

1995

Radisson Inn of Park City v. Board of Review of the Industrial Commission of Utah, Richard S. Rollins : Reply Brief

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 950827-CA

IN THE UTAH COURT OF APPEALS

RADISSON INN OF PARK CITY,	:	
	:	
Petitioner,	:	PETITIONER'S REPLY BRIEF
	:	
v.	:	
	:	
BOARD OF REVIEW OF THE	:	Case No. 950827-CA
INDUSTRIAL COMMISSION OF UTAH;	:	
and RICHARD S. ROLLINS,	:	Priority No. 7
	:	
Respondents.	:	

APPEAL FROM DECISION OF THE BOARD OF REVIEW
OF THE INDUSTRIAL COMMISSION OF UTAH

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TABLE OF CONTENTS

ARGUMENT 1

 I. RESPONDENTS' ARGUMENT THAT ROLLINS DID NOT KNOW THAT HIS VIOLATION OF RADISSON INN'S "NO DRINKING" POLICY COULD RESULT IN HIS TERMINATION IS CONTRARY TO ROLLINS' OWN TESTIMONY THAT HE KNEW THAT SUCH CONDUCT COULD RESULT IN HIS IMMEDIATE DISMISSAL 1

 II. ROLLINS' DELIBERATE CONDUCT IN DRINKING ON COMPANY PREMISES, KNOWING THAT SUCH BEHAVIOR WAS PROHIBITED, WAS NOT AN "ISOLATED INCIDENT OF POOR JUDGMENT," BUT RATHER A SERIOUS VIOLATION OF COMPANY POLICY THAT RENDERS ROLLINS CULPABLE FOR UNEMPLOYMENT COMPENSATION PURPOSES 4

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Bhatia v. Department of Employment Security, 834 P.2d 574 (Utah App. 1992) 5

Kehl v. Board of Review of the Industrial Commission, 700 P.2d 1129 (Utah 1985) 5

Trotta v. Department of Employment Security, 664 P.2d 1195 (Utah 1983) 5

Statutes

Rule 562-5b-102(1)(b) of the Utah Administrative Code 2

Rule 562-5b-108(1)(a) of the Utah Administrative Code 2

Utah Admin. Code R562-5b-102(1)(a) 7

Utah Admin. Code R562-5b-102(1)(b) 2

Utah Admin. Code R562-5b-108(1)(a) 2

Utah Admin. Code R562-5b-108(1)(d) 5

ARGUMENT

I.

RESPONDENTS' ARGUMENT THAT ROLLINS DID NOT KNOW THAT HIS VIOLATION OF RADISSON INN'S "NO DRINKING" POLICY COULD RESULT IN HIS TERMINATION IS CONTRARY TO ROLLINS' OWN TESTIMONY THAT HE KNEW THAT SUCH CONDUCT COULD RESULT IN HIS IMMEDIATE DISMISSAL

Respondents argue that Rollins did not know that a violation of the "no drinking" policy could result in the termination of his employment because other employees who were found drinking on the company's premises were not discharged by Radisson Inn. That argument is without merit, however, in view of Rollins' own testimony that he knew that drinking while on company property could result in his immediate dismissal.

Rollins acknowledged at the hearing before the Administrative Law Judge that, prior to his being caught violating the "no drinking" policy, he had received a copy of Radisson Inn's policy manual, and had read the provision that provided that "possession or partaking of alcoholic beverages . . . on Company property at any time" was prohibited. [R. at 27.] Rollins testified that he knew that the company's work rules specifically identify possession or partaking of alcoholic beverages on company property as cause for termination. [R. at 27.] Most importantly, Rollins admitted that he knew that drinking on the job could cause him to be terminated from his employment. [R. at 27.]

The fact that other employees had not been discharged for violating the company's "no drinking" policy did not alter Rollins' understanding of the possible disciplinary action that could be taken against him if he were to violate the policy. As he testified, he knew that

drinking on the job could result in the termination of his employment. [R. at 27.]

Moreover, Rollins admitted to the Department of Employment Security's representative that he knew other employees who had been terminated for the same behavior. [R. at 7.]

Respondents' reliance on Rule 562-5b-108(1)(a) of the Utah Administrative Code is misplaced. That rule provides that "[w]hen rules are changed, the employer must provide appropriate notice and afford the worker a reasonable opportunity to comply." Utah Admin. Code R562-5b-108(1)(a). In this case, the rule had never changed. The "no drinking" policy at all times prohibited the possession or partaking of alcoholic beverages on company property at any time. [R. at 1.] The company's policy at all times provided that, "[d]epending solely on the Company's assessment of the circumstances and seriousness of the infraction, such [disciplinary] actions may consist of 1) verbal warning, 2) written warning and 3) termination." [R. at 1 (emphasis added).] The policy also at all times provided that such violations of company policy "may result in disciplinary action being taken, up to and including immediate termination." [R. at 1 (emphasis added).]

The policies in question had never changed, and Rollins did not make any claim to the contrary.

Respondents' reliance on Rule 562-5b-102(1)(b) of the Utah Administrative Code also is misplaced. That rule provides that in order to show knowledge, an employer must show that the worker "had knowledge of the conduct the employer expected" and "that the worker should have been able to anticipate the negative effect of his conduct." Utah Admin. Code R562-5b-102(1)(b).

Under Radisson Inn's written disciplinary policy, the company could give verbal warnings, give written warnings, or terminate the employee's employment, as it deemed appropriate based on its "assessment of the circumstances and seriousness of the infraction." [R. at 1.] The fact that some situations in the past had warranted the giving of verbal or written warnings to employees who had violated the policy did not preclude the company from discharging other employees caught violating the policy where the company determined that the circumstances justified more serious disciplinary action. In fact, as Rollins indicated to the Department of Employment Security's representative, other employees had been discharged for drinking on the job. [R. at 7.]

Rollins did not testify at the hearing that, based on his understanding of the disciplinary action taken against other employees who were found to have violated the "no drinking" policy, he understood that the company could not and would not discharge an employee for drinking on the job. To the contrary, Rollins admitted that he knew that his employment could be terminated if he possessed or partook of alcoholic beverages on company property at any time. [R. at 27.] Rollins' own testimony conclusively established that he had knowledge of the conduct expected of him by his employer and knew the possible results of violating the company's "no drinking" policy.

Respondents' argue that the disciplinary action taken against other employees who previously had violated the policy had sent the message that alcohol use on company premises was not a big deal and certainly not job threatening. There is no evidence to support that argument, however, particularly as it relates to Rollins. Rollins' admission that he knew that drinking on the job could cause him to be terminated from his employment

conclusively establishes that he was not led to believe that violating the "no drinking" policy could not result in his dismissal.

The Board of Review expressly stated in its Decision as follows:

The Board of Review agrees that Claimant knew he was in violation of the employer's rule when he had a beer with lunch. The Board of Review also agrees that Claimant was aware that discharge was a possible punishment for drinking alcohol on the premises.

[R. at 81.]

Given Rollins' testimony that he knew that drinking on the job could cause the termination of his employment, and given the Board of Review's own findings consistent with that testimony, if the Board of Review concluded that the element of knowledge was not proven, as Respondents contend, such a conclusion clearly is unreasonable, and should be reversed by this Court.

II.

ROLLINS' DELIBERATE CONDUCT IN DRINKING ON COMPANY PREMISES, KNOWING THAT SUCH BEHAVIOR WAS PROHIBITED, WAS NOT AN "ISOLATED INCIDENT OF POOR JUDGMENT," BUT RATHER A SERIOUS VIOLATION OF COMPANY POLICY THAT RENDERS ROLLINS CULPABLE FOR UNEMPLOYMENT COMPENSATION PURPOSES

Contrary to Respondents' argument, Rollins' drinking on the job in clear violation of company policy was not merely an isolated incident of poor judgment, but rather constituted willful, intentional and flagrant conduct sufficient to satisfy the culpability test and warrant a denial of unemployment benefits.

Radisson Inn's representative acknowledged at the hearing that Rollins' dismissal was based on a single incident.¹ [R. at 21.] But as Respondents concede, a single incident may constitute culpable conduct for unemployment compensation purposes sufficient to deny the granting of unemployment benefits. See, e.g., Kehl v. Board of Review of the Industrial Commission, 700 P.2d 1129 (Utah 1985); Trotta v. Department of Employment Security, 664 P.2d 1195 (Utah 1983); Bhatia v. Department of Employment Security, 834 P.2d 574 (Utah App. 1992).

Respondents argue that Rollins' conduct resulted in no harm to Radisson Inn, and therefore his conduct cannot be characterized as serious or culpable. They conveniently ignore the fact that Rollins was the acting maintenance manager and head of the maintenance department. As such, it was particularly important that he comply with company policies in order that other employees would do likewise. His failure to do so impaired Radisson Inn's ability to maintain control and discipline in the company, and therefore constitutes culpable conduct, as defined by the Utah Administrative Code:

Culpability may be established even if the result of the violation of the rule does not in and of itself cause harm to the employer, but the resultant lack of compliance of rules diminishes the employer's ability to have order and control. Culpability is established if termination of the employee was required to maintain necessary discipline in the company.

Utah Admin. Code R562-5b-108(1)(d).

¹Contrary to Respondents' assertion in their brief, Radisson Inn's representative did not agree that the incident for which Rollins was discharged was not an "isolated incident of poor judgment." [Respondents' Brief at 10. Cf. R. at 21.] A "single incident" is not necessarily the same as an "isolated incident of poor judgment."

Rollins was in a position of authority, responsibility, and influence. As a manager, it was his duty to see that employees complied with company policy. Yet, notwithstanding that responsibility, Rollins openly drank while on the job, in front of other employees, with the knowledge that such conduct was prohibited by company policy. That type of blatant disregard for company policy by a manager could greatly undermine the company's ability to obtain compliance to its policies from its other employees. Had Radisson Inn not discharged Rollins for intentionally engaging in such a clear and serious violation of company policy, the message that would have been sent to all other employees is that company policies are not important, and nothing adverse will happen if the policies are disregarded or disobeyed.

Respondents also attempt to gloss over the safety concerns created by Rollins' disregard of the "no drinking" policy. Rollins testified, however, that his duties as acting maintenance manager included being in charge of fire control, the swimming pool, and daytime security. [R. at 29.] The duties of his position required him to be alert and in full control of his faculties at all times.

Respondents concede that, under the case law, a single incident may constitute culpable conduct where the acts "could have resulted or did result in extremely dangerous, disruptive, or costly consequences to the employer." [Respondents Brief at 12.] The evidence in this case established that Rollins' conduct could have resulted in dangerous, disruptive, or costly consequences to Radisson Inn.

The company could have suffered significant harm if, due to any decrease in Rollins' faculties as a result of his on-the-job use of alcohol, he had caused injury to others through his acts or omissions. In addition, if someone had been injured on the premises, and the

cause of the injury had involved something over which Rollins had responsibility to supervise or control, and it was learned that Rollins had been drinking on the job, the company's potential liability would have increased significantly, regardless of whether Rollins actually had been incapacitated by the alcohol.

The potential for considerable liability was introduced the moment Rollins took the first drink. Simply having a supervisor in charge of fire control, daytime security, and the pool with even trace amounts of alcohol in his system threatens increased liability for any accident which may occur while he is on duty. Accordingly, Rollins' discharge was necessary to avoid actual or potential harm to the company's rightful interests. Utah Admin. Code R562-5b-102(1)(a).

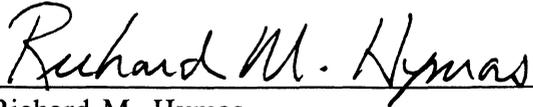
Rollins' on-the-job drinking evidenced a cavalier disregard for his responsibilities as a manager of the company. This was not an isolated incident of poor judgment. In fact, when Rollins was told by another employee who saw him drinking, "You know that you should not be drinking beer here," he "laughed off" the warning and continued drinking the beer. [R. at 55.] Such evidence indicates that Rollins' drinking was not a mere oversight, but rather a flagrant disregard of company policy. Such conduct by a company supervisor constitutes culpable conduct which warrants the denial of unemployment benefits. The Board of Review's decision to the contrary is unreasonable, and should be reversed by this Court.

CONCLUSION

For the reasons set forth herein, and in Radisson Inn's initial brief, Radisson Inn respectfully requests that the Court reverse the decision of the Board of Review, and rule that

Rollins was discharged for just cause within the meaning of the Worker's Compensation Act,
and therefore is not entitled to unemployment compensation benefits.

DATED this 10th day of May, 1996.



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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 1996, I caused two true and correct copies of the foregoing **PETITIONER'S REPLY BRIEF** to be mailed, first class and postage prepaid, to each of the following:

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