

BEFORE THE  
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

LYLE D. ORR  
(Claimant)

PRECEDENT  
BENEFIT DECISION  
No. P-B-78  
Case No. 69-5150

SAFEWAY STORES, INC.  
(Employer)

The employer appealed from Referee's Decision No. SF-13978 which held that the claimant was entitled to benefits under the Unemployment Insurance Code and that the employer's account is not relieved of charges under section 1032 of the code.

STATEMENT OF FACTS

The claimant last worked for the employer as a checker and box boy for two days at a wage of \$2.29 per hour. His last day of work was October 1, 1969.

Several years ago the claimant began to experience severe pains in his back. He obtained medical attention and was fitted with a brace. His back condition was so serious that he gave up all forms of manual labor and was given vocational rehabilitation training in bookkeeping and accounting. After this his back condition improved and he did not experience any serious difficulties during the next few years.

At the time the claimant applied for work with Safeway Stores, he was skeptical of his ability to stoop and bag groceries but he knew that he probably would not be hired if he informed the employer about his back. With that thought in mind, the claimant specifically denied any physical handicaps on the application form. He also answered in the negative a question about whether or not he had suffered from any back or foot trouble.

The claimant was hired and given a week's training. He did not experience any back problems during the training. He attributes his freedom from pain during the training period to the fact that all packages and bags were dummy merchandise and not very heavy. After two days of actual work, the claimant's back was bothering him so bad he had to quit. His condition was not apparent to the employer. In order to avoid embarrassment, the claimant informed the employer that he was quitting because he did not like the work. The employer felt the claimant was learning the job and progressing satisfactorily.

The claimant would not have been hired if he had made a full disclosure of his physical condition to the employer.

### REASONS FOR DECISION

Section 1256 of the California Unemployment Insurance Code provides that an individual shall be disqualified for benefits, and sections 1030 and 1032 of the code provide that an employer's account may be relieved of benefit charges if the individual left his most recent work voluntarily and without good cause or if he has been discharged for misconduct connected with his most recent work.

In Appeals Board Decision No. P-B-27 we held that there is good cause for the voluntary leaving of work where the facts disclose a real, substantial, and compelling reason of such nature as would cause a reasonable person genuinely desirous of retaining employment to take similar action.

In Appeals Board Decision No. 6050 we held that to establish "misconduct" the evidence must show that the claimant was discharged "because of a material breach of duty owed the employer under the contract of employment, which breach tends to injure substantially the employer's interest."

For years this board has been faced with a dilemma in this type of case. For the most part, we have permitted the decision to turn on whether the claimant quit or was discharged. If the employer discovered the fraud perpetrated upon it at the time of hire and discharged the claimant, the discharge was found to be for misconduct and the claimant was disqualified from receiving unemployment insurance benefits. On the other hand, if the claimant decided to quit before the employer became aware of the fraud, he

was held entitled to benefits on the ground that he had good cause for leaving his work. The good cause was predicated upon his physical inability to perform the work.

Upon further consideration of the problem we feel that there is no reason to continue such an illogical and oversimplified distinction. In our opinion, a prospective employee has a duty to make a full disclosure of any facts which may affect his ability to work. If he fails to do so, he is guilty of fraud and should not be permitted to benefit from his wrongful act. The claimant's failure to disclose his back condition to the employer was a fraud at the inception of the employment contract and it permeates the entire transaction. This principle is too deeply rooted in the law to be ignored. For example, specific performance of a contract will be denied if the assent of the defendant was obtained by misrepresentation, concealment, circumvention or unfair practices. (Witkin, Section 30, p. 2812, Volume 4, 7th ed.)

A court will neither aid in the commission of a fraud by enforcing a contract, nor relieve one of two parties to a fraud from its consequences. (Witkin, Section 7, p. 2791, Volume 4, 7th ed.) These effects flowed from the "clean hands" doctrine in equity.

Fraud in the inception voids a civil contract. In such a case it may be disregarded without the necessity of rescission. (Witkin, Section 139, p. 150, Volume 4, 7th ed.) There are many other examples in the law of fraud or material misrepresentation at the inception negating what otherwise would be some benefit to the person who had misrepresented.

Accordingly, we hold that the claimant's fraud negated what would otherwise be considered good cause for leaving his work under sections 1256 and 1030 of the code and he must be disqualified for benefits.

In order to make our position abundantly clear, we wish to state that the duty of making a full disclosure as to all important matters affecting the employment contract also applies to employers. A failure to disclose important facts or the making of a material misrepresentation to a prospective employee may provide good cause for a claimant to leave work or negate what would otherwise be considered a discharge for misconduct.

In this connection, the doctrine of condonation also applies. Parties have a duty to act with due diligence after a fraud is discovered. If either party sleeps on their rights or permits the employment contract to continue for an extended length of time after the fraud is discovered, then it may well be that they have condoned the original fraud and its existence would have no bearing on a subsequent termination of work.

DECISION

The decision of the referee is reversed. The claimant left his most recent work voluntarily without good cause. The employer's account is relieved of charges.

Sacramento, California, June 4, 1970

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

JOHN B. WEISS

DISSENTING - Written Opinion Attached

LOWELL NELSON

DON BLEWETT

DISSENTING OPINION

In arriving at its decision in this matter the majority has followed a legalistic course. To us as laymen, unschooled in the law, such course is an anathema.

The majority finds that this claimant perpetrated a fraud upon his employer when he completed the application form. This is a serious charge and should not be lightly made. There was no documentary evidence introduced at the referee's hearing to support a finding that this claimant fraudulently completed his work application. The only testimony presented in relation to this was that presented by the employer's witness and the claimant himself.

The testimony of the employer's witness was a general statement that the claimant did answer certain questions on the work application incorrectly. It is unknown how these specific questions were worded and it is likewise unknown how the claimant answered these questions. The testimony of the claimant in regard to this is found in answers to the referee's questions:

"Q Why didn't you tell the employer when you made this application about this back problem?

"A At the time the back didn't bother me. I felt the back was well enough to work in this capacity.

\* \* \*

"Q When you made this application you indicated no injury there. I believe Mr. Rendon asked if you had any serious back trouble or foot trouble. Did you answer no to that question?

"A Yes."

We do not believe a charge of fraud should be based on such flimsy evidence.

In this case we must decide whether the claimant is subject to disqualification under section 1256 of the code. This section provides for the disqualification of a claimant only if the claimant was discharged for misconduct connected with his most recent work or voluntarily left his most recent work without good cause.

In Benefit Decisions Nos. 5522 and 6054 it was held that in applying the provisions of section 1256 of the code the situation must necessarily be judged as of the time of leaving. If this claimant had been discharged by his employer for falsifying his work application, we would find that he was discharged for misconduct connected with his work if the record established that he did in fact falsify his work application, and if it was shown that this falsification tended to injure the employer's interests.

However, the claimant was not discharged but voluntarily left his work. It is therefore necessary to decide if he had good cause for so doing. In this connection it should be pointed out that section 100 of the code provides that unemployment insurance benefits should be provided "for persons unemployed through no fault of their own." Certainly it cannot be logically said that at the time the claimant left work his unemployment was due to any answers he placed on his work application. The reason for the claimant's unemployment at the time he left work was because of his physical inability to perform the duties of the job. Since he was physically incapable of doing the job, we find he had good cause for leaving work.

The dilemma of which the majority speaks results from the failure of the legislature to anticipate and provide for a situation such as we are confronted with in this case. The correction of such legislative oversight is the province of the lawmakers. In our opinion we should apply the law as it is written and not through interpretation arrive at a wanted result, no matter how desirable that result appears at the moment to be. To do so, in our opinion, is to legislate.

LOWELL NELSON

DON BLEWETT