

1981

Mark T. Haywood v. The Industrial Commission of Utah, Department of Employment Security : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

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MARK T. HAYWOOD,

:

Plaintiff,

:

vs.

:

Case No. 17372

THE INDUSTRIAL COMMISSION
OF UTAH, DEPARTMENT OF
EMPLOYMENT SECURITY,

:

:

Defendant.

:

-----000000000-----

BRIEF OF APPELLANT

-----000000000-----

Appeal from a decision of the Appeals Board, Industrial Commission
of Utah, Department of Employment Security.

RAY S. STODDARD
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174 Social Hall Avenue
Salt Lake City, Utah 84147

FILE

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IN THE SUPREME COURT
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MARK T. HAYWOOD,

Plaintiff

vs.

Case No. 17373

THE INDUSTRIAL COMMISSION
OF UTAH, DEPARTMENT OF
EMPLOYMENT SECURITY,

Defendant

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BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

On December 7, 1979, the claimant filed a request to reopen his claim for unemployment benefits with the Industrial Commission. On this claim he stated that his last employer was Gibbons & Reed and that his last period of employment was from June 4, 1979, to October 19, 1979. The evidence, however, indicated that the claimant worked for Monroc from October 22, 1979, to December 5, 1979.

The claimant received 18 weekly payments in the amount of \$89.00 each for a total of \$1,602.

DISPOSITION IN THE LOWER COURT

On August 21, 1979, the Appeals Referee, Industrial Commission of Utah, Department of Employment Security found: (1) that the

claimant had voluntarily left his employment with Monroc without good cause; (2) that the claimant had knowingly withheld information concerning the circumstances of his leaving Monroc in order to obtain benefits to which he was not entitled; and (3) that the claimant had knowingly withheld information concerning his work and earnings during the week ending December 8, 1979.

On the basis of these findings of fact the appeals referee held that the claimant had been overpaid in the amount of \$3,204.

On September 25, 1979, the Appeals Board, Industrial Commission of Utah, Department of Employment Security, upheld the decision of the Appeals Referee.

RELIEF SOUGHT ON APPEAL

Claimant seeks to have the amount of the "overpayment reduced from \$3,204 to \$1,691. In the alternative the claimant seeks to have this matter remanded to the appeals referee for additional findings of fact.

STATEMENT OF FACTS

On May 13, 1979, the claimant filed a claim for unemployment benefit with the Department of Employment Security. Before receiving any benefits he found another job. The claimant worked for Gibbons & Reed from June 4, 1979, until October 19, 1979. On October 22, 1979, the claimant obtained employment with Monroc.

On December 5, 1979, the claimant walked off his job at Monroc. The incident that precipitated his walking off the job was his supervisor's refusal to let him leave work early to do some Christmas shopping when he had let other employees leave

early, on other occasions, to do their Christmas shopping. The testimony also indicated that the claimant was bothered by a number of other problems at the job.

The claimant's testimony also indicated that a refusal to work overtime may have been involved but the appeals referee did not go into this issue. The claimant testified that he left work at 4:30 or 5:00 P.M. and that the supervisor wanted him to stay and work on a job that would not start for two or three hours.

The claimant testified that after cooling down he called his supervisor the next morning and asked him whether he wanted him to come to work and was told, "No, you walked off the job."

Exhibit 5, which is a report of work and earning from Monroc, indicates that claimant worked for Monroc on December 3, 4 and 5, 1979. Exhibit 6, which is a verification of employment from Monroc, indicates that the was seperated from Monroc on December 6, 1979.

On December 7, 1979, the claimant filed a request to reopen his claim for unemployment benefits. On this claim he stated that his last employer was Gibbons & Reed. The claimant also filed a claim for the week ending December 8, 1979, on which he did not disclose that he had worked during that week.

The claimant received 18 weekly benefit payments in the amount of \$89.00 each for a total of \$1,602.

POINT 1

THE APPEALS REFEREE DID NOT MAKE A FINDING OF FACT ON THE ISSUE OF HOW MUCH OF THE AMOUNT RECEIVED BY THE CLAIMANT WAS RECEIVED BY REASON OF HIS FAILURE TO REPORT A MATERIAL FACT.

THIS ISSUE SHOULD HAVE BEEN DECIDED BY AN EXERCISE OF JUDICIAL DISCRETION.

Section 35-4-5(e) provides that "...each individual found in violation of this subsection shall pay to the commission twice the amount received by reason of the false representation or statement or failure to report a material fact."

Thus, in order to assess the claimant twice the amount that he received the appeals referee should have found first, that he failed to report a material fact, and second, that he received all 18 payments because of that failure to report a material fact. The appeals referee made no finding of fact on the latter issue.

Since the appeals referee made no finding of fact on the issue of much of the amount received by the claimant was received by reason of the failure to report a material fact we are left to speculate at his reason for holding that claimant was overpaid by an amount equal to twice the amount actually paid to him. Presumably, however, the appeals referee reasoned: (1) that the claimant voluntarily left his employment with Monroc; (2) that therefore the claimant was ineligible for benefits until he had earned an amount equal to at least six times the amount of his weekly benefit; (3) that the claimant did not perform such work; (4) that therefore all of the payments made to the claimant were the result of his failure to provide material information.

The problem with this logic is that a person who voluntarily leaves his employment without good cause is not automatically disqualified for any given length of time. He is disqualified only until he "performs work in bona fide covered services and earned wages for such services equal to at least six times the claimants weekly benefit amount." (Section 35-4-5(a), Utah Code Annotated, 1953). Thus if section 35-4-5(e) and Section 35-4-5(a) are to be read together there and if there is no definite period of disqualification provided by Section 35-4-5(a) there is obviously an area where judicial discretion could be and should be exercised. This is especially true since Section 35-4-5(a) displays an obvious concern for the equities of the individual situation. The section provides: "The commission shall ... consider for the purposes of this act, the reasonableness of the claimants actions and the extent to which the actions evidence a genuine continuing attachment to the labor market in reaching a determination of whether the ineligibility of a claimant is contrary to equity and good conscience." (Emphasis added). Thus section 35-4-5(E) is very different from Section 35-4-6(d) which is the section considered in Decker v. Industrial Commission, 533 P.2d 898 (1975) and Diprizio v. Industrial Commission, 572 p. 2d 679 (1977).

POINT II

IF SECTION 35-4-5(e), UCA PROVIDES THAT ANY PERSON WHO VOLUNTARILY LEAVES WORK WITHOUT CAUSE AND WITHHOLDS THAT INFORMATION FROM THE INDUSTRIAL COMMISSION MUST AUTOMATICALLY REPAY THE

COMMISSION AN AMOUNT TWICE THAT RECEIVED BY THE PERSON DURING HIS TERM OF UNEMPLOYMENT THAT SECTION WOULD THEN VIOLATE CLAIMANTS RIGHT TO EQUAL PROTECTION.

It is well established that any legislative act which makes a classification of disclassification which is rational, related to a legitimate governmental purpose satisfies the exigencies of equal protection. The question here, however, whether the legislature singled out fraud concerning the reason for a persons leaving work where the person left work without good cause for a much harsher punishment than any other type of fraud, and, if so, why.

In the instant case, for example, if the hearing examiner found that the claimant had good cause to leave work the penalty would have been substantially less harsh. At most he would have had to repay the commission the amount that he actually received plus \$89.00. Why should a harsh penalty hang not on the nature of the fraud committed but on the decision as to whether the claimant left work without cause.

Or consider the hypothetical situation where the claimant leaves work without cause, fails to report that material fact to the commission and obtains unemployment benefits, obtains another job without reporting his work or earnings and continues to collect benefits. His fraud would obviously be greater than that committed in the present case but because he "performed work, work in a bona fide covered service and earned wages for such services equal to at least six times the claimants weekly benefit amount" he would have purged the disqualification under Section 35-4-5(a) and therefore be subject

to a lesser panalty than he had simply collected benfits without obtaining a job.

It would seem unlikely that the legislature intended to impose such a harsh and arbitrary punishment on this one type of fraud, that of obtaining benefits by fraud as to the claimant's leaving work where the cliamant left work without cuase, and if the legislature did so intend that provision clearly violates the claimant's right to equal protection.

POINT III

THE FACTS IN THIS CASE DO NOT AS A MATTER OF LAW SUPPORT THE FINDING OF FACT THAT THE CLAIMANT LEFT WORK WITHOUT GOOD CAUSE.

The facts show that the claimant walked off the job with Monroc after a dispute with his supervisor about whether he should be allowed to leave early to go Christmas shopping. The claimant testified that after cooling off he called reconsidered his action and called his supervisor the next morning and asked him whether he wanted him to come for work and was told, "No you walked off the job."

In a simial case, Powers v. Chizek, 285 N.W. 2d501 (Neb. 1979) the claimant walked off her job before the end of her shift after a dispute with her supervisor and failed to report for her next shift both without good cause. The court held that this did not contitute leaving work voluntarily" within the Unemployment Security Law."

The language of the Nebraska statute is very similar to the language in the Utah statute.

Also in Sevastino v. State Board of Review, 240A21 172 (NJ, 1968) an employee walked off the job after he got into a dispute with another employee. When he returned to work the next morning, he found that he had been replaced. The court remanded the matter for a hearing on the matter of whether claimant quit or was voluntarily discharged. In doing so, the Court said: "It seems plain . . . that the legislature, in adopting the language 'has left work' in the disqualifications section . . . was undoubtedly mindful of a distinction between quitting employment and being discharged. Employees frequently leave work temporarily for some fleeting mental irritation or 'in a huff' occasioned by more or less of the frustrations attending commercial life, without intending to quit. Although such an individual may be said to have left work voluntarily and without cause attributable to work, thus engaging in conduct which might justify a discharge by the employer, nevertheless, such a party may not be said to have 'left work' in the meaning of having severed his employment with an intention not to return.

In the present case, the referee found that the claimant quit work on December 5, 1979, but he used the term quit work in the sense of "left work" without any finding as to whether the claimant intended to sever the employment relationship. The claimant's statements clearly indicate that he wanted to return to work the next day but was told not to do so.

Also Exhibit 5 and 6 indicate that claimant worked on December 3, 4 and 5, 1979 and that he was separated on December 6, 1979 because he "quit". The fact that he is listed as having quit the day after he walked off the job would seem to indicate that he was really fired for having walked off of the job.

POINT IV

IN FINDING THAT THE CLAIMANT LEFT WORK VOLUNTARILY WITHOUT GOOD CAUSE THE APPEALS REFEREE FAILED TO CONSIDER THE WHETHER THE CLAIMANTS ACTIONS EVIDENCED A GENUINE ATTACHMENT TO THE LABOR MARKET: AND IN FACT THE CLAIMANTS ACTIONS EVIDENCED GENUINE ATTACHEMNT TO THE LABOR MARKET.

Section 35-4-5(a) states "The commission shall consider . . . for the purposes of this act, the reasonableness of the claimant's actions, and the extent to which the actions evidence a genuine continuing attachemtn to the labor market in reaching a determination of whether the ineligibility of a claimant is contrary to equity and good conscience.

The appeals referee clearly considered only the reasonableness of claimants actions in leaving the job at Monroc. He states that: "The claimant has not shown that the circumstances were so compelling as to leave no alternative but to risk a long period of unemployment by leaving work without notice of without prospects of other work."

Section 35-4-5(a), however, clearly requires that the referee consider the genuineness of the claimants attachment to the job market. This provision is obviously aimed at protecting the diligent job seeker who, upon finding himself without a job, goes out and gets a job that doesn't work out. It would be extremely unfair to tell this person that he could quit that job, after finding that he made a mistake to take it in the first place, only at the risk of losing his eligibiltiy for unemployemnt benefits. Also such a policy would tend to discourage people from taking a job.

In the present case, the referee should have considered the claimant's past record of promptly obtaining employment when he found himself without a job and the relative shortness of his term of

This is especially true in view of the harshness of this penalty.

Record shows that the claimant filed his original claim for benefits in May 18, 1979, but that he found a job before he received any benefits; and that after losing his job with Gibbons and Reed He obtained a job with Monroc within three days. It also shows that he worked for Monroc for the relatively short period of six weeks.

In view of these facts, the claimants record indicated a genuine attachment to the labor market even if his action in leaving his job at Monroc was not "reasonable."

POINT V

THE FACTS IN THE RECORD DO NOT SUPPORT THE APPEALS REFEREES FINDING THAT THE CLAIMANT KNOWINGLY WITHHELD MATERIAL INFORMATION CONCERNING HIS VOLUNTARILY LEAVING AT MONROC.

The fact in the record show only that the claimant knowingly withheld the information that he had been employed by Monroc. There is nothing in the record that indicates that any questions were asked of the claimant concerning the reasons for his quitting Monroc or that he withheld information on that issue.

The referee seems to have based his decisions on this issue on the alleged fact that the Unemployment Insurance Handbook explained that unemployment benefits may be denied to a claimant who voluntarily left work without good cause. This document was not introduced into evidence; the claimant received it 6 months prior to the time that he filed the claim; he testified that he did not read it; and the mere fact that a person might lose his unemployment benefits if he leaves work voluntarily does not without more, necessarily inform a person that he must

disclose the circumstances of his leaving work.

CONCLUSION

The appeals referee erred in holding (1) that the claimant voluntarily left work without good cause; (2) that claimant knowingly withheld information concerning the circumstances of his leaving his employment at Monroc; (3) That person who leaves work without cause and withholds that information from the commission must automatically repay the commission a sum equal to twice the amount paid to the claimant. The Court should reduce the amount of overpayment to \$1602.00 which is the amount actually paid to claimant plus \$89.00 which is the amount obtained by the fraud concerning his earnings during the week ending December 8, 1979. In the alternative this matter should be remanded for additional findings of fact with instructions to: (1) Consider the claimants work record and the length of his employment with Monroc and the questions of whether he intended to sever his employment with Monroc when he walked off the job in determining whether he left his employment without cause and (2) that the appeals referee should exercise judicial discretion and consider whether the penalty to be assessed would be inequitable and contrary to good conscience in determining what amount of the benefits paid to the claimant were obtained by fraud.

DATED this 17th day of June, 1981.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing Brief of Appellant on Floyd G. Astin and K. Allan Zabel, attorneys for defendant-respondent, 174 Social Hall Avenue, Salt Lake City, Utah, by hand delivering two copies on this 17th day of June, 1981, to their office.

RAY S. STODDARD

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CASES CITED

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<i>Davis, Administrative Law Treatise</i> , Volume 2, Section 16.02	10

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARK T. HAYWOOD,

Plaintiff,

vs.

Case No. 17372

THE INDUSTRIAL COMMISSION
OF UTAH, DEPARTMENT OF
EMPLOYMENT SECURITY

Defendant.

DEFENDANT'S BRIEF

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, seeking judicial review of a decision of the Board of Review of the Industrial Commission of Utah, which affirmed the decision of an Appeal Referee which denied benefits to the Plaintiff, (hereinafter referred to as claimant), effective December 2, 1979, and continuing until he has earned wages equal to six times his weekly benefit amount, pursuant to Section 35-4-5(a), Utah Code Annotated, 1953, as amended (1979 Pocket Supplement), on the grounds the claimant voluntarily left work without good cause; and also denied benefits to the claimant for the weeks ended December 8, 1979, through April 5, 1980, and for 49 additional weeks beginning May 25, 1980, and ending May 2, 1981, pursuant to Section 35-4-5(e), Utah Code Annotated 1953, as amended (1979 Pocket Supplement), on the grounds the claimant knowingly withheld material information with regard to work and earnings and voluntarily quit to receive benefits to which he was not entitled.

DISPOSITION BELOW

The claimant was disqualified from receiving unemployment benefits and assessed an overpayment of \$3,204.00 pursuant to Sections 35-4-5(a) and 35-4-5(e), Utah Code Annotated 1953, as amended, (1979 Pocket Supplement), by decision of a Department Representative, dated May 21, 1980. Claimant appealed the decision which was affirmed by an Appeal Referee in decision no. 80-A-2081, dated August 21, 1980. Upon further appeal the decision of the Appeal Referee was affirmed by the Board of Review of the Industrial Commission of Utah in case no. 80-A-2081, 80-BR-264, dated September 25, 1980, and issued October 7, 1980.

RELIEF SOUGHT ON APPEAL

Plaintiff/Claimant seeks reduction of the overpayment affirmed by the Board of Review from \$3,204 to \$1,691 or, in the alternative, remand to the Appeal Referee to make additional findings of fact. Defendant seeks affirmance of the decision of the Board of Review.

STATEMENT OF FACTS

Although there are minor inaccuracies in claimant's Statement of Facts, it is substantially correct as to the pertinent facts of his work and earnings with and separation from Monroc.

It should be noted that the claimant did not file for or receive unemployment benefits while working for Gibbons and Reed from June 4, 1979, to October 19, 1979, nor while working for Monroc from October 22, 1979, until his last week of employment at Monroc. (R.00006, 00012, 00013) However, during his last week of employment, the week ended December 8, 1979, the claimant worked three days, December 3, 4, and 5, and earned \$183.30. R.00033 He separated under the circumstances outlined in Plaintiff's Brief, Statement of Facts, page 3. When claimant sought to reopen his claim for benefits during the week ended December 8, 1979, he failed to report his work and earnings for that week or that he had worked at all for Monroc. Plaintiff's Brief, page 3, R.00012, 00019. Claimant also failed to report his earnings of \$183.30 on his claim for the week ended December 8, 1979; indeed, he certified "None" on the claim form in the place where it calls for Total Gross Earnings. R.00035 He also certified that he had not refused work during the week. R.00035

ARGUMENT

POINT I

THAT IN REVIEWING DETERMINATIONS 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*, Utah, 533 P. 2d 898 (1975); *Whitcome v. Department of Employment Security, Industrial Commission of Utah*, Utah, 564 P. 2d 1116 (1977).

POINT II

THE COMMISSION DID NOT ERR IN DETERMINING THAT THE CLAIMANT INTENTIONALLY WITHHELD INFORMATION OF HIS WORK AND EARNINGS FOR THE WEEK ENDED DECEMBER 8, 1979, IN ORDER TO OBTAIN BENEFITS TO WHICH HE WAS NOT ENTITLED.

Section 35-4-5(e), Utah Code Annotated 1953, as amended (1979 Pocket Supplement) provides as follows:

An individual shall be ineligible for benefits or for purposes of establishing a waiting period:

(e) For each week with respect to which the claimant 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 an additional 13 weeks for the last week the statement or representation was made or fact withheld and six weeks for each week thereafter; such additional weeks not to exceed 49 weeks. The additional period shall commence on the Sunday following the issuance of a determination finding the claimant in violation of this subsection. In addition, each individual found in violation of this subsection shall pay to the commission twice the amount received by reason of the false representation or statement or failure to report a material fact. This amount shall be collectible by civil action or warrant in the manner provided in section 34-4-17 (c) and (e). A claimant shall be ineligible for future benefits or waiting week credit if any amount owed under this subsection remains unpaid. One-half of the amount recovered in each case shall be repaid to the unemployment compensation fund, pursuant to section 35-6-5 (d), and the balance shall be regarded as any other penalty under this act.

Determinations under this subsection shall be made only upon a sworn written admission of the claimant or after due notice and recorded hearing. If a claimant waives the recorded hearing a determination shall be made based upon all the facts which the commission, exercising due diligence, has obtained. Determinations by the commission shall be appealable in the manner provided by this act for appeals from other benefit determinations.

The evidence of record in this matter is clear and convincing. The claimant worked at least two days (R.00021) and earned \$183.30 (R.00033) during the week ended December 8, 1979. Despite the knowledge of his work and earnings claimant certified on his claim for that week that his total gross earnings were "None." R.00035 Claimant's testimony at R.00020 that he thought he was filling out a claim for the following week is clearly without merit in view of the week-ending date prominently displayed on the claim card and also the fact that he signed the claim prior to the conclusion of the following week. R.00035 This Court has previously stated that intention to defraud is inherent in the claim itself when such claim contains false

statements and fails to set forth material information required by statute. *Martinez v. Industrial Commission*, Utah, 576 P. 2d 1295 (1978). 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, 572 P. 2d 1364 (1977). The claimant offered no other explanation for his false claim; however, the record shows the claimant to have been evasive whenever the Appeal Referee inquired into the claimant's understanding of his responsibilities when filing for unemployment insurance benefits. (See R. 00019, 00020, 00021, 00025, 00026)

Claimant apparently does not dispute the finding of fraud with respect to his failure to report work and earnings for the week ended December 8, 1979. (See Plaintiff's Brief, pages 2 and 11). The issues thus before the Court are: (1) did the claimant voluntarily quit work without good cause under the terms of Section 35-4-5(a), Utah Code Annotated, 1953 (1979 Pocket Supplement); and, (2) if so, did the claimant intentionally withhold the material information of his quit in order to obtain unemployment benefits to which he was not entitled.

POINT III

THE COMMISSION DID NOT ERR IN DETERMINING THAT CLAIMANT VOLUNTARILY LEFT WORK WITHOUT GOOD CAUSE.

Claimant contends that he did not intend to quit his job, but rather, that he walked off the jobsite, after working a full eight hours, because of a dispute with his supervisor, intending to return to work the next day. Plaintiff's Brief, page 7, R. 00009, 00010, 00024. However, the decision of the Commission that claimant voluntarily quit his job is supported by substantial evidence in the record. At several points in the hearing before the Appeal Referee claimant referred to his termination as a quit:

- Referee: And they also reported that you earned during the week of December 2nd to the 8th of '79 a \$183.30. Did you work for Monroc during the week of December 2nd to the 8th of '79?
- Mr. Haywood: Well, I worked for them, but I don't know when—I don't know when I quit. R.00018

Referee: Well, I don't have the answer. What I'm asking you, really; if you feel like it's faulty, I would do that. If you agree that this is correct, I'll just—

Mr. Haywood: Well, I—the thing is, it's been so long ago, I don't even remember exactly when I quit. I know it was right before Christmas. R.00019

Mr. Haywood: Well, I think that's wrong, because I remember going to work Monday—on a Monday, and I think it was—okay, Monday—let's see—no, it was a Tuesday, and I was upset, so I called—I left the job is what I did. I got mad and I left the job.

Referee: Did you give them notice that you were quitting?

Mr. Haywood: No, they don't give me notice that they are going to fire me.

Referee: Okay. I'm just suggesting—

Mr. Haywood: No, I didn't give them notice. See, it was a—I'd had personal conflict with the boss there, and there was a lot of things that were happening on that job that I didn't—well, it wasn't the way he ran it, it was just that the job was very unsafe, and just one day I was thinking about it, and I had words with him and he just wouldn't talk to me, so I just got in my car and left. R.000021

The claimant's testimony that he quit his job is also supported by the claimant's appeal to the Board of Review wherein he stated:

I testified that I left Monroc because the job was unsafe. I also testified how the foreman was only interested in getting the job done no matter how many safety precautions that he might elect to overlook. **The events the night that I left were the last draw as far as that job was concerned.** (Emphasis added.) R.00009, 00010

The events of that night, when the claimant left work, were explained by him to the Appeal Referee in the following manner:

Referee: I mean, what happened—did you walk off the job? Did you tell them you were quitting? What happened?

Mr. Haywood: Oh, no. Not then, no. It wasn't until later. It wasn't until several days later. And I want to ask him—I think what I wanted to do that night was to go shopping, Christmas shopping, or something. And, you know—well, he said, 'I got to pour this one bed.'

You know, and they wasn't going to pour for about three hours. They had plenty of people, and he just, you know, he didn't stand there and explain to me or nothing. He just said, 'No, you got to pour the bed,' and he turned around and walked off . . .

Referee: Okay. What happened to cause you to quit your job?

Mr. Haywood: Well, I just—when he did that—when he told me, you know, 'you got to pour that bed,' and it was about 4:30 or 5:00 o'clock in the afternoon, and I just—everything hit me at once, **and I decided that the job wasn't worth it.** It wasn't worth the problems they were having, you know, with doing things in a haphazard manner and putting up with a man who didn't care about nobody but himself. (Emphasis added) R.00023, 00024

In the face of such evidence the Appeal Referee and Board of Review correctly rejected the claimant's later self-serving testimony (R.00024) and subsequent contention (Plaintiff's Brief, pages 7-8) that he did not intend to quit.

Claimant refers in his Brief to two cases from other jurisdictions concerning voluntary quits: *Powers v. Chizel*, 204 Neb. 759, 285 N. W. 2d 501 (1979); and *Savastano v. State Board of Review*, 99 N. J. Super. 397, 240 A. 2d 172 (1968). Defendant agrees with the principle for which these cases stand: that an employee who leaves work temporarily for some fleeting physical or mental irritation may not intend to sever his employment relationship. The Nebraska Supreme Court in *Powers* stated that there must be additional evidence indicating the claimant's intent to quit before a disqualification would be in order when a claimant simply walks off the job. 285 N. W. 2d, at page 504. Although the facts cited by the Court in *Powers* suggest that the conclusion of the Court was erroneous, it is apparent from the record in the instant case that such additional evidence is ample, as already recited herein. Claimant's contention that his phone call to the employer the next day evidences his lack of intent to quit is without merit. Had the claimant intended to return to work, it is logical that he would have reported on the jobsite at starting time rather than merely calling.

The claimant's specific testimony concerning his intent, although basically vague and evasive, suggests that he later changed his mind after walking off the job.

Referee: When you left the job that evening, were you under the impression that you quit your job?

Mr. Haywood: No. I don't know what was going through my mind. **All I know is that 10:00 or 11:00 o'clock that night, I started thinking, you know, that I did—because I was mad . . .** (Emphasis added) R.00024

Although the above obviously self-serving testimony implies that the claimant did not intend to sever his employment relationship, it is inconsistent with claimant's many statements that he quit or that he decided "... the job wasn't worth it." In view of the entire record in this matter the commission properly concluded that the claimant quit his job.

One final matter concerning the claimant's quit requires comment. Although the claimant testified he quit because of alleged unsafe working conditions, there is no evidence that he made any attempt to have management correct the problems or that he reported the problems to OSHA. This Court has previously held that an employee with grievances must indicate an effort to work out the problems of which he complains, unless he can demonstrate that such efforts would be futile. *Denby v. Board of Review of the Industrial Commission of Utah*, Utah, 567 P. 2d 626 (1977)

POINT IV

THE CLAIMANT WAS NOT ENTITLED TO BENEFITS BASED ON CONSIDERATIONS OF EQUITY AND GOOD CONSCIENCE

Claimant contends that even if his action in leaving work at Monroc was not "reasonable," the Appeal Referee should have considered the evidence of the claimant's genuine attachment to the labor market. Plaintiff's Brief, page 10.

In considering whether a denial of benefits would be contrary to equity and good conscience, the legislature provided three guidelines: (1) that the allowance of benefits in such cases would be consistent with the purposes of the Employment Security Act; (2) that the claimant's decision to quit work was reasonable under the circumstances; and (3) that the claimant's actions evidence a genuine continuing attachment to the labor market. By use of the

word "and," it appears that the legislature intended these three requirements to be read in the conjunctive, for only by so doing can both purposes of unemployment insurance be adequately met.

It is apparent from the fact that the legislature did not eliminate the "at fault" concept in unemployment cases, that the legislature must have intended a melding or blending of that concept with the purpose of maintaining purchasing power in the community when an individual becomes unemployed by reason of a voluntary quit, but under circumstances that demonstrate the reasonableness of the claimant's decision to quit and also his genuine continuing attachment to the labor market. This exception to the disqualification, however, should not be construed too broadly so as to do damage to the long-standing principle that the claimant's actions must be motivated by circumstances or conditions beyond his control. The interpretation of "equity and good conscience" should be consistent with the requirement that the unemployment be "caused by external pressures" such as would motivate "a reasonably prudent person, exercising ordinary common sense and prudence," to quit work. *Denby v. Board of Review*, Supra. To our knowledge, no other state has attempted to redefine the voluntary quit disqualification in this manner.

The claimant's action in quitting work was not reasonable, as evidenced by his own admission that after thinking it over, he called the employer the next day and asked if the employer wanted him to report to work. R.00024 Further, the claimant made no effort to resolve his differences with the employer prior to quitting. Therefore, claimant has failed to show that his quit was motivated by circumstances or conditions beyond his control. Such being the case, the claimant has not met all of the requirements established by the legislature for application of the principle of equity and good conscience.

POINT V

THE COMMISSION DID NOT ERR IN DETERMINING THAT THE CLAIMANT KNOWINGLY WITHHELD THE MATERIAL INFORMATION OF HIS VOLUNTARY QUIT, AND THE DECISION IS NOT VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION.

The claimant alleges there is nothing in the record that indicates any questions were asked of him concerning the reasons he quit Monroc. The reason no questions concerning Monroc were asked when the claimant reopened his claim is obvious—he had concealed the fact of his employment and subsequent voluntary quit by not reporting that information to the Department of Employment Security when he filed his request for reopening. R.00012, 00019

The claimant's explanation to the Appeal Referee of why he did not report his employment with Monroc was very vague and ambiguous:

Referee: Was there any reason why you didn't list Monroc on that when you reopened your claim?

Mr. Haywood: I don't know why I didn't.

Referee: Did you understand when you signed this certification that you were certifying that all the information on the form was correct?

Mr. Haywood: Well, all I know is that I had a blue slip from Mon—from Gibbons & Reed.

Referee: Uh, huh.

Mr. Haywood: And, to tell you the truth, I don't—I wasn't really up to—you know—aware of all the rules and regulations. I never—well, okay, I had a blue slip from Snowbird, and I can't remember—I know I had to wait awhile, you know, to get the unemployment benefits, but I don't—I wasn't aware that, you know—I mean, you have a blue slip that says you were laid off, but I don't know why I didn't put—I should have put Monroc down there. R.00019

The claimant further testified that he didn't read the form he was asked to fill out when he reopened his claim.

Referee: Okay. Did you know that when you filled out this form that the form was asking you to list all the jobs you had had since you filed last?

Mr. Haywood: I probably didn't read it. Because if I had read it, I would have put it down.

The claimant's testimony that he filled out a form without reading it is incredible. At the very least, it shows a conscious disregard for his responsibilities when filing for unemployment benefits.

With respect to the claimant's contention that the Appeal Referee failed to make a specific finding of fact as to how much of the overpayment was attributable to the claimant's fraud, it should be noted that the primary reason for requiring findings of fact in administrative proceedings is to facilitate judicial review. 2 *Am. Jur. 2d*, Administrative Law, Section 455; Davis, *Administrative Law Treatise*, Volume 2, Section 16.02. An examination of the Referee's decision shows that he considered all of the weeks for which the claimant filed claims after leaving Monroc to have been fraudulent. This conclusion is evident from the fact that the Appeal Referee assessed the administrative penalty provided in Section 5(e) of the Act to all such weeks.

Claimant further contends that the assessment of fraud for all weeks claimed after a voluntary quit, when a claimant fails to report the quit, is a violation of the Equal Protection Clause of the Constitution. In support of this contention the claimant argues that the harshness of the penalty hangs on whether or not the claimant quit without good cause rather than on the nature of the fraud. Such is simply not the case.

Section 5(e) of the Act, as quoted in Point II hereof, provides that a claimant will be disqualified for each week **with respect to which** he fails to report material information. For that reason all claimants are required to report their last employment and reason for separation therefrom. When such information is reported the issue is adjudicated. If it is determined that the claimant quit without good cause, he is disqualified from receiving benefits until he earns six times his weekly benefit amount in other employment. When a claimant conceals this information and is found eligible for benefits, he receives such benefits by reason of his failure to report material information. A claimant who fails to report his employment and separation, thinking he had good cause for quitting, cannot later avail himself of the defense of simple mistake when he intentionally precluded the Department from making a proper adjudication of the issue by reason of his concealment.

In the instant case the claimant received benefits for 18 weeks, for which he would have been ineligible had he not fraudulently concealed the reason for his unemployment. The 5(e)

penalty is not assessed because the claimant quit work without good cause, but rather, because he intentionally withheld that information and thereby received benefits to which he was not entitled.

The claimant's hypothetical situation wherein an individual quits work without good cause and later obtains new work, without reporting either the quit or the new work, is of no value in the instant matter. Although the hypothetical claimant may purge the disqualification for voluntarily quitting, his failure to report the new work while drawing benefits is itself a fraudulent act which would subject him to the penalty provided in Section 5(e).

The significance of this issue is that in most cases of fraud covering several weeks, there is an act or omission each week, such as in failing to report work and earnings. However, a claimant is required to report a voluntary quit only once, that is when he opens or reopens his claim for benefits. Each week of benefits received by a claimant after a failure to report his quit is directly attributable to his original fraudulent act, and therefore, the fraudulent act is with respect to each such week.

Defendants concede that an overpayment of \$3,204 may be a harsh penalty. However, it is consistent with the plain meaning of the words in Section 5(e), is directly related to the purpose of Section 5(e) to encourage honesty in reporting, *Millet v. Industrial Commission*, Utah, 609 P. 2d 946, 948 (1980), and does not operate in a discriminatory manner toward any individual.

CONCLUSION

The evidence in the instant case is clear and convincing that the claimant knowingly withheld material information of his work and earnings for the week ended December 8, 1979, and his voluntary quit that same week in order to obtain benefits to which he was not entitled. The decision of the Board of Review should therefore be affirmed.

Respectfully submitted this _____ day of July, 1981.

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**BY: _____
K. Allan Zabel**

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that I mailed two copies of the foregoing Defendant's Brief to
RAY S. STODDARD, Attorney for Plaintiff, 1600 South Main Street, Salt Lake City, Utah
84115, this _____ day of July, 1981.

BY: _____
K. Allan Zabel