1983

Agnes Payotelis v. The Industrial Commission of Utah, Department of Employment Security : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

AGNES PAYOTELIS, Appellant, vs. THE INDUSTRIAL COMMISSION OF UTAH, Department of Employment Security, Respondent.	*	Case No. 83-BR-39 Supreme Court No. 19127

BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE

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

DISPOSITION BELOW

On November 9, 1982, the Department of Employment Security issued a decision denying Appellant Agnes Payotelis unemployment compensation insurance benefits retroactive to October 3, 1982. The basis for the denial was inadequate job search. Appellant Payotelis was also charged with an overpayment liability of $536.00.

On January 4, 1983, after a hearing on the matter, Appeals Referee Christopher W. Love issued a decision modifying the Department of Employment Security's decision. The Referee denied benefits for the periods October 3 through October 23, and November 28, 1982, and continuing. The Referee also reduced the overpayment liability to $402.00.

On March 29, 1983, the Board of Review of the Industrial Commission of Utah affirmed the Referee's decision.

RELIEF SOUGHT ON APPEAL

Appellant asks the Court to reverse Respondent's decision that Appellant failed to make an active work search

effort. Appellant further asks the Court to enter a judgment that Respondent's decision was not supported by substantial evidence and was not in compliance with the law. Finally, Appellant asks that the Court find that she is entitled to unemployment compensation benefits from October 3, 1982, until she is no longer otherwise eligible and that therefore, as a matter of law, no unemployment compensation benefits received by Appellant after October 3, 1982, were overpayments.

PRELIMINARY STATEMENT

On November 1, 1982, Department of Employment Security Representative S. Chapman conducted an eligibility interview with Appellant. (R.64) During this interview Appellant filled out a form provided by Chapman. (R.63-64) Appellant listed ten job contacts on the space provided on the form and an additional five contacts on a separate sheet of paper. (R.42-43) The separate sheet of paper was lost by the Department. (R.42) Of her contacts listed that day, six were in-person and nine were made by telephone. The representative informed Appellant during the meeting that she would have to make three in-person job search contacts each week to be eligible for benefits. (R.64) During this same interview, Appellant also signed a statement written by the representative stating that Appellant was making a list of her employer contacts by telephone because of her lack of money to buy gas to go in person. (R.62) Eight days after this interview, Appellant received a notice that her

benefits had been terminated retroactive to October 3, 1982, and that she owed the Department $536.00 in overpayments. (R.61)

On November 15, 1982, Appellant requested a hearing. She received a hearing on December 9, 1982. (R.60) Appellant presented evidence in the hearing that she had contacted 35 employers in 67 days. (R.33-36, 64). Of these contacts, 22 were in-person and 13 were by telephone.

On January 4, 1983, Appeals Referee Christopher Love modified the decision of the Department representative. He denied Appellant benefits from October 3, 1982, through October 23, 1982, allowed benefits for the weeks ending October 30, November 6, November 13, November 20, and November 27, 1982, and denied benefits from November 28, 1982, henceforth. The overpayment amount was also modified down to $402.00.

The Appeals Referee found that Appellant's telephone contacts were generally insufficient and that Appellant was required to contact at least two new potential employers in person every week. The Referee also found that Appellant was at fault in the creation of a $402.00 overpayment and would be responsible for paying it back.

On January 13, 1983, Appellant filed an appeal from the decision of the Appeals Referee to the Board of Review of the Industrial Commission. (R.10-13) In its decision, the Board affirmed and adopted the findings of fact and conclusions of law in the decision by the Appeals Referee. (R.5)

STATEMENT OF FACTS

Appellant Agnes Payotelis is a 49 year old woman who has most recently worked as a pest control exterminator (R.39-40) Her last job was with Terminex, Inc. where she had worked for nearly three years before being laid off on July 31, 1982. (R.39-40, 55) She was earning $1,200.00 per month when laid off. (R.40) Prior to that she had worked for Orkin, Inc., another exterminator company. (R.46) She also has work experience as a seamstress and has worked in a wallpaper store and a specialty food store. (R.46-47) Prior to her current unemployment, Appellant had not drawn unemployment benefits in the last twenty years. (R.53)

Since being laid off she has looked for work each and every week. At the hearing she presented a list of the in-person contacts she had made the last week of October at the Cottonwood Mall. (R.33) This list was used to replace the one which Appellant had submitted prior to the termination of her benefits but which the agency had lost. (R.41-42) Appellant also presented a lengthy list of the job contacts she had made up to the date of the hearing. (R.34-36)

Payotelis contacted all of the pest control firms in Salt Lake City in-person during her search for employment. (R.51) She testified that she relied on the telephone to make follow up contacts with the exterminator companies and to set up appointments for interviews. (R.49-50) Most

of the time the companies would tell her they were not taking applications or giving interviews. (R.50)

She further testified that she has not had money for gas since being terminated from unemployment benefits. (R.50) Likewise, she has not had money for the bus. (R.44) She testified that she walked from her home in West Jordan (7079 South 1115 West) to Fashion Place Mall (6200 South State Street) in Murray on one job search venture. (R.44) She has also resorted to hitch-hiking to make an in-person contact. (R.52) To be able to appear at her hearing Appellant had to borrow gas money from her daughter, something that she is morally opposed to doing. (R.45)

At the time of her hearing Appellant had not been able to pay her gas utility bill. (R.52) She had to sell her t.v., stereo, microwave, extra tires and other household items to make her monthly house payments of $125.00. (R.52-53) Furthermore, she had gone without food for two days prior to applying for her hearing. (R.52)

Appellant has contacted and applied for many jobs that pay much less than what she was earning at Terminex. (R.43) Though she has stated that the least she feels she should have to accept is $900.00 per month (R.40), since being terminated from benefits she has become desperate and destitute. (R.43) Not knowing whether she will get her benefits again, she has been willing to take just about anything. (R.43)

In addition to her 37 contacts over the two months immediately preceding her hearing, Appellant went into the Job Service office twice weekly to check the job boards and responded to the one referral she has received from Job Service (Orkin, Inc.).

STATEMENT OF ISSUES

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

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

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

ARGUMENT

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

POINT I.

APPELLANT CONDUCTED A DILIGENT JOB SEARCH.

Utah law provides that:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found by the commission that:
>
> . . .
>
> (c) He is able to work and is available for work during each and every week with respect to which he made a claim for benefits under

> this Act, and acted in good faith in an active effort to secure employment,...

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

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

> An individual shall be ineligible for benefits or for purposes of establishing a waiting period:
>
> . . .
>
> Failure to Apply for or Accept Work.
>
> (c) If the commission finds that the claimant has failed without good cause to properly apply for available suitable work...provided no claimant shall be ineligible for benefits for failure to apply, accept a referral, or accept suitable work under circumstances of such a nature that it would be contrary to equity and good conscience to impose a disqualification.
>
> The commission shall consider the purposes of this act, the reasonableness of the claimant's actions, and the extent to which the actions evidence a genuine continuing attachment to the labor market in reaching a determination of whether the ineligibility of a claimant is contrary to equity and good conscience.

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

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

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

It has since been held, that this Act, being remedial in nature should be liberally construed. Singer Sewing Machine Co. v. Industrial Comm. 134 P.2d 479 (Utah, 1943) reh.den. 141 P.2d 694 (Utah 1943). The Act should be administered to effectuate its purposes, which include lightening the burdens of unemployment and maintaining purchasing power in the economy. Johnson v. Board of Review of Industrial Comm., 320 P.2d 315 (Utah 1958).

The remedial purpose of the Act was further stated in Singer Sewing Machine, supra, to protect the health, morals, and welfare of the people by providing a cushion against the shocks and rigors of unemployment. The purpose of providing benefits was defined as twofold: First, 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." Utah Code Ann. §35-4-5(c) (1953, as amended)

That the law requires a subjective analysis is further clarified in the case law. The Utah Supreme Court held in the case of Denby v. Board of Review, 567 P.2d 626 (Utah 1977) that the claimant "must act in good faith to make an active and reasonable effort to secure employment, and must be genuinely attached to the labor market." Id. at 628. This principle has not changed. The words "good faith" and "reasonable effort" imply a subjective individualized analysis of the claimants' job search efforts. The law does not require the "2 to 3 new, in-person contacts" imposed by the Appeals Referee. (R.15)

Appellant's job search was made in good faith through reasonable efforts. She testified that she contacted each and every pest control business in the Salt Lake area in an effort to find re-employment in the job which she is most qualified to do, that of pest exterminator. She contacted these pest control firms either

in-person or by phone. Furthermore, she has maintained contact with them by calling back on a weekly basis to find out if there are any new job openings. Appellant's job search has thus been very thorough in the field in which she is most qualified. Even so, Appellant did not stop there. She also contacted many businesses which were not pest control companies but which had job openings which she felt she would be able to do.

Appellant was earning $1,200.00 per month as an exterminator for Terminex, Inc. She testified during her hearing that her financial situation required new employment that would pay at least $900.00 per month. Nevertheless, Appellant has gone without income of any kind for so long now that she has, at times, earnestly sought work which pays only minimum wage. The vast majority of these contacts have been in-person.

In all, Appellant contacted 35 businesses within 67 days. Including weekends, that is an average of one contact every 1.9 days. Out of her 35 contacts, 22 were in-person. This is an average of 1 in-person contact every 3 days or slightly more than 2 in-person contacts each week. Thus, even though Appellant Payotelis contests the legitimacy of the 2 to 3 in-person contact rule, she has substantially complied with it.

It is true that Appellant did not even distribute her job search efforts so that she could make exactly 2 in-person contacts each and every week as

Respondent would have her do. Some weeks she made more than 2 in-person contacts, some weeks less. Appellant's search was fitted to her own personal circumstances. She made in-person contacts to as many businesses as she could, given her financial resources. She would go to several companies on one day all within close vicinity. This helped her conserve gas. Had she nicely spaced her job search trips, she would unduly increase travel distances. When Appellant could not afford gas she walked or hitch-hiked to look for work. She visited several companies in one trip because of the time and distances involved. These measures are all within the statutory definition of a reasonable good faith effort to secure employment given Appellant's particular circumstances.

Adding to the reasonableness of her efforts was the fact that Appellant would often call before expending gas or walking to a company. If there are no job openings then Appellant should not be required to waste her precious resources driving around only to be told the same thing in person that she would have been told on the telephone.

Hunting for a job is a serious and painstaking process. Yet Respondent ignores this. The fears and pressures which are created by the normal job search are compounded many times for a person in Appellant's situation who is working in a very limited market and who does not have resources to live day to day, let alone make a job search simply to conform to Respondent's unduly restrictive

requirements. If she were to follow Respondent's directives to the letter she could go to any two companies in town each week and this would be considered an adequate job search.

Yet Appellant's goals are not simply to meet Respondent's inflexible and structured standards in hopes that she might retain her unemployment benefits. Instead, Appellant is concerned with finding the job most suitable to her skills and career goals. Appellant has made a good faith effort to find a job. Her search efforts have been reasonable given her circumstances. Respondent should thus be required to pay Appellant for those benefits illegally withheld from her.

A. Case Law Further Supports Appellant's Position.

The case of Gocke v. Industrial Commission, 420 P.2d 44 (Utah 1966) interprets Utah's job search requirements. The first 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 help advertisements. On these facts the Utah Supreme Court found that:

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

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

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

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

The Gocke decision went on to state:

> Only if it is understood that an unemployment compensation law is a broad public measure, designed by the payment of benefits to check and ameliorate the effects of unemployment among workers who are able, willing and ready to work, will workers be assured the reasonable protection which the statute has provided for them. The same view was expressed by Justice Cardozo when he stated:
>
> > "An unemployment law framed in such a way that the unemployed who look to it will be deprived of reasonable protection is one

> in name and nothing more." See Stewart Machine Co. v. Davis, 301 U.S. 548, at 593, 57 S.Ct. 883, 891, 81 L.Ed. 1279 (1937).

Id. at 47.

The Referee relied on the case of Marvin L. Hurd v. Board of Review, 638 P.2d 544 (Utah 1981). (R.15) Yet this case fails to address the issue of telephone contacts versus in person contacts. Hurd had contacted only three businesses in 30 days. This is certainly not the case with Agnes Payotelis who made 35 job contacts in 67 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 in the conduct of the claimant in seeking employment, which must be determined as an issue of fact by the Department in each particular case in accordance with all of the evidence, facts and circumstances bearing upon the situation. See, Brown v. Board of Review, 289 N.E.2d 40 (Ill. App. 1972).

In the case of Employment Security Administration Board of Appeals v. Smith, 383 A.2d 1108 (Ct. of App. Md. 1978) the court found that telephone contacts were reasonable in light of the lack of public transportation in the area. Smith had 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, she was terminated from benefits because of a standard form she had filled out and

because of a signed confession that had been drawn up by an eligibility worker.

Case law, both in Utah and across the country supports Appellant's claim and shows that her 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 for such an analysis to take place. The 2 to 3 contact rule discounts telephone contacts in violation of law and their own "Claimant Guide" which encourages the use of telephone calls, resumes and other non-personal contacts. Utah Department of Employment Security, Unemployment Insurance Claimant Guide, at 7 (February 1982). The 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 through emergency rulemaking procedures. The new rule took effect April 5, 1983. The new rule redefines "good faith work search effort" to include, but not be limited to, in-person contacts with employers. The rule creates a rebuttable presumption that a claimant has not made an active work search effort if the claimant fails to make a specific minimum number of in-person employer contacts after being told to do so by a local Employment Security office. Utah Admin. Bull. No. 83-7 at 77 (April 1, 1983). A copy of which is attached to

this Brief as Exhibit 1. However, even though the state has now promulgated such a rule, it was not in effect at the time Payotelis' case was adjudicated. Furthermore, this rule violates the Utah unemployment compensation statute, and as such is ultra vires and is thus invalid.

POINT III.

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

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

The New York procedure challenged in Goldberg v. Kelly provided that a caseworker who had doubts about a recipient's continued eligibility for benefits would first discuss these doubts with the recipient. If the caseworker concluded that the recipient was no longer eligible he/she would recommend termination of aid to a unit supervisor. If the latter concurred, he/she would send the recipient a letter stating the reasons for proposing to terminate aid. The letter also informed the recipient that within seven

days he or she could request that a higher official review the record and that she could submit a written statement in support of her claim. If the reviewing official affirmed the determination of ineligibility, aid would be terminated immediately. After termination, the recipient was entitled to a "fair hearing" and after that to judicial review. The challenge to this procedure was that it did not allow for the personal appearance of the recipient before a reviewing official, for oral presentation of evidence, and for confrontation and cross-examination of adverse witnesses prior to termination.

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

A year after the Goldberg v. Kelly decision, the U.S. Supreme Court reviewed a challenge to California's termination procedure for unemployment compensation benefits. California Department of Human Resources

Development v. Java, 402 U.S. 121 (1971). California Unemployment Compensation recipients had initially brought the action to enjoin California from terminating their benefits without a pre-termination hearing. Java v. California Department of Human Resources, 317 F.Supp. 6 (N.D. Cal. 1970). They argued that there was a median delay of seven weeks before payments were resumed and that this violated the cliamant's federal statutory and Constitutional rights. The Federal Court for the Northern District of California held that this delay violated 42 U.S.C. §503(a) which requires that payments be made "when due." Relying on Goldberg v. Kelly, supra, the District Court also held that denial of a pre-termination hearing violated the claimants' right to due process of law. In reading its conclusions, the court balanced the claimants' interest in having the necessities of life while the bureaucracy mulls over his or her continued eligibility against the state's interest in protecting public funds.

On review by the Supreme Court it was found that termination of unemployment compensation benefits without a pre-termination hearing violated 42 U.S.C. §503 because benefits would not be paid "when due." The court reasoned that Congress had intended for unemployment benefits to provide cash at a time when a claimant has nothing else to spend, thus maintaining the claimant at subsistence level without the necessity of turning to welfare or private charity. In addition, Congress intended unemployment

insurance payments to act as a means of exerting an influence upon the stability of industry.

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

> You are to contact three places of employment as a routine factory worker or general office clerk between 2/17/71 and 2/24/71. These are to be personal contacts in the Rutland area.

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

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

Id at 858-859.

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

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

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

After an adverse "fair hearing" determination, the claimant brought suit alleging that due process had been denied her because (1) the fact-finding interviews were not conducted by the same person making the decision to terminate her benefits, (2) there was no prior notice that the fact-finding process was to take place, (3) there was no opportunity to know beforehand the specific reasons for the terminations of her benefits, and(4) the claimant did not have an opportunity to consult with counsel or to confront or cross-examine witnesses before the decision to terminate her benefits was made.

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

The Utah procedure applied against Appellant Payotelis was even more violative of her rights than the Vermont procedure in Wheeler. Appellant was only interviewed on one occasion prior to the termination of her benefits. She was given no warning whatsoever prior to that interview as to what to expect. She was not told she could have an attorney present at the interview. Nor was she advised beforehand what issues would be raised at the interview or that the interview might result in the termination of her benefits. Like the Wheeler claimant, Appellant was directed to sign a statement written by the agency representative. She was told that if she didn't sign the statement her benefits could be terminated. Like the claimant in Wheeler, Appellant's benefits were terminated a few days after the interview, based on information received during the interview. However, Appellant's benefits were terminated retroactively a full month prior to the interview thus creating a large overpayment. Furthermore, Appellant waited two months between the time she applied for a fair hearing and the time she received the hearing decision. The average claimant in Vermont had but a 37.5 day wait. In fact, Appellant's waiting period was as long as the one which the U.S. Supreme Court struck down in California Department of Human Resources Development v. Java, 402 U.S. 121 (1971), discussed above. There is thus even more reason to hold Utah's procedure invalid than there was to hold Vermont's invalid.

Agnes Payotelis' claim was terminated eight [illegible] after she had been called in for an eligibility review. [illegible] that time, she had presented her Eligibility Review [illegible] plus a supplemental list which was lost by the Departme[illegible] During her Eligibility Review, Appellant was directed [illegible] sign a statement written by Department Representative S[illegible] Chapman, confessing to make only telephone calls. On he[illegible] appeal request, Appellant made it clear that she never admitted to only contacting firms by telephone. Again, a[illegible] her hearing, Appellant testified that she disagreed that telephone calls were her only job search activity. This scenario illustrates the precise reasons why the U.S. District Court for the district of Connecticut struck down an identical practice in that state. See Steinberg v. Fusari, 364 F.Supp. 922 (D.Conn. 1973).

In Connecticut, a recipient was required to make bi-weekly visits to the Unemployment Compensation Department to fill out a "Continued Claim for Unemployment Compensation" 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 Informatio[illegible] Form." These papers were then presented to an employee o[illegible] the Department; if no questions were raised, he was paid. If the Department employee raised an issue of possib[illegible] disqualification, the claimant was sent in for a "seat[illegible] interview." He was then interviewed by a "Fact Findi[illegible] Examiner," who sought to ascertain facts as to possib[illegible]

disqualification. If the examiner decided that the claimant had not conducted a diligent job search, the claimant was not given his check and was told that he would receive written notification. A letter was then sent out under the signature of the office manager stating the reasons for termination.

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

This case was appealed to the U.S. Supreme Court, Fusari v. Steinberg, 419 U.S. 379 (1975) who remanded the case in light of the fact that the Connecticut Legislature had enacted major revisions, 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. Payotelis was terminated without prior notice or a Goldberg v. Kelly hearing. She was never provided an adequate opportunity to present her arguments nor present the additional information that she had. She was merely summarily terminated from benefits.

This termination has caused Appellant tremendous hardship. She has had to sell her personal property just to pay her $125.00 monthly house payments. Among the items that she has had to sell were her t.v., stereo, microwave, extra tires, and some other household items. She is behind on her utility payments and is afraid of her gas being shut off. She testified that at one point, for at least two days, she has had to go hungry. 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. 87 (N.D. Cal. 1970).

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

POINT IV.

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

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

> [S]ustain the determination of the Board of Review, unless the record clearly and persuasively proves the action of the Board was arbitrary, capricious and unreasonable. Specifically, as a matter of law, the

> determination was wrong; because only the opposite conclusion could be drawn from the facts.

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

As stated above, Respondent has deprived Appellant of her sole means of support through a rigid and inflexible job search requirement. Appellant made 35 employer contacts over a 67 day period, an amount far exceeding the reasonable job search efforts being upheld in most cases. Yet she has been denied benefits by Respondent because she did not make 2 to 3 new in-person employer contacts each week. As shown above, Respondent's requirement is void because it violates Utah 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 were also arbitrary, capricious and unreasonable.

Finally, Respondent has caused hardships to Appellant which far exceed any wrong which Respondent could ever conceivably find in Appellant's actions. All of these hardships have resulted because of Respondent's arbitrary,

capricious and unreasonable application of an inflexible and invalid standard. This Court should strike down and enjoin Respondent's illegal practices, reverse Respondent's findings, and award full benefits to the Appellant, Agnes Payotelis.

CONCLUSION

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

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

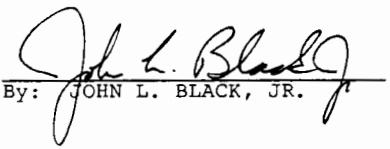
Appellant therefore requests that she be reimbursed for all benefits denied her and that the Department be enjoined from terminating her claim again for any reason other than exhaustion of benefits without first providing her with due process of law.

//

DATED this 27th day of May, 1983.

Respectfully submitted,

UTAH LEGAL SERVICES, INC.
Attorneys for Appellant



By: JOHN L. BLACK, JR.

EMPLOYMENT SECURITY
174 Social Hall Avenue
Salt Lake City, Utah 84111

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

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

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

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

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

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

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

EXHIBIT 1

CERTIFICATE OF MAILING

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

Floyd G. Astin
Special Assistant Attorney General
The Industrial Commission of Utah
Department of Employment Security
P. O. Box 11249
Salt Lake City, Utah 84147

K. Allan Zabel
Special Assistant Attorney General
The Industrial Commission of Utah
Department of Employment Security
P. O. Box 11600
Salt Lake City, Utah 84147

DATED this 27th day of May, 1983.