

1983

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

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IN THE SUPREME COURT OF THE STATE OF UTAH

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FRANKLIN L. SLAUGH,

Plaintiff/Appellant,

Case No. 19363

THE INDUSTRIAL COMMISSION OF  
UTAH, DEPARTMENT OF EMPLOYMENT  
SECURITY,

Defendant/Respondent.

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BRIEF OF APPELLANT

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APPEAL FROM THE DECISION OF THE BOARD  
OF REVIEW OF THE INDUSTRIAL COMMISSION OF  
UTAH DATED JULY 27, 1983

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State Supreme Court Utah

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STATUTES CITED

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	§35-4-1 et. seq.....
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which were adverse to the employer's interest, pursuant to 23-4-318, Utah Code Annotated (1953, as amended).

The Plaintiff timely filed an appeal from the decision of the appeals referee and on July 27th, 1983, the Board of Review rendered a split decision affirming the decision of the appeal referee denying benefits to the claimant effective March 20th, 1983, and adopting the findings of fact and conclusions of law of the appeals referee.

#### RELIEF SOUGHT ON APPEAL

The Plaintiff by this appeal seeks a reversal of the defendant's decision that the plaintiff acted in a manner which was deliberate, willful and wanton and adverse to her employer's rightful interests and asks that the court enter its judgment that defendant's decision was erroneous as a matter of law and not supported by substantial evidence and that Plaintiff is entitled to unemployment compensation benefits from March 20th, 1983, until she is no longer otherwise eligible, and that therefore as a matter of law unemployment compensation benefits received for the calendar weeks ending April 2nd, April 9th, April 16th, April 23rd, April 29th, 1983, were not overpayments.

#### STATEMENT OF FACTS

The following facts are undisputed. Additional facts will be set forth in the text of the argument.

The Plaintiff, Gayle Martin, was an employee of National Semiconductor Corporation from April of 1979 to March 22nd, 1983. (R.39) At the time of termination the Plaintiff was a line specialist. (R.45,50) The Plaintiff was discharged by National Semiconductor Corporation because of a problem due to mis-processing of material and improper verification of work that had been done by other personnel. (R.40) The employer's representative, Mr. Robert Taylor, testified at the hearing that he had no first hand knowledge of what happened in this case. (R.40) The records of the employer, however, show

that the Plaintiff had received a verbal warning on September 29th, 1982, for a mis-processed lot. The Plaintiff received another verbal warning on January 14th, 1983, for two mis-verified processes. A written warning was issued on February 24th, 1983 regarding a mis-processed lot and, on March 21st, 1983, when another mis-process occurred, the Plaintiff was placed on suspension pending termination and was subsequently discharged. (R.43,44)

After her discharge, Mrs. Martin, applied for and was awarded unemployment insurance compensation benefits by the Department of Employment Security. (R.12) The employer appealed the award.(R.57) The appeals referee reversed the decision of the Department representative (R.12-13) after which the Claimant appeared to the State Industrial Commission Board of Review. (R.30-31) The three member Board of Review affirmed the appeals referee's decision with one member dissenting. (R.10-11)

#### ARGUMENT

##### POINT I.

MRS. MARTIN WAS NOT DISCHARGED FOR AN ACT OR OMISSION IN CONNECTION WITH HER EMPLOYMENT WHICH WAS DELIBERATE, WILLFUL, OR WANTON AND ADVERSE TO HER EMPLOYER'S RIGHTFUL INTEREST

In 1979, section 35-4-5 Utah Code Annotated, a section which set forth criteria of ineligibility for benefits under the Unemployment Compensation Act, was amended to provide:

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

Discharge for mis-conduct.

(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 weekly benefit amount in benefit covered employment.



This statute was recently interpreted in Harbison v. Utah Department of Employment Security, 691 P.2d 440 (Utah, 1984). The court held that the discharge of a police officer for an "indefinite" justified denial of benefits. The court stated in that case that:

Here, the 1979 amendment to § 35-4-10b(1) makes no reference to an "intent to cause harm" or "the intentional disregard for misconduct that was 'deliberate, willful, or wanton'." In this case the two acts of misconduct (excess and deceiving the employer) were both "deliberate" and "willful" in the sense that they were volitional acts by an employee who should not have been heedless of their consequences. It only remains to determine whether these acts were sufficiently serious to involve the degree of culpability that the department concluded (reasonably, in our view) was impliedly required by this statute. Id. at 444.

The court distinguished deliberate acts of misconduct from "inefficiency or failure of performance as a result inability, inadvertent, ordinary negligence, or good faith error" id. at 444, n.3. See also, Continental Oil Company v. Board of Review, 505 P.2d 727, 730 (Utah, 1973).

4. The Plaintiff's Inability to Perform Her Job or Her Negligence in Performing Her Job Did Not Constitute Misconduct Within the Meaning of the Law.

Substandard performance by an employee due to inability or inattentance is not misconduct unless it is the result of a deliberate exercise of will contrary to the interest of the employer. Harlette Jones, 33 O.R.D. Division, 33 O.R.D. 347, 377 (1978); Continental Oil Company v. Board of Review, supra. The courts dealing with this issue place the emphasis on the intentional element of the conduct, i.e., whether the employee acted in a manner which might result in dismissal. Id. See Wright v. State Personnel Bd., 21 Wash. App. 211, 214-215 (1978).

An early case cited in Harbison, supra, is Wright v. State Personnel Board, 21 Wash. App. 211, 214 (1978). In that case the court stated:

...the intended meaning of the term 'misconduct'...is limited to conduct evincing such willful or wanton 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 equal culpability, wrongful intent or evil design....296 N.W. at 640.

The record below does not contain a single instance of "misconduct" and the term has been interpreted by this Court and other courts interpreting similar statutes.

In the instant case, the Employer's representative testified at the hearing before the appeals referee of the Industrial Commission that the reason for the claimant's discharge was "a job performance problem having to do with the process of material and if I remember correctly, it was a situation involving improperly verifying work that's been done by previous personnel" (R.40). Mr. Taylor went on to explain that "processing Semi-Conductor devices is a lengthy and complicated process. There is quite a few different steps involved at the --there are certain requirements for each step, and there is a certain protocol if you will, on verifying that certain things have been done properly before the work is passed on to the next step, that type of thing.

The problem had to do with improperly verifying some of these processes. I don't know the specifics on that, again, this recollecting them from the transcript (R.40). Mr. Taylor admitted having no first hand knowledge of what happened in this case (R.40) and no testimony was introduced at the hearing that would indicate that the conduct of the Plaintiff in mis-processing the material resulted in her discharge or in mis-processing any of the other material. Plaintiff had no verbal or written warnings on previous occasions, was not willful, or wanton. The Plaintiff's conduct was not volitional and was not misconduct within the meaning of the statute.

B. There Is No Evidence that the Plaintiff's Own Performance Of Her Job Was So Adverse to The Employer's Rightful Interests To Justify A Precission Of Benefits.

The testimony of the Plaintiff at the hearing was that the result of the mis-process, in many instances, was simply less of time and effort to produce a product. (R.50) The Employer introduced no testimony respecting the amount of any losses incurred as a result of the Plaintiff's alleged lack of performance. (R.45-46) When questioned on the reasons for the mis-processed lots, the Plaintiff responded that there was a great deal of pressure at the end of the day and not only was she responsible for seeing that the lots were processed properly but was also responsible for seeing that the next shift had a "good set up" when they came on. (R.52) While it can be argued that she should have simply taken more time to assure that the lots were processed properly, the resulting inefficiencies, if any, and the resulting project loss, if any, were not established by competent evidence and were not significantly adverse to the Employer's interests within the meaning of the statute.

C. The Conduct Of The Plaintiff Which Resulted in Her Discharge Was Not Sufficiently Culpable Within The Meaning Of The Statute.

While it is not required that the employee be found to intend to do harm to her employer, it must nevertheless be shown she intended the act such that the foreseeable harms were sufficiently serious to meet the statutory level of culpability. Clearfield City v. Department of Employment Security, 308 Pa. 107, 110 (1934); Trotta v. Department of Employment Security, 664 F. 2d 1195 (Oct. 1981). In the Clearfield City decision, the court quoted approvingly from a Maryland Court of Appeals Case, Employment Security Board v. Helgeson, 217 Maryland 207, 24 Cal. App. 3d 840, (1958). The Maryland Court of Appeals stated in that case that "the important element is the nature of the misconduct and how seriously it affected the claimant's employment or the Employer's rights." Id. at 244.

There is no question that the actions of the Plaintiff complained of by her Employer were directly related to her employment. There is, however, nothing to suggest that Mrs. Martin's conduct, i.e., the mis-processing of a claim on the occasion that resulted in her discharge, was a volitional act on the part of the Plaintiff with foreseeable consequences. Further, even if the consequences were foreseeable, the harm which could or would have resulted to the employer is not of such seriousness or of such a nature as to elevate the conduct from inefficiency or inability to the level of deliberate misconduct proscribed by the statute. While the Plaintiff testified that she had the ability to perform the job, (R.53) the job performance which resulted in her discharge was clearly from an inability to perform the job in the manner required. The occasions of alleged misconduct apparently occurred at times when the shift was changing. (R.52-53) and were clearly not done on the part of the Plaintiff as volitional, culpable acts, within the meaning of §35-4-5(b)(1) Utah Code Annotated.

#### POINT II.

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

The standard of review in unemployment compensation cases is well established.

Section 35-4-10 (1), Utah Code Annotated 1953, provides in part:

In any judicial proceeding 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 should be confined to questions of law.

The court is to sustain the determination of the Board of Review unless the plaintiff clearly and persuasively proves the action of the Board was arbitrary, capricious and unreasonable. Continental Oil Company v. Board of Review of Unemployment Commission, Supra. The only evidence adduced in this case which could be considered competent evidence from a witness having first hand knowledge of

the event was submitted to the appeals referee after the date of the hearing. R.35 The letter from Lerck Torgerson, General Foreman at National Shipbuilding Corporation to Mr. Rob Taylor indicates that copies of the list were sent on March 11, 1983 for violation of a written warning issued on 1/10/83 for improper verification. It is clear from the letter that the violation was followed by both Mrs. Martin and Mr. Torgerson as a mistake. There is no evidence as to what effect the mistake had upon the employer's interest. The appeals referee made a finding of fact that as a result of the claimant's mis-verify on February 14, 1983, that the list was scrapped and the cost to the employer was a minimum several hundred dollars. R.33 This finding is not supported by the evidence. Mr. Taylor, in response to the questions by the referee explained that the loss could amount to hundreds or thousands of dollars. R.43-44. Having previously admitted that he had no first hand knowledge of the matter that resulted in Mrs. Martin's dismissal. R.40 Mr. Taylor speculated that the cost could be significant cost involved. R.46 There was no evidence presented by Mr. Taylor with respect to the precise damages that resulted to the company as a result of the mis-processed list on February 14th, 1983. Mr. Taylor simply indicated hypothetically that after a point the material could not be re-used and would have to be totally scrapped and that that would be a more expensive costly mistake. R.46 and no time was any evidence received indicating the cost was as a result of Mrs. Martin's mistake.

The appeals referee draws a conclusion from its findings that the failure to verify the processing was a job requirement of the specialist and that the claimant's failure to perform this task could only be attributed to carelessness and that such carelessness after repeated warnings constitutes a deliberate act for the possible adverse effect on the Employer's interest in this case was deliberate. R.35 There is no evidence in the record to support the referee's that conclusion. In fact, the record contains evidence which would indicate

plaintiff engaged in any action in a deliberate fashion or with such neglect as to raise the conduct to that level of culpability required by §35-4-5(b)(1) of the Act, as interpreted by this Court.

The reasoning and conclusion of law of the appeals referee, which was affirmed by the Board of Review, were not supported by competent evidence on the record and the decision was arbitrary, capricious, and unreasonable. Under the circumstances, this court should reverse the decision of the Board of Review which affirmed the decision of the appeals referee, and enter its judgment that the defendant's decision was not supported by substantial evidence and that the plaintiff is entitled as a matter of law to unemployment compensation benefits from March 20th, 1983.

### POINT III.

THE DECISION OF THE BOARD OF REVIEW  
IS NOT CONSISTENT WITH THE BROAD  
PURPOSES OF THE UNEMPLOYMENT COM-  
PENSATION LAW.

The declared policy of the Employment Security Act §35-4-1, et. seq. Utah Code Annotated. (1953, as amended), is to establish financial reserves for the benefit of persons unemployed, through no fault of their own. Olof Construction Co. v. Industrial Commission, 121 Utah 525, 243 F.2nd 951 (1956). Webster v. Potlatch Forest, Inc. 68 Idaho 1, 187 F.2nd 527(1947). In determining whether a claimant should be denied benefits because of "misconduct", the courts have taken the view that, because the operation of such statutes involves a penalty and a forfeiture on the employee, that such statutes are to be strictly construed. Baynton Cab Co. v. Neubeck, *Supra*.

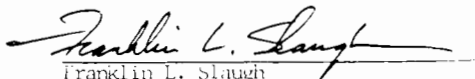
The determination of the defendant, denying benefits to the Plaintiff, is arbitrary and imposes an unjust penalty and forfeiture on an individual who the unemployment statute was designed to protect. The broad interpretation of the term "misconduct" that the defendant has adopted in this case is overbroad and contrary to the broad purpose expressed in the Employment Security Act itself

and judicial interpretations thereof.

CONCLUSION:

The carelessness, inefficiency, and ordinary negligence of the Plaintiff in failing to perform her job as a line specialist for her company was not "misconduct" within the meaning of §35-4-5(b)(1) Utah Code Ann. (1953, as amended). Such conduct on the Plaintiff's part was not of such seriousness or done with the degree of culpability which would justify a conclusion of unemployment benefits. The decision of the Board of Review was contrary to law, was not supported by substantial evidence, and is inconsistent with the declared policy of the Utah Employment Security Act. The decision should be reversed and the defendant should be ordered to award Plaintiff the benefits to which she was and is entitled under law.

Respectfully Submitted,



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