

1995

Jose L. Lopez v. Board of Review of The Industrial Commision of Utah, Department Employment Security, and Utah Transit Authority : Brief of Petitioner

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 950279CA

IN THE UTAH COURT OF APPEALS

Jose L. Lopez

Petitioner,

vs.

Board of Review of The Industrial
Commission of Utah, Department
Employment Security, and Utah
Transit Authority

Respondents.

CASE No. 950279-CA

BRIEF OF PETITIONER

PETITION FOR REVIEW OF FINAL ORDER OF
THE BOARD OF REVIEW OF THE INDUSTRIAL
COMMISSION AND UTAH TRANSIT AUTHORITY

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COURT OF APPEALS

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JURISDICTION OF THE COURT

This Case involves a Petition for Review of the final Order of - The Board of Review of The Industrial Commission of Utah and The Utah Transit Authority (UTA) denying unemployment benefits and/- or reinstatement of employment sustained as a result of being - wrongfully fired.

This Court has jurisdiction to hear this Petition for Review pursuant to Utah Code Annotated, Sections 35-1-82.53(2)(1988), 35-1-86 (1988), 63-46b-16 (1988), and 78-2a-3(2)(a)(1988); and Rule 14 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUE/STANDARD OF APPELLATE REVIEW

The single substantive issue presented for review in this case is whether my termination of employment did not follow my due process of law constitutional right to confront and cross examine my accusers and two of my witnesses present the day of the hearing before the administrative law Judge did not testify.

The standard of appellate review to be applied to the resolution of the issue is "fair hearing" since it involves a question of law in situations where the normal judicial processes would be inadequate to secure due process, either because a judicial remedy does not exist, or because one would suffer grievous harm or substantial prejudice to his rights. Utah Code annotated, Section 63-46b-16(4)(d)(1988). Mor-Flo Industries v. Board of review, 817 P. 2d 328(Ut 1991). Morton International Inc. v. Auditing division of the Utah State Tax Commission, 814 P. 2d 581 (Utah 1991).

DETERMINATIVE CONSTITUTIONAL PROVISION (S)/STATUTE(S)/RULE(S)

The Fourteen Amendment to the Constitution of the United States and Article I, Section 7 of the Constitution of The State of Utah are the two constitutional provisions dealing with the due process of law guarantees which are the determinative constitutional provisions involved in this case. Utah Code annotated, Section 35-1-77(e) and the Utah Administrative Procedure Act, - Section 63-46b-8-(d)(1988) is the determinative statute. Utah administrative code, Rule R568-1-9, Utah Code annotated, 2C Title 17A part 10 Independent Special Districts 17A-2-1030.- and 17A-2-1022 and 17A-2-1023. Utah Code annotated, 4B Title 34 Section 34-20-7.

STATEMENT OF THE CASE

Nature of the case

I, Jose Lopez seeks review of the Board of Review's order denying unemployment benefits and The Utah Transit Authority's wrongful termination. Specifically, I seek reinstatement of employment, which was denied to me on the basis that the allegations of unprofessional conduct did occur.

Course of Proceedings

I filed a petition for a hearing to the Industrial Commission, unemployment Division as a result of my termination of employment December, 1, 1994, from Utah Transit Authority.

A formal hearing was held before an Administrative Law Judge on January 31, 1995.

Disposition Below

An Administrative Law Judge was appointed to examine my evidence and Utah Transit Authority's evidence, and prepare a written - report of his findings and conclusions.

On February 3, 1995, The administrative Law Judge held that I was fired from my employment for just caused.

I timely filed a petition of review with the Board of Review, Industrial Commission of Utah on March 1, 1995.

On April 19, 1995, The Board of Review held (two to one) that I was fired for just caused.

I, Jose Lopez, respectfully challenges the Board order in this petition of Review.

Statement of Facts

I, Jose Lopez, was summarily fired after almost eleven years of faithful, productive, and loyal service to Utah Transit Authority. At the time of being fired, I was about to get ten years safety award, including three years perfect attendance, three years no customer complains, letters of commendation from customers, no criminal record, and no record related to the allegation of kissing a passenger. I was fired as punishment for direct violation of Company's approved policy on unprofessional conduct, dishonesty, and insubordination. I was fired without first being provided with progressive discipline as promised in the Company's employee handbook, and unfair representation as promised in the Utah

annotated Code, Independent Special Districts, enacted by the Utah legislation 17A-2-1030, Section 13 (c) of the Urban Mass Transportation act of 1964, as amended (49 U.S.C. 1609(c)).

The circumstances and compensability of the incidents regarding my case is in dispute.

On Nov. 3, 1994, I was suspended without pay following a short meeting with UTA Division manager Karen Hicks and a supervisor. Two letters of Nov. 4, 1994, inform me I was under investigation for violation of UTA policies, specifically unprofessional conduct, dishonesty and insubordination.

The events that led to my termination of employment did concentrate in two days: Nov. 1, 1994, and Nov. 2, 1994.

According to UTA policies and procedures, three different categories of offenses of the same nature during a period of twelve months may or may not allow the operator to keep his/her job. UTA interpretation of those policies as they apply to the facts of my case are as follow:

Food and drinks stops: If there are no passengers on the bus, you may stop to purchase food or drink at the last accessible location before reaching your EOL (end of the line). You must be able to park your bus safely and must take your purchases to the EOL and consume them there.

On Nov. 2, 1994, there was a passenger on the bus, this particular passenger always asked me if is O.K. to ride around a loop, and legally the passenger had the right to stay on the bus for UTA drivers are obligated to provide public service,

at the time I stopped to use the restroom at a seven-eleven store which is the closest to the EOL and a facility always use by other UTA drivers, in my way out I purchase a burrito to eat at the EOL, UTA said I violated this policy.

Further, based on the fact that an accident ensued while I was parked there, UTA argued I did not safety parked the bus. This may be a basis for termination.

On Nov. 15, 1994, before I was fired, The UTA accident Review Board, reviewed my involvement in an accident/incident report #94-11-00018-2, which occurred on Nov. 2, 1994, based on all information available at the time of the review, The Board has determined this accident/incident to be unavoidable, not charge.

Also, at the time of this accident/incident there was a Police Officer at the scene who investigated the issues and wrote a report (report - case #94-58743, West Valley City) stating that the bus was parked safely and had the opportunity to interrogated local witnesses including the young lady passenger who was on the bus that day.

According to the police report, the passenger's name was Alicia Johnson, and as a single occupant of the bus said, she hit her chest on an interior bus but declined medical attention.

Not mention is said about having the lady passenger against her will.

The next day, Nov. 3, 1994, when I went to work, I was asked to go to the office of UTA division manager Karen Hicks and she told me

I was being suspended for complain received on Nov.1, 1994, in which a person said while she was at the location or driving her vehicle had seen the UTA driver, also, driving the bus at the time he had exchanged a kiss with a female passenger.

No details or written documents I was able to read at the time, for the Division manager said, she needed to investigate further. UTA Division Manager Karen Hicks had received a report even before the accident/incident happened on Nov. 2, 1994, yet the young lady passenger was still riding the bus.

I understood the allegations were serious enough to request an attorney.

On Nov. 7, 1994, I and UTA Divisions managers Mr. Massey and Mrs. Hicks and Mr. Miner had a meeting to discuss the issues: I stated I came alone to the meeting with a tape recorder but Mr. Miner said in order to allow that they all have to agree. I was told I had the right to have Union representation and understanding, then, the name of the female passenger involved I had a firm idea she was the daughter of the Union-Vice president (Local 382 amalgamated transit union).

I was convinced I was not going to get a fair representation, I requested an attorney to be present because at this time they have added to the investigation I forced the passenger to stay on the bus which is kidnapping.

I was told I did not have the right to pursue the case in any other way but through the bargaining agreement procedure (the union).

I have review the Union collective agreement.

I looked at this in light of Company's complaince with the terms thereof to see if they followed the contractual provisions:

Article Eleven. addresses notification of discipline.

pursuant to this article employees must be notified "within eleven days" of the manager learning that an employee has violated any policy. This notification may either be in writing or given orally. In the written notification I received on Nov.4, 1994, it states that I was going to be investigated, it was not untill December 1, 1994, I was formally charge and fired (over-twenty five days later).

On November 23, 1994, I decided to contact an attorney since UTA Division Managers had not made a decision, I was suspended with no income and when calling UTA I was told the investigation was still under way.

From the attorney's office we called (telephone) UTA's Mr. Miner to inform him of possible legal action to resolve the issue but Mr. Miner said according to the bargaining unit agreement the only legal tool available to me to litigate the issue was through the Union.

Following the conversation with Mr. Miner, we contacted the Union President, who stated he did not know much about my case.

The Union President agreed to meet with me on November 30. 1994, and file a grievance but that never took place because he did not show up for the meeting. The next day, December 1, 1994, I was fired.

Now, UTA and Union said: by intentionally letting the opportunity to grieve lapse, I may have precluded any right that I have to litigate the issue.

Mr. Steve Booth, Union President, never had any intention to represent me. Although Mr. Booth deny having any knowledge of the allegations from the beginning of the investigation, it was not until January 4, 1995, (over a month later) I had the opportunity to read, in detail, the written documents explaining the events that led to my termination.

Copy of these documents were obtained from The State of Utah-unemployment Division:

In a swear affidavit, I found out that Mr. Booth, Union president had contacted UTA's Allan Miner to initiate investigation against myself on or before November 1, 1994.

During the investigation of the allegations against myself, UTA's Mr. Miner said to me I had the right to be represented by the Union. In no way, I could have been properly represented. During the Meeting of Nov. 7, 1994, I suggested a polygraph test, UTA said that was not necessary, even though they were dealing with serious allegations against an operator of almost eleven years of employment and having knowledge that the nineteen year old passenger provided information under pressure and alleging being mentally challenge condition.

Although, during the hearing before the Administrative Law Judge I was represented by counsel, legally the proceedings were conducted via the telephone, the opposing party introduce the

the young lady passenger and her mother to testify against me. There is an explanation of why the conclusion is different than the referenced finding, or what the events were humanly possibly to have occurred.

Where the incident happened, the mother said the bus was traveling in the opposite direction, she did not know if what she saw was a kiss/ a kiss on the lips or on the cheek.

I was driving a vehicle in a busy intersection, in that particular intersection - 5600 West, between 3500 and 3900 South, the bus is traveling south, two way street, speed 25 to 35 mph.

The mother waited for the young lady passenger to get off the bus, she never talked to me but instead asked her daughter about the alleged kiss, the young lady deny this to have occurred but, the mother insisted, pursuing the questioning, until her daughter said yes/he kissed me.

Based upon the two conflicting testimony from the opposing party and myself - The administrative Law Judge held that the kiss occurred, that I did not admit buying a burrito, and I did not listen to supervisor orders, offenses that yet not associated in nature, violated the employers policy.

SUMMARY OF ARGUMENT

THE conclusion is particularly onerous in this case since there was evidence of misrepresentation from the beginning of the investigation, testimony from other drivers, and the length of employment. I should be given the opportunity to cross-examine the mother and the young lady.

I was working for Utah Transit Authority almost eleven years, I believe the right to due process of law guaranteed to me by federal and state constitutions arise several bases for reversal during the investigation that led to my termination of employment.

ARGUMENT

I WAS DENIED MY DUE PROCESS OF LAW CONSTITUTIONAL RIGHTS TO CONFRONT AND CROSS EXAMINE MY ACCUSERS DURING THE INVESTIGATION THAT LED TO MY TERMINATION OF EMPLOYMENT AS WELL AS DURING THE HEARING BEFORE THE ADMINISTRATIVE LAW JUDGE, MY TWO WITNESSES DID NOT TESTIFY IN MY BEHALF.

The right of cross-examination of adverse witnesses in administrative proceedings is constitutionally protected. The United States Supreme Court in a landmark decision, *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), a case involving the adequacy of procedure for notice and hearing in connection with the termination of federal aid under the AFDC program, held that procedural due process requires a hearing to be held and the right to confront and cross-examine adverse witnesses prior to termination of aid benefits. The Supreme Court noted that this right to confrontation was steeped in the Fifth Amendment right to due process, incorporated against the states through the fourteenth Amendment to The Constitution of the United States. *Id.* at 264.

Similarly, The Supreme Court of Utah has emphasized the importance of the right to cross-examination in administrative hearings.

In D.B. v. Division of Occupational & Professional Licensing, 779 P. 2d 1145 (Utah 1989), The Supreme Court underscored the right of cross-examination in an administrative hearing by reversing the Order of an Administrative Agency and remanding with instructions to provide the Petitioner the right to cross-examine all of the witnesses against him. This case involved the failure of an administrative Law Judge to allow a social worker accused of unprofessional conduct with the opportunity to cross-examine the witnesses against him.

This federal and state constitutional mandate, i.e., the right of cross-examination, is further included in and protected by statute. The administrative Procedures Act, Utah Code Annotated, Section 63-46b-8(1) (d) (1988), provides in relevant part, as follows:

The presiding officer shall afford to all parties the opportunity to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence.

Utah Code Annotated, Labor in General, Section 34-20-7.

Organization and collective bargaining - Employees' rights. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities.

Union membership not a prerequisite.

Membership in the union is not a prerequisite to designating it as bargaining agent. International Union of Operating Eng'rs, Local 354 v. Industrial Commission, 101 Utah 139, 119, P.2d 243 (1941).

CONCLUSION/STATEMENT OF RELIEF SOUGHT

Based upon the foregoing it is respectfully submitted that the majority of The Board of Review of The Industrial Commission improperly review my case and The Utah Transit Authority terminated my employment after an investigation that did not preserved my fundamental rights of due process.

All parties must be fully apprised of the evidence submitted or to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding. Therefore, it is respectfully requested that this Court remand this case to the Industrial Commission with instructions to convene a hearing and the reinstatement of employment with my former employer Utah Transit Authority.

DATED this 10th day of August, 1995.

Jose L. Lopez
Pro Se

Certificate of Mailing

I hereby certify that I mailed two copies of the foregoing to Emma R. Thomas #4681 and K. Allan Zabel #3598 Attorney for respondent Board of Review of the Industrial Commission, Department of Employment Security, 140 East 300 South P O Box 45244, postage prepaid, this 10th day of August 1995

Jose L. Lopez
Petitioner

I hereby certify that I mailed two copies of the foregoing to John P. Kennedy #1796 Attorney for respondent Utah Transit Authority 1385 Yale Avenue, Salt Lake City, Utah 84105, postage prepaid, this 10th day of August 1995

Jose L. Lopez
Petitioner

I hereby certify that I personally delivered eight copies of the foregoing to The Utah Court of Appeals 230 South 500 East Suite 400 Salt Lake City, Utah 84102, this 10th day of August 1995

Jose L. Lopez
Petitioner