

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

WILLIAM C. HAMLETT
(Claimant-Appellant)

ITT CANNON ELECTRIC
(Employer-Respondent)

PRECEDENT
BENEFIT DECISION
No. P-B-10
Case No. 67-5465

The claimant appealed from Referee's Decision No. LB-8388 which held the claimant disqualified for unemployment insurance benefits under section 1256 of the Unemployment Insurance Code and that the employer's account was relieved of charges under section 1032 of the code. Written argument was submitted by the claimant and the employer. The Department of Employment, although duly notified and afforded an opportunity to submit written argument, did not do so.

STATEMENT OF FACTS

The claimant was last employed by the above named employer for approximately four years. At the termination of the employment relationship he was working as an inspector for an hourly wage of \$2.84. He last worked July 17, 1967 on which date he was discharged under the following circumstances.

A security guard reported to the employer and testified at the hearing before the referee that at about 1:10 a.m. on July 12, 1967 he was making his usual security check in the vicinity of the company's cafeteria. The cafeteria was closed for business at that time, but the premises were left open in order that workers on the night shift might have access to vending machines located therein. The guard saw the claimant enter the cafeteria in the company of two other employees. Approximately five minutes later he saw the men leave. One of the men was carrying a box containing merchandise taken from the cafeteria. He did not stop the men at that time because he thought the food had been obtained from the vending machines in the cafeteria and was being carried back to the work area. However, when he saw the man who was

carrying the merchandise walk towards the parking lot, he became suspicious and called the man back. He saw that the merchandise being carried was ten cartons of milk and three or four prepared salads. The security guard told the man to return the stolen merchandise to the cafeteria refrigerator from which it had been taken. The worker complied with the guard's order.

The guard reported the incident to his supervisor. He also prepared a written report of the event. At this time the guard did not know the name of the three workers.

Upon receiving the guard's report of the incident, the personnel director commenced an investigation. The security guard walked through the plant and made a positive identification of the claimant and the man who had carried the merchandise. He was unable to identify the third person he had seen with the other two workers.

Several days later the personnel director called the claimant into his office and, in the presence of an assistant, stated to the claimant that he had been identified as one of the persons involved in the incident. The claimant was then asked to explain what had occurred. The personnel director testified that in response to his questioning the claimant stated, "I was involved." When asked by the personnel director why he had participated in the incident, the claimant stated that he really did not know the reason. When the personnel director remarked that he doubted if he would get the name of the third suspect from the claimant, the claimant replied, "No, you wouldn't." The claimant offered no other explanation to the personnel director of the events of the night.

The claimant testified at the hearing that he had gone into the cafeteria with one other employee for a cup of coffee. He saw this employee removing the food from the cafeteria freezer. While the employee was doing this, he dropped a coin in the coffee vending machine but was unable to get a cup of coffee. He then went to a cigarette machine and purchased a package of cigarettes. During this time the claimant and his fellow employee exchanged some banter, not relating to the theft. He left the cafeteria at the same time as the other employee and met the security guard as the latter was entering the cafeteria. The claimant said nothing to the guard. He continued on his way to another department where he knew he could obtain some coffee. He did not thereafter report the incident to anyone, although he heard some rumors from other employees regarding his involvement in the event. When he was

interrogated by the personnel director, he did not reveal the identity of the third man who was allegedly involved because there was no third man. He did not offer an explanation as to details of the incident and did not deny his participation in the theft because he felt that the personnel director had already concluded that the claimant was guilty of the offense. The claimant stated at the hearing:

" . . . I was present there with him [fellow worker]. I will stipulate to that, yes, indeed, and a theft did take place, and I witnessed it, but I will say that I had no part in the planning or the actual physical machinations of the theft."

The personnel director testified that, if the claimant had denied his guilt or participation in the theft when he was called into the office to discuss the matter, he probably would not have been discharged if his explanation had been satisfactory.

REASONS FOR DECISION

Section 1256 of the California Unemployment Insurance Code provides that an individual is disqualified for benefits, and sections 1030 and 1032 of the code provide that the employer's reserve account may be relieved of benefit charges if the claimant has been discharged for misconduct connected with his most recent work.

The California District Court of Appeals in Maywood Glass Company v. Stewart (1959), 170 Cal. App. 2d 719, 339 Pac. 2d 947, held that the term "misconduct," as it appears in section 1256, is limited to conduct which shows wilful or wanton disregard of the employer's interest, such as (1) deliberate violations of or deliberate disregard of the standards of behavior which the employer has a right to expect of his employee; or (2) carelessness or negligence of such degree or recurrence as to show wrongful intent or evil design.

On the other hand, mere inefficiency, unsatisfactory conduct, poor performance because of inability or incapacity, isolated instances of ordinary negligence or inadvertence, or good faith errors in judgment or discretion are not "misconduct."

The District Court further held that the employer has the burden of establishing misconduct.

In the instant case the referee who heard the evidence made no specific finding that the claimant was guilty of "conspiring" to remove the food, or that he was guilty of the theft itself. He based his decision upon the claimant's breach of duty to the employer in not informing the guard of the theft and his failure to disassociate himself from the illegal act when given an opportunity to do so by the employer.

It has been well established that, in reviewing appeals from decisions of referees, this board follows the spirit of the juridical principle that the findings of the trier of fact who heard the evidence and observed the witnesses in the tribunal below will be disturbed only if arbitrary or against the weight of the evidence (Benefit Decision No. 6721). In the instant case the referee's findings are not against the weight of the evidence and therefore we are not permitted to substitute our findings for those of the referee. We find that there is insufficient evidence to sustain a finding that the claimant did conspire or did participate in the theft. Thus, the determinative point in this case is whether the claimant had a duty to inform his employer of the dishonest act committed by the fellow employee and the duty to disassociate himself from the illegal act when given an opportunity to do so. If misconduct is to be found, it must stem from a breach of duty owed to the employer.

There is no dispute in the record that the claimant was present at the time the fellow employee removed the food from the freezer. He made no attempt to dissuade his companion from converting the employer's property, nor did he report the incident to the guard or to any of his superiors. Although given an opportunity to explain the events of the night to the personnel director of the employer, he did not avail himself of the chance to disassociate himself from the theft. When asked if he would be willing to reveal the name of the third party allegedly involved, he indicated that he would not be willing to identify the suspect.

The California District Court of Appeals and the Supreme Court of the United States has commented on the matter of an employee's loyalty to his employer:

"One of the foundation stones of private business is that the employee must be loyal to his employer. Loyalty is implicit in the contract of hiring. No private business can long succeed without the conscientious, undivided support of its employees. . . ."

(Garner v. Board of Public Works (1950), 98 Cal. App. 2d 493, 498, 220 Pac. 2d 958, affirmed 341 U.S. 716, 71 S. Ct. 909 (1951))

The Supreme Court of the United States has also declared that "There is no more elemental cause for discharge of an employee than disloyalty to his employer." (National Labor Relations Board v. International Brotherhood of Electrical Workers (1953), 346 U.S. 464, 472, 74 S. Ct. 172)

Was the conduct of the claimant herein that of a loyal employee? We think not. Considering the factors surrounding the events of July 12, especially that the claimant both entered and left the cafeteria with the man who removed the foodstuffs, the claimant's failure to notify the guard of the theft, the claimant's failure to offer a full explanation of the incident when given an opportunity to do so, and stating he would not reveal the identity of the third suspect, if there was one, we find that the claimant's attitude manifested a lack of good faith and fair dealing due to his employer.

The claimant has not shown or even asserted that his failure to speak, when there was an obvious duty to speak, was merely an instance of poor judgment of discretion. Rather, the claimant's behavior appears to have been the studied and calculated choice of a person who deliberately resolved to disregard the standards of behavior which the employer had the right to expect of an employee. We conclude that the claimant's discharge was for misconduct.

DECISION

The decision of the referee is affirmed. The claimant is disqualified for benefits under section 1256 of the code. The employer's reserve account is relieved of charges under section 1032 of the code.

Sacramento, California, April 12, 1968.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

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