BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
BENEFIT DECISION

In the Matter of:

MICHAEL HUTTON
(Claimant)

DOMINGUEZ WATER CORP
(Employer)

PRECEDENT
BENEFIT DECISION
No. P-B-471
Case No. 90-07939

Office of Appeals No. ING-22118

The claimant appealed from the decision of the administrative law judge which held the claimant was disqualified for benefits under section 1256 of the Unemployment Insurance Code and the employer's reserve account was relieved of benefit charges.

STATEMENT OF FACTS

The claimant had worked for approximately three and one-half years as a field service representative for a water company when his employment ended on March 9, 1990. His duties consisted of responding to customer complaints and making minor repairs in the field. In the course of his employment, the claimant drove the employer's truck.

On September 23, 1988, in his own automobile and during off-duty hours, the claimant received a traffic ticket for passing a vehicle on the right-hand side.

On November 22, 1988, the claimant was cited for failing to stop at a stop sign. He was driving the employer's vehicle and in the course of his employment.

On July 27, 1989, the claimant was involved in an automobile accident while driving his own vehicle. The claimant had no personal liability automobile insurance. He had lost contact with his insurance agent and his policy had lapsed approximately two months before the accident. As a result of his having no insurance, his license was suspended by the Department of Motor Vehicles. The suspension did not apply to the claimant's privilege of driving the employer's vehicle in the course of the claimant's employment.

In a letter dated February 28, 1990, the employer's insurance carrier informed the employer that the claimant "can no longer drive a Dominguez Water vehicle and will be excluded from the policy." Attached to the letter was a copy of a printout from the Department of Motor Vehicles detailing the claimant's driving record as described above.

On March 5, 1990, the employer suspended the claimant pending an investigation and on March 9, 1990, sent him a letter informing him he had been discharged.

The claimant testified at the hearing that he had informed his supervisor of the citation he had received in the employer's vehicle on November 22, 1988. He stated that he had been given time during working hours to pay the ticket.

The employer denied that the supervisor knew about the citation in the company vehicle. The supervisor was not present at the hearing to testify.

The employer testified it periodically received Department of Motor Vehicle computer printouts of employee driving records. The employer stated, however, it would not have been able to examine the claimant's driving record because "no one had time to look at them".

The employer testified that it did not believe the claimant had been candid about his driving record and that it did not trust the claimant's judgment. The employer asserted that it was at risk because the claimant drove back and forth to work on a suspended license. The employer testified that it would have discharged the claimant solely because of the cancellation of the insurance coverage by the employer's insurer, notwithstanding the claimant's driving record.

The claimant was deemed by the Department to have "constructively quit" his employment because his employer allegedly had no alternative other than to discharge the claimant.

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides that an individual is disqualified for benefits if he or she left his or her most recent work voluntarily without good cause or has been discharged for misconduct connected with the most recent work.

Sections 1030 and 1032 of the Unemployment Insurance Code provide that an employer's reserve account may be relieved of benefit charges if the claimant is disqualified under section 1256 of the Code.

In Steinberg v. California Unemployment Insurance Appeals Board (1978), 87 Cal.App.3d 582, the court held that all three of the following elements must be present to constitute a constructive quit:

1. The claimant voluntarily committed an act,

2. which made it impossible for the employer to continue to use the claimant's services, and

3. the claimant knew or reasonably should have known that the act would possibly result in loss of employment.

The doctrine of "constructive quit" has evolved in order to address equitably one type of employment separation not comfortably described as a "discharge" or a "quit" when determining an individual's eligibility for benefits under section 1256 of the Unemployment Insurance Code.

In the Steinberg case, the court describes the evolution of the doctrine and lists the requisites for the rule's application.

> " . . . the doctrine of constructive voluntary quit is an outgrowth of employment situations where a license or a union membership is a necessity for employment. The doctrine was an expression of the qualification for continued employment. In such instances, though termination would appear to be the act of the employer; nevertheless, the terminated employee could not receive unemployment benefits."

Quoting a Department publication, the court in Steinberg stated:

> " . . . A claimant is said to have constructively quit his job when, although discharged by the employer, the claimant himself set in motion the chain of events which resulted in the employer having no choice except to terminate him."

Subsequent to the Steinberg case, the Department promulgated a regulation by which it intended to define a "constructive quit".

Section 1256-1(f), Title 22, California Code of Regulations, states in pertinent part that ". . . such a leaving is designated as a constructive voluntary leaving and it occurs when an employee becomes the moving party by engaging in a voluntary act or in a course of conduct which leaves the employer no reasonable alternative but to discharge the employee and which the employee knew or reasonably should have known would result in his or her unemployment."

The Appeals Board in the past has applied the doctrine of constructive voluntary leaving in various situations when an action of the claimant has resulted in the employer having no reasonable alternative but to discharge a claimant.

In Precedent Decision P-B-290, a claimant was discharged when he refused to pay a union agency fee under what was subsequently determined to be a valid collective bargaining agreement between the employer and the union. The Appeals Board found that by his conduct, the claimant became the moving party in the separation and that the leaving was without good cause.

In Precedent Decision P-B-288, in a case having similar aspects to the matter before us, the claimant, a truck driver, was convicted of driving a private automobile while intoxicated. He was terminated when the employer learned that the claimant's license to drive had been suspended for one year as a consequence, and no work other than driving was available. The Appeals Board held that the claimant left employment voluntarily without good cause, having voluntarily set in motion events whose natural and probable result was the loss of the claimant's employment.

The claimant in the case before us was discharged when the employer's insurance carrier refused to continue carrying the claimant on the employer's policy. The employer states that its insurance carrier's action alone necessitated the claimant's discharge. Whether the insurance company's deletion of the claimant from the employer's policy triggers the operation of the doctrine of constructive leaving is the primary issue for our resolution.

We must conclude that a discharge brought about by an insurer's cancellation of an individual employee's coverage under the employer's motor vehicle liability insurance policy will not, as a matter of unemployment insurance law, require a finding of a voluntary leaving without good cause. As stated in the Steinberg case, three elements must be present before a discharge can be considered a constructive quit. In our view, only the first of these requirements, the commission of a voluntary act, has been met by a preponderance of the evidence in the case before us.

There is a paucity of evidence regarding the question of whether the employer had no reasonable alternative other than to discharge the claimant. We cannot ascertain from the record whether or not the employer could have obtained alternative insurance or had work other than driving available to the claimant.

Additionally, the claimant could not reasonably have expected that the violations in his driving record, including the provisional suspension of his license, would jeopardize his employment. The claimant had two traffic tickets, one in his personal vehicle. His lone traffic accident resulted only in a citation for lack of proof of insurance and did not interfere with his ability to drive the employer's vehicle. Any tentative doubt he may have had regarding his future as a driver for the employer should have been erased by the Department of Motor Vehicles' approval of his driving the employer's vehicle on the job.

Section 670 of the Insurance Code provides in pertinent part that:

> "(a) No admitted insurer licensed to issue motor vehicle liability policies, as defined in section 16450 of the Vehicle Code, shall cancel, or refuse to renew, a motor vehicle liability insurance policy covering drivers hired to drive by a commercial business establishment . . . for the reason that those drivers have been convicted of violations of the vehicle code or the traffic laws of any subdivision of the state which were committed while operating private passenger vehicles not owned or leased by their employer."

The statute goes on to list various exclusions from this article, none of which is applicable to the case before us.

Section 16073 of the Vehicle Code states that:

> "The privilege of a person employed for the purpose of driving a motor vehicle for compensation whose occupation requires the use of a motor vehicle in the course of his employment to drive a motor vehicle not registered in his name and in the course of his employment shall not be suspended under this chapter even though his privilege to drive is otherwise suspended under this chapter."

In State Farm Mutual Auto Insurance Company v. Haight (1988) 205 Cal.App.3d 223, an insurer attempted to exclude from its coverage an employee under the employer's automobile liability insurance policy because the employee had four speeding tickets while driving his own vehicle on his own time. The court upheld the prohibition against said attempted exclusion under section 670 of the Insurance Code even though the policy had specifically exempted the employee from the employer's liability policy.

We note that the record is not clear as to why the insurance company cancelled the employer's coverage of the claimant. The evidence appears to indicate the policy was cancelled because the claimant's license was suspended. If this was so, the cancellation was illegal as the accident involved only the claimant's vehicle and was not in the course of the claimant's employment (see section 670, Insurance Code, cited above). Certainly, the legislature did not intend that an individual who drives for a living and who fails to maintain his own automobile insurance, should lose his job because of that failure (see section 16073, Vehicle Code, cited above).

Accordingly, as all the elements necessary for the application of the doctrine of constructive voluntary leaving have not been met, the question becomes whether or not the claimant was discharged for misconduct.

Citing Maywood Glass Company v. Stewart (1959) 170 Cal. App. 2d 719, the California Unemployment Insurance Appeals Board in Precedent Decision P-B-3 defined "misconduct connected with the work" as a substantial breach by the claimant of an important duty or obligation owed the employer, wilful or wanton in character, and tending to injure the employer.

The claimant in this case let his insurance lapse and was involved in an accident. While the claimant's license was provisionally suspended he was permitted to drive the employer's vehicle pursuant to Vehicle Code section 16073. The only time he was cited in the company's vehicle he merely paid the ticket. There was only one other violation of the Vehicle Code noted in the Department of Motor Vehicles printout in evidence. The alleged failure of the claimant to disclose his rather unremarkable driving record to the employer does not, in our view, constitute a substantial breach of an important duty owed to the employer, wilful or wanton in character which tends to damage the employer's interests. Furthermore, we cannot see any credible connection between the claimant's driving to work on a suspended license and his discharge. We conclude there is no misconduct in this case.

DECISION

The decision of the administrative law judge is reversed. 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 16, 1991.

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