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Beulah B. Gocke v. Otto A. Wiesley, Daniel A. Elt0N, Eliot Y. Gates, Members of Board of Review of the Industrial Commission of Utah, Department of Employment Security : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

BEULAH B. GOCKE,
Appellant,

vs.

OTTO A. WIESLEY, DANIEL A. ELTON, ELIOT Y. GATES, MEMBERS OF BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY,
Respondents.

Case No. 10514

RESPONDENTS' BRIEF

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STATUTES

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STATEMENT OF THE CASE

On September 29, 1965, a representative of the Utah Department of Employment Security of the Industrial Commission of Utah issued a review decision affirming a prior decision issued September 14, 1965, denying unemployment benefits to the appellant for the ten-week period commencing September 5, 1965, and ending November 8, 1965, on the grounds that she did

not meet the eligibility requirement of the Utah Employment Security Act that a claimant be available for work.

After due notice and hearing the Appeals Referee of the Department of Employment Security on November 8, 1965, affirmed the ineligibility of the claimant for unemployment benefits to the date of hearing, November 4, 1965. On December 1, 1965, the Board of Review of the Industrial Commission of Utah affirmed the decision of the Appeals Referee and denied any further hearing on appeal. The matter is now before this Court on a petition for review of the decision of the Board of Review, which was filed on the 20th day of December, 1965.

STATEMENT OF FACTS

The appellant's statement of facts is correct except in two respects:

1. The record does not show as stated on page one of appellant's brief that the appellant was told that her former employer wished to rehire her as soon as she was able to return to work. Rather the prospect of return to such employer was indefinite (R-16, 18, 19).

2. The record does not show that the appellant contacted her former employer as the appellant's brief (at page three) indicates between September 14, 1965, and November 4, 1965, but

only that she did so within the last two weeks in September (R-22).

THE ISSUE

The issue involved in this case is whether the appellant must be allowed unemployment benefits as a matter of right on the grounds that there was no evidence whatsoever to support the respondents' finding that her personal efforts to seek work were insufficient in light of her individual circumstances to indicate a definite affirmative attachment to the labor market or availability for work.

ARGUMENT

POINT ONE

THE UTAH EMPLOYMENT SECURITY ACT BARS THE DEPARTMENT OF EMPLOYMENT SECURITY FROM PAYING UNEMPLOYMENT BENEFITS EXCEPT WHERE THE CLAIMANT IS BOTH REGISTERED FOR WORK AND AVAILABLE FOR WORK.

That portion of the Employment Security Act which is central to this case is 35-4-4, Utah Code Annotated 1953, as amended, which imposes a limitation upon eligibility for unemployment benefits as follows:

"35-4-4 An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found by the commission that:

"(a) He has made a claim for benefits with respect to such week in accordance with such regulations as the commission may prescribe.

"(b) He has registered for work at, and thereafter continued to report at, an employment office, . . .

"(c) He is able to work and is available for work."

The plain meaning of the quoted language is to require a disallowance of unemployment benefits unless the commission finds that the claimant has fulfilled several conjunctive requirements, these pertaining to (a) filing claims, and (b) registering for work and continuing thereafter to report at the employment office, and (c) being for the period in question able to work and available for work. That the requirement of availability for work is a separate one to be met on a week-by-week basis, over and above the claimant's mere registration and reporting, appears clear from the structure of the Act and such has been affirmed by cases in other jurisdictions. *Chadwick v. Employment Security Board of Review,* 192 Kan. 769, 390 P. 2d 1017; *Shannon v. Bureau of Unemployment Compensation,* 155 Ohio St. 53, 97 NE 2d 425; *Department of Industrial Relations v. Tomlinson* (Alabama), 36 So. 2d 496.

It is apparent that the commission may and must require affirmative indications that the several funda-

mental requirements are met as a basis for its findings to that effect. In accord is the leading Michigan case of *Dwyer v. Appeal Board of Michigan, U. C. Comm.*, 321 Mich. 178, 32 NW 2d 434. By the same token, the commission would act inconsistently with the law if it declared such requirements to have been met and allowed benefits when it had evidence before it indicating the contrary to be true. This is particularly true when there has been a voluntary withdrawal from the labor market and an absence therefrom for several months.

POINT TWO

IN APPLYING THE "AVAILABLE FOR WORK" REQUIREMENTS OF THE EMPLOYMENT SECURITY ACT, THE DEPARTMENT OF EMPLOYMENT SECURITY MAY LOOK BEYOND A CLAIMANT'S MERE DECLARED SUBJECTIVE WILLINGNESS TO ACCEPT WORK FOR OBJECTIVE EVIDENCES OF AVAILABILITY SUCH AS PERSONAL EFFORTS TO SEEK WORK.

In the appellant's brief the foregoing point is conceded. However, since this case is one of the first impression in certain aspects the related authorities should be cited. They are clearly to the effect that "availability for work" as used in Employment Security Acts implies an obligation upon the claimant to make personal efforts to find work. In *Dwyer v. Appeal Board of Michigan U. C. Commission,* supra, the Michigan Court

analyzed an act identical in its material respects to that in Utah and concluded that registration and availability for work are separate requirements, and that from the availability requirement it is reasonable to infer the need for a personal search for work as an affirmative indication of labor market attachment. The Court specifically found the Unemployment Compensation Commission to be right in its position that it could not find the availability requirement met without an objective manifestation of attachment to the labor market by the claimant's efforts to seek work.

Among numerous other authorities in accord are *Teague v. Florida Industrial Commission* (Florida), 104 So. 2d 612; *Shannon v. Bureau of Unemployment Compensation,* supra; *Department of Industrial Relation v. Tomlinson,* supra; *Farrer v. Director of Division of Employment Security,* 324 Mass. 45, 84 NE 2d 540; *Mohler v. Department of Labor,* 409 Ill. 79, 97 NE 2d 762, and cases cited therein.

The duty to determine the facts has been delegated to the commission by law and a realistic interpretation of the facts and circumstances is essential to the successful operation of the program.

In its search for truth, the commission has the right and duty to consider the interest of the appellant; the probability or improbability of her assertions in light of the proved or admitted facts; the general situation as shown by all of the surrounding circumstances; the conditions or compulsions under which the appellant

acted and under which she testifies; her prejudices, if any, and her desires; together with many other factors including restrictions as to wages, hours, and kinds of work which the appellant will accept. (Indiana) *Haynes v. Brown* (1949) 88 NE 2d 795; *Walton v. Wilhelm,* 91 NE 2d 373 .

Basically the commission operates on the premise that the philosophy underlying the "availability" requirement is that benefits under the unemployment compensation system should be reserved for those unemployed workers, otherwise eligible, who maintain a genuine attachment to the labor market.

Obviously any general premise must be implemented. Each claimant must be tested or examined on a week-by-week basis to determine whether he or she has done those things which might be reasonably expected of one diligently seeking work, keeping in mind his skill, his training, and the labor market.

We agree with the *Nelson v. Van Horn Construction Company* case cited by appellant at page 8, that a union man who pays his dues and keeps in contact with his union is diligently seeking work when in his labor market the majority of all construction workers are hired by employers through the union hiring hall.

An employer might be expected to *rehire* an employee through a telephone contact. We cannot agree that telephone calls asking whether openings exist are a reflection of a genuine labor market attachment, par-

ticularly when they are few in number and over a ten-week period. At best they constitute a desultory effort.

POINT THREE

A PROPER ADMINISTRATIVE TEST TO BE APPLIED IN WEIGHING THE SUFFICIENCY OF A CLAIMANT'S PERSONAL EFFORTS TO SEEK WORK AS AN OBJECTIVE INDICATOR OF AVAILABILITY FOR WORK IS WHETHER THE CLAIMANT ACTED IN A REASONABLE MANNER UNDER HIS INDIVIDUAL CIRCUMSTANCES TO RELIEVE HIS UNEMPLOYMENT.

Among the authorities cited under Point Two above are numerous statements evaluating the respective claimant's efforts to seek work against the standard of a reasonable search in terms of the claimant's facts and circumstances. With considerable uniformity the cases on availability observe that the determination is an individual one to be made by the application of basic guides (the reasonable search or reasonable conduct test) to the claimant's peculiar facts and circumstances. In cases where the test used is not "reasonable efforts" it is often "active efforts." An example of the latter construction under a statute materially identical to Utah's is *Florida Industrial Commission v. Ciarlante* (Florida), 84 So. 2d 1. In the course of an extensive review of sustaining authorities, the case being one of the first impression there, the Florida Court noted:

"It has also been argued here that the policy adopted by the Florida Industrial Commission of requiring claimants to indicate their desire to become employed and their 'availability for work' by actively seeking work has the effect of adding, adminstratively, an additional requirement for eligibility . . . This contention cannot be sustained. The Act not only requires registration for employment but also, that the claimant be found to be able to work and available for work. It does not seem to be an unreasonable interpretation of the general terms of the statute that 'availability' should be evidenced by something more than mere registration with an employment agency and expressed willingness to work."

POINT FOUR

THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD TO INDICATE THAT CONSIDERING HER INDIVIDUAL FACTS AND CIRCUMSTANCES THE APPELLANT DID NOT ACT REASONABLY TO RELIEVE HER UNEMPLOYMENT AND WAS NOT AVAILABLE FOR WORK.

The appellant's case on appeal relies heavily upon the assertion that she had a definite prospect of early re-employment with her former employer and that she looked, therefore, initially to this source rather than to extensive outside contacts. However, if the record be examined closely it may be seen that the claimant did not in fact have any definite prospect with her

former and that she knew or might have known this both by the facts as to her relationship with the employer before and after her separation and by the facts as to the limitations upon her own hours of work as contrasted to the employer's required or desired hours for her services.

Although the appellant's brief states broadly that she left employment with the understanding that the employer "wished to rehire her as soon as she was able to return to work" (p. 1), the record is devoid of substantiation of this assertion. Rather, the appellant gives indication by her own testimony that: (1) the employer declined to place her on pregnancy leave, in effect denying her the right of rehire after the birth of her child (R-16), (2) that the company treatment on the occasion of her termination bothered her with the notion that something was wrong which she might have been in a position to correct (R-16), (3) that as of September 13, 1965, her former employer had no openings and was not hiring (R-15, 16), (4) that from September 13, 1965, to the first week in October she was definitely limited to working day shift only (R-15, 17), and (5) that thereafter her willingness to work other than day shifts was extremely doubtful. As to this latter point, the appellant reported at various times during the hearing: "If I *had to* I could work swing shift. *It would not be convenient,* but if I had to I could," (R-15), "I did work night shift (previously) *because my children were old enough* to . . ." (R-16), "*I wanted to work days last year* and I couldn't trans-

fer" (R-16), "I finally decided that maybe if I could possibly get on at nights out there, because they have more turnover on the night shift, that I could try it for awhile. *It wouldn't be the most satisfactory arrangement"* (R-17), "I don't think I could work very long on the night shift, as far as that goes. *They would have to transfer me."* (R-17). (Emphasis supplied.)

Considering these several indications of the appellant's actual unwillingness to work night shift, her extra problems of leaving a new baby at night and her inability to get back to work on day shift as emphasized by her former inability, even while actively employed, to transfer to day shift, it is not unreasonable to conclude that the appellant had no good prospect of reemployment at her former place of work. More important as pertaining to her subjective frame of mind, it is also reasonable to conclude from the foregoing that the appellant must have realized the great likelihood that she would not find work with her former employer at all, let alone on a basis compatible with her limited freedom as to hours. As a further indication of this latter likelihood, the appellant's counsel by leading questions implied a possibility that the appellant had personal difficulties at her former employment. The questions and answers thereto, taken with the earlier reference at R-16, fairly sustain at least an inference that the appellant did have a feeling of some personal attitude or prejudice against her at the former employment (R-21, 22).

The record also contains evidence sustaining inferences that the appellant's search for work independent of the former employer was not a reasonable one, under her circumstances. The appellant reported no personal contacts to locate prospective new employment for more than two months following the birth of her baby on July 24, 1965 (R-17), although she was released by the doctor midway in that period (September 4, 1965) (R-17). According to the testimony, her first personal application was to Albertson's on October 15, 1965 (R-20), nearly three months after the birth of her child, six weeks after her release by the doctor, and four weeks after she was advised of the denial of benefits because of her failure to show by her efforts a genuine availability for work (R-46). This fact negatives to a great extent the assertions elsewhere in the record that the appellant was acting reasonably to minimize the length of her unemployment and obtain an early return to work.

When asked by the Referee (R-19) what she was doing to occupy her time primarily, the appellant replied: "Truthfully, getting everything caught up that I could possibly get caught up in the house so that I would be ready to go at a minute's notice for work, I mean. Doing extra cleaning and doing extra sewing, trying to get my children's wardrobes complete for the year until next summer. This is just practical thinking, I feel." This is not indicative of a genuine attachment to the labor market. Rather it reflects a lack of

urgency to seek work even though at that time her husband was apparently also unemployed.

The appellant reported on September 13, 1965, that the " . . . *kinds* of work" she was " . . . ready, willing, and able to accept" were "Electronics assembly work" and that the minimum wage which would be acceptable to her was $1.85 per hour, based on the scale in that occupation (R-15, 27). Despite this fact, she made only one personal application to an employer in that field during the entire fifteen weeks from the date of birth of her child to the date of hearing (R-20). Although she made a few telephone calls to other places, it was not capricious or arbitrary for the Referee and the Board to view these as an insufficient substitute for actual visits to places of prospective employment in her field when they were attempting to determine whether the appellant acted like a person who really wanted to find early employment. It is submitted that the minimal effort of a personal application rather than a mere telephone call is not an unreasonable one to expect of the sincere job seeker who is anxious to end his unemployment.

Further, the appellant reported applications to two grocery markets and telephone calls to a jewelry company, a bag company, and food company as indicative of her active efforts to seek work (R-20). Although the record does not attempt either to substantiate or impeach her sincerity as to these places, such sincerity does appear questionable on the face of the record since

none offers work in the technical occupation which she reported as her basis of availability. The record does not develop the facts as to any potential salary disparity between the appellant's expressed *minimum* acceptable wage of $1.85 per hour and the going rate for the other divergent occupations about which she says she inquired, but such disparity might well exist. Nowhere in the record does the appellant express herself as being willing to change occupations or accept a lower wage.

Counsel for appellant reports his failure to find any case in which efforts comparable to the appellant's have been determined to be insufficient as an indication of availability for work. While it is true that the cases turn very much upon individual facts and circumstances and the inferences therein, the authorities are not without examples parallel to the appellant's facts. In the case of ***Ethel R. Chadwick v. Employment Security Board of Review,*** supra, the Kansas Supreme Court in 1964 reversed the District Court and upheld the Board's decision denying benefits on the insufficiency of the claimant's efforts to seek work, concluding that there was relevant evidence in the record from which the Board might determine as it did that the efforts were not a reasonable search for work for one in the claimant's circumstances. The claimant in that case was a telephone operator who worked until October 15, 1961, at which time she entered on pregnancy leave. Following the birth of her child on December 11, 1961, she was released to work by her doctor on January 21, 1962. She initiated a claim for unemployment benefits

on January 14, 1962. She attempted unsuccessfully to obtain reinstatement with her former employer and to transfer from Olathe, Kansas, to Parsons, Kansas, where her husband had moved and was working. On March 22, 1962, the claimant moved to Parsons. This claimant's efforts to seek work in the period of January 21, 1962, to April 25, 1962, were found by the Referee to have included personal applications to the county courthouse, the Olathe News, "various PBX users" (number unspecified), and two Federal agencies. The latter two employers required a test which the claimant had not taken as of the date of the hearing.

The Court found the claimant to have made three personal applications between January 21, 1962, and March 12, 1962, and three more personal applications between March 13, 1962, and April 25, 1962. The claimant also registered for work and reported weekly at the State Employment Office. The claimant in this case reported that she would accept a minimum wage of $75.00 per week and that she would work day hours. In her former job she had been paid $78.50 per week and she appears to have worked at least some night hours.

In concluding that the claimant's actions did not constitute a reasonable effort to seek work within the meaning of the availability statute, the Kansas Court cited its own earlier case of *Clark v. Board of Review,* 187 Kan. 695, 359 P. 2d 856, in which the Court reviewed numerous authorities as to the meaning of "rea-

sonable efforts to find work" and noted, " . . . one of the tests is whether the facts show that a claimant sincerely wants work and has acted in a reasonable manner under *his* circumstances in trying to relieve his unemployment." (At 359 P. 2d 858.)

POINT FIVE

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

Although the point is not disputed, it might be noted herein that consistently with the general rule as to scope of review in administrative cases this Court will affirm an administrative denial of benefits unless such denial was clearly capricious, arbitrary, and unreasonable. *Kennecott Copper Corporation Employees v. Department of Employment Security,* 13 Utah 2d 262, 372 P. 2d 987. In *Members of Iron Workers Union of Provo v. Industrial Commission,* 104 Utah 242, 248; 139 P. 2d 208, 211, this Court said:

> "If there is substantial competent evidence to sustain the findings and decision 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 SIX

THAT THE EMPLOYMENT SECURITY ACT IS TO BE LIBERALLY CONSTRUED TO ACCOMPLISH ITS OBJECTS BUT SUCH RULE DOES NOT PERMIT AN EXTENSION OF UNEMPLOYMENT BENEFITS TO ONE WHOSE INITIAL OR CONTINUED UNEMPLOYMENT MAY BE VOLITIONAL.

It is a generally acknowledged rule that Employment Security Acts are construed liberally to accomplish their purposes and objectives. However, in Utah and elsewhere the courts construe the Acts in a manner which distinguishes those petitioning as beneficiaries of the Act who become unemployed for reasons attributable to themselves or whose failure to become re-employed may be attributable to their own actions or failure to act. In *Kennecott Copper Corporation Employees v. Department of Employment Security,* supra, this Court was careful to point out that the purpose of the Employment Security Act is to assist the worker and his family in times when, *without fault on his part,* he is out of work. In *Olaf Nelson Construction Company v. Industrial Commission,* 121 Utah 521, 243 P. 2d 951, the Court noted that the underlying legislative intent is that the commission is to determine a claimant's eligibility for unemployment benefits by adhering to the volitional test, and declared the policy of the contributions provisions of the statute to be to establish financial reserves for the benefit of persons unemployed through no fault of their own.

Representative of the position of other courts is the statement of the Kansas Court in *Clark v. Board of Review,* supra. In denying unemployment benefits on the grounds that the claimant had not made a reasonable search for work, the Court noted as a factor in construction of the Act that " . . . benefits are for those who are unemployed through no fault of their own and are willing, anxious, and ready to support themselves and family, and who are unemployed because of conditions over which they have no control." In a similar context the Alabama Supreme Court upheld the denial of unemployment benefits to a worker who had failed to show availability by reasonable efforts to seek work. In so doing the Court declared the unemployment compensation law to be remedial and hence susceptible of liberal construction to realize its purpose. However, the Court noted that the Act was designed to ameliorate consequences of the failure of industry to provide jobs, i.e., to insure a *diligent* worker against the vicissitudes of enforced unemployment. *Department of Industrial Relations v. Tomlinson,* supra.

CONCLUSION

The law imposes upon the commission a duty of distinguishing the eligible claimant who is "available for work" from one who does not meet this requirement. As an objective manifestation of a claimant's subjective condition of availability, the commission reasonably looks to the nature and extent of the claimant's efforts

to seek work and considers these in light of the claimant's individual circumstances. Where there is substantial evidence that a claimant's efforts to seek work are not reasonable under the circumstances, the commission may find the availability requirement not met and deny benefits. Such was the case with the appellant. There was evidence upon the record which formed a basis for the commission's denial of benefits. Since there was sustaining evidence, the denial of benefits in this case was consistent with principles of construction applicable to the Employment Security Act and should be affirmed.

Respectfully submitted,

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