IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RICHARD TUCKER — APPELLANT

VS. — CASE NO.2008-CC-00329

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY AND CLEAN SOURCE, INC. — APPELLEES

APPEAL TO THE SUPREME COURT OF MISSISSIPPI FROM THE CIRCUIT COURT OF MADISON COUNTY

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

JARROD W. TAYLOR
MS BAR NO [redacted]
BAKER LAW FIRM, P.C.
POST OFFICE BOX 947
BRANDON, MISSISSIPPI 39043
(601) 824-7455

ATTORNEY FOR APPELLANT

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

Hon. William E. Chapman, III	Circuit Court Judge for the Twentieth Judicial District
Richard A. Tucker	Plaintiff
Mark C. Baker, Sr., Esq. Jarrod W. Taylor, Esq.	Attorneys for Appellant
Mississippi Department of Employment Security Clean Source, Inc.	Defendants
LeAnne F. Brady, Esq.	Attorney for the Department of Employment Security

Jarrod W. Taylor
Attorney of record for Plaintiff

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I. STATEMENT OF FACTS

Richard Tucker (hereinafter "Mr. Tucker") was General Manager of Clean Source, Inc. (hereinafter "Clean Source"), a janitorial company owned and operated by his parents, Thomas Tucker and Betty Tucker (hereinafter "Ms. Tucker"). Mr. Tucker worked for Clean Source for approximately twelve years. R. 15. On March 27, 2007, Mr. Tucker went to work, and, upon arriving, found that the locks on the business had been changed. *Id.* Mr. Tucker then called his immediate supervisor, Ms. Tucker, and was told that his employment was terminated. *Id.* Ms. Tucker refused to disclose a reason for Mr. Tucker's termination. *Id.*

Mr. Tucker then filed for unemployment benefits with Mississippi Department of Employment Security (hereinafter "MDES" and/or "the agency"), and on May 4, 2007, MDES issued a Notice of Nonmonetary Decision based upon MDES's determination that Mr. Tucker had voluntarily left his employment while continuing work was available. *Id.* at 6. Mr. Tucker then notified MDES's appeals department that he desired review of the May 4, 2007, decision. *Id.* at 7. MDES then held a telephone hearing before Administrative Law Judge Gary L. Holmes, Jr. on June 8, 2007, at approximately 8:39 a.m. *Id.* at 10.

During the telephone hearing, Ms. Tucker knowingly gave false information to MDES and committed fraud upon the proceeding. On June 5, 2007, Mr. Tucker sent, via certified mail, Ms. Tucker documents related to the termination of his employment that Mr. Tucker intended to introduce at the hearing. *Id.* at 66-67. At the hearing, Ms. Tucker told the administrative law judge that she had not received Mr. Tucker's documents (*Id.* at 11-12); Ms. Tucker made this statement while knowing it to be false. *Id.* at 66-67. On June 8, 2007, after the hearing was concluded, Mr. Tucker received proof of Ms. Tucker's receipt of the documents, and, therefore, of the fraud

committed by Ms. Tucker. *Id.* at 64-68.

On June 11, 2007, MDES issued its decision finding that Mr. Tucker voluntarily left his employment after giving two-weeks notice to Clean Source and denied Mr. Tucker unemployment benefits. *Id.* at 69-70. On June 20, 2007, Mr. Tucker gave MDES notice of his desire to have his case reviewed by MDES's Board of Review (hereinafter "the Board"). *Id.* at 72-73. On July 24, 2007, the Board affirmed the administrative law judge's decision. *Id.* at 74. On August 10, 2007, Mr. Tucker filed his Complaint/Petition for Judicial Review/Appeal in this Court.

II. STATEMENT OF THE ISSUES

1. The Circuit Court erred in finding that MDES's factual finding that Mr. Tucker voluntarily left the employment of Clean Source was supported by the evidence, was not made in the presence of fraud, and was not arbitrary and capricious;

2. MDES's consideration of Ms. Tucker's testimony was beyond the scope of the agency's power and in violation of the Plaintiff's constitutional rights as Ms. Tucker committed fraud by offering false information to MDES at the hearing.

III. SUMMARY OF THE ARGUMENT

The lower court's affirmation of MDES's finding that Mr. Tucker voluntarily left the employment of Clean Source on March 27, 2007, was made in err as the decision was made without substantial evidence and in the presence of fraud. The evidence before MDES demonstrated that Mr. Tucker loyally worked for Clean Source for several years, and to find that Mr. Tucker arbitrarily walked away from his job while "pouting" (as described by Ms. Tucker) is a decision that could only be made on a whim and is arbitrary and capricious. The testimony given to MDES clearly showed that Mr. Tucker not only worked his normal hours, but also maintained additional accounts that required him to work long hours. *Id.* at 32. Furthermore, MDES ignored Mr. Tucker's testimony of his willingness to continue his employment with Clean Source, had he been allowed to do so. *Id.* at 15-16. MDES's conclusion that Mr. Tucker voluntarily left his employment with Clean Source was not supported by the evidence and was arbitrary and capricious. Further, Mr. Tucker was denied a fair hearing by MDES considering the testimony of Ms. Tucker when MDES was informed that Ms. Tucker had deliberately misled MDES by her denial receipt of the documents forwarded by Mr. Tucker.

IV. ARGUMENT

STANDARD OF REVIEW

Review by the Supreme Court of MDES's decision is limited to questions of law unless it is shown that the facts found by the Department are not supported by the evidence and/or fraud has been committed. Miss. Code Ann. § 71-5-531 (1972 as amended). The Mississippi Supreme Court has stated, "the board's finding of facts are conclusive if supported by substantial evidence and without fraud." *Broome v. Miss. Emp. Sec. Comm'n.*, 921 So.2d 334, 337 (Miss. 2006). Substantial evidence has been defined as evidence which is substantial, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. Administrative Law, Encyclopedia of Mississippi Law § 2:97 (West 2001). However, the Supreme Court reviews constitutional and legal decisions of administrative agencies *de novo*. *Clark Printing Co., Inc. v. Miss. Employment Security Comm.*, 681 So.2d 1238 (Miss. 1996).

THE LOWER COURT ERRED IN FINDING THAT MDES'S FACTUAL FINDING THAT MR. TUCKER VOLUNTARILY LEFT HIS EMPLOYMENT WITH CLEAN SOURCE WAS SUPPORTED BY THE EVIDENCE, WAS NOT MADE IN THE PRESENCE OF FRAUD, AND WAS NOT ARBITRARY AND CAPRICIOUS

Mr. Tucker was discharged by Clean Source on March 27, 2007, when he was locked out of Clean Source's place of business and not allowed to return, and MDES's finding that Mr. Tucker voluntarily left was not supported by the evidence. "Discharge" of an employee has been defined as "[when an employer] . . . is done with [the employee], and all contract relations are at an end." *Droste v. Nash-Kelvinator Corp.*, 64 F.Supp. 716, (E.D. Mich. 1946) internal citation omitted. As General Manager for Clean Source Mr. Tucker required access to Clean Source's facilities to perform his duties. R. 15. It is difficult to fathom a more unambiguous method for

Clean Source to convey to Mr. Tucker that their contractual relations were at an end than for Clean Source to change the locks on the business's physical facility *and* to have Clean Source's president inform Mr. Tucker that he was no longer employed with the corporation.

MDES wrongfully determined that Mr. Tucker voluntarily left the employment of Clean Source on March 27, 2007, after having submitted a voluntary resignation two weeks earlier. MDES's decision expressly relied upon the testimony of Ms. Tucker and one witness (who was not named in MDES's decision) that stated Mr. Tucker had submitted a verbal resignation to Ms. Tucker. *Id.* at 70. Mr. Tucker admitted that he had an emotional conversation with Ms. Tucker and Thomas Tucker in March 2007, but Mr. Tucker strictly denied ever giving any notice of an intent to resign from Clean Source. *Id.* at 19. The evidence before MDES presented a person who had worked for Clean Source loyally several years, and to find that Mr. Tucker arbitrarily walked away from his job while "pouting" (as described by Ms. Tucker *Id.* at 33) is a decision that could only be made on a whim and is arbitrary and capricious.

Evidence presented to MDES demonstrated Mr. Tucker's willingness to work long hours for Clean Source. The testimony to MDES demonstrated that Mr. Tucker had worked for the company for multiple years, and that in addition to his normal duties, Mr. Tucker even maintained extra accounts that required him to work long hours. *Id.* at 32. Ignoring Mr. Tucker's testimony, MDES chose to rely on the tainted testimony of Ms. Tucker, finding that Mr. Tucker had chosen to quit his employment after he had invested a substantial portion of his work life in Clean Source. Furthermore, MDES ignored Mr. Tucker's testimony of his willingness to continue his employment with Clean Source, had he been allowed to do so. *Id.* at 15-16. MDES's conclusion that Mr. Tucker voluntarily left his employment with Clean Source was not

supported by the evidence and was arbitrary and capricious.

Mr. Tucker filed his Complaint/Petition for Judicial Review on August 10, 2007. The Circuit Court of Madison County entered its Order January 18, 2008 affirming the decision of the MDES.

MDES'S CONSIDERATION OF BETTY TUCKER'S TESTIMONY WAS BEYOND THE SCOPE OF THE AGENCY'S POWER AND IN VIOLATION OF THE PLAINTIFF'S CONSTITUTIONAL RIGHTS

MDES's consideration of Ms. Tucker's testimony after it was informed she gave false information at the hearing violated Mr. Tucker's right to a fair and impartial hearing before MDES. Miss. Const. Art. 3 § 14 (1890). Due process has been defined as evenhanded fairness in legal proceedings. *Miss. Power Co. v. Goudy*, 459 So.2d 257 (Miss. 1984) citing U.S. Const. Amend. 14. For MDES to consider Ms. Tucker's testimony after she blatantly misled MDES by her denial of reception of the documents, the agency demonstrated an uneven view favorable to Ms. Tucker. Mr. Tucker was denied an evenhanded, fair hearing.

Further, the Mississippi Court of Appeals has stated that if a witness has been impeached to the extent that his testimony is rendered highly improbable or incredible that witness's testimony may be deprived of any probative value. *Boles v. State*, 744 So.2d 347, 351 (Miss. App. 1999). Other courts have held when a witness impeaches himself, his testimony can be disbelieved. State v. Jackson, 794 S.W.2d 344 (Mo. App. 1990). MDES's decision to deny Mr. Tucker unemployment benefits was based upon Ms. Tucker's tainted testimony. R. 69-70. In relying upon Ms. Tucker's testimony for its decision, MDES ignored that it had been alerted to the fact that Ms. Tucker, at the initiation of the proceeding, knowingly made false statements to MDES. Ms. Tucker's testimony should have been disregarded and MDES's failure to do so

violated Mr. Tucker's right to a fair hearing. In the case at bar, Ms. Tucker's testimony was been impeached to the extent that her testimony could not have been considered incredible, and her *veracity* was so impugned when it was discovered that she had deliberately misled MDES that to give her testimony any probative value denies Mr. Tucker an impartial hearing and in violation of Mr. Tucker's right to due process.

V. CONCLUSION

The decision of the lower court and the MDES was in err and should be reversed as MDES's decision was not supported by the evidence, was made in the presence of fraud, and was arbitrary and capricious. Further, the decision of MDES was in violation of Mr. Tucker's right to due process. Upon reversal of MDES's decision, Mr. Tucker should be awarded his due unemployment benefits.

Respectfully submitted, this the 22nd day of July, 2008.

RICHARD A. TUCKER, Plaintiff

BY: _____
JARROD W. TAYLOR
Attorney for the Plaintiff

OF COUNSEL:

MARK C. BAKER, SR., MB#[redacted]
JARROD W. TAYLOR, MB#[redacted]
BAKER LAW FIRM, P.C.
306 Maxey Drive, Suite D
Post Office Box 947
Brandon, MS 39043
Telephone Number (601) 824-7455

CERTIFICATE OF SERVICE

I, JARROD W. TAYLOR, attorney for the Plaintiff, do hereby certify that I have this day mailed, postage prepaid, via United States Mail, a true and correct copy of the above and forgoing to Hon. LeAnne F. Brady, Attorney for the Mississippi Department of Employment Security Commission, 1235 Echelon Parkway, Jackson, MS 39213.

THIS, the 22nd day of July, 2008.

JARROD W. TAYLOR

CState v. Jackson

Mo.App. S.D. 1990.

Missouri Court of Appeals,Southern District,Division One.

STATE of Missouri, Plaintiff-Respondent,

v.

Carl David JACKSON, Defendant-Appellant.

No. 16329.

Aug. 24, 1990.

Defendant was convicted in Circuit Court, Hickory County, Charles V. Barker, J., of selling marijuana, and defendant appealed. The Court of Appeals, Maus, J., held that: (1) evidence was sufficient to sustain conviction for sale of marijuana; (2) testimony of rebuttal witness was not inadmissible as improper impeachment on collateral matter; and (3) State did not violate rule requiring it to disclose requested information regarding witnesses State intends to call.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚿553

110 Criminal Law

110XVII Evidence

110XVII(V) Weight and Sufficiency

110k553 k. Credibility of Witnesses in General. Most Cited Cases

Trial court is entitled to believe all, part, or none of testimony of any witness.

[2] Witnesses 410 ⚿409

410 Witnesses

410IV Credibility and Impeachment

410IV(E) Contradiction

410k409 k. Effect of Contradiction. Most Cited Cases

Trial court properly found defendant's testimony not credible where defendant's reliability was impeached by own self-contradictions.

[3] Controlled Substances 96H ⚿82

96H Controlled Substances

96HIII Prosecutions

96Hk70 Weight and Sufficiency of Evidence

96Hk82 k. Sale, Distribution, Delivery, Transfer or Trafficking. Most Cited Cases

(Formerly 138k119.1, 138k119 Drugs and Narcotics)

Testimony of undercover agent that sale of marijuana occurred was sufficient to sustain conviction for sale of marijuana, notwithstanding testimony denying that sale occurred.

[4] Criminal Law 110 ⚿404.60

110 Criminal Law

110XVII Evidence

110XVII(K) Demonstrative Evidence

110k404.35 Particular Objects

110k404.60 k. Drugs or Narcotics and Related Objects. Most Cited Cases

Finding that there was reasonable assurance of reliable chain of custody of paper sack and marijuana so that evidence was properly admitted was supported by testimony that undercover agent personally delivered marijuana in sack from defendant's house to chemist, that plants given to chemist were marijuana, and that marijuana in sack presented to chemist was same sack and contents taken from defendant's home.

[5] Witnesses 410 405(1)

410 Witnesses

410IV Credibility and Impeachment

410IV(E) Contradiction

410k403 Testimony Subject to Contradiction

410k405 Irrelevant, Collateral, or Immaterial Matters

410k405(1) k. In General. Most Cited Cases

Collateral matter for purposes of determining proper impeachment is matter of no material significance in case or not pertinent to issues as developed.

[6] Witnesses 410 ⚿383

410 Witnesses

410IV Credibility and Impeachment

410IV(D) Inconsistent Statements by Witness

410k381 Testimony Subject to Impeachment

410k383 k. Irrelevant, Collateral, or Immaterial Matters. Most Cited Cases

Testimony of rebuttal witness, that defense witness informed her that defendant sold drugs in past to two individuals, was admissible to call into question credibility of defense witness, who testified that to her knowledge defendant never smoked or sold marijuana; testimony was not inadmissible as improper impeachment on collateral matter where rebuttal witness testimony was pertinent to issue of credibility of defense witness which developed when defendant attempted to use witness to

enhance his own credibility.

[7] Criminal Law 110 ⚿1999

110 Criminal Law

110XXXI Counsel

110XXXI(D) Duties and Obligations of Prosecuting Attorneys

110XXXI(D)2 Disclosure of Information

110k1993 Particular Types of Information Subject to Disclosure

110k1999 k. Impeaching Evidence. Most Cited Cases

(Formerly 110k700(4))

Duty of State to disclose information concerning plea bargains does not apply to witness' independent anticipation of possibility of some recognition of his willingness to testify. V.A.M.R. 25.03(A)(1).

[8] Criminal Law 110 ⚿1999

110 Criminal Law

110XXXI Counsel

110XXXI(D) Duties and Obligations of Prosecuting Attorneys

110XXXI(D)2 Disclosure of Information

110k1993 Particular Types of Information Subject to Disclosure

110k1999 k. Impeaching Evidence. Most Cited Cases

(Formerly 110k700(4))

State did not violate duty to provide defendant with information concerning plea bargain where witness testified because he believed his testimony might help him in disposition of his own charges and State made no promises or deals in exchange for his testimony. V.A.M.R. 25.03(A)(1).

[9] Criminal Law 110 ⚿627.6(1)

110 Criminal Law

110XX Trial

110XX(A) Preliminary Proceedings

110k627.5 Discovery Prior to and Incident to Trial

110k627.6 Information or Things, Disclosure of

110k627.6(1) k. In General. Most Cited Cases

State did not violate rule requiring it to disclose requested information regarding witnesses it intends to call, where witness in question was witness for defense not for State. V.A.M.R. 25.03(A)(1).

*345 William L. Webster, Atty. Gen., Frank A. Jung, Asst. Atty. Gen., Jefferson City, for plaintiff-respondent.

Mel L. Gilbert, Buffalo, for defendant-appellant.

MAUS, Judge.

Defendant Carl David Jackson was charged with selling marijuana to Mike Lowe, an undercover agent with the Department of Conservation, in violation of § 195.020 RSMo 1986. In a jury-waived case, the defendant was found guilty and sentenced to five years' imprisonment. Defendant raises three points on appeal.

In his first point, defendant contends there was insufficient evidence to support his conviction. The facts surrounding the sale were sharply disputed. The state's case-in-chief consisted of the testimony of *346 Mike Lowe and a chemist with the Missouri Highway Patrol. The testimony of agent Lowe

was essentially as follows. As part of his ongoing undercover investigation into game violations in Hickory County, he had become acquainted with several individuals, including defendant, Danny Hash and Randy Gates. On November 10, 1986, Lowe went to defendant's house to buy two deer from Danny Hash. When Lowe arrived at defendant's house, defendant told him that Hash would be over shortly with the deer. Defendant asked Lowe if he wanted to go kill another deer. Lowe answered yes and the two men left in Lowe's truck.

While driving in Lowe's truck looking for deer, defendant asked Lowe if he wanted some marijuana. When Lowe asked how much marijuana defendant had, defendant directed Lowe to a field. Defendant said that he, Danny Hash and Randy Gates had planted that field with marijuana earlier that year. Defendant pulled several plants out of the ground and the two men left. After stopping at Hash's house, defendant and Lowe returned to defendant's house and defendant took the plants into his barn.

Defendant took a paper bag containing three plastic bags of marijuana from a shelf and asked Lowe if he wanted to buy the contents of the bag plus the plants that were just picked in the field for $75. Lowe offered $50. Defendant took the money from Lowe without responding and put the money in

his wallet. Defendant then put the plants into the bag with the packaged marijuana and put the bag in Lowe's truck.

Defendant testified that Lowe asked him to kill another deer for him, in addition to the two he was buying from Danny Hash. While the two men were riding, Lowe continually asked defendant about getting some marijuana. After several requests by Lowe, defendant directed Lowe to a field containing a patch of marijuana he knew of through working for the sheriff. Defendant told Lowe that the marijuana was no good because of frostbite, but Lowe pulled several plants out of the ground and offered to buy them. Defendant refused to sell them but told Lowe he could have them. Lowe put the plants in his truck. Defendant admits that he then put the plants into a brown bag that was lying in Lowe's truck. After returning to defendant's house, Lowe again offered to buy the plants. Defendant refused to accept any money for the marijuana although Lowe continued to offer $50 to defendant. Defendant last saw the $50 in Lowe's shirt pocket. In addition to testifying, defendant called six of his associates, including his live-in girlfriend, to bolster his testimony and to impeach agent Lowe's credibility.

[1][2] An extended discussion regarding the sufficiency of the evidence to establish that a sale of

marijuana took place is not necessary. Defendant's first point is a contention that the testimony of Lowe, when balanced against the testimony of the defendant and his witnesses, was not credible. The court was entitled to believe all, part or none of the testimony of any witness. *State v. Hunter*, 782 S.W.2d 95, 99 (Mo.App.1989). The record demonstrates why the trial court found the defendant's version was not credible. Much of defendant's testimony was inherently incredible. His reliability as a witness was impeached by his own self-contradictions. Those contradictions are exemplified by the following. On direct examination, defendant, to bolster his version of events, unambiguously stated he did not carry money in his billfold and has "not used his billfold in years." On cross-examination, when attempting to establish a date, the defendant replied, "If I can look in my billfold, I may have a check stub".

[3] In determining the sufficiency of the evidence, this court must accept as true all evidence in the record that tends to prove defendant's guilt, together with any favorable inferences that can be drawn from the evidence. *State v. Barnett*, 767 S.W.2d 38, 39 (Mo. banc 1989). Lowe's testimony that a sale occurred is sufficient to sustain the conviction. *State v. Ferguson*, 780 S.W.2d 112, 113 (Mo.App.1989).

[4] As part of his contention the evidence is insufficient the defendant argues the paper sack and marijuana were improperly admitted in evidence because a chain ***347** of custody was not established. "The trial court has the discretion to determine whether a chain of custody which will allow the admission of physical evidence has been sufficiently established." *State v. Turnbough*, 729 S.W.2d 37, 39 (Mo.App.1987). See also *State v. Shelli*, 675 S.W.2d 79, 81 (Mo.App.1984). "The court must be able to find that the evidence provides 'reasonable assurance' that the exhibits were in the same and in like condition when admitted as when received from defendant." *Turnbough* at 40. Lowe testified that he took the marijuana in the sack from defendant's house to the chemist. He stopped in Warsaw to call his supervisor, Calvin Christensen. Christensen met Lowe and the two men drove to Jefferson City with the marijuana. Lowe's supervisor turned the marijuana over to the chemist. The chemist testified that the plants given to him by Christensen were marijuana. Moreover, Lowe, without objection, testified that the state's exhibits, presented by the chemist, were the same sack and contents that he had taken to Jefferson City. This evidence established "reasonable assurance" of a reliable chain of custody. *Turnbough.*

[5][6] Defendant's second point is that the trial court erred in admitting the testimony of rebuttal witness Becky Doss. Doss was the prosecuting attorney's secretary. Doss testified that defendant's

girlfriend, Karen Busboom, had called Doss at the prosecutor's office on the day of defendant's preliminary hearing. During that call, Busboom informed Doss that defendant sold drugs in the past and told her the name of an individual and gave a description of another individual to whom the defendant had sold drugs. Defendant argues the testimony of Becky Doss was inadmissible because it constituted improper impeachment on a collateral matter. A collateral matter is one of no material significance in the case or is not pertinent to the issues as developed. *State v. Roberts*, 778 S.W.2d 763, 765 (Mo.App.1989). See also *State v. Shaw*, 694 S.W.2d 857, 859 (Mo.App.1985). Defendant called Karen Busboom who testified that to her knowledge defendant never smoked or sold marijuana. Defendant used Karen Busboom's testimony to enhance his own credibility. Defendant opened up the issue of the credibility of Busboom's testimony. The testimony of Doss rebutting Busboom's testimony was clearly pertinent to the issue defendant developed. *Roberts* at 765.

By his last point, defendant argues the state failed to reveal relevant information concerning plea bargains made with Danny Hash and Randy Gates. Danny Hash did testify for the state. However, he repeatedly testified the state had not made any promises or deals in exchange for his testimony. There was no evidence to the contrary.

[7][8] Hash did indicate he believed his testimony might help him in the disposition of his own charges. The duty to disclose, however, "does not apply to a witness' independent anticipation of the possibility of some recognition of his willingness to testify." *McCollum v. State*, 651 S.W.2d 674, 675 (Mo.App.1983). The belief must be reasonably based upon conduct of the prosecutor. *Id.* There was no evidence that Hash's belief was based on any action by the state. Defendant's argument concerning Hash has no merit.

[9] Defendant next argues the state did not reveal a deal entered into with Randy Gates in exchange for this testimony. Mr. Gates was a defense witness and not a witness for the state. The discovery rule relied on by defendant is irrelevant. Rule 25.03(A)(1) states that the state shall disclose to defense on request information in its possession regarding witnesses the *state intends to call.* The Rule does not require the state to reveal agreements made with defense witnesses. The final point is denied and the judgment is affirmed.

PREWITT and CROW, JJ., concur.

Mo.App. S.D. 1990.

State v. Jackson

794 S.W.2d 344

END OF DOCUMENT

LEXSEE 142 N.W. 1110

STITT v. LOCOMOTIVE ENGINEERS' MUTUAL PROTECTIVE ASSOCIATION

Docket No. 56

SUPREME COURT OF MICHIGAN

177 Mich. 207; 142 N.W. 1110; 1913 Mich. LEXIS 704

June 19, 1913, Submitted
September 30, 1913, Decided

HEADNOTES

[***1] 1. INSURANCE -- INDEMNITY POLICY -- MUTUAL BENEFIT ASSOCIATIONS.

Under a policy of indemnity against loss of employment occasioned by discharge of the insured or his suspension as a penalty or method of discipline, containing a condition that knowingly disobeying orders or rules should not be included among the insurable causes of discharge, and that the insured must show by his notice of claim and accompanying proofs that his suspension or discharge was strictly within the terms of the certificate or policy, and that the cause assigned by the employer should be the sole basis of determining liability, such assigned cause must be taken as a basis or general reason for the discharge, and could not be contradicted, but it would be an unreasonable construction to hold that plaintiff could not recover unless his employer stated as cause of his discharge all the stipulated conditions or provisions essential to liability.

2. INSURANCE -- INDEMNITY POLICY -- MUTUAL BENEFIT ASSOCIATIONS.

Both application and policy must be construed together as constituting the contract, and plaintiff is presumed to have read and understood both.

3. INSURANCE -- DISCHARGE -- MASTER AND SERVANT.

[***2] And under its conditions plaintiff could only recover if his discharge or suspension was in the nature of a penalty, the word discharge presumptively meaning that the employer no longer needs or desires the servant's services and terminates the contract relation.

4. INSURANCE -- CONTRACTS -- CONSTRUCTION -- PENALTY.

Penalty indicates punishment for doing or failing to do a required act.

5. INSURANCE -- DISCIPLINE.

But the word discipline as employed in the contract signified instruction, or the communication of knowledge and training to observe and act in accordance with rules or orders and was used in the sense of correction, chastisement, or punishment inflicted by way of training.

6. INSURANCE -- CONDITIONS PRECEDENT -- NOTICE TO INSURER.

Where plaintiff's notice of claim given to the insurer did not indicate that his suspension or discharge was a penalty or measure of discipline, and not for knowingly disobeying orders or rules, and the policy required specifically that his statement must show that he was within the provisions of the certificate, he could not recover, and a verdict was properly directed for defendant.

SYLLABUS

Error to Bay; Collins, J. Submitted June [***3] 19, 1913. (Docket No. 56.) Decided September 30, 1913.

Assumpsit by Raleigh K. Stitt against the Locomotive Engineers' Mutual Protective Association under an indemnity policy. Judgment for defendant on a

directed verdict. Plaintiff brings error. Affirmed.

COUNSEL: *Hall & De Foe,* for appellant.

Cavanaugh, Wedemeyer & Burke, for appellee.

OPINION BY: STEERE

OPINION

[*208] [**1111] STEERE, C.J. Plaintiff brought this action in the circuit court of Bay county to recover an indemnity of $15 per week, during 33 1/3 weeks, for loss of time by being out of employment, under an indemnity policy issued to him by defendant. The case was tried December 16, 1912, before a jury. The testimony was mostly documentary; plaintiff being the only witness sworn. The trial resulted in a judgment for defendant on a directed verdict, and, after denial of a motion for a new trial, plaintiff removed the proceedings to this court for review upon a writ of error.

When insured, plaintiff was a locomotive engineer running freight engines hauling freight trains in the employ of the Grand Trunk Railway system. He [*209] joined the defendant association in July, 1911, was suspended from his [***4] employment for violation of orders September 1, 1911, and was never reinstated, being discharged 18 days later for the same reason. On April 26, 1912, he began this action.

On July 12, 1911, plaintiff made written application for membership in the defendant association, which application was in part as follows:

"I further agree that in case my application is accepted, and I at any time thereafter become a claimant, to furnish said association with full and complete proofs of my claim, furnishing the statement of any reliable witnesses or persons who may have knowledge of the matter, and that the cause assigned by my employer for suspension or discharge shall be the sole basis of determining the liability of the association."

The next day the defendant issued to him a certificate of membership, insuring him --

"Against loss of time by being out of employment, occasioned by his discharge or suspension as a penalty or method of discipline, from his present position as a locomotive engineer, subject to the conditions as hereinafter stated."

The indemnity was limited to $500, being $15 per week for not to exceed 33 1/3 weeks. Said certificate of membership also provided:

[***5] "Notice of every claim must be signed by the applicant and must set forth the reasons for which he is under suspension or discharge, and must show by his own statement and the statements of at least two other persons who are acquainted with the facts in the case that such suspension or discharge is within the provisions of this certificate and that he is clearly entitled to the indemnity applied for. * * * Time is strictly the essence of this provision and unless notice is mailed to the home office of the association in the manner and within the time specified, no [*210] rights shall [**1112] accrue to the member and no claim shall be made nor indemnity paid under this certificate.

"This certificate does not include nor cover any suspension or discharge not in the nature of a penalty or measure of discipline nor any case arising or traceable to any of the following causes or conditions, viz.: * * * knowingly disobeying orders or rules.

"The member shall, as a condition precedent to the establishment of his claim, furnish under oath such reasonable proofs in addition to his notice of loss as may be demanded of him by the association, and failure or refusal to furnish [***6] such proofs within ten days after same are demanded of him in writing, shall estop and prevent him from asserting any rights as a claimant under this certificate."

The acts for which plaintiff was suspended and subsequently discharged were committed August 21, 1911, and the cause assigned by the railroad company in discharging him is stated in his notice of claim for indemnity to have been "for exceeding speed limit of eight miles per hour over Raisin River bridge and for using interlocking plant at Slocum, Mich., with signals set against me."

His notice of claim was returned with a request for further information, and he added the following:

"In regard to attached request for further information, I would say there was a bulletin in bulletin book at Lang terminal restricting the speed of trains to eight miles per hour over Raisin River bridge at Monroe, but that there

had never been any special orders issued to this effect. And, farther, that the superintendent of the line of which this bridge is a part reported my speed over this bridge at a rate much exceeding the speed used in crossing same.

"Farther, in using hand signal at home semaphore at Slocum, I did this strictly [***7] according to the interlocking rules, which allow an engineman to use hand signals, from the towerman, providing the towerman is on the ground when giving the signal (and the signal is meant for the train using the same, without a doubt), in which case the train must approach the [*211] signal under full control and know that derails are properly set. All these instructions were carried out, and the signal I acted on could have been for no other train, as there was no other train approaching crossing in either direction."

His two witnesses, the conductor and fireman, gave, respectively, the "details" of the acts on which his discharge was based as --

"Exceeded speed limit over Raisin River bridge at Monroe, and used hand signal in crossing Michigan Central interlocked crossing instead of receiving and using semaphore. * * * Exceeded speed limit over Raisin River bridge, and used hand signal instead of semaphore at Michigan Central interlocked crossing."

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Plaintiff paid all dues and assessments called for by defendant, and was a member in good standing at the time he was suspended, on September 1, 1911. He testified that he had been an engineer on the Grand Trunk Railway [***8] for four years; that, as was his duty, he had familiarized himself with the rules and bulletins of the company; that he was familiar with the bulletin order in relation to rate of speed for trains crossing the Raisin River bridge, exceeding which was one of the reasons assigned by the company for his suspension and discharge; that neither the railway company nor any of its officials ever assigned as a reason for his suspension or discharge that he *knowingly* violated any rule of the company. The following question asked him by his counsel was objected to, and the objection sustained: "Q. State the circumstances under which you ran over that bridge?"

It was conceded by both parties that no issue of fact for the jury was involved, and each asked a directed verdict.

Plaintiff's counsel contended at the time of the trial that, inasmuch as the policy provided distinctly that [*212] the reason assigned by the company upon his discharge as to the cause of discharge shall be the sole measure of determining his liability, and, it not being stated that he was suspended or discharged for *knowingly* doing the acts stated as a reason for his discharge, a verdict should be directed [***9] in his favor, for the reason that this certificate, or policy, stated, as a condition, that it did not include nor cover any suspension "not in the nature of a penalty or measure of discipline, nor * * * *knowingly* disobeying orders or rules."

In construing the policy before directing a verdict for defendant, the court said, addressing counsel for plaintiff:

"It is your contention, and it is the contention of the defendant, that the cause assigned by the railroad company is the cause. The cause assigned by the railroad company, as described by the plaintiff, and as described by these witnesses, assigned as cause of an act, the doing of which act was knowingly done, the doing of the act implies that it was knowingly done."

Plaintiff promptly made a motion for a new trial, again urging that a proper construction of the policy entitled him to a directed verdict in his favor, and further contending that, if such view did not prevail, he was entitled to have submitted to the jury as an issue of fact the question of whether or not he knowingly disobeyed any rules or orders of his employer. Upon this proposition the contention of his counsel is stated in said written motion for [***10] a new trial as follows:

"On the trial of the issue it was mistakenly assumed by both counsel for plaintiff and counsel for defendant, and such issue was submitted to the court on the theory that the provision in the application that the cause assigned for suspension or discharge should be the sole basis for determining the liability of the defendant [**1113] means that the employer should by [*213] the cause assigned determine the liability as between plaintiff and defendant, without leaving the issue as to whether the plaintiff in disobeying the orders and rules did so knowingly, while in fact the true construction of such provision in said application is that the cause assigned by the employer for suspension or discharge merely refers to the reason for such suspension or discharge, and precludes either plaintiff or defendant from assigning any other reason therefor, leaving the question as to whether the disobedience of orders or rules which led to the

suspension or discharge was a knowing disobedience on the part of plaintiff to be determined as an issue of fact in the case, for which reason the question of whether such disobedience by the plaintiff was in fact knowing [***11] should have been submitted to the jury as a question of fact."

In its reasons for denying such motion, the trial court, among other things, stated:

"The proofs of loss or proofs of claim filed by the defendant show that he knowingly violated a rule of his employer in exceeding the speed limit over the Raisin River bridge at Monroe, Mich., and for accepting a hand signal, crossing interlocker plant with semaphore set against him.

"Under the policy sued on in this case, when it appears that the insured is employed by a railroad company, and that he is discharged, and that the effect of the order discharging him is a finding on the part of his employer that the insured was discharged for knowingly disobeying an order or rule of the company, as between the insurance company and the insured the finding of the railroad company is conclusive and binding, and cannot be disputed by the insured. That is a part of his contract of insurance."

We do not think a fair and reasonable interpretation of the contract limits the inquiry to the cause assigned by the employer, as contended by defendant, by reason of the provision that it should be "the sole basis of determining the liability of [***12] the association." It must be taken as the basis, as the general [*214] reason of discharge, and cannot be contradicted; but the employer is not a party to the contract of indemnity, nor presumably interested in it; and it would be an unreasonable construction to hold that plaintiff cannot recover unless the employer states, and assigns as cause, all the numerous provisions, exceptions, and conditions in detail essential to a recovery with which defendant has freighted its policy. But it is incumbent upon plaintiff, under his contract, in harmony with the cause assigned by the employer, and with it as the sole basis, to set out in his notice of claim, aver, and establish in his proofs that which by his contract is essential to a recovery.

The contract must govern, though it may be more harsh and unfavorable to plaintiff than defendant. Courts do not make contracts for parties; they can only construe and administer them.

Defendant is of that class of mutual indemnity or insurance companies organized, apparently without capital, on the assessment plan to secure to its members a continuance of wages, when out of employment, for a certain length of time, under specified conditions. [***13] Those conditions seem to be conspicuously numerous and stringent in this instance; but a member of such an association is at the same time an insurer and an insured. In contemplation of law he is a party to imposing the conditions and restrictions in the policy issued to members.

When he accepts such policy, his rights as an insured are determined by its terms, whatever they may be. His application and certificate of membership, or policy, must be taken and construed together as constituting the contract between the parties. He is presumed to have read his application and been fully acquainted with its contents. *Briggs v. Insurance Co., 65 Mich. 52 (31 N.W. 616)*. Plaintiff makes no claim in this case that he was not, and in answer to numerous questions in his application certifies, [*215] over his signature, that he understands its provisions.

While all insurance, strictly considered, is for indemnity, this is of that special kind more conspicuously so, and is often called "indemnity insurance," as distinguished from fire, marine, life, and other more common forms of insurance. A careful study of the contract leads to the conviction that it is not favorable to [***14] the insured, and his rights under it are limited. The fact that he has been suspended or discharged, standing alone, gives him no rights. It is only when his suspension or discharge is in the nature of a penalty or measure of discipline, that he may urge his claim at all. This would seem to cast particular difficulties in his way in case of discharge.

A discharge presumptively means that the employer no longer needs or desires his services; that he is done with him, and all contract relations are at an end. In such case it is difficult to see why the employer should dispense with his services as a penalty, or to discipline him.

In a popular sense it can be said all persons discharged from a satisfactory and profitable employment are penalized and disciplined in the particular that penalty and discipline are punishment; but a penalty in legal significance indicates a punishment inflicted by a law for its violation, including both fine and forfeiture, or

imposed by contract for doing or failing to do something in violation of the contract obligations.

While "discipline" has no technical, legal meaning, it in common and most general use signifies "instruction, comprehending [***15] the communication of knowledge and training to observe and act in accordance with rules or orders," or, as it may be inferred [**1114] was the meaning intended here, "correction, chastisement, or punishment inflicted by way of training." By the terms of the policy this must be an element [*216] before recovery can be had, and there is no statement in the cause of suspension or discharge assigned by the railway company, nor in plaintiff's notice of claim and the accompanying statements of his two witnesses, that his employment was terminated as a penalty or measure of discipline.

Even though such was the cause, and it was properly set out in his notice of claim, he would yet have no right to indemnity, if the cause arose from, or was traceable to --

"Absence from engine while in charge of same; nor for any act or acts while in charge of your engine, use of intoxicating liquors, soliciting his own discharge or suspension, striking, garnishment, fighting, assaulting superior officers, knowingly disobeying orders or rules," etc.

No mention is made of these matters in his notice of claim, nor in the cause assigned by his employer.

Plaintiff's contract specifically and distinctly [***16] requires that his notice of claim, corresponding to proofs of loss in ordinary insurance --

"Must show by his own statement and the statements of at least two other persons who are acquainted with the facts in the case that such suspension or discharge is within the provisions of this certificate and that he is clearly entitled to the indemnity applied for."

Both plaintiff's statement and those of his two witnesess fail in numerous particulars, beside the allegation that he did not knowingly disobey orders or rules, to show that his suspension and discharge are within the provisions of his contract, though he was requested, and given further time, to submit additional, full, "final, and complete proofs."

The contract under which he brings suit makes it obligatory upon him to establish those things requisite to show himself entitled to indemnity, in order to make out a *prima facie* case. In this he [*217] failed, and we are constrained to conclude that the trial court correctly determined "that the plaintiff has not, as a matter of law, shown a case against defendant."

The judgment is affirmed.

MOORE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred. [***17]

AMENDED CERTIFICATE OF SERVICE

I, JARROD W. TAYLOR, attorney for the Plaintiff, do hereby certify that I have this day mailed, postage prepaid, via United States Mail, a true and correct copy of the above and forgoing to Hon. LeAnne F. Brady, Attorney for the Mississippi Department of Employment Security Commission, 1235 Echelon Parkway, Jackson, MS 39213 and Honorable William E. Chapman, III, Circuit Judge for the Twentieth Judicial District, P.O. Box 1626, Canton, Mississippi 39046.

THIS, the 22nd day of July, 2008.

JARROD W. TAYLOR