

ORAL ARGUMENT — 4/28/98
97-0894
COLLINGSWORTH V. HUNNICUTT

LAWYER: It is the position of the petitioners that the CA incorrectly determined when an employee's misconduct is connected with the work under the Texas Unemployment Compensation Act. The petitioners assert that the CA further imposed an erroneous standard to determine whether such conduct is connected with the work under the Act.

Briefly, the facts of this case are, that Ms. Hunnicutt worked with Collingsworth General Hospital in the custodial staff. In doing her duties, she was allowed to and frequently was in various parts of the hospital unsupervised. While off duty, she initiated and instigated a fight where she used a box cutter as a weapon and slashed another person.

GONZALEZ: She initiated the fight?

LAWYER: Yes.

GONZALEZ: I thought she got a phone call from her _____ and that she went over there to take care of business?

LAWYER: Yes.

GONZALEZ: But she did not initiate the fight? She was provoked?

LAWYER: The facts did not reflect that there was any kind of a physical...

ENOCH: Just concede that and move on.

LAWYER: She was arrested, charged with, indicted for and pleaded guilty to the felony of aggravated assault.

ABBOTT: It was my understanding that after the pleading that it was actually not for a felony? Did she plead guilty? Was she actually convicted of a felony?

LAWYER: Yes. The felony of aggravated assault. I believe the record reflects that she pled guilty and the record contains a lot of the paperwork that she signed.

PHILLIPS: It was deferred adjudication.

LAWYER: Yes.

PHILLIPS: So if we hold the case long enough it will go away?

LAWYER: I'm not familiar with the criminal law in that regard. The hospital's policy had a section entitled "Immediate Discharge," and two of the justifiable reasons for immediate discharge are 1) performance of malicious or destructive acts harmful to persons; and 2) serious violation of hospital rules or breach of accepted standards of conduct.

ENOCH: I'm not clear about the hospital's position there. There is a lot of reference to the Labor Code and the standards by which someone can be discharged, and not draw unemployment compensation. Is it your position that the hospital's policy manual somehow changes the outcome, or is it your position that the policy manual is consistent with the Labor Code? The Labor Code says: "It has to be connected with the work." It seems to me your argument is it doesn't have to be connected with the work. I'm not clear what your position is.

LAWYER: In order for the off duty conduct to be connected with the work, under our position the rules have to be somehow reasonably connected with the obligation that the employer has in the discharge of its business.

ENOCH: Can I, as an employer, have a policy that I will not tolerate criminal conduct by an employee on or off duty, and if I learn of criminal conduct off duty they will be fired And if that's in my policy and in my manual, then does that mean they are not entitled to unemployment compensation?

LAWYER: The cases that we cite show that if that off duty conduct has a reasonable relationship to the worker.

ENOCH: No, that's not my question. My question is, I just say you can't have violent conduct off duty or you're fired. Does that mean that they are not eligible for unemployment compensation?

LAWYER: Yes.

ENOCH: So "in connection with the work" is not really relevant to your inquiry here. The hospital had a policy: You cannot commit a violent vicious act on duty or off duty. If you do, you're fired. And they are not entitled to unemployment compensation. And that's your position?

LAWYER: If I can backtrack a little bit. Our position is that the rule of the employment and the off duty conduct should have some kind of a reasonable relationship.

ENOCH: Now the Labor Code requires this?

LAWYER: The "connection with the work." Yes, that's what the Labor Code requires.

ENOCH: And so, the hospital acknowledges that she's entitled to unemployment compensation if this violent act was not connected somehow with her work. They are not arguing that it was simply a violation of hospital policy?

LAWYER: Right. The commission determined that there was a connection with the work with regard to the policy.

ENOCH: And you don't disagree with that application of the law. You just argue that the violence was connected with the work?

LAWYER: Yes.

SPECTOR: What was the connection?

LAWYER: The hospital's position is that Ms. Hunnicutt as a supervisor was going through the hospital and she was alone many times because she was the supervisor, and the hospital's concern was that someone who had committed this kind of conduct whether on or off duty posed a concern to the hospital with regard to having her around people that are obviously sick and infirmed.

SPECTOR: She had worked at the hospital how many years?

LAWYER: I think 25 years.

SPECTOR: And she had responsibilities similar to what she had then?

LAWYER: Yes.

GONZALEZ: The CA described the incident as a crime of passion. Do you disagree with that?

LAWYER: I disagree, and that was why I answered your previous question in the same manner. Although she received the phone call and went over to that woman's house, she had the box cutter in her pocket, she talked to her on the phone, she got in her car and drove over, I just have trouble concluding that that was just an outburst of passion.

GONZALEZ: She had been working with the cutters at home?

LAWYER: Yes.

PHILLIPS: The connection with work for somebody who does something like that on a Saturday morning is liable to do it at work, or is it the reputation to the hospital in a small

community of somebody like that working there?

LAWYER: That was something that came up repeatedly in both the administrative process and in the trial court, and the people at the hospital consistently asserted that they were worried about the safety of the patients in the hospital and her being around these people. The issue of the reputation of the hospital and the bad press did come up, but always the hospital stood their ground on that.

PHILLIPS: So it wouldn't be that if this hospital was in Houston it would be a different result in your opinion?

LAWYER: No, I don't think so. A Houston hospital would also be concerned about the safety of their patients, which is what Collingsworth was concerned about.

HANKINSON: Do you disagree with the CA's decision that the *Nelson* case sets out the test used by the majority of jurisdictions in interpreting this type of statute?

LAWYER: Our research shows that that's correct, that the *Nelson* case does not represent a majority. As a matter of fact, one of the jurisdictions that the CA cited was a jurisdiction that we cited to support our proposition.

HANKINSON: What is the majority rule in interpreting a "connected with" language that's found in these unemployment statutes?

LAWYER: It seems to be well stated in the *O'Neal* case. Basically that a rule laid down by the employer governing off duty conduct must have a reasonable relationship to the employer's interests in order that the violation will constitute misconduct.

HANKINSON: Does there have to be a rule then that is violated by the employee and it's the rule then that must show the connection between the off duty conduct and the employment? Is the rule the lynchpin in this?

LAWYER: In this case it was definitely. It was a violation of a policy or rule adopted. I don't think that that should be the case all the time. I think certain behavior should be assumed not to be conducted and an employer should expect employees not to engage.

HANKINSON: How would you define the test that you're asking us to adopt to define "connected with" in the statute?

LAWYER: The test that we are suggesting is probably once again stated best in the *O'Neal* case, which is the activity must have some reasonable relationship to what the employer's activities are. In *O'Neal*, it was a postal worker who engaged in some illegal activity. In some of

the other cases it was a trucking company not wanting their employees to be convicted of DWI. In this case it's a hospital not wanting their employees to engage in violent behavior.

* * *

COLLINGSWORTH GENERAL HOSPITAL

LAWYER: I would like to address the specifics to the hospital. First, the nexus where the employees work. Of course, as Mr. Atturro stated, the Collingsworth County personnel policy stated that the sort of act committed by Mrs. Hunnicutt would result in immediate termination. And the reason it's so important in this community, is that it's a small hospital in a small community. Everyone knows everyone. It's vital for the hospital that everyone has confidence in the employees. So the connection there, is the fact that it's such a public position.

PHILLIPS: What if you had an employee who took an unpopular position. If they were a socialist or they had a notorious relationship outside their marriage and they didn't violate any law, but it was so repulsive to a small community that people didn't go to your hospital should they not be able to get employment insurance?

LAWYER: There's a possibility in the small community that that could be a problem. For instance, if there was a doctor or a nurse that was involved with a much younger man or much younger woman, and there is a possibility that people in the community would not want their children around that individual.

PHILLIPS: So the AG's position that this is primarily a question of the safety of the patients in the hospital, is wrong?

LAWYER: No, that is a combination of safety as well as the well being of the employer. If a person who is known for violent acts is working at that hospital, the hospital can't survive because we lose the confidence of the people who have loved ones in that hospital.

BAKER: Has anybody questioned the hospital's right to terminate an employee under these circumstances in this case?

LAWYER: No, no one has questioned that right.

BAKER: The only question is, after you do this, is that employee entitled to unemployment benefits under the legislative scheme, isn't that right?

LAWYER: That's correct.

BAKER: And so how does that connect with the legislative scheme or are they two different things and the focus is wrong?

LAWYER: The hospital takes a position that they should not be in a position of dismissing someone and then paying unemployment compensation, then paying another person to take that individual's place. In other words, the individual who committed the act gains benefit from the act in effect.

BAKER: Well it just affects your rate. You don't pay unemployment directly to the discharged?

LAWYER: There is a surcharge for that unemployed employer.

BAKER: I understand there's an economic detriment, but you don't pay whatever the benefits are directly?

LAWYER: It's a large percentage. There is a notice that we receive and we do have to pay a lump sum.

ABBOTT: How much do you pay?

LAWYER: I believe in this case it was around \$2,000.

ABBOTT: One time charge?

LAWYER: It was a one time charge in this particular case.

SPECTOR: How many employees are in this hospital?

LAWYER: There are approximately 40 employees in this hospital. It's a small hospital.

SPECTOR: Going back to your standards for terminating. What violations of the law are set out? How is that described?

LAWYER: That is described specifically as malicious acts committed against an individual; specific acts that would be committed against the individual: a violent act, and also a notorious type act.

SPECTOR: That's in the manual?

LAWYER: Yes. There are two sections in the manual that relates to this specific matter. Another aspect to this is the liability if an individual who commits a notorious act, and that individual's retained in employment, then there is potential liability there also if something happened in the hospital where an individual is injured due to that person's act.

GONZALEZ: How is this attack connected with her last work? She was angry at the person who was fooling around with her husband. So how is that connected with her job?

LAWYER: Anyone, who would commit a violent act like that, is someone that we cannot have in the hospital.

GONZALEZ: I'm not questioning the hospital's authority to fire her. I'm talking about her right to unemployment compensation?

LAWYER: There is no direct factual connection. There is none.

GONZALEZ: If you concede that why don't you lose the case?

LAWYER: Because the connection is the nature of her job and the nature of the hospital and the community.

PHILLIPS: So this might be a different case if it was in Houston or New York City?

LAWYER: Yes.

* * * * *

RESPONDENT

LAWYER: I think the last interchange kind of exhibits the problem that we see with not following the test that the CA has laid down. You would give the employer the power to dictate when unemployment compensation would be paid out, and they could do that through their employees' manual. They could do that through maybe even verbal instructions.

OWEN: What if she had been convicted of drug dealing, and there was nothing in the policy manual?

LAWYER: They would still have the right to fire her.

OWEN: Do you think she would be entitled to collect unemployment benefits?

LAWYER: If it was totally unrelated to the work, yes.

HECHT: Is murder the same answer?

LAWYER: Yes.

HECHT: In fact it's hard to think of a crime that she could commit that she wouldn't

be entitled to benefits?

LAWYER: No, if it was connected to the work.

HECHT: If she killed her supervisor?

LAWYER: Right. Or did something that involved the employer's property, like the *Ryan* case: stealing the employer's property, or took advantage of the employment relationship and committed fraud or something like that.

HECHT: If she killed a former supervisor that would not disqualify her?

LAWYER: If there are no other facts, no, it wouldn't.

SPECTOR: Wouldn't you concede that if there was a problem with drugs and drugs are available in a hospital, that that would be such conduct that would be connected with her work? If there were a drug violation away from the hospital but part of her job is the handling of drugs?

LAWYER: That would make her unsuitable for that job perhaps.

SPECTOR: You won't concede that that would be in anyway connected with her work?

LAWYER: No, not necessarily. There is a case referred to in one of the briefs regarding a person who is a cashier, who committed theft. I think that's kind of a similar comparison. It makes them unsuitable for work, but unless it has some connection to it it doesn't disqualify them from unemployment benefits.

HECHT: Well the connection is you're afraid that if they steal from somebody else they will steal from you.

LAWYER: That's right.

HECHT: And that's not a connection?

LAWYER: That is an unsuitability for work. Keep in mind, the legislature has already said that misconduct is not enough. It's got to be misconduct connected with work.

ABBOTT: Let's talk about what the legislature has said. You don't disagree with what the legislative intent was that was stated in *Ryan* do you?

LAWYER: No.

ABBOTT: There it says, that unemployment benefits are basically for workers who are unemployed through no fault of their own.

LAWYER: But I think what that means is dealing with the willingness to work.

ABBOTT: You say you think that's what that means, but what your thoughts are, are not based upon anything else that the legislature has said, is it?

LAWYER: It doesn't refer to criminal statutes.

ABBOTT: We're talking about faults of their own. The legislature declares it to be the purpose of the state by this enactment to provide an orderly system of contributions for the care of justifiably unemployed. And that's not what we have here.

LAWYER: I think we do have a justifiably unemployed person. Keep in mind, I think when the legislature, again this is my thought but I am suggesting this to you, the legislature is thinking about the worker as a willingness to work. They are not thinking about imposing criminal sanctions through the labor laws of Texas. I don't think that was a thought that came into it. But the statute later, which talks about misconduct, does talk about intentional violation of the law as being misconduct. But it said that was not enough to disqualify somebody. They had to have a reason for putting that phrase in "in connection with."

ENOCH: I think the hospital makes a very persuasive argument that this woman should not be working for the hospital and that the aggravated assault reflects badly on the hospital. And certainly in connection with her work could be read broad enough to encompass that. But if you do all those things, I couldn't imagine that any sort of crime of any significance would be connected to anybody's work no matter whom they worked for. So it seems to me this "in connection with" the work must be for some other purpose than kind of this notion of rewarding them for unemployment. I wonder if the worker's compensation issue is really a welfare provision. They are going to have somebody who is unemployed. They recognize the person is going to be unemployed. Now who is going to pay for it? Is it going to come out of the general fund or are they going to require employers generally to pay for this type of individual? Maybe it has nothing to do with the crime that was committed. But I can't imagine a scenario where someone who commits a crime that there isn't an employee in the world who couldn't claim that's connected with their employment. You wouldn't hire a person who had that in their record. So the legislature put that in there for some reason. Why is "in connection with the work," in there?

LAWYER: Perhaps to put a check on employers. You can take for example murder, and it sounds bad. But if you look at this situation, you look at the facts, you look at what happened here, I certainly don't have any problem with my tax dollars going to pay for unemployment compensation in this case. So I think that that was placed in there to put a check on employers, because otherwise they could dictate whatever they wanted to. They could put down anything and it would control if

they labeled it as misconduct, performance of the work or cause, and then what meaning would it have? So I agree with you, it means something. I think it's a control with a proper definition, which I hope you will adopt the CA's definition, but with a proper definition it will restrict employers.

It's not the employees that are going to take advantage of this when this is put into practice. It will be the employers who will look at this law and look at what you say and either abuse and manipulate it or use it properly. But I know there will be those out there that will abuse it.

HANKINSON: Even though the test adopted by the CA, the first element is that the employee's conduct must have had some nexus with the employee's work. And then there are additional elements that are part of the test as well. So we're still faced even with the CA's test in deciding what the nexus is, another way of saying connected with. Is it your position then that the misconduct must have occurred actually on the job, on the employer's property or involved the employer's property? Tell us what test should be used to define that piece, the nexus or "connected with" language?

LAWYER: It needs to be a concrete connection, not just a mere superficial one like suitability for work. They are not suitable because their character is in question. That's not concrete enough. That's abstract. That may or may not be true.

HANKINSON: What is a concrete connection?

LAWYER: I would say occur on the job. It would involve the employer's property. It would affect directly in the interest of the employer something that is similar to property. Or it would be taking advantage of the relationship of work: using that relationship to gain some advantage you wouldn't normally have.

BAKER: Is your additional clause on that that it has to occur on the premises or can it occur off the premises if it directly affects the _____?

LAWYER: I don't think it has to occur on the premises.

BAKER: Why don't the facts fit here as the hospital argues?

LAWYER: Because the interest that they are looking at is a very abstract interest. Let me give you an example from another case. There was a fellow that had a DWI in one of the other cases, and his employer told him, "Look I've got insurance problems and I can't have you drinking either on or off the job." And he understood that, and that was a special circumstance of his employer, and then he got a DWI. That would fit. But not in this case.

BAKER: Extrapolate the same facts here that you have a small hospital in a small town

that depends on the trust of its employees for its community people in order to get the business. And so the employer's interest is to have a code of conduct, "You just can't do these things that reflect poorly on the hospital as an entity" and enforce it, and doesn't it still fit the example you just gave?

LAWYER: I don't think it fits the example, but it does permit what occurred here, it permits them to fire her, which they did. She would rather be working there right now, but she's not after 25 years. This is about as far away as you can imagine from the hospital and anything that was direct. Every employer wants the safety. They don't want their employees running around committing felonies. Nobody wants that. But the question is not whether or not the employer wants that, but whether or not that's going to be a reason to disqualify the person from benefits.

OWEN: What about a childcare worker who either physically or sexually abused a child that wasn't at the daycare center and wasn't related to the daycare center, would that fall under your DWI example or not?

LAWYER: I don't know. That's a good question. That's a hard one. But I would say that certain person would certainly be suitable. I don't know if that would necessarily disqualify them from benefits. That's justifiable to fire them. They are certainly unsuitable for working and no one would question that. Some positions like police have on and off duty. In other words, they are almost never off duty, and that might fall into something like that where you are always expected to be on duty.

HECHT: What does, being on duty matter?

LAWYER: That's the connection to the work. If you are a police officer you're 24 hours a day, you have a special relationship that ordinary citizens wouldn't have.

HECHT: So if the respondent had gotten a call at work and she had said, "Look I've got to go, I will be right back," that might be a different case?

LAWYER: And she had left work to commit a crime? It could be.

ABBOTT: What if the position of the hospital was, "we are in the business of caring for people, and as a result it's important that all of our employees care for people inside and outside of the employment situation, and within that context it's important that you not injure anybody?"

LAWYER: I think that is their position. I think that is exactly what they are saying.

ABBOTT: Why would that not be "in connection with the job" the same way that the employer who says it's very important for your employment here that you not become intoxicated either on the job or off the job because we care for people. It's part of your job 24 hours a day that you conduct your life in a way that you don't injure anyone?

LAWYER: It's too abstract, I guess would be my question. That's like telling your kids to be careful, and if you have teenagers like I do, you better be specific about it or they will take advantage of it. It's just too abstract a standard. Where would you draw the line on something like that? I don't know the answer to that.

OWEN: If this were a physician who was on call 24 hours a day would your position be different?

LAWYER: Yes, it could be. Like a police officer or if a doctor was on call say for doctors who were alternating. I know in small hospitals there may be a weekend when they are on call, and I think that type of relationship could change that if they are expected to be there. In effect then they are on duty all the time.

HECHT: I don't understand under your theory how that makes it connected, because it's certainly not part of their job. It's totally unrelated to their job. They just have to be on the job.

LAWYER: Well if they are on the job it's connected to the job. That's what my theory is. If they have a relationship at that time. If you walk out at 5:00 p.m. out of this building and you have no responsibilities, then nothing is left open, then it's very limited that anything could be connected with the work. But if you're expected to be on call or on duty it doesn't matter whether you are on the premises. There is a factual link there. The doctor is on duty and he goes out and gets drunk, he's not able to perform.

HECHT: Something completely unrelated.

LAWYER: It impacts his performance, his work performance.

HECHT: He runs off and assaults somebody and comes back it doesn't impact it all. He does it on his lunch break. The hospital is going to say, "This is not part of us. We didn't know anything about this."

LAWYER: You can imagine all kinds of examples and stuff. But I think on that, if he's supposed to be at work and he runs off, he's supposed to be at work, maybe that wouldn't justify a denial of benefits. But he's doing something, he shouldn't do, connected with the work in the sense that he's left work where he's supposed to be in order to do something wrongful. I can see a connection there.

GONZALEZ: The CA recites in their opinion that after the incident Mrs. Hunnicutt reported the incident to her supervisor, the supervisor took no action. It wasn't until later when a new administrator came on board that she was dismissed. What is the time gap between the time she reported the incident and she was dismissed?

LAWYER: I believe it was 4-5 months. She did receive a deferred adjudication. There was some question. She was never convicted, which is not a final conviction as far as criminal statutes, and she continued to serve the hospital until she entered her plea during that period of time.

GONZALEZ: In her 20 years at the hospital had she had other incidents like this even remotely close to this?

LAWYER: No.

ABBOTT: Was it a felony that she pled to?

LAWYER: Yes.

ABBOTT: And how long after the plea was she terminated?

LAWYER: She was terminated within a week. Very quickly.

* * * * *

REBUTTAL

LAWYER: Just to clarify, there was the allegation in July concerning the misconduct, but there was no conviction and no legal action until the end of September when this came out in the paper that there had been a guilty plea, that's when the action was taken.

SPECTOR: Just the fact that she was charged with a felony and pled guilty, if the charges had never been brought but there was this conduct, would that have made a difference?

LAWYER: It would have made a difference in this particular case because there was not a general knowledge of what had happened, and the hospital didn't have an understanding of what had happened. In other words, if it had been an incident that had been taken care of and the police officers looked at it, but if there had been some sort of self defense or maybe an incident provocation where she had cut someone, they had come to her house or something like that, then probably no action would have ever been taken.

SPECTOR: On a deferred adjudication, that conviction will be erased or maybe it already has been. What would be the result of that? In other words she will not have this on her record.

LAWYER: She admitted to the facts in the case. In other words, she pleaded guilty to that felony charge, and that was the basis for the hospital taking action, that and the notoriety of the event.

SPECTOR: The notoriety is what sets it off for you?

LAWYER: The notoriety plus the knowledge of the facts. The facts were ambiguous. The hospital didn't know exactly what had happened until the plea of guilty was taken and Mrs. Hunnicutt pleaded guilty.

SPECTOR: There is no question that she brought it to the attention of the hospital immediately?

LAWYER: She did tell her supervisor that there had been an incident.

ENOCH: Suppose that this was a sacker at the grocery store who did this assault on a Saturday. Is there anything different about that grocery store's proprietor's relationship to his or her community that would say that that assault was not in connection with that work, but the assault would be in connection with the hospital work? Draw me a distinction there or can you?

LAWYER: The distinction in that particular case is that the hospital's job is to take care of sick people and not to harm people, but to help people. In this case, Ms. Hunnicutt, as a supervisor, was alone with patients and had a special duty to those patients and to the hospital and was there to help.

ENOCH: But a sacker is supposed to help people. They are supposed to make people feel welcomed coming to the store. So that sacker goes out and commits an aggravated assault and there's a lot of publicity, it's harmful to the business to have this assaulter meeting people at the door, carrying their groceries, why is that not in connection with that work?

LAWYER: It certainly could be especially if you looked at a test of misconduct. The hospital would propose that the simplest thing from an employer's standpoint, the complex test that's set forth by the CA, is very, very difficult to apply. So if there was a simple test, such as if a person commits misconduct as defined in the statutes, then that would be much easier for an employer to apply.

OWEN: Is the word "misconduct" defined anywhere?

LAWYER: It is at 201.012.

ENOCH: But it has to be "in connection with" the individual's last work?

LAWYER: Yes. And under the definition of misconduct there is going to be very little that rises. If the incident rises to the elevation of misconduct as defined there is going to be very few instances where it's not going to be connected to the work. If you look at the definition.