

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

EARTHEL R. WHITE
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-83
Case No. 70-1873

E. GOTTSCHALK & CO., INC.
(Employer)

The employer appealed from that portion of Referee's Decision No. S-35527 which held the claimant not ineligible for benefits under section 1264 of the Unemployment Insurance Code on the ground that the claimant was the major support of her family both at the time of leaving work and at the time of filing her claim for benefits. That part of the referee's decision from which the employer did not appeal held the claimant not subject to disqualification under section 1256 of the code and the employer's reserve account not relieved of benefit charges under section 1032 of the code on the ground that the claimant voluntarily left her most recent work with good cause.

STATEMENT OF FACTS

The claimant was last employed by the above identified employer for approximately six months as a retail salesclerk working 35 hours per week at a terminal wage of \$1.75 per hour.

In February 1969 the claimant's husband was injured and thereafter was unable to work. However, sometime shortly before January 24, 1970 he entered into an agreement with a company in Sacramento to act as a commission insurance salesman for this company in Modesto, California. He thereupon commenced selling for this company and for a short period of time commuted between his home in Fresno and his place of assignment in Modesto. Modesto is approximately 90 miles from Fresno and in order to continue to sell in Modesto it was necessary for the husband to move there. For this reason the couple sold their home in Fresno and on or about January 24, 1970 they took up residence in Modesto.

On February 11, 1970 the claimant reported to the Modesto Office of the Department and filed a claim for unemployment benefits effective February 8, 1970. On February 12, 1970 the claimant's husband received his first commission check in the amount of \$78.40.

It is the claimant's contention that she was the sole or major support of the family both at the time she left work and at the time she filed her claim for benefits because during the six months she worked for the above identified employer, her husband was totally unemployed and although he commenced performing services sometime before the claimant filed her claim for benefits, he enjoyed no income until after the claim had been filed.

REASONS FOR DECISION

Section 1264 of the Unemployment Insurance Code provides in pertinent part as follows:

" . . . an employee who leaves his or her employment . . . to accompany his or her spouse to or join her or him at a place from which it is impractical to commute to such employment . . . shall not be eligible for unemployment insurance benefits for the duration of the ensuing period of unemployment. . . . The provisions of this section shall not be applicable if the individual at the time of such voluntary leaving was and at the time of filing a claim for benefits is the sole or major support of his or her family."

The legislature of this state has provided in section 1264 that under the conditions enumerated therein a claimant is ineligible to receive unemployment insurance benefits. However, the legislature was aware that certain hardship would result from the application of this section. Therefore, the law included an "escape clause" which provided that section 1264 would not be applicable if the claimant was the sole or major support of the family both at the time of leaving work and at the time of filing the claim for benefits. However, in construing the "escape clause" we are bound by the rule that a person claiming to fall within the exception of a statute has the burden of clearly bringing himself within it, and must prove every fact essential to the invocation of the exemption. (Rheem Mfg. Co. v. Rheem, 295 F. 2d 473)

In implementing section 1264, the Director of Employment (now Director of the Department of Human Resources Development) adopted section 1264-1(d), Title 22, California Administrative Code. This section reads as follows:

" 'Major support' of a family shall be presumed to be the family members, in the order provided below:

- (1) The husband or father
- (2) The wife or mother in any family in which there is no husband or father."

The presumption contained in the above cited section of the administrative code applies not only to the situation as it existed when the claimant left work, but to the situation as it existed at the time the claimant filed the claim for benefits. Thus, the burden is upon the claimant to overcome the presumption at both of the times mentioned.

It is clear in this matter that at the time the claimant left her work, she was, if not the sole support, at least the major support of the family because her husband had been unable to work for a considerable period of time and the only income the family enjoyed was that of the claimant. Thus, the presumption contained in the above cited section of Title 22, California Administrative Code, has been overcome insofar as it applies to the situation that existed at the time the claimant left her work. However, as pointed out above, this presumption also applies at the time the claimant filed her claim for benefits.

In this case the claimant was unemployed and was enjoying no income at the time she filed her claim for benefits. She presented no evidence to overcome the presumption that her husband was the major support at that time. In fact, her husband had entered into an agreement to sell insurance and commenced performing these services prior to the time the claimant filed her claim for benefits. Applying the presumption contained in section 1264-1(d) of the Administrative Code, it must be held that the claimant's husband was the major support of the family at the time she filed her claim for benefits. Therefore, she is ineligible for benefits under section 1264 of the code.

Since no appeal has been taken from the issues under sections 1256, 1030 and 1032 of the code, we will make no findings in regard to these sections and the referee's decision relative to these sections shall stand.

DECISION

The decision of the referee is modified. The claimant is ineligible for benefits under section 1264 of the code. The claimant is not subject to disqualification under section 1256 of the code and the employer's reserve account is not relieved of charges under section 1032 of the code.

Sacramento, California, August 20, 1970

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

JOHN B. WEISS

DISSENTING - Written Opinion Attached

LOWELL NELSON

DON BLEWETT

DISSENTING OPINION

The majority has based their opinion on the conclusion that the claimant has not overcome the presumption contained in section 1264-1(d), Title 22, California Administrative Code. With this we do not agree.

The California Evidence Code, in section 601, classifies presumptions as follows:

"601. Classification of presumptions. A presumption is either conclusive or rebuttable. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof."

It is clear that the presumption in section 1264-1(d) is not conclusive but is rebuttable. The Evidence Code defines a presumption affecting the burden of producing evidence as follows:

"603. Presumption affecting the burden of producing evidence defined. A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied."

Presumptions affecting the burden of proof are defined as follows:

"605. Presumption affecting the burden of proof defined. A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of the legitimacy of children, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others."

In our opinion the presumption contained in section 1264-1(d) is one affecting the burden of producing evidence because there is no strong public policy behind section 1264 of the Unemployment Insurance Code such as the policy in favor of the legitimacy of children, the validity of marriage, etc.

It was pointed out in Loew's Inc. v. California Employment Stabilization Commission (76 Cal. App. 2d 231; 172 Pac. 2d 938) that the burden is upon the claimant to establish his or her eligibility for unemployment benefits. The claimant in this matter met this burden because after she filed her claim for benefits the Department investigated her eligibility thoroughly and issued a determination holding the claimant eligible for benefits and section 664 of the Evidence Code provides in part that "It is presumed that official duty has been regularly performed. . . ."

The employer filed the appeal to the referee from the Department's determination and the burden was on the employer to produce evidence to overcome the findings of the Department. The only evidence the employer produced was to show that sometime after the claimant left work, her husband commenced performing services presumably as an insurance salesman.

The "escape clause" in section 1264 of the Unemployment Insurance Code reads as follows:

". . . The provisions of this section shall not be applicable if the individual at the time of such voluntary leaving was and at the time of filing a claim for benefits is the sole or major support of his or her family." (emphasis added)

Thus, in applying this section of the code we must concern ourselves with who the sole or major support of the family was at the time of leaving work not during the week or the month in which the employment was terminated, but at the time. Likewise, we must ascertain who the sole or major support of the family was at the time, not during the week or month, but at the time of filing the claim for benefits.

One of the Maxims of Jurisprudence contained in the California Civil Code at section 3547 provides that "A thing continues to exist as long as is usual with things of that nature."

Accordingly, if a claimant was the sole or major support of the family at the time of leaving work but at the time the claim was filed her husband was working but would not receive his pay until after 30 days of employment, we would hold that she remained the sole or major support until such a time as he received some expendable income. Actually the length of time does not matter, whether it be 30 days, ten days or one day, so long as the husband

has no income at the time the claim is filed, the claimant remains the sole or major support if she was at the time she left work.

Since the claimant was the sole or major support of the family at the time she left work and since nothing intervened subsequent thereto which would establish that her husband was enjoying an income at the time she filed her claim for benefits, we conclude that she was the sole or major support of the family at the time she filed her claim. Therefore, we would hold that the claimant is not ineligible for benefits under section 1264 of the code.

In brief, what we are saying is, that in order to be entirely fair to all parties to an appeal, we are obligated to apply the law as it is written to the facts as they exist. To do otherwise would place one party to an appeal in a position of unfair advantage over the other.

LOWELL NELSON

DON BLEWETT