

BEFORE THE  
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

THERESA L. ESTAY  
(Claimant)

HARBERT TRANSPORTATION, INC.  
(Employer)

PRECEDENT  
BENEFIT DECISION  
No. P-B-423  
Case No. 81-8140

Office of Appeals No. OAK-16782

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 the employer's reserve account was subject to benefit charges.

STATEMENT OF FACTS

The employer appealed from a Department determination and ruling which held the employer's reserve account subject to charges, and the claimant not disqualified from receiving unemployment insurance benefits on the ground that the claimant was discharged for reasons other than misconduct.

The claimant was employed as a school bus driver from September 3, 1980, to June 30, 1981, and was paid \$4.83 per hour. The law requires that a school bus driver must have a valid school bus driver's certificate. At the time the claimant was hired she had such a certificate, which was due to expire on June 30, 1981. She had worked as a school bus driver for a previous employer. In order to obtain a new certificate it was necessary for the claimant to pass a written test. Although she took the test three times, she was unable to pass it.

The employer provided in-service training to facilitate its employees passing the test. The claimant had 10 hours of in-service training and attended 8.5 hours of classroom instruction. She did not attend an additional 5.5 hours of instruction which was available to her. The employer's instructors observed that the claimant seemed to be preoccupied with other matters during the time she was attending classes. However, she did not ask questions or indicate in any way that she did not understand the instruction. The claimant confided in the assistant to the general manager that she was having emotional problems, and he suggested that she delay taking the test the third time in order to give herself a better chance of passing. She did not follow the suggestion. When she failed the test for the third time, and her present certificate expired on June 30, 1981, the employer discharged her as she no longer had a valid certificate.

The employer contends that the claimant's unemployment was due to her own failure to pass the test, and that the employer should not be penalized since the employer has no control over the issuance, denial, or revocation of the school bus driver's certificate and must comply with the law.

#### 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 individual left his most recent work voluntarily without good cause or he has been discharged for misconduct connected with his most recent work.

In Appeals Board Decision No. P-B-37 the Appeals Board held that in determining whether there has been a voluntary leaving or discharge under code section 1256, it must first be determined who was the moving party in the termination. If the claimant left employment while continued work was available, then the claimant was the moving party. On the other hand, if the employer refused to permit an individual to continue working although the individual was ready, willing and able to do so, then the employer was the moving party.

In Appeals Board Decision No. P-B-288, the Appeals Board held that, by voluntarily embarking upon a course of conduct which resulted in the loss of his driver's license, the loss of employment was attributable to an act of volition on the claimant's part and therefore was "voluntary" and consequently the claimant was subject to disqualification under section 1256 of the code.

This case does not fall within the scope of Appeals Board Decision No. P-B-288. There the claimant lost his license because he drove his automobile while intoxicated. The Board emphasized that the claimant voluntarily embarked on a course of conduct resulting in the loss of his license. He chose to drive while intoxicated.

The claimant here was unable to pass the test to renew her certificate. The record reveals no act on her part which was voluntary. She took the instruction offered by the employer and attempted to pass the test as often as she was permitted to do so. Her inability to pass shows no element of wilfulness or deliberateness on her part.

It is true that the employer had no choice but to terminate the claimant. However, the unemployment insurance system was established to provide unemployment insurance benefits for persons unemployed through no fault of their own. (Section 100, Unemployment Insurance Code.) The claimant's unemployment resulted through no fault of her own. Therefore she is not disqualified for benefits.

### 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 subject to benefit charges.

Sacramento, California, April 13, 1982.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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