

1982

# Neil Trotta v. Industrial Commission of Utah et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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NEIL TROTTA,

Plaintiff/Appellant,

v.

THE INDUSTRIAL COMMISSION OF  
UTAH, DEPARTMENT OF EMPLOY-  
MENT SECURITY,

Defendant/Respondent.

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Case No. 18237

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BRIEF OF APPELLANT

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APPEAL FROM THE DECISION OF THE BOARD  
OF REVIEW OF THE INDUSTRIAL COMMISSION OF  
UTAH DATED FEBRUARY 4, 1982.

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FILED

APR 27 1982

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Case No. 18237

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BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is a review of a decision of the Board of Review of the Industrial Commission of Utah finding that Appellant was discharged from his employment for actions which were deliberate, willful and wanton and adverse to his employer's rightful interests in accordance with §35-3-5(b)(1), Utah Code Annotated (1953, as amended).

DISPOSITIONS BELOW

The Industrial Commission of Utah, through its Board of Review, reversed the previous decisions of the Department of Employment Security and its appeals referee, in making its finding. Appellant had been awarded unemployment compensation benefits upon application. The employer, the Fisher Company, appealed that award and a hearing was conducted. The appeals referee affirmed the initial award of benefits following which the employer appealed to the Board of Review.



### RELIEF SOUGHT ON APPEAL

Appellant asks that the Court reverse Respondent's decision that Appellant acted in a manner which was deliberate, willful, and wanton and adverse to his employer's rightful interests and enter its judgment that Respondent's decision was not supported by substantial evidence and that Plaintiff is entitled as a matter of law to unemployment compensation benefits from November 14, 1981, until he is no longer otherwise eligible and that therefore as a matter of law unemployment compensation benefits received by Appellant for the calendar weeks November 14, 1981, through December 5, 1981, and for the calendar weeks December 12, 1981, through January 20, 1982, were not overpayments.

### STATEMENT OF FACTS

The following facts are undisputed. Additional facts will be referred to in the text of the argument.

Appellant Neil Trotta was a former employee of the Fisher Company. (R.24) On August 12, 1981, he was rehired as a fiberglass laminator. (R.23) He was rehired because of his good record with the company and his good relationship and bond with the employer. (R.24) From August 12, 1981, to October 15, 1981, Mr. Trotta worked without any absences and without receiving any notice that his job performance was not satisfactory. (R.29) On Friday, October 16, 1981, Fisher Company allowed all of its employees to take the day off so that they might go deer hunting.

(R.23) Even though Mr. Trotta was not feeling well he took advantage of the opportunity and went hunting. (R.21, 39)

On the following Monday and Tuesday, October 19, and 20, 1981, Mr. Trotta was absent from work. (R.21,39) Mr. Trotta returned to work on Wednesday, October 21, 1981. (R.25) Upon his return, his employer, Mr. Fisher, inquired about his health. (R.25, 23) Mr. Trotta responded that he was not feeling great but would try to make it through the rest of the week. (R.25) There were no further discussions about Mr. Trotta's health or absences until October 29, 1981. (R.29, 24) Nor was anything said about the sufficiency or insufficiency of Mr. Trotta's notification of those absences. (R.29,24) The employer was not contemplating discharging Mr. Trotta at that time. (R.24) Mr. Trotta worked the rest of the week even though he felt sick. (R.30) His sickness lasted over the weekend and into the following Monday, October 26. (R.25, 30) Nevertheless, he worked 10 1/2 hours on that day. (R.27) On Tuesday and Wednesday, October 27 and 28, 1981, Mr. Trotta was absent again. (R.21, 39) When Mr. Trotta returned to work on Thursday, October 29, he was discharged. (R.21, 39) He was told that he was being discharged so that an example might be made of him. (R.21, 39, 28)

After his discharge, Mr. Trotta applied for and was awarded unemployment insurance compensation benefits by the Department of Employment Security. (R.21, 39) The employer appealed the award. (R.35, 36) After a hearing before an appeals



referee the award was upheld. (R.17, 18, 19) The employer appealed again to the State Industrial Commission's Board of Review. (R.16) The three member Board of Review reversed the referee's decision with one member dissenting. (R.7, 8, 9)

#### ARGUMENT

##### POINT I.

MR. TROTТА WAS NOT DISCHARGED FOR AN ACT OR OMISSION WHICH WAS DELIBERATE, WILLFUL, OR WANTON AND ADVERSE TO HIS EMPLOYER'S RIGHTFUL INTEREST.

An employer has the legal right to discharge an employee for any cause or even without cause. Turner v. Brown, 134 So.2d 384, 386 (La. 1961). However, there is a sharp legal distinction between cause for discharge and willful misconduct which bars unemployment compensation benefits. Grace v. Commonwealth Unemployment Compensation Board of Review, 412 A.2d 1128, 1130 (Pa. 1980). Under Utah law "misconduct" which bars unemployment compensation benefits must be an "act or omission in connection with employment, not constituting a crime, which is deliberate, willful, or wanton, and adverse to the employer's rightful interest." Utah Code Ann. (1953, as amended) §35-4-5(b)(1). Under misconduct standards similar to Utah's the courts have generally held that the employer has the burden of proving that an employee was discharged for misconduct and that misconduct was of sufficient severity to make the employee ineligible for unemployment compensation benefits. Wheeler v. Department of Employment Security, 421 A.2d 1315, 1316 (Vt.

1980); Giese v. Employment Division, 557 P.2d 1354, 1356 (Or. 1976); Coulter v. Commonwealth Unemployment Compensation's Board of Review, 332 A.2d 876, 879 (Pa. 1975); Tundel v. Commonwealth Unemployment Compensation's Board of Review, 404 A.2d 434, 435 (Pa. 1979); and Hawkins v. District Unemployment Compensation Board, 381 A.2d 619, 621 (D.C. 1977).

A. Going Deer Hunting While Sick With the Flu is Not Misconduct Within the Meaning of the Law.

Evidence indicates that Mr. Trotta had the flu from Friday, October 16, 1981, through Wednesday, October 28, 1981. (R.40, 30) No evidence introduced by the employer refutes this or is directed toward refuting this fact. The only evidence given by the employer which might be taken as contrary to this was that the employer believed that Mr. Trotta had gone deer hunting on October 20. (R.23) But even if Mr. Trotta had gone hunting on the 20th, a fact which he has consistently denied (R.25, 26), it does not follow that he was not also ill on that day. Mr. Trotta introduced evidence that he went hunting on the first day of the hunt even though he was ill. (R.21, 39) Mr. Trotta could have gone hunting in a manner which would not have greatly taxed him. Thus a mere showing that he did go hunting would not negate the fact that he was still too ill to justify going to work. And even had Mr. Trotta gone hunting in a manner which could have aggravated his illness, this would not be determinative of whether or not he was entitled to unemployment compensation benefits.

The employer based his belief that Mr. Trotta had gone hunting on October 20 on information received from another employee, Jack Gardner. (R.23) Mr. Gardner is a high school student who occasionally works for the Fisher Company after school at night. (R.32) At Mr. Trotta's unemployment hearing the employer's representative, Mrs. Fisher, testified that Mr. Gardner had called in on October 20 and had asked for the day off to go hunting with Mr. Trotta. (R.23) Mrs. Fisher then introduced a notarized statement signed by Mr. Gardner that he had gone hunting with Mr. Trotta. (R.23) However, Mr. Gardner was not present at the hearing to verify this hearsay statement. The notarized statement stated November 20 as the day on which Mr. Gardner went hunting with Mr. Trotta, not October 20. (R.23) Further, the statement was dated December 8, 1981, which was over a month and a half after Mr. Gardner was supposed to have gone hunting. Because of the error, the lapse in time, and Mr. Gardner's failure to testify, this evidence is insufficient. However, even if the employer had proven that Mr. Trotta had gone deer hunting on October 20, this would not amount to misconduct such as to justify denying him unemployment compensation benefits.

In Eagan v. Philips, 431 N.Y.S.2d. 731, 784, D.2d 564 (App. Div. 1980), an employee whose job required lifting auto parts weighing 15 pounds or more onto a conveyor belt, injured her arm on the job. Her physicians recommended that she take her

two weeks vacation and ask her employer for an extra week as sick leave so that her arm could properly heal. Her employer agreed. On the first week away from work, the employee participated in a softball game which she was watching. She was dismissed and the New York Unemployment Insurance Board determined that her actions were misconduct and denied her unemployment compensation benefits. The Appellate Division of the New York Supreme Court reversed. The court found that the claimant's spontaneous decision, given the purpose of her leave, was an error in judgment, but it was not intended to injure her employer's interest and was therefore not misconduct such as would defeat her claim for unemployment compensation benefits. The claimant in Eagan had an injury which could be aggravated by playing softball. If she aggravated her injury further, more time off would be required for it to heal. This would be detrimental to her employer's interest. But the decision to play softball was not made with the intention of harming the employer's interest. It was poor judgment but was not misconduct.

Mr. Trotta was sick with the flu which could possibly have been aggravated by going deer hunting. This may have resulted in more absences. This would be detrimental to his employer's interest. But there is no evidence that any decision by Mr. Trotta to go hunting was made with the intention of harming the employer's interest. Going hunting may have demonstrated poor judgment, but by a mere showing that Mr. Trotta

had gone deer hunting the employer would not meet the burden of proving that Mr. Trotta had committed a deliberate, willful, or wanton act adverse to the employer's interest.

B. Appellant Did Not Break Any Company Policies Regarding Absences From Work.

Because the employer cannot meet the burden of proving misconduct by merely showing that Mr. Trotta went deer hunting on October 20, he must prove that other actions by Mr. Trotta amounted to misconduct and that the employer in fact dismissed Mr. Trotta for these other actions. See Coulter v. Commonwealth Unemployment Board of Review, 332 A.2d 876 (Pa. 1975). The claimant in Coulter was a truck driver. The referee board had found that Coulter was dismissed for (1) reclining in his truck during working hours with his shoes off and both doors open, (2) failing to keep his truck clean, and (3) damaging his truck by hitting a curb of a bridge. The Court held that reclining in his truck was not misconduct which would deny Coulter unemployment compensation benefits. The court could find no specific rule against such behavior. Nor could the employer be found to have really considered Coulter's action to be misconduct at the time he saw it. At no time was Coulter reprimanded or questioned concerning the propriety of his action until after he had wrecked his truck sometime later and had been dismissed. As to the charge that the employee had failed to keep his truck clean, the employer failed to demonstrate any set standard or rule for keeping the truck clean. Furthermore, the employer did not



reveal in what way the truck was unclean. The Pennsylvania court held that a general statement that the employee failed to keep his truck clean was not sufficient to prove misconduct. The court further held that the employee's dismissal for failing to negotiate a turn onto a bridge was not willful misconduct. This was merely a single act of negligence or carelessness and did not constitute willful misconduct.

While the employer in Coulter was aware that the employee had been riding on company time, there was no rule or policy, written or otherwise, against doing so. Mr. Trotta's employer submitted evidence that any employee could have time off for any reason even if it was inconvenient for the employer. (R.23) Thus, the Fisher Company had no rule or policy, written or otherwise, which restricted the types of reasons for which an employee could take a day off.

Next, the employer in Coulter had failed at any time to mention, question, or reprimand the employee for reclining on the job. After Mr. Trotta's return to work on October 21, his employer inquired about his health. (R.25, 23) But at no time did the employer mention, question, or reprimand Mr. Trotta for having been absent on October 19 and 20. In Coulter, the first time that the incident of the employee reclining was mentioned was after he had been dismissed following the truck accident. Similarly, the Fisher Company never alleged any kind of misconduct by Mr. Trotta until after he had been dismissed following his October 27 and 28 absences.



Finally, the employer in Coulter admitted that the employee's conduct of reclining on work time would not have resulted in dismissal. Id. at 878. Mr. Trotta's employer testified at his unemployment hearing that there was no contemplation to dismiss Mr. Trotta following his return to work on October 21. (R.24) Thus, under the Coulter standard, the employer has failed to meet his burden of proving that Mr. Trotta was dismissed for misconduct due to his being absent on October 19 and 20.

C. Failure to Work Overtime Was Not the Reason for Firing Trotta, Nor Would it Have Been Misconduct.

The Fisher Company also complained that Mr. Trotta refused to make up his absences by working on the weekend. (R.31) Mr. Trotta denies ever having been asked to do so and further, denies that he refused to work overtime. (R.25) There was no set policy requiring the employee to make up the day for which he had been absent. Nor did the employer mention, question, or reprimand Mr. Trotta for not having worked on the weekend. Furthermore, there is nothing to indicate that until Mr. Trotta's absences on October 27 and 28, 1981, the employer had planned on dismissing Mr. Trotta for not having worked on the weekend. Thus, under the Coulter standard, the employer failed to meet his burden of proving that Mr. Trotta was fired for not having worked on the weekend and that such conduct would be sufficient to deny Mr. Trotta unemployment compensation benefits.

The employer further alleged that Mr. Trotta refused to work any overtime. (R.22, 38) Yet Mr. Trotta introduced check stubs showing that he had worked overtime. (R.13) The employer's records show that on Mr. Trotta's last day of work he worked 10 1/2 hours. (R.27) This was 2 1/2 hours more than his shift required. (R.29) The prior week he had worked 26 hours in three days for 2 hours overtime. (R.31) Once again, the employer never mentioned, questioned, or reprimanded Mr. Trotta for not working sufficient overtime. (R.29) The employer even admitted that the employees could put in as much overtime as they desired. (R.23) Lastly, the employer advised the hearing examiner that, "We never require anyone to put in overtime and we never fire anyone for refusing to put in overtime." (R.32)

Because the employer did not at anytime mention, question, or reprimand Mr. Trotta about his overtime, and because there was no policy requiring anyone to put in any overtime nor would an employee be dismissed for refusing to put in overtime, the employer has failed to meet his burden of proving that Mr. Trotta engaged in any willful misconduct in connection with the adequacy of his overtime that would establish grounds for denying him unemployment compensation benefits.

D. Appellant's Job Performance Was Not the Reason  
Nor Did it Arise to the Level of Misconduct.

The Fisher Company alleged that Mr. Trotta's job performance had been unsatisfactory prior to his first absence on October 19. (R.22, 38) Yet even if true, this is not misconduct. In Coulter, supra, the employer gave as one of the reasons for dismissing the employee that the employee failed to keep his truck clean. The court found that the employer had no policy regarding keeping trucks clean and further that the employer had never indicated in what way the truck was unclean. The court held that the employer had not met his burden of proof with abroad assertion that the truck was unclean. Id. at 878, 879.

Mr. Trotta's employer at no time informed him that his work was unsatisfactory (R29). Further, as in Coulter, there were no work evaluations or other standards that would indicate in what manner his performance was lacking. As was found in Coulter, a broad assertion of unsatisfactory behavior does not meet the employer's burden of proving misconduct.

E. Appellant Did Not Fail to Notify His Employer of  
His Absences.

The employer alleged that Mr. Trotta had failed to give proper notice of his absences as required by company policy. (R.36) According to the employer, Mr. Trotta failed to call in personally on each day that he was absent. (R.36) Instead, according to the employer, his wife called in on October 20 and again on October 28 and stated that Mr. Trotta was home sick.

(R.35, 36) At the hearing, Mrs. Fisher testified that there were no written formal procedures for giving notice. (R.24) The only requirement was that an employee inform the employer as soon as possible and advise them of the reason for the absence. (R.24) Mrs. Fisher testified that employees called in to the shop to report their absences and that anyone there could answer the telephone. (R.31) The employer placed the responsibility for knowing that someone had called in on the shop foreman. (R.31) Mr. Trotta testified that the foreman usually did not answer the telephone when someone called in. (R.30) Therefore it would have to have been up to the employee answering the telephone to relay a co-worker's message that he would be absent. While Mrs. Fisher testified that all production employees report to the supervisor, (R.31) they only have record of having received calls on October 20 and 28. (R.23) Yet the Trotta's testified that they had called in on every absence. (R.25) It is certainly possible that the foreman may not always be available for calls. This was the case when the Department of Employment Security attempted to call him on November 9, 1981. (R.22, 38) There apparently is no company practice that would insure that all messages will be relayed to the foreman.

A similar situation arose in Penn Photomats Incorporated v. Commonwealth Compensation Board of Review, 417 A.2d 1311 (Pa. 1980). The employer in Penn Photomats had a formal written policy concerning the required notice. This

policy was posted throughout the employer's plant. It required the absent employee to contact the office by 9:00 a.m. on the first day out. The claimant did not contact the office but instead called co-workers in a different building to inform them that she would not be in and to have them relay the message. The plant manager failed to receive the message and the claimant was discharged for unexcused absences. The court found that neither claimant nor other employees had been reprimanded in the past for calling in their absences to co-workers in their own building. Penn Photomats admitted that this procedure was acceptable. Therefore the court sustained the Board of Review's conclusion that even though such messages were not relayed to the main office the claimant had given notice and her conduct in following the less formal procedure was not willful misconduct for which unemployment compensation benefits would be denied.

The Fisher Company did not have a written formal procedure. (R.24) Thus there would be even less justification for finding that Mr. Trotta violated a known policy than in Penn Photomats. The Fisher Company testified that the policy required employees to "report in." (R.24) As in Penn Photomat, not all of the calls from Mr. and Mrs. Trotta were logged. (R.23) But Mr. Trotta was not reprimanded after having once followed the accepted procedure for notification. Therefore under the Penn Photomat standard he gave notice and the employer has to meet his burden of proving that Mr. Trotta failed to give notice and that



if he had not called in, that such failure was the result of a deliberate, willful or wanton act by Mr. Trotta for which he would be denied unemployment compensation benefits.

F. Appellant's Absences Were Not Misconduct Under the Januzik Standard.

The Supreme Court of Utah has held that dismissal for excessive absenteeism may be misconduct which will make the claimant ineligible for unemployment compensation benefits. Januzik v. Department of Employment Security and Board of Review of the Industrial Commission of Utah, 569 P.2d 1112 (Utah, 1977). But Januzik is clearly distinguishable in that the claimant in Januzik received a written warning prior to his dismissal that he would be discharged should he have any more absences. Id. at 1113. The claimant in Januzik was not dismissed after being absent due to illness but rather for not coming into work at all after calling and stating that he would be an hour late because of car problems. Id. at 1113. This lack of prior notice is a critical defect in the Respondent's case, for without it, misconduct cannot be found. As discussed above, the Fisher Company failed to prove that Trotta's notice was inadequate nor that he was not ill.

The record does not show that Mr. Trotta was dismissed for going deer hunting. While the employer testified that no notice of Mr. Trotta's absence on October 27 was received, (R.23) Mr. Trotta denies this. (R.21, 39, 25, 27, 30). No other evidence was introduced by the employer concerning Mr. Trotta's



activities on the 27th and 28th. Therefore at the time Mr. Trotta was dismissed the employer could not have based a dismissal for Mr. Trotta's October 27 and 28 absences on any other grounds than that Mr. Trotta was absent due to illness.

In Unemployment Compensation Board of Review v. Blouse, 350 A.2d 220 (Pa. 1976), the court found that where there is proper notice, absences for illness are not misconduct. In Blouse the claimant had a long history of absences close to weekends for which she had been given warnings. There was a question as to whether she had been ill or not but the court upheld the Board of Review's finding of illness and upheld the award of unemployment compensation benefits. The court found sufficient notice by claimant on her days off and held that illness with sufficient notice is never misconduct.

As there was no proof that Mr. Trotta had not been ill on October 27 and 28 at the time of his dismissal, it could not have been made on the basis of misconduct.

Mr. Trotta testified at his hearing that on October 27 he had been deer hunting. (R.26) However, the employer had no knowledge of this until the date of the hearing, which was approximately one and one half months after Mr. Trotta's dismissal. The Utah Supreme Court has held that evidence presented at an unemployment hearing which had not been discovered until approximately one and one half months after a claimants' dismissal could not be considered as evidence to

support the reason for termination. Continental Oil Company v. Board of Review of Industrial Commission, 558 P.2d 727, 729 (Utah 1977). Thus the hunting incident cannot be considered as evidence to support the employer's reason for dismissing Mr. Trotta.

In conclusion Mr. Trotta has shown that he was basically a good employee and had no problem with his employer until October, 1981. On October 16 he was given the day off to go deer hunting, and went even though he was ill. Over the next two weeks he missed four days of work because of his continuing illness. This was the first time that he had been absent since beginning work on August 12, 1981. On one of his days off he also went deer hunting. He did not inform his employer of having done so. However it was his employer's belief that Mr. Trotta had gone deer hunting. Nevertheless, his employer at no time prior to the day of Mr. Trotta's dismissal said anything that in any way would indicate dissatisfaction with his job performance or absenteeism. At the time Mr. Trotta was dismissed he was told that he was being dismissed to set an example. The employer had the burden of proving that Mr. Trotta was dismissed for an act which was deliberate, willful, or wanton, or adverse to the employer's rightful interest. By failing to indicate his dissatisfaction with Mr. Trotta's actions prior to Mr. Trotta's dismissal, the employer failed to meet his burden. Mr. Trotta is therefore entitled to unemployment compensation benefits as a matter of law.

POINT II.

THE BOARD OF REVIEW'S DETERMINATION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS ARBITRARY AND CAPRICIOUS.

The role of the Utah Supreme Court under Section 35-4-10(i) of the Utah Employment Security Act is to:

[S]ustain the determination of the Board of Review, unless the record clearly and persuasively proves the action of the Board 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 Industrial Commission, 568 P.2d 727, 729-30 (Utah 1977).

A majority of a three member Board of Review disallowed Mr. Trotta benefits. The majority based it's decision on the fact that while Mr. Trotta had been aware that his employer was busy he nevertheless went deer hunting on the 27th of October and only gave notice of this absence by having his wife call in for him. As demonstrated above, the fact that Mr. Trotta went deer hunting on the 27th cannot be considered as evidence to support the reason for his termination. And a Board of Review "may not in its findings rely on reasons for discharge that were not considered relevant by the employer." Tundel v. Commonwealth Unemployment Compensation Board of Review, 404 A.2d 434, 435 (Pa. 1979). In Tundel the Board of Review had considered evidence of the claimant's unexcused absences as support for its conclusion of willful misconduct. But, while the claimant had had unexcused

absences in March and April for which he had been given a warning and suspension, the employer had dismissed him for falling asleep, watching television and eating on the job, and occasional tardiness. The court held that for the Board to have relied on reasons which the employer had not considered relevant was error. Id. at 435. Until it was disclosed at Mr. Trotta's unemployment hearing, Mr. Trotta's employer was not aware that Mr. Trotta had gone deer hunting on October 27, 1981. The employer did not rely on this as a reason for Mr. Trotta's dismissal. Thus, under Tundel it was error for the Board to consider it to support its conclusions of willful misconduct.

The Board's reliance on the sufficiency of Mr. Trotta's notice to his employer was also error. Mr. Trotta followed an accepted procedure for giving such notice. By law the manner in which Mr. Trotta gave notice was not misconduct. The fact that Mr. Trotta knew that his employer was busy on the 27th when he went hunting does not misconduct. The employer's policy regarding absences was that anyone could take a day off for almost any reason even when it was inconvenient to the employer. (R.23) Furthermore, the employer did not dismiss Mr. Trotta for having gone deer hunting on the 27th. Therefore going hunting on the 27th cannot be relied on by the Board to justify its finding of misconduct. As the Utah Supreme Court found in Continental Oil Company, supra, even though "conduct may be harmful to the employer's interest and justify the employee's discharge;

nevertheless it evokes the disqualifications for unemployment benefits only if it is willful, wanton, or equally culpable." 568 P.2d 727, 731 (Utah 1977). See also Jacobs v. California Unemployment Insurance Appeals Board, 25 Cal.App. 1035, 102 Cal. Rptr. 364. For a general discussion of the law see 26 A.L.R. 3d 1356. Going deer hunting while sick with the flu was not an action directed towards the employer. This may have been poor judgment but it is not misconduct.

Finally, the Review Board majority noted that Mr. Trotta noted on his Statement of Reason for Quit or Discharge that he was ill on the 27th. (R.39) The majority inferred that this statement was not credible in as much as Mr. Trotta testified at his hearing that he had gone deer hunting on that day. Here again the Board committed error in using evidence as part of its conclusion which could not have been and was not relied upon by the employer in the dismissal. Mr. Trotta has consistently maintained that he was ill and even though he may have used poor judgment in also going deer hunting, this was not misconduct. Indeed, the form asks for reasons for discharge. No evidence has been introduced showing that the employer informed Mr. Trotta prior to filling out this form that he was being discharged for any other reason than to be made an example of. (R.29, 28) This reason was given by Mr. Trotta as the reason for discharge along with what he presumed to be his employer's justification, that is, that he had been absent due to illness on



October 19, 20, 27, and 28. At the time Mr. Trotta filled out this form nothing had at any time been said to him in the way of informing him that his employer was dismissing him for having gone deer hunting on a day when he was home sick with the flu.

#### CONCLUSION

Because the employer did not meet its burden of proving that Mr. Trotta's dismissal was due to an act or omission which was deliberate, willful, or wanton, and adverse to the employer's rightful interest it was error for the Board of Review to disallow unemployment compensation benefits. The Board relied upon evidence which had not been the basis for Mr. Trotta's dismissal. Thus to rely upon it in their decision was arbitrary, capricious and unreasonable. As a matter of law the Board's determination was in error because only the opposite conclusion can be drawn from the facts. This conclusion is expressed quite succinctly by the dissenting member of the Board of Review:

It is evident from the record that whether the claimant actually went hunting with his fellow worker on October 20 or October 27, the fact remains that the employer believed that he had gone hunting on October 20, a day which he had reported in ill. In spite of what the employer believed to be a lie by the claimant, the employer allowed the claimant to return to work on October 21, 22, and 23, thus apparently choosing not to terminate the claimant as a result of what the employer believed to be his dishonesty in reporting in ill when he was deer hunting. It was only the following week after the claimant was absent an additional two days, that claimant was terminated. Prior to the claimant's admission that he had gone deer hunting on October 27, the employer had no reason to believe but what he was ill for those



two days, which would have been a matter beyond the claimant's control therefore, it appears that the employer terminated the claimant to make an example out of him to the other employees and at his own convenience. (R.9)

DATED this 26<sup>th</sup> day of April, 1982.

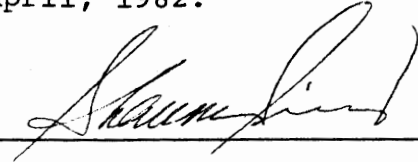
Respectfully submitted,

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Attorneys for Appellant

  
By: JOHN L. BLACK, JR.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that two true and correct copies of the foregoing BRIEF OF APPELLANT was mailed first-class postage prepaid to Floyd G. Astin and Allan Zabel, Special Assistant Attorneys General, The Industrial Commission of Utah, Department of Employment Security, 174 Social Hall Avenue, Salt Lake City, Utah 84147, this 26<sup>th</sup> day of April, 1982.



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