

1994

# Department of the Air Force v. Gregory Debloois and Department of Employment Security : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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DEPARTMENT OF THE AIR FORCE, )  
) )  
Petitioner, ) )  
) ) ) REPLY BRIEF OF PETITIONER  
vs. ) ) )  
) ) )  
GREGORY DEBLOOIS & DEPARTMENT ) )  
OF EMPLOYMENT SECURITY, ) ) NO. 940775-CA  
) ) )  
Respondents. ) )  
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REPLY BRIEF OF PETITIONER

Petition for Review of an order of the Board of Review of the Industrial Commission of the State of Utah dated December 20, 1994 bearing Board of Review docket numbers 94-BR-310, 94-BR-313, 94-A-1605-R

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Priority 7

**UTAH COURT OF APPEALS  
BRIEF**

UTAH

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DOCKET NO. 940775

**FILED**  
Utah Court of Appeals

MAY 19 1995

Marilyn M. Branch  
Clerk of the Court

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## ARGUMENT

### I

#### CONTRARY TO EMPLOYMENT SECURITY'S ARGUMENT AT POINT II OF THEIR BRIEF THE CONCLUSION OF SHARED FAULT IS NOT SUPPORTED BY ANY EVIDENCE

Respondent Department of Employment Security (Employment Security) argues that the legal conclusion of shared fault is supported by the Board of Review's suggestion that had Petitioner Department of the Air Force (Air Force) recalled Dr. Kuntz to rebut Respondent Gregory DeBloois's (DeBloois) testimony that he had "drunk a horrendous amount of water" the ALJ would have ruled in favor of the Air Force. This suggestion flies in the face of the entire record and in particular the findings and conclusions of the ALJ, which the Board of Review adopted to reach its decision.

In the ALJ's decision following the first hearing the findings of fact deal predominantly with the mechanics of DeBloois providing his specimen and his denial that he provided water, Record at 71-72. Employment Security's after the fact discovery that the ALJ would have been sufficiently impressed with further testimony by Dr. Kuntz does not appear in the record. Despite extensive testimony by Dr. Kuntz on the chemical and physical evidence showing the sample was not urine the ALJ concluded "The Administrative Law Judge was unable to conclude, through competent evidence, that the claimant did not submit a legitimate urine specimen ..." record at 75. His focus was on ". . . no other medical evidence presented at the hearing to confirm

that the liquid in the sample bottle provided by the claimant was not his own urine." record at 75. There was no indication he believed DeBloois's testimony on "horrendous amounts of water" to carry the day, only that "there was no evidence" supporting Air Force's position. The ALJ simply ignored Air Force's testimony.

The ALJ's statement is:

"Well, I guess in this particular hearing, what I had not had provided in the way of evidence is any type of other information from the testing laboratory as to what other testing procedures were -- was used. I have no -- I have no test form from the employer. I do not know that -- excuse me, from Northwest Toxicology, I do not know for a certainty, I do not have documentation that the, uh, Northwest Toxicology tested for, uh, drug -- drugs or whether or not they, uh, tested for any other substance in that urine. We -- we do not have that report, and I'm assuming, Mr., uh, Price, you don't have that as part of your documentation. record at 67.

This does not show any inclination to buy into the especially dilute theory, only a failure to present any evidence he deemed to be admissible. Notably, Employment Security instructed the ALJ on the admissibility of that evidence when it remanded this case to him. It did not instruct him to reconsider the dilute specimen testimony.

The ALJ ruled against the Air Force not because of the "horrendous amounts of water" testimony but because he declined to accept the expert testimony of Dr. Kuntz. "The Administrative Law Judge was unable to conclude, through competent evidence, that the claimant did not submit a legitimate urine specimen on February 8, 1993." record at 75.

The conclusion of shared fault is not only not supported by

substantial evidence within the record, it is not supported by any evidence within the record, and must be reversed.

## II

### THE FINDING OF SHARED FAULT IS AN ABUSE OF DISCRETION

Employment Security suggests that it has appropriately exercised discretion in finding shared fault. As shown above, there is no evidence supporting the proposition that the ALJ would have decided differently in the first hearing had Air Force recalled Dr. Kuntz.

Air Force acknowledges that Utah Code Ann. 35-4-406 and Utah Code Ann. 35-4-6 grant Employment Security discretion. That discretion is abused if the decision of Employment Security ". .

exceeds the bounds of reasonableness and rationality." *Morton Intern., Inc. vs. Auditing Div.*, 814 P.2d 581, 587-88 (Utah 1991).

Where there is no evidence in the record supporting the underlying fact a finding of fact, like the finding that the ALJ would have decided differently had Dr. Kuntz been recalled as a witness, is an abuse of discretion. The shared fault conclusion is based on abused discretion and must be reversed.

## III

### EMPLOYMENT SECURITY IS REQUIRED TO COLLECT THE ARREARAGE NO LATER THAN TWO YEARS AFTER A FINDING OF FAULT

Employment Security cites Rule 562-311-105, Utah Admin. Code. (1994), for the proposition that it may indefinitely defer collection of the sums DeBloois defrauded from the government. That rule cites 20 CFR § 609.11, attached. 20 CFR § 609.11(a)(2)

provides that where a State agency, like Employment Security, has found, after a hearing, that an individual has made a false statement or representation sums paid that individual will be recovered within two years of the finding.

In this matter Employment Security found the specimen was not urine, record at 181, and accordingly that DeBloois obtained benefits through false statements that he had submitted urine as his specimen. That finding was made March 25, 1994. Employment Security is required by 20 CFR § 609.11, and by 562-311-105, Utah Admin. Code. (1994), which incorporates 20 CFR § 609.11 by reference, to collect the overpayment from DeBloois no later than March 25, 1996.

#### CONCLUSION

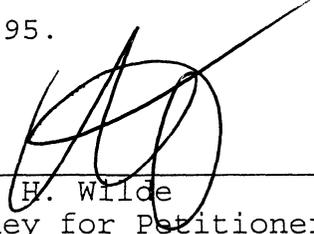
Contrary to the assertions of Employment Security there is no evidence, let alone substantial evidence, in this extensive record to support the proposition that had Air Force recalled Dr. Kuntz to the witness stand the ALJ would have ruled for Air Force. The ALJ's comments, both during the hearings and in his decisions, show he was either confused or uninformed as to what expert testimony is and what its role is in an evidentiary hearing. The ALJ erred. The Board of Review remanded this matter to him with very specific instructions telling how he erred and how to correct that err at the next hearing. He did. Not because the evidence on dilution was better, or different, but because he had been schooled in the applicable rules of evidence and then chose to give credence to Dr. Kuntz's testimony

as he should have done in the first instance.

Air Force did nothing to lead to the conclusion it shared fault. The Board of Review's conclusion that it did is not supported by the evidence and is an abuse of discretion. By the applicable rules Employment Security is required to recoup the overpayment from DeBloois, either immediately because it was fraudulently obtained, or at the very least within two years of the date it found information provided by DeBloois was false.

This court should reverse the Board of Review and order Employment Security to recoup from DeBloois unemployment compensation payments made to him and paid for with Air Force funds.

Dated this 19 day of May, 1995.

  
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Robert H. Wilde  
Attorney for Petitioner

**ADDENDUM**

20 CFR § 609.11

**§ 609.11 Overpayments; penalties for fraud.**

(a) *False statements and representations* Section 8507(a) of the Act provides that if a State agency, the Department or a court of competent jurisdiction finds that an individual—

(1) Knowingly has made, or caused to be made by another, a false statement or representation of a material fact, or knowingly has failed, or caused another to fail, to disclose a material fact, and

(2) As a result of that action has received an amount as UCFE to which the individual was not entitled, the individual shall repay the amount to the State agency or the Department. Instead of requiring repayments, the State agency or the Department may recover the amount by deductions from UCFE payable to the individual during the 2-year period after the date of the finding. A finding by a State agency or the Department may be made only after an opportunity for a fair hearing, subject to such further review as may be appropriate under § 609.7

(b) *Prosecution for fraud.* Section 1919 of title 18, United States Code, provides that whoever makes a false statement or representation of a material fact knowing it to be false, or knowingly fails to disclose a material fact, to obtain or increase for himself or for any other individual any payment authorized to be paid under chapter 85 of title 5, United States Code, or under an agreement thereunder, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(c) *Absence of fraud.* If a State agency or court of competent jurisdiction finds that an individual has received a payment of UCFE to which the individual was not entitled under the Act and this part, which was not due to a false statement or representation as provided in paragraph (a) or (b) of this section, the individual shall be liable to repay to the applicable State the total sum of the payment to which the individual was not entitled, and the State agency shall take all reasonable measures authorized under any State law or Federal law to recover for the account of the United States the total sum of the payment to which the individual was not entitled.

(d) *Recovery by offset.* (1) The State agency shall recover, insofar as is possible the amount of any overpayment which is not repaid by the individual, by deductions from any UCFE payable to the individual under the Act and this part, or from any unemployment compensation payable to the individual under any Federal unemployment compensation law administered by the State agency, or from any assistance or allowance payable to the individual with respect to unemployment under any other Federal law administered by the State agency.

(2) A State agency shall also recover, insofar as is possible, the amount of any overpayment of UCFE made to the individual by another State, by deductions from any UCFE payable by the State agency to the individual under the Act and this part, or from any unemployment compensation payable to the individual under any Federal unemployment compensation law administered by the State agency, or from any assistance or allowance payable to the individual with respect to unemployment under any other Federal law administered by the State agency.

(3) Recoupment of fraudulent overpayments referred to in paragraph (a) of this section shall be limited to the 2-year period stated in that paragraph. Recoupment of fraudulent overpayments referred to in paragraph (b) of this section, and nonfraudulent overpayments referred to in paragraph (c) of this section shall be subject to any time limitation on recoupment provided for in the State law that applies to the case.

(e) *Debts due the United States.* UCFE payable to an individual shall be applied by the State agency for the recovery by offset of any debt due to the United States from the individual, but shall not be applied or used by the State agency in any manner for the payment of any debt of the individual to any State or any other entity or person except pursuant to a court order for child support or alimony in accordance with the law of the State and section 459 of the Social Security Act, 42 U.S.C. 659.

(f) *Application of State law.* (1) Except as indicated in paragraph (a) of this section, any provision of State law

that may be applied for the recovery of overpayments or prosecution for fraud, and any provision of State law authorizing waiver of recovery of overpayments of unemployment compensation, shall be applicable to UCFE.

(2) In the case of any finding of false statement or representation under the Act and paragraph (a) of this section, or prosecution for fraud under 18 U.S.C. 1919 or pursuant to paragraph (f)(1) of this section, the individual shall be disqualified or penalized in accordance with the provisions of the applicable State law relating to fraud in connection with a claim for State unemployment compensation.

(g) *Final decision.* Recovery of any overpayment of UCFE shall not be enforced by the State agency until the determination or redetermination establishing the overpayment has become final, or if appeal is taken from the determination or redetermination, until the decision after opportunity for a fair hearing has become final.

(h) *Procedural requirements.* (1) The provisions of paragraphs (c), (d), and (g) of § 609.6 shall apply to determinations and redeterminations made pursuant to this section.

(2) The provisions of § 609.7 shall apply to determinations and redeterminations made pursuant to this section.

(i) *Fraud detection and prevention.* Provisions in the procedures of each State with respect to detection and prevention of fraudulent overpayments of UCFE shall be, as a minimum, commensurate with the procedures adopted by the State with respect to State unemployment compensation and consistent with the Secretary's "Standard for Fraud and Overpayment Detection" (*Employment Security Manual*, part V, section 7510 *et seq.*).

(j) *Recovered overpayments.* An amount repaid or recouped under this section shall be—

(1) Deposited in the fund from which payment was made, if the repayment was to a State agency; or

(2) Returned to the Treasury of the United States and credited to the current applicable appropriation, fund, or account from which payment was made, if the repayment was to the Department.

#### § 609.12 Inviolable rights to UCFE.

Except as specifically provided in this part, the rights of individuals to UCFE shall be protected in the same manner and to the same extent as the rights of persons to State unemployment compensation are protected under the applicable State law. Such measures shall include protection of applicants for UCFE from waiver, release, assignment, pledge, encumbrance, levy, execution, attachment, and garnishment of their rights to UCFE, except as provided in § 609.11. In the same manner and to the same extent, individuals shall be protected from discrimination and obstruction in regard to seeking, applying for, and receiving any right to UCFE.

#### § 609.13 Recordkeeping; disclosure of information.

(a) *Recordkeeping.* Each State agency will make and maintain records pertaining to the administration of the UCFE Program as the Department requires, and will make all such records available for inspection, examination, and audit by such Federal officials or employees as the Department may designate or as may be required by law.

(b) *Disclosure of Information.* Information in records maintained by a State agency in administering the UCFE Program shall be kept confidential, and information in such records may be disclosed only in the same manner and to the same extent as information with respect to State unemployment compensation and the entitlement of individuals thereto may be disclosed under the applicable State law. This provision on the confidentiality of information maintained in the administration of the UCFE Program shall not apply, however, to the Department or for the purposes of §§ 609.11 or 609.13, or in the case of information, reports and studies required pursuant to §§ 609.17 or 609.25, or where the result would be inconsistent with the Freedom of Information Act (5 U.S.C. 552), the Privacy Act of 1974 (5 U.S.C. 552a), or regulations of the Department promulgated thereunder.

#### § 609.14 Payments to States.

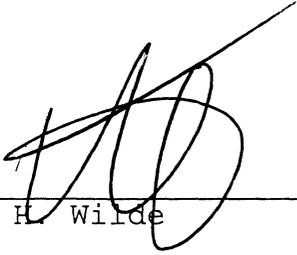
(a) *State entitlement.* Each State is entitled to be paid by the United States

Delivery Certificate

I certify that I mailed a two copies of the foregoing  
Appellants' Brief on this 19 day of May, 1995 to the offices  
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