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IN THE SUPREME COURT
OF THE STATE OF UTAH

KENNETH A. SWIECICKI,

Plaintiff/Appellant,

v.

Case No. 18315

BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY, and UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Defendant/Respondents.

DEFENDANT'S BRIEF

Appeal from a decision of the Department of Employment Security State of Utah, as upheld by the Appeal Referee and the Board of Review of the Industrial Commission, State of Utah

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
OF THE STATE OF UTAH

KENNETH A. SWIECICKI,

Plaintiff/Appellant,

v.

Case No. 18315

BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY, and UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Defendant/Respondents.

DEFENDANT'S BRIEF

STATEMENT OF NATURE OF THE CASE

Plaintiff filed a Petition for Writ of Review in accordance with Utah Code Annotated 35-4-10(i) seeking a reversal of the Board of Review's decision denying him unemployment benefits.

Plaintiff was denied benefits, pursuant to U.C.A. 35-4-5(d), from August 2 through August 8, 1981 by virtue of his unemployment arising from a strike involving his grade, class or group of workers at the establishment where he was last employed. Plaintiff was also denied benefits on the ground that he left work voluntarily without good cause, U.C.A. 35-4-5(a). The effective date under this last provision was August 2, 1981, with the

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disqualification period to extend until such time as Plaintiff has earned wages at least six times his weekly benefit amount in bona fide covered employment.

The issue on appeal is whether there is competent and reasonable evidence in the record to support the Board of Review's decision denying Plaintiff unemployment benefits.

RELIEF SOUGHT ON APPEAL

Defendant seeks an affirmance of the Board of Review's decision denying Plaintiff unemployment benefits and further prays that the Court will deny Plaintiff any costs or attorney's fees incurred in this action.

FACTUAL SITUATION

Plaintiff was hired by the Federal Aviation Administration in February, 1974, (R.0040) and was employed as an air traffic controller at the Salt Lake City Tower during the time period in question herein (R.0040).

On August 3, 1981, Plaintiff failed to report for work (R.0041) with full knowledge that an air traffic controller strike had begun on the same day (R.0049). Plaintiff was a member of the Professional Air Traffic Controllers Organization (PATCO) (R.0040 & .0059), which was the union calling the strike (R.0059), and Plaintiff subsequently did not report to work on August 4 and 5 as the strike proceeded (R.0041).

On August 6, 1981, Plaintiff telephoned Mr. Warren Lee, Deputy Chief, Salt Lake City Tower, at about 7:00 a.m. regarding the procedure for reporting to work (R.0047) within President Reagan's amnesty period (R.0042-0043).

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Plaintiff apparently had some knowledge of the amnesty period (R.0041) despite his confusion with media reports (R.0062). Plaintiff informed Mr. Lee that he was prepared to come to work (R.0047) and Mr. Lee responded that Plaintiff should report to work by 8 a.m. (R.0047). If Plaintiff had reported at 8 a.m. on August 6, then he would have complied with the amnesty program and been allowed to work (R.0042). Plaintiff indicated he would report by 8 a.m. or shortly thereafter (R.0047), but apparently failed to do so and called Mr. Lee some time after 8 a.m. (R.0047). At this time, Mr. Lee extended Plaintiff's time for reporting to work until 9 a.m. (R.0047).

At approximately 9:00 or 9:15 a.m., Plaintiff contacted Mr. Lee and told him he would report for duty, and Mr. Lee replied, "Fine." (R.0047). Mr. Lee then proceeded to give Plaintiff instructions on how to gain access to the tower (R.0047). Plaintiff was to enter the airport on the east side and park in the Utah National Guard area (R.0049). This entrance was on the opposite side of the airport from the tower (R.0049) and Plaintiff was to be transported from there to the tower by van (R.0049). This procedure was part of the F.A.A.'s contingency plan that had been in effect since the strike began (R.0049). It is disputed whether Plaintiff would have to cross any picket lines when entering the Utah National Guard parking area (R.0049), but no evidence was offered to show that violence had erupted when individuals attempted to cross the picket lines.

In response to Mr. Lee's instructions, Plaintiff stated that, "I cannot do something like that at this time." (R.0048). Plaintiff, subsequently, did not attempt to report to work (R.0048), but he did report later in the

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evening around 11:30 p.m. (R.0041 & 0049) after being approached by the F.B.I. (R.0041 & 0048). No pickets were present when Plaintiff reported in the evening (R.0049). Upon presenting himself to the supervisor, Plaintiff was told that an intent to terminate was in progress and he should leave the facility immediately (R.0041).

Plaintiff contacted the Salt Lake Tower on the morning of August 7 and informed the personnel he was seeking professional help (R.0043). This was the first time Plaintiff had made any mention of illness to the personnel at the tower (R.0042). Later that day Plaintiff was treated by Dr. David A. Schein, M.D., Ph.D., (R.0042 & 0064) for anxiety, insomnia and other disorders (R.0041 & 0064). These disorders, however, had apparently developed during the last few days of July (R.0042), although Dr. Schien stated in his letter the air traffic controller strike led to these disorders (R.0064). Dr. Schein prescribed valium for treatment of Plaintiff's disorders (R.0042).

On August 9, 1981, a letter was sent to Plaintiff informing him of an intent to remove him from his position as air traffic controller (R.0064 & 0065). Plaintiff responded in a letter dated August 19, 1981, setting forth his reasons for not reporting to work (R.0062). In his letter, Plaintiff attached Dr. Schein's letter containing a diagnosis of Plaintiff's condition (R.0067). As a result of Plaintiff's response, Dr. H. C. Burton, Assistant Regional Flight Surgeon for the Salt Lake Air Traffic Control Center, was asked to investigate Plaintiff's illness and determine suitability for work (R.0044). Dr. Burton reviewed Plaintiff's medical records and concluded there was no documented findings which rendered Plaintiff medically disabled and unfit for duty (R.0058). Consequently, Plaintiff was informed by a

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letter dated September 8, 1981, that he was officially terminated effective September 15, 1981 (R.0056).

Plaintiff applied for unemployment benefits on August 27, 1981 (R.0061). Plaintiff was denied benefits in a decision rendered by Tom L. Brant pursuant to the U.C.A. 35-4-5(d) (R.0055). Plaintiff also received an Elgibility Determination, Form 615-A, stating denial of benefits pursuant to U.C.A. 35-4-5(b)(1) (R.0054). Plaintiff appealed the denial of benefits to the Appeals Referee on October 13, 1981 (R.0052). The Referee denied benefits pursuant to U.C.A. 35-4-5(d) and 5(a) (R.0035-0037), and the Board of Review affirmed the Referee's decision (R.0016). Thereafter, Plaintiff filed this appeal.

ARGUMENT

POINT I

IN REVIEWING A DETERMINATION OF THE INDUSTRIAL COMMISSION UNDER THE UTAH EMPLOYMENT SECURITY ACT THE COURT WILL AFFIRM THE COMMISSION'S FINDINGS IF SUCH ARE SUSTAINED BY SUBSTANTIAL COMPETENT EVIDENCE.

Defendant submits that this Court's review of determinations of the Department is limited to deciding whether there is substantial competent evidence to sustain such determinations. Martinez v. Board of Review, 25 Utah 2d 131, 477 P. 2d 587 (1970). A reversal of an order of the Department denying compensation can only be justified if there is no substantial evidence to sustain the determination and the facts giving rise to a right to

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compensation are so persuasive that the Department's denial was clearly capricious, arbitrary, and unreasonable. Kennecott Copper Corp. v. Dept. of Emp. Sec., 13 Utah 2d 262, 372 P. 2d 987 (1962); Gocke v. Wiesley, 18 Utah 2d 245, 420 P. 2d 44,45 (1966); Continental Oil Co. v. Board of Review, 568 P. 2d 727 (Utah 1977); In Members of Iron Workers Union of Provo v. Industrial Commission, 104 Utah 242, 139 P. 2d 208, 211, the Court said:

> If there is substantial competent evidence to sustain the findings and decisions of the Industrial Commission, this court may not set aside the decision even though on a review of the record we might well have reached a different result.

POINT II

PLAINTIFF'S UNEMPLOYMENT, DURING THE PERIOD OF AUGUST 3 THROUGH AUGUST 6, WAS DUE TO A STOPPAGE OF WORK WHICH EXISTED BECAUSE OF A STRIKE INVOLVING HIS GRADE, CLASS OR GROUP OF WORKERS, AND PLAINTIFF IS THEREFORE INELIGIBLE FOR BENEFITS FOR THAT PERIOD.

The Defendant wishes to bring to the Court's attention that Plaintiff did not address in his Brief the denial of benefits pursuant to U.C.A. 35-4-5(d). Plaintiff merely states in his Brief (at page 10) that he should be disqualified for voluntarily leaving work for the duration only of the period August 3 through August 6, 1981. However, such a conclusion ignores the fact that a strike was in progress during that period, and that Plaintiff failed to cross the picket lines. (R.0040, 0041). Under such circumstances, this court has previously held that benefits must be denied pursuant to Section 5(d) of the Employment Security Act. Kennecott Copper Corp. Employees v. Dept. of Emp. Sec., Supra.

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POINT III

THE COMMISSION DID NOT ERR IN DETERMINING THAT PLAINTIFF VOLUNTARILY LEFT WORK WITHOUT GOOD CAUSE, AND SUCH DECISION IS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

The issues presented by this case are: 1) whether the Plaintiff's failure to report for work as requird by his employer constitutes a voluntary quit; and 2) whether the Plaintiff had good cause for not reporting to work as required by the employer.

Voluntary quitting is a mixed question of law and fact. Denby v. Board of Review of the Industrial Commission, 567 P. 2d 626 (Utah, 1977). This court has repeatedly held that the disqualification provisions of the Employment Security Act reveal an underlying legislative intent for the commission to determine a claimant's eligibility by adhering to the volitional test; Olof Nelson Construction Co. v. Industrial Commission, 121 Utah 525, 243 P. 2d 951 (1952); Lexes v. Industrial Commission, 121 Utah 551, 243 P. 2d 964 (1952); or in other words, a claimant will be ineligible for benefits if his unemployment is the result of voluntary action by him and was not caused by some coercive factor or economic influence beyond his control. Mills v. Gronning, 581 P. 2d 1334, 1337 (Utah, 1978). This principle is commonly known as the "fault concept."

Plaintiff argues that he was discharged and that his discharge must be evaluated under Section 35-4-5(b)(1), Utah Code Annotated, 1953, as amended (Pocket Supplement). See Plaintiff's Brief, page 10. While it is undisputed that the claimant was discharged, both the Appeal Referee and the Board of Review concluded that the facts of the case were more consistent with a voluntary leaving than a discharge for misconduct.

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There is a split among the many jurisdictions which have dealt with the question of voluntary leaving v. discharge for misconduct, under circumstances where an employee is terminated for failure to report to work. See Annotation, "Discharge for Absenteeism as Affecting Right to Unemployment Compensation," 41 ALR 2d 1158 (1955). See also Annotation, "Discharge for Absenteeism or Tardiness as Affecting Right to Unemployment Compensation," 58 ALR 3rd 674 (1974). The decisions referred to in these annotations all appear to rely on the specific law of the jurisdiction involved and the facts of the particular case. However, in general, it appears the courts which held that the claimant was discharged for misconduct found the claimant's conduct to meet that level of "willful, wanton or deliberate" conduct normally associated with the definition of misconduct, as set forth in Boynton Cab Company v. Nuebeck, 237 Wis. 249, 296 N.W. 636; and as adopted by this court in Continental Oil Company v. Board of Review of the Industrial Commission of Utah, Supra. On the other hand, those courts which applied the voluntary leaving disqualification generally found each claimant's actions to be the result of voluntary choice not affected by factors beyond the claimant's control, but not rising to the level of culpability necessary to find misconduct. Although a discharge for misconduct also generally results from the voluntary action of the employee, the difference in cases of this nature lies in the evidence of an intent to harm the employer or to deliberately disregard the employer's rightful interests. Lacking such intent, a claimant's actions may not be misconduct. However, where the claimant's actions are voluntary and not influenced by "coercive factors or economic influence beyond his control," the claimant's resulting unemployment is volitional, thus subjecting him to disqualification under the Act.

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In the instant case the Appeal Referee concluded that the evidence of record indicated that the claimant's failure to return to work within the "grace period" was voluntary and that his resulting unemployment was, therefore, volitional.

The undisputed facts in this matter are that Plaintiff was employed by the Federal Aviation Administration as an air traffic controller at the Salt Lake Air Traffic Control Center; that a nationwide air traffic controllers' strike commenced on or about August 3, 1981; that Plaintiff failed to report for work on August 3, 4 and 5, 1981; that President Reagan granted an "amnesty period" for all air traffic controllers who would report for work at the beginning of their first scheduled shift after 11 a.m. Eastern Standard Time; that Plaintiff did not report for work as scheduled at 8 a.m. on August 6, nor did he report after a one hour extension to 9 a.m., but rather, Plaintiff reported at 11:30 p.m. the night of August 6, and then only after the F.B.I. advised Plaintiff that a restraining order was in effect which "literally scared the hell out of" Plaintiff. (See Plaintiff's Brief, pages 3, 4 8, 9.) Upon Plaintiff's failure to comply with the terms of the President's "Amnesty Period," Plaintiff was terminated by the employer.

Given the foregoing facts, the Appeal Referee and Board of Review properly concluded that the claimant voluntarily left his employment.

Plaintiff argues that even if the court finds he voluntarily quit, he did so with good cause, or at least that his quit was under such circumstances that a denial of benefits is contrary to equity and good consience. (Plaintiff's Brief, pages 11-15.)

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Plaintiff's argument that he had good cause for leaving work or that his leaving was reasonable under the circumstances is based on the contention that he was subjected to external pressures causing him emotional and physical problems. However, the Appeal Referee found that the record fails to support the Plaintiff's contention that he was ill, stating:

> . . . He did not see a doctor until August 8, 1981 and he failed to notify the employer on either August 5, or August 6, 1981 that he was ill and unable to work. There is no evidence to indicate that, in fact, the claimant was ill on either August 5, or August 6, 1981 and it must be held that, by failing to return to work, the claimant voluntarily left his job, inasmuch as he knew he would forfeit his job if he did not report back. (R.0036)

Plaintiff testified that he was absent due to illness. (R.0042) Yet, he did not see a doctor until August 7, 1981, (R.0064) after he was told of the termination action. Plaintiff's physician reported that Plaintiff was seen for "anxiety and nervous disorders," a "situational condition" related to the air traffic controllers strike. (R.0064) The Assistant Regional Flight Surgeon for the F.A.A. reviewed the Plaintiff's doctor's report and concluded there were no medical indications of illness, only the Plaintiff's subjective complaints, and that, therefore, the Plaintiff's illness did not render him unfit for duty. (R.0058) The Plaintiff's testimony on this point is also very self-serving, and ambiguous:

> Referee: Well did you mention to Mr. Lee that you were having medical problems?

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Claimant: Not at this time. I wasn't even that aware of the fact at this point. I mean a person that has a nervous breakdown, you have a heck of a time convincing of it.

Referee: You know I don't really have evidence that you had a nervous breakdown.

Claimant: I'm not saying that - -

Referee: I imagine there were 130 individuals roughly that were experiencing some of the same symptoms you were.

Claimant: That might be a good assumption. Maybe there was a lot of militant types out there that weren't.

Referee: Well, that's possible, but I don't think your reaction would be that abnormal, considering what was going on. You know sometimes I don't sleep too well at nights thinking what's going to take place the next day myself. So I don't really have evidence that you had an actual nervous breakdown.

Claimant: I didn't say that. Please. If you took me wrong on that, I'm just saying I was making an observation that you asked me, did I know I was sick at the time, and I'm saying in some illnesses, you don't know you have it until three, four, five days later. Isn't that a possibility?

Referee: I guess it's a possibility, but you - -

Claimant: Isn't it as possible as everybody out there being a nervous wreck over a strike and some people not. I mean, there's a million possibilities.

In light of such evidence the Appeal Referee and Board of Review properly concluded that the claimant was not prevented by illness from reporting to work.

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POINT IV

EVEN ASSUMING, ARGUENDO, THAT PLAINTIFF WAS DISCHARGED, HE IS STILL NOT ENTITLED TO BENEFITS.

As explained in Point III hereof, the jurisdictions which have considered the issue of discharge v. quit in cases of absenteeism have split in their conclusions. Part of the reason for this dichotomy arises from the particular facts of each case being adjudicated. Another part of the reason is that the facts sometimes support different conclusions. For example, see Continental Oil Company v. Board of Review, Supra.

However, should this Court decide the facts herein amount to a discharge, Plaintiff is still not entitled to benefits. Plaintiff's participation in an illegal work stoppage and failure to report to work after requested to do so is willful disregard of his employer's interest that is sufficient to constitute willful misconduct. See Bays v. Com., Unemployment Compensation Bd., 437 A. 2d 72 (Pa. Comwlth. 1981), Reinhard v. Com., Unemp. Comp. Bd of Review, 410 A. 2d 401 (Pa. Cmwlth. 1980). Plaintiff, therefore, cannot prevail. See also, Januzik v. Department of Employment Security, 569 P. 2d 1112 (Utah, 1977), in which this court stated:

> It has frequently been held in other jurisdictions that excessive absenteeism without good cause, constitutes willful misconduct, particularly where the employee fails to report to his employer, or continues to be absent or tardy after warnings by the employer. [Footnote ommitted.]

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CONCLUSION

The decision of the Board of Review denying Plaintiff unemployment benefits on the basis that he left work voluntarily without good cause is supported by substantial and competent evidence. Plaintiff does not dispute his disqualification for the period of August 3 through August 6, 1981, due to his participation in an illegal work stoppage. The decision of the Board of Review, being reasonable and not arbitrary or capricious, should be affirmed.

DATED this 20th day of August, 1982.

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By______________________________
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CERTIFICATE OF MAILING

I do hereby certify that I mailed two copies of the foregoing Defendants-Respondents' Brief postage prepaid to the following this 20th day of August, 1982: John S. Chindlund, Attorney for Plaintiff-Appellant, PRINCE, YEATES & GELDZAHLER, Third Floor Mony Plaza, 424 East Fifth South, Salt Lake City, Utah 84111; and Robert Huffine, Personnel Office ARM-16, Labor Relations Branch, F.A.A Rocky Mountain Region, 10455 East 25th Avenue, Aurora, Colorado 80010; Allan Horowitz, Office of Regional Consultation, F.A.A. Rocky Mountain Region, 10455 East 25th Aurora, Suite 203, Denver, Colorado 80010; and Robert Blunk, F.A.A., 17900 Pacific Highway South, Seattle, Washington 98168.

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