BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:
EMORY A. SWAYZE
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-90
Case No. 70-1449

LIBERTY NATIONAL BANK
(Employer)

DEPARTMENT OF HUMAN
RESOURCES DEVELOPMENT

The Department appealed from Referee's Decision No. SF-14829 which set aside the determination of the Department under section 1256 of the Unemployment Insurance Code and referred the matter to the Department for consideration under said section. The ruling of the Department was affirmed; the employer's reserve account was not subject to benefit charges under section 1032 of the code. The Department and the employer submitted written argument to which we have given consideration. None has been received from the claimant.

STATEMENT OF FACTS

The claimant was employed by the above identified employer since December 1967. His employment as vice-president and controller terminated on January 31, 1969 when he was discharged. In his job as controller his duties were to handle all of the accounting records of the bank. He had other duties, including the supervision of part of the operation and administration.

An investigation had been undertaken by the bank's officials because of a suspicion that there had been a misappropriation of bank funds. There was a shortage of approximately $2,400.

The bank auditor testified that by the week ending January 31, 1969 it was clearly established that the claimant had diverted funds belonging to the bank - received in the form of checks payable to the bank - to his personal use. This was accomplished by substituting those checks without any entry for cash received that was recorded in the books. The claimant did not report

to work on January 31, 1969 because he had been seriously injured in an automobile accident and hospitalized in Salinas, California. The bank was informed on February 7, 1969 of his hospitalization and coverage was requested under the group plan carried by the bank.

The claimant's notice of discharge was mailed to him on February 2, 1969, terminating his employment as of January 31, 1969.

The Federal Bureau of Investigation was called into the case but because of the serious condition of the claimant action was deferred until he had recovered sufficiently to be questioned. He was indicted after the completion of the investigation under section 656 of Title 18 of the United States Code Annotated, which provides punishment for theft, embezzlement or misapplication by bank officials or employees. He pleaded nolo contendere to the charge. He was not actually incarcerated until after his recovery and entered the Federal Correctional Institute, Terminal Island, California, on August 6, 1969. He was released December 10, 1969.

While he was confined in the institution he was assigned work in the business office. He worked eight hours a day and was paid approximately $45 a month. He filed his claim for benefits with an effective date of December 21, 1969. Notice of the filing was given to the bank who responded with information that the claimant had been discharged because of evidence of his theft of funds from the bank.

The referee found that the claimant's last employment was the work performed as an office worker in the Federal Correctional Institute. At the referee's hearing the claimant denied his guilt and contended he entered a plea of nolo contendere on the advice of his attorney.

REASONS FOR DECISION

Section 1327 of the Unemployment Insurance Code provides:

> "A notice of the filing of a new or additional claim shall be given to the employing unit by which the claimant was last employed immediately preceding the filing of such claim, and

the employing unit so notified shall submit within 10 days after the mailing of such notice any acts then known which may affect the claimant's eligibility for benefits.

Section 1030 of the code provides in part:

"(a) Any employer who is entitled under Section 1327 to receive notice of the filing of a new or additional claim may, within 10 days after mailing of such notice, submit to the department any facts within its possession disclosing whether the claimant left such employer's employ voluntarily and without good cause or was discharged from such employment for misconduct with his work . . . ."

"(b) Any base period employer who is not entitled under Section 1327 to receive notice of the filing of a new or additional claim and is entitled under Section 1329 to receive notice of computation may, within 15 days after mailing of such notice of computation, submit to the department any facts within its possession disclosing whether the claimant left such employer's employ voluntarily and without good cause or was discharged from such employment for misconduct connected with his work . . . ." (emphasis added)

Section 1328 of the code provides in part:

"The facts submitted by an employer pursuant to Section 1327 shall be considered and a determination made as to the claimant's eligibility for benefits. The claimant and any employer who prior to the determination has submitted any facts or given any notice pursuant to Section 1327 and authorized regulations shall be promptly notified of the determination and the reasons therefor and may appeal therefrom to a referee within ten days from mailing or personal service of notice of the determination. . . ."

The Department, in its written argument, contended that the employment performed in the Federal Correctional Institute was not employment, although so characterized, and was not performed as a federal employee under an employer-employee relationship.

Section 4122, Title 18, USCA provides in part:

"4122. Administration of Federal Prison Industries

"(a) Federal Prison Industries shall determine in what manner and to what extent industrial operations shall be carried on in Federal penal and correctional institutions for the production of commodities for consumption in such institutions or for sale to the departments or agencies of the United States, but not for sale to the public in competition with private enterprise.

"(b) Its board of directors shall provide employment for all physically fit inmates in the United States penal and correctional institutions, diversify, so far as practicable, prison industrial operations and so operate the prison shops that no single private industry shall be forced to bear an undue burden of competition from the products of the prison workshops, and to reduce to a minimum competition with private industry or free labor."

In our opinion the obvious purpose of that statute is to provide occupation for individuals so confined.

Section 8501 of Chapter 25 (unemployment compensation), Title 5, USCA, provides in part:

"8501. Definitions

For the purpose of this subchapter—

"(1) 'Federal service' means service performed after 1952 in the employ of the United States or an instrumentality of the United States which is wholly or partially owned by the United States, but does not include service (except service to which subchapter II of this chapter applies) performed--

* * *

"(G) in a hospital, home, or other institution of the United States by a patient or inmate thereof"

Federal service, therefore, does not include services performed by an inmate of a federal correctional institute within the meaning of section 8501, Title 5, USCA.

In addition, section 2105, USCA, provides in part:

> "(a) For the purpose of this title, 'employee', except as otherwise provided by this section or when specifically notified, means an officer and an individual who is--
>
> "(1) Appointed in the civil service by one of the following acting in an official capacity--
>
> (A) the President;
> (B) a member or members of Congress, or the Congress;
> (C) a member of a uniformed service;
> (D) an individual who is an employee under this section;
> (E) the head of a Government controlled corporation; of
> (F) the adjutants general designated by the Secretary concerned under section 709(c) of Title 32, United States Code;
>
> "(2) engaged in the performance of a Federal function under authority of law or an Executive Act; and
>
> "(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position."

Therefore, in order to be an employee in federal service, an individual must be appointed in federal civil service, be engaged in federal functions and be subject to the supervision of an individual in paragraph 1 of subsection (a) of section 2105.

For these reasons, we find that the claimant's last employment, as defined in the Unemployment Insurance Code, was that performed for the Liberty National Bank.

Section 1256 of the 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 claimant has been discharged for misconduct connected with his most recent work.

In Appeals Board Decision No. P-B-3 we found that the four elements necessary to establish misconduct are:

(1) A material duty owed by the claimant to the employer under the contract of employment;

(2) A substantial breach of that duty;

(3) A breach which is a wilful or wanton disregard of that duty; and

(4) A disregard of the employer's interests, which tends to injure the employer.

This board has held many times that the conversion of the property of the employer is misconduct and subjects a claimant to disqualification for benefits under section 1256 of the code. (Benefit Decisions Nos. 5796 and 6235)

The question to be resolved in this matter is whether the claimant's plea of nolo contendere is sufficient to establish misconduct on the part of the defendant. On this point the District Court of Appeal, Second Appellate District in Caminetti v. Imperial Mutual Life Insurance Company (59 C.A. 2d 476 (1943)) stated at page 490:

> "In reviewing the history of nolo contendere pleas, the authorities are harmonious in holding that such a plea, like a demurer, admits for the purpose of the particular case, all the facts therein stated, but is not to be used as an admission elsewhere. Such a plea is an implied confession only of the offense charged. It is discretionary with the court to receive it or not. It is advantageous to a party because by it he is not estopped to plead not guilty to an action for the same facts, as he would not be permitted to do upon a plea of guilty. The existence in the law of the two pleas, i.e., guilty and nolo

> contendere, is indicative of the fact that there is some distinction or difference between them. Undoubtedly the plea of nolo contendere is often used as a substitute for a plea of guilty but it amounts only to a declaration by the defendant that he will not contend. It has been held not to be a confession of guilt (Barker v. Almy. 20 R.I. 367 [39 A. 185]). It is uniformly held that such a plea cannot be used against the defendant as an admission in any civil suit for the same act. Manifestly, if a plea of nolo contendere has the same effect as a plea of guilty, viz., admitting the charge, then it differs in no respect from a plea of guilty (Buck v. Commonwealth, 107 Penn. 486, 489). Tucker v. United States, 196 F. 260 [116 C.C.A. 62, 41 L.R.A.N.S. 70], is authority for the statement that the plea of nolo contendere is in fact a confession on which a defendant may be sentenced in a particular prosecution, and as the plea is limited to that particular case, such conviction can not be used in another proceeding to discredit the witness; then in State v. Suick, 195 Wis. 175 [217 N.W. 743], we find the following: 'The plea of "nolo contendere" is an implied confession. Judgment of conviction follows such a plea as a matter of course, yet the plea itself contains no admissions which can be used against the defendant in another action.' Strictly speaking, therefore, the plea of nolo contendere amounts only to an agreement on the part of the defendant that the fact charged may be considered as true for the purposes of the particular case wherein it is entered (31 A.L.R. 278). A plea of nolo contendere, while implied, is not a conclusive confession of guilt. By entering the plea the defendant does not confess or acknowledge the charge against him, as upon a plea of guilty (Doughty v. DeAmoreel, 22 R.I. 158 [46 A. 838]; State v. LaRose, 71 N.H. 435 [52 A.943]; White v. Creamer, 175 Mass. 567 [56 N.E. 832])."

However, we do not need to rely on the plea of nolo contendere since there was testimony by the auditor of the employer which clearly established that the claimant had engaged in misappropriation of the employer's funds. We find that the claimant was discharged for misconduct in connection with his most recent work and is subject to disqualification under section 1256 of the code. Consequently, the employer's reserve account is entitled to the relief of benefit charges under section 1032 of the code.

DECISION

The decision of the referee is modified. The claimant is disqualified for benefits under section 1256 of the code and the employer's reserve account is relieved of benefit charges under section 1032 of the code.

Sacramento, California, December 10, 1970.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

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