1983

Gayle L. Martin v. Board of Review of The Industrial Commission of Utah, Department of Employment Security, And National Semi-Conductor Corporation : Defendant's Brief

IN THE SUPRE
OF THE STATE

GAYLE L. MARTIN,

Plaintiff,

vs.

BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY, and NATIONAL SEMI-CONDUCTOR CORPORATION,

Defendants.

DEFENDA

Appeal from a decision of the
State of Utah, as reviewe
and the Board of Review of
State

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IN THE SUPREME COURT
OF THE STATE OF UTAH

GAYLE L. MARTIN,

Plaintiff,

vs.

Case No. 19363

BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY, and NATIONAL SEMI-CONDUCTOR CORPORATION,

Defendants.

DEFENDANT'S BRIEF

NATURE OF THE CASE

This is an appeal pursuant to Section 35-4-10(i), Utah Code Annotated [illegible], from a decision by the Board of Review, Industrial Commission of Utah, affirming a decision by an Appeal Referee that denied unemployment compensation to the Plaintiff pursuant to Section 35-4-5(b)(1), Utah Code Annotated [illegible], as amended, on the grounds the Plaintiff had been discharged from her employment for actions connected with her work which were disqualifying.

DISPOSITION BY LOWER AUTHORITY

Plaintiff filed an initial claim for unemployment compensation effective March 20, 1983. After considering the reasons for the claimant's discharge, a local office representative allowed benefits to the claimant. The employer appealed. The Appeal Referee reversed the allowance of benefits and denied benefits to the Plaintiff pursuant to Section 35-4-5(b) Utah Code Annotated 1953, as amended, in Case No. 83-A-2721. Plaintiff appealed to the Board of Review of the Industrial Commission of Utah which affirmed the denial of benefits in a split decision issued July 29, 1983, Case No. 83-A-2721, 83-BR-348.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the decision of the Defendant and that judgement be entered by the Court allowing benefits to the Plaintiff for March 29, 1983 until she is no longer otherwise eligible, and that an overpayment in the amount of $660 be set aside. Defendant seeks affirmance of the decision of the Board of Review.

STATEMENT OF FACTS

Defendant is in substantial agreement with Plaintiff's Statement of Facts.

Plaintiff, hereinafter referred to as claimant, notes in her brief that she was last employed as a line specialist. As the line specialist it was the claimant's responsibility to recheck the operators' work prod-

... sure it was being done correctly and that it would not be misprocessed.

...nd50

ARGUMENT

POINT I

IN REVIEWING DETERMINATIONS OF THE INDUSTRIAL COMMISSION UNDER THE UTAH EMPLOYMENT SECURITY ACT THE COURT WILL AFFIRM THE FINDINGS OF THE BOARD OF REVIEW IF SUCH ARE SUSTAINED BY SUBSTANTIAL COMPETENT EVIDENCE.

The standard of review in unemployment insurance cases is well established. Section 35-4-10(i), Utah Code Annotated 1953, provides in part:

> In any judicial proceedings under this section the findings of the Commission and the Board of Review as to the facts if supported by evidence shall be conclusive and the jurisdiction of said Court shall be confined to questions of law.

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 (1970). In analyzing the above-referenced review provisions, this Court has stated:

> Under Section 35-4-10(i) the role of this Court is to sustain the determination of the Board of Review unless the record clearly and persuasively proves the action of the Board of Review 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 the Industrial Commission of Utah, 568 P. 2d, 727,729 (1977).

POINT II

THE BOARD OF REVIEW DID NOT ERR IN CONCLUDING THAT THE CLAIMANT WAS DISCHARGED FOR DELIBERATE, WILLFUL ACTION ADVERSE TO HER EMPLOYER'S RIGHTFUL INTERESTS.

Section 35-4-5(b)(1), Utah Code Annotated, 1953, as amended, provides as follows:

> 5. An individual is ineligible for benefits or for purposes of establishing a waiting period:
>
> (b)(1) For the week in which the claimant was discharged for an act or omission in connection with employment, not constituting a crime, which is deliberate, willful, or wanton and adverse to the employer's rightful interest, if so found by the commission, and thereafter until the claimant has earned an amount equal to at least six times the claimant's weekly benefit amount in bona fide covered employment.

This Court has previously held that the Employment Security Act shall be liberally construed and administered to effectuate its beneficent purposes. Johnson v. Board of Review of Industrial Commission, 7 U. 2d [illegible] 320 P. 2d 315 (1958). See also Singer Sewing Machine Company v. Industrial Commission, Department of Placement and Unemployment Insurance, 104 U. 174 P. 2d 479, rehearing denied 104 U. 196, 141 P. 2d 694 (1943); Northwestern Oil Company v. Industrial Commission, 104 U. 353, 140 P. 2d 329 [illegible]. However, in Utah and elsewhere the courts construe unemployment compensation acts in a manner which distinguishes those individuals petitioning as beneficiaries of the Act who become unemployed for reasons attributable to themselves. This Court has previously pointed out that the purpose of the Unemployment Security Act is to assist the worker and his family in times when

[illegible] work without fault on his part. Kennecott Copper Corporation Employees v. Department of Employment Security, 13 U. 2d 262, 372 P. 2d 987 [illegible]. The Court has also noted that the underlying legislative intent of the various disqualifying provisions of the Act is that the Department is to [illegible] the claimants' eligibility for unemployment compensation by adherence 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. Olof Nelson Construction Company v. Industrial Commission, 121 U. 521, 243 P. 2d 951, (1952); [illegible] v. Industrial Commission, 121 U. 551, 243 P. 2d 964 (1952); Mills v. [illegible]ming, Utah, 581 P. 2d 1334 (1978).

This Court has recently interpreted the misconduct provision as requiring three elements for a claimant to be ineligible after a discharge: (1) the claimant must be discharged for an act or omission in connection with employment; (2) the act or omission must be deliberate, willful, or wanton; and (3) the act or omission must be adverse to the employer's rightful interest. Clearfield City v. Department of Employment Security, et al., Utah, 663 P. 2d [illegible] (1983). In determining whether an act or omission is deliberate, willful, or wanton, this Court has said: "It is sufficient that he intended [illegible] or that the foreseeable harms were sufficiently serious to meet the [illegible] degree of culpability." Clearfield City v. Department of Employment [illegible], supra; Trotta v. Department of Employment Security, Utah, 664 P. 2d [illegible] (1983). In construing the statutory language "deliberate, willful, or [illegible]" this Court has adopted the following rule:

> The important element to be considered is the nature of the misconduct and how seriously it affects the claimant's employment or the [employer's] rights. [Citation omitted] Clearfield City v. Department of Employment Security, Supra.

The claimant contends that her discharge was the result of her inability to do her job or for non-disqualifying inadvertence, that her non-performance was not sufficiently adverse to the employer's rightful interest to justify disqualification, and that her conduct was not culpable within the meaning of the statute. In determining whether the claimant's misconduct was "deliberate, willful, or wanton" the court will review the agency's decision to see whether it falls "within the limits of reasonableness or rationality" inherent in the Department's governing legislation. Clearfield City v. Department of Employment Security, supra. There is no dispute as to the facts of the case. The claimant had worked for about two years as a line specialist for her employer. R.0053 As line specialist, it was the claimant's responsibility to recheck the work of the operators to be sure they were doing it right and to see that it would not be misprocessed. R.0050 On February 1, 1983, the claimant was given a verbal warning for misprocessing a "lot" electronic wafers or semiconductors. R.0043 She was again warned on February 24, 1983 for another misprocess. This warning was in writing and placed the claimant on a 60-day probationary period and warned her that further disciplinary action up to and including discharge could result from further misprocessing. R.0043 The "lot" which was misprocessed on February 24 had to be scrapped. R.0043,0050 That is, it was an entire loss to the employer

It should be noted that the employer's representative testified with respect to the warning on February 24, 1983 that the claimant was given the option of taking another position of lesser responsibility, with a slight reduction in pay. R.0043 However, the claimant denied being given such an option. R.0053 The Defendant concedes that the finding by the Appeal Referee and the Board of Review that the claimant was offered demotion is not sustained by the evidence where such evidence consists of only the uncontradicted sworn testimony of the claimant that she was not offered such a demotion, as contrasted with written, unsworn statements by the employer's representatives, which were not subject to cross-examination by the claimant. However, neither the decision of the Appeal Referee nor the Board of Review rested solely on that point. Specifically, the Appeal Referee reasoned as follows:

> Since verification of the processing was a job requirement of the specialist, the claimant's failure to perform this task could only be attributable to carelessness. Such carelessness after repeated warnings evidences a lack of concern for the possible adverse effect on the employer sufficient to find that her acts were deliberate. R.0033

The final incident of misprocessing occurred on March 21, 1983, during the claimant's 60-day probationary period. The claimant specifically testified that she had the ability to perform the work assigned to her. R.0053 When asked why the misprocessing occurred the claimant acknowledged that it was her responsibility to prevent it:

> Referee: Was it not your responsibility to check it out?

Claimant: That's right. If I would have been doing what I was supposed to have been doing, it wouldn't have been ran like that, but it was at the last minute. R.0052

The claimant further testified that she was rushed sometimes at the last minute of a shift to properly set up for the succeeding shift. However, she further acknowledged that failure to set up for the next shift was less significant than proper processing to the extent that no warnings would have been given her for failure to properly set up. R.0052-0053 In the face of such evidence the Board of Review properly concluded that it was within the claimant's responsibility and control to prevent such misprocesses but that the misprocesses occurred through her carelessness.

The claimant's second contention, that her non-performance was not adverse to her employer's rightful interest as to justify denial of benefits is likewise without merit. The employer's representative testified that some of the misprocessed "lots" which resulted from the claimant's carelessness had to be scrapped. The loss of a particular "lot" would vary depending on the nature of the products being processed. Other misprocessed "lots" had to be reworked. R.0046 Although the claimant denied that her mistakes caused damage to the product or loss, (R.0049) she admitted that some misprocessed "lots" had to be reworked, with resulting loss of time to the employer, and that at least one of the misprocessed "lots" for which she was responsible could not be reworked, but was simply lost. R.0051 Given such evidence, the Appeal Referee and Board of Review properly found that the claimant's non-performance of her job was adverse to her employer's interest.

Claimant's final contention, that her non-performance was without culpability sufficient to justify disqualification, is contrary to the evidence. As previously noted, the claimant testified that as line specialist it was her specific responsibility to recheck the work of the operators to be sure they were doing it right and that it would not be misprocessed. R.0050 In attempting to explain her mistakes, the claimant testified that at the end of a shift work was often hurried. However, she admitted in her direct testimony that it was her responsibility to prevent the misprocesses that might occur at such times:

> Claimant: . . . but, they would, instead of warning us and saying okay, we are going to have this lot that is going to come down, and its not going to be a gate 6 or a gate 9, they just threw it on the line, and then it wasn't checked out right, and it was ran wrong.
>
> Referee: Was it not your responsibility to check it out?
>
> Claimant: That's right. If I would have been doing what I was supposed to have been doing, it wouldn't have been ran like that, but it was the last minute. . . . R.0052

The claimant's errors occurred despite the warnings she had been given and the fact that she knew she was on probation for such errors. R.0052-0053 A case very similar to this is found in Rieder v. Commonwealth of Pennsylvania Unemployment Compensation Board of Review, Pa. Cmwlth., 325 A. 2d [illegible], in which the claimant was employed to inspect trousers for defects but continued to pass defective trousers after she had been warned. The Court upheld the disqualification of the claimant because she was unable

to offer an explanation as to why or how she passed defective trousers [illegible] she had been warned. See also Sheink v. Maine Department of Manpower Affairs, Maine, 423 A. 2d 519 (1980); Ham v. Daniels, Ark. App., 606 SW 2d 604 (1980); Kilgore v. Caldwell, 152 Ga. App. 863, 264 SE 2d 312 (1980); and Petrie v. Ross, 58 App. Div. 2d 963, 397 NYS 2d 434 (1977). That the claimant's carelessness was well within her control is further evidenced by the attitude she displayed in the hearing that the employer suffered no loss when a "lot" was misprocessed, even though the claimant admitted that it had to be reworked and in some instances the product was completely lost. R.0050 For other cases concerning work-connected inefficiency or negligence, see Annotation, "Work-Connected Inefficiency or Negligence As 'Misconduct' Barring Unemployment Compensation," 26 A.L.R. 3rd 1356 (1969), and Supplement, 1983.

The claimant's only explanation for allowing the misprocessing of "lots" which it was her specific responsibility to prevent, was that such misprocessing occurred only at the end of a shift when a rush was put on to prepare for the next shift. However, by her own admission, had the claimant been doing that which she was assigned to do, such misprocessing would not have occurred. Under such circumstances the Appeal Referee and Board of Review properly concluded that the claimant's carelessness in performing her assignment, after repeated warnings, evidenced a lack of concern for the possible adverse effect on her employer such as to require disqualification under the provisions of the Employment Security Act.

CONCLUSION

The claimant was discharged by her employer, after warning, for repeated acts of carelessness which were adverse to the employer's rightful interest and within the control of the claimant. The evidence shows that the claimant's attitude with respect to her carelessness was that it was inconsequential to the employer, when in fact it had significant consequence on the work product of the employer. Under such circumstances the decision of the Board of Review should be affirmed.

Dated this 26th day of October, 1983.

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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: Franklin L. Slaugh, Attorney for the Plaintiff, Gayle Martin, [illegible] South 1300 East, Suite D-203, Sandy, Utah 84070, this 26th day of October, 1983.

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