1983

Baltazar Antillon v. The Board of Review of The Industrial Commission of Utah, Supreme Court Department of Employment Security : Defendant's Brief

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IN THE SUPREME COURT
OF THE STATE OF UTAH

BALTAZAR ANTILLON,

Plaintiff,

vs.

Case No. 19338

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

Defendant.

DEFENDANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an appeal pursuant to Section 35-4-10(i), Utah Code Annotated 1953, from a decision by the Board of Review of the Industrial Commission of Utah, which affirmed a decision of an Appeal Referee which denied unemployment benefits to the Plaintiff pursuant to Section 35-4-5(k)(1), Utah Code Annotated 1953, as amended, (1981 Supplement) on the grounds the Plaintiff is an illegal alien who has not been lawfully admitted to the United States; and pursuant to Section 35-4-5(e), Utah Code Annotated 1953, as amended, on the

grounds the Plaintiff withheld the material information of his status as an illegal alien in order to obtain benefits to which he was not entitled.

DISPOSITION BY LOWER AUTHORITY

Plaintiff was denied benefits on the grounds that he was an illegal alien who has not been lawfully admitted to the United States and further, on the grounds the Plaintiff failed to report the material information of his status as an illegal alien while claiming benefits to which he was not entitled, pursuant to Sections 35-4-5(k)(1) and 35-4-5(e), Utah Code Annotated 1953, as amended. Plaintiff appealed the denial of benefits. An Appeal Referee, upon hearing, affirmed the decision of the Department Representative by decision in Case No. 83-A-2223, dated April 19, 1983. The decision of the Appeal Referee also affirmed an overpayment in the amount of $4,220. Plaintiff appealed to the Board of Review of the Industrial Commission of Utah, which Board affirmed the determination of the Appeal Referee by decision in Case No. 83-A-2223, 83-BR-289, issued July 15, 1983.

REVIEW SOUGHT ON APPEAL

Plaintiff seeks reversal of the decision of the Board of Review of the Industrial Commission of Utah and requests reinstatement of his unemployment benefits. Defendant seeks affirmance of said decision.

STATEMENT OF FACTS

Plaintiff, hereinafter referred to as claimant, is a citizen of Mexico. R.0054 He entered the United States in June 1971 without visa, without inspection and without admittance. He returned to Mexico in December 1971; he re-entered the United States in June 1972 and returned to Mexico in December 1972; he re-entered the United States in May 1973 and returned to Mexico in December 1973; he re-entered the United States in August 1974 and remained in the United States until July 1980 when he returned to Mexico for one month and re-entered the United States in August 1980. Each time the claimant returned to the United States he did so without visa, without inspection, and without admittance. R.0054 Sometime during 1980 the claimant contacted the Immigration and Naturalization Service to request a change of his status to that of legal resident. R.0033,0035 On January 30, 1981 claimant received a voluntary departure notice from the Salt Lake Office of the Immigration and Naturalization Service. R.0056 On September 10, 1982 an Order To Show Cause and Notice Of Hearing was issued to the claimant alleging that the claimant is subject to deportation on the grounds that he entered the United States without inspection. R.0051-0052 Upon receiving the Order to Show Cause the claimant filed an Application for Suspension of Deportation on the grounds that the claimant is eligible for Suspension of Deportation because such deportation would result in extreme hardship to himself and to his child who is a citizen of the United States, and that the claimant has been physically present in the United States without any absence since August

1974, other than a "non-meaningful interruption in July of 1980." R.0054 This application was filed on August 4, 1981. R.0055

On January 5, 1981 the claimant filed an initial claim for unemployment benefits on which he reported that he had worked for the Price River Coal Corporation from July 10, 1978 to July 9, 1982. R.0032,0058 On his initial claim form the claimant reported that he is a citizen of the United States. R.0058 The claimant thereafter received benefits in the amount of $450 during 1981. R.0059 (Supplemental Record) The claimant also filed an initial claim for benefits effective July 11, 1982 on which he also certified that he was a United States citizen. R.0032 and R.0060 (Supplemental Record) Thereafter the claimant received $1,660 in unemployment benefits for weeks ended July 17 and July 24, 1982 and from October 23, 1982 through December 25, 1982. R.0008 As of the date of hearing before the Appeal Referee, the claimant had not appeared before an Immigration Judge and has received no further notice from the Immigration and Naturalization Service concerning the issue of his deportation. R.0038,0049

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.

This Court has consistently held that where the findings of the Commission and the Board of Review are supported by evidence, they will not

be disturbed. Martinez v. Board of Review, 25 U. 2d 131, 477 P. 2d 587 (1971). 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 compensation are so persuasive that the Department's denial was clearly capricious, arbitrary and unreasonable. Kennecott Copper Corporation Employees v. Department of Employment Security, 13 U. 2d 262, 372 P. 2d 987 (1962); Gocke v. Wiesley, 18 U. 2d 245, 420 P. 2d 44 (1966); Continental Oil Company v. Board of Review of the Industrial Commission, Utah, 568 P. 2d 727 (1977). In Members of Iron Workers Union of Provo v. Industrial Commission, 104 U. 242, 139 P. 2d 208, 211 (1943), this Court stated:

> 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.

This Court has adhered to the same standard of review in cases involving violation of Section 35-4-5(e) of the Utah Employment Security Act. Decker v. Industrial Commission of Utah, Department of Employment Security, Utah, 533 P. 2d 898 (1975); Whitcome v. Department of Employment Security, Industrial Commission of Utah, Utah, 564 P. 2d 1116 (1977).

POINT II

THE BOARD OF REVIEW DID NOT ERR IN DETERMINING THAT THE CLAIMANT IS INELIGIBLE TO RECEIVE UNEMPLOYMENT BENEFITS AS AN ALIEN PERMANENTLY RESIDING IN THE UNITED STATES UNDER COLOR OF LAW, AND SAID DETERMINATION IS SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE.

Section 35-4-5(k)(1), Utah Code Annotated, provides as follows:

> 5. An individual shall be ineligible for benefits or for purposes of establishing a waiting period:
>
> (k)(1) For any week in which the benefits are based upon services performed by an alien, unless the alien is an individual who has been lawfully admitted for permanent residence at the time the services were performed, was lawfully present for purposes of performing the services or, was permanently residing in the United States under color of law at the time the services were performed, including an alien who is lawfully present in the United States as a result of application of the provisions of subsection 203(a)(7) or subsection 212(d)(5) of the Immigration and Nationality Act. (Emphasis added.)

Paragraph (3) of Section 5(k) requires that a determination of eligibility for unemployment benefits under this section of law be made on a preponderance of the evidence. In this matter the evidence is substantial, competent and preponderates against the claimant.

Authorization for aliens to be employed while residing in the United States is governed by 8 C.F.R., Part 109. Definition for those aliens who are not required to request authorization to be employed is found in 8 C.F.R. 109.1(a). The evidence of record does not support, nor has the claimant alleged that he belongs to any of the classes of aliens who are allowed to be employed without making a request for such authorization to the Immigration and Naturalization Service.

Definition for those aliens who must apply for work authorization is found in 8 C.F.R. 109.1(b). Included in this classification are any aliens who are deportable, but have been granted voluntary departure. See 8 C.F.R. 109.1(b)(6). The claimant has not established, nor has he even contended

that he has at any time been granted authorization by the Immigration and Naturalization Service to work in the United States.

Plaintiff's principle contention on appeal is that since his initial contact with the Immigration and Naturalization Service he has been permanently residing in the United States under color of law because the Immigration and Naturalization Service has taken no final action to deport him. See Brief of Appellant, Page 9. Defendant agrees with the definition of the term "under color of law" set forth in Appellant's Brief which quotes from the case of Holley v. Lavine, 553 F. 2d 845, (2nd Cir. 1977), cert. denied Shang v. U.S., 435 U.S. 947 (1978). Most cases defining the term refer to it in terms of the acts of an official done by virtue of power as contrasted with acts done by specific authority. See Words and Phrases, "Color of Law."

Claimant relies heavily on the cases of Papadopoulos v. Shang, 414 N.Y.S. 2d 152 (1979) and St. Francis Hospital v. D'Elia, 422 N.Y.S. 2d 104 (1979). In each of these cases the aliens had entered the United States legally and thereafter requested a change of their status to that of permanent residents. The Immigration and Naturalization Service in Papadopoulos and Holley issued letters to the New York State Department of Social Services that deportation proceedings would not be instituted for humanitarian reasons and that the Immigration and Naturalization Service did not contemplate enforcing the aliens' departure at that particular time. In the third case, St. Francis Hospital, the alien had requested a change of status and had received no communication to the effect that she must leave the country.

Claimant has also appended to his Brief a copy of a decision in the case of Berger v. Secretary of the United States Department of Health, Education and Welfare, Civil Action No. 76 C 1420 (1978), in which the Federal District Court for the Eastern District of New York held that any alien residing in the United States with the knowledge and permission of the Immigration and Naturalization Service and whose departure from the United States the Service does not contemplate enforcing is also permanently residing in the United States under color of law. Like the Holley and Papadopoulos cases, the Berger case is distinguishable from the instant case in that the alien was residing in the United States under an Order of Supervision.

In the instant case the claimant was given a Notice of Voluntary Departure, with which he failed to comply. Subsequent thereto the claimant received an Order to Show Cause why he should not be deported. He thereupon filed an Application for Suspension of Deportation on the grounds of hardship. The claimant offered no evidence nor is there any evidence in the record that the Immigration and Naturalization Service intends to withhold deportation action with respect to the claimant. On the contrary, the Department of Employment Security was advised in writing by the Officer in charge of the Salt Lake City Office of the Immigration and Naturalization Service that the claimant will be scheduled for a deportation hearing at a future date. Further, the letter advises that the claimant has not been granted the right to accept employment in this country. R.0049 Under such circumstances the claimant's case is clearly distinguishable from those

cases cited in his Brief. The Board of Review, therefore, did not err in finding that the claimant is not residing in the United States under color of law.

In contrast with the cases cited by the claimant, which are Social Security Disability or Medicare cases, there have been several reported cases involving the eligibility of aliens for unemployment insurance. An early case was Alonso v. State, 50 Cal. App. 3rd 242, 123 Cal. Rpr 536, 87 ALR 3rd 678 (1975), cert. denied 425 U.S. 903, 47 L.Ed. 2d 752, 96 S.Ct. 1492. The court held that an alien who is in the United States unlawfully has no constitutional right to work; that a state employment department requirement that an alien applicant for unemployment insurance benefits supply evidence that the Immigration and Naturalization Service is aware of his presense was a relevant and proper requirement; that on the alien's failure to supply such evidence the department may find that he was not entitled to unemployment benefits by reason of not being "available for work;" and that the applicant for unemployment insurance benefits has a burden to prove his eligibility for such benefits. A New Jersey Court has held that an alien who is not authorized to be gainfully employed is ineligible for unemployment compensation on the ground of unavailability for work even though the alien would have achieved immigrant status earlier but for a legal error by the Immigration and Naturalization Service. Lepiani v. Board of Review, Department of Labor and Industry, 169 N.J. Super. 72, 404 A. 2d 318 (1979). The court specifically stated:

> . . . The fact nevertheless remains that until she was duly authorized to work by I.N.S. her alien status, of which she was well aware, precluded her legal employment. 404 A. 2d, at 319.

This decision also contains reference to two other New Jersey cases in which aliens having a non-immigrant status without employment authorization were disqualified from receiving unemployment benefits.

The Supreme Court of Colorado has also denied unemployment benefits to an illegal alien. The court, sitting en bank, stated:

> The courts have consistently held that aliens who enter the United States on non-immigrant visas and aliens who enter illegally have no constitutional right to work. [Citations omitted] An illegal alien is also subject to deportation. [Citation omitted]
>
> Such an individual is legally unable to work, and "legal inability to work is as disqualifying as physical inability to work." [Citations omitted] Thus, appellant, who was legally unavailable for work, did not qualify for benefits under Section 8-73-107(1)(c). Duenas-Rodriguez v. Industrial Commission, Colo., 606 P. 2d 437 (1980).

The underlying reason for disqualification of illegal aliens is that such individuals are not legally authorized to work and therefore cannot meet the availability requirements of the unemployment insurance laws. Each of the cases cited above was decided on that basis. See also Annotation, "Aliens' Right to Unemployment Compensation," 87 ALR 3rd 694. Recently the Congress amended the Federal Unemployment Tax Act to require the states deny unemployment benefits to an alien unless such alien has been lawfully admitted for permanent residence or is otherwise residing in the United States under color of law. See 26 U.S.C.S. Section 3304(a)(14)(A). Section

[illegible](k) was added to the Utah Employment Security Act by the Utah Legislature in 1977 in response to the Federal requirement. The claimant's contention that he was residing in the United States under color of law is not supported by either his own testimony or by the other evidence in the record.

First, by the claimant's own admission he entered the United States illegally on five separate occasions, including his last entry. R.0054 In the claimant's own words he stated that he "jumped the fence." R.0054 The claimant specifically testified that prior to 1981 he did not apply for any public benefits because he knew that he "was not legal." R.0034 Further, the claimant offered no evidence whatsoever that he has ever been authorized by the I.N.S. to work in the United States.

The claimant contends that the decision of the Board of Review relies solely on hearsay evidence and is, therefore, invalid. Defendant agrees with claimant that an administrative finding generally may not be based solely on hearsay evidence, but must be supported by a residuum of legal, competent evidence. However, with respect to hearsay evidence in unemployment insurance cases, this Court has recently held that such evidence is admissible if it has some probative weight and reliability. Further, while gossip or rumor will not suffice as admissible evidence, a written statement may be admitted where there is some reasonable basis for inferring the reliability of such evidence. Trotta v. Department of Employment Security, Utah, 664 P. 2d 1195, 1198 (1983).

Section 35-4-5(k)(3) requires that an individual may not be denied benefits because of his alien status except upon a preponderance of the evidence. In the instant case the evidence is substantial, competent and preponderates against the claimant.

The specific hearsay evidence of which claimant complains is a letter by the Officer in Charge of the Salt Lake City Office of the Immigration and Naturalization Service, in which he states that the claimant was not authorized to work in the United States. That letter constituted an official communication from the Federal Agency charged with enforcing the Immigration Laws of this nation and was written by an individual in a position to know the claimant's alien status. The evidence contained in the letter and other documents provided by the I.N.S., is supported by the claimant's own admissions of his illegal entry into the United States and his failure to produce any evidence that I.N.S. has ever granted him authorization to work. Under such circumstances neither the Appeal Referee nor the Board of Review erred in accepting such evidence and giving it its proper probative weight.

POINT III

THE BOARD OF REVIEW DID NOT ERR IN DETERMINING THAT THE CLAIMANT INTENTIONALLY WITHHELD INFORMATION OF HIS ALIEN STATUS IN ORDER TO OBTAIN BENEFITS TO WHICH HE WAS NOT ENTITLED.

Section 35-4-5(e), Utah Code Annotated, 1953, as amended (1979 Supplement) provides as follows:

> 5. An individual shall be ineligible for benefits or for purposes of establishing a waiting period:

> (e) For each week with respect to which the claimant has willfully made a false statement or representation or knowingly failed to report material facts to obtain any benefit under the provisions of this act, and an additional 13 weeks for the first week the statement or representation was made or fact withheld and six weeks for each week thereafter; such additional weeks not to exceed 49 weeks. The additional period shall commence on the Sunday following the issuance of a determination finding the claimant in violation of this subsection. In addition, each individual found in violation of this subsection shall pay to the commission twice the amount received by reason of the false representation or statement or failure to report a material fact. . . .

This Court has previously stated that intention to defraud is inherent in the claim itself when such claim contains false statements and fails to set forth material information required by statute. Martinez v. Industrial Commission, Utah, 576 P. 2d 1295 (1978). The filing of such a claim is in and of itself a manifestation of intent to defraud. Mineer v. Board of Review of the Industrial Commission of Utah, Utah, 572 P. 2d 1364 (1977).

The evidence of record in this matter is clear and convincing. The claimant filed two initial claims for benefits on which he answered "Yes" to the question "Are you a U. S. Citizen?" R.0058 and R.0060 (Supplemental Record) By his own admission the claimant had entered the United States illegally on four separate occasions, by jumping the fence; the last entrance occurring in August 1980. R.0054 The claimant admitted to knowing that he was not eligible for benefits up to 1980. In response to an inquiry as to why he marked "Yes" to the question of whether he was a citizen, the claimant responded:

> . . . And I was on and off, unemployed, and I never did apply for any public benefits because I know back then I was not legal, and of course I understand that I'm-- I was wrong on that time because I didn't have nothing to prove that I was legal in the country, or illegal, so I did not apply for any benefits, because I didn't begin to get nothing from the Immigration Service. R.0034-0035

The claimant contends that he contacted the Immigration and Naturalization Service in July or August 1980. R.0035 At that time he requested a change of status. However, in January 1981 the claimant received a Notice of Voluntary Departure from the Immigration and Naturalization Service, R.0056 At the time of filing his initial claim for unemployment benefits in January 1981, the claimant certainly knew that he was not a citizen of the United States. By July 1982, when the claimant filed his second initial claim for unemployment benefits, he had already applied for Suspension of Deportation. R.0054 Under such circumstances the claimant's assertion that he thought he was legally in the United States is simply not credible and was properly rejected by the Board of Review and the Appeal Referee in determining that the claimant intentionally withheld the information of his alien status.

CONCLUSION

The Unemployment Insurance Program is designed to protect members of the work force when they become unemployed through no fault of their own if they are genuinely available for work. The disqualification contained in Section 35-4-5(k) of the Employment Security Act was added to the law to

protect the Unemployment Compensation Fund from predation by aliens who have worked illegally within the United States. Such aliens are not legally available for work as required by the Unemployment Insurance Program. Allowance of unemployment benefits to illegal aliens would simply encourage continuing illegal employment, and would be in conflict with the purposes of both the Employment Security Act and the Federal Immigration and Naturalization Act pertaining to employment of aliens.

The claimant knew that he was not a citizen of the United States. Despite his known status as an illegal alien, the claimant certified that he was a United States citizen in order to obtain unemployment benefits. Such action constitutes fraud within the meaning and intent of Section 35-4-5(e) U.C.A. 1953, as amended. Therefore, the disqualifications imposed upon the claimant in the instant case should be affirmed.

Dated this 10th day of November, 1983.

DAVID L. WILKINSON
Attorney General

K. ALLAN ZABEL
Special Assistant Attorney General

By_____
K. Allan Zabel
Special Assistant Attorney General

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that I mailed two copies of the foregoing Defendant's Brief to: Cecelia M. Espenoza, UTAH LEGAL SERVICES, INC., 637 East Fourth South, Salt Lake City, Utah 84102, this 10th day of November, 1983.

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