

BEFORE THE  
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

LARRY S. TAUBE  
(Claimant)

CENTRAL SUPPLY NETWORK  
(Employer)

PRECEDENT  
BENEFIT DECISION  
No. P-B-472  
Case No. 90-09433

EMPLOYMENT DEVELOPMENT DEPARTMENT

Office of Appeals No. ING-25519-0001

The Department 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 from June 3, 1990 through June 30, 1990, and was disqualified for benefits under section 1256 of the code beginning July 1, 1990. The employer's reserve account was not subject to benefit charges for the period beginning July 1, 1990, and was impliedly subject to benefit charges for the period June 3 through June 30, 1990.

STATEMENT OF FACTS

In approximately the third week of May of 1990, the claimant informed the employer of his intention to leave his job as a warehouse manager in order to devote more time to the pursuit of his career as a musician. The claimant had no assurance of future employment as a musician. The employer and the claimant agreed that June 29, 1990 would be the claimant's last day of work. Shortly thereafter, the claimant took a brief vacation from which he returned on May 29, 1990. He was at that time informed that, as he was a "lame duck" employee, his services would no longer be needed and that his last day of work would be June 1, 1990. The claimant's final day of employment was indeed June 1, 1990 and he was not paid beyond that date.

In his decision, the administrative law judge found that while the claimant had been discharged for reasons other than misconduct, he should nevertheless be disqualified under section 1256 of the code effective the date his resignation would have become effective. The administrative law judge cited as authority for this proposition Precedent Decision P-B-259. The administrative law judge's decision provides that, in cases such as the one before us, there are two separations, requiring that the claimant be paid benefits during his previously indicated notice of resignation period and not be paid effective the expiration of that notice period.

### 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.

Section 1256.3 of the Unemployment Insurance Code was effective September 19, 1979 and provides:

"For the purposes of Sections 1256, 1256.1, and 1256.2, most recent work is that work in which a claimant last performed compensated services:

(a) Prior to and nearest the date of filing a valid new, reopened, or additional claim for unemployment compensation benefits, a valid primary, reopened, or additional claim for extended duration benefits, or a valid application, or reopened or additional claim for federal-state extended benefits.

(b) During the calendar week for which a continued claim is filed."

Section 1256.3 of the code was enacted to nullify Tomlin v. California Unemployment Insurance Appeals Board (1978) 82 Cal. App. 3d 642. The court in Tomlin held that a claimant's most recent work was not necessarily the last work in which the claimant was engaged but should be the claimant's last primary or principal full-time employment. In enacting section 1256.3 the legislature indicated that under the Tomlin decision, " 'Most recent work' can be performed in the past ending at an uncertain, indefinite, and lengthy time preceding unemployment and have little or no causal relationship to the claimant's present unemployment". (Section 4 of Stats. 1979, c.770, p.2640.)

We believe that sections 1256 and 1256.3 of the code make clear the framework within which an individual may or may not be disqualified when quitting or being discharged. Section 1256 provides that a person is or is not disqualified based upon the circumstances of his leaving his most "recent work". "Most recent work" is defined in section 1256.3 as the work last performed "prior to and nearest" the date of the filing of a claim. There is nothing in these code sections that would suggest that two determinations regarding the same claim filing might be warranted.

The Appeals Board and the courts have, in the past, dealt with nettlesome questions regarding the character of employment relationships which change during periods when the employment relationship could be said to be in suspense. A fair reading of court cases, precedent decisions, and sections 1256 and 1256.3 indicates to us that a single determination should be made in these cases by (1) ascertaining the filing date and, (2) analyzing the cause of the claimant's unemployment as of the time the claimant files his or her claim.

In Lewis v. California Unemployment Insurance Appeals Board (1976) 56 Cal. App. 3d 729, the court directed the Department to look toward the cause of the claimant's unemployment to determine eligibility when the claimant is on a leave of absence. The claimant's eligibility under section 1256 during the leave of absence depends on whether the claimant had good cause to stop working or whether the claimant's leave was a bona fide leave of absence. If the claimant was not on a bona fide leave, the court would find that the employment relationship was severed when the employee left the job. If the leave is bona fide and the claimant is discharged or quits during the leave, the court indicates that the situation would be examined for section 1256 purposes at the time of the quit or discharge. We believe that this analysis would occur when the claimant files for benefits.

In Precedent Decision P-B-265 the claimant resigned while on a leave of absence, thereafter filing a claim for unemployment insurance benefits. The Appeals Board held that the claimant's eligibility for benefits under section 1256 of the code was determinable by the facts as they existed at the time of the filing of the claim. Accordingly, the reason for the claimant's resignation, rather than the reason for taking the leave of absence, should be considered in determining whether there was good cause to quit.

In Morris v. California Unemployment Insurance Appeals Board (1973), 34 Cal. App. 3d 1002, the Court held that a person temporarily suspended from work for disciplinary reasons was "discharged" within the meaning of section 1256 of the code if that person files a claim for benefits during the period of the suspension.

We do not believe, as we have stated in non-precedent decisions before, that the Morris case holds that an employee's suspension necessarily terminates the relationship between the employer and the employee. In our view, if the claimant quits during his suspension and then files a claim for benefits, we would examine the reason the claimant is actually unemployed, that is to say, the reason he quit his job and applied for benefits.

In the court cases and precedent decisions cited above, a common thread has been that a determination of disqualification should be related to the cause of a claimant's present unemployment, the reason he is filing his claim. This is the rationale expressed by the legislature with regard to the enactment of section 1256.3 of the code.

The administrative law judge has cited Precedent Decision P-B-259 in support of the "two separations" theory.

In Precedent Decision P-B-259 the claimant resigned, but would have been obliged to begin an involuntary pregnancy leave of absence on the same date if she had not resigned. The Appeals Board noted that the claimant had no real choice as far as leaving work was concerned and held that the leaving was involuntary. The claimant was not disqualified for benefits under section 1256 of the code. The cause of the claimant's unemployment was the employer's policy requiring her leave-taking. What she did during the pendency of the leave was irrelevant. The Appeals Board noted that

whether the claimant may be subject to disqualification under section 1256 after the pregnancy leave was not an issue before the Board. The Board noted that if the claimant then filed a claim for benefits, it would be "necessary for the Department to ascertain the cause of her unemployment in relationship to that claim and to determine her eligibility for benefits."

The primary holding of P-B-259 was that the cause of the claimant's unemployment was the involuntary leave of absence. Her leaving was therefore, not disqualifying. P-B-259 was issued in 1976, before the enactment of section 1256.3 of the code. To the extent that the above-quoted language from the decision leads to an interpretation that an additional determination should be made from the same separation from the same employer, P-B-259 must be overruled. In accordance with section 1256.3 of the code, once an individual files for unemployment insurance, a determination should be made based upon the facts of the separation from the most recent employer.

The logic and efficacy of the position that there should be only one determination of the circumstances of separation with regard to the same application for benefits is amply demonstrated by the result called for in the facts of the case before us. The claimant had given notice to the employer that he would quit. The employer fired him well before that happened. What may have occurred subsequent to the discharge is pure speculation. The employment relationship may have continued, the parties settling their differences. We simply cannot know what would have happened. It is clear that the employer took the initiative in this case and such an action is clearly its prerogative. However, to make a second, additional determination under these circumstances would be a theoretical exercise having no relationship to the facts of the case. The claimant filed his claim shortly after his discharge. The reason he was discharged is clear.

In Precedent Decision P-B-39 the Appeals Board held that an employer who discharged the claimant prior to the effective date of the claimant's intended resignation, and paid no wages after the last day of work, was the moving party in the separation.

Citing Maywood Glass Company v. Stewart (1959) 170 Cal. App. 2d 719, the 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.

In the present case, the employer became the moving party when it discharged the claimant before the claimant's notice period had expired. Section 1256 of the code provides that an individual is disqualified for benefits if the individual is discharged for misconduct. There is no evidence that the claimant committed an act of misconduct. Section 1256.3 of the code defines "most recent work" as that work in which the claimant last performed compensated services prior to and nearest the date of filing a valid claim. In this case, the claimant's most recent work before filing his claim was that work with the employer herein, which ended on May 29, 1990 when he was discharged for reasons other than misconduct. Accordingly, the claimant is not disqualified for benefits under section 1256 of the code.

### DECISION

The decision of the administrative law judge is set aside. The claimant was discharged from his most recent work for reasons other than misconduct. 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, May 23, 1991.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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