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Unemployment Compensation Upon Mandatory Retirement

be confronted by the private litigant with matters that were not litigated by the Government and, because of the passage of perhaps 10 to 15 years the defendant may find it impossible to obtain evidence to defend against the claim. Also, since under *Leh* the statute is probably tolled even against defendants not named in the Government suit, some defendants in private suits may be faced with a wholly unanticipated suit with all of the resultant evidence-acquisition problems, years after the occurrence of the matters complained of.

A much more just and less confusing procedure would be for the private plaintiff to file a timely claim, then have a right to continuance until the Government suit has been completed. This procedure would still enable the private litigant to make full use of the Government suit, but would be more equitable, since defendants would have notice of the pending suit against them and could within the time which the statute of limitations indicates is the outermost limit of fairness begin obtaining evidence.

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UNEMPLOYMENT COMPENSATION UPON MANDATORY RETIREMENT

The purpose of unemployment compensation is to provide for the systematic accumulation of funds during periods of employment from which temporary benefits may be paid during periods of unemployment. Unemployment compensation thus helps the employee to obtain another job by temporarily maintaining his purchasing power. With this assistance a claimant can remain in the labor market until he finds work comparable to his previous job.[1] The unemployment compensation system is tied into a nationwide system of publicly run employment offices which help to reduce the volume of unemployment.[2]

[1]Fla. Stat. Ann. § 443.02 (1952).

[2]The Wagner-Peyser Act, 29 U.S.C.A. §§ 49-49(l) establishes the United States Employment Service. 26 U.S.C.A. § 3301 (Supp. 1966) provides for a maximum tax on the employer of 3.13% of each covered employee's total wages, as defined in 26 U.S.C.A. § 3306(b), as the means of financing this service. Various credits are available to employers to reduce this tax liability, among them the allowance of a credit of up to 90% of the tax otherwise due. The employer must thus pay at least 10% of the tax (.31% of the taxable wages), and this amount is used to defray the administrative expenses of the entire system. 26 U.S.C.A. § 3302. Each state unemployment compensation system receives necessary appropriations from the .31% and the remaining amount is paid into the individual state benefit fund.

To qualify for appropriations a state unemployment compensation agency

Eligibility for unemployment compensation requires that the claimant be unemployed through other than his own fault or design, that he be capable of work, and that he be actively seeking suitable employment. If such a claimant is unable to obtain employment and the required waiting period, usually a week, has elapsed since his application for unemployment compensation, he is entitled to receive monetary benefits. Of course, a claimant cannot refuse to accept an offer of suitable work without good cause and still receive monetary benefits.

Unemployment compensation is available to the claimant only for a limited period after termination of his previous employment[3] and may not be waived or assigned and is exempt from execution and attachment by creditors.[4] Since unemployment compensation is premised upon the employee's leaving his employment through some fault of his employer,[5] it is paid to a claimant entirely from money

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must be vested with all powers necessary to cooperate with the United States Employment Service and to adopt certain provisions of the Act, 29 U.S.C.A. § 49(c), certified by the Secretary of Labor as conforming to the Act. 26 U.S.C.A. § 3304. Individual state acts provide that an application for unemployment compensation benefits is also an application for suitable employment, and the state agencies serve as job clearing houses for employer and employee.

[3]Fla. Stat. Ann. § 443.04(4) (1952); Ohio Rev. Code Ann. § 4141.30 (Baldwin 1964).

[4] No agreement by an employee to waive his right to benefits is valid, nor shall benefits be assigned, released, or commuted. Such benefits are exempt from all claims of creditors and from levy, execution, garnishment, attachment, and all other process or remedy for recovery or collection of a debt, which exemption may not be waived. Ohio Rev. Code Ann. § 4141.32 (Baldwin 1964). See also Fla. Stat. Ann. § 443.16 (1952).

[5]The dismissal of an employee pursuant to the terms of a collective bargaining agreement has been held a voluntary leaving without good cause attributable to the employer; thus the employee is not within the statutory terms under which unemployment compensation is payable. For example:

(a) refusal to join labor organizations with which the employer had a closed or union-shop agreement, *In Re* Malaspina, 285 App. Div. 564, 139 N.Y.S.2d 521 (1955), *aff'd*, 309 N.Y. 413, 131 N.E.2d 709 (1956);

(b) refsual to pay union dues and thus remain in good standing with the union as required under the contract, O'Donnell v. Unemployment Comp. Bd., 173 Pa. Super. 263, 98 A.2d 406 (1953);

(c) marriage, after which the contract requires discharge, Means v. Unemployment Comp. Bd., 177 Pa. Super. 410, 110 A.2d 886 (1955);

(d) pregnancy, requiring discharge under terms of the contract, Rzepski v. Unemployment Comp. Bd., 182 Pa. Super. 16, 124 A.2d 651 (1956);

(e) refusal of a contract-permitted transfer or downgrading which involves lower pay or less favorable hours (with retention of seniority), *In re* Gerdano, 2 App. Div. 2d 88, 153 N.Y.S.2d 924 (1956); Roberts v. Chain Belt Co., 2 Wis. 2d 399, 86 N.W.2d 406 (1957). See Annot., 90 A.L.R.2d 835 (1963) where "termination of employment as a result of union action or pursuant to union contract as 'voluntary' for purposes of unemployment compensation benefits" is dealt with.

the discharging employer has paid into a general fund.[6] The contribution rates for the employer are therefore based upon his past experience in causing employees to be eligible for benefits.[7]

The requirement of employer-fault raises the question whether an employee who, pursuant to his employment contract, is mandatorily retired with a pension paid in part or exclusively by his employer may also receive unemployment compensation. It is probable that in the negotiation of such an employment contract, frequently a collective bargaining agreement, a claim for unemployment compensation upon mandatory retirement is not contemplated by either party. Payment of both the pension and unemployment compensation introduces a double financial burden upon the employer. Nonpayment of unemployment compensation introduces the possibility of a mandatorily retired employee's loss of his anticipated right to unemployment compensation with the consequential hardship of being placed at a disadvantage in the search for employment. Equitable resolution of this problem requires considering the interaction of unemployment compensation, pensions, social security, and the welfare role of the state and federal governments.

In determining whether such an employee may receive both benefits, courts have reached opposite conclusions. Florida[8] has held that the mandatorily retired employee who, pursuant to his employment contract, is receiving a pension may also receive unemployment compensation; but Ohio[9] has reached the opposite result.

Marcum v. Ohio Match Co.[10] denied unemployment compensation to an employee retired pursuant to a collective bargaining agreement providing for a pension upon mandatory retirement. To deny the claimant compensation, the court had to find, in the words of the applicable statute, that the claimant had "quit his work without just cause or . . . been discharged for just cause in connection with his work. . . ." [11] *Marcum*, in upholding the result reached by the Ohio Bureau of Unemployment Compensation, differed with the Bureau's

[6]"[C]ontributions become due and shall be paid by each employer to the bureau of unemployment compensation for the unemployment compensation fund in accordance with such regulations as the administrator of the bureau of unemployment compensation prescribes, and shall not be deducted, in whole or in part, from the remuneration of individuals in his employ." Ohio Rev. Code Ann. § 4141.23 (Baldwin 1964); See also Fla. Stat. Ann. § 443.08 (1952).

[7]Fla. Stat. Ann. § 443.08(3) (1952).

[8]St. Joe Paper Co. v. Gautreaux, 180 So. 2d 668 (Dist. Ct. App. Fla. 1965).

[9]Marcum v. Ohio Match Co., 4 Ohio App. 2d 95, 212 N.E.2d 425 (1965).

[10]*Ibid.*

[11]Ohio Rev. Code Ann. § 4141.29(D)(2)(a) (Baldwin 1964).

holding that this was a quit without cause[12] and held that the employee's mandatory retirement was a discharge for just cause in connection with his work.[13] The court used claimant's compulsory union membership and consequent representation by the bargaining agent as a novel basis for holding that acceptance of a pension as a benefit of the employment contract required acceptance of mandatory retirement as a burden of the contract. The court therefore held that mandatory retirement is a discharge for just cause.[14]

From the employer's viewpoint, this result is satisfactory since it leaves him with only the burden of the pension which he had contracted to bear. Since unemployment compensation is not due, the employer does not bear the additional burden of a rise in unemployment compensation rates. From the employee's viewpoint, this decision is inequitable and violates the spirit of unemployment compensation to the extent that pension payments are less than unemployment compensation benefits. To the extent of this deficit, the employee is deprived of the opportunity to compete in the labor market on a relatively equal footing with other unemployed workers.[15] There is little reason to exclude a covered employee from unemployment compensation solely on the ground that he is old[16] or that his employment contract implies that he wishes to be retired when actuallly he is an able worker who desires to continue his employment.[17] To hold that a mandatory retirement is a voluntary leaving can be done only by holding that the making of the contract of employment providing for mandatory retirement is itself voluntary. However, this

[12]Marcum v. Ohio Match Co., *supra* note 9, at 426.

[13]*Id.* at 427-28.

[14]*Ibid.* The statutory reduction in unemployment compensation benefits in the event that retirement pay is received, Ohio Rev. Code Ann. § 4141.31 (Baldwin 1964), was not construed by the court as implying a right to unemployment benefits when retirement pay is received. The court further held that there was no statute-violating waiver of benefits. "Before one can waive benefits under a statute, it must first be determined that one is entitled to those rights." *Id.* at 427.

[15]Fla. Stat. Ann. § 443.02 (1952).

[16]Age may be "just cause" for dismissal if one is incapacitated by age. That view leaves to relief the problem of the superannuated employee who is attempting to find work which he is still able to perform.

[17]The failure of the claimant to find employment is presumed to arise either from claimant's age or the fact that his union which had contracted for his retirement pervaded the field, thus tending automatically excluding him from future work. It is possible that the claimant knew he could not get future employment and was applying only to receive unemployment compensation. However, to assume this would impute a dishonest intent to the claimant and not allow a rational investigation of the problem.

holding is not valid because the real choice of an employee when faced with such a contract is not whether he wishes to comply with the retirement provision but whether he prefers to work under such terms or not at all. That is a Hobson's choice.

The Florida decision in *St. Joe Paper Co. v. Gautreaux*[18] permitted the former employee mandatorily retired by the terms of a collective bargaining agreement to receive unemployment compensation in addition to his pension. It is interesting to note that although *St. Joe Paper Co.* concluded that "an unemployment compensation statute is remedial and is to be liberally construed to effect its beneficent purpose, and that the disqualifying provisions therein are to be narrowly construed," [19] the court may have been forced into its result by the wording of the Florida statute. To have reached the opposite result and denied unemployment compensation, *St. Joe Paper Co.* would have had to hold that mandatory retirement was a quit without just cause or a discharge for *misconduct* in connection with the claimant's work.[20] It is difficult to rationalize how mandatory retirement could be put under either of these categories. The court, "in the interest of relieving the economic insecurity of a person unemployed through no fault of his own . . . [and] in order to attain the Legislature's goal of lightening the burden of unemployment . . . ," [21] held that the claimant had *not voluntarily* left his employment.[22] Legislative intent for this result was also derived from other Florida statutes which make a waiver of any right of unemployment compensation void[23] and from statutes guaranteeing that employees have the right of self-organization.[24] But, in accordance with a Florida Industrial Commission policy,

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[18]180 So. 2d 668 (Dist. Ct. App. Fla. 1965).

[19]*Id.* at 674.

[20]Fla. Stat. Ann. § 443.06 (1) (1952).

[21]St. Joe Paper Co. v. Gautreaux, *supra* note 18, at 671.

[22]*Ibid.*

[23]Fla. Stat. Ann. § 443.16 (1) (1952) provides in part:

"Any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this chapter shall be void."

Cf. Ohio Rev. Code Ann. § 4141.32 (Baldwin 1964), which was dismissed by *Marcum* as inapplicable. Marcum v. Ohio Match Co., *supra* note 9, at 427.

[24]Fla. Stat. Ann. § 447.03 (1952):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

the holding was limited to cases in which the claimant's weekly pension payments are less than the weekly unemployment compensation.[25]

In *Marcum*, on the other hand, the court had different statutory language to interpret. Only with considerable difficulty could mandatory retirement be called a "quit without just cause," but it could, without doing violence to the language involved, be called a "discharge for just cause in connection with . . . [claimant's] work." [26] Thus the variance in the 2 holdings may have resulted from the fact that *Marcum* found the "discharge for just cause" phrase of the Ohio statute could reasonably be interpreted to permit discharge of an employee pursuant to a mandatory retirement agreement or discharge because one has reached a certain age.

St. Joe Paper Co. required benefits to be paid to the claimant only if weekly pension payments are less than weekly unemployment compensation. A decision that both pension and unemployment compensation were fully payable would have imposed upon the employer possible double liability[27] for the amount of the unemployment compensation. The employer would thus have been misled by his reliance upon the unemployment contract with the employee or representative of the employee. Such an unexpected financial burden would place the employer at a disadvantage compared to competitors who do not have pension plans in effect or with competitors in other jurisdictions where only a single liability is imposed.

In any attempt to solve this problem, one must consider the entire scope of social legislation. If it is decided that an employee retired under a mandatory retirement agreement which includes a pension at least equal to the benefits under unemployment compensation is

[25]In St. Joe Paper Co. v. Gautreaux, *supra* note 18, at 670, the court refers to Rule 185U-2.07 of the Florida Industrial Commission:

> [W]here an employee is retired—pursuant to the terms of a retirement plan financed in whole or in part by the employer, under which he had no option to continue in his employment, he shall be disqualified for unemployment compensation benefits on the ground that he has voluntarily left his employment without good cause attributable to the employer "only if the Commission finds" that the payments to the employee under the plan, when pro-rated by weeks, "equal or exceed the maximum weekly benefit amount allowable under the Florida Unemployment Compensation Law."

[26]Ohio Rev. Code Ann. § 4141.29 (Baldwin 1964).

[27]St. Joe Paper Co. v. Gautreaux, *supra* note 18, at 674 recognizes this inequity, stating that to allow the claimant to receive unemployment benefits "would penalize the employer who has instituted a pension plan for his employees, as compared to an employer who has not, for the former would be required to bear the double financial burden of contributing to both the pension plan and the unemployment compensation fund."

eligible for benefits which would raise his income above the level of unemployment compensation, it must then be decided who is to pay for such compensation. The employer is wholly responsible for unemployment compensation[28] and for the pension he contracted to provide the employee. Moreover, the employee will probably be receiving social security to which the employee and all his employers combined have contributed equally.[29] The employee who collects a pension, unemployment compensation, and social security places a tremendous financial burden upon the employer. The excess of the pension, social security, and unemployment compensation combined over unemployment compensation alone might then be said to be a welfare payment made largely by the retirement employer. That employer would thus bear a burden which has traditionally been spread throughout the entire population by means of a general tax. If the net sum[30] of weekly social security and pension payments at least equals the weekly unemployment compensation benefits, which is the legislative determination of the income necessary to allow one to stay in the labor market, the purpose of unemployment compensation is accomplished without resort to unemployment compensation itself.

When the pension income is less than the unemployment compensation, the employer should be liable for the net difference between the pension and the unemployment compensation otherwise due. If, as in *Marcum*, the employer is not to be liable for that difference, a possible solution is to hold the union liable since the union has a duty to represent adequately all employees for which it is the collective bargaining agent. The liability of the union could be based upon a theory of inadequate representation of the employee. A union fund to cover the difference could be financed from union dues and the retired employee would thus be enabled to search for another job without undue economic hardship.

Another possible solution would be a statute requiring that a contract

[28]Fla. Stat. Ann. § 443.08 (1952); Ohio Rev. Code Ann. § 4141.23 (Baldwin 1964).

[29]Int. Rev. Code of 1954 § 3111; Int. Rev. Code of 1954 § 3101.

[30]Neither unemployment compensation nor Social Security payments is taxable. IT 3230, 1938-2 Cum. Bull. 136-37; 3 P-H 1966 Fed. Tax Serv. ¶ 7032(5); IT 3447, 1941-1 Cum. Bull. 191. However, by virtue of Int. Rev. Code of 1954 § 106, all of a pension paid wholly from employer contributions, none of which contributions was considered taxable income of the employee when made, is, when received, taxable income of the employee. Thus the net amount a retired employee receives when a pension is a substitute for any portion of unemployment compensation may be less than if full unemployment compensation is received. The net difference would usually be small, but small amounts of money can be significant at the income levels typically involved here.