

Colorado
**THE DISTRICT COURT
CITY AND COUNTY OF DENVER**

December 15, 1961

**TIDMARSH, Jr., V. THE INDUSTRIAL COMMISSION OF THE STATE OF
COLORADO AND FRONTIER AIRLINES, INC.**

This case was heard on November 6, 1961, and at the conclusion of the hearing the Court took the matter under advisement, and this Court, having since reviewed the record and considering the law, now believes itself to be fully advised, and Finds:

That the review decision made by defendant Commission on July 14, 1961, should be affirmed; therefore, It Is The Judgment And Order Of This court that the review decision made by defendant Commission, be and hereby is affirmed.

It Is Further Ordered that, by stipulation of all parties, motion for new trial be and hereby is dispensed with.

Dated this 15th day of December, 1961.

By The Court:
/s/ HENRY E. SANTO
Judge

Memorandum Opinion

This is a proceeding to review a decision of the Industrial Commission wherein the plaintiff was disqualified from receiving unemployment compensation benefits for a period of fifteen weeks under the provisions of C.R.S. 1953,82-4-9 (1) (c).

The plaintiff had been employed by Frontier Airlines and the Commission found he was discharged when he walked off his job as co-pilot of a scheduled flight just prior to departure time. The Commission denied benefits for the fifteen-week period on the grounds that plaintiff was discharged for gross misconduct consisting of willful neglect of his employer's interest.

The evidence as disclosed by the record is without substantial conflict and may be summarized as follows:

Plaintiff at the time of the incident in question had been employed as a co-pilot by the Frontier Airlines for approximately two years. Before employment by Frontier he had flown as co-pilot for Pan American in New York for three years.

At Frontier personnel are assigned to scheduled flights on a calendar-month basis, the list being posted two or three days before the beginning of the month. The normal procedure is for the co-pilot to report for his scheduled trip one hour ahead of departure time, at which point he is directly responsible to the pilot (captain) who is in command of the flight. Upon reporting it is then the duty of the co-pilot to make out the flight plan.

After the pilot and co-pilot board the plane and prior to departure time, the standard operating procedure is to go over a check list, the pilot directing certain inquiries to the co-pilot pertaining to operation of the airplane, and there follows a discussion of the flight plan.

The plaintiff was assigned as co-pilot on flight 5, a passenger-carrying flight, scheduled to depart Denver at 1445 hours on January 18, 1961. Plaintiff had on previous occasions flown approximately 10 or 12 trips with the pilot assigned to Flight 5, one such flight having occurred on December 21, 1960 at which time there was a near-miss collision with another aircraft in Wyoming.

After the near miss the plaintiff and his pilot discussed the incident and the pilot decided he would put the matter in the company's hands by making a brief report. This did not meet with plaintiff's approval and on January 3, 1961, he talked to the FAA for two hours about the occurrence although he made no formal report to that agency. Plaintiff contends that because he talked with the FAA the pilot made uncommunicated threats that he was going to ride and harass plaintiff and have him kicked out of the union.

On January 18, 1961, a day of inclement weather, the plaintiff reported to the pilot as normal, and both parties, after preliminary matters, boarded the plane assigned to Flight 5. After both took their places in the cockpit seats they proceeded to go over the check list. While so engaged, the pilot, as part of the routine questioning, asked the plaintiff to explain the correct setting for maximum heat on the plane under the item "Heat Control," important in view of the

weather. At this point the plaintiff stated. "I have nothing to say." to which the pilot replied, "This is not a personal question but one which pertains to the operation of the trip." When the plaintiff still did not reply the pilot asked him to continue with the rest of the check list, plaintiff complying with this request.

The pilot then began discussing the flight plan with the plaintiff and inquired concerning altitude points on the flight. The plaintiff said he had filed for certain altitude points because that was the way others were doing it. This prompted the pilot to say, "As long as this is my trip we are going to operate it exactly by the book; I don't care what anyone else does or does not do. I am the captain of the flight and it will be operated exactly as I direct." The plaintiff made no reply to this statement of the pilot for about a minute, then said, "Call dispatch and get another co-pilot." He then left the plane and, without reporting to anybody at the company, went home.

At the time the plaintiff left the plane the motors were ready to be started and the passengers were boarded or boarding. It was necessary to delay the flight thirteen minutes in order to obtain another co-pilot.

Approximately three or four hours after the plaintiff arrived home, he called the company asking to be put on sick leave although he was not in fact ill. The company discharged the plaintiff on the grounds of insubordination, refusal to fly, and refusal to fly as scheduled. Later the plaintiff requested and was granted a hearing with the company in regard to his dismissal, at which he explained his actions by stating that he was being harassed by the pilot. Plaintiff's termination was then processed and he made no further formal claim for sick leave.

A hearing was held before a referee of the Department of Employment, at which the plaintiff appeared in person and Frontier was represented by its director of flight operations. The flight director there testified that to his own knowledge in fifteen years of operation this was the first time an employee had walked off a scheduled flight.

When the plaintiff testified he did not contradict any of the events summarized above, but in fact admitted that was precisely what happened. In explanation he maintained his actions were the indirect result of the near-miss collision, having led to his harassment by the pilot. However, the plaintiff testified the pilot did not threaten him or indicate he did not want the plaintiff on his flight, but he stated the pilot had never talked like that to him before. When asked the nature of the harassment he complained of, the plaintiff stated only that when flying with another captain (not the pilot of Flight 5) he did not speak to the plaintiff on three trips, and on the third trip he was not allowed to touch the controls, although plaintiff admitted that was proper under the captain's authority.

The Commission's findings of fact adequately set forth the evidence as above recited. Based thereon, the Commission concluded that the plaintiff's acts constituted misconduct involving willful neglect of his employer's interest and that these acts were the grounds of his discharge.

All parties agree the case poses but one question, to wit: On the record as made and as a matter of law, do the acts of the plaintiff constitute gross misconduct consisting of willful neglect of his employer's interest?

The question must be answered in the affirmative. Obviously no hard and fast rule can be made to cover every situation. When viewed in light of the foregoing definitions, the important element to be considered is the nature of the misconduct and how seriously it affects the employee-employer relationship.

In the Court's opinion the conduct of the plaintiff constitutes gross misconduct consisting of a willful neglect of his employer's interests, within the meaning of the Statute and under the definition heretofore enunciated. Plaintiff, by his conduct, demonstrated a total lack of regard for his duties and obligations to his employer. His action at the time and subsequent thereto, together with his attempted explanations, leads inescapably to the conclusion that through wrongful intent and evil design he sought to and did precipitate a situation detrimental to his employer's interests. His action was a deliberate and perverse violation of the employer's rules, showing a complete disregard of the standards of behavior to be expected by an employer of an employee in the plaintiff's position.

The action of the plaintiff when viewed in its entirety is certainly as onerous as drunkenness on the job or assault and battery on the employer or fellow worker, which acts, among others, are spelled out in the Statute as gross misconduct of such culpability as to call for the imposition of the more stringent penalties.

The decision of the Industrial Commission is affirmed..

Done in chambers this 15th day of December, 1961

By The Court:
/s/ Henry E. Santo
Judge