employed by Plaintiff. (R.00092 R.00119, R.00120) In fact, claimant Johnson stated that his continued employment was the only means by which he was able to attend school, and that he was compelled to temporarily withdraw from school when he lost his job. (R.00069) Under such circumstances the Board of Review properly concluded that claimants did not quit their employment in order to attend school.

In a case very similar to the instant matter, the Supreme Court of Pennsylvania allowed benefits to a Black claimant who quit his job because of verbal abuse due to his race. After determining that incidents of racially derogatory remarks may constitute good cause, the Court held:

> Applying these principles to the instant case, we are convinced that appellant has sustained his burden of showing that his termination of employment was with cause of a necessitous and compelling nature by demonstrating that his conduct was consistent with ordinary common sense and prudence, and that the circumstances prompting the severance of the employment were substantial. Appellant and his witnesses testified to several instances in which he was subjected to verbal abuse because of his race. Such verbal abuse was a continuing occurrence throughout appellant's three year employment at Victor's Restaurant. The continuing racial tension created by such abuse caused appellant repeated humiliation and apprehension. These reactions were not merely whims, nor were they caused by any overly sensitive emotional condition on appellant's part. The humiliation and apprehension were emotions grounded in reality and were substantial burdens placed upon appellant's ability to perform his job. The degrading and abusive effects of the repeated expressions of racial prejudice were cumulative in nature and ultimately created an employment condition which would have been intolerable to any reasonable person in similar circumstances. The record establishes that appellant left his job after suffering through three years of such repeated incidents of racial prejudice and verbal abuse...The termination was with cause of a necessitous and compelling nature and appellant should not have been denied compensation. *Taylor v. Unemployment Compensation Board of Review*, 474 Pa. 351, 378 A. 2d 829 (1977).

The parallels with the instant matter are obvious. Claimants Johnson and Nolisa attempted for sixteen months to resolve a racial grievance. When they finally filed their discrimination complaints with the Industrial Commission they were immediately suspended and thereafter were mistreated by supervision and their co-workers until it was no longer possible to carry out their work assignments. They thereupon quit by tendering their resignations on September 9, 1978. (R.00117, R.00118) The Board of Review correctly concluded that such circumstances were compelling and constituted good cause as defined by this Court in *Denby v. Board of Review of the Industrial Commission of Utah, SUPRA.*

CONCLUSION

The evidence in support of the decision of the Board of Review is both competent and substantial. The decisions allowing benefits to the claimants and setting aside the overpayments of $738.00 for each should, therefore, be affirmed.

Respectfully submitted this _____ day of November, 1979.

ROBERT B. HANSEN,
Attorney General

FLOYD G. ASTIN
K. ALLAN ZABEL
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 M. Byron Fisher, Daniel W. Anderson, Attorneys for Plaintiff, Fabian & Clendenin, 800 Continental Bank Building, Salt Lake City, Utah, 84101, this _____ day of November, 1979.

BY: _____
K. Allan Zabel