BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT DECISION NO. 6634 AS A PRECEDENT DECISION PURSUANT TO SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE.

In the Matter of:

BRIAN ALLISON BREYE
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-167

FORMERLY
BENEFIT DECISION
NO. 6634

The claimant appealed from Referee's Decision No. LA-20637 which held that the claimant was disqualified for benefits for five weeks commencing October 16, 1960 under section 1256 of the Unemployment Insurance Code on the ground that he was discharged for misconduct connected with his most recent work.

STATEMENT OF FACTS

The claimant was employed as a taxi driver by a cab company for eleven months ending October 9, 1960. He was discharged when he reported to work on October 10, 1960.

On the evening of October 7, 1960, the claimant was driving his taxi north on Los Angeles Street, and while in the lane next to the double line, signaled for a left turn on to Fifth Street. He was first in line for the turn when a fellow employee drove his cab over the double line, cut in front of him, and turned left, driving his cab into a taxi stand. The claimant decided to report the incident to his employer, so he followed and parked behind him, and walked over to another taxicab driver to ascertain whether he had observed the incident.

The claimant then proceeded to return to his cab and in passing the fellow employee's cab, was stopped by him. The latter apparently wished to

prevent the claimant from making a report. The claimant told him that he did not wish to argue the matter and he could take it up with his union representative. At some point the claimant leaned over this employee's cab to get his name off the clipboard and as he started to move away, the employee grabbed him by the collar and struck a blow which the claimant deflected as he shoved him away. The employee charged him again and in self-defense the claimant exchanged blows and knocked him to the ground. They were separated by the other driver.

The employer informed the departmental representative that the claimant could have avoided the fight by not stopping, and that the employer's rule provides for the automatic dismissal of employees fighting on company time. The claimant contended that he did not wish to fight and was only protecting himself.

REASONS FOR DECISION

Section 1256 of the code provides that an individual shall be disqualified for benefits if he was discharged for misconduct connected with his most recent work.

We have consistently applied the definition of misconduct laid down by the Supreme Court of Wisconsin in Boynton Cab Company v. Neubeck (1941), 237 Wis. 249, 296 N.W. 636, wherein the court stated:

> " . . . The term 'misconduct', as used in (the disqualification provision) is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance . . . or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute."

The question of whether engaging in an altercation on the employer's premises constitutes misconduct has been considered by us in prior decisions (Benefit Decisions Nos. 4447, 4985, 5004, 5238 and 5365). We have held consistently that it does, even though the claimant was not the aggressor and the evidence indicated he was acting in self-defense. Thus, in Benefit Decision No. 1401, the Appeals Board noted that the employer's rule against fighting made no distinction between the guilt or innocence of the participants and indicated that it was not concerned therewith. It stated that "engaging in the prohibited act, whoever may have been at fault, became cause for immediate discharge." However, the disqualification period was reduced to a minimum of two weeks. Similarly, in Benefit Decision No. 5362, where the claimant fought upon being grabbed by his supervisor, the Appeals Board held that the discharge was for misconduct, but again reduced the penalty to two weeks.

In reviewing our prior decisions, we are in full accord with those which hold that it is misconduct within the meaning of section 1256 of the code for an employee to engage in an altercation on the employer's premises, or as an employee during working hours, where he initiates the fight, or is an aggressor. We realize that he need not strike a blow to be an aggressor, because he may well provoke a fight by his language, or actions. On the other hand, we do not believe it is misconduct under the code for an employee to protect or defend himself in a fight which he has not intended and when he has not used any words, or engaged in any actions, which reasonably may be construed as improper, or as inciting or causing or precipitating a fight.

The claimant herein neither sought nor intended an encounter or fight with his fellow employee. He was seeking to obtain evidence to support a report to his employer of that employee's behavior. This was not an improper action on his part, nor one intended to precipitate or provoke a fight. He did not become a participant in the fight until he was struck and attacked and then he intended only to protect himself. We do not consider this conduct to be a wilful or wanton disregard of the employer's interests, or a deliberate violation or disregard of the standard of behavior which the employer had the right to expect of him. Nor do we think that the claimant's behavior showed an intentional or substantial disregard of his duties and obligations to the employer. In our opinion, even though the claimant's action of defending himself in a fight during working hours was in violation of the employer's rule and cause for dismissal, it was not misconduct within the meaning of section 1256 of the code. In view of this conclusion, we expressly overrule Benefit Decisions Nos. 1401 and 5362.

DECISION

The decision of the referee is reversed. The claimant is not disqualified for benefits under section 1256 of the code. Benefits are payable provided the claimant is otherwise eligible.

Sacramento, California, January 6, 1976

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

CARL A. BRITSCHGI

RICHARD H. MARRIOTT

DISSENTING

HARRY K. GRAFE