1982

St. Benedict's Hospital v. Board of Review of the Industrial Commission of Utah and Carol Petersen : Defendant's Brief

Utah Supreme Court

Glenn J> Mecham; Craig S. Cook; Attorneys for Plaintiff;
Floyd G. Astin; K. Allan Zabel; Attorneys for Defendants;

IN THE SUPREME COURT OF THE STATE OF UTAH

ST. BENEDICT'S HOSPITAL,

Appellant,

vs.

Case No. 18120

BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, and CAROL PETERSEN,

Appellees.

DEFENDANT'S BRIEF

Appeal from a decision of the Board of Review of the Industrial Commission, State of Utah, which reversed the decision of the Department of Employment Security, State of Utah and Appeal Referee

GLENN J. MECHAM, ESQ.
2506 Madison Avenue
Ogden, Utah 84401

CRAIG S. COOK
3645 East 3100 South
Salt Lake City, Utah 84109

Attorneys for Appellant

DAVID L. WILKINSON
Attorney General

FLOYD G. ASTIN
K. ALLAN ZABEL
Special Assistants
Attorney General
174 Social Hall Avenue
Salt Lake City, Utah 84147

Attorney for Appellees

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DEFENDANT'S BRIEF

STATEMENT OF NATURE OF THE CASE

This is an action before the Supreme Court of the State of Utah pursuant to Section 35-4-10(i), Utah Code Annotated 1953, as amended, seeking judicial review of a decision of the Board of Review of the Industrial Commission of Utah, which reversed the decision of an Appeal Referee which denied benefits to the Appellee, Carol Petersen, effective July 5, 1981, pursuant to Section 35-4-5(a), Utah Code Annotated 1953, as amended (Pocket Supplement, 1979), on the grounds that while said Appellee may not have had good cause for voluntarily leaving work, a denial of benefits in the instant case would be contrary to equity and good conscience.

DISPOSITION BELOW

Appellee, Carol Petersen (hereinafter referred to as Claimant), was denied unemployment benefits effective July 5, 1981 by a Department Representative pursuant to Section 35-4-5(a) of the Utah Employment Security Act, Utah Code Annotated 1953, as amended (Pocket Supplement, 1979), hereinafter referred to as the Act, on the grounds she voluntarily left work without good cause. (R.0037) The claimant appealed to an Appeal Referee, who affirmed the decision to deny benefits by a decision dated September 16, 1981. The Board of Review reversed the decision of the Appeal Referee by a decision issued November 12, 1981, in Case No. 81-A-3224-R, 81-BR-324, on the ground that although claimant did not have good cause to quit, it would be contrary to equity and good conscience to deny her benefits.

RELIEF SOUGHT ON REVIEW

Appellant seeks a reversal of the Board of Review's decision allowing the award of unemployment benefits. Appellees seek affirmance of the decision by the Board of Review (hereinafter referred to as Appellee).

STATEMENT OF FACTS

Appellee substantially agrees with the Statement of Facts set forth in Appellant's Brief, except in the following particulars, to wit:

At page 5 of its Brief, Appellant states:

> Petersen told Featherston that her supervisor kept informing her that she was not producing, was not doing her job, and always spoke with her at inappropriate times. (Emphasis added.)

Appellant does not indicate where in the record claimant made such statements to Featherston. Appellant apparently is referring to claimant's testimony at the bottom of R.0021 where, in response to the Appeal Referee's question of what circumstances caused claimant to go to Featherston, claimant described her supervisor's actions of criticizing claimant's performance "just before I was to be with a group of orientees." Claimant went on to describe how "extremely painful" and upsetting this was to her and how it appeared to her that her supervisor was deliberately choosing a bad time to criticize her. While claimant well may have told this to Featherston, the record indicates only that she was relating to the Appeal Referee the circumstances which caused her to go to him.

Claimant's testimony that the work environment made her ill; that as a nurse she knew the consequences of prolonged stress; what she could take; what she could not take; and, therefore, that she hadn't consulted a doctor is at R.0022 and not R.23 as stated on page 6 of Appellant's Brief.

While it is true that Mr. Featherston testified that claimant never utilized the formal grievance procedure as indicated at page 9 of Appellant's Brief, Mr. Featherston also testified that he is the third-level supervisor to whom an appeal would be addressed in the grievance process (R.0028), that claimant did come to him with her problems with her supervisor (R.0026), and

that he did not discuss the formal grievance procedure with her " . . . because . . . I didn't see it as appropriate when we were discussing the matter." (R.0028)

ARGUMENT

POINT I

THAT IN REVIEWING DETERMINATIONS OF THE INDUSTRIAL COMMISSION UNDER THE UTAH EMPLOYMENT SECURITY ACT THE COURT WILL AFFIRM THE FINDINGS OF THE BOARD OF REVIEW IF SUCH ARE SUSTAINED BY SUBSTANTIAL COMPETENT EVIDENCE.

The standard of review in unemployment insurance cases is well established. Section 35-4-10(i), Utah Code Annotated, 1953, provides in part:

> In any judicial proceedings under this section the findings of the Commission and the Board of Review as to the facts if supported by evidence shall be conclusive and the jurisdiction of said Court shall be confined to questions of law.

This Court has consistently held that where the findings of the Commission and the Board of Review are supported by evidence, they will not be disturbed. Martinez v. Board of Review, 25 U. 2d 131, 477 P. 2d 587 (1970). In analyzing the above-referenced review provision, this Court has stated:

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

POINT II

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

Section 35-4-5(a), Utah Code Annotated, 1953, (Pocket Supplement, 1979) provides:

> 5. An individual shall be ineligible for benefits or for purposes of establishing a waiting period:
>
> (a) For the week in which the claimant left work voluntarily without good cause, if so found by the commission, and for each week thereafter until the claimant has performed services in bona fide covered employment and earned wages for such services equal to at least six times the claimant's weekly benefit amount; provided, that no claimant shall be ineligible for benefits if the claimant leaves work under circumstances of such a nature that it would be contrary to equity and good conscience to impose a disqualification.
>
> The commission shall in cooperation with the employer 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 attachment to the labor market in reaching a determination of whether the ineligibility of a claimant is contrary to equity and good conscience.

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

POINT III

THE UTAH EMPLOYMENT SECURITY ACT BEING REMEDIAL IN CHARACTER SHOULD BE LIBERALLY CONSTRUED AND ADMINISTERED TO EFFECTUATE ITS PURPOSES BUT DISQUALIFICATION OR FORFEITURE PROVISIONS SHOULD BE STRICTLY CONSTRUED.

This Court has heretofore held that the Employment Security Act, hereinafter referred to as the Act, being remedial in character, should be liberally construed and administered to effectuate its purposes, which include lightening the burdens of unemployment and maintaining purchasing power in the economy. Singer Sewing Machine Co. v. Industrial Commission, 104 U. 175, 134 P. 2d 479, 485 (1943); Northern Oil Co. v. Industrial Commission, 104 U. 353, 140 P. 2d 329, 332 (1943); Johnson v. Board of Review of Industrial Commission, 7 U. 2d 113, 320 P. 2d 315, 318 (1958).

On the other hand, in construing Section 5(b)(1) of the Act in Continental Oil Co. v. Board of Review of the Industrial Commission of Utah, Supra, at p. 730, this Court relied upon the reasoning of the Supreme Court of Wisconsin in Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636, 640 (1941) for the principle that:

> . . . [A] statute for a forfeiture should be strictly construed, and an ambiguous or doubtful term should be given a construction which is least likely to work a forfeiture. The penal character of the provision should be minimized by excluding, rather than including, conduct not clearly intended to be within the provision.

While the Continental Oil Co. case dealt with Section 5(b)(1) rather than Section 5(a) of the Act, the above reasoning is applicable to this case in that both provide for a forfeiture if certain facts exist.

POINT IV

THE BOARD OF REVIEW PROPERLY INTERPRETED THE EQUITY AND GOOD CONSCIENCE EXCEPTION TO THE VOLUNTARY QUIT DISQUALIFICATION CONTAINED IN SECTION 35-4-5(a) OF THE EMPLOYMENT SECURITY ACT

The Appellant contends that the Board of Review erred in its interpretation of the "equity and good conscience" provision of Section 5(a) of the Act. Appellant contends at page 18 of its Brief that:

> The interpretation given by the Board of Review would make the "good cause" language in the statute meaningless.

Further, Appellant contends, at page 20-21 of its Brief that:

> It would not be reasonable for a person to leave their employment merely because they have been criticized on several occasions by their supervisor regardless of when these occasions occurred. Likewise, it would not be reasonable for a person to leave their employment when they are denied a transfer due to the employer's policy of preventing conflicts between best friends in a subordinate and superior position. The Board would have concluded that these factors were not sufficient to justify the voluntary termination under the "good cause" mandate.

It is important to note the actual decision of the Board of Review. The Board held that although the claimant did not have good cause for voluntarily leaving work, a denial of benefits would be contrary to equity and good conscience within the intent and purposes of the Employment Security Act. (R.0006)

The basis for the Board's decision was:

> . . . the claimant's testimony that on several occasions she was criticized by her supervisor just before conducting training sessions and that she was denied a transfer

> to another assignment for which she was experienced solely because the supervisor of the new unit would have been a friend of the claimant's. The claimant's testimony regarding these circumstances was undisputed by the employer's representative.

In order to determine whether the decision of the Board of Review is supported by substantial, competent evidence, it is first necessary to understand the legal basis of the decision.

The history of the 1979 amendments to the Employment Security Act, Senate Bill 78, illuminates the intent of the Legislature in providing an "equity and good conscience" exception to the voluntary quit disqualification.

Prior to July 1, 1979, Section 5(a) of the Employment Security Act, provided that a claimant who voluntarily quit work shall be disqualified for six weeks. If the commission found mitigating circumstances to exist, the commission could assess a disqualification of less than six weeks. At the conclusion of the disqualification period, whether it was for six weeks or less, a claimant could re-file for and receive unemployment benefits. For many years the management representatives on the Employment Security Advisory Council had sought to change the six week disqualification to an indefinite disqualification which could be purged only by returning to work for a period of time and then becoming unemployed through no fault of the claimant. Their concern undoubtedly was centered on the payment of benefits to individuals, such as secondary wage earners who were not genuinely attached to the labor market, but rather worked only enough to qualify for benefits, accepted the six week disqualification, and then proceeded to draw benefits until they had

exhausted their claims. This was subsequently expressed by the Legislative Auditor General. (See A Performance Audit of the Unemployment Insurance Program in Utah, May 1978, Report to the Utah State Legislature, No. 78-9, pages 6-9.) The labor representatives to the Advisory Council, of course, resisted such efforts because of their concern for those claimants who may not have been compelled to quit, but quit under mitigating circumstances sufficient to result in less than the full disqualification. For an excellent discussion of the role and history of the Utah Employment Security Council, see Shared Government in Employment Security, by S. J. Becker, Columbia University Press (1959), Chapter 5, pp. 155-142, (available at the BYU Harold B. Lee Library or the Department of Employment Security Library). See also Minutes of the Advisory Council Meetings for 1978, available at the Department of Employment Security Administrative Office, 174 Social Hall Avenue, Salt Lake City. A portion of the Minutes of the Advisory Council Subcommittee are also attached hereto as Appendice.

As mentioned in the preceding paragraph, the Legislative Auditor General's Staff conducted a performance audit of the unemployment insurance program during 1978. Recognizing the role of the Advisory Council, which was established pursuant to Section 35-4-11(e), U.C.A. 1953, the Legislative Auditor's Staff met with an Advisory Council Subcommittee on June 8, 1978, and presented the results of their audit, recommending certain changes in the Employment Security Act. See Minutes of the Subcommittee Meeting, Appendix I, herein. In response to the expressed concerns of the Legislative

Auditor General and others, the Advisory Council met several times thereafter, culminating in the drafting of a bill to amend the Employment Security Act which was subsequently submitted to the 1979 Legislature and became designed as Senate Bill 78. Senate Bill 78 was the result of substantial negotiations between the labor and employer representatives on the Advisory Council Subcommittee. The concerns of labor and employer representatives with respect to voluntary quit, as mentioned in the preceding paragraph, were resolved with a compromise proposal for an indefinite disqualification unless a denial of benefits would be contrary to equity and good conscience. The Advisory Council requested that the Department of Employment Security prepare a memorandum explaining how the equity and good conscience exception to the disqualification should be applied. A memorandum was issued on October 13, 1978 and officially adopted by the Advisory Council Subcommittee on October 18, 1978. See Appendice II and III. It is interesting to note in this regard that the motion to adopt the memorandum was made by one of the labor representatives and seconded by the employer representative. See Advisory Council Letterhead, Appendix IV. Note also that in its report to the Legislature the Advisory Council explained the effort that went into the development of Senate Bill 78 as follows:

> The attached Senate Bill 78 is the result of nearly a year of meetings which included the study of the laws of other states and the Legislative Auditor's report, open hearings where special interest groups could express their concerns and, finally, a great deal of negotiation primarily between the employer and employee representatives over what changes to make and the wording of those changes.

Appellant argues at page 20 of its Brief that the term "reasonable" as used in defining equity and good conscience in Section 5(a) must have the same meaning as used in judicial definitions of "good cause" for quitting work. However, as can be seen from Appendix II herein, the Advisory Council had negotiated an exception to the good cause requirement that would allow benefits when mitigating circumstances exist. If the term "reasonable" must be applied under the equity and good conscience provision only with the same meaning as that term is used for the "good cause" standard, then obviously there would have been no need for the exception which was negotiated by the labor and management representatives on the Advisory Council.

In addition, floor debate on the Senate confirms the intent of the members of the Advisory Council and the acceptance of that intent by the Legislature. During the third reading of Senate Bill 78, Senator Halverson proposed an amendment to the bill, which raised an objection from the bill sponsor, Senator Black. Senator Black moved that the Senate be formed into a Committee of the Whole in order to question a representative of the Department of Employment Security concerning the intent of the Advisory Council. Mr. Floyd Astin, General Counsel for the Utah Department of Employment Security, testified as to the reason for having an equity and good conscience provision in the following manner:

> . . . good cause, the courts have generally ruled this, this is language in all, most jurisdictions. Generally they rule that good cause is what a reasonable prudent person would do. There is a lot of language, but it boils down basically to that. And there are areas, however, they're in that gray land that it is hard to say its this; its not good cause, but he had some good reasons for what he did. And this is what this language is

trying to get at. (Refer to 1979 Legislative Session, Senate Journal, page 340, and recording of the afternoon session of day 22.)

Contrary to Appellant's contention that the equity and good conscience provision of the Act is an unlimited standard, the Legislature structured the discretion the commission may exercise in cases such as this. In making decisions under Section 5(a) of the Act, the commission must look to the purposes of the Act which are (1) to assist the worker and his family in times when, without fault on his part, he is out of work and (2) to provide stability for the economy by assuring continuity of purchasing power. Lexes v. Industrial Commission, 121 U. 551, 243 P. 2d 964 (1952); Kennecott Copper Corporation Employees v. Department of Employment Security, Supra; Johnson v. Board of Review of the Industrial Commission, Supra. 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 the fault concept with the purpose of maintaining purchasing power in the community when an individual becomes unemployed by reason of a voluntary quit, but under mitigating circumstances. For that reason, the commission is required to also look at the reasonableness of the claimant's actions under the circumstances and whether or not the claimant's actions contain evidence of a genuine continuing attachment to the labor market.

At page 14 of its Brief, Appellant cites Boodry v. Eddy Bakeries Co., 397 P. 2d 256 (Idaho 1964), as a similar case to the instant one which "held that 'good cause' is not established when a superintendent criticizes a worker for substandard work."

In Boodry, the claimant tried, in part, to justify her voluntary quit on the ground that the superintendent threatened her as follows:

> Well, Jack Hall, every time you didn't do anything he wanted you to do just exactly, he always comes up with this little statement like, "You're not indispensable", and that's just like a threat saying if you don't do such-and-such, we're going to get rid of you.

Appellee submits that "threat" is distinguishable from the present case where the supervisor, knowing it was inappropriate timing, criticized claimant's performance just before claimant was to teach classes and thus sabotaged her effectiveness to the point that claimant was made physically ill.

Beaman v. Aynes, 393 P. 2d 152 (Ariz. 1964), cited by Appellant at page 14 of its Brief, as precedent that "good cause" is not established "when an employee fails to follow grievance procedures as to disputes in the condition of employment" is also distinguishable from the present case. In Beaman the claimant quit when the employer refused to pay $8.16 of additional pay the claimant claimed was due under the collective bargaining agreement. Subsequent to quitting the claimant submitted his grievance through the union and was paid his additional $8.16. In the instant case the claimant had no union to turn to and even though she failed to utilize the formal grievance procedure, the Director of her supervisor to whom she did complain didn't see the formal grievance procedure as appropriate when they were discussing the matter. (R.0028) Appellant submits claimant demonstrated an effort to work out her grievances to a point where further efforts would be futile. See Denby v. Board of Review, 567 P. 2d 626, 627 (Utah, 1977).

The Appellant acknowledges at page 15 of its Brief that it was unable to find "any similar wording of a statute in the United States in which 'equity and good conscience' applies to qualifications of unemployment benefits." Appellee is similarly unaware of any such wording of a statute in any other state. Thus the decisions from other states can shed little if any light on the proper interpretation of Utah's "equity and good conscience" provision.

In reference to Appellant's criticism of the phrase "equity and good conscience" at pages 15-16 of its Brief, it should be noted that it was in a dissenting opinion in City of Leadville v. Leadville Sewer Co., 107 P. 801, 813 (Colo. 1909), wherein "Equity and good conscience" was termed an "elastic expression."

Appellee submits that Gilles v. Dept. of Human Resources Development, 521 P. 2d 110, 116 (Cal. 1974), cited at page 16 of Appellant's Brief is favorable authority for affirmance of the decision of the Board of Review in this case. Respecting "equity and good conscience" the court in Gilles stated at page 116:

> [2] Section 1375, however, says nothing of notice, but enunciates a standard of "equity and good conscience"--language of unusual generality. Such broad terms necessarily anticipate that the trier of fact, instead of attempting to channelize his decision within regid and specific rules, will draw upon precepts of justice and morality as the basis for his ruling.[10] Thus the language of section 1375 impliedly rejects the notion that the board can establish a rule which focuses decision upon a single narrow issue such as notice; it involves

> a panoramic vision that encompasses all factors which might persuade an individual--or a government--of good conscience to forego recoupment of moneys previously paid.

The definition of "conscience" which Appellant refers to on page 17 of its Brief comes from an 1857 case cited in footnote 10 noted above.

Appellee submits that the intent of the Utah Legislature in amending Section 35-4-5(a) of the Act to provide an "equity and good conscience" exception to the disqualification for quitting a job without good cause is better determined from the legislative history cited above by Appellee than by cases from other jurisdictions which are construing dissimilar statutes.

The factual circumstances surrounding the claimant's decision to voluntarily leave her work, as found by the Board of Review, and the evidence in support of those findings, will be fully discussed in Point V hereof. However, having found that on several occasions claimant was criticized by her supervisor just before conducting training sessions and that she was denied a transfer to another assignment for which she was experienced solely because the supervisor of the new unit would have been a friend of the claimant's, the Board properly concluded that mitigating circumstances existed at the time of the claimant's quit. This conclusion is further supported by the claimant's testimony that the work environment made her ill (R.0022) and by her demonstrated continuing attachment to the labor market shown by her part-time work at Hill Air Force Base subsequent to her quitting her job with Appellant. (R.0019-20)

POINT V

THE BOARD OF REVIEW DID NOT ERR IN FINDING THAT A DENIAL OF BENEFITS WOULD BE CONTRARY TO EQUITY AND GOOD CONSCIENCE WITHIN THE MEANING OF THAT EXCEPTION TO THE VOLUNTARY QUIT DISQUALIFICATION.

Appellee submits that the record in this case provides substantial competent evidence that justify Appellee's decision that a denial of benefits would be contrary to equity and good conscience.

When asked by the Appeals Referee, "Did you quit your job?" claimant responded:

> Uh, I, no, I didn't mean to quit it. I wanted to take a leave of absence because I was--I feel like I was being really, really harrassed. [sic] I couldn't take it. I was physically ill. I just, I just come to the end of my rope and I just simply couldn't take the harrassment [sic] from my immediate supervisor and--

She explained she went to see the Director, Mr. Joe Featherston, who is over her supervisor. When the Appeal Referee asked the circumstances which caused claimant to see Mr. Featherston, the claimant testified:

> Well, the main, the well, it--There were just a lot of little snide remarks that she would make that really bothered me and then one day she (it was just before I was to be with a group of orientees--there were about seven or eight of them so it must have been the first part of May) and she just jumped all over me and that I wasn't producing and I wasn't doing my job and I was cheating the hospital. And it was really extremely painful, and I was, I was just shaking by the time I had to, you know, talk to these people. And I was just shaking and I couldn't keep my mind on it. This happened at three different intervals.

The Appeal Referee then asked, "About when was the first time that that happened?" And the claimant responded:

> I think, and I, I tend to block because it's so painful, but I think--this is about the first time that I really remember it, you know, that it was--just seemed to be--She said, "I know this is a bad time to be getting after you," like, "this is the time I choose because I know it's a bad time." And that was about the first of May and then there was--I can't remember when I first came to see you, Joe, but it was right after another episode. And then she did it again just before I had a diabetic coming, you know, to teach. And I just re-I can't remember the date on that, but I can remember how upset I was and trying to get, you know, my mind set over to helping this diabetic and how difficult it was. (R.0021)

Thus Appellant's contention at page 14 of its Brief that:

> The Board of Review in this case recognized that the claim by Carol Petersen of harrassment [sic] by her supervisor was not substantiated by the facts . . .

is simply not true. The Board's decision, based as it is on the above-cited testimony, clearly recognized claimant was being harassed.

Claimant finally decided:

> I don't understand it. I can't take it. I've got to have some help somewhere.

At that point claimant went to see Mr. Featherston. The testimony concerning her visit and its purpose was in part:

> PETERSEN:
>
> I just told him--I said, "I guess you know things aren't going well," and he said, "Yeah, I can see there's some bad chemistry down there." And so, anyway, I think that's when we decided that I would take a leave of absence, right?

FEATHERSTON:

That was the original thing you proposed, yes.

PETERSEN:

Yeah, that's what I wanted to do. I did not want to quit St. Benedict's. I had no intentions of ever quitting. I knew I couldn't stay in that environment because I was, I was ill. I really was.

REFEREE:

Were you under a doctor's care?

PETERSEN:

No, I was just, you know how you get upset and diarrhea and all that good stuff. . . .

REFEREE:

So on the--The decision to take time off was your decision, not necessarily advice of a doctor?

PETERSEN:

No, that, that--Well, I'm a nurse, you know, I know what I can take and what I can't and what the consequences of prolonged stress are. (R.0022)

Thus when claimant went to Mr. Featherston, she did not intent to quit even though the stress had made her ill. She merely wanted a leave of absence in order to get her "self-esteem back together." (R.0023)

This Court noted in Box Elder County v. Industrial Commission of Utah, Unemployment Compensation Appeals Board and Ellis V. Flint, 632 P. 2d 839, 841 (1981), that a claimant "need not necessarily prove that he was advised by his physician to quit his job."

Claimant recognized that even after a leave of absence she would not want to come back under her present supervisor. Also, her position couldn't remain vacant while she was on leave. (R.0023) Therefore, she went to see Pat Brown, the Director of Nurses. She requested a transfer to the Coronary Care Unit where she has 10 years of training. She was told she could not work in Coronary Care and that she could not take a leave of absence. She was offered a night shift as a staff nurse in an area she wasn't familiar with. (R.0023-24 & 0026)

It is difficult to determine from the minimal evidence offered by either the claimant (R.0023 and 0024) or the employer (R.0026) whether the offered night shift work could be considered suitable. However, the fact that it was in an area with which claimant was unfamiliar would indicate that the work was unsuitable in that it failed to utilize her "skills, training and experience," and she was denied a leave of absence which would have provided her an opportunity to seek other suitable work. See United States Steel Corp. v. Department of Employment Security, Utah, 523 P. 2d 854 (1974).

Mr. Featherston testified that the Director of Nursing did not have authority to deny claimant a leave of absence but it appears that claimant did not know this.

Mr. Featherston also testified that the reason claimant's request to transfer to the Coronary Care Unit, "where she does have expertise," was denied was because "her best friend is the head nurse of that unit. We do not feel that that would be a healthy relationship for either of them. It would put undue pressure on the head nurse for that type of relationship and it wouldn't be healthy for Carol either." (R.0026)

There is no indication that this reason was explained to claimant but even if it had, it undoubtedly simply reinforced her feeling that she was being "railroaded right out." (R.0024) Claimant demonstrated her attachment not only to the labor market but also to this particular employer by her request of a transfer from the unit in which she was experiencing difficulty with her supervisor to a unit in which the employer acknowledges her expertise. The decision of the Baord of Review recognizes this request by the claimant as a reasonable alternative which the employer could have accepted. The Board of Review was not persuaded by the employer's explanation for denying claimant the transfer. It seems rather illogical for a hospital to deny an employee a transfer from a unit where her relationship with her supervisor was so bad it made her physically ill to a unit where her supervisor was her best friend on the ground that "it wouldn't be healthy" for her. One would expect she would not only feel better, but would function more effectively for her employer in a congenial atmosphere.

Even when she decided she was going to quit she stated she would be available through the end of July. This was admitted by Mr. Featherston. (R.0026) It was the employer's decision that she would be allowed to work only through the end of June. (R.0026) It was not the claimant who prepared and submitted a letter of resignation, rather it was her supervisor with whom she did not get along who typed up the letter of resignation specifying claimant would leave on June 30 and demanded that claimant sign it. Claiment did not want to sign it but felt intimidated. (R.0024-25.

Even after she had signed the letter of resignation she went to see Mr. Featherston about it, indicating her surprise that she was asked to resign at the end of "30 days as opposed to 60 days." Nevertheless, the employer "stuck with 30 days." (R.0027) See General Rules of Adjudication, Rule 135.4 Resignation Intended, which states in pertinent part:

> 135.4 Resignation Intended
>
> When a worker submits his/her resignation to be effective at some definite future date, but is discharged prior thereto, the leaving is usually not considered voluntary. The reason for this is that the immediate cause of the claimant's unemployment was the result of the employer's action and caused the worker to suffer a wage loss for period the employer did not permit him to work. The reason for discharge should be examined to see whether a denial under Section 5(b)(1) is required.

The Appeal Referee commented in his decision that the claimant chose not to pursue the employer's formal grievance procedure. (R.0016) However, Mr. Featherston, admitted: 1) that he was the third level supervisor to whom an appeal would be addressed in the grievance process (R.0028); 2) that claimant did come to him with her problems with her supervisor (R.0026); 3) that he did not discuss the formal grievance procedure with claimant because " . . . I didn't see it as appropriate when we were discussing the matter." (R.0028)

Under these circumstances, it does not appear that claimant should be faulted for failing to utilize the formal grievance procedure.

CONCLUSION

The evidence in support of the decision by the Board of Review is both competent and substantial. The Board of Review is not bound by the findings of the Appeal Referee even when such findings are supported by evidence. The decision should, therefore, be affirmed.

Respectfully submitted this 10th day of March, 1982.

DAVID L. WILKINSON,
Attorney General of Utah

FLOYD G. ASTIN
K. ALLAN ZABEL
Special Assistants
Attorney General

By _____
Lorin R. Blauer

CERTIFICATE OF MAILING

I do hereby certify that I mailed two copies of the foregoing Appellee's Brief postage prepaid to the following this 10th day of March, 1982: Glenn J. Mecham, 2506 Madison Avenue, Ogden, Utah 84401 and Craig S. Cook, 3645 East 3100 South, Salt Lake City, Utah 84109, Attorneys for Appellant, St. Benedict's Hospital.

_____

ADVISORY COUNCIL FOR SUBCOMMITTEE MEETING
DEPARTMENT OF EMPLOYMENT SECURITY
174 Social Hall Avenue
Salt Lake City, Utah 84147

DATE: June 8, 1978

PLACE: 174 Social Hall Avenue (Executive Board Room)

MEMBERS PRESENT: Helen Ure, Chairperson
Robert E. Halladay
Ray Walters
Ed Mayne

Department of Employment Security

Edgar M. Denny
Duane Price
Floyd G. Astin
Richard B. Weed

Others

Representative Harold Newman
Dr. Robert Parsons, Consultant from BYU
Dick Schone - AFL-CIO

Legislative Auditors

Douglas West
David Porter
Sumner Newman
Wayne Welsh

The meeting was called to order by Chairperson Ure. Lenice Nielsen was excused. Mrs. Ure remarked that she felt that the auditors have done a fine job. While they may not agree philosophically with some of the positions the auditors have taken, the subcommittee agreed that the auditors had made a number of recommendations that have merit and that their audit appeared to have been done on a systematic, professional basis. Mrs. Ure asked Floyd Astin, General Counsel, to introduce the speakers and the subject as he had worked most closely with the legislative auditors.

The legislative auditors, supervised by Mr. West "walked" through their performance audit of the U. I. program. At the outset Mr. West said that they would look at it as objectively as possible and that they would like the subcommittee to view the auditors in a consulting role. He stated that their only purpose in making the audit was to look at the U.I. program and to make recommendations based upon what their audit revealed. Any law changes that occur will come about through the Advisory Council proposing legislation and through legislative action, not through the actions of the auditors. Representative Newman expressed the fact that he has found out how important the Advisory Council is with respect to U.I. legislation since he has been in the legislature. Mr. West stated that this audit has been sent to the legislature but has not as yet been the subject of a formal review. [illegible] the audit was a random sample of 500 out of 34,500

claimants who had applied for and received benefits between November 1, 1976 and October 31, 1977. Approximately 300 of the 500 selected claimants were used to test the eligibility determination and monitoring procedures. The auditors stated that inferences made from their sampling process had a statistical confidence level of 95 percent. Recommendations made by the auditors which require legislative consideration if they are to be adopted include:

1. That the Utah State Legislature amend Section 35-4-5(a) of the Utah code to disqualify claimants who voluntarily quit work without good cause for the duration of their unemployment.

2. That Section 35-4-5(b)(1) be amended to disqualify claimants who are discharged for misconduct for the entire period of unemployment.

3. That the Utah State Legislature amend Section 35-4-5(c) of the Utah Code to disqualify claimants who fail without good cause to properly apply, to accept referrals, to accept work, or to return to customary self-employment for the entire period of their unemployment. (Mr. Walters asked if this shouldn't include the term "suitable work" and it was agreed by the auditors that it should.)

4. That the Utah State Legislature consider amending Section 35-4-3(b) of the Utah Code so that 100% of retirement income is deducted from a claimant's weekly benefit amount.

5. That the Department of Employment Security and the Advisory Council study Utah's experience rating system to determine ways of improving employer participation in eligibility determination.

   That the results of this study should be presented to the Utah State Legislature for further consideration and action.

6. That the phrase "...and otherwise eligible for benefits..." be deleted from the first sentence of Section 35-4-5(c) of the statute.

7. That the Legislature consider adopting an active work search provision to identify:

   a. When the work search must begin;
   b. Restrictions that the individual cannot place on acceptable jobs;
   c. Any groups that are exempt from active work search and the period of time they are exempt.

8. That the Legislature review Section 35-4-5(e) of the statute and consider:

   a. Changing the statute to require only the repayment of benefits received due to fraud;
   b. And changing the statute to require a 52 week disqualification period from the time fraud is discovered rather than wh[illegible]

Mr. Halladay brought out the fact that the General Accounting Office has issued an audit report on a national basis.

Voluntary Quits

When asked by Mr. Walters if they were able to determine if any voluntary quits were proper, Mr. West stated that it would be impossible for the auditors to identify from their sample individuals who weren't given a disqualification for voluntary quit. "Good cause" was discussed and Mr. Denny stated that good cause has been defined by the courts and is not as open to interpretation as inferred by the preceding discussion.

Mr. Mayne asked about penalization of those who voluntary reduce themselves from a job during a company reduction in force. He was told that that reason for a voluntary quit did not appear in the audit sample. Mr. West informed him that since it was not identified as a cause the audit did not deal with it. Mr. Price said that such persons were generally given a minimum two week disqualification.

Misconduct

Misconduct was discussed. The fact was brought out that in all instances of disqualification, except for fraud, Utah's law only delays payment. It doesn't reduce the benefit year or the total benefit eligibility. The sample indicated that 700 out of 35,000 were disqualified by the agency for misconduct. The auditors stated that even though their sample was small they are 95% confident that this is a good report.

Disqualification

When discussing disqualification, it was mentioned that a person, when disqualified, would then probably go on welfare. It was brought out by Mr. Halladay that this is not our problem because we are an insurance program and are only concerned with eligibility. Chairperson Ure remarked that welfare programs have to establish their own criteria for eligibility and that the two programs, Welfare and Unemployment Insurance, are independent. She also stated that the public in general is questioning qualification and disqualification for U.I. benefits and that their concerns should be taken into consideration by the subcommittee.

Experience Rating

Experience rating was mentioned. Mr. West stated that it is working well in Utah and that it has real advantages. It has good, sound management. He did say that Utah employers are not generally concerned about who receives benefits and that our experience rating system does not give employers an incentive to be concerned.

Fraud

A newspaper article (Attachment #1) was referred to. Mr. Denny said that it is much easier to find fraud than it is to prosecute and [illegible] but that prosecutors have a much better attitude

since the auditors have talked to them. Prosecution is easier than collecting overpayments. Mr. Denny expressed his concern that the citizenry would only take a limited amount of harassment. He said that the agency is computerizing collections, but that will only be a partial solution to the problem.

Failure to Apply for Work

Approximately 3 percent or 1,000 claimants being paid benefits during the 12 months ending October 31, 1977 were disqualified for failure to apply for or accept suitable work.

Dr. Parsons spoke briefly on literature involving unemployment insurance. He presented a Bibliography: Economics of Unemployment Insurance (Attachment #2). He said that in his review of the literature he had attempted to look for information relating to the issues in the audit. There is a remarkable consensus among economists in these areas. Most feel the U.I. program is good but that some changes are needed. Research has resulted in three main conclusions:

1. More liberal benefits lead to higher unemployment rates.
2. A higher denial rate lowers unemployment.
3. An increase in administration expenditures to monitor claimants who fail to apply for, or accept suitable work, will reduce unemployment.

Monitoring specific claimants who fail to apply for or accept suitable work is referred to as the work test. An increase in the application of the work test will reduce unemployment. The more time unemployment insurance office personnel spend seeking eligibility, the tighter the screening, the lower the unemployment rate will be without discouraging job search.

The auditors were excused with a vote of thanks.

Chairperson Ure called for approval of the minutes of May 22, 1978. They were approved as written.

Mrs. Ure asked if it was the subcommittee's feeling that we should go through the recommendations and decide how we want to deal with them. Mr. Halladay said that we're not restricted to the auditor's report and that we still have a job to do. The auditor's report is helpful, but we do have to bring our own ideas in.

Universities and non-profit organizations were discussed since it appears that someone at USU was responsible for U.I. legislation proposed during the special session of the legislature. Specifically mentioned were the B.Y.U., University of Utah, and the State University. Mr. Denny said that their average costs for unemployment compensation are the lowest of all employers in the state because they do not contribute to the fund or to administrative costs. Mr. Halladay stated that we should contact Representative Waldrum and get a statement from him as he was the one who submitted the bill in the special session of the legislature pertaining to disqualification.

The next meeting of the subcommittee will be held the 28th of June at 2:00 p.m. in the Executive Board Room at 174 Social Hall Avenue. The subcommittee will discuss qualification and disqualification issues from all sources and make a decision on which ones to agree with or disagree with.

Meeting was adjourned at 4:00 p.m.

Secretary

Attachments

Utah Department of Employment Security

Floyd G. Astin
General Counsel

Interoffice Communication

Cleared for Release:

Date: October 13, 1978

TO: Directors, Section Heads and Local Office Managers

SUBJECT: Recent Law Changes

Subsections 35-4-5(a), (b)(1) and (c) of the Utah Employment Security Act were recently changed. In order to establish uniform application of these subsections, the following policies will apply.

There are two basic changes in subsection 35-4-5(b)(1). The word "misconduct" has been deleted and replaced by the Utah Supreme Court definition of that word, which is "any action or omission in connection with employment which is deliberate, wilful, or wanton and is adverse to the employers rightful interest." This is the same definition we have used in the past so there will not be any change in the application of the section. The word "misconduct" was deleted because of the negative connotations associated with the word. It should, therefore, also be deleted from all our decisions.

The second change in 35-4-5(b)(1) is in the duration of the disqualification. Instead of 2 to 10 weeks, it will provide a disqualification requiring the claimant to reenter employment and earn at least 6 times the claimant's weekly benefit amount.

Subsections 35-4-5(a) and (c) have similar changes. They each have the change in duration of the disqualification from the former 2 to 6 weeks to the disqualification that now requires the claimant to return to work and earn at least 6 times the claimant's weekly benefit amount.

The 6 times requalification requirement is similar to that found in a number of other states. However, in developing the legislative changes the Utah Advisory Council felt that there should be some allowance for those close cases in which there were mitigating circumstances. They felt that those cases which under the former law would have resulted in a 2 to 5 week disqualification should now have no disqualification at all and in those cases that would have received the 6 week disqualification would now be denied benefits until the claimant has returned to work and earned at least 6 times his or her weekly benefit amount. It is to this intent that the new law should be interpreted and it was for this reason that the wording "equity and good conscience" was written into the law so as to allow benefits in the type of case in which we formerly denied benefits 2 to 5 weeks.

The application of the new law should not result in any changes from the way in which these two laws were formerly applied insofar as determining whether or not "good cause" existed in the claimant's actions of voluntarily leaving work or in the failure to apply for or accept suitable work. What constitutes "good cause" has been established by most courts in this country, including the Utah Supreme Court. Therefore, as before, if a claimant has "good cause," (as defined by the courts) for his actions then benefits will be allowed. If "good cause" does not exist, then the surrounding circumstances are reviewed. Formerly this was done to determine if the duration of the disqualification should be less than 6 weeks. Now it will be done to determine if no disqualification should apply. Formerly we reasoned that although the claimant did not have "good cause" for his actions the circumstances were such that equity and good conscience would dictate that a denial of benefits for less than 6 weeks should be assessed. The same reasoning now applies except that instead of reducing the weeks of denial, benefits will be allowed.

An example of this under the new law would be a case where the employer and the claimant have a disagreement over working conditions and the claimant quits without giving the employer a chance to make improvements. The claimant did not have "good cause" for quitting without giving the employer a reasonable chance to improve the conditions. The employer was in error for allowing such conditions to exist. Formerly we would reason that the "surrounding circumstances" of the case would warrant a denial of benefits, but that the denial should be reduced from the normal 6 weeks disqualification. Now we would reason that although the claimant did not have "good cause" for what he did, there was some "reasonableness" in his actions because of the working conditions and he has evidenced "a genuine, continuing attachment to the labor market," therefore, it would be "contrary to equity and good conscience to impose a disqualification."

This policy of interpretation will become effective at the same time the new law changes become effective. All necessary training and manual changes will also reflect this policy.

Edgar M. Denny
Administrator

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ADVISORY COUNCIL FOR SUBCOMMITTEE MEETING
DEPARTMENT OF EMPLOYMENT SECURITY
174 Social Hall Avenue
Salt Lake City, Utah 84147

DATE: October 18, 1978

PLACE: 174 Social Hall Avenue (Administrative Board Room)

MEMBERS PRESENT:

Helen Ure, Chairperson
Robert E. Halladay
Ed Mayne
Lenice L. Nielsen

Department of Employment Security

Edgar M. Denny
Duane Price
Floyd G. Astin

Needle Trade

Dick Olmore
Jack Holton
Noel Lee

Utah Legal Services

Lucy Billings
John Black

Chairperson Ure called the meeting to order. Ray Walters was excused. Messrs. Olmore, Holton, and Lee introduced themselves as employers in the needle trades and Mrs. Ure welcomed them. Mrs. Ure explained that some study needed to be made before the Advisory Council met with the Legislature to present their proposals. Therefore, the Advisory Subcommittee was formed. Their intent is to tighten up the law in the qualifying area and change it so that it will conform more with what other states are doing. Proposed law changes (Attachment #1) were given to them for study. Mr. Halladay stated that there had also been an audit report by the Legislative Auditors. Mr. Olmore asked if there would be a savings to employers, and Mr. Halladay remarked that the Legislative Auditors expressed the fact that it should be about two and one-half million dollars a year. Mr. Denny advised them that the process from here will be that the Advisory Council will consider the proposals made by the Subcommittee. On this basis they will make recommendations to the Legislature. Mr. Astin said that the Subcommittee would welcome any support toward legislation, and that the Subcommittee would be available for further meetings. Mrs. Ure told them that their endorsement in writing would be appreciated.

John Black and Lucy Billings from Utah Legal Services were then introduced to those attending. Lucy Billings stated that she represents low income people in civil matters. She is quite disappointed with the Utah law in the fraud area and mentioned how the states of Nevada, Idaho, and Montana handle unemployment insurance. Mr. Nielsen stated that he thought there should be some changes. There may be some changes for Section 5(e) (Attachment #2) pursuant to Lucy's presentation. She was asked to submit some recommendations.

The Subcommittee then discussed further business. Mrs. Ure asked if the "Recent Law Changes" discussed in an interoffice communication addressed to Directors, Section Heads and Local Office Managers (Attachment #3) covered everything needed. Mr. Nielsen answered, "In this regard, yes." Mr. Denny asked if the Subcommittee

wanted to act upon it for their administration of it. The motion was made by Mr. Mayne that the "Recent Law Changes" be adopted as part of the report to the staff who will have to interpret it. The motion was seconded by Mr. Halladay and passed.

The motion was made by Mr. Halladay that for a matter of policy the work week will be determined by the work period upon which the next work day begins. This motion was seconded by Ed Mayne and was unanimously approved.

Mr. Denny stated that as soon as the guidelines on change are established we will start interpreting them. At the next meeting we will develop a lot of alternatives and not provisions. He also stated that he had had a call from the Governor's office asking for a report of pending legislation and he had informed Kent Briggs that the Council was working as instructed. Recommendations were given to report to Richard Dunn along with the legislative auditors.

The next Advisory Subcommittee meeting will be held Wednesday, November 1, 1978 in the Executive Board Room.

The meeting was adjourned at 3:40 p.m.

Secretary

ADVISORY COUNCIL

for

INDUSTRIAL COMMISSION OF UTAH

January 10, 1979

Honorable Miles "Cap" Ferry
President, Utah State Senate

Honorable James V. Hansen
Speaker, Utah House of Representatives

Gentlemen:

We write as representatives of the Advisory Council to the Industrial Commission of Utah, Department of Employment Security, which Council as you know was created by the legislature to represent the interests of industry, labor, and the general public in matters relating to Employment Security.

During the last legislative session a bill was introduced that would have made some changes in the Utah Employment Security Act without involving the Advisory Council. The bill was withdrawn with the charge given to the Advisory Council to study the proposed changes and make its recommendations during this session. About this same time the Legislative Auditors completed a study of the Department of Employment Security.

The attached Senate Bill 78 is the result of nearly a year of meetings which included the study of the laws of the other states and the Legislative Auditors' report, open hearings where special interest groups could express their concerns and, finally, a great deal of negotiation primarily between the employer and employee representatives over what changes to make and the wording of those changes. Although there may be some other areas of the law that might need further study this bill deals with the major concerns expressed and represents a substantial change in the eligibility provisions of the Utah Employment Security Act.

Industry and labor alone pay the bills and are recipients of the benefits of these programs. We, therefore, want to maintain a law that will provide for long-range stability unaffected by the shifting views of special interest groups. We are well aware of the costly and destructive labor-management struggles experienced in other states where Employment Security policies have fluctuated frequently and widely with short-term changes of philosophical viewpoints. Thus, the Utah Legislature in its wisdom created the Advisory Council which has, over the years, worked well for Utah.

Because of this it is a widely accepted fact in industry, labor and government circles that the Utah Employment Security program and its management are among the best, if not the best, in the nation.

We, therefore, urge your support for the passage of this negotiated Senate Bill 78 unchanged and, if there are other areas of concern, that the Advisory Council be given the opportunity to thoroughly study them and report again at the next legislative session. We would be pleased to meet with you or your committees on any of these matters at your convenience as would any Advisory Council member or any of the management staff of the Department of Employment Security.

Sincerely,

Alison C Thorne

Dr. Alison Thorne
Committee Chairperson
Lecturer, College of Family Life
Logan, Utah

Robert E. Halladay

Robert E. Halladay
Executive Vice President
Utah Manufacturers Association

Eddie P. Mayne

Ed Mayne
President Secretary-Treasurer
Utah State AFL-CIO

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Attachment