1983

Gordon A. Gray v. The Industrial Commission of Utah, Department Of Employment Security : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

GORDON A. GRAY, *

Appellant, *

vs. *

THE INDUSTRIAL COMMISSION OF UTAH, Department of Employment Security, *

Respondent. *

Case No. 82-BR-534

Supreme Court No. 19005

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

Claimant Gordon A. Gray by this appeal seeks review of a decision of the Board of Review of the Industrial Commission of Utah denying Appellant 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 September 29, 1982, the Utah Department of Employment Security sent Appellant notice that he had failed to make an adequate work search effort and denied him unemployment compensation benefits retroactively to August 29, 1892, with an overpayment liability assessment of $498.00. On November 9, 1982, after a 4 1/2 hour hearing on the matter, Senior Appeals Referee Shonnie B. Passey rendered her decision which modified the Department of Employment Security's decision by denying benefits from August 29 through October 30, 1982, with the exception of the weeks ending October 9 and 16, 1982. The overpayment liability of $498.00 was upheld. The Appeals Referee reopened the hearing on November 17, 1982, and modified her prior decision so that benefits would once again be allowed effective October 24, 1982. She also modified the overpayment liability of $498.00 up to $664.00.

On January 18, 1983, the Board of Review of the Industrial Commission reversed in part and affirmed in part the referee's decision. The Board affirmed the denial of benefits for the period August 29 through October 2, 1982, with the

exception of the calendar week ending September 25, 1982, ... which benefits were allowed. Benefits were denied for the we... ending October 9, 1982, and October 23, 1982, but allowe... the week ending October 16, 1982. Appellant's overpa... liability was modified down to $498.00. This ... overpayment was offset by valid claims filed October 16, 30, ... November 6, 1982.

RELIEF SOUGHT ON APPEAL

Appellant asks the Court to reverse Respondent's decision that Appellant failed to make an active work sear... effort. Appellant further asks the Court to enter a judgme... that Respondent's decision was not supported by substanti... evidence and was not in compliance with Utah law. Finall... Appellant asks that the Court find that he is entitled t... unemployment compensation benefits from August 29, 1982, unt... he is no longer otherwise eligible and that therefore, as ... matter of law, no unemployment compensation benefits received ... Appellant after October 29, 1982, were overpayments.

PRELIMINARY STATEMENT

The Department of Employment Security issued ... decision dated September 29, 1982, (R. 160) denying Appell... Gordon A. Gray unemployment compensation insurance benef... effective August 29, 1982, on the grounds the Appellant ha... made an active job search effort. Appellant had been calle... for an eligibility review on September 27, 1982, ...

representative "D. Dean." Appellant listed the names of three employers whom he had contacted in person and by telephone during September. Following the conversation, Dean asked Appellant Gray to sign a "Statement Regarding Claims for Benefits" (R. 163) which Dean had authored. That statement indicated that "benefits could be denied" if Appellant didn't make the required number of contacts. Two days later, Appellant was sent an "Eligibility Determination and Overpayment Notice" (R. 160) signed by "V. Byrd" denying benefits beginning August 29, 1982, and assessing an overpayment of $498.00 for the weeks ending September 4, 11, and 18, 1982.

Appellant Gray received his last benefit check during the week ending October 2, 1982, for the prior weeks claim.

On October 1, 1982, Appellant requested a hearing. Appellant received a hearing November 3, 1982, which hearing lasted approximately 4 1/2 hours. During the hearing he was examined and cross-examined as to every single job contact he had made since August 29, 1982.

In a decision dated November 9, 1982, (R. 43-48) Appeals Referee Shonnie B. Passey affirmed the decision of the Department representative in denying benefits from August 29, 1982, through October 30, 1982. However she modified the prior decision to allow benefits for the weeks ending October 9 and 16, 1982.

The Appeals Referee found that Appellant's telephone contacts were generally insufficient and that Gray was required to contact at least two new potential employers in person every

week. She further found that Appellant Gray was not with fault in creating the overpayment and required that the overpayment of $498.00 be offset by withholding such Appellant's weekly benefit amount.

The Appeals Referee re-opened the hearing November 1982, to receive additional testimony from the Appellant regarding his job search efforts during the weeks of October 1982, and November 8, 1982. (R. 41-42) The Appeals Referee amended her prior decision to find that the disqualification period terminated October 23, 1982, and allowed benefits effective October 24, 1982. The Appeals Referee further amended her prior decision to find that the overpayment was not $498.00 but $664.00.

On October 1, 1982, Appellant filed an appeal from the decision of the Appeals Referee to the Board of Review of the Industrial Commission. (R.39-40) In its decision (R. 12-13) the Board affirmed and adopted the findings of fact in the decision by the Appeals Referee with respect to the denial of benefits for the period August 29 through October 2, 1982, with the exception of the calendar week ending September 25, 1982, for which the Board allowed benefits. The Board also modified the Referee's decision by denying benefits for the week ending October 9, 1982.

The Board of Review noted that for the calendar week ending September 25, 1982, Appellant had made one in-person employer contact, supplemented by telephone contacts. However he had only made telephone contacts for the week ending Octo-

9, 1982, which the Board held were not sufficient to establish an active work search effort.

The modifications made by the Board of Review resulted in a reduction of Appellant's overpayment liability from $664.00 to $498.00, which the Board found had been offset by valid claims filed for the weeks ending October 16, 30, and November 6, 1982, thus taking a 100% set off.

STATEMENT OF FACTS

Appellant Gordon A. Gray is a welder and steel worker having worked in the industry for over nine years. (R. 128) Through his work he has become a highly skilled welder. (R. 130) Through additional training, he has received certificates qualifying him to perform specialized work. (R. 127) During his lengthy testimony before the Appeals Referee, he established that from August 29 to October 30, 1982, he made 48 job contacts, 38 of which were made by telephone. To generalize, his basic approach was to contact a potential employer either by telephone or in person and fill out an application if permitted. After that, he would continue to contact these companies on a regular basis, generally by telephone. Often the companies themselves would request that he call them periodically to check back. Gray had worked for several of these employers before. They were therefore personally familiar with him and the quality of his work; those companies were Williamson Trucking (R. 66), Mark Steel (R.61), Allen Steel (R. 65), and O.J. Industries (R.54).

Appellant Gray continued to broaden his sear checking with new potential employers as well as keepi contact with his "good prospects." Much of this was done the telephone. Gray testified that he felt the company ha "open the door" first. When he would call he would ask if t had any openings or were taking applications. If the answer a strong no, he would not attempt to contact them in person. the "door" was open or even ajar, he would go to the employe office and submit his application, or speak with the forema Appellant reminded the Department that he had worked in t industry for 9 years and knows how to get jobs. He has done successfully in the past following precisely the meth identified above. Until recently, he has not been unemploye Often he has worked two jobs when necessary to better t quality of life for his family. He feels that he is an expe in finding work in the industry.

Yet as is common knowledge, this country is exper encing the highest unemployment rate since the Great Depressi and Gordon Gray is clearly a victim of this. Constructi trades and heavy industry are extremely depressed and jobs a scarce.

After Appellant received his last benefit check October 2, 1982, in-person contacts became nearly impossible his family was without any income, or savings. They w already behind in house payments, furniture payments, and ot bills, and he had no money to buy gas for his motorcycle. contacts thereafter were almost entirely telephone conta

except for the week ending October 16, 1982. In that week, Gray borrowed money from relatives in order buy gas to look for work. (R. 79) In that week he made 6 job contacts, 5 of which were new and in-person. (R. 79, 80, 81) He even drove to Mercur, Utah to check with Anaconda Copper about jobs. (R. 72)

The specific job contacts made by Appellant are well documented in the record. Appellant believes it would be helpful to tally all the job contacts made during the time period in question, as the hearing examiner disregarded return calls made to previously contacted employers.

Week Ending Date	Contacts Made
August 29 - September 4	1 in-person
September 4 - September 18 (2 weeks)	9 contacts 6 new 4 in-person 5 by telephone
September 19 - September 25	6 contacts 4 new 6 by telephone
September 26 - October 2	6 contacts 3 new 6 by telephone
October 3 - October 9	9 contacts 7 new 9 by telephone
October 10 - October 16	6 contacts 5 new 5 in-person 1 by telephone
October 17 - October 23	4 contacts 1 new 4 by telephone
October 24 - October 30	7 contacts 7 new 7 by telephone

Total Contacts: 48

Average Contacts per week: 5.3

This was not the extent of Appellant Gray's job s... however. He testified that he checked the skills board a... Job Service building "once or twice a week" and checked the ... ads in the newspaper daily. He learned of some job prosp... from friends (R. 79) and relatives and fellow church membe... (R.73, 78) He has even checked with the newspaper circula... department to see if he could get a paper route. He attende... job placement seminar at Job Service even though he was ... required to do so. (R. 123) Gray feels that these other ... search activities should be considered along with his empl... contacts in determining his eligibility for benefits.

STATEMENT OF ISSUES

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

2) Is the "2 to 3 new, in-person contact rul... valid legal standard?

3) Was the offset of Appellant's weekly bene... amount excessive under the circumstances?

4) Does the Fourteenth Amendment require ... recipients of Utah unemployment compensation benefits ... afforded a Goldberg v. Kelly, 397 U.S. 254 (1970) hearing ... 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 cla has failed without good cause to properly apply for avail suitable work, the commission must take into considerat among other factors, the "purposes of this act." U.C.A. §35- 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 remed in nature should be liberally construed. Singer Sewing Ma Co. v. Industrial Comm. 134 P.2d 479 (Utah, 1943) reh.den. P.2d 694 (Utah 1943). The Act should be administered

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 the claimant to act in "good faith in an active effort to secure employment."

This 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 "2 to 3 new, in person contacts" imposed
Appeals Referee. In the matter of Gordon A. Gray, Ca
82-A-4423 at 4 (November 9, 1982) (The Industrial Commis
Utah, Department of Employment Security, Appeals Sect
Decision of Appeals Referee Shonnie B. Passey.) (R. 43-48)

Nor is the test whether or not Appellant Gray
doing the absolute best possible type of job search. The
that Gray did not make a resume to staple to the front of
application, nor go in person to all his contacts is
operative. This does not reach the issue of "good faith"
"reasonable efforts." These points may serve as helpful adv
to those seeking work but it is not required by the law.

Appellant's testimony was inherently believable,
was found credible by the Appeals Referee. From his testim
and job search list, he has provided a wealth of information
each employer; Appellant not only indicated the name of
person he spoke with and their response, but added informati
about what jobs they had going, what contracts they we
expecting, their financial circumstances, as well as oth
information about the company. It is clear that Gray talk
with them at some length to try to learn what his chances we
and what the company's needs may be.

Appellant testified that his basic method was
contact the company, either by telephone or in person, fill
an application if permitted, and then continue calling them o
weekly basis. Often the companies would ask him to do
that. The Department has found that these return contac

somehow did not count as they were not "new." The question should have been whether these return calls were reasonable and made in good faith.

The Department is encouraging individuals to hold back on their efforts by such a practice. In a small specialized field as is steel fabrication, there may be only 20-30 potential employers. If all were contacted within the first month of unemployment, the Appellant could never make another "new" contact in his field. The absurdity of this result illustrates the problem with the Department's position. This is precisely why the 2 to 3 new in-person contact rule is impractical. It leads to unfair and inequitable results. Furthermore, it eliminates the need for individual analysis of each Appellant's circumstances. The rule reduces the Appeals Referee's job to that of a computer, merely counting the number of new, in-person contacts, just as Shonnie Passey has done on page 3 of her decision. (R. 45) Such was not the intent of the legislature nor is it the legal requirement.

Appellant testified that the door must be first opened to him. When he would call an employer, often he would be advised of recent layoffs and financial woes. He would be discouraged by the companies from making a personal visit. Appellant submits that such telephone contacts were reasonable in todays economy. This is especially true later on in his claim after being terminated from benefits. Burning gas chasing down "in-person" contacts makes no sense when you have a family

to feed and house when there is no chance for a job base information you receive through a telephone call.

Perhaps Appellant should be considered the exp job search in the steel fabrication industry. He has working in the field for nine years and has been employed ne continuously. He has worked for several different companie has acquired what he described as "solid contacts." He re on this knowledge and his contacts to open the doors for He calls his contacts, they know of and appreciate the qua of his work. They want to hire him but can't. Going to the person would not increase his chances with these compan These individuals tell him about other prospects. If t seems to be a chance of getting an application or an interv Appellant will go in person.

Along with these activities, Appellant reads the w ads daily. If the ad asks him to phone, he does! If they send a resume, he'll send one. In-person contacts in th circumstances could hurt his chances of employment. employer might think he can't follow directions or read we Uninvited appearances may inconvenience the employer. Yet Appeals Referee discounted all such efforts as they were made in person.

All the evidence in the record proves that Appe has acted in good faith and has made reasonable effort secure employment and has clearly demonstrated by his acti work history, and credible testimony his continuing attach to the work force.

A. Case Law Further Supports Appellant's Position.

The Appeals Referee in her decision relied upon the case of Gocke v. Industrial Commission, 420 P.2d 44 (Utah 1966). Appellant agrees Gocke is good law in Utah. The Gocke case also involved a job search issue. The first 2 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 4 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 effect 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.

The Referee further relied on the case of Marvin L. Hurd v. Board of Review, 638 P.2d 544 (Utah 1981). Yet this case fails to address the issue of telephone contacts versus in person contacts. Hurd had contacted only three businesses in 3 days. This is certainly not the case with Gordon Gray who made 48 job contacts in 60 days.

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

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. 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 contacted 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.

Similarly with Appellant, he was terminated from benefits because of a standard form he had improperly filled out and because of a signed confession that had been drawn up by an eligibility worker who told him this was "merely a warning".

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

POINT II.

THE 2 TO 3 NEW IN-PERSON CONTACT RULE IS VOID.

The 2 to 3 new in-person contact rule as referred to above is void as it is contrary to Utah law and had not been promulgated as a rule pursuant to Utah law at the time it was applied to Appellant. The Department can point to no authority to legitimize the 2 to 3 contact rule. The Utah law cited previously clearly requires a subjective analysis of each claimants efforts in light of their personal circumstances. The 2 to 3 contact rule does not allow such an analysis. The 2 to 3 contact rule discounts telephone contacts in violation of

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 2 to 3 contact 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 2 to 3 contact 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, subsequent to the application of the rule against Appellant, Respondent began the process of promulgating the 2 to 3 new in-person contact rule in accordance with Utah's Administrative Rule-making Act. The new rule took effect April 5, 1983. It

redefines "good faith work search effort" to include, but not limited to, in person contacts with employers. The rule creates a rebuttable presumption that a claimant has not made a good work search effort if the claimant fails to make a specified minimum number of in-person employer contacts after being directed to do so by a local Employment Security office. Utah Admin. Bull. No. 83-7 at 77 (April 1, 1983). However, even though the state has now promulgated such a rule, it was not in effect at the time Gray'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.

GARNISHING 100% OF APPELLANT'S BENEFIT CHECK WAS EXCESSIVE.

As Appellant Gray testified at the hearing, during September, his family's sole source of income was unemployment compensation benefits of $166.00 per week. After his benefits were terminated, the family was left with no income in October. Claimant has a wife and three children to provide for. The Grays were not eligible for any form of welfare assistance as there is currently no AFDC-Unemployed Parent program in Utah. The agency after reopening Gray's claim withheld 100% of his weekly benefits in order to recoup the overpayment. This was excessive. The Department has discretion regarding recoupment of overpayments and such discretion should be used wisely and equitably. The Department should take into consideration

family's income and expenses when determining the amount to be garnished. The generally applicable laws of garnishment and attachment provide for the protection of the unfortunate and needy. Generally one's wages cannot be garnished in excess of 25% of weekly disposable earnings or to an extent that it would drop the debtors wages below minimum wage. 15 U.S.C. §1673(a); Utah Code Ann. §70B-5-105 (1953, as amended). In as much as unemployment compensation benefits are intended to be a wage substitute during times of temporary unemployment, the same prohibitions against excessive garnishment of wages should apply to unemployment benefits.

Garnishing 100% of Gray's benefits was draconian in this case as it jeopardized his entire family's well-being. Respondent made no effort to determine an equitable amount to be garnished in light of the Appellant's circumstances. Nor was Appellant ever given a chance to discuss his financial circumstances in an effort to determine an appropriate amount. Thus he has been denied fundamental fairness in this regard and has been denied due process of law.

Virtually all forms of financial assistance received from public assistance programs are exempt from collection efforts on the part of creditors. 42 U.S.C. §407, 42 U.S.C. §1383(d)(1). Furthermore, in instances where recoupment of overpayments by the administering agency is allowed, such recoupment will most likely be restricted so as to allow for the continued survival of those meant to be benefitted by the program. This is the case, for example, with recovery of

overpayments made under the Aid to Families with Dependent Children program where recoupment is restricted to 10% of available resources for a household. 42 U.S.C. §602(a)(13) (Supp. 1975 to 1981) The reasoning behind these laws should be self-evident. In many cases, and certainly in Appellant's case, unemployment compensation is the family's lifeline. It is the only source of income and has many of the essential characteristics of public assistance. Thus the Department may have abused its discretion by failing to consider the financial circumstances of Appellant in determining the amount of the garnishment.

POINT IV.

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

Appellant's claim was terminated two days after he had been called in for an eligibility review. At that time, he had listed three employers' names on his review form. Appellant Gray later testified that he had listed only his "best contacts" and "most positive" prospects. He listed his prior employers: Williamson's Trucking, Allen Steel, and O.J. Industries. This was not the extent of his job search by any means as he tried to explain. Yet at the eligibility review he was not given an opportunity to explain. He was merely directed to sign a statement written by Department Representative D. [illegible] confessing to an inadequate job search. Appellant testified at the hearing that he felt fearful and intimidated by

confrontation and didn't fully read the statement before signing it. At his hearing he testified that he disagreed with much of what was written on the form. Appellant never admitted to only contacting those 3 firms. On his appeal request Appellant made this clear. His testimony at the hearing detailed his work search activities. He testified that Dean threatened him with termination of benefits if he didn't contact 3 employers per week. Appellant felt this threat included failure to sign the "Statement Regarding Claims for Benefits."

Two days after this encounter, Appellant's benefits were terminated, totally out of the blue and without notice or opportunity to clarify the facts.

This scenario illustrates precisely the 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" 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 possible disqualification. If the examiner decided that claimant had not conducted a diligent job search, the cla was not given his check and was told that he would rece 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. Finding due process lacking, the Connecticut court enjoined the Department from 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, 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. Gray was terminated without prior notice or a Goldberg v. Kelly hearing. He was never provided an adequate opportunity to present his arguments

present the additional information that he had. He was merely summarily terminated from benefits.

This termination has caused his family great hardship. As a family unit they were not eligible for any form of public financial assistance in Utah. They have lost their home, Gray's family has moved in with neighbors and Gray himself is out on the street. It was exactly these results that the federal and state unemployment compensation laws were enacted to prevent. See, e.g. Java v. California Department of Human Resources Development, 317 F.Supp. 875 (N.D. Cal. 1970).

In Java, supra, the court was faced with a situation analagous to Gray's. The California Department of Human Resources Development had initially found the claimant eligible for benefits. After this initial determination of eligibility, the claimant's former employer objected to the award of benefits and the claimant was terminated without a Goldberg v. Kelly type hearing. The Java court found that:

> An entitlement to unemployment insurance benefits or welfare payments is no different from the due process standpoint than an entitlement to a pension or a form subsidy, or a professional license to practice. Once a person's qualifications for the benefit is shown, it cannot be arbitrarily denied, or withdrawn, without due process standards being fulfilled.

Java, 317 F.Supp. at 877. The court went on to find that:

> [T]he situation of the unemployed person herein is every bit as lamentable from the legal standpoint as that of the welfare client in Kelly v. Wyman, 294 F.Supp. 893 (D.C. 1968) and

> the garnishee in Sniadach v. Family Finance Corp. of Bay View, et al., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969).

Id. at 878.

The Java court determined the California procedure to be defective on constitutional and statutory grounds. Because unemployment compensation benefits are "due" upon the initial determination of eligibility, termination of these benefits without a pre-termination hearing violates due process. Furthermore, because claimants were denied benefits for a median of seven weeks while the hearing process ran its course, the California procedure violated 42 U.S.C. §503(a)(1) which mandates that a state's program be "reasonably calculated to insure full payment of unemployment compensation when due."

Java was affirmed on appeal to the United States Supreme Court on the grounds that termination of benefits during the 7 to 10 week period a claimant had to wait for the hearing process to finish and benefits to be reinstated violated 42 U.S.C. §503(a)(1) in that the California procedure was not "reasonably calculated to insure full payment of unemployment compensation when due." California Department of Human Resources Development v. Java, 402 U.S. 121 (1971).

Respondent's procedures have the same shortcomings as those found in Java. After Gray was initially determined eligible for benefits, he was terminated without prior notice and without a prior due process hearing. To add to the flagrant violation of Gray's rights, his termination was

retroactive to a month prior to notice and he was charged with an overpayment for using benefits which he had no way of knowing he was not entitled to use. Like the Java court, this court should enjoin Respondent from terminating Gray's benefits again for any reason other than exhaustion of benefits without first affording him a Goldberg v. Kelly due process hearing. Thus Respondent's procedure violated Gray'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."

POINT V.

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 his sole means of support for himself and his family through a rigid and inflexible job search requirement. Appellant made 48

employer contacts over a 60 day period, an amount far [illegible] the reasonable job search efforts being upheld in [illegible]. Yet he has been denied benefits by Respondent because he [illegible] make 2 to 3 new in-person employer contacts each week. As [illegible] above, Respondent's requirement is void because it violates the Employment Security statutes and because it had not been promulgated under Utah's Administrative Rule-making Act at the time it was applied against Appellant. 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 are 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. Appellant has lost his home, his wife and family have been forced to move in with a neighbor, and Appellant has been forced to live on the street. 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, Gordon Gray.

CONCLUSION

Appellant Gray has presented copious evidence as proof of his diligent job search efforts that demonstrate his continuing attachment to the labor market. Appellant's actions fully comply with the requirements of Utah law. Utah law did not require the 2 to 3 new in-person contacts per week when Gray's claim was terminated. 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.

Furthermore, the 100% offset (garnishment) of Appellant's benefits was excessive under the circumstances and thus was arbitrary and capricious and an abuse of agency discretion. Finally, Appellant was terminated from benefits in violation of law as he 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 he be reimbursed for all benefits denied him and that the Department be enjoined from terminating his claim again for any reason other than exhaustion of benefits without first providing him with due process of law.

DATED this 21st day of April, 1983.

Respectfully submitted,

UTAH LEGAL SERVICES, INC.
Attorneys for Appellant

By: JOHN L. BLACK, JR.

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 21st day of April, 1983.

Shauna Sims