

1956

# Milton B. Johnson v. Board of Review of the Industrial Commission of Utah : Brief of Petitioner

Utah Supreme Court

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Mark Hammond; Attorney for Petitioner;

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IN THE SUPREME COURT OF THE STATE OF UTAH

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MILTON E. JOHNSON,  
Petitioner,

-vs-

BOARD OF REVIEW OF THE  
INDUSTRIAL COMMISSION  
OF UTAH, Department of  
Employment Security, L.  
STANFORD WOOTON, Appeals  
Referee, MELVIN E. HAMP-  
SHIRE and JOHN C. FORR-  
ESTER, Department Repre-  
sentatives,

Defendants.

Case No.

8553

FILED

DEC 27 1956

Clerk, Supreme Court, Utah

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BRIEF OF PETITIONER

MARK HAMMOND

Attorney for Petitioner

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MARK HAMMOND

Attorney for Petitioner

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MISSION OF UTAH, DE-  
PARTMENT OF EMPLOY-  
MENT SECURITY, et al,

Defendants.

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BRIEF OF PETITIONER

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STATEMENT OF FACTS

This is a suit brought to review the decision of the Board of Review of the Industrial commission of the State of Utah, Department of Employment Security, affirming the rulings of the other defendants denying plaintiff's application for unemployment compensation.

For at least ten years prior to the 30th day of March, 1956 plaintiff was employed by the United States Fuel Company at its coal mine in Hiawatha, Utah, on a regular basis. He was subject to seasonal lay-offs as a result of reduction in operations, but for a period of approximately five years, 1949

through 1954, he worked for the company full time. (Record, pp 13, 19)

During this time, and on the date above mentioned, plaintiff was the owner of approximately 254 acres of land in Emery County, Utah of which about 40 acres was tillable and cultivated. The 40 acres was made up of small scattered tracts of 3 to 5 acres each. The remainder was waste land not good even for grazing livestock. It never produced any income although he has been able to accumulate and maintain seven head of cattle, two sows and their letters and 25 or 30 chickens. All hay and grain produced was fed to the livestock and consumed on the place, and he never sold any products of the farm or the livestock except a little surplus cream from milking a couple of the scrub cows, and this brought about \$3 per week.

There appears to be no question but what plaintiff acquired the "farm" with the hope that he could make his living from it and be self-sustaining, but this dream of independence never materialized (Record, pp 12, 16). His wife and oldest son managed the work on the farm although he participated in and even did what planning was necessary on so few scattered acres (Record, p 18). But this never interfered with his occupat-

ion as a miner, and the farm was operated during the years of full employment just the same as other years. Plaintiff put in 25 to 30 hours a week on the farm (3½ to 4½ hours per day ) mostly irrigating, and he never lost time at the mine on account of his "farming" activities". He did not reside on the farm but lived in the town of Huntington.

On March 31, 1956 plaintiff was involuntarily separated from his employment at the mine in Hiawatha because of a "Reduction of force", and in due course he made his application in proper form for unemployment benefits.

On account of plaintiff's so-called farming operations his application was rejected on the ground that he was "'self-employed' and not 'unemployed'". (Record, p 24). There is no issue that plaintiff was not otherwise eligible for benefits.

### STATEMENT OF POINTS

#### I

The evidence does not support the Finding and Conclusion that Plaintiff (petitioner) was not unemployed.

#### II

The Board of Review erred in affirming the



decision of the Department representatives denying to plaintiff the benefits of the Employment Security Act.

### ARGUMENT

When an applicant has been involuntarily separated from his employment and has complied with the formalities of the statute relative to an application for benefits, and holds himself out as available for work, registers for, and is ready, willing and able to work and actively seeks employment, he is not ineligible because he owns and operates a small farm and derives a part of his livelihood therefrom, not from sale of production, but from its use on the farm.

1. The ultimate question, of course, is whether plaintiff was "unemployed" within the meaning of the Statute. It is provided by Section 35-4-3 (a), U C A 1953 as amended:

"Benefits shall become payable from the fund to any individual who hereafter is or becomes unemployed and eligible for benefits. ..."

He must be both "unemployed" and "eligible". Since there is no question of plaintiff's eligibility, the question is confined to whether he was "unemployed". The Appeals Referee found that "claimant was not unemployed .."

It is significant to note that while the

terms "unemployment" and "employment" are defined in the Act, the term "self-employment" is NOT defined, and is not used in the Act except as a basis for denial of benefits when it is found that there is "customary self-employment" to which the applicant refuses to return when so directed by the commission. (Section 35-4-5 (c), U C A 1953 as amended).

Section 35-4-22, Subsection (j) (1) U C A 1953 defines "employment" as:

"... any service performed prior to January 1, 1941, which was employment as defined in the Utah Unemployment Compensation Law prior to the effective date of this act, ..."

The word "service" is not defined, and under Section 63-3-11, U C A 1953, must be construed according to the "approved usage of the language". See also Cache Auto Co. v. Central Garage, 63 U. 10; 221 Pac. 862, 30 ALR 1217.

By no stretch of the imagination can the "approved usage" of the word "service" be tortured to include the plaintiff's activities on his "farm" as disclosed by the record.

"The word 'Service', not being defined in the act, must be given its common meaning, unless the context requires otherwise, which it does not. Merriam-Webster's New Inter-

national Dictionary defines 'service' as, 'The occupation, condition, or status of a servant. - Performance of labor for the benefit of another, or at another's command; - hire helper; - duty done or required. ' Certainly these definitions do not embrace the activities of the defendant in assisting part time in the running of his own clothing establishment. In addition, the defendant's services were not performed for 'wages' nor did he receive any compensation therefor. Likewise he was not under 'any contract of hire,' express or implied."

People v. Nest, (Cal. 1942)  
128 P.2d 444 @ 446.

Subsection (m) (1) of Section 35-4-22, U C A 1953 provides that;

"An individual shall be deemed 'unemployed' in any week during which he performs no services and with respect to which no wages are payable to him, ..."

Since plaintiff's farming activities cannot be construed as "service", and since it is not claimed that any wages were paid or payable to him, plaintiff was "unemployed" within the meaning of the Act and entitled to the benefits therein provided.

2. The Board of Review and Department representatives have no right or authority to determine what activities constitute "self-employment" and to withhold the benefits of the Act because of such activities.



Nowhere in the Act is it provided that "self-employment" makes ineligible for the benefits one who is otherwise eligible. The tests of ineligibility are set out in Section 35-4-5 U C A 1953, and "self-employment" is not among them.

The Department and the Board are creatures of statute and their powers and authority cannot be extended by judicial construction. Inasmuch as the terms "employment" and "unemployment" are defined by the legislature but the term "self-employment" is not, it cannot logically be contended that the legislature intended for the Board and department representatives to read the term into the Act and define it by their own standards. Even if this were so, it would be unconstitutional as an unwarranted delegation of legislative powers in that it fails to set up standards to guide the Board in its determination.

Case No. 56-BR-137 (Record, p 25), relied on for decision in the instant case, is an example of the evil of such a contention. While there are distinguishing variations in the fact situations which, in the writer's opinion, render the former case useless as a basis for a decision in this case, the decision is based on the "intent" of the applicant when he undertakes outside activities.

"The doctor or lawyer who is devoting his time and effort to build up his practice upon which he intends to rely for a living is engaged in self-employment. \* \* \* \* \*

"Secondly, the Department must arrive at a determination as to whether or not the self-employment enterprise does, or potentially may, produce a substantial or material part of his gross income."

(Record, p 28)

In other words, the applicant is penalized for trying to be, or to become, self-sustaining. If the plaintiff had let his farm go to weeds, and had sat on his front porch, so to speak, and twiddled his thumbs, never intending to derive a "substantial or material part of his gross income" from his farm, and made no effort to be independent or self-sustaining during his periods of unemployment, then the Board would have paid the benefits; otherwise, he gets nothing.

"In applying the above rules to the sections of the Unemployment Insurance Act involved herein we are of the opinion that the while it was the intention of the legislature to protect the fund created under the statute from chisellers, it was not its intention to put a premium on idleness, nor to discourage citizens out of employment from making early and earnest attempts to re-establish themselves economically to avoid becoming or continuing to be charges on society."

People v. Nest, supra.

## CONCLUSION

The extent to which the Board, in No. 56-BR-137, copied from the opinion in *MUNCHANT v. UNEMPLOYMENT COMPENSATION BOARD OF REVIEW*, 175 Pa. Super. 85, 103 A.2d 438 (1954), and the extent to which the Appeals Referee in the instant case, by leading questions, undertook to bring plaintiff's situation within the law and facts of that case, make it apparent that the Board relies completely on that case for the two decisions.

Even if there was any similarity in the fact situations; and even if the law in Pennsylvania was the same as in Utah, that decision is wrong in principal. But to compare 50 acres of farming land in Pennsylvania with 40 acres of alkali land in Emery County, Utah places too great a strain on the imagination.

Respectfully submitted,

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