1983

Gretchen G. Leininger v. Board Of Review of the Industrial Commission Of Utah : Brief For The Plaintiff-Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

GRETCHEN G. LEININGER, Plaintiff/Appellant, vs. BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, Defendants/Appellees.	:	No. 19048

BRIEF FOR THE PLAINTIFF/APPELLANT

ON APPEAL FROM THE DECISION OF THE BOARD OF REVIEW, DENYING UNEMPLOYMENT COMPENSATION TO THE PLAINTIFF/APPELLANT

Gretchen G. Leininger
Plaintiff
1551 East 4160 South
Salt Lake City, Utah 84117

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Plaintiff/Appellant,	:	
	:	No. 19048
vs.	:	
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Defendants/Appellees.	:	

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NATURE OF THE CASE

This is an appeal from a final decision of the Board of Review of the Industrial Commission. The Board affirmed the termination of unemployment benefits for the plaintiff/appellant, Gretchen Leininger, because she attended two classes at the University of Utah.

RELIEF SOUGHT

The plaintiff seeks reversal of the decision of the Board, an order to pay the benefits withheld, and reimbursement of the costs of this appeal.

THE FACTS OF THE CASE

Grethcen Leininger was employed as a nurse at St. Marks Hospital in Salt Lake City from July 1, 1975, to January 19, 1982. On February 5, 1982, she applied for and eventually began receiving unemployment compensation. Having been

unsuccessful in obtaining employment, Gretchen enrolled in the University of Utah during the Fall, 1982 quarter. She attended two classes, five days a week, from 11:00 a.m. to 1:00 p.m. She was classified as a part-time student. Her continued efforts to become reemployed bore fruit when she obtained full-time work as a nurse on November 29, 1982. She continued to work full time and attend classes part time through the Spring, 1983 quarter at the University. The benefits at issue are those that she should have received between September 26 and November 29, 1982.

The Department of Economic Security terminated Gretchen's unemployment compensation retroactively to September 26, 1982, because of her attendance at school. She appealed the termination to the appeals referee, who affirmed. Case No. 82-A-4601 (November 9, 1982) (R.30). The Board of Review remanded for further factfinding on the impact of school attendance on work opportunities. Decision No. 82-BR-526 (Dec. 28, 1982) (R.21). On appeal from hearing on remand (R.12-18), the Board of Review affirmed the denial of compensation to Gretchen. Decision 82-BR-526 Review (February 9, 1983) (R.7).

ISSUES ON APPEAL

1. Did the Board erroneously interpret U.C.A. § 35-4-5(g) as requiring an irrebuttable presumption that all students are not able and available for work, and are therefore categorically ineligible for unemployment compensation?

2. Was the decision of the Board arbitrary, capricious, and unsupported by substantial competent evidence?

ARGUMENT

POINT I

THE BOARD ERRED IN APPLYING AN IRREBUTTABLE PRESUMPTION THAT GRETCHEN WAS INELIGIBLE

The second decision of the Board of Review denied unemployment compensation to Gretchen because she was (1) registered at and attending an established school, (2) did not earn the major portion of her base period wages while attending school, and (3) is not attending school under Commission approval. Decision 82-BR-526 Review (February 9, 1983) (R.7). In so doing, the Board adopted the findings of fact and conclusions of law of the appeals referee. The appeals referee refused to consider evidence that Gretchen was able and available for work. He held that "an individual must first meet the eligibility requirements of Section 35-4-5(g) to receive benefits while attending [school] before the matter of availability for work becomes a consideration. The claimant does not meet any of the exclusionary provisions of Section 35-4-5(g). Therefore, the Representative's denial of benefits is held to have been in order." Decision of Appeals Referee, No. 82-A-4601 (Nov. 9, 1982) (R.30).

It was error to interpret U.C.A. § 35-4-5(g) (1982 Supp.) as requiring the categorical exclusion of all students from eligibility for unemployment compensation. In essence, that

applies an irrebuttable or conclusive presumption that all students are not availble for work, as required by § 35-4-4(c). In reviewing questions of statutory construction, judicial review is "plenary with no deference accorded the administrative determination." Salt Lake City Corp. v. Dept. of Employment Security, 657 P.2d 1312, 1315 (Utah 1982). The better interpretation is that § 35-4-5(g) is a rebuttable presumption of unavailability for work, which can be disproved in a particular case with a showing by the student claimant that she was, in fact, primarily a member of the work force and secondarily a student.

The fundamental role of the court in construing statutes is to give effect the underlying intent of the legislature. West Jordan v. Morrison, 656 P.2d 445, 446 (Utah 1982). Sections 35-4-5 and 35-4-4 are completely separate sections, with no express legislative bridge between them. To give effect only to the disqualifying factors in § 35-4-5, without making any effort to balance them with the competing interests of the eligibility factors in § 35-4-4, is to write § 35-4-4 out of the code. Section 35-4-4 unequivocally establishes eligibility. Section 35-4-3 unequivocally states that eligible persons shall receive benefits. Section 35-4-5 is equally unequivocal that certain factors render a claimant ineligible for benefits. The statute does not expressly state which section controls in the event of a conflict.

Rather than ignore proof that a person is eligible under

§ 35-4-4, the better view is to balance the competing interests underlying both sections. This can be accomplished by interpreting § 35-4-5(g) as a rebuttable presumption. In this way, effect can be given to both sections. This is one instance where a too literal interpretation of a statute creates a result that is "unreasonably confused, inoperable, [and] in blatant contradiction to the express purpose of the statute. . . ." West Jordan v. Morrison, 656 P.2d at 446.

The unemployment compensation statute is to be ". . . liberally construed and administered to assist those who are attached to the work force and need a bridge between jobs." Salt Lake City Corp. v. Dept. of Employment Security, 657 P.2d at 1315. Consistent with the ameliorative purpose of the Act, § 35-4-5 is to be strictly construed as a forfeiture statute.

> [A] statute for a forfeiture should be strictly construed, and an ambiguous or doubtful term should be given a construction which is least likely to work a forfeiture. The penal character of the provision should be minimized by excluding, rather than including, conduct not clearly intended to be within the provision.

Continental Oil Co. v. Board of Review, 568 P.2d 727, 730 (Utah 1977).

The ambiguity of the statute arises when trying to reconcile the phrases "able to work and is available for work," § 35-4-4(c), and "is registered at and attending an established school," § 35-4-5(g). Did the legislature intend to categorically exclude each and every student, and include each

and every person who is able and available to work, at the same time? The statute should be applied in light of reality. There has been a noticeable change in the types of students and educational courses available today. There has also been a sharp increase in the number of "nontraditional students," such as Gretchen, at today's colleges. A literal interpretation of § 35-4-5(g) would exclude all full-time, part-time, day, and night students. Those attending weekend outdoor recreation classes, correspondence study, continuing education, or even religious instruction classes at their church would be excluded. This would result even though they are otherwise eligible under § 35-4-4(c).

This court has unfortunately not taken an entirely consistent position in interpreting § 35-4-5(g). In Norton v. Dept. of Employment Security, 447 P.2d 907 (Utah 1968), § 35-4-5(g) was applied as a per se, categorical exclusion of students from eligibility. No effort was made to analyze or implement the purpose of the statute. Townsend v. Board of Review, 493 P.2d 614 (Utah 1972), took a more reasoned approach to the problem. The policies behind § 35-4-5(g) were identified as: (1) the legislative presumption that students are not available for work, and (2) to prevent the use of unemployment compensation as a subsidy for an education. In Schultz v. Board of Review, 606 P.2d 254 (Utah 1980), § 35-4-5(g) was not argued or considered, the decision rested entirely on whether the appellant in that case had proven he

was able and available for work as defined in § 35-4-4(c).

The General Rules of Adjudication for the Board of Review adopt the position of the plaintiff/appellant in this case. Rule 30, Able and Available, provides:

> The important factor to bear in mind is the evidence of school attendance and work history must clearly demonstrate that the claimant is primarily a member of the work force and only secondarily a student.
>
> Whenever a claimant begins school attendance after becoming unemployed, he/she is under the same obligation to show that the hours of school attendance would not require any rearrangement of his/her regular working hours in order to accommodate the school attendance.

This requires a case by case analysis of circumstances to determine whether the student is eligible as being primarily attached to the work force. This view is consistent with Townsend and Schultz. The Board nevertheless changed its position after remand and applied a conclusive presumption.

The primary focus must be on availability for work. In Idaho Dept. of Employment v. Smith, 434 U.S. 100 (1977), an Idaho student exemption was upheld against an equal protection challenge. The Court held that the presumption that full-time day students are unavailable for work, and generally not looking, provided a rational basis for excluding them from unemployment benefits. However, if the determination of eligibility breaks free of considerations about availability for work, the rational basis is gone and the per se exclusion is subject to constitutional challenge. In other words, if unavailability and lack of desire to work are not the basis for

excluding students, then the supporting rational basis is gone and the provision violates guarantees of equal protection.

A literal interpretation of the Utah statute would sweep far more broadly than the Idaho statute that was upheld. There is no rational basis for excluding those who take one or two classes in such a way as to not interfere with potential employment opportunities. The exclusion would be based solely on one's status as a student rather than one who had removed herself from the work force. The two classes of unemployed are not coextensive. Some unemployed are therefore being penalized for doing an act that is not adverse to either community morals or values or the interests of the former employer.

The student class of ineligible unemployed is treated differently from other classes of ineligibles listed in § 35-4-5. With other ineligibles, once a prima facie case for ineligibility is estabished, there is opportunity to rebut that finding with appropriate evidence. But once a prima facie case of school attendance is established, there is no further opportunity to prove eligibility. Students are therefore the only group of unemployed who have no opportunity to prove extenuating circumstances or facts tending to prove continued eligibility. There is no rational basis for such disparate treatment. The conclusive presumption therefore violates equal protection guarantees.

Allowing Gretchen the opportunity to overcome the presumption of unavailability and prove that she was sincerely

seeking employment will not subvert legislative intent. It will instead effectuate it. Virtually all states apply only a rebuttable presumption that can be overcome with proof. Although the student rarely succeeds, they at least have an opportunity to offer their proof. See, Petro v. Employment Division, Dept. of Human Resources, 573 P.2d 1250 (Or. Ct. App. 1978); Glict v. Unemployment Ins. Appeals Bd., 591 P.2d 24 (Cal. 1979); Davoren v. Iowa Employment Security Comm'n., 277 N.W.2d 602 (Iowa 1979); Zukauskas v. Commw. Unemployment Comp. Bd., 401 A.2d 866 (Pa. Commw. Ct. 1979); Annotation, 31 A.L.R.3d 891, 939-43. By refusing to consider evidence that Gretchen was eligible under § 35-4-4, the Commission committed legal error. The statute requires only a rebuttable presumption that can be overcome with proof of full eligibility.

POINT II

THE DECISION OF THE BOARD IS UNSUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE

The Board simply refused to consider whether Gretchen was eligible because of its erroneous interpretation of § 35-4-5(g). There were therefore no findings of fact on the issue of eligibility under § 35-4-4, so the decision is unsupported by evidence and must be reversed.

However, Gretchen offered substantial evidence that she was able and available for work,§ 35-4-4(c), and therefore eligible for unemployment compensation. The presumption of unavailability was conclusively rebutted when she testified

that she did obtain full-time employment as a nurse while in school, and that neither her academic or work performance suffered. (R.13, 16-17). She reduced her school load because it was interfering with her work, thus indicating a primary dedication to her work (R.16-17). Her search for employment did not abate because of school (R.15). As a nurse, a 24-hour profession, she was available for work during the commonly accepted working hours of the profession. Cf. Schultz v. Bd. of Review, 606 P.2d 254 (Utah 1980).

On the facts of this case, Gretchen does not deserve to be penalized for attending two college classes. She had been unemployed for more than nine months. There is no evidence that she was anything other than diligent and earnest in her search for new employment. She suffered the additional handicap of being older than the new nursing graduates against whom she was competing for work. It is only natural that an active, intelligent mind would seek intellectual challenges while continuing her search for work.

Our colleges, universities, and other public schools are no longer strictly classical academic institutions. Through expanded and varied course offerings, they reach out to attract and enrich all members of society. Schools are community cultural and social centers. Perhaps no segment of our society more earnestly needs to participate, to socialize, and to be motivated through challenge than the unemployed. The unemployed are isolated and more easily discouraged than their

employed peers. If they can attend school part time and not allow it to interfere with a diligent and good faith search for work, there is no reason to penalize their initiative. The unemployed who prefer to spend their off-hours watching television do not suffer such a penalty.

The Bord may emphasize the fact that Gretchen's ultimate goal was to change her career. That fact is irrelevant because the Board's decision was based entirely on her status as a student. It didn't matter whether she was enrolled in Russian or a canoeing class. That issue is now moot anyway. Gretchen is continuing her education on her own time and with her own money. There is no evidence that she is or ever was using unemployment compensation to finance an education.

There was ample evidence of Gretchen's willingness and desire to work. Of critical importance was that she was attending school only part time and arranged her class schedule around her job. Also important is the fact that she is a nurse and doesn't face the 9 to 5 restraint in hours that many other professions do. In short, her schedule is merely the reverse of the person who works days and goes to school nights. Night school apparently does not disqualify one from receiving unemployment compensation (R.37-38). There is no just reason to penalize a person because their profession provides equal opportunity for day or night work. Either way, Gretchen was available for the same number of working hours. The uncontradicted evidence proves that Gretchen was eligible

for her benefits.

CONCLUSION AND RELIEF SOUGHT

The Board erred in changing its position in the midst of Gretchen's appeal and applying an irrebuttable presumption that she was ineligible for unemployment compensation because of her status as a student. The great weight of the evidence that was ignored proves that she was primarily looking and available for work, and only secondarily a student. The decision of the Board must be reversed and remanded with an order to pay Gretchen the unemployment compensation benefits she was eligible to receive from September 26 to November 29, 1982, and the costs of this appeal.

Respectfully submitted this 20th day of June, 1983.

Gretchen G. Leininger
Plaintiff/Appellant

CERTIFICATE OF DELIVERY

I certify that a true and exact copy of this brief was hand delivered to Floyd G. Astin and K. Allan Zabel at their offices at 1234 South Main, Salt Lake City, Utah, 84101. Done this 20th day of June, 1983.

Utah Department
of Employment Security

A DIVISION OF THE INDUSTRIAL COMMISSION OF UTAH

Walter T. Axelgard
Commission Chairman

Stephen M. Hadley
Commissioner

Lenice L. Nielsen
Commissioner

August 25, 1983

Mr. Geoffrey J. Butler
Clerk, Utah Supreme Court
Utah State Supreme Court
State Capitol Building
Salt Lake City, Utah 84114

Re: Case No. 19048, Leininger v. Board of Review

Dear Mr. Butler:

As Counsel for the Respondent, Board of Review, in the above-referenced case, I hereby respectfully waive Respondent's right to submit a Response Brief and request that the Court decide this matter on the record, Appellant's Brief and this letter, and that such decision be expedited pursuant to Section 35-4-10(i), U.C.A. 1953.

This request is made after a careful and thorough review of the record in the above-entitled matter and discussion with the members of the Board of Review. The General Rules of Adjudication, Able and Available, Section 40, quoted at R.0021-0022, provides that one who is unemployed may begin school attendance and still qualify for unemployment benefits provided that the hours of school attendance do not require any rearrangement of his/her regular working hours. In applying this Rule of Adjudication it appears that the pertinent facts in this case are that the claimant worked one and one-half years on the 3 p.m. to 11 p.m. shift, prior to her separation from employment; that her school attendance was from 11 a.m. to 1 p.m., commencing September 28, 1982; that on November 29, 1982, the claimant began working for the University Hospital as a Registered Nurse from 3 p.m. to 11 p.m.; that in January 1983 the claimant reduced her school hours because of an extra heavy workload.

It is my opinion, and the Board of Review has concurred, that the evidence of record in this matter more clearly supports the claimant's position that she is entitled to benefits and that the decision of the Board of Review is not supported by substantial evidence. Therefore, we request that the Court enter an order reversing the decision of the Board of Review and allowing benefits to the claimant for the period beginning September 26, 1982 and ending November 28, 1982. It is requested that the Court expedite its Order so that benefits may be paid to the claimant as early as possible to avoid any further delays in this matter.

Very truly yours,

K. Allan Zabel

K. Allan Zabel
Legal Counsel

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cc: Gretchen G. Leininger