BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

TERRY L. HECKER
(Claimant)

MARKET BASKET
(Employer)

PRECEDENT
BENEFIT DECISION
No. P-B-293
Case No. 75-12132

Office of Appeals No. ONT-20345

The employer appealed from the decision of the Administrative Law Judge which held that the claimant was not disqualified for benefits under section 1256 of the Unemployment Insurance Code and that the employer's reserve account was not relieved of benefit charges under section 1032 of the code.

STATEMENT OF FACTS

The claimant had about eight years of experience as a journeyman clerk. Before filing his claim for unemployment benefits, the claimant last worked as a clerk in the liquor department of the employer's La Mirada market from April 2, 1973 until he was discharged on July 15, 1975. The claimant was discharged on the ground that he had violated a company rule which required him to record promptly each sales transaction on the cash register.

On March 27, 1973, before he commenced work for the employer, the claimant signed a form which stated the following:

"SUPPLEMENT TO MARKET BASKET CHECKING POLICY
COMPLETION OF EACH TRANSACTION

"Each transaction with each customer must be completed before the next customer is served. This is to say that each order must be so completed even if it is only one item and even if the customer has the right change for this one item.

By 'completed', we mean that all phases including the sub-total, the receiving of the amount tendered, the issuing of the customer's change and receipt, the placing of the money in the drawer and the closing of the drawer must all be completed.

"To further clarify and emphasize the above: Separate sales, regardless of size, may not be grouped into a single register recording. Each customer must be waited on in turn and be issued a receipt. In the event that a customer leaves even change for an item and hurries on, this sale must be recorded immediately. If this occurs in the middle of another sale, the even money purchase must be recorded immediately after completing the sale in process.

"I have read and understand thoroughly the above policy of Market Basket and understand that a single violation of this policy can result in my immediate dismissal."

On April 25, 1974 and again on February 12, 1975, the claimant signed acknowledgement forms that he had been informed of and understood the employer's policies on the above rules and 12 other topical areas of company rules.

The employer presented at the hearing three statements under penalty of perjury of three employees of a commercial shopping service dated Saturday, June 28, Thursday, July 10, and Friday, July 11, 1975, that on those dates the claimant had been paid the exact amounts of $1.37, $4.03 and $2 respectively for sales items and he had not been observed ringing the amounts on the cash register. Cash register tapes purportedly for those three dates were presented which showed the exact amounts rung up of other items identified by the shopping service employees but did not contain nearby on the tapes the $1.37, $4.03 or $2 for the items purchased with exact change. All three statements, in almost identical language, indicated the claimant had not been rushed or confused at the times of the transactions. According to the statement for July 10, 1975, when the shopper had asked for a bottle of vodka, the claimant had asked whether any lime juice might be needed and sold that too.

These reports were discussed with the claimant on July 15, 1975 by a representative of the employer's security department and a representative of the shopping service. No written report of this discussion was submitted by the employer, but the store manager testified he had been present at the end of the interview and the claimant had been discharged after he admitted that he had previously failed to record sales in order to make up for errors. The claimant was not accused of dishonesty or theft. The claimant filed a grievance with his labor union but it was not processed due to the reports.

The claimant denied that he had at any time failed to ring up a cash transaction. The claimant testified that under the manager of the market prior to June 16, 1975, the claimant had made an error when he rang up the total regular per bottle price for a case of liquor instead of deducting 10 percent from the regular price and ringing up only the discounted price. The former manager had been critical of the claimant for the error. It was to this error the claimant referred when he was accused on July 15, 1975 of failure to record sales. The claimant testified he mistakenly thought he had on that one occasion failed to record a sale when actually he had overrung the sale and had not failed to record it.

The claimant testified that he could not remember any of the incidents reported in the three statements. However, he emphatically denied that he had ever suggested that a customer purchase lime juice with vodka, even though the former manager had criticized the claimant for not doing "suggestive selling" and the claimant had been trying to comply without offending the customers. The claimant also testified that the liquor department was usually very busy on Fridays and Saturdays, requiring additional employees to work on those days, all using the single cash register in the liquor department. The claimant received no warning that he was not following the employer's proper cash register procedure.

The employer contends that the claimant, as an experienced and trained journeyman clerk, mishandled cash receipts by his failure to record cash for purchases on three occasions, and that such failure cannot be viewed as mere negligence but amounted to such a substantial disregard of the duty owed to the employer as to constitute misconduct connected with the work without regard to any specific warning.

The Administrative Law Judge concluded that misconduct had not been established because the claimant had not been warned as required by the California Appellate Court decision in Delgado v. California Unemployment Insurance Appeals Board (1974), 41 Cal. App. 3d 788, 116 Cal. Rptr. 497, and the evidence against the claimant consisted entirely of hearsay.

REASONS FOR DECISION

Sections 1256, 1030 and 1032 of the Unemployment Insurance Code provide that the claimant is disqualified for benefits and 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 Appellate Courts have long followed the views so well set forth by the Supreme Court of Wisconsin in Boynton Cab Company v. Neubeck (1941), 237 Wis. 249, 296 N.W. 636, as follows:

> ". . . the intended meaning of the term 'misconduct,' . . . is limited to conduct evincing such wilful or wanton disregard of an employer's interests 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 interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isloated instances, or good faith errors in judgement or discretion are not to be deemed 'misconduct' within the meaning of the statute."

(Maywood Glass Company v. Stewart (1959), 170 Cal. App. 2d 719, 339 P. 2d 947; Jacobs v. California Unemployment Insurance Appeals Board (1972), 25 Cal. App. 3d 1012, 102 Cal. Rptr. 364; Silva v. Nelson (1973), 31 Cal. App. 3d 136, 106 Cal. Rptr. 908; the Delgado case, supra, and many others).

In the Delgado case, supra, the claimant had been employed as a grocery checker for nearly five years when she was discharged for failing to record three sales on her cash register contrary to the employer's rules. The claimant was aware of the rule requiring recordation of each individual sale,

but she would accept money from customers for individual items while she was ringing up other sales and then record the individual sale by itself or with others later in an effort to avoid making the customer with a single purshase wait in line. There was no evidence to show that the claimant profited financially from her practice. She had never been warned that the procedure was not acceptable and her supervisor and other checkers participated in the same procedures at times. The California Court of Appeal held that the evidence did not compel the conclusion that the claimant's conduct amounted to "wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design" but, at most, it could be classified as "ordinary negligence in isolated instances, or good faith errors in judgement."

In Delgado, the court went on to distinguish its holding from Sabatelli v. Unemployment Board of Review (1956), 168 Pa. Super. 85, 76 A. 2d 654, where the Pennsylvania court held the claimant's conduct " 'so recklessly disregardful' that . . . there is at least a willingness to inflict harm, a conscious indifference to the perpetration of the wrong" where the claimant bus driver improperly registered fares on 24 different occasions in five weeks and offered an explanation for only one occasion.

In the present case, the claimant testified under oath and subject to cross-examination and refutation that he had never failed to record sales. The employer presented only hearsay evidence to the contrary. The Administrative Law Judge concluded that the employer had not established misconduct under the views set forth in Delgado; we agree both on the facts and the law.

We recognize that the employer as the owner of retail establishments has a very real problem of control over its cash register operations. We certainly recognize the employer's prerogative to hire and fire its employees in the proper management of its affairs and, in so doing, to choose to rely upon the reports of individuals whose employment with shopping services depends upon uncovering rule violations by employees. Nevertheless, these problems and rights are not determinative of a claimant's rights to benefits (King v. California Unemployment Insurance Appeals Board (1972), 25 Cal. App. 3d 199, 101 Cal. Rptr. 660). While losses from neglecting proper cash register procedures may be serious for the employer's business success, such neglect can hardly be equated with, for example, the neglect of an airline pilot to properly check a landing gear lever where substantial loss of life and property could result, as discussed in Appeals Board Decision No. P-B-193. The responsibilities involve very different standards of care.

In the present case, the employer just did not establish as a matter of fact that the claimant did fail to record sales. The hearing judge accepted the claimant's testimony and we can find no legal basis upon which to disregard it. Even were we to assume for the purposes of discussion that the claimant thought he had never failed to record sales, but in fact that he had upon occasion neglected to follow the employer's rules in this regard, we can find no misconduct in the absence of warning as required by Delgado. As an administrative tribunal, we are bound by the law as it has been authoritatively construed by the courts.

Therefore, we hold that the claimant was discharged for reasons other than misconduct under section 1256 of the code. In so holding, we note that our decision is consistent with Benefit Decision No. 6653 which was specifically disaffirmed in Appeals Board Decision No. P-B-108 by the majority of this Board. We further note that Appeals Board Decision No. P-B-108 has been set aside and is no longer of any force and effect pursuant to a writ of mandate granted by the superior court and affirmed in an unpublished decision of the Court of Appeal, Second District, Gatlin v. California Unemployment Insurance Appeals Board (January 31, 1973), 2 Civil 39922.

DECISION

The decision of the Administrative law Judge is affirmed. The claimant is not disqualified for benefits under section 1256 of the code. The employer's reserve account is not relieved of benefit charges under section 1032 of the code.

Sacramento, California, April 13, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairman

MARILYN H. GRACE (Not participating)

CARL A. BRITSCHGI

HARRY K. GRAFE

RICHARD H. MARRIOTT