

No. 20-194

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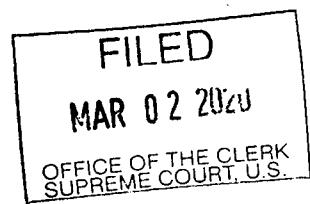
SUPREME COURT OF THE UNITED STATES

FRANKLIN COX, *Petitioner*

v.

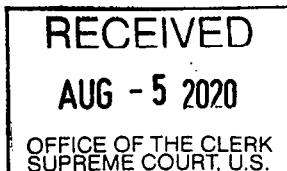
TEXAS WORKFORCE COMMISSION
AND LINCOLN TECHNICAL, *Respondent*

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Texas



PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Will the employee have a duty to defend employer tax audit for unemployment joined as employer in the above reference cause?
2. Under Tex. Lab. Code 207.044 Misconduct neglect that jeopardizes the life or property of another does the legal standard- vicarious liability- an employer can be held liable for its employee degree of careless as to evidence a disregard of the consequence, an whether manifested through action or inaction apply in the above reference cause?
3. How can the substantial evidence rule be properly applied when no date in the record that misconduct occurred on to satisfy the first prongs of misconduct and second prongs discharge close in time to termination?
4. Did supervisor cause employee to abandoned job assignment, refusal of job assignment, or delay performance of job assignment?
5. Within the scope of employer's business or related to employer's equipment what confidential and proprietary information was disclosed to employee including training on a task -task basis for assignment?
6. Is Affirmative Defense of Impracticability or Impossibility of Performance with summary evidence sufficient to raise an issue of fact on each element to preclude summary judgment is applicable to above reference cause?
See Brownlee v. Brownlee, 665 S. W. 2d 111, 112 (Tex. 1984).

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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All parties do not appear in the caption of the cover page.

UCAC INC See(CR 194; App J-
1201 Richardson Dr., Ste. 110 CR 195; App I).
Richardson, Texas 75080

Cox v. TWC & Lincoln Technical No. DC-17-012
61, U.S. District Court of Dallas. Judgment entered Nov. 3, 2017.

Cox v. TWC & Lincoln Technical No. 05-17-031-
31-CV U.S. Court of Appeals for the Fifth District at Dallas. Judgment entered May 10, 2019.

Cox v. TWC & Lincoln Technical No.19-0443
Supreme Court of Texas petition for review denied October 4, 2019.

Cox v. TWC & Lincoln Technical No. 19-0443
Supreme Court of Texas motion for rehearing denied December 6, 2019.

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Judicial review of an administrative decision regarding a former employee's right to employment benefits requires a trial de novo with substantial evidence review. Tex. Lab. Code 212.202; *Merger v. Ross*, 701 S.W.2d 830, 831 (Tex. 1986). The document which the Dallas Fifth Court of Appeals refused to consider demonstrate the existence of fact issues that should preclude summary judgment.

This Court has emphasized repeatedly that the Rules of Appellate Procedure recognize a strong policy preference in Texas that appeals are to be resolved on the merits whenever possible. See, *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 896 (Tex. 2018).

Cox deserves appellate review on the merits to determine whether the trial court erred in rendering summary judgment against him for misconduct connect with work. The Court of appeals erred by failing to reach the merits of Cox arguments on appeal.

1. Will the employee have a duty to defend employer tax audit for unemployment joined as employer in the above reference cause? Texas Labor Code under section 212.201 (a) states that a party aggrieved by a final decision of the TWC may obtain judicial review of

the decision by bringing a suit for review against the TWC not later than the fourteenth day after the decision becomes final. Subsection (b) states that “[e]ach other party to the proceeding before the commission must be made a defendant in an action under this chapter.” On Cox letter of right to sue UCAC INC with business address was listed as employer, Lincoln Technical above UCAC INC (CR 113 ; App H). *See Stoker's v. TWC Commissioners* (2013). No. 05-00086-CV by the statute, which included mandatory defendants, had to be brought within the limitation period to confer jurisdiction on the trial court. TWC and Lincoln Technical were the mandatory defendants, UCAC the necessary defendant should not be under the jurisdictional prerequisite for suit against the government with the limitation period. Once the limitation period expires the necessary defendant can be dismiss. See Declaration of UCAC, INC, and Motion to Dismiss UCAC, INC (CR 195 ; App I). Also See Memorandum of UCAC, INC (CR 194; App J). Cox does not put UCAC, INC in front of this above reference cause. UCAC, INC is not Cox employer.

2. Under Tex. Lab Code 207.044 Misconduct neglect that jeopardizes the life or property of another does the legal standard - vicarious liability - an employer can be held liable for its employee degree of careless-

ness as to evidence a disregard of the consequence , an whether manifested through action or inaction apply in the above reference cause? Generally, an employer is vicariously liable for the torts of his employees committed in the course and scope of their employment. *See GTE Sw., Inc v. Bruce*, 998 S. W. 2d 605, 617 (Tex. 1999). The test is whether the employee was acting within the scope of employment , not whether the employer authorized the specific act. *See Farmer Enters., Inc v. Gulf States Ins. Co.*, 940 Sh. W. 2d 103, 111 (Tex. App.-Dallas 1996, no writ). An employer is liable “when the tortious act falls within the scope of the employee’s general authority in furtherance of the employer’s of employer’s business and for the accomplishment of the object for which the employee was hired.” *Minyard Food Stores, Inc v. Goodman*, 80 S. W. 3d 573, 577 (Tex. 2002); see also *G.T. Mgmt., Inc v. Gonzalez*, 106 S. W. 3d 880, 884 (Tex.-Dallas 2003, no pet.)(employer liable for act of employee even if act contrary to express orders, if done within general authority of employee). The employee’s acts must be of the same general nature as the conduct authorized or incidental to authorized conduct to be within the scope of employment. *Goodyear Tire & Rubber Co. v. Mayes* , 236 S.W. 3d 754, 757 (Tex. 2007). Cox was hired at Lincoln Technical as a tool room attendant in the

furtherance of the employer's business, Cox essential duties and responsibilities "Perform" duties and responsibilities as assigned. Advise the supervisor of needed materials. We are teaching student to become certified welder See (CR 13 - 14; Exhibit 1).

3. How can the substantial evidence rule be properly applied when no date in the record that misconduct occurred on to satisfy the first pongs of misconduct and second pongs discharge close in time to termination? Cox directs the Court to Brief of Appellant page 17 line 13 , "evidence missing from the record no date of misconduct close in time to termination as in *Saavedra v. Texas Workforce Commission* No. 09-12-00567-CV." Date of misconduct May 26, 2010, date of discharge June 10, 2010. In the above reference cause no date of misconduct to satisfy the first pongs to trigger the denial of unemployment benefits Tex. Labor Code 201. 012. *Collingsworth Gen. Hosp. v. Hunnicutt*, 988 S. W. 2d 706, 709 (Tex. 1998). And does not fit within statutory definition. Cox was performing the object for which Cox was hired and was within the scope of employment.

4. Did supervisor cause employee to abandoned job assignment, refusal of job assignment, or delay performance of job assignment.

When the reason for the discharge is neglect that endangers property of the employer, the neglect must be intentional or must show such carelessness that it indicates a disregard for the consequences. Mere failure to perform the task to the satisfaction of the employer, without more, does not constitute misconduct which disqualifies an employee from benefits.

The purpose of the statute is to provide benefits for the unemployed and as such it is to be construed liberally in favor of the award of benefits. See Meggs v. Texas Unemployment Compensation Comm'n, 234 S.W. 2d 453. The Court of Appeals opinion page 8 line 8, "then in January 20-16, Cox was given a specific list of task to complete and a deadline for completing them." The Court failed to realize Mr. Calverley was not supervisor, with clean hands Cox was never in a position of mismanagement Cox is working under the am shift education supervisor which is Mr. Calerley, and the pm education supervisor is Mr. Jenkins, Cox work the am shift, if Cox needed any material for a task he has to advise am supervisor which would be Mr. Calverley.

On highest priority, extended the deadline, specific warning, he had other daily task that interfered with completing the Argon leaks. At the time Cox was working in the course and scope of his employment. Cox does not why it took Mr. Calverley months to get plugs and thread seal tape or why he did not have January 23, 2016

for Saturday work when no student are in the lab. The Court may concluded that Cox was acting within the course and scope of his employment and that Lincoln and TWC was not entitled to a summary judgment on this issue. Mr. Calverley has proper maintenance that define and describe Cox work duties nothing in the record points to whether Cox deviated from his duties.

5. Within the scope of employer's business or related to employer's equipment what confidential and proprietary information was disclosed to employee including training on a task-task basic for assignment?
Second assignment "Mr. Hughes asked you to have all machine sorted, inspected, and tagged within 10 days, and send repairable machines to Airgas for repair." See (App: D) (photo of V 350 without attachment).Mr. Calverley testified in by affidavit " I am a custodian of records for Lincoln Technical." As custodian of records Rick Calverley should have knowledge of person or who is duly authorized to call Airgas and schedule pick up of equipment for repair, sign repair order and approve repair of said equipment Cox is not authorized to do shipping from Lincoln to Airgas to have machine repaired. No confidential and proprietary information was disclosed to Cox including training to complete this assignment. All machine that ready for load test from update of progress See Petitioner's Affidavit in support of a Writ of Certiorari item No. 13 line 7

(Total 20 V-350). Units to be sent to Airgas Row C 11 units.

6. Is Affirmative Defense of Impracticability or Impossibility of Performance with summary evidence sufficient to raise an issue of fact on each element to preclude summary judgement is applicable to above reference cause See *Brownlee v. Brownlee*, 665 S.W, 2d 111, 112 (Tex 1984)? Cox raises a genuine issue of material fact to defeat motion for summary judgment. Cox performance is made impracticable, Mr. Calverley has control over the performance of two assignment given to Cox leaks in Argon in Tig section and welding machine in ramp room. A true and correct copy attached within Exhibit 1 to Affidavit in support of a Writ of Certiorari.

Utilizing the record to point out deficiencies as to matters upon which Appeals Court misapplied the rule of law:

1. Mr. Calverley email I can not give you plugs 1/25/16 (CR 134; App L) received in May 2016.
2. Cox request more thread seal tape no response 1/29/16(CR 135; App M)(CR 67 line 17).
3. Failed to provide a safe time in welding lab to perform task on Saturday no student in lab.

4. Had actual knowledge of the condition and failed to adequately warn.
5. Assignment of welding machine in ramp room could not complete confidential and proprietary information was not disclosed to Cox including training to complete this assignment. Regular assignment that are recurring were delayed.

Mr. Calverley intended to cause an adverse employment action, that act was the proximate cause of the ultimate employment action Cox was fired June 28, 2016.

Employees are generally understood as those who work "in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance." Black Law Dictionary, at 639.

Cox seeks relief 10 weeks unemployment back pay 6/26/2016 thru 9/11/2016, costs of court.(CR 57).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted



Date: July 7, 2020