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IN THE SUPREME
OF THE STATE O

AGNES PAYOTELIS,

Appellant,

vs.

BOARD OF REVIEW OF THE INDUSTRIAL
COMMISSION OF UTAH, DEPARTMENT
OF EMPLOYMENT SECURITY,

Respondent.

RESPO

Appeal from a
State
and the

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FILE

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Clerk, Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

AGNES PAYOTELIS,

Appellant,

vs. Case No. 19127

BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY,

Respondent.

RESPONDENT'S BRIEF

STATEMENT OF NATURE OF THE CASE

This is an action before the Supreme Court of the State of Utah pursuant to Section 35-4-10(i), Utah Code Annotated 1953, as amended, seeking judicial review of a decision of the Board of Review of the Industrial Commission of Utah, which denied unemployment benefits to the Appellant, Agnes Payotelis, pursuant to Section 35-4-4(c), Utah Code Annotated 1953, as amended (Pocket Supplement, 1981), on the grounds that during certain weeks for which she claimed benefits she failed to demonstrate a "good faith" active effort to seek employment as required for eligibility. This disqualification established an overpayment liability in the amount of $402, pursuant to Section 35-4-6(d), Utah Code Annotated 1953, as amended (Pocket Supplement, 1981).

DISPOSITION BELOW

The Department Representative's decision, dated November 9, 1982, den unemployment benefits effective October 3, 1982, on the grounds that Appe lant had not made an active effort to find work as required for eligibil under the provisions of Section 35-4-4(c), Utah Code Annotated 1953, amended (Pocket Supplement, 1981). This decision established an overpaym liability in the amount of $536. Plaintiff appealed to an Appeal Refe who modified the decision of the Department Representative in a decis dated January 4, 1983, to deny benefits from October 3, 1982 through Oc ber 23, 1982; to allow benefits for the weeks ended October 30, November November 13, November 20, and November 27, 1982; and to deny benefits eff tive November 28, 1982 and continuing until a change in facts or condit was demonstrated. The Appeal Referee's decision reduced the overpayment $402. The Appellant appealed to the Board of Review of the Industrial C mission of Utah, which by decision issued March 29, 1983, in Case No. 82- 5336, 83-BR-39, affirmed the decision of the Appeal Referee.

RELIEF SOUGHT ON REVIEW

Appellant seeks a finding of the Court that the Appellant did in make a diligent job search effort that demonstrated her continuing att ment to the labor market and such actions fully complied with requir of Utah law. Respondent seeks affirmance of the decisions of the A Referee and Board of Review.

STATEMENT OF FACTS

Respondent agrees with Preliminary Statement and Statement of Facts set forth in Appellant's Brief, however, notes that for the total period of disqualification, Appellant made only two in-person employer contacts and six telephone contacts. In particular: For the week ended October 9, 1982, Appellant made no in-person contacts and contacted Rid A Pest, Pennock Pest Control and R & R Pest Control by telephone. (R.0064) For the week ended October 16, 1982, Appellant contacted Wasatch Exterminators in person, and Columbia Pest Control by telephone. (R.0064) For the week ended October 23, 1982, Appellant made no in-person contacts and contacted Utah Pest Control and Holiday Pest Control by telephone. (R.0064) For the period from November 28, 1982 to her hearing on December 9, 1982, Appellant contacted only Zeeman's Manufacturing which was an in-person contact. (R.0036)

ARGUMENT

POINT I

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

This Court has consistently held that where the findings of the Commission and the Board of Review are supported by evidence, they will not be disturbed. Martinez v. Board of Review, 477 P. 2d 587 (Utah, 1970). In the

case of Members of Iron Workers Union of Provo v. Industrial Commission, P. 2d 208, 211 (Utah, 1943), this Court held:

> If there is substantial competent evidence to sustain the findings and decision of the Industrial Commission, this court may not set aside the decision even though on a review of the record we might well have reached a different result.

With specific reference to the question of availability, this Court stated:

> It is our duty to examine the record and to affirm the decision unless we can say as a matter of law that the conclusion on the question of "available for work" was wrong because only the opposite conclusion could be drawn from the facts. Gocke v. Wiesley, 420 P. 2d 44,46 (Utah, 1966); citing Salt Lake County v. Industrial Commission, 120 P. 2d 321 (Utah, 1940).

POINT II

THE FINDINGS AND DETERMINATION OF THE INDUSTRIAL COMMISSION ARE SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE.

Section 35-4-4(c) requires, by direct statutory language, that an unemployment insurance claimant make an active and good faith effort to secure employment each week that he files for benefits.

> 4. 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 . . . (Emphasis added.)

Although the Utah Employment Security Act does not require that a claimant be engaged in a search for work for any given number of hours each day or week to prove he is engaged in a good faith active effort work search, this Court has held that a claimant must be unequivocally exposed to the labor market and must show more than a passive willingness to gain employment. Denby v. Board of Review, 567 P. 2d 626 (Utah, 1977).

Appellant relies on Gocke, supra, as support for her contention that her work search was adequate. See page 12 of Appellant's Brief. However, Gocke is distinguishable in that the claimant therein was not advised as to the extent of work search she should be making. The claimant in Gocke relied on the "Handbook for Claimant" which, when read literally, "doesn't require any affirmative action by a claimant other than registration." Id. at 46. In the present case, however, Appellant was advised as to the extent of work search she should be making and understood fully what would constitute an active effort to secure employment. The United States District Court for the District of Connecticut stated in Steinberg v. Fusari, 364 F. Supp. 922 (Conn., 1973), cited on page 24 of Appellant's Brief:

> [I]f a stated number of employers must be visited, a claimant's acknowledgment that he had seen fewer than the required number would eliminate the factual controversy and provide an adequate basis for denial of benefits.

In the present case, when Appellant initially filed for benefits, she signed and received a copy of the "Responsibilities While Claiming Benefits" form which provides:

> Seek work - I will make an active effort to look for full time work each week and will follow up on any job leads I am given by Job Service. An active effort, in part, means I will personally contact employers who would hire people in my occupation. Failure to do so may be considered as evidence that I do not have a genuine desire to find immediate employment. (R.0065. Emphasis added.)

She also certified to the following statement on her initial claim f

> I understand that I must personally seek work and be able and available to accept full-time work. I have received the U. I. Claimant Guide explaining my rights and responsibilities. (R.0066. Emphasis added.)

The U. I. Claimant Guide, referred to as the Handbook, pro

> Make an active effort to look for work. An active effort means that you should contact several employers in person each week who would hire people in your occupational field. Unemployment Insurance Claimant Guide, page 7, 1982. (Emphasis added)

Several obviously means more than one, and that Appellant read the Ha book and understood the work search requirements is appparent from her tes mony:

> Referee: Okay. What was your understanding based on your reading of the Handbook and reading Exhibit #2 ["Responsibilities While Claiming Benefits" form] of the responsibilities or the work search requirements imposed by the Department of Employment Security? What did you understand that you needed to do to remain eligible for unemployment insurance as far as work search?
>
> Claimant: To make at least two to three contacts a week.
>
> Referee: Did you understand the . . . how those contacts were to be made?
>
> Claimant: Yes.

Referee: What was your understanding of how they were to be made?

Claimant: That I should make about, at least, two to three contacts a week in person and you know, minimum. (R.0041)

With such a clear understanding as to what would suffice as the minimal job search, Appellant nevertheless made only one in-person contact during the three weeks between October 3, 1982 and October 21, 1982 (R.0064) and only one in-person contact during the twelve days between November 27, 1982 and December 9, 1982. (R.0036) These two in-person contacts were supplemented by six telephone contacts. (R.0064) This fact situation appears almost analogous to the situation in Hurd v. Board of Review, 638 P. 2d 544 (Utah, 1981), wherein this Court held that a claimant who had contacted only three businesses for the purpose of finding work during a 30 day period, was not entitled to unemployment compensation because his efforts showed only a "passive search for work" even though he alleged in his appeal to the Board of Review that he had made "numerous telephone calls pursuant to want ad listings." Id. at 545.

Accordingly, Appellant's sporadic and limited employer contacts in the present case and particularly her failure to pursue in-person contacts, are inconsistent with an unequivocal exposure to the labor market and do not show a good faith effort to secure employment. Therefore, this Court is justified in supporting the decision of the Appeal Referee as affirmed by the Board of Review to deny benefits and assess the overpayment.

POINT III

THE REQUIREMENT THAT APPELLANT CONTACT 2 TO 3 POTENTIAL EMPLOYERS IN PERSON EACH WEEK IS CONSISTENT WITH THE LAW AND IS REASONABLE.

The Appellant contends that the Industrial Commission has applied in rigid and inflexible manner the so-called "2 to 3 in person contact rule. However, that requirement is only an interpretive guideline that is considered viable in most occupations and areas, but is not applied rigidly inflexibly in all cases. That the Industrial Commission and the Departm have the authority to make such interpretations of the Utah Employment Se rity Act and issue such guidelines, has been affirmed by this Court in Lake City Corporation v. Board of Review, 657 P. 2d 1312 (Utah, 19

> . . . Furthermore, where agency decisions deal with technical questions which call for the exercise of expertise, born either of a technical background and training or long experience in dealings with numerous, similar problems, we also accord deference to an agency interpretation because of the necessity to recognize discretion commensurate with the nature of the issue, as defined by the general purposes of the Act, although the latitude accorded may vary with the nature of the issue. . . .

With Utah unemployment compensation claims as high as 35,000 duri particular week, and in recognition of the difficulty involved in the pr adjudication and payment week by week of benefits, it is only natural t the Department would issue guidelines which are applicable even-hand to all similarly situated claimants subject to the work search require of Section 35-4-4(c) of the Act.

The minimal requirement placed upon claimants to contact 2 to 3 potential employers each week in person is both reasonable and is supported by case law from other jurisdictions. See Jones v. Administrator, Unemployment Compensation Act, 228 A. 2d 807 (Conn. 1966); Redd v. Texas Unemployment Compensation Act, 431 S.W. 2d 16 (Tx., 1968); Carr v. Administrator, Unemployment Compensation Act, 223 A. 2d 313 (Conn., 1966).

Considering the purpose of the work search requirement, and the requirement of Denby, supra, that a claimant must be unequivocally exposed to the labor market and must show more than a passive willingness to gain employment, the requirement in this case that Appellant contact at least two potential employers each week, is reasonable and consistent with the generalized work search requirement contained in the Utah Employment Security Act. As noted above, Appellant received and understood the work search instructions. That she was able to comply is apparent, because for that period in which she was allowed benefits, Appellant did contact at least three potential employers in person each week.

POINT IV

THE PROCEDURE BY WHICH THE COMMISSION TERMINATED UNEMPLOYMENT BENEFITS TO THE CLAIMANT DID NOT VIOLATE DUE PROCESS.

Appellant contends in her Brief at Point III that she was denied unemployment benefits without prior notice and without opportunity for a Goldberg v. Kelly type of hearing before termination of benefits. In support of this

contention claimant cites the cases of Steinburg v. Fusari, supra, and
fornia Department of Human Resources Development v. Java, 402 U.S. 121
Appellant explains the Fusari case as holding that the "seated inter
system did not provide sufficient procedural due process protection
unemployment insurance claimants. A cursory review of the District
Opinion would lead one to that conclusion. The District Court held
the Connecticut procedures for determining unemployment insurance eligib
violated due process as follows:

> . . . because (a) a property interest has been denied (b) at an inadequate hearing (c) that is not reviewable de novo until an unreasonable length of time. 364 F. Supp., at 937-938.

The Connecticut legislature thereafter amended the review provision
its unemployment insurance law. The U. S. Supreme Court remanded the
to the District Court to determine whether the new provisions improve
time factor sufficiently to make the entire process legally sufficient, s
ing:

> Prompt and adequate administrative review provides an opportunity for consideration and correction of errors made in initial eligibility determinations. Fusari v. Steinberg, 419 U.S. 379,389, 95 S.Ct. 533,540, 42 L.Ed. 521 (1975).

Thus a careful reading of the opinion of the Supreme Court in the Fus
case clearly shows that the Court was primarily concerned with the leng
delay in obtaining proper review of a denial of benefits. This concer
subsequently specifically recognized by the Supreme Court in the case
Matthews v. Eldridge, 96 S.Ct. 893 (1976), citing Fusari at 906. Eldr

a disability insurance case, involved the precise issue to which Appellant speaks in Point III of her Brief, that is, whether an individual claiming government benefits under an entitlement program may be denied such benefits without a Goldberg v. Kelly type hearing.

In analyzing the issue presented, the Eldridge court set forth the factors to be considered in determining the amount of due process required in such cases, as follows:

> Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. [Citations omitted] More precisely our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or a substitute procedural safeguard; and finally, the government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Citing Goldberg v. Kelly]

The Court then proceeded to analyze the individual interest involved in the Eldridge case, stating:

> Only in Goldberg has the court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence; "the crucial factor in this context - a factor not present in the case of . . . virtually anyone else whose governmental entitlements are ended - is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. 397 U.S., 254,264, 90 S.Ct. 1011,1018 (Emphasis in original)." Eligibility for disability benefits,

> in contrast, is not based upon financial need. Indeed, it is wholly unrelated to the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards, court claims awards, savings, private insurance, public or private pensions, veterans' benefits, food stamps, public assistance, or the "many other important programs both public and private, which contain provisions for disability payments affecting a substantial portion of the work force. . . ." [Footnotes and Citations omitted. 96 S.Ct., at 905]

After considering the other two factors previously referred to, the court concluded that an evidentiary hearing is not required prior to the termination of disability benefits.

The holding that pre-termination evidentiary hearings are not required was extended to unemployment insurance cases by Graves v. Meystrik, 425 F. Supp. 40 (E.D. Mo., 1977), affirmed 431 U.S. 910, 97 S.Ct. 2164, 53 L.Ed. 2d 220 (1977). See also Torres v. New York State Department of Labor, 333 F. Supp. 431 (S.D.N.Y., 1971), affirmed 405 U.S. 949, 92 S.Ct. 1185, 31 L.Ed. 2d 228 (1972).

Appellant's reliance on California Department of Human Resources Development v. Java, supra, is likewise misplaced. The Java case involved a procedure whereby an employer could sit back and await an initial determination of a claimant's eligibility for unemployment benefits. If the determination found the claimant eligible, the employer could then appeal, thus causing the termination of the claimant's benefits pending the outcome of the employer's appeal. Such appeals took a median of seven to ten weeks to resolve. The U.S. Supreme Court held in Java that the suspension of unemployment benefits for such a lengthy period, after an initial determination of eligibility

violated due process. In the instant case the termination of Appellent's benefits was not initiated by an appeal of another party, but rather was based on the claimant's own statements in an eligibility review. (R.0063-0064). The eligibility review is an administrative device by which benefit claimants are periodically asked to prove their eligibility consistent with Rule A71-07-2:1.e.(1), General Rules of Adjudication. Appellant was notified of the eligibility review and appeared as requested by the local office. (R.0063-0064) Thereafter Appellant received a notice of denial of benefits which she appealed in a timely manner to an Appeal Referee. (R.0060-0061) Appellant was given a notice of the appeal hearing setting forth the time, date, place and issues to be covered. (R.0059) As required by Section 35-4-10, U.C.A. 1953, Appellant was given a full evidentiary hearing within four weeks from the date she was denied benefits (R.0014) A decision from that hearing was issued to the Appellant within four weeks. This procedure afforded Appellant the full due process of law required by Eldridge.

CONCLUSION

The decision of the Appeal Referee, as affirmed by the Board of Review, is in compliance with statutory law, case law and Respondent's regulations. The evidence in support of this decision substantially exceeds the test of Members of Iron Workers Union of Provo, supra at 211, which requires this Court to sustain the determinations of the Board of Review if there is evidence of any substance whatever which can reasonably be regarded as supporting those determinations.

Inasmuch as Appellant failed to comply with the work search crite this Court should affirm the decision to deny benefits and access the ov payment.

Respectfully submitted this ____ day of July, 1983.

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By_____
K. Allan Zabel
Legal Counsel

CERTIFICATE OF MAILING

I do hereby certify that I mailed two copies of the foregoing Respon ent's Brief to JOHN L. BLACK, JR., UTAH LEGAL SERVICES, INC., 637 East Four South, Salt Lake City, Utah 84102, this 5th day of July, 1983.

_____