6-28-2018

Keller v. Ameritel Inns, Inc. Appellant's Reply Brief Dckt. 45555

Docket No. 45555

IN THE SUPREME COURT OF THE STATE OF IDAHO

MEGAN D. KELLER,
Claimant/Respondent,

vs.

AMERITEL INNS, INC. D/B/A HAMPTON INN AND SUITES,
Employer/Appellant,

and

IDAHO DEPARTMENT OF LABOR,
Respondent.

APPELLANT'S REPLY BRIEF

Appeal from the Industrial Commission
of the State of Idaho

Commissioner Thomas E. Limbaugh, Presiding

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I. INTRODUCTION

Both Megan D. Keller ("Keller") and the Idaho Department of Labor (the "DOL") filed Respondents' Briefs in this matter. AmeriTel and the DOL are generally in agreement as to the facts, but Keller, at times, questions AmeriTel and the DOL's statements of law. For example, it appears that Keller believes that a claimant who seeks "unemployment based upon discharge has no reason to present proof that he also did not voluntarily leave." Keller's Respondent Brief, p. 6. This argument directly contradicts well-established authority, which Keller herself cited:

> The claimant has the burden to show that she was discharged and did not voluntarily resign. If the claimant was discharged, it is then the employer's burden to show by a preponderance of the evidence that the discharge was for misconduct in connection with the employment.

Id., p. 5 (citing *Thrall v. St. Luke's Reg. Med. Ctr.*, 157 Idaho 944, 946-47, 342 P.3d 656, 658-59 (2015)). While this Reply will respond to both Keller and the DOL's arguments, AmeriTel will not address Keller's various misstatements of law.

Before analyzing the facts of this case, it is beneficial to view this case from a global perspective. Keller contacted AmeriTel on June 5, 2017—one day after she no called/no showed—to "discuss her sick leave." (Tr., p. 48, ll. 12-16.) This testimony establishes that Keller did not want to continue to work; instead, Keller wanted to go on leave. Had Keller notified AmeriTel on June 4, 2017 that she would not be in to work and would proceed with leave, Keller would not be entitled to unemployment compensation. In other words, Keller is only receiving unemployment compensation because she "no called/no showed" on June 4, 2017. That does not seem logical, nor does it meet the intent behind the unemployment compensation statutes.

Keller benefiting from "no calling/no showing" is not the only unique fact in this case. In the many decades that this Court has decided unemployment cases, this Court has never directly analyzed what constitutes an employee leaving "his employment voluntarily" under Idaho Code § 72-1366(5). While Keller and the DOL appear to question AmeriTel's motives in this case, it must be understood that AmeriTel is not challenging the Industrial Commission's findings to harm Keller. AmeriTel is instead in a business where "no calls/no shows" are frequent. If missing an entire shift without notification does not rise to the level of an employee voluntarily leaving his or her employment, then AmeriTel needs to know (as do many other Idaho employers) because essentially every employee has one free pass. In essence, this case is not just about Keller; this case is about whether any Idaho employee can miss an entire day of work without notification and be deemed to not have quit. AmeriTel submits that this simply cannot be the law.

II. FACTS

The relevant facts of this case are not in dispute. Neither Keller nor the DOL disputes that Keller "no called/no showed" on June 4, 2017. Moreover, both Keller and the DOL specifically admit that the Industrial Commission found that the *only* time during Keller's employment with AmeriTel that she was a 'no call, no show'" was June 4, 2017. DOL's Respondent Brief, p. 5. Finally, neither Keller nor the DOL disputes that Keller had both the means and ability to notify AmeriTel of her absence on June 4, 2017, but failed to do so. As discussed herein, these are the only facts relevant in this case.

Turning to the alleged "facts" that need further discussion, it is important to note that the DOL and AmeriTel are generally in agreement as to the relevant facts. Keller, on the other hand,

makes several factual assertions that are not supported (or directly refuted) by the record. The remainder of this section is therefore broken into two parts – factual issues in Keller and the DOL's Respondents' Briefs, respectively.

A. Factual Issues in Keller's Brief.

AmeriTel cited to the record in support of the proposition that Keller received bi-weekly work schedules stating, "All employees are required to speak with a manager when calling in" sick. (R. Exhibits, pp. C-32 to C-33.) Keller now appears to disagree that she received these bi-weekly work schedules. Keller's Respondent Brief, p. 1. Keller's position is curious for two reasons. First, the exhibits AmeriTel cited were introduced into evidence by Keller. It seems disingenuous for Keller to object to the exhibits that Keller herself offered. Second, AmeriTel cited to the same exhibits for the same proposition in its appeal to the Idaho Industrial Commission. (R. p. 24) ("In addition to the Employee Manual, Keller also received a bi-weekly scheduled that stated '. . . **All employees are required to speak with a manager when calling in.**'") (emphasis in original). Keller never objected to this citation below, and Keller should not now be able to raise any objection.

Keller next states that she was able to use text messages to notify her managers of an absence. Respondent's Brief, p. 2. While this fact is correct, it is also irrelevant. The relevant inquiry is whether Keller texted (or otherwise contacted her manager) on June 4, 2017. What is not in dispute and was found to be true by the Industrial Commission is that Keller "was scheduled to work on June 4, 2017. . . . [Keller] prepared a text message to inform Black, but for whatever reason, the message never transmitted." (R. p. 47).

Keller argues that the Commission made no finding that Keller "disregarded AmeriTel's policies and procedures." *Id.* While there was no such express finding by the Commission, the Commission's findings of fact include the following: (1) AmeriTel "maintains a policy requiring an employee to provide notice to the property manager or other designated point-of-contact as soon as possible in the event of an unplanned absence or tardiness," and (2) Keller was a "'no call no show'" on June 4, 2017, her first such instance. (R. pp. 46-47.) These facts, when taken together, establish without doubt that Keller violated AmeriTel's policies and procedures. While the Commission ultimately ruled that AmeriTel did not satisfy its burden to prove misconduct, there can be no credible argument supporting any inference that Keller's "no call/no show" on June 4, 2017 was anything other than a violation of AmeriTel's policies and procedures.

Keller next takes issue with the portion of the transcript AmeriTel cited in support of the proposition that AmeriTel's general policy when an employee "no calls/no shows" is to treat such employee as having voluntarily quit his or her employment. Keller is correct that AmeriTel incorrectly cited to page 18 in support of this proposition. The correct citation is found on page 19 of the transcript: "But generally speaking, to give a direct answer to your question [as to what would happen if an employee "no called/no showed"], they are a voluntary quit."

Keller asserts that "AmeriTel concedes that it discharged Keller." *Id.*, p. 10. This is false. AmeriTel has always maintained that it treated Keller as having voluntarily quit, which the Industrial Commission found: "Because [Keller] neither showed for work on June 4, 2017, nor called to report her absence, [AmeriTel] concluded that [Keller] had abandoned her job." (R. p. 47.)

Keller finally argues that there are two "instances where Keller did not notify an absence and AmeriTel took no action." Keller's Respondent Brief, p. 16. This statement is also false. Keller did arrive at work fifty minutes late on May 20, but the very fact that she arrived to work belies any argument that she "no called/no showed" on May 20. Keller alleges that the second instance occurred on June 3, 2017, when "Keller not only failed to notify AmeriTel of her absence but messaged Black of her intent to meet and 'figure out her schedule.'" *Id.* This statement directly misrepresents the record, which again the Industrial Commission commented upon: Keller "was ill on June 3, 2017 [and] sent Black a text message stating that she was too ill to report to work." (R. p. 47). Even the DOL acknowledges this fact: "Black, in his testimony, stated that Keller texted him on June 3rd 'saying she wasn't coming to work.'" DOL's Respondent Brief, p. 4. It is not in dispute that Keller's only "no call/no show" was June 4, 2017. Any argument to the contrary is a misrepresentation of the record and the Industrial Commission's findings of fact.

B. Factual Issues in the DOL's Respondent Brief.

The facts in the DOL's brief are generally accurate, although two facts need to be briefly discussed.

The DOL admits that "Keller did not show up for work June 4, 2017," but the DOL then alleges that, "according to AmeriTel, [AmeriTel] received no notice from Keller that she would be absent." *Id.* This statement is misleading. The facts bear out that both AmeriTel *and* Keller admit that Keller did not give any notice that she would be absent on June 4, 2017. Indeed, in the very next sentence the DOL points out that Keller admits that she never sent any text or other message to AmeriTel about her absence. *Id.*

The second fact is the DOL's allegation that AmeriTel's "employee attendance [policy was] unclear and loosely applied." *Id.* This statement is hyperbole.

It needs to be remembered that despite the Industrial Commission's Decision and the arguments raised by Keller and the DOL, Keller's employment was not terminated for any reason other than her "no calling/no showing" on June 4, 2017. The Industrial Commission ignores this in its misconduct analysis, which was discussed at length in AmeriTel's initial Appeal Brief. The DOL's reliance on AmeriTel's "attendance policy" is another attempt to obfuscate the issue at hand because the policy at issue, the employee notification policy, is clear and unambiguous.

The relevant AmeriTel Employee Policies provide that "Whenever an employee intends to be absent from work . . . he or she must provide notice." (R. Exhibits, p. C-14.) If an employee does not follow this protocol, the employee will be subject to "disciplinary action up to and including termination." *Id.* This policy is clear, and even the Industrial Commission agreed, stating AmeriTel "maintains a policy requiring an employee to provide notice to the property manager or other designated point-of-contact as soon as possible in the event of an unplanned absence or tardiness." (R. p. 46.) Moreover, the Industrial Commission's findings of fact establish that Keller "no called/no showed" for the first and only time on June 4, 2017. (R. p. 47.) Since June 4, 2017 was Keller's first violation of the AmeriTel's notification policy, AmeriTel never had any prior occasion to "loosely" apply this policy. Based upon these facts, the DOL's arguments that AmeriTel's notification policy was unclear and/or loosely applied has no basis in fact.

III. ARGUMENT

Keller submits that this case presents a mixed question of law and fact. The question of law is the interpretation of the words "left his employment voluntarily" in Idaho Code § 72-1366(5), which has never been directly addressed by this Court. The question of fact is whether substantial competent evidence exists to uphold the Industrial Commission's rulings that (a) Keller did not quit or, in the alternative, (b) Keller was not discharged for misconduct. Each of these issues will be addressed in turn.

A. The Interpretation of Idaho Code § 72-1366(5) is a Question of Law.

Neither Keller nor the DOL addressed the legal argument germane to this appeal. Keller and the DOL instead relied on the much more deferential standard of substantial competent evidence. Keller and the DOL's decision to ignore the legal aspect of this case is fatal.

The interpretation of a statute is a question of law. *Nez Perce Tribe v. Little Hope Invs.*, 140 Idaho 219, 222, 91 P.3d 1123, 1126 (2004). Moreover, while it is true that this Court only reviews the Industrial Commission's finding of facts to determine if there is substantial competent evidence to support its findings, *Locker v. How Soel, Inc.*, 151 Idaho 696, 699, 263 P.3d 750, 753 (2011), the Court enjoys free review over whether the Industrial Commission correctly applied the facts to the law. *Taylor v. Burley Care Ctr.*, 121 Idaho 792, 796, 828 P.2d 821, 825 (1991) ("as to whether the facts found by the Industrial Commission mounted to the level of misconduct presents a question of law, allowing free review."); *see also Excell Constr. v. State*, 141 Idaho 688, 696, 116 P.3d 18, 26 (2005). AmeriTel submits that the question of law at the heart of this case is the interpretation of what is meant by the words "left employment

voluntarily" in Section 72-1366(5) and whether the Industrial Commission properly applied the facts to the law.

The Industrial Commission's findings of fact are not in dispute. The Industrial Commission found that Keller was scheduled to work on June 4, 2017, but "no called, no showed" for the first time. (R. p. 47.) The Industrial Commission did not examine whether Keller had the ability to contact her employer, but the Industrial Commission did note that Keller "prepared a text message to inform Black, but for whatever reason, the message never transmitted." *Id.* At the very least, this finding shows that Keller had the means and ability to notify AmeriTel of her absence. Finally, the Industrial Commission found that AmeriTel treated Keller's "no call/no show" as a voluntary quit. *Id.* Despite these findings, the Industrial Commission concluded that Keller did not quit. AmeriTel submits that the Industrial Commission misinterpreted Idaho Code § 72-1366(5) and/or incorrectly applied the facts to the law.

Idaho Code § 72-1366(5) provides that a claimant is not entitled to unemployment compensation if she left her "employment voluntarily." The first question of law is what is meant by leaving "employment voluntarily" in Section 72-1366(5). AmeriTel examined this issue at length in its original brief and will not restate its analysis herein. AmeriTel will instead merely submit that Keller's "no call/no show" on June 4, 2017 is sufficient to find that she left her employment voluntarily.

The second legal question is whether the Industrial Commission correctly applied the facts to the law. The Industrial Commission likely struggled with this analysis because of the lack of authority discussing what facts rise to the level of an employee voluntarily quitting.

However, the dicta from *Doran v. Employment Sec. Agency*, 75 Idaho 94, 97, 267 P.2d 628, 630 (1954), establishes that, at a minimum, Keller was required to "act as a reasonably prudent person would in keeping contact with [her] employer." The question then becomes whether the facts of this case support the legal conclusion that Keller did not quit. It is respectfully submitted that this question should be answered in the negative.

It is not reasonably prudent to "no call/no show" for a shift. This is especially true when an employer lets you contact it via telephone or text message. Keller herself admits that she drafted a text message, it just was not sent for some reason. The very fact that Keller took the time to draft a text message shows that she understood she had a duty to keep AmeriTel informed of her attendance.

It is respectfully submitted that the question of law in this case—the interpretation of Idaho Code § 72-1366(5) and whether the Industrial Commission correctly applied the facts to that section—supports overturning the Industrial Commission.

B. Substantial Competent Evidence Does Not Support the Commission's Findings That Keller Voluntarily Quit.

Keller fully analyzed why there is no substantial competent evidence supporting a finding that Keller did not voluntarily quit in her initial brief. The only arguments presented by Keller or the DOL that must be addressed here is the reliance on Keller's June 5, 2017 text message.

The DOL argues that substantial competent evidence exists to find Keller did not voluntarily quit because on June 5, 2017, "Keller texted her supervisor to inform him that she would be coming in to 'discuss her sick leave'" that day. DOL Respondent Brief, p. 10. This argument is a red herring.

What happened after Keller voluntarily left her employment does not and should not matter. Indeed, if the DOL's argument is found to be correct, then any employee in the State of Idaho could miss a shift and then call in the next day to state they had no intention of quitting. This would then put the burden on the employer to prove misconduct. This simply cannot be the law. There should be no "one free" missed shift. The question is and should remain whether an employee voluntarily left his or her employment. What happens afterwards should have no bearing on this question.

It should also be noted again that the Industrial Commission did not set forth the reasons why it found that Keller did not voluntarily quit her employment. The Industrial Commission instead merely declared that the "evidence in this case establishes that" AmeriTel discharged Keller. (R. p. 48.) This begs the question: what evidence establishes this?

Both the DOL and Keller argued at length their belief as to what evidence the Industrial Commission relied upon in finding that Keller did not quit, but both the DOL and Keller are merely speculating. The simple fact is neither Keller, the DOL, AmeriTel, nor this Court knows what evidence the Industrial Commission relied upon to find that Keller did not quit. For this reason, this case should at least be remanded to the Industrial Commission.

C. Substantial Competent Evidence Shows That Keller Was Discharged for Misconduct.

AmeriTel's initial brief fully analyzed this argument as well and it does not need to be restated herein. The few arguments raised by Keller and the DOL, however, must be addressed. It must be remembered that the Industrial Commission focused exclusively on Keller's excessive absences in finding that Keller was not discharged for misconduct. Importantly, both the DOL

and Keller chose to piggyback on the Industrial Commission's findings in relying upon Keller's excessive absences and AmeriTel's leniency with respect to those absences to show why substantial competent evidence supports upholding the Industrial Commission's decision. DOL Respondent Brief, pp. 14-21. However, the Industrial Commission ruling and the DOL and Keller's reliance on that ruling were in error because the factual findings by the Industrial Commission clearly establish that Keller *was not* discharged due to excessive absences.

The Industrial Commission findings of facts set forth that: (1) AmeriTel "maintains a policy requiring an employee to provide notice to the property manager or other designated point-of-contact as soon as possible in the event of an unplanned absence or tardiness"; (2) Keller was a "'no call no show'" on June 4, 2017, her first such instance; and (3) AmeriTel concluded that Keller abandoned her job" because Keller "neither showed for work on June 4, 2017, nor called to report her absence." (R. pp. 46-47.) These findings of fact are patently clear—Keller was terminated due to her "no call/no show." It was simply an error for the Industrial Commission to rely (or even discuss) Keller's excessive absences in its decision when its own findings of fact establish that AmeriTel discharged Keller, if at all, due to her "no call/no show."

It is respectfully submitted that Keller "no calling/no showing" is misconduct. Again, if "no calling/no showing" is not misconduct, then every employee in the state gets one free day off. This simply cannot be the law.

D. Neither Keller Nor the DOL is Entitled to Attorneys' Fees.

Both the DOL and Keller seek attorneys' fees under Idaho Code § 12-117(1) due to their misconception that AmeriTel's appeal is not reasonably based in law or fact. Keller also seeks sanctions under Idaho Appellate Rule 11(a)(2). These requests are meritless.

As discussed above, the very fact that the Industrial Commission did not provide any meaningful analysis as to why it found Keller did not voluntarily quit is by itself sufficient grounds to appeal the ruling. What facts did the Industrial Commission rely upon? AmeriTel certainly does not know, which is crucial in this case because the Industrial Commission essentially ignores Keller's "no call/no show." It is certainly reasonable for AmeriTel to appeal the Industrial Commission's decision given this glaring omission.

The arguments set forth above and in the AmeriTel's initial brief are also well-grounded in fact and law. AmeriTel has a strong interest in knowing what constitutes an employee leaving "his employment voluntarily" under Idaho Code § 72-1366(5). Here, Keller was absent without notification for an entire day. It seems reasonable that this would constitute voluntarily leaving employment under Section 72-1366(5). Additionally, since the Industrial Commission's opinion was almost entirely based upon Keller's excessive absences, which again, had nothing to do with Keller's termination, it was certainly reasonable for AmeriTel to seek guidance from this Court as to whether Keller's "no call/no show" amounted to misconduct.

Finally, the reasonableness of AmeriTel's appeal is also supported in precedent from this very Court.

Keller failed to identify and the DOL failed to discuss controlling precedent from this Court that is directly adverse to Keller and the DOL's requests for attorneys' fees. Indeed, this exact issue was addressed in *Hughen v. Highland Estates*, 137 Idaho 349, 48 P.3d 1238 (2002).

The employee in *Hughen* filed for unemployment compensation, which claim was initially approved. *Id.* at 350, 48 P.3d at 1239. The employer appealed the decision and the Appeals Examiner reversed the approval. *Id.* The Industrial Commission then upheld the Appeals Examiner's ruling, and the employee subsequently appealed. *Id.* This Court then upheld the Industrial Commission, and the employer sought attorneys' fees under Idaho Code § 12-121. *Id.* at 351, 48 P.3d at 1240. In denying attorneys' fees, this Court stated:

> Generally, an award of attorney's fees is appropriate on appeal under § 12-121 when the appeal has been brought or defended frivolously, unreasonably, or without foundation. Because the original appeals examiner ruled in favor of Hughen, it was not frivolous, unreasonable, or without foundation for him to pursue this appeal. We therefore decline to award Highland attorney's fees on appeal.

Id. AmeriTel is in the same position as the employee in *Hughen*.

Keller's claim was originally denied in this case. (Exhibits, pp. 16-21.) Keller (not AmeriTel) then appealed that decision, which was overturned by an Appeals Examiner and affirmed by the Industrial Commission. (R. pp. 1-6, 54.) AmeriTel then appealed to this Court. This procedural history is the exact procedural history that occurred in *Hughen*. Frankly, neither Keller nor the DOL should have asked for attorneys' fees under *Hughen*, and both Keller and the DOL should have cited to and discussed *Hughen* in their briefs.

IV. CONCLUSION

The facts of this case are unique. Keller missed an entire work shift without notifying her employer of her absence. In every conceivable job an un-notified absence for an entire day would be considered either a voluntary quit or a termination for misconduct. Here, however, the Industrial Commission disagreed. The reason for the disagreement was because the Industrial Commission based its decision on Keller's past attendance and not her "no call/no show." The Industrial Commission's reliance on Keller's past attendance was directly in conflict with the Industrial Commission's own finding of fact that AmeriTel treated Keller's "no call/no show" as job abandonment. It is respectfully submitted that when applying Keller's "no call/no show" to the law there is only one proper outcome: Keller either voluntarily quit or was terminated for misconduct. Any other ruling would have a substantial negative impact on employers throughout the State of Idaho. AmeriTel therefore respectfully requests that this Court overturn the Industrial Commission's decision and find that Keller is not entitled to unemployment compensation.

DATED this 28th day of June, 2018.

EBERLE, BERLIN, KADING, TURNBOW
& McKLVEEN, CHARTERED

By:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorneys this 28th day of June, 2018, as indicated below and addressed as follows:

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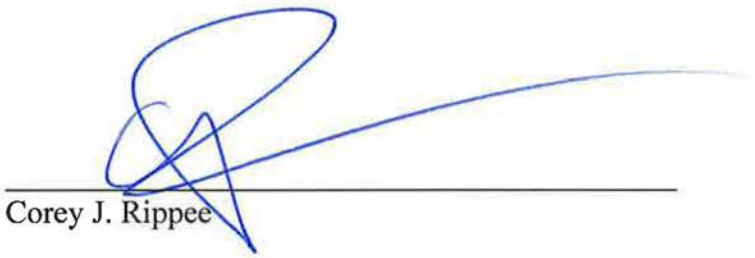

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