1983

# Mary A Schoen v. Board of Review of The Industrial Commission of Utah, Department of Employment Security : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

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| MARY A. SCHOEN,<br><br>Plaintiff/Appellant,<br><br>vs.<br><br>BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, Department of Employment Security,<br><br>Defendant/Respondent. | * | Case No. 83-BR-246<br><br>Supreme Court No. 19346 |

# BRIEF OF APPELLANT

APPEAL FROM THE DECISION OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY, BOARD OF REVIEW

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## STATEMENT OF THE CASE

Appellant Mary A. Schoen by this appeal seeks review of a decision by the Board of Review of the Industrial Commission of Utah denying her unemployment compensation benefits pursuant to Utah Code Ann. §35-4-4(c) (1953, as amended) for failure to meet work search requirements for eligibility.

## DISPOSITION BELOW

On February 14, 1983, the Department of Employment Security issued a decision denying Appellant Mary A. Schoen unemployment compensation insurance benefits retroactive to January 2, 1983. The basis for the denial was inadequate job search. Appellant Schoen was also charged with an overpayment liability of $664.00. She requested a hearing on February 24, 1983, and received such hearing on March 22, 1983.

On April 4, 1983 Appeals Referee Linda Gowaty issued a decision modifying the Department of Employment Security's decision. The Referee denied benefits for the weeks ending January 8, January 15, and January 22 but allowed benefits for the week ending January 29. The Referee determined Appellant's overpayment liability to be $498.00 and offset the overpayment by benefits due her February 5, 12, and 19, 1983.

On June 21, 1983, the Board of Review of the Industrial Commission of Utah affirmed the Referee's decision.

## RELIEF SOUGHT ON APPEAL

Appellant asks the Court to reverse Respondent's

decision that Appellant failed to make an active work search effort. Appellant further asks the Court to enter its judgment that Respondent's decision was not supported by substantial evidence and was not in compliance with Utah law. Finally, Appellant asks that the Court find that she is entitled to unemployment compensation benefits from January 2, 1983 until she is no longer otherwise eligible and that therefore, as a matter of law, no unemployment compensation benefits received by Appellant after January 2, 1983 were overpayments.

## STATEMENT OF FACTS

Appellant Schoen was hired by the Utah State Department of Highway Safety to set up a program in motorcycle safety. She is a highly skilled professional and has a Masters degree in industrial safety from the University of Illinois. Schoen lost her job when the federal government failed to renew the grant for the program. After losing her job, Appellant applied for and was awarded unemployment compensation benefits. When Schoen applied for benefits in December, 1982, she was instructed to make three new in-person job contacts per week. However the agency representative modified this requirement verbally when she learned of the appellant's educational background. The representative encouraged Schoen to send out resumes and cover letters and make as many in-person interviews as she could secure by sending out resumes. (R. 71)

Since losing her job, Appellant has been diligently and regularly seeking work. Her job search activities do not merely

include in-person contacts and sending resumes. Appellant utilizes her membership in various professional societies to obtain job leads. She reads both local and out-of-state newspapers to get job leads, and she makes it a practice to check the Job Service job board whenever she can.

Over the 30 day period covered by this appeal, Appellant contacted 13 prospective employers (R.80) These contacts were made between Jan 6 and Jan. 31, 1983 and are essentially summarized in the Appeals Referee's decision. (R. 38) The Appeals Referee found that Appellant was eligible for benefits for the weeks ending January 29 and February 5, upon the reasoning that she would be allowed benefits for any week in which she made three resume searches or three in-person work searches. The agency representative had denied Schoen on the basis of a strict three in-person contact rule. Thus the Appeals Referee denied benefits for the week ending January 8 even though she had tabulated three contacts for that week. She further denied benefits for the week ending January 15 even though Schoen had made two in-person contacts.

Appellant Schoen explained in her testimony and correspondence with the Department that she relied heavily on resumes as this was a customary and accepted method of seeking work in her field. (R. 50,78) As a professional in the very specialized field of industrial safety and accident prevention, there are limited opportunities within the local job market. (R.72) Schoen testified that in-person contacts are often viewed

as rude by potential employers because employers have no information on you or knowledge of your credentials and you're merely taking up their time. (R. 66) This is especially true in the professional fields where specialized education and training are prerequisites for the job. (R.67) Schoen continued:

> They don't like you dropping in on them and some of the parent companies that I have written to, have offices here in Utah, like Wausau, Union Pacific, the Association for International Student Exchange and Civil Service. And they, the office which is located in Utah, they will not even talk with you unless the parent office has come down and said something to them.

(R.67)

Sometimes in-person contacts were impossible. At the Family Health Program (FHP) Appellant had tried to go in-person but was advised over the phone that they were inundated with applicants and she was told that there was no way that she could file an application and she would just have to mail in a cover letter and a resume. (R. 60)

## STATEMENT OF ISSUES

1) Did Appellant act in good faith to make an active and reasonable effort to secure employment?

2) Is the 3 in-person or resume contact rule a valid legal standard?

3) Does the Fourteenth Amendment require that recipients of Utah unemployment compensation benefits be afforded a Goldberg v. Kelly, 397 U.S. 254 (1970) hearing prior to being deprived of such payments?

## ARGUMENT

THE BOARD OF REVIEW'S DETERMINATION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS ARBITRARY AND CAPRICIOUS AND IS CONTRARY TO LAW.

### POINT I

APPELLANT CONDUCTED A DILIGENT JOB SEARCH.

Utah law provides that:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found by the commission that:
>
> . . .
>
> (c) He is able to work and is available for work during each and every week with respect to which he made a claim for benefits under this Act, and acted in good faith in an active effort to secure employment....

Utah Code Ann. §35-4-4 (1953, as amended) (emphasis added).

Utah law further clarifies the manner in which this requirement is to be interpreted and imposed in the next section of the Code, Ineligibility for benefits:

> An individual shall be ineligible for benefits or for purposes of establishing a waiting period:
>
> . . .
>
> Failure to Apply for or Accept Work.
>
> (c) If the commission finds that the claimant has failed without good cause to properly apply for available suitable work...provided no claimant shall be ineligible for benefits for failure to apply, accept a referral, or accept suitable work under circumstances of such a nature that it would be contrary to equity and good conscience to impose a disqualification.

> The commission shall consider the purposes of this act, the reasonableness of the claimant's actions, and the extent to which the actions evidence a genuine continuing attachment to the labor market in reaching a determination of whether the ineligibility of a claimant is contrary to equity and good conscience.

Utah code Ann. §35-3-5(c), (1953, as amended).

As noted above, in determining whether or not Appellant has failed without good cause to properly apply for available suitable work, the commission must take into consideration, among other factors, the "purposes of this act." U.C.A. §35-4-2 states this public policy and purpose:

> As a guide to the interpretation and application of this act, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life.... The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure....

It has since been held, that this Act, being remedial in nature should be liberally construed. Singer Sewing Machine Co. v. Industrial Comm. 134 P.2d 479 (Utah 1943) reh.den. 141 P.2d 694 (Utah 1943). The Act should be administered to

effectuate its purposes, which include lightening the burdens of unemployment and maintaining purchasing power in the economy. Johnson v. Board of Review of Industrial Comm., 320 P.2d 315 (Utah 1958).

The remedial purpose of the Act was further stated in Singer Sewing Machine, supra, to protect the health, morals, and welfare of the people by providing a cushion against the shocks and rigors of unemployment. The purpose of providing benefits was defined as twofold: First, to alleviate the need of the worker and his family who found no market for their services, and were deprived of wages by the general business collapse; Second, to provide increased buying power through pump-priming, and, thereby, to stimulate our economic system. Lexes v. Industrial Comm., 243 P.2d 964 (Utah 1952).

It is clear from the words of the statute and the purpose of the Act that the law requires a subjective analysis of the individual claimant's acts. The statute requires that the claimant act in "good faith in an active effort to secure employment." Utah Code Ann. §35-4-4(c) (1953, as amended).

That the law requires a subjective analysis is further clarified in the case law. The Utah Supreme Court held in the case of Denby v. Board of Review, 567 P.2d 626 (Utah 1977) that the claimant "must act in good faith to make an active and reasonable effort to secure employment, and must be genuinely attached to the labor market," Id. at 628. This principle has not changed. The words "good faith" and "reasonable effort" imply a subjective individualized analysis of the claimants' job

search efforts. The law does not require the concrete rule imposed by the Appeals Referee. (R. 39)

Appellant utilized the best means available to her in looking for work. The Appeals Referee agreed to allow resumes to be considered, so long as the number of in-person and resume contacts summed to 3. Thus, she was denied benefits for a week in which she made two in-person contacts when the Appeals Referee admitted that this would normally be sufficient, except for the fact that eligibility worker D. Dean wrote "3 new in person" on Appellant's Responsibilities While Claiming Benefits form. (R. 81). No explanation was ever offered for this more restrictive requirement being imposed upon Schoen when the general rule requires two in-person contacts. The Appeals Referee imposed this three contact limit despite the fact that at Appellant's eligibility review, Appellant was advised that two in-person contacts would be sufficient. (R. 78)

This illustrates the absurdity of this concrete and inflexible minimum contact rule. The rule fails to address the issue of the diligence and reasonableness of the Claimant's job search activities, and is being applied inconsistently by the Department.

Appellant is concerned with finding the job most suitable to her skills and career goals. Appellant has made a good faith effort to find a job. Her work search efforts have been reasonable given her circumstances. Respondent should thus be required to pay Appellant for those benefits illegally withheld from her.

A. Case Law Further Supports Appellant's Position.

The case of Gocke v. Industrial Commission, 420 P.2d 44 (Utah 1966) interprets Utah's job search requirements. The first two weeks of Gocke's job search consisted of contacting her former employer and inquiring about a job with Shoppers' Discount store. Towards the end of her first month of unemployment, she made telephone calls to four employers. Ten days later she personally applied at Albertsons. She made telephone calls to jewelry stores and near the end of the second month she personally applied at Litton Data Systems. Then during the last week of the second month she mailed replies to newspaper box advertisements. On these facts the Utah Supreme Court found that:

> There is nothing in the Referee's findings which will support any inference that she did not make a legitimate attempt to obtain work. Based upon her apparent clean work record, it seems reasonable and natural that she should look to her former employer in the first instance for re-employment. When that expectation did not materialize, the plaintiff acted reasonably in seeking employment elsewhere by personal application, telephone calls and written responses to newspaper advertisements. These affirmative acts are all in the record and the Referee's own findings of fact. Such efforts constitute a reasonable effort on her part to obtain work.

Id. at 47 (emphasis added). The Supreme Court held in Gocke that:

> The Employment Security Act should be liberally construed to best effectuate its purposes which include enabling unemployed workers to find suitable work and to provide cash benefits during periods of unemployment.

ID. at 46. Certainly the Department has failed to effectuate the Act's purpose in Appellant's case.

The Gocke decision went on to state:

> Only if it is understood that an unemployment compensation law is a broad public measure, designed by the payment of benefits to check and ameliorate the effects of unemployment among workers who are able, willing and ready to work, will workers be assured the reasonable protection which the statute has provided for them. The same view was expressed by Justice Cardozo when he stated:
>
> > "An unemployment law framed in such a way that the unemployed who look to it will be deprived of reasonable protection is one in name and nothing more." See Stewart Machine Co. v. Davis, 301 U.S. 548, at 593, 57 S.Ct. 883, 891, 81 L.Ed. 1279 (1937).

Id. at 47.

B. The Courts Frown Upon Rigid and Inflexible Standards in Job Search Cases.

The words of the Utah statute do not set a rigid and inflexible standard which can be applied in determining eligibility. Rather, it creates a standard of reasonability in the conduct of the claimant in seeking employment, which must be determined as an issue of fact by the Department in each particular case in accordance with all of the evidence, facts and circumstances bearing upon the situation. See, Brown v. Board of Review, 289 N.E.2d 40 (Ill. App. 1972).

In the case of Employment Security Administration Board of Appeals v. Smith, 383 A.2d 1108 (Ct. of App. Md. 1978) the court found that telephone contacts were reasonable in light of the lack of public transportation in the area. Smith had

contracted 35 businesses over a 7 month period, mostly by telephone. The Maryland court found that in light of all the circumstances, claimant Smith had made active and reasonable efforts to secure employment.

In Cascade Rolling Mills, Inc. v. Employment Div., 554 P.2d 549 (Or. App. 1976) the court held that, where for a period of less than six weeks after his former employer failed to offer claimant work after being injured on the job, the employee telephoned one other employer and registered for work with local union leaders he had been "actively seeking work."

In the case of Bloomfield v. Employment Div., 550 P.2d 1400 (Or. App. 1976) the court held that 1 personal contact and "numerous telephone calls and other contacts" were sufficient.

In Hill v. District Unemployment Compensation Board, 302 A.2d 226 (D.C. Ct. of App. 1973) the court in similar facts found that neither the unemployment compensation statute nor the Board's regulations required a claimant to make, as a condition precedent, at least three job contacts weekly. The court relied upon claimant's testimony and the testimony of her witnesses that she had made numerous job contacts, and a constant effort to obtain employment. The court noted that the Board's findings were based largely upon statements set forth on standard forms indicating 12 personal job contacts in 12 weeks. The court observed that "many of the standard forms, prepared as they were by an Illinois claims taker, contained illegible cryptic notes." Id. at 227, 228.

Case law, both in Utah and across the country supports Appellant's claim and establishes that her job search was reasonable within the meaning of the law.

POINT II

THE THREE CONTACTS RULE IS VOID

The three contacts rule as referred to above is void as it is contrary to Utah law and has never been promulgated as a rule pursuant to Utah law. The Utah law cited previously clearly requires a subjective analysis of each claimants efforts in light of their personal circumstances. The minimum contacts rule does not allow for such an analysis to take place. The minimum contacts rule discounts telephone contacts in violation of law and their own "Claimant Guide" which encourages the use of telephone calls, resumes and other non-personal contacts. Utah Department of Employment Security, Unemployment Insurance Claimant Guide, at 7 (February 1982). The minimum contacts rule has been criticized by the courts as being overly rigid and inflexible, and not in compliance with the Unemployment Compensation Act.

The Utah Administrative Rule-making Act, Utah Code Ann. §63-46-1 et seq., which is applicable to every agency of the State of Utah sets out the requirements that the state agency must follow prior to adoption, amendment, or repeal of any rule. These requirements mandate the agency to give prior notice of intended action, provide for public comment, and perhaps provide a public hearing. The rule must then be filed with the state archivist. The rule must then be published in the Utah Bulletin

and ultimately codified in the Department's Rules of Adjudication. The minimum contacts rule had clearly never been properly promulgated as a rule in Utah and was thus void at the time Respondent applied it against Appellant. It is a well understood principle of law that a rule is invalid if the agency failed to comply with the requisite rulemaking requirements, Morton v. Ruiz, 415 U.S. 199 (1974).

Appellant is aware that on January 20, 1983, Respondent began the process of promulgating the minimum contacts rule through emergency rulemaking procedures. The new rule took effect April 5, 1983. The new rule redefines "good faith work search effort" to include, but not be limited to, in-person contacts with employers. The rule creates a rebuttable presumption that a claimant has not made an active work search effort if the claimant fails to make a specific minimum number of in-person employer contacts after being told to do so by a local Employment Security office. Utah Admin. Bull. No. 83-7 at 77 (April 1, 1983). A copy of which is attached to this brief as Exhibit 1. However, even though the state has now promulgated such a rule, it was not in effect at the time Schoen's case was adjudicated. Furthermore, this rule violates the Utah unemployment compensation statutes and as such is ultra vires and is thus invalid.

## POINT III

### THE DEPARTMENT'S PRACTICE OF TERMINATING APPELLANT'S BENEFITS WITHOUT PRIOR NOTICE AND A HEARING DENIED HER DUE PROCESS OF LAW.

In 1970 the United States Supreme Court declared that a welfare recipient's Fourteenth Amendment due process rights would be violated if that recipient were terminated from welfare benefits without notice and a pre-termination fair hearing. Goldberg v. Kelly, 397 U.S. 254 (1970). In Goldberg v. Kelly, the court found that: "Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation." Id. at 262 (emphasis added).

The New York procedure challenged in Goldberg v. Kelly provided that a caseworker who had doubts about a recipient's continued eligibility for benefits would first discuss these doubts with the recipient. If the caseworker concluded that the recipient was no longer eligible he/she would recommend termination of aid to a unit supervisor. If the latter concurred, he/she would send the recipient a letter stating the reasons for proposing to terminate aid. The letter also informed the recipient that within seven days he or she could request that a higher official review the record and that she could submit a written statement in support of her claim. If the reviewing official affirmed the determination of ineligibility, aid would be terminated immediately. After termination, the recipient was entitled to a "fair hearing" and after that to judicial review.

The challenge to this procedure was that it did not allow for the personal appearance of the recipient before a reviewing official, for oral presentation of evidence, and for confrontation and cross-examination of adverse witnesses prior to termination of benefits.

Respondent's procedures for terminating unemployment compensation benefits in Utah are much more inadequate than those procedures that Goldberg v. Kelly struck down. Like the New York procedure, Utah provides for an initial confrontation between a claimant and an agency representative. However, in Utah no notice of the reasons for termination is ever given prior to termination. Furthermore, the Utah claimant is never allowed to even make a written objection prior to termination as the recipient in Goldberg v. Kelly was. Thus, there is even less due process allowed in Utah and more reason to strike down the procedure than there was in Goldberg v. Kelly.

A year after the Goldberg v. Kelly decision, the U.S. Supreme Court reviewed a challenge to California's termination procedure for unemployment compensation benefits. California Department of Human Resources Development v. Java, 402 U.S. 121 (1971). California Unemployment Compensation recipients had initially brought the action to enjoin California from terminating their benefits without a pre-termination hearing. Java v. California Department of Human Resources, 317 F.Supp. 875 (N.D. Cal. 1970). They argued that there was a median delay of seven weeks before payments were resumed and that this violated the claimant's federal statutory and constitutional rights. The

United States District Court for the Northern District of California held that this delay violated 42 U.S.C. §503(a) which requires that payments be made "when due." Relying on Goldberg v. Kelly, supra, the District Court also held that denial of a pre-termination hearing violated the claimants' right to due process of law. In reaching its conclusions, the court balanced the claimants' interest in having the necessities of life while the bureaucracy mulls over his or her continued eligibility against the state's interest in protecting public funds.

On review by the Supreme Court it was found that termination of unemployment compensation benefits without a pre-termination hearing violated 42 U.S.C. §503 because benefits would not be paid "when due." The court reasoned that Congress had intended for unemployment benefits to provide cash at a time when a claimant has nothing else to spend, thus maintaining the claimant at subsistence levels without the necessity of turning to welfare or private charity. In addition, Congress intended unemployment insurance payments to act as a means of exerting an influence upon the stability of industry. California Department of Human Resources Development v. Java, 402 U.S. 121 (1971).

The United States District Court for Vermont reached the same conclusions in Wheeler v. State of Vermont, 335 F.Supp. 856 (D.Vermont 1972). In Wheeler the claimant was called in for a "periodic interview" during which she was given a form on which to list the names of firms contacted. The form also contained this language:

> You are to contact three places of employment as a routine factory worker

> or general office clerk between 2/17/71 and 2/24/71. These are to be personal contacts in the Rutland area.

Id. at 858. A week later the claimant was called in for another interview where she signed a statement filled out and read to her by the interviewer. The statement read in pertinent part:

> I did not actively seek work as directed by making personal contacts during the week of 2/17/71 and 2/24/71 because I answered 2 ads in the Rutland Herald. I talked to an individual in personnel in one ad and was informed I had the qualifications for the job and I would be notified if I got the job. I felt fairly sure after the phone conversation that I had the job and therefore, made no other contacts.

Id. at 858-859.

The day after signing this statement the claimant was terminated from benefits. The next week the claimant signed a second statement which read:

> I did not actively seek work as directed by the local offices because I did not have transportation during the week ending 2/27/71.

Id. at 859. That same day a second determination adverse to the claimant was made.

After an adverse "fair hearing" determination, the claimant brought suit alleging that due process had been denied her because (1) the fact-finding interviews were not conducted by the same person making the decision to terminate her benefits, (2) there was no prior notice that the fact-finding process was

to take place, (3) there was no opportunity to know beforehand the specific reasons for the terminations of her benefits, and (4) the claimant did not have an opportunity to consult with counsel or to confront or cross-examine witnesses before the decision to terminate her benefits was made.

The court held that because the average time between termination of a Vermont claimant's benefits and her fair hearing was 37.5 days, the Vermont procedure violated 42 U.S.C. §503(a)(1) in that benefits were not paid "when due." The court also held unemployment compensation benefits could not be treated differently from the welfare benefits in Goldberg v. Kelly, 397 U.S. 254 (1970); the wages in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); the right to a tax exemption in Speiser v. Randall, 357 U.S. 513 (1958); or the right to public employment in Slochower v. Board of Higher Education, 350 U.S. 551 (1956).

The Utah procedure applied against Appellant Schoen was even more violative of her rights than the Vermont procedure in Wheeler. Appellant was only interviewed on one occasion prior to the termination of her benefits. She was given no warning whatsoever prior to that interview as to what to expect. She was not allowed to have an attorney present at the interview. Nor was she advised beforehand what issues would be raised at the interview or that the interview might result in the termination of her benefits. Like the claimant in Wheeler, Appellant's benefits were terminated after the interview, based on information received during the interview. However, Appellant's benefits were terminated retroactively a full month prior to the

interview thus creating a large overpayment. Furthermore, Appellant was made to wait 39 days from the time she applied for a fair hearing and the time she received the hearing decision. The average wait in Vermont had been 37.5 days. In fact, Appellant's waiting period was nearly as long as the one which the U.S. Supreme Court struck down in California Department of Human Resources Development v. Java, 402 U.S. 121 (1971), discussed above. There is thus compelling authority to hold Utah's procedure invalid.

Mary Schoen's claim was terminated eleven days after she had been called in for an eligibility review. At that time, she had presented her Eligibility Review form listing her job contacts. At her hearing, Appellant testified that she disagreed that her job search was inadequate, and explained why. This scenario illustrates the precise reasons why the U.S. District Court for the district of Connecticut struck down an identical practice in that state. See Steinberg v. Fusari, 364 F.Supp. 922 (D.Conn. 1973).

In Connecticut, a recipient was required to make bi-weekly visits to the Unemployment Compensation Department to fill out a "Continued Claim for Unemployment Compensation" form upon which he would swear to his availability for work and his "reasonable efforts" to find work. He also would fill out a "Continued Claim Work Effort Information Form." These papers were then presented to an employee of the Department; if no questions were raised, he was paid. If the Department employee raised an issue of possible disqualification, the claimant was

sent in for a "seated interview." He was then interviewed by a "Fact Finding Examiner," who sought to ascertain facts as to possible disqualification. If the examiner decided that the claimant had not conducted a diligent job search, the claimant was not given his check and was told that he would receive written notification. A letter was then sent out under the signature of the office manager stating the reasons for termination.

The Steinberg court held that the "seated interview" system did not provide sufficient procedural due process. Claimants were provided no advance notice of the interview, or of the precise issues involved, and consequently had no opportunity to either prepare their arguments or present witnesses on their behalf. Nor were claimants provided with an opportunity to confront adverse witnesses. No opportunity was provided to consult with counsel either. Finding due process lacking, the Connecticut court enjoined the Department from continuing this practice.

This case was appealed to the U.S. Supreme Court, Fusari v. Steinberg, 419 U.S. 379 (1975) who remanded the case in light of the fact that the Connecticut Legislature had enacted major revisions in the law, some of which were designed to alleviate problems that the lower court had identified.

The comparison between Utah's practices and Connecticut's is quite obvious. Schoen's benefits were terminated without prior notice or a Goldberg v. Kelly hearing. She was never provided an adequate opportunity to present her

arguments nor present the additional information that she had. She was merely summarily terminated from benefits.

This termination has caused Appellant tremendous financial hardship as this was her only source of income at the time and she had many financial obligations.

Respondent's procedure thus violated Schoen's due process rights to notice and a fair hearing as well as 42 U.S.C. §503(a)(1) which requires that unemployment compensation benefits be provided "when due." Respondent should be enjoined from further application of these procedures and required to provide a fair hearing prior to termination of a claimants benefits.

POINT IV.

THE BOARD OF REVIEW'S DETERMINATION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS ARBITRARY AND CAPRICIOUS.

The role of the Utah Supreme Court under Section 35-4-10(i) of the Utah Employment Security Act is to:

> [S]ustain the determination of the Board of Review, unless the record clearly and persuasively proves the action of the Board was arbitrary, capricious and unreasonable. Specifically, as a matter of law, the determination was wrong; because only the opposite conclusion could be drawn from the facts.

Continental Oil Company v. Board of Review of Industrial Commission, 568 P.2d 727, 729-30 (Utah 1977).

As stated above, Respondent has deprived Appellant of her sole means of support through a rigid and inflexible job search requirement. Appellant made 13 employer contacts over a 25 day period, an amount far exceeding the reasonable job search

efforts being upheld in most cases. Yet she has been denied benefits by Respondent because she did not make precisely 3 new in-person or resume employer contacts each week. As shown above, Respondent's requirement is void because it violates Utah Employment Security statutes and because it has not been promulgated as a rule under Utah's Administrative Rule-making Act at the time it was applied against Appellant. Appellant was subjected to a standard more rigid than that imposed on other Claimants. Thus, Respondent's deprivation of Appellant's benefits for failure to meet an invalid requirement was arbitrary, capricious and unreasonable.

Respondent also violated Appellant's due process rights to notice and a pre-termination hearing. In addition, Respondent violated 42 U.S.C. §503(a)(1) by failing to insure that benefits were provided when due. These acts were also arbitrary, capricious and unreasonable.

Finally, Respondent has caused hardships to Appellant which far exceed any wrong which Respondent could ever conceivably find in Appellant's actions. All of these hardships have resulted because of Respondent's arbitrary, capricious and unreasonable application of an inflexible and invalid standard. This Court should strike down and enjoin Respondent's illegal practices, reverse Respondent's findings, and award full benefits to the Appellant, Mary Schoen.

## CONCLUSION

Appellant Schoen has presented copious evidence as proof of her diligent job search efforts that demonstrate her

continuing attachment to the labor market. Appellant's actions fully comply with the requirements of Utah law. Utah law did not require a minimum number of contacts each week. This unwritten rule was void as it had not been legally promulgated. Furthermore, it remains void even after promulgation because it is in conflict with Utah statutory law as interpreted by case law.

Finally, Appellant was terminated from benefits in violation of law as she was not provided prior notice and a due process hearing, and because this practice of the Respondent was not reasonably calculated to insure full payment of unemployment compensation benefits when due.

Appellant therefore requests that she be reimbursed for all benefits denied her and that the Department be enjoined from terminating her claim again for any reason other than exhaustion of benefits without first providing her with due process of law.

//

DATED this 2nd day of September, 1983.

Respectfully submitted,

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ARM File No. 6106, Adopted Amendment
Title: General Rules of Adjudication.
Brief extract of rule: Able and Available, Section 160 - Effort of Secure Employment, Actively Seeking Work.

Redefines "good faith effort" to find work as including, but not limited to, in-person contacts with employers.

Also, creates a rebuttable presumption of failure to make an active work search when a claimant fails to make a specific minimum number of in-person employer contacts after being instructed by his local office to do so.
Effective date: April 5, 1982.

ARM File No, 6107, Adopted Amendment
Title: General Rules of Adjudication.
Brief extract of rule: Able and Available, Section 190 - Evidence, Burden of Proof.

Requires a claimant to keep a record of his work search efforts; permits retroactive disqualification and assessment of a fault overpayment for failure to establish to the satisfaction of the Department that the claimant made an active work search; retroactive disqualification is limited to four (4) weeks.
Effective date: April 5, 1983.

ARM File No. 6108, Adopted Amendment
Title: General Rules of Adjudication.
Brief extract of rule: Volunatary Leaving, Section 155.2 - Movement to Another Locality.

Removes provision allowing good cause for quit to accompany a spouse, to bring Rule into conformity with 1982 amentment of Section 35-4-5(a), which states that a quit to accompany, follow or join a spouse is without good cause.
Effective date: April 5, 1983.

EXHIBIT 1

CERTIFICATE OF MAILING

I HEREBY CERTIFY that two true and correct copies of the foregoing BRIEF OF APPELLANT was mailed first-class postage prepaid to the following:

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DATED this 8th day of September, 1983.