1983

Guy L. Kirkwood v. Board of Review of The Industrial Commission of Utah, Department of Employment Security : Plaintiff And Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

GUY L. KIRKWOOD,

Plaintiff-Appellant,

-vs-

Supreme Court No. 19,177

BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY,

Defendant-Respondent,

PLAINTIFF AND APPELLANT'S BRIEF

Appeal from Decision of the
Board of Review of the
Industrial Commission of Utah,
Department of Employment Security

Brian C. Harrison
290 West Center
Provo, Utah 84601
Attorney for Plaintiff
and Appellant

K. Allen Zabel
174 Social Hall Avenue
Salt Lake City, Utah 84147
Attorney for Defendant
and Respondent

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PLAINTIFF AND APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action wherein Plaintiff-Appellant applied for unemployment compensation after being fired from his job with Helper City. Unemployment compensation was denied on the basis of Section 35-4-5-(b)(1), Utah Code Annotated 1953, as Amended [Discharged for Misconduct].

DISPOSITION IN THE ADMINISTRATIVE HEARING

This matter was considered by a Job Service Representative on July 4, 1982, by an Appeal's Referee on September 2, 1982, and by the Board of Review of the Industrial Commission of Utah on April 19, 1983. This appeal is from the final decision of the

Board of Review of the Industrial Commission of Utah, denying Plaintiff-Appellant's appeal from the Appeal Referee's decision Number 83-A-3482, dated September 2, 1983, wherein the findings and conclusions of the Job Service Representative were sustained.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks an Order of this Court reversing the denials of unemployment compensation rendered below, or in the alternative, granting a new evidentiary hearing and remanding this matter for hearing on the merits of the case.

STATEMENT OF FACTS

Guy L. Kirkwood was employed by Helper City in 1972 and rose to the responsibility of Street Superintendent by 1977 and continued his employment without incident for nearly ten years. He was elected by the Helper City Employees to serve as a member of the Helper City Board of Appeals (this Board considered and ruled upon employee management disputes). In addition, Plaintiff-Appellant was a long time member of the Helper City Volunteer Fire Department.

On July 1, 1982, Plaintiff-Appellant discovered that his wife was having an affair with another man, that she had removed all of the household furniture, dishes, bedding and food from the house of the parties, and that she had taken the two minor children of the parties and moved in with her lover. Plaintiff-Appellant was devastated.

Plaintiff-Appellant missed work on July 1, 1982 and made

arrangements to meet with an attorney on July 2, 1982 regarding his domestic problems. Plaintiff-Appellant obtained a substitute to cover his duties as Street Superintendent for July 2, 1982 in order to meet with his counsel. At 7:00 a.m. on July 2, 1982, a newly elected Helper City Councilman, Jack Ori, appeared at the home of Plaintiff-Appellant and demanded that he meet with the Mayor and City Council at 9:00 a.m. Plaintiff-Appellant declined to attend the meeting because of his appointment with legal counsel and was summarily fired.

Plaintiff-Appellant was knowledgeable about the termination policies of Helper City by virtue of his experience on the Appeals Board. This policy provided a three-step procedure in cases of employee misconduct,

1. Verbal warning,
2. Written warning and one week suspension without pay,
3. Hearing before the Mayor, Councilmen, and Appeals Board.

None of these procedures were followed in this case.

Plaintiff-Appellant applied for unemployment compensation from the Job Service representative on July 6, 1982. The representative refused to allow Plaintiff-Appellant to read or review any statements by his employer, Helper City, and made the following finding:

> You were discharged from your job with Helper City on July 2, 1982 when you refused to meet with the Mayor and City Council after an

unexcused absence. Such a request was not unusual in that you were the Street Department Supervisor.

From this finding, the Job Service representative concluded: Under Section 35-4-5-(b)(1) you were discharged for an act or omission in connection with employment which is deliberate, willful or wanton, and adverse to the employer's rightful interest.

As a result of the foregoing conclusion, Plaintiff-Appellant was denied any unemployment compensation. Plaintiff-Appellant had no funds for legal counsel, having been fired from his job, and having discovered that his wife had left him with a twelve month delinquency on house payments, the phone service having been terminated for non-payment, and having discovered numerous other outstanding bills which had not been paid by his wife prior to their separation. Notwithstanding these difficulties, Plaintiff-Appellant sent letters to the various administrative hearing boards on August 11, 1982 (See Page 38 - Record on Appeal), March 29, 1983 (See Page 27 - Record on Appeal), April 29, 1983 (See Page 21 - Record on Appeal), and June 13, 1983 (See Page 4 - Record on Appeal), in an effort to present evidence regarding his claim for unemployment compensation and the wrongful treatment which he had received from Helper City.

Plaintiff-Appellant has been unemployed for fourteen months since his termination by Helper City. Prior to July 1, 1982 he had

been a loyal and dedicated employee for over ten years. His efforts to present evidence and have his case reviewed had been severely limited by his modest reading and writing capabilities.

ARGUMENT

POINT I. THE EVIDENCE FAILS TO SUPPORT A FINDING THAT PLAINTIFF-APPELLANT'S DISCHARGE WAS FOR MISCONDUCT AS DEFINED BY SECTION 34-4-5-(b)(1).

The only evidence submitted to the Job Service Representative regarding the alleged grounds for termination was a payroll sheet which showed that Plaintiff-Appellant had worked five hours rather than eight hours on June 18, 1982 (See Page 29 - Record on Appeal). There was no evidence in the payroll sheets relating to July 1, 1982. In this case, there is no record of excessive absenteeism. There is a record that shows five hours work rather than eight hours on June 18, 1982. There is no record that prior warnings had been given to the Plaintiff-Appellant. In addition, Plaintiff-Appellant had arranged for a substitute to cover his employment responsibilities while he was seeking legal counsel to help resolve his domestic difficulties.

In the case of Janucik v. Department of Employment Security and Board of Review of the Industrial Commission of Utah, 569 P.2d 1112, the 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.

In this case, the record shows one day of five hours rather than eight hours work. The record does not show a record of any warning whatsoever having been given the employee by the employer. In addition, the domestic difficulties of Plaintiff-Appellant should certainly be considered as they relate to the issue of good cause and absenteeism. Furthermore, as stated in Plaintiff-Appellant's letter of June 13, 1983 (See Page 4 - Record on Appeal), Plaintiff-Appellant asked for but was denied the right to read or review the statement of his employer as to the basis for his firing, thus denying him notice and an opportunity to be heard regarding the finding of misconduct.

POINT II. THE RECORD PERSUASIVELY SHOWS THE ACTION OF THE APPEALS REFEREE AND OF THE BOARD OF REVIEW WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE, AND WITHOUT SUBSTANTIAL SUPPORT IN THE RECORD.

Plaintiff-Appellant perhaps made errors in judgment regarding the finding of a substitute employee during a time of extreme marital conflict, but his action is more properly characterized as leaving work voluntarily, without cause, if anything. Moreover, the events of July 1, 1982 may constitute reasonable cause if fairly considered.

Plaintiff-Appellant is an unlearned man but has worked consistently and without incident as a Street Supervisor for Helper City for over ten years. He has limited training and ability in the basic skills of reading and writing. The substance of his evidence may be gleamed from the four letters previously

referred to which he submitted to the various administrative hearing boards. From these letters, the Board of Review should have found an absence of willful and wanton conduct on the part of Plaintiff-Appellant. There was no finding whatsoever regarding culpability. Kirkwood's intent was not specifically considered by the Appeal's Referee nor by the Board of Review, therefore the determination of misconduct under Section 35-4-5-(b)(1) was wrong as a matter of law. In the case of Continental Oil Company v. Board of Review of the Industrial Commission of Utah, 568 P.2d 727, the Court found that the purpose of the Employment Security Act was:

> To cushion the effect of unemployment by the payment of benefits to a worker in the event of his unemployment.

Citing a related case, Boyntan Cab Company v. Neubeck, 296 N.W. 636, the Court considered the meaning of misconduct and stated:

> If mere mistakes, errors in judgment, or in the exercise of discretion, minor and but casual or untentional carelessness or negligence, and similar minor peccadilloes must be considered to be within the term misconduct, and no such element as wantoness, culpability, or willfulness with wrongful intent or evil design is to be included as an essential element in order to constitute misconduct within the intended meaning of the term as used in the Statute, then they will be defeating as to many of the great mass of less capable industrial workers, who are in the lower income brackets and for whose benefit the act was largely designed, the principal purpose and object under the act of alleviating the eyils of unemployment by cushioning the shock of a lay-off, which is apt to be the most serious to such workers.

The Court in discussing the Boyntan case further stated

that, "a statute for a forfeiture should be strictly construed and the penal character of the provision should be minimized by excluding, rather than including, conduct not clearly intended to be within the provision."

Based upon the foregoing principals, the Court stated in the Boyntan case:

> The intended meaning of the term misconduct is limited to conduct evencing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest evil culpability, wrongful intent or evil design, and to show an intentional and substantial disregard of the employer's interest or the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the Statute.

In the instant case, the Appeal's Referee did not find that Kirkwood's conduct showed a deliberate, willful, or wanton disregard of his employer's interests. Kirkwood's intent was not specifically considered by the Appeal's Referee and without a finding of culpability, the determination of misconduct was wrong as a matter of law.

The Appeal's Referee and the Board of Review should have applied the "equity and good conscience" standard set out in the Employment Security Act and considered the reasonableness of

claimant's actions. This they did not do. Despite claimant's functional incapacities in reading and writing, his letters do provide evidence which should be judged by this standard. The record shows no such consideration. In the case of Salt Lake City Corporation v. Department of Employment Security and Marion Lynch, 657 P.2d 1312, the Court discussed the standard of equity and good conscience and stated as follows:

> In determining what constitutes equity and good conscience, the commission must consider the reasonableness of the claimant's actions . . .

In this case, the Appeal's Referee refused to allow the Plaintiff-Appellant to read and review the stated grounds for termination submitted by Helper City, and in addition the Board of Review failed to consider the various letters submitted by Plaintiff-Appellant as evidence towards the issue of misconduct and a finding of culpability on the part of Plaintiff-Appellant.

The record in this case does not provide support for a finding of misconduct on the part of Plaintiff-Appellant. Both the Continental Oil case and the Boyntan Cab Company case require that intent be specifically considered, and without a specific finding of culpability, the conclusion of misconduct was wrong as a matter of law.

CONCLUSION

Plaintiff-Appellant respectfully submits that the Job Service Representative's determination, the Appeal's Referee's decision and the decision of the Board of Review of the Industrial

Commission of Utah were in error as a matter of law and that the denial of unemployment compensation to Plaintiff-Appellant should be reversed, or in the alternative, this case should be remanded for an evidentiary hearing on the merits.

DATED this 21st day of September, 1983.

Respectfully submitted,

BRIAN C. HARRISON
Attorney for Plaintiff-Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing to K. Allen Zabel at 174 Social Hall Avenue, Salt Lake City, Utah 84147, Attorney for Defendant-Respondent, postage prepaid, this 23rd day of September, 1983.

Secretary