

2010

Jeffrey S. Record, Emile A. Tanner v. Workforce Appeals Board, Utah Department of Workforce Services, and Zions First National Bank : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JEFFREY S. RECORD,

EMILIE A. TANNER,

Petitioners,

PETITIONER'S REPLY BRIEF

vs.

Case No. 20100719-CA

WORKFORCE APPEALS BOARD,

UTAH DEPARTMENT OF

WORKFORCE SERVICES, and

ZIONS FIRST NATIONAL BANK,

Case No. 20100755-CA

Respondents.

On Review from a Final Order

of the Utah Department of Workforce Services, Workforce Appeals Board

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ORAL ARGUMENT REQUESTED

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REPLY REGARDING STATEMENT OF ISSUES AND STANDARD OF REVIEW

As stated in the Brief of Respondent (hereinafter “Resp. Br.”), the question of whether an employer terminated employees for “just cause” is a mixed question of law and fact. The decision, however, should only be upheld if it is “supported by substantial evidence when viewed in light of the whole record before the court. . . . Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Johnson v. Department of Employment Sec.*, 782 P.2d 965, 968 (Utah Ct. App. 1989). The decision regarding “just cause” in this case is predicated on a decision regarding what constitutes the “whole record,” which Petitioners argue should include photographs of the room at issue in this case and, in the case of Mr. Record, the testimony of David Ratliff. The decision regarding whether the photographs and testimony should be part of the record is accorded “only moderate deference,” as pointed out in Petitioners’ Opening Briefs. Petitioners argue that if those photographs and Mr. Ratliff’s testimony were included as part of the record, the decision that Petitioners were terminated for “just cause” must be overturned, since the photographs demonstrate that Zions’ witnesses were lying about the file room and what Ms. Hanson saw and could possibly have seen. Moreover, in Mr. Record’s case, the testimony of Mr. Ratliff could have been used to cast doubt on the credibility of Mr. Hinds, one of Zions’ primary witnesses.

REPLY REGARDING RESPONDENT'S STATEMENT OF FACTS

Petitioners hereby correct Respondent's Statement of Facts as follows:

1. Respondent states, "Mr. Hinds questioned the Claimants regarding the incident." Resp. Br. at 4. This is incorrect, to the extent it suggests Mr. Hinds told Petitioners that they were accused of being in the file room undressed or that he questioned them about whether this was so. Rather, Mr. Hinds only asked them if they were in the file room together, which they both admitted, and regarding which they did not see anything wrong. See Record's Opening Brief at Statement of Fact 15; Tanner's Opening Brief at Statement of Fact 4.
2. Respondent states, "The Employer received complaints from employees and managers [that] the Claimants spent too much time together behind closed doors and acted inappropriately toward each other while at work." Resp. Br. at 5. It is important to point out that no witnesses testified as to any personal knowledge of any inappropriate behavior by Claimants, other than Ms. Hanson regarding the file room incident. Ms. Battista's note from her conversation with Mr. Record in September 2010 indicates that Mr. Record stated he had never behaved inappropriately with Ms. Tanner (Tanner R. 11); Ms. Battista testified that she had no personal knowledge of any inappropriate behavior between them (Tanner R. 51:4-6); and Mr. Hinds also had no personal knowledge of any inappropriate behavior they had engaged in (Record R. 66:25-28).

3. Respondent states, “The Claimants were issued a second formal warning in November 2009, when the objectionable conduct continued.” Resp. Br. at 5. Claimants dispute that they were ever given a “formal warning” about their conduct, and the testimony cited by Respondent does not indicate that they were given a formal warning.
4. Respondent states, “Mr. Record alleges he did nothing inappropriate by meeting in the empty dark file room.” Resp. Br. at 6. The characterization of the file room as “empty” is incorrect, and the testimony cited by Respondent does not support the statement. Rather, there were several sets of shelves in the room, and some of the files had boxes on them. Record R. 19; 49:24-33.
5. Respondent states, “Mr. Record testified they used the dark unused file room to hide their meeting in an effort to manage the perception of their relationship as instructed by their superiors.” Resp. Br. at 6. Petitioners dispute that Mr. Record said he and Ms. Tanner were attempting to hide their meeting, and the cited testimony does not state this. Rather, Mr. Record stated that he and Ms. Tanner had been told to “manage perception. So the only thing we could think of to manage perception was to not be seen together.” As for the particular meeting they had on February 19, 2010, he explained, “And it wasn’t the sort of thing where I would set up a conference room, try to find one available. I was sort of an impulsive thing. I was already going down to see Mr. Mather. She was already going down to take a break. It wasn’t meant to be a big thing.” Record R. 073:19-21.

6. Respondent states, “The Claimants allege this lack of visibility made it impossible for the witness to clearly see if the Claimants were undressed in the file room.” Resp. Br. at 6. This statement is incorrect to the extent it suggests Petitioners’ argument is that Ms. Hanson could not have seen them undressed. Actually, Petitioners are unequivocal that they were not undressed in the file room or even touching. See, e.g., Record Opening Brief Statement of Facts 32-34. The lack of visibility is significant because it makes clear that Ms. Hanson could not have seen what she claims to have seen, and that the other witnesses were lying about the visibility in the room, presumably to make Ms. Hanson’s story more believable.

ARGUMENT

In its Combined Brief of Respondent, the Board argues six points: 1) There is substantial evidence in the record to support the Board’s decision to deny Mr. Record and Ms. Tanner unemployment benefits; 2) Zions had “just cause” to terminate Mr. Record and Ms. Tanner; 3) The Board correctly refused to admit the photographs on appeal; 4) the photographs would not have changed the outcome of the decisions even if they were admitted; 5) the Board was correct in affirming the ALJ’s decision in Mr. Record’s case to exclude Mr. Ratliff as a witness; and 6) Petitioners failed to marshal the evidence in support of their appeal. Petitioners respond to each of these arguments as follows:

A. The Board Incorrectly Refused to Admit the Photographs

Petitioners will respond first to Respondent’s “Point III,” regarding whether the Board correctly refused to admit Petitioners’ new evidence, as this is the point upon which most of the other arguments hinge. Respondent claims that Petitioners could and

should have seen the need for the photographs they seek to introduce, and should have sought to obtain the photographs prior to the hearing on their unemployment claims. Respondent asserts, “The Claimants could have reasonably foreseen testimony regarding the visibility of the room was likely.” Resp. Br. at 15. While it is arguably true that the general visibility across the file room was foreseeable given the information Petitioner had going into their respective unemployment hearings, they could not have reasonably foreseen the need for photographs for several reasons. First, both Mr. Record and Ms. Tanner were told by their respective ALJs prior to their unemployment hearings that the burden of proof rested with Zions, and that they did not need to provide documents that they wanted to request or subpoena to support their positions. Tanner, R. 153, 159; Record, R. 101. *Given that information, they could not have foreseen the need for photographic evidence to impeach Zions’ witnesses.* Second, they could not have foreseen the testimony that the photographs rebut. Specifically, they could not have foreseen that although Ms. Hanson would testify that she could see Mr. Record and Ms. Tanner pulling up their pants when she walked into the file room, which was untrue, that Ms. Hanson would testify truthfully as to where she stood when she walked in the file room (in the doorway) and where Petitioners were at the time (in the back corner of the room, with several sets of shelving between them and the doorway), and that she did not have to bend down to see them. They could also not have foreseen that Ms. Hanson and two other Zions’ witnesses, Mr. Hinds and Ms. Battista, would testify that one can clearly see from the doorway to the back corner of the room despite all of the shelving, which is provably false, but only if one has photographs of the room. Had Petitioners anticipated

that they might need photographs of the room, they could not have anticipated what angles or views of the room and shelving they might have needed. Petitioners knew, of course, where they were and where Ms. Hanson was in the room, but they also knew that one cannot see clearly through all the shelving, and therefore, they could not have reasonably expected that Ms. Hanson would testify truthfully as to where each of them were when she walked in, but testify untruthfully about the view between those locations.

The only case Respondent relies upon to support its argument that the Board should have considered the photographs is *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah 1989). That case is distinguishable from this because in *Grace*, the drug test results that the employer sought to admit after the record closed were in existence at the time of the hearing, but the employer did not submit them because it claimed “it was trying to avoid confidentiality problems and protect [the employee’s] privacy interests.” 776 P.2d at 70. The court in *Grace* found the employer’s arguments to admit the evidence on appeal unpersuasive. In this case, however, the photographic evidence did not exist at the time of the hearing, so the cases are not analogous.

This is apparently an issue of first impression of this court: whether after-acquired evidence that impeaches key witness testimony or goes to the crux of the issues to be decided should be admitted. Respondent suggests that allowing evidence such as the photographs in this case would “make the Department’s requirement to present all relevant evidence at the hearing meaningless.” Resp. Br. at 16. This is not a legitimate argument against allowing the evidence in this case where the issue regarding visibility was addressed, but evidence did not exist at the time of the hearing to prove that the

employer's witnesses were lying, and as explained above, Petitioners could not have foreseen the type of photographic or other evidence that would impeach the adverse witnesses. Petitioners addressed the topic of visibility in the room with their own testimony and a diagram. They could not have foreseen that the witnesses would misrepresent the view in light of the shelving.

Petitioners submit that cases in which parties could obtain evidence that would definitively impeach an adverse witness after a hearing would be rare (as indicated by the fact that there is no case law on point), such that allowing the photographic evidence in this case would not create any risk of a flood of similar requests for a reversal or rehearing. To the extent that other such situations may arise, however, Petitioners maintain that establishing a precedent that favors admissibility of evidence obtained after a hearing that proves the adverse party lied about a crucial issue addressed in the hearing is a rule that promotes "elementary fairness," which theoretically is the goal of the unemployment hearing process. 776 P.2d at 70. To the contrary, not allowing such evidence under any circumstances creates an incentive for parties to lie with impunity, and even to get additional witnesses to lie. When the party lying is the employer, such as in this case, this puts the employee at an enormous disadvantage, because it would be a rare judge that would believe a single employee over several employer witnesses with the same story, particularly ones with titles like Vice President and Director of Human Resources as in this case. The possibility that an adverse ruling can be overturned if a party obtains proof that testimony is false would be a way to prevent such conduct, providing an incentive for parties to tell the truth in the first place.

B. In Light of the Photographs, there is not Substantial Evidence to Support a Finding of Just Cause for Petitioners' Termination

Regarding Respondent's first argument, that there is substantial evidence in the record to support the Board's decision, this is a "Catch-22" for Petitioners, since is only correct if the photographic evidence of the file room is excluded. Respondent's analysis on this point argues that it is for the Board to assess conflicting evidence. Petitioner's argument, however, is that if the photographic evidence is allowed, it resolves the conflict between the evidence by proving that Zions' witnesses were not truthful during the unemployment hearing. The photographs show that Ms. Hanson could not have seen what she claimed to have seen, and Mr. Hinds and Ms. Battista were not truthful about the view from the doorway to the back corner of the room. The evidence is not appropriately characterized as simply "conflicting" evidence from which the fact-finder can choose which to believe, as Respondent describes the evidence in this case, when one party's evidence can be proven to be incorrect.

Respondent argues that even if Petitioners are correct that Ms. Hanson "could not see who was in the file room or their state of dress," there was "just cause" for Petitioners' termination because they were in the file room "after having been told not to have any non work related contact with each other at the work place." Resp. Br. at 10. This argument is incorrect, as there is no evidence that Petitioners had "non work related contact" with each other, other than Ms. Hanson's testimony, which the photographs prove to be unreliable.

Respondent's Point II is dedicated to the "just cause" analysis, and maintains that Zions established culpability, knowledge, and control necessary to show just cause. Resp. Br. at 11-12. This argument, however, is based on the finding that Ms. Hanson saw Petitioners undressed in the file room. For instance, Respondent argued, "The Claimants knew, or should have known, that being alone together in a dark unused file room during work hours in a state of partial undress was inappropriate behavior" Resp. Br. at 12. Petitioners agree that had they been undressed in the file room together, just cause for their termination would be established. Given that they were not, and that they have photographic evidence that proves that the only "witness" to this event was either mistaken or untruthful, just cause has not been established.

Respondent's Point VI, that the photographs would not change the outcome here, is inexplicable. Respondent argues that since the ALJs found Ms. Hanson to be more credible than Petitioners, then even if the photographs were allowed, the Board would still give more weight to Ms. Hanson's claim that she saw them unclothed. Resp. Br. at 19. This does not make sense, given that in the photograph submitted, Mr. Record was sitting exactly where he was sitting when Ms. Hanson walked in the room, and Ms. Tanner, who is Ms. Hanson's height, took the photograph (and Ms. Hanson testified that she did not have to look down in order to see Petitioners when she walked in the room). Respondent suggests there is nothing that Petitioners can say or submit that would shake the Board's faith in Ms. Hanson, which does not suggest a fair hearing process.

Respondent also suggests that the photographic evidence is flawed because it "captures a view of the room from one fixed point." Importantly, when they took the still

photographs submitted to the Board, Petitioners also took videos of the file room that provide a more comprehensive view of the shelving in the room and provide even better evidence that Zions' witnesses were lying, but did not know how to present such evidence to the Board. It does not seem to matter, given that no matter what the photographs show, the Board and Zions argue that they are flawed somehow. Petitioners believe that the photographs submitted prove that the view is so clearly obstructed from the doorway to the back corner of the room that the Board should have disregarded the testimony of Ms. Hanson, Ms. Battista, and Mr. Hinds. If this Court disagrees, and believes that more testimony should be allowed about whether Ms. Hanson "maneuvered her head to a point where she could see clearly through the shelves" (even though that is not possible under the circumstances), the Court should remand the case for another hearing on that point rather than refuse to accept the evidence.

C. Mr. Record Should Have Been Allowed to Introduce Mr. Ratliff as a Witness to Impeach Mr. Hinds' Testimony

Respondent argues that the Board correctly affirmed the ALJ's decision during Mr. Record's hearing to exclude the testimony of Mr. Ratliff. Mr. Record wanted to use Mr. Ratliff as a witness to discredit Mr. Hinds concerning his testimony about the meeting he had with Mr. Record on February 19, at which both Mr. Hinds and Mr. Ratliff were present. Respondent argues that because the conversation on February 19 is not relevant to whether Zions had just cause to terminate Mr. Record, it was not an error to exclude Mr. Ratliff. Respondent's argument, however, is incorrect given the basic principle that a fact-finder can disregard the entire testimony of a witness if the witness is

found to willfully testify falsely on any point. *See, e.g., State v. Dunn*, 850 P.2d 1201, 1228 (Utah 1993).

In this case, although the ALJ told Mr. Record that it was Zions' burden of proof to show it had just cause to terminate him, the ALJ nonetheless accepted Zions' witnesses' testimony uncritically. The fact that the ALJ also failed to allow Mr. Record the opportunity to rely on documents or witnesses that would cast doubt on the credibility of one of these witnesses put him a severe disadvantage.

D. Petitioners Met Their Burden of Marshaling the Evidence

Finally, Respondent argues that Petitioners failed to marshal the evidence to show that the Board's findings are clearly erroneous. Petitioners disagree. The evidence supporting the Board's finding that Petitioners were terminated for just cause is the testimony of Ms. Hanson stating that she saw Petitioners undressed together in a file room, and the testimony of Mr. Hinds and Ms. Battista regarding the view in that room. Petitioners included cites to this evidence, which was relied upon by the ALJs, in their Opening Briefs. Thus, they included all the material evidence relied upon by the ALJs in making a decision that Zions established just cause for their termination.

The photographic evidence obtained after the hearing, however, shows that Ms. Hanson could not have seen Petitioners unclothed in the back corner of the room from the doorway in which she stood, and that Mr. Hinds and Ms. Battista incorrectly stated that the view across the room from the doorway to the back corner was clear. In light of the photographs, the ALJs reliance upon the testimony of Ms. Hanson, Mr. Hinds, and Ms. Battista was clearly erroneous, as was the conclusions they reached based upon this

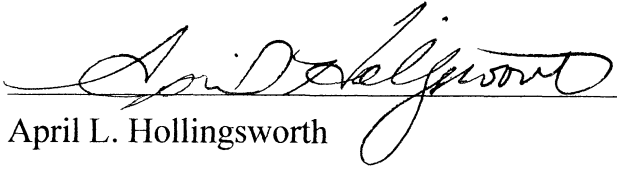
testimony. It is not clear what evidence Respondent maintains Petitioners failed to include as part of their burden to marshal the evidence, and Petitioners dispute that this is a legitimate concern.

CONCLUSION

For the foregoing reasons, Mr. Record and Ms. Tanner respectfully request that the decisions of the ALJ and the Workforce Appeals Board be reversed and that they be awarded unemployment benefits. In the alternative, Petitioners request that their cases be remanded for an additional hearing to address the new evidence, as well as evidence that was improperly excluded from the first hearing.

DATED this 14th day of March, 2011.

HOLLINGSWORTH LAW OFFICE, LLC



April L. Hollingsworth
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of March, 2011, a copy of the foregoing **PETITIONERS' REPLY BRIEF** was hand-delivered to:

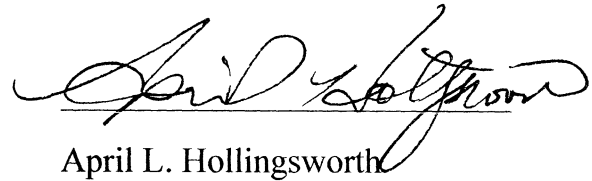
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FILED

Utah Court of Appeals

JAN 04 1994


Mary T. Noonan
Clerk of the Court

**UTAH COURT OF APPEALS
BRIEF**

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

ENVIROTECH CORPORATION, a
Delaware corporation, d/b/a
EIMCO PROCESS EQUIPMENT
COMPANY,

Plaintiff, Appellee
and Cross-Appellant,

vs.

GERALD A. CALLAHAN, an
individual,

Defendant, Appellant
and Cross-Appellee,

G & G STEEL CORPORATION,
a Utah corporation, and GLEN
O. HANSEN, an individual,
GLEN O. HANSEN, an individual,

Defendants and
Cross-Appellees

and

C-H INDUSTRIES, INC., a Utah
corporation,

Intervenor.

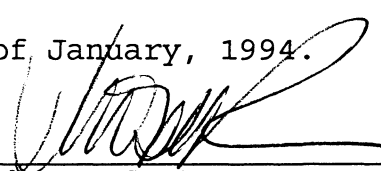
TRANSMITTAL OF
RECENT CASE LAW

Case No. 920645-CA

Priority No. 15

Appellee and Cross-appellant Envirotech (d.b.a. Eimco Process and Equipment Company, hereinafter EIMCO) hereby submits for consideration, a copy of the case MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993) which has recently come to light. EIMCO's position is that MAI clearly contravenes the interpretation of Trade Secret law advanced by Appellant G&G Steel at oral argument (G&G). Contrary to G&G's arguments, both Technical information and Customer lists are protectible interests in the 9th circuit, whether or not fixed in any tangible form. Protection by an injunction against improper use of such information is proper. The law in Utah and the 10th circuit is consistent with this interpretation, as held by the trial court. See Addendum 2 at pages 12-18, Record pages 2799-2805).

DATED this 3rd day of January, 1994.



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CERTIFICATE OF SERVICE

This certifies that true and correct copies of the
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