4-10-2014

Boyd-Davis v. Macomber Law Appellant's Reply Brief Dckt. 41523

IN THE SUPREME COURT OF THE STATE OF IDAHO

TERRI L. BOYD-DAVIS, Claimant/Appellant, v. MACOMBER LAW, P.L.L.C., Employer/Respondent, and IDAHO DEPARTMENT OF LABOR, Respondent.	)	Supreme Court Docket No. 41523-2013 Industrial Commission No. 3509-2013

APPELLANT'S REPLY BRIEF

APPEAL FROM THE IDAHO INDUSTRIAL COMMISSION

CHAIRMAN THOMAS P. BASKIN PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Idaho Cases

Foreign Cases

Federal Cases

Other Authorities

I. ARGUMENT

A. The question as to whether Boyd-Davis met the Idaho Department of Labor's eligibility requirements for unemployment benefits is not at issue.

The Idaho Department of Labor ("IDOL" or "Department") has never asserted that the Appellant/Claimant Terri Boyd-Davis was ineligible for unemployment benefits nor that she failed to prove her eligibility. Thus, when the Department asserts that "[t]he claimant carries the burden of proving that all eligibility requirement have been met," its focus is on the wrong issue. (Respondent's Brief, p. 6). The Department inaccurately rephrases this burden of proof when it states "[b]ecause Appellant has the burden of proof, she must demonstrate by a preponderance of the evidence that she did not fail to provide her work search documentation when requested to do so by the Department." It is necessary that the focus is on the correct issue. The Idaho Industrial Commission ("Commission") accurately stated that the "real issue in this case" is "whether Claimant can be held accountable for failing to comply with the Department's request when she did purportedly not receive the Department's letter regarding that request." (R., p. 18).

Based on the IDOL's faulty interpretation of when a "presumption of service" applies under Idaho law, the Department argues that Boyd-Davis can and should be held accountable for not responding to a letter the Appellant asserts she did not receive. There is simply no support under Idaho law – not in its statutes and not in case law – that provides support for the Department's position.

B. There is no presumption of service that applies to the facts of this case.

Appellant does not contest the IDOL's factual finding that she did not provide the information requested in the March 6 Online Review Letter *by the deadline provided therein.*

Boyd-Davis' position is that no presumption of service under Idaho statutes or case law applies to receipt of the letter upon its purported date of mailing and that therefore, the IDOL abused its discretion in denying her the benefits to which she was undisputedly entitled.

1. The *Gary* case is distinguishable from this case.

In support of its position that a presumption of service of the Online Review Letter applies in this case, the Department cites to a case from the United States District Court for the District of Idaho, *Gary v. Nichols*, 447 F.Supp. 320 (D. Idaho 1978), claiming that it is "strikingly similar to this one." (Respondent's Brief, p. 7). While it is true in the *Gary* case that the Plaintiff challenged the adequacy of the notice he received, there are two ways in which this case is significantly different from the instant one.

First, in *Gary*, the issue was not whether the notice was sent to the claimant nor was it whether it was received by the claimant. In that case, the notice was sent and it was received, but the claimant was out of town so he did not receive the notice until he returned from his trip, and it was then too late to timely reply to it.

Secondly and more significantly is that in the *Gary* case the notice he challenged was a notice of redetermination. In fact, this case supports the arguments Boyd-Davis has made all along – that the presumption of service found in I.C. 72-1368(5) applies only to the five notices specifically delineated therein, one of which is a notice of redetermination. In the *Gary* case, the District Court quoted the statute, "a notice [of a redetermination] shall be deemed served if delivered to the person being served or if mailed to his last known address; service by mail shall be deemed complete on the date of mailing" and thus accurately determined by the plain

language of the statute that "the plaintiff *by statute* must be deemed to have received notice of the redetermination on March 4, 1975, the stipulated date of mailing." *Id.* at 327. (Emphasis added.)

The presumption of service in *Gary* was by statute. By statute (I.C. 72-1368(5)), a notice of redetermination is deemed served on the date of mailing. Boyd-Davis agrees. Boyd-Davis disagrees that the *Gary* case can in any way be said to provide support to the Department's argument that the Online Review Letter, which is not covered by I.C. 72-1368(5), was deemed served on Boyd-Davis on the date that the Department purports it was mailed. The Department argues that in *Gary* "[n]othing prevented the District Court from adopting the rationale in § 72-1368(5) and nothing prevents the Commission form adopting the same rationale in determining whether Claimant met her burden of proof." (Respondent's Brief, p. 9). But the Department is wrong. Something does prevent the Commission from adopting the same rationale. This rationale does not apply here because in *Gary* the statute very specifically applied to the notice of redetermination, which was the piece of mail at issue in that case. In this case, I.C. 72-1368(5) does not apply to the Online Review Letter that the Department purportedly mailed to Boyd-Davis.

In *Gary*, the District Court cited to an Idaho Supreme Court case, *Fouste v. Department of Employment*, 97 Idaho 162, 540 P.2d 1341 (1975), which additionally confirms that I.C. 72-1368(5) only applies to the specific notices delineated therein. The *Fouste* case "address[ed] and uph[eld] the notice provisions of Idaho Code § 72-1368." *Gary* at 327. In the *Fouste* case, the Idaho Supreme Court stated: "What we are dealing with is a claimant who failed to properly

utilize *the clearly established procedures for appealing a determination of ineligibility.* The appellate procedure with its prescribed time limitations for perfecting appeals is reasonable and violates no federal directive or law." *Fouste* at 1346. (Emphasis added.) Again, the *Fouste* case concerned appellate procedure and a notice of determination, which I.C. 72-1368(5) specifically designates as one of the notices covered by that section of Idaho Code, and which was significantly unlike our case which concerns a letter mailed by the Department to Boyd-Davis and which was prior to an appeal being filed.

2. The *Jones* case, which concerns a state taking property and selling it for unpaid taxes, does not support the IDOL's position that in the instant case the Department was not required to provide Boyd-Davis with actual notice.

Without explaining how exactly a U.S. Supreme Court case, *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708 (2006), which concerns the issue of a State taking property and selling it for unpaid taxes, applies to the case at hand, the Department uses this case to support its position that "[d]ue process does not require the Department to provide actual notice." The IDOL argues that it was not required to provide Boyd-Davis with actual notice but "rather it is required to provide notice reasonably calculated under the circumstances to apprise interested parties, in this case Appellant, of the pendency of an action, or as in this case, the need to provide information to maintain her benefit eligibility." (Respondent's Brief, p. 7). This makes no sense.

The Department does not explain ***why*** it does not have to provide the claimant with "actual notice" of the need to provide information to maintain benefit eligibility. The instant case concerns a completely different scenario than the *Jones* case. This is not a case about

selling property for unpaid taxes. The Department does not explain what – other than actual notice – would qualify as "notice reasonably calculated under the circumstances to apprise...Appellant of...the need to provide information." In this case, other than "actual notice," the Appellant could not possibly have known she was required to provide this information. The *Jones* case does not apply here.

3. The Idaho Supreme Court has confirmed that the notice provisions of I.C. 72-1368(5) apply only to notices served on interested parties of determinations, redetermination and decisions of appeal examiners.

In another Idaho Supreme Court case dealing with the presumption of service under I.C. 72-1368, *In re Dominy*, 116 Idaho 727, 779 P.2d 402 (1989), the Court stated that Appellant "would have us apply the provisions of I.C. § 72-1368(e)[1] (Supp. 1988) to the facts here." This case further shoots down the Department's argument that "nothing prevents the Commission from adopting the same rationale" the Court applied in *Gary*. In the *Dominy* case, like our case, the party asking the Court to "apply the provisions of I.C. § 72-1368(e)," was asking that these provisions be applied to something other than a notice of determination or redetermination. There, the Appellant wanted the Court to apply these provisions to "an appeal of a determination of coverage." The Idaho Supreme Court declined to apply these provisions, stating:

> Under that section [72-1368(e)], service by mail is deemed complete on the date of mailing. However, I.C. § 72-1368(e) deals with service of notice of determinations and redeterminations by D.O.E., not appeals by interested parties....There is no indication in either I.C. § 72-1368(e) or (f) that the service by mail provisions referred to there were intended to apply to appeals. *It is clear*

[1] I.C. 72-1368(5) was previously 72-1368(e). It was recodified in 1998.

*from reading these provisions that they apply **only** to notices served on interested parties of determinations, redetermination and decisions of appeals examiners.*

Id. at 404, 405. (Emphasis added.)

It was clear to the Court then and it is no less clear now that "these provisions... apply only to notices served on interested parties of determinations, redetermination an decisions of appeal examiners."

4. The "mailbox rule" does not apply to this case.

The Department claims "[t]he rationale in § 72-1368(5) is based on a presumption recognized by many courts" – the mailbox rule." (Respondent's Brief, p. 9).

The problem with comparing the mailbox rule to the facts of this case is that it simply does not apply. In support of its argument, the Department cites to five cases, four of which are cases from foreign jurisdictions. While the Department cites to one Idaho case, *Hobson v. Security State Bank*, 56 Idaho 60 57 P.2d 685 (1936), it tells us nothing about this case, does not explain what the holding in the case was, and does not provide even a quote from the case but appears to claim that "[d]enial of receipt merely presents an issue of fact for the factfinder." (Respondent's Brief, p. 9). There is no way to determine how this case might support the IDOL's proposition.

The Department argues that in the California case of *Schikore v. Bankamerica Supplemental Retirement*, 269 F.3d 965 (9th Cir. 2001) that the Ninth Circuit Court of Appeals held that "a sworn statement that the letter was mailed is credible evidence for purpose of the mail box rule." What the Department neglects to explain is that immediately before stating that

holding, the Court noted that, "Schikore [] presented, *as evidence of mailing a sworn declaration that she mailed the benefit payment.*" *Id.* at 964. (Emphasis added.) In our case, we have no sworn statement from the person who purportedly mailed the Online Review Letter. We do not even know who the person who allegedly mailed the letter is. We don't know because no one signed the letter and there is no certificate of mailing on the letter. The testimony provided by the IDOL in the instant case was by an assistant manager who testified only to the information in the Department's records. She did not purport to have been the one who mailed the letter nor did she identify who it was that allegedly mailed the letter. The Department states that "[t]here was no evidence in the record that the letter was returned to the Department," (Respondent's Brief, p. 10) but it could be asserted with just as much certainty that neither was there any evidence in the record that the letter *wasn't* returned to the Department. Besides the fact that the *Schikore* case is not an Idaho case and does not have anything to do with unemployment benefits, its facts are different than ours. In the instant case we do not have a sworn statement that the letter was mailed.

The mailbox rule is a rule that typically applies to contract law. *Black's Law Dictionary, 6th Ed.* defines the "mailbox rule" as follows: "In contract law, unless otherwise agreed or provided by law, acceptance of offer is effective when deposited in mail if properly addressed." It is unclear how the Department believes that a rule that applies to acceptance of an offer in contract law also applies to the facts of this case. The Department does not provide any clear argument as to why the "mailbox rule" should be applied in this case. In Idaho, outside of contract law, there is no evidence that the mailbox rule applies in any other circumstances other

than "for purposes of *pro se* inmates filing petitions for post-conviction relief," *Munson v. State*, 128 Idaho 639, 643, 917 P.2d 796, 800 (1996).

The IDOL has made no convincing argument that the mailbox rule applies to the facts of this case.

II. CONCLUSION

The IDOL admits the Industrial Commission abused its discretion in determining that Boyd-Davis was ineligible for benefits. The IDOL is further unable to show that a presumption of service applies to the facts of this case.

Boyd-Davis was undisputedly eligible for unemployment benefits and the IDOL's refusal to pay her the benefits to which she was entitled resulted in violating the very purpose for which of the Idaho Employment Law was enacted.

Thus, the Industrial Commission's Decision should be overturned and the IDOL should be ordered to pay to Claimant Terri Boyd-Davis the UE benefits for the period of March 10-30, 2013 to which she is entitled.

Respectfully submitted,

DATED: 4-8-14

Terri Boyd-Davis
Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of April 2014, I caused to be served two true and correct copy of the foregoing document on the parties listed below in the manner indicated.

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