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EMPLOYEE'S MISCONDUCT AS A BAR TO UNEMPLOYMENT COMPENSATION

Employers' contributions to unemployment compensation funds are generally based on an experience rating system whereby the employer who provides steady employment is charged a lower rate than an employer who has an erratic employment record.[1] In this way employers are induced to keep unemployment at a minimum. At the same time, to insure good business practices, the employer should be able to discharge an employee whose conduct is detrimental to the employer's business without having his merit rating adversely affected. Consequently, employers have an interest in seeing that an employee discharged for misconduct connected with his work is precluded from obtaining unemployment compensation benefits.

In the recent case of *Gregory v. Anderson*[2] the employee was discharged for violation of a pre-existing employment agreement that the employee was not to drink alcoholic beverages either on or off the job.[3] Since the employer's business was the servicing of vending machines in taverns and restaurants both the place and time of employment provided strong temptation for employees to drink while working. The employer found it most practical to deal with the problem by inserting a provision in the employment contract prohibiting drinking both on and off the job. Actually, because of the nature of his business the employer had found it difficult to obtain automobile insurance for his business vehicles. An insurance agent, impressed with the fact that the employer enforced the rule prohibiting drinking on the part of his employees, persuaded one of the insurance companies he represented to insure the employer's vehicles.

The employee had been warned once by the employer for drink-

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[1]The objectives of experience rating in unemployment compensation may be stated as: firstly, the prevention of unemployment by inducing employers to stabilize their operations; and secondly, the allocation of the social costs of unemployment to the individual business concerns responsible for those costs. A sound unemployment compensation system "must include both an attempt to reduce the hazard [of unemployment] to its smallest possible proportions, and provision for compensating the unemployment that remains." Brandeis, Elizabeth, The Employer Reserve Type of Unemployment Compensation Law, 3 Law & Contemp. Prob. 54, 56 (1936).

[2]14 Wis.2d 130, 109 N.W.2d 675 (1961).

[3]The employee addressed a letter to the employer: "This letter is to confirm our verbal conversation.... Please be assured that I agree to work for you and that while in your employment I will not drink alcoholic beverages or beer, either on the job or off the job. I understand ... that it is in strict violation to your agreement with your Insurance Company who insures you on your cars and trucks for personal liability." Id. at 677.

ing while off-duty, after being arrested, although not convicted, for drunk driving. Subsequently, the employee was injured in an accident resulting from off-duty drinking and this time the employer discharged him. The Wisconsin Industrial Commission awarded the discharged employee unemployment compensation. The employer appealed to the courts claiming that compensation was barred by the statutory provision that "an employe's eligibility . . . shall be barred for any week of unemployment completed after he has been discharged by the employing unit for misconduct connected with his work."[4] The trial court set aside the award and the Industrial Commission appealed.

The Supreme Court of Wisconsin in a four-to-three decision affirmed the judgment, holding that a breach of a company rule in an employment contract prohibiting off-duty drinking by truck drivers would bar unemployment compensation benefits under the Wisconsin Unemployment Compensation statute.

In determining what constitutes misconduct the majority of the court said that the standard is whether the employee has deliberately disregarded a rule of employment that has a reasonable relationship to the employer's business. It found that the rule prohibiting drinking was reasonable and bore a reasonable relationship to the employer's interests so that the employee's violation was misconduct within the meaning of the statute.

Two dissenting judges would have accepted the Commission's contrary findings of fact on this issue. Another dissenting judge also relied heavily on the Commission's findings and stated further that there was "no evidence that the [insurance company] required such a rule or adherence thereto as a condition precedent to issuing or continuing its insurance coverage."[5] He said that the insurance coverage only applied to business vehicles while being used on company business, and thus, the risk which was being insured against could not have been affected by the employee's off-duty drinking.[6]

A determination that an employee has been discharged for misconduct connected with his work involves four distinct findings: (1) that the claimant did the act alleged; (2) that the claimant was discharged; (3) that the act was the reason for discharge; and, (4) that the act was misconduct connected with the work.[7] The court in the instant case was primarily concerned with the fourth point.

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[4]Wis. Stat. § 108.04(5) (1959).

[5]109 N.W.2d at 682.

[6]Ibid.

[7]Kempfer, Disqualifications for Voluntary Leaving and Misconduct, 55 Yale L.J. 147, 160 (1955).

In the absence of contractual or statutory prohibitions the employer can establish any rules and regulations that he may deem expedient and advisable relating to the employment.[8] He may incorporate such rules and regulations directly into the employment contract.

Nevertheless, there is a vast distinction between conduct that justifies discharge of an employee and conduct that disqualifies the employee for the statutory unemployment compensation benefits.[9]

The statute says that an employee will be barred from benefits if he has been discharged for misconduct connected with his work.[10] It would be inconsistent with the policy of unemployment compensation laws to permit an employer to connect any behavior with the employment merely by obtaining an express promise from the employee not to engage in that type of behavior.[11] The employment contract, as such, has little effect on the determination of whether specific conduct covered in the contract is connected with the business. The essential question is whether an objective factual determination shows the conduct, which results in discharge from employment, is "connected with the business."

A Florida unemployment compensation commission proceeding[12] is illustrative of misconduct that justifies discharge from employment, but does not disqualify for unemployment compensation benefits. An inspector in a plant making airplane parts falsified questionnaires and applications for gas rationing. The employer argued that the misrepresentations were misconduct connected with the work as they related to the employee's fitness as a suitable worker. This theory was found unsound by the Florida Board of Review, which stated that suitability is not a good test of connection with the work. It is a vague term much broader in meaning than "connected with the work."[13]

The misconduct that disqualifies for unemployment compensation is that which jeopardizes an essential business interest of the employer.[14] The courts define the "employer's business interests" rather strictly. Thus where a cab driver left his cab unattended and checked in

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[8]Robinson v. Brown, 129 So. 2d 45, 46 (La. Ct. App. 1961).

[9]Ibid.

[10]See note 4 supra.

[11]Kempfer note 7 supra, at 163.

[12]Ben. Ser. 7900-Fla. A. (V6-4).

[13]Ibid.

[14]Allison v. Unemployment Comp. Bd. of Rev., 193 Pa. Super. 370, 165 A.2d 125, 126 (1960); Seaton v. Unemployment Comp. Bd. of Rev., 192 Pa. Super. 398, 161 A.2d 926, 927 (1960); Sewell v. Sharp, 102 So. 2d 259, 261 (La. Ct. App. 1958).

"short" in violation of a company rule, the driver was allowed unemployment compensation; while inefficiency had been established, misconduct had not.[15] And where the driver had several accidents the courts held there was no misconduct connected with the work as there was no disregard of the employer's interest.[16] An employee who is discharged for failure to apply for citizenship papers in accordance with conditions set by the employer is not disqualified.[17] A woman who marries knowing that her employer does not hire married women is not disqualified for misconduct.[18] And an employee who is discharged because he reaches the retiring age set by the employer[19] is not disqualified.

Off-duty drinking does not usually warrant a denial of unemployment compensation. The South Carolina Industrial Commission has awarded unemployment compensation where the employee was discharged for off-duty drinking. This law, the Commission said, was not intended to supplement the criminal statutes or regulate morals.[20] Similarly, the North Carolina Unemployment Compensation Commission has said that off-duty drinking was not misconduct within the intendment of the Unemployment Compensation Act so as to disqualify the discharged employee from the benefits.[21]

In determining an issue concerned with an unemployment compensation statute it is quite evident that the purpose of the statute is to cushion the effect of unemployment by a series of payments.[22] However, the act is not intended to benefit persons who by their own misconduct bring about their own unemployment.

The concept of misconduct in connection with the work can be

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[15]Boynton Cab Co. v. Schroeder, 237 Wis. 264, 296 N.W. 642 (1941).

[16]Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941). In this case, the driver had also failed properly to report two accidents in accordance with the employer's rules.

[17]See Ohio Ref. Dec. 808-Ref-42, May 1, 1942, CCH Unemployment Ins. Serv.-Ohio ¶ 1970.016.

[18]Ben. Ser. 492-Wis. A(VI-4); Ben. Ser. 2615-Mo. A (V3-1); Ben. Ser. 2623-Ohio A (V3-1).

[19]Ben. Ser. 3669-Mo. A (V3-6).

[20]Ben. Ser. 1985-S.C. A (V2-9). The South Carolina Statute which is similar to the Wisconsin Statute states: "Any individual shall be ineligible for benefits.... For the week in which he has been discharged for misconduct connected with his most recent work, if so found by the Commission...." S.C. Code § 68-11(a) (1952).

[21]Ben. Ser. 3685-N.C. V(3-6). The North Carolina Statute which is similar to the Wisconsin Statute states: "An individual shall be disqualified for benefits.... if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work...." N.C. Gen. Stat. § 96-14(a) (1958).

[22]Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636, 639 (1941).