1973

Edna L. Kopp v. Salt Lake City, A Municipal Corporation of the State of Utah : Appellant's Reply Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

EDNA L. KOPP, *Respondent,*

vs.

SALT LAKE CITY, a Municipal corporation of the State of Utah, *Appellant.*

Case No. 12999

APPELLANT'S REPLY BRIEF

Appeal from an Order of the Industrial Commission and The District Court of Salt Lake County, State of Utah Stewart M. Hanson, Judge

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In order to simplify the consideration of the Appellant's discussion of the points raised in the Respondent's Brief, the points will be discussed by the Appellant in the order in which they are set out in that Brief, so far as practical.

POINT I

REPLY TO RESPONDENT'S STATE OF THE RECORD.

It is Respondent's contention that the Appellant is merely rearguing factual matters which were determined against Appellant by the lower court. This contention is unfounded. What the Appellant does attack are the legal conclusions of the Commission and lower court which were drawn from the facts and it would contend that this Court is not bound by legal conclusions of the Industrial Commission or the lower court. Reference is made to a case cited on Page 7 of Respondent's Brief, *Shultz v. Wheaton Glass Co.*, 421 F. 2d 259 (1970). Appellant would reiterate the quote from that case found on Page 8 of Respondent's Brief:

> "We are not, however, bound by evidence which has not reached the status of finding of fact, nor by conclusions which are legal inferences from facts."

The legal question of what constitutes the same job, job classifiication or position is what is in contention and this is a legal rather than factual determination.

Respondent contends that both the Industrial Commission and the lower court found factually against the contention that there were two distinct and different jobs within the dispatch office. This is not true. In fact, it would appear that the lower court concluded,

as a legal conclusion, that because there was some overlapping of the functions performed this made them the same job. In fact, in its finding the lower court acknowledged that there were two jobs and stated:

> "Regardless of the distinct duties purportedly shown by Defendant, *the evidence in our opinion, does not show that a male or female was specifically assigned to one job to the exclusion of the* other." (Industrial Record, page 298) (Emphasis added)

It was the finding of the Industrial Commission that irrespective of the fact that there existed two distinct jobs within the dispatch office, because the Respondent was not specifically assigned to the one job to the exclusion of the other, this fact, no matter how little or how much she performed the tasks of the other job, required a finding that it was the same job. The lower court in a memorandum decision dated August 20, 1971, stated that it sustained the Order of the Industrial Commission. The court's finding of fact and conclusions of law state merely:

> "That the Plaintiff performed the same services as male employees of Salt Lake City during the period in question in her job as dispatcher, but received as compensation a substantial lower amount than the male employees." (Trial Court Record, page 47)

The lower court and the Industrial Commission made no finding as to what portion of time the Respondent performed the same services as did the male employees

and nowhere did they state that she performed these services to an equal extent with the male employees.

It would also seem that Respondent attempts to argue from both sides of the fence when she puts forth the argument that the lower court and the Industrial Commission found that there was no distinction in the type of jobs performed by the Respondent and the male counterparts, and then turns around and argues that the Respondent had the most intense and difficult job in the dispatch office. Quoting from the Respondent's Brief on Page 9:

> "It seems ironic that the Appellant argued differently when the evidence shows that she trained policemen from their jobs as dispatchers *and had the most intense and difficult job in the dispatch office when she was working with her male co-workers.*" (Emphasis added)

This, together with the findings of the Industrial Commission that there was testimony that Mrs. Kopp handled the more complicated and more intense part of the job, would indicate that everyone is accepting the fact that there were two distinct functions. It is no matter that a person may have, "more intense and difficult task" than another but in order for discrimination to occur, a person must be on the same job. For the foregoing reasons, it is the conclusions and legal inferences which are being attacked by Appellant and not a rearguing of the facts. The Appellant has during the total proceedings of this matter admitted the fact that the Respondent performed the same functions and

duties of her male counterparts. However, the argument continually was and still is that she did not perform these functions to the same extent as did the male counterparts. For testimony to this effect, Appellant would refer the Court to the Defendant's Memorandum before the Industrial Commission as well as testimony before the lower court.

The testimony of Officer Floylynn Baker substantiates the Appellant's contention that there were separate primary functions. Officer Baker was a witness for the Respondent in the hearing before the Industrial Commission and was called again as witness in the lower court, but was not called as a witness for the Defendant as was indicated by the transcript. Mr. Baker was merely examined to supplement the record. His testimony was that he worked with the Defendant for about seven years, then continued as follows:

> "Q. During the time you have worked with Mrs. Kopp what was your designated function?
>
> A. Well, my designated function was a dispatcher, to perform all the functions necessary in the dispatch office. Primarily I answered the telephone when I wasn't on the radio.
>
> Q. Primarily you answered the telephone? *Does that mean primarily Mrs. Kopp operated the radio?*
>
> A. *Yes, the majority of the time.*
>
> Q. . . . Could you give us an idea of any percentage of the time that Mrs. Kopp performed the same functions that you did on the telephone?

That is, give us a breakdown between the answering that Mrs. Kopp did on the telephone and the answering of the telephone you did?

A. Percentagewise it would be awfully hard to do so because of the type of work there, and the volume of business. *But I think a fair evaluation would be probably* 20-80 *percent.*

Q. *Twenty percent of the time Mrs. Kopp answered the telephone, and eighty percent of the time you answered the telephone, is that correct?*

A. Yes.

Q. *As to the radio, could you give us a breakdown on the radio?*

A. *Well, it would be almost reversed during my time in there.*

Q. *Then you spent about twenty percent of your time on the radio and Mrs. Kopp eighty percent of the time on the radio?*

A. *I would say that would be a fair evaluation.*

Q. Now, when Mrs. Kopp went to lunch, did you replace her?

A. Yes.

Q. Who would take over the operation of the radio at that time?

A. I would.

Q. When you went to lunch did Mrs. Kopp replace you?

A. Not necessarily. It would depend on how many people were in the office, and in the event

that they brought a clerk in she would probably help in answering the phones then, and, of course, I wasn't there, so I don't know.

Q. The 80-20 split that you referred to, would that be a part of the time you operated the radio when Mrs. Kopp went to lunch?

A. Yes.

Q. *Did you answer the radio when Mrs. Kopp was in the office?*

A. *Not very often, no."* (Emphasis added)

(Transcript of District Court Pages 31 and 32)

If for any reason it were interpreted that the decision of the Industrial Commission as well as the lower court was that Respondent performed the same job and performed such job to an equal extent with her male counterparts, then Appellant would assert that these findings of fact were not based upon substantial and creditable evidence.

POINT II

REPLY TO RESPONDENT'S POINT IV.

While it is true, as Respondent urges, that constitutional objections, to be available for review on appeal, must ordinarily be first asserted in the lower court, however, there are generally accepted exceptions to this rule. Among these exceptions are two which are relevant to this matter—one is when the issue raised is a matter

of public policy or concern and the other is where the question of the constitutionality involved is one of jurisdiction of the subject matter. See 4 *C.J.S.*, Section 234, Page 703. The question of whether or not to review the constitutionality is one of administration and not one of power of the court.

> "No question of the power of this court is involved. Whether this court should review a question raised here for the first time depends upon the facts and circumstances disclosed by the particular record. It undoubtedly has the power, but ordinarily will not exercise it. The question is one of administration, not of power." *Town of South Tucson v. Board of Sup'rs.*, 84 P.2d 581, 584 (1938).

In that case the question was whether or not the disincorporation statute was constitutional and the court considered such question of considerable importance to the state as a matter of public policy. They said that other municipalities have been disincorporated in the past and more may desire disincorporation in the future; because of this the court said that the constitutionality of the statute was one of great public concern and could first be considered on appeal even though such was not questioned in the lower court. The court further said:

> "One of the exceptions to the rule is questions of a general public nature, affecting the interests of the state at large, and this is particularly true when the question raised for the first time is one of substantive law which is not affected by

> any dispute as to the facts of the case, for under such circumstances the parties may present the issue as thoroughly in the appellate court as it could have been presented below, without injury to either one." *Town of South Tucson v. Board of Sup'rs.*, Supra.

The statute here involved relates to discrimination in employment. It is a matter of daily and vital concern to the employees and the employers of the State. All are operating under it constantly. It is submitted that the interest of the public is sufficient to bring this matter within the exception of public policy and public concern.

It may be observed that the Anti-Discrimination Division of the Industrial Commission is an administrative body of limited jurisdiction. The Industrial Commission has no jurisdiction with respect to hearings on matters of discrimination except as the Anti-Discrimination Act, if constitutional, has conferred upon that body. The question raised by Appellant goes to the jurisdiction of the Industrial Commission in regard back pay. If the Act is unconstitutional, the Industrial Commission is without jurisdiction; hence, the question is really a question of jurisdiction and, therefore, comes within the exception as a jurisdictional matter. For the foregoing reasons, the constitutionality of the Act can and should be considered by this Court.

POINT III

FURTHER REPLY TO RESPONDENT'S POINT IV.

Respondent makes the claim that the factual matter regarding over-qualified police officers was determined against the Appellant in the lower court. There was no reference to any finding of fact regarding the qualifications of the male personnel who worked in the dispatch office. This is true in the findings of the Industrial Commission and of the lower court.

Respondent further makes reference to the fact that not all males were police officers. This is found in Point II of Respondent's brief. There was only one male employee working in the dispatch office who was not a police officer. This person was Harold Goates, and Mr. Goates was licensed by the Federal Communications Commission as a radio operator and in addition thereto was a qualified radio repairman able to maintain the radio equipment of the police department. Chief of Police Calvin C. Whitehead testified regarding this matter as follows:

> "Mr. Earl:
>
> Q. Referring to Mr. Goates, does he have a radio operator's license under the Federal Communications Commission?
>
> A. He has a first-class license.
>
> Q. Do you know how long he has had that license?
>
> A. A number of years.
>
> Q. He has been licensed then for a number of year?

A. I would say at least 15.

Q. At least during the entire time he was working in the dispatch office, he has been licensed as such?

A. Yes.

Q. And could maintain equipment?

A. Yes."

* * *

Commissioner Hadley:

"Q. Do you know whether or not, when Mr. Goates was hired, his license as a radio operator was considered in his salary range?

The Witness:

A. Well, he was hired about 28 or 29 years ago.

Commissioner Hadley:

Q. I see.

The Witness:

A. And I don't know, but I'm sure it's been considered in the interim." (Industrial Record, page 219-221)

Since Mr. Goates did have additional qualifications over and above those required to be a dispatcher, he would together with the police officers, be included within the category argued in Appellant's Brief as an over-qualified male personnel working as a dispatcher.

POINT IV

REPLY TO RESPONDENT'S POINT VI.

Respondent would have this court believe that the right of action does not accrue until she was allowed to intervene and this just is not the case. The purpose of allowing a Complainant to intervene is for the purpose of presenting testimony at the hearing as set forth in Paragraph 8 of Section 34-35-7, U. C. A., 1953, as amended:

> "A Complainant may be allowed to intervene *and present testimony in person or by counsel.*" (Emphasis added)

Further, the regulations adopted by the Utah Industrial Commission state:

> "At the discretion of the Hearing Examiner or Commission, Complainant shall be permitted to intervene either in person or by counsel to present oral testimony or other evidence and to examine and cross-examine witnesses." (Adopted Regulations, Utah Industrial Commission, Regulation 1, Section 7 (b), Hearing.

The right of action which a person has who claims to be aggrieved by a discriminatory or alleged unfair employment practice is to file a complaint with the Commission as is indicated in Section 34-35-7, U.C.A., 1953, as amended, which provides in part as follows:

> "Any person claimed to be aggravated by a discriminatory or alleged unfair employment practice may, by himself or his attorney at law,

make, sign, and file with the Commission a written complaint in duplicate . . . "

Hence, there is no contingency specified in the Anti-Discrimination Act before a cause of action accrues. A cause of action is a claim which may be enforced. It is the right which a party has to institute and carry through an action. *Lewis v. Hyams*, 63 P. 126, 26 Nev. 68. The method of enforcing the claim and right which the Respondent was alleged to have was by filing the complaint with the Industrial Commission. For this reason there is no contingency and no reason for tolling the statute of limitation.

CONCLUSION

In conclusion, Appellant urges this Court to overturn the decision of the lower court. In the event the decision were to be upheld, it would mean that any time a person performs tasks that are performed by a higher employed person that person must be paid the same. This would be true whether these tasks are performed only during a small percentage of the time or for almost all of the working day. Such a decision would open the flood gates of litigation and bring cases into court which were not so intended by the Legislature. The intent of the Legislature was that employees of different sexes be on the same footing and be treated equal by employers, not that one be given preference over the other by not performing the same job the same amount of time, but being entitled to the same pay.

If discrimination is found, it is urged that this is not a case where back-pay should be awarded. The ultimate purpose of the Anti-Discrimination Act is to eliminate discrimination and this was accomplished without the award of back-pay. All reasons set forth by Appellant as to why back-pay should not be awarded are proper to be considered by this court and it is urged that it do so.

Respectfully submitted,

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