

1980

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

PEPPERIDGE FARM, INC.,)
)
Plaintiff,)
)
v.)
)
THE BOARD OF REVIEW,)
DEPARTMENT OF EMPLOYMENT)
SECURITY, INDUSTRIAL)
COMMISSION OF UTAH; JOHN I.)
JOHNSON; and AUSTIN C.)
NOLISA,)
)
Defendants.)

Case No. 16655

REPLY BRIEF OF PLAINTIFF

ORIGINAL ACTION TO REVIEW THE PROCEEDINGS AND
ORDER OF THE BOARD OF REVIEW, DEPARTMENT OF EMPLOYMENT
SECURITY, INDUSTRIAL COMMISSION OF UTAH

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IN THE SUPREME COURT OF THE
STATE OF UTAH

PEPPERIDGE FARM, INC.,	:	
Plaintiff,	:	
v.	:	
THE BOARD OF REVIEW, DEPARTMENT	:	Case No. 16655
OF EMPLOYMENT SECURITY,	:	
INDUSTRIAL COMMISSION OF UTAH;	:	
JOHN I. JOHNSON; and AUSTIN C.	:	
NOLISA,	:	
Defendants.	:	

REPLY BRIEF OF PLAINTIFF

INTRODUCTION

This action was filed with the Utah Supreme Court seeking judicial review and reversal of the decision of the Board of Review of the Industrial Commission of Utah, which allowed two claimants, John I. Johnson and Austin C. Nolisa, to receive unemployment compensation from December 19, 1978 to January 27, 1979. Pepperidge Farm, Inc. filed its brief on October 26, 1979 and the brief of the defendant was filed on November 21, 1979.

ARGUMENT

I. THE RECORD DOES NOT SUPPORT THE
CONCLUSIONS OF THE BOARD OF REVIEW.

The defendant Industrial Commission suggests that the Utah Supreme Court, in reviewing the decision of the Board of

Review in the instant case, should merely affix its rubber stamp of approval and affirm the decision. The purpose of providing judicial review, however, is to determine whether decisions made by the Industrial Commission are proper and supported by substantial evidence, and the process is not as automatic as the defendant assumes.

In reviewing decisions of the Industrial Commission, the Supreme Court is required to review the record below. Martinez v. Board of Review, Department of Employment Security, 25 Utah 2d 131, 477 P.2d 587, 588 (1970); Denby v. Board of Review of Industrial Commission, 567 P.2d 626, 628 (Utah 1977). Furthermore, the Court is not bound by conclusions of the Board of Review and will not substitute missing findings in order to corroborate a decision of the Industrial Commission which is not supported by the record. Gocke v. Wiesley, 18 Utah 2d 245, 420 P.2d 44, 46 (1966).

That decisions of the Industrial Commission are not automatically affirmed was recognized in Peterson v. Industrial Commission, 102 Utah 175, 129 P.2d 563, at 564 (1942), where the Utah Supreme Court stated:

But to sustain the conclusion of the Commission the evidence must be substantial evidence, competent evidence, evidence upon which a reasonable mind, a judicious mind, may be content to rest its judgment.

In the instant case, the decision of the Board of Review awarding unemployment benefits to the claimants (reversing the decision of the Appeal Referee) was not supported by either substantial or competent evidence and consequently the decision of the Board Review must be reversed.

II. THE UTAH EMPLOYMENT SECURITY ACT WAS NOT
INTENDED TO SUBSIDIZE AN EMPLOYEE'S EDUCATION.

The Industrial Commission does not dispute that claimants Johnson and Nolisa terminated their employment and returned to school or that a justified reprimand by an employer is not a good cause for termination. Nor does the Commission assert that the claimants' unsuccessful efforts to be reclassified as Plant Services "A" employees constituted a good cause for quitting their jobs with Pepperidge Farm, Inc. The sole contention of the Commission is that the termination of employment by both Johnson and Nolisa was somehow involuntary under the circumstances.

The courts have never held, however, that quitting to return to school full time constitutes an "involuntary" termination or a termination with "good cause." Rather, the courts have unanimously agreed that the purpose of the unemployment system is not to subsidize an employees education, Keisling v. Unemployment Compensation Board of Review, 181 A.2d 717, 718 (Pa. 1962); Fentersheib v. Unemployment Compensation Board of Review, 124 A.2d 375, 376 (Pa.1956); Perales v. Department of Human Resources Development, 32 Cal App. 3d 338, 108 Cal. Rptr. 167, 171 (1973), but "to provide a cushion against the shocks and rigors of unemployment." Singer Sewing Machine Co. v. Industrial Commission, Department of Placement and Unemployment Insurance, 104 Utah 175, 134 P.2d 479, 485 (1943).

The declared policy of the Employment Security act is
"to establish financial reserves for the benefit of persons

unemployed through no fault of their own." Olof Nelson Construction Co. v. Industrial Commission, 121 Utah 521, 243 P.2d 951, 958 (1952). And one whose mental attitude is inconsistent with a genuine attachment to the labor market or who is unavailable for and refuses to accept suitable work for personal reasons is not entitled to unemployment compensation. Denby v. Board of Review of Industrial Commission, 567 P.2d 626, 629 (Utah 1977); Mills v. Gronning, 581 P.2d 1334, 1337 (Utah 1978). As this Court stated in Johnson v. Board of Review of Industrial Commission, 7 Utah 2d 113, 320 P.2d 315, at 316 (1958):

...[T]he purpose of the Employment Security Act, as stated by the declaration of policy, is to lighten the burdens of unemployment upon the worker and his family and to maintain purchasing power in the economy. The design is to nip in the bud the descending economic spiral which may result from unemployment and consequent loss of purchasing power which tends to ramify in chain reaction from throughout the economy. It is reasoned, however, that the Act was not intended to go beyond that purpose, and that unless it is carefully administered, the fund will be kept depleted so that it will not be able to fill in the breach and stabilize the economy in emergencies as intended.
(Emphasis supplied).

In the instant case the only compelling circumstance requiring both Johnson and Nolisla to quit their jobs with Pepperidge Farm, Inc., on September 23, 1978 was their desire and intent to return, full time, to Utah State University for Fall Quarter, which began on September 26, 1978, the Tuesday following their voluntary termination.

III. THE CLAIMANTS VOLUNTARILY TERMINATED THEIR
EMPLOYMENT WITHOUT GOOD CAUSE.

A. Claimants' Failure To Be Reclassified Did
Not Constitute Good Cause For Termination

Section 35-4-5(a) of the Utah Code Annotated 1953, as amended, disqualifies both claimants from receiving unemployment benefits from December 17, 1978 to January 27, 1979. The Industrial Commission contends that the claimants were justified in quitting their jobs due to their failure to be reclassified as Plant Services "A" employees. The record, however, is clear that the reclassification applied only to those employees working the night-owl shift and that neither claimant was working that shift. (R. 00098, 00099). Furthermore, the plaintiff, at the request of claimants, reviewed the job reclassification on two separate occasions and determined each time that it was both proper and necessary because of the greater skills, duties, and responsibilities required of the Plant Service "A" employees. (R. 00039, 00043, 00044).

The failure of either claimant to obtain reclassification did not constitute good cause for voluntarily leaving their employment with plaintiff. The claimants chose to remain employed for over 16 months after the job reclassification occurred. Their responsibilities and wages were the same as all other Plant Service "B" employees, and each claimant had at least five (5) separate opportunities to bid for the position of Plant Service "A" yet, neither Johnson or Nolisa made any effort to do so. (R. 00039, 00044, 00098, 00099).

B. The Merits Of The Discrimination
Complaints Are Not Before The Court

The Industrial Commission attempts to confuse the issues by repeatedly mentioning that claimants had filed complaints of discrimination with the Industrial Commission of the State of Utah and by pointing out that both Johnson and Nolisa "are Black". While the defendant correctly states that the merits of those discrimination complaints are not at issue in the current controversy before the Supreme Court, the brief of the Industrial Commission is replete with comments arguing the validity of those complaints and ultimately reduces the claimants failure to be reclassified as Plant Service "A" employees as a "racial grievance." (Defendant's brief at 11).

The Industrial Commission clouds the issues further by referring the Court to the case of Taylor v. Unemployment Compensation Board of Review, 378 A.2d 829 (Pa. 1977). There, the merits of the employees complaints of racial discrimination were before the reviewing court and the claimant, unlike the current case, had been subjected to racially derogatory language and slurs from his employees, co-workers and customers, in addition to verbal abuse and racial insults. Furthermore, the claimant had been told by his employer that it would be too embarrassing if his customers learned that he had hired a black employee, so he required the claimant to pick up his paycheck in the basement so that none of the white customers would see that a black man was employed there.

There is no evidence or even a claim in the instant case that either Johnson or Nolisa were ever subject to racial

insults or verbal abuse while at Pepperidge Farm, Inc. or that their employer attempted to conceal their employment from the public. On the contrary, Pepperidge Farm, Inc. is an equal opportunity employer and has never discriminated against any employee because of race or national origin and the fact that the claimants are black was not a factor in their job classification and did not effect their opportunity for advancement. (R. 00039, 00040). Moreover, the merits of the discrimination complaints are not currently before the court for consideration or review. The sole issue is whether or not the claimants are entitled to unemployment compensation, as was recognized by the Appeal Referee:

Referee: All right. Now then, concerning this matter of the discrimination charge, is there any documentation available at this hearing concerning that charge and the Industrial Commission's decision in the matter?
Mr. Green, do you have anything on that?

.....

Referee: Excuse me, what I asked you about, Mr. Green, was, "What was the decision of the Industrial Commission concerning the charge of discrimination?"

.....

Green: It's still, still occurring now, it's not completed. Is that right?

Referee: All this is, is a notification that a charge has been filed. This is not the decision.

.....

Referee: So then, actually, in fact, the case is still pending?

Stokes: That is correct.

.....

Referee: Now, just a moment, Mr. Nolisa, it is not my intention to determine the merits of this matter of the, your complaint with the company. That's between you and the company. What I have to rule on is this matter of the allowance of benefits under the circumstances.

.....

Referee: If you are here, supposedly, as representative of Mr. Johnson and I will listen to your testimony insofar as it is relevant to his separation, but I am not going to consider the entire issue of discrimination as it occurred between these gentlemen and the Pepperidge Farms. That is something that has been filed with another authority and until that becomes final, I would have no decision on it. (R. 00092, 00093, 00094, 00101). (Emphasis supplied).

C. Plaintiff Was Not Aware Of The Discrimination Complaints At The Time Claimants Were Suspended Or Prior To Their Termination

The Industrial Commission also asserts that the claimants were compelled to terminate their employment because of acts of discrimination which "intensified after they filed a discrimination complaint." Noticeably lacking from the record, however, is any evidence supporting the claimants allegations that they were assigned dangerous or unusually difficult tasks once they had filed discrimination complaints with the Industrial Commission. Claimant Nolisa maintains that he was, on three separate occasions, "directed to enter and clean a baking oven while in operation" yet plaintiff's equipment was never cleaned during operation, and in fact, it was impossible to even open a baking oven while in operation. (R. 00040).

The Industrial Commission states 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." (Defendant's Brief at 9). Yet, the Industrial Commission resorts to assumptions in its self-serving conclusion that the claimants had filed their discrimination complaints before they were suspended on August 29, 1978, a conclusion entirely unsupported by the record. The Industrial Commission further ignores the record in its statement that the claimants were suspended as a result of the discrimination complaints they filed.

On August 28, 1978, before the discrimination complaints were even filed, claimant Nolisa was determined to be insubordinate to his foreman and was suspended for five days without pay when he reported to work on the next day. (R. 00043). On August 29, 1978 claimant Johnson was also suspended for failure to accept direction from his supervisor. (R. 00037).

The Industrial Commission maintains that the claimants filed their discrimination complaints in the morning of August 29, 1978 and were consequently suspended when they reported to work that afternoon. Not only did the misconduct of Nolisa giving rise to his suspension occur the day before the Industrial Commission claims the complaints were even filed, but the record establishes, and the attorney for the claimants agreed, that the claimants did not file their complaint's alleging discrimination until August 31, 1978, two days after their suspension by plaintiff. (R. 00062, 00083, 00086, 00100).

Plaintiff did not suspend either claimant in retaliation for their complaints since both claimants were disciplined before any complaint of discrimination was even filed. Contrary to the defendant's "assumption" the record establishes that the plaintiff had no knowledge of the complaints until September 22, 1978 when the claimants picked up their separation slips, and consequently did not, in retaliation, force or request either claimant to perform tasks which were different, additional or dangerous from their ordinary job assignments. (R. 00021, 00091). Notice from the Industrial Commission of the discrimination complaints was not even mailed until August 31, 1978 and then the notice was mailed to plaintiff's main office in Connecticut rather than to its plant in Smithfield, Utah. (R. 00093, 00093, 00107). Moreover, no notice of the complaints was mailed to plaintiff's plant in Utah until November 1, 1978, long after both claimants had quit and returned to school. (R. 00093, 00105). Indeed, contrary to the Industrial Commission's "assumptions," there is no evidence of any discrimination or that acts of discrimination intensified after the claimants filed discrimination complaints or that the filing of the complaints was even a factor in their termination. Rather, the only "abundant and convincing" evidence is that plaintiff was not even aware that either claimant had filed a complaint alleging discrimination either at the time they were suspended or at the time the purported acts of discrimination occurred.

Despite the distorted arguments of the Industrial Commission, the evidence of record fails to support a finding

that either claimant had good cause for voluntarily terminating their employment with plaintiff. The real reason claimants Johnson and Nolisa quit their jobs with Pepperidge Farm, Inc. was so they could return to school full time. The Industrial Commission does not even attempt to dispute the following evidence: (1) that both claimants informed plaintiff on August 29, 1978 that they were quitting to return to school (R. 00037, 00042, 00043, 00091); (2) that neither claimant had been attending school during the summer of 1978, nor were they enrolled at the time they informed plaintiff of their intended termination (R. 00092); (3) that both gave notice that they intended to quit well in advance of their actual termination date (R. 00042, 00043, 00082, 00085, 00091); (4) that the claimants terminated their employment on the exact date they stated they would (R. 00091, 00092); (5) that the discharge slips prepared by plaintiff indicated that both claimants had quit to return to school (R. 00091, 00100, 00101); (6) that the claims for unemployment benefits submitted by both claimants stated only that they had "Quit" (R. 00123, 00124); and (7) that both claimants began to attend school at Utah State University on a full time basis on September 26, 1978, only three days after they had quit. (R. 00092).

CONCLUSION

The decision of the Board of Review is unsupported by any substantial evidence of record and the decision of the Appeal Referee determining the claimants to be ineligible to receive unemployment benefits from December 17, 1978 to

January 27, 1979 and establishing an overpayment of compensation to claimants should be affirmed.

Respectfully submitted this 7 day of March, 1980.

FABIAN & CLENDENIN

By /s/

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CERTIFICATE OF MAILING

THIS WILL CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF PLAINTIFF, was mailed via United States mail postage fully pre-paid to Floyd Z. Astin & K. Alan Zabel, Special Assistants to the Attorney General for the Industrial Commission of Utah, Department of Employment Security, 174 Social Hall Avenue Salt Lake City, Utah 84147 and to Michael E. Bolson, Attorney for Claimants, Utah Legal Services, Inc., 385-24th Street, Suite 522, Ogden, Utah 84401, on this ____ day of March, 1980.

FABIAN & CLENDENIN

By _____

Daniel W. Anderson