1982

Kenneth A. Swiecicki v. Board of Review of the Industrial Commission of Utah et al : Defendant's Brief

Utah Supreme Court

John S. Chindlund; Prince, Yeates & Geldzahler; Attorneys for Plaintiff-Appellant;
Floyd G. Astin and K. Allan Zabel; Attorneys for Defendants-Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH A. SWIECICKI, Plaintiff-Appellant, vs. BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY, and UNITED STATES DEPARTMENT OF TRANSPORATION, FEDERAL AVIATION ADMINISTRATION, Defendants-Respondents.	Case No. 18315

REPLY BRIEF OF PLAINTIFF-APPELLANT

Appeal from Determination of the Board of Review
of the Industrial Commission of Utah

JOHN S. CHINDLUND
JAMES A. BOEVERS
PRINCE, YEATES & GELDZAHLER
Third Floor Mony Plaza
424 East Fifth South
Salt Lake City, Utah 84111

Attorneys for Plaintiff-Appellant

FLOYD G. ASTIN and K. ALLAN ZABEL
INDUSTRIAL COMMISSION OF UTAH,
DEPARTMENT OF EMPLOYMENT SECURITY
1234 South Main Street
Salt Lake City, Utah 84147

Attorneys for Defendants-Respondents

CONTENTS

	Page
AUTHORITIES	(ii)
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN ADMINISTRATIVE REVIEW PROCEEDINGS	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	3
ARGUMENT:	3
POINT I. THE DECISION OF THE INDUSTRIAL COMMISSION WAS ARBITRARY AND CAPRICIOUS, UNSUPPORTED BY ANY EVIDENCE OR ADEQUATE FINDINGS AND UNREASONABLE AS A MATTER OF LAW.	3
POINT II. THE INDUSTRIAL COMMISSION MAY NOT NOW CONTEND THAT PLAINTIFF WAS DISCHARGED FOR A "DELIBERATE, WILLFUL OR WANTON ACT" AND THERE IS NO EVIDENCE OR FINDINGS IN SUPPORT OF SUCH A CONTENTION.	8
CONCLUSION	9

AUTHORITIES

Cases

	Page
Continental Oil Company v. Board of Review of the Industrial Commission of Utah, 568 P.2d 727 (Utah 1977).	5, 6, 9

Statutes

Utah Employment Security Act - Section 35-4-1 et seq., Utah Code Ann. (1953, as amended)	1,2,3, 4,5,7, 9

IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH A. SWIECICKI, Plaintiff-Appellant, vs. BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY, and UNITED STATES DEPARTMENT OF TRANSPORATION, FEDERAL AVIATION ADMINISTRATION, Defendants-Respondents.	:	Case No. 18315

STATEMENT OF THE NATURE OF THE CASE

In this action, plaintiff seeks unemployment compensation benefits under the Utah Employment Security Act, § 35-4-1 et seq., Utah Code Ann. (1953, as amended).[1]

DISPOSITION IN ADMINISTRATIVE REVIEW PROCEEDINGS

On August 6, 1981,[2] plaintiff was prevented by his employer from reporting to work and was advised his termination was in progress. Plaintiff was officially terminated from his job as an air traffic controller at the Salt Lake International

---

[1]Hereinafter, reference to the Utah Code Annotated will be by "U.C.A.", followed by designation of the appropriate section thereof.

[2]All dates herein are in 1981 unless otherwise indicated.

Airport effective September 15. On August 27, plaintiff applied for unemployment insurance benefits. On September 18, plaintiff's application was denied under U.C.A. § 35-4-5(b)(1) and (d). On October 13, plaintiff appealed. On December 30, Appeal Referee Stanley H. Griffin affirmed the denial of plaintiff's application for benefits under U.C.A. § 35-4-5(a) and (d). The appeal referee did not rely in any part upon U.C.A. § 35-4-5(b)(1) in so ruling. On January 8, 1982, plaintiff appealed Referee Griffin's decision to the Board of Review of the Industrial Commission of Utah, Department of Employment Security (hereinafter the "Board of Review"). In a decision dated February 16, 1982, the Board of Review (member Richard H. Schone separately concurring) affirmed the Appeal Referee's decision. Pursuant to U.C.A. § 35-4-10(i), plaintiff filed his Petition for Writ of Review herein on March 15, 1982. On June 24, 1982 plaintiff filed his opening brief. On August 20, 1982 defendants filed their brief. Plaintiff now replies to defendants' arguments.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the decision of the Board of Review affirming the denial of unemployment benefits to plaintiff. Plaintiff asks the Court to direct the Department of Employment Security to grant him unemployment benefits and award him costs and attorneys' fees incurred in his appeals.

STATEMENT OF FACTS

Plaintiff does not wish to supplement the Statement of Facts contained in his opening brief. Facts relied upon in support of plaintiff's reply to defendants' arguments will be set forth in the Argument portion of this brief below.

ARGUMENT

POINT I

THE DECISION OF THE INDUSTRIAL COMMISSION WAS ARBITRARY AND CAPRICIOUS, UNSUPPORTED BY ANY EVIDENCE OR ADEQUATE FINDINGS AND UNREASONABLE AS A MATTER OF LAW.

Plaintiff does not contest the general statements in defendants' brief concerning standard of review applicable to Industrial Commission decisions on issues of fact. However here, the underlying facts are basically undisputed, leaving only legal issues of statutory interpretation and application, which are fully reviewable by this Court under U.C.A. § 35-4-10(i). In any event, if ever there was a case where a decision was arbitrary, capricious, totally unsupported by the record and procedurally irregular, this is that case. Defendants virtually concede as much by the admissions in their brief.

In the statement of facts at pages 3-5 of their brief, defendants admit that "[p]laintiff informed Mr. Lee that he was prepared to come to work" on August 6; that later in the day plaintiff told Lee ". . . he would report for duty . . ."; that plaintiff ". . . did report later in the evening around 11:30 p.m. . . ."; that "[u]pon presenting himself to the supervisor,

Plaintiff was told that an intent to terminate was in progress and he should leave the facility immediately . . ." (emphasis added); that "[o]n August 9, 1981, a letter was sent to Plaintiff informing him of an intent to remove him from his position as air traffic controller . . ."; and finally that "[c]onsequently, Plaintiff was informed by a letter dated September 8, 1981 that he was officially terminated effective September 15, 1981." (emphasis added). Further, at page 7 of their argument, after stating that the issue is whether the facts show a discharge or a "voluntary quit", defendants state, ". . . it is undisputed that the claimant was discharged . . ." (emphasis added)!

Although there appear to be no Utah cases discussing the distinction between a voluntary quit and a discharge, U.C.A. § 35-4-5 itself draws that distinction, and for good reason. If the employee tells his employer "I quit", under subsection (a) the burden is on the employee to establish "good cause" or else the employee can be penalized by loss of unemployment benefits. But if on the other hand, as here, the employer says, "You're fired", the burden is on him to establish much more than good cause for that decision. Under subsection (b)(1), the employer must establish "deliberate, willful or wanton" conduct before the employee may be penalized. Thus, the issue here is whose act terminated plaintiff's employment. The only evidence is that it was the employer's act. At no point did plaintiff ever evidence an intent to quit his employment.

Moreover, there is no evidence in the record that plaintiff intended, or knew or had reason to know that his actions would result in termination. As conceded by defendants, plaintiff knew he had an "amnesty" until at least 8:00 a.m. on August 6. After speaking with Lee, he knew he had until at least 9:00 a.m. to report to work and reason to believe that Lee could grant further extensions of the amnesty. If plaintiff knew he was no longer employed, if he intended to quit his job, there would have been no reason for him to report for work at 11:30 p.m. Then, when he did report, fully expecting and desiring to resume his duties, he was ordered off the job! Whether his employer had good cause for this discharge of plaintiff is a different issue, to be decided in a different forum. However, there is no question that this was an involuntary discharge and not a voluntary quit. The statement in the Board of Review's main opinion that "the claimant's indecision was in effect a decision" (R.0016) punishes co duct clearly not intended to be punished by § 35-4-5(a).

In Continental Oil Co. v. Board of Review of the Industrial Commission of the State of Utah, 568 P.2d 727 (Utah 1977) this Court stated that the overall purpose of the Employment Security Act is ". . . to cushion the effect of unemployment . . ." Id. at p. 730. Therefore the Court adopted the position that those portions of the Act removing eligibility for benefits should be strictly construed as penalties or forfeitures:

> [A]n 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. Id. (emphasis added).

What the defendants have attempted to do is obvious. They knew there was no factual basis upon which to penalize plaintiff for "willful, wanton or deliberate" conduct. They also knew that they could assess the same penalty by calling the discharge something it was not. Although defendants have cited no specific court decision that would apply to the facts of this case, their brief obliquely refers to anonymous decisions from other jurisdictions, implying that such decisions could justify their actions. However, any such decisions would themselves be unreasonable, wrongly decided and cannot be followed by this Court in light of Continental Oil. No amount of legal legerdemain can turn an apple into an orange simply by calling it one.

The Court may wonder, as plaintiff has wondered, why he should receive such treatment from defendants. The reason is revealed in the following concurring opinion from the Board of Review decision:

> Were this case isolated by itself, there are circumstances which might give cause to consideration of the principle of equity and good conscience. However, based on the overall circumtances for all Air Traffic Controllers, I am concurring that this claimant be treated the same as his coworkers. (R.0017, emphasis added).

Thus, plaintiff was not given a fair hearing on the individual merits of his case and cannot expect to receive one if this case is remanded, rather than decided once and for all by this Court. Instead, he is the victim of still another label, that of "air traffic controller", which established an irrebuttable presumption or predisposition in the minds of the defendants that he was to be penalized, regardless of his particular circumstances. This is truly arbitrariness and capriciousness at their worst.

This arbitrariness and capriciousness is also demonstrated by the fact that the findings of the Appeal Referee, adopted by the Board of Review, are inadequate to support their decision under U.C.A. § 35-4-5(a). The statute requires not just a finding that plaintiff "left work voluntarily without good cause"; it also requires a finding as to whether plaintiff left work "under circumstances of such a nature that it would be contrary to equity and good conscience to impose such a disqualification", considering, ". . . the reasonableness of the claimant's actions, and the extent to which the actions evidence a continuing attachment to the labor market . . . ." The latter finding does not appear anywhere in the record, and it is obvious from the above-quoted concurring opinion that the Board of Review refused to consider these statutory principles! If they had been genuinely considered (beyond mere lip service), the same decision could not have been reached.

The final indication of the unreasonableness of defendants' actions comes from the fact that, after they twice rejected the preliminary decision (R.0054) that plaintiff was in fact discharged, Argument IV of their brief retreats to the position that plaintiff not only was discharged but that the grounds for discharge were "deliberate, willful or wanton" conduct. However, this argument is definitely too little, and much, much too late.

POINT II

THE INDUSTRIAL COMMISSION MAY NOT NOW CONTEND THAT PLAINTIFF WAS DISCHARGED FOR A "DELIBERATE, WILLFUL OR WANTON ACT" AND THERE IS NO EVIDENCE OR FINDINGS IN SUPPORT OF SUCH A CONTENTION.

The only issue properly before this Court is whether plaintiff quit his job. Not only are there no findings by the Appeal Referree or Board of Review of "deliberate, willful or wanton" conduct on the part of plaintiff, but the Appeal Referee's rejection (R.0037) of Brant's preliminary decision on (R.00054) this point must be taken as a finding of no such conduct.

For defendants to be asserting this contention for the first time now, after not even raising it in their Answer to the Petition for Writ of Review, shows the procedural nightmare they continue to inflict on plaintiff. Thus, if the result of this appeal is a decision that plaintiff did not quit his job, but that the case should be remanded for a determination of

whether his discharge was for willful misconduct, the Court can be sure of what the decision will be, in light of defendants' obvious desire to punish plaintiff for being an air traffic controller. As with the issue of whether plaintiff voluntarily quit his job, the fact that there is no evidence to support a finding of willful misconduct will not present defendants from making such a finding.

From the evidence and findings presently in the record, this Court should hold that, as a matter of law, plaintiff's discharge was not for willful misconduct. In Continental Oil, the case which brought about the 1979 amendments to U.C.A. § 35-4-5(b)(1) adding the "deliberate, willful or wanton" standard, the Court was careful to draw a very clear distinction between this type of conduct and . . . mistakes, errors in judgment '. . . carelessness or negligence . . .' Id at 730. As characterized by the Board of Review, the worst that can be said about plaintiff's conduct is that it resulted from "indecision". Plaintiff cannot be subjected to a penalty or forfeiture on this basis.

CONCLUSION

All plaintiff asks from this Court are his rights to a reasonable interpretation of statutes designed to protect rather than punish him, and a fair and impartial application of these statutes to facts that are generally not in dispute. Plaintiff has received neither in the previous administrative

proceedings and cannot expect to receive them in the future, if this case is remanded. The Court should rule that, as a matter of law, plaintiff was discharged and that the grounds for discharge do not amount to willful misconduct.

DATED this 14th day of September, 1982.

PRINCE, YEATES & GELDZAHLER

By _____
John S. Chindlund

By _____
James A. Boevers
Attorneys for Plaintiff-Appellant

MAILING CERTIFICATE

On this 15th day of September, 1982, I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Reply Brief, to the following parties of record:

Floyd G. Astin/K. Allan Zabel
Board of Review of the Industrial Commission
of Utah
Department of Employment Security
1234 South Main Street
Salt Lake City, Utah 84115

Mr. Robert Huffine/Mr. Robert Blunk
Personnel Office ARM-16
Labor Relations Branch
FAA Rocky Mountain Region
10455 East 25th Avenue
Aurora, Colorado 80010

_____