

69252-6

69252-6

ORIGINAL

No. 69252-6-1

COURT OF APPEALS, DIVISION I,
FOR THE STATE OF WASHINGTON

JOHN THOMAS,

Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT,
STATE OF WASHINGTON,

Respondent.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 JAN - 8 PM 1: 24

REPLY BRIEF OF APPELLANT

Marc Lampson
Unemployment Law Project
Attorney for Appellant
WSBA # 14998
1904 Fourth Ave., Suite 604
Seattle, WA 98101
206.441.9178

TABLE OF CONTENTS

A.	INTRODUCTION.....	1
B.	STATEMENT OF THE CASE	2
C.	ARGUMENT IN REPLY	4
	1. MR. THOMAS WAS ESSENTIALLY LAID OFF FROM HIS YEAR-ROUND POSITION AND THUS HE WAS ENTITLED TO UNEMPLOYMENT BENEFITS.....	4
	2. PRECISELY BECAUSE MR. THOMAS'S UNEMPLOYMENT IN THE SUMMER OF 2011 WAS <i>NOT PREDICTABLE</i>, WHEN HE FOUND HIMSELF UNEMPLOYED THROUGH NO FAULT OF HIS OWN, HE SHOULD HAVE QUALIFIED FOR UNEMPLOYMENT BENEFITS.	5
D.	CONCLUSION	8

TABLE OF AUTHORITIES

Table of Cases

Washington Cases

Evans v. ESD,
72 Wn. App. 862, 866 P.2d 687 (1994) 4, 5, 7

Statutes

RCW 50.01.010 6

Treatises

Henry Sumner Maine,
Ancient Law 1

A. INTRODUCTION

Mr. Thomas was a “school employee” – a lunchroom manager and custodian - who “worked all year-round” for the Seattle School District in 2008, 2009, 2010, and up until June 2011. CP 6 Comm. Rec. 11-13, 17; CP 6 Comm. Rec. 50-51, Finding of Fact (“FF”) 1-3.¹ In the spring of 2011 he learned that unlike past years, he would not be working during the summer due to budget cuts. CP 6 Comm. Rec. 51, FF 3.

Finding himself unemployed through no fault of his own, he applied for unemployment benefits. The ESD denied benefits because he was an “employee” of an “educational institution” who had “reasonable assurance” of work in the fall. CP 6 Comm. Rec. 34, 51, 65.

One of the first adages that lawyers learn is that “the movement of the progressive societies has hitherto been a movement *from Status to Contract*.”² (emphasis added). The

¹ The “Commissioner’s Record” is the record on review in this case, as it was on review at the Superior Court. That record bears its own pagination. Although appellant’s Designation of Clerk’s Papers designated the Commissioner’s Record as a portion of the file to be sent to this court, the Index to Clerk’s Papers lists the record as “Sub No. 6” and as an attachment. Therefore, references in this brief to the Commissioner’s Record will appear as “CP 6 Comm. Rec. ” followed by the page number as it appears in the Commissioner’s Record itself.

² Henry Sumner Maine, *Ancient Law* available at, e.g., <http://instruct.uwo.ca/anthro/222/maine.htm>

ESD's interpretation of the "reasonable assurance" statutes and the State's defense of that interpretation in this case return Washington unemployment law in this area to one governed by status, and not contract.

Merely because Mr. Thomas had the status of a "school employee" cannot be sufficient reason to deny him benefits when he worked all year every year for three years for the school district until 2011 when he became unemployed due to budget cuts. The State's position is essentially that because Mr. Thomas was a school employee with "reasonable assurance" of employment in the Fall, he was ineligible for unemployment benefits *regardless of his specific circumstances*. This position misinterprets and misapplies the statute.

B. STATEMENT OF THE CASE

The facts are fully set out in Mr. Thomas's opening brief and the State agrees in its brief that the facts "are not in dispute." State's Brief, p. 2.

The State's Statement of the Case, however, underlines Mr. Thomas's argument that he was denied benefits regardless of his specific situation but merely because of his status as a school

employee. The State writes as follows: “[T]he Department denied the application [for benefits] *because Mr. Thomas was a classified school employee who sought benefits during a school break period, though he had a reasonable assurance of returning to work at the beginning of the next academic year.*” State’s Brief, p. 3 (emphasis added).

The school as an institution may have been on a “school break period,” but summer had never been a “break” for Mr. Thomas as an individual employee. The State mistakenly focuses on the status of Mr. Thomas as a school employee – neglecting that for Mr. Thomas, as an individual apart from his status, the job had been a year-round one for the prior three years until he was suddenly and unexpectedly unemployed due to budget cuts, that is, through no fault of his own.

C. ARGUMENT IN REPLY

1. MR. THOMAS WAS ESSENTIALLY LAID OFF FROM HIS YEAR-ROUND POSITION AND THUS HE WAS ENTITLED TO UNEMPLOYMENT BENEFITS.

The State argues that *Evans v. ESD*, 72 Wn. App. 862, 866 P.2d 687 (1994), is distinguishable because the focus in that case was upon the institution and not the individual. But the institution in that case was deemed to be a “year-round” one because the institution continued to function, if in a diminished capacity, all year round. See, *Evans*, 72 Wn. App. at 862. The Court there found that although there were “no specific findings on whether summer is a ‘term’,” the evidence was “suggestive” that summer was an administrative term in part because classes were offered. *Id.*

Similarly, the facts in Mr. Thomas’s case are also “suggestive” that his institution too continued to function, if in a diminished capacity, all year round because he was hired as a groundskeeper and janitor each summer to help insure the institution *did* continue to function year-round – through maintenance and upkeep of the institution.

So whether the focus is on the institution or the individual, Mr. Thomas was employed year-round for an institution that

functioned year-round. Therefore, *Evans* should apply either because the school at which Mr. Thomas worked was a year-round institution as far as he was concerned, or because the reasoning in *Evans* should extend beyond the institution itself to those individuals who are in fact employed “year-round” at the school. Thus, under *Evans* Mr. Thomas was eligible for unemployment benefits.

**2. PRECISELY BECAUSE MR. THOMAS’S
UNEMPLOYMENT IN THE SUMMER OF 2011 WAS
NOT PREDICTABLE, WHEN HE FOUND HIMSELF
UNEMPLOYED THROUGH NO FAULT OF HIS
OWN, HE SHOULD HAVE QUALIFIED FOR
UNEMPLOYMENT BENEFITS.**

Mr. Thomas had worked all year every year for the school district until the summer of 2011. His unemployment was sudden and unexpected and though no fault of his own but through the fault of unexpected budget cuts. Therefore, under the Preamble to the Employment Security Act, which states benefits are for those who are unemployed through no fault of their own, and the Preamble’s mandate for a liberal construction of the statute, Mr. Thomas should have qualified for benefits.

The policy of the Employment Security Act is stated in its Preamble:

The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of **unemployment reserves to be used for the benefit of persons unemployed through no fault of their own**, and that **this title shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum.**

RCW 50.01.010 (emphasis added).

The State argues Mr. Thomas was ineligible because his unemployment was a “predictable” period of unemployment. State’s Brief, p. 15. To the contrary, he was first hired in 2008 and worked all year round in 2008, 2009, and 2010: if anything was “predictable,” it was that he would also work year-round in 2011. Unpredictably, budgets were slashed and he was not given work for all of 2011. Such periods of unexpected unemployment – and “involuntary unemployment” under the terms of the Act’s Preamble - occurring through no fault of the employee are precisely the sorts of periods of unemployment that the statute is intended to cover.

The State’s Brief goes on to try to reduce Mr. Thomas’s argument to absurdity by claiming that if benefits were granted he could continue to claim benefits for every summer “for the indefinite future.” State’s Brief, p. 16. Obviously, though he could predict from his work in 2008, 2009, and 2010 that he would work in 2011,

after 2011 no such predictability would exist and he could not claim benefits based on “year-round” employment that had reverted to something less.

The State’s Brief in its Argument Section C argues that Mr. Thomas’s benefits claim somehow “raises questions relating to other aspects of Washington’s employment security law,” specifically regarding the able and available requirements. State’s Brief, p. 17. This difficult argument seems to say that if Mr. Thomas were granted benefits for the summer of 2011 his availability for fall employment would be jeopardized because his was a “full-time, permanent position during the school year” and therefore he “is not truly ‘available’ to accept permanent work during the summer break.” State’s Brief, p. 18. Though the meaning of this remains uncertain, the evidence shows that Mr. Thomas’s work during the summers of 2008, 2009, and 2010, never interfered with his work in the fall.

Finally, the State’s Brief argues that its position is consistent with case law from other jurisdictions. State’s Brief, pgs. 19-20. But Minnesota decisions made in the absence of decisions such as Washington’s *Evans* decision, which holds that the year-round

nature of the employment changes the analysis for eligibility, are not relevant to the analysis here.

D. CONCLUSION

Because Mr. Thomas was employed for the entire year by the employer he was entitled to unemployment benefits when the employer laid him off in the summer of 2011. Therefore, Mr. Thomas respectfully requests that this Court reverse the Commissioner's Order in this case and find that he was entitled to unemployment benefits.

The petitioner also respectfully requests that upon reversal of the Commissioner's Order in this case, attorney fees and costs be awarded as mandated by statute.

Dated this 7th day of January 2013.

Respectfully submitted,



Marc Lampson
Attorney for Appellant
WSBA # 14998
1904 Fourth Ave., Suite 604
Seattle, WA 98101
206.441.9178

