BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of the
Reserve Account of:

WHITTAKER CORPORATION
BERMITE DIVISION
(Employer)

PRECEDENT
RULING DECISION
No. P-R-86
Case No. R-69-71

Claimant: Gary A. Ashwell

Subsequent to the issuance of Referee's Decision No. BN-R-7820, we assumed jurisdiction of the matter under section 1336 of the Unemployment Insurance Code. The referee's decision reversed a ruling of the Department of Employment (now the Department of Human Resources Development) and held that the employer's reserve account was not subject to charges under section 1032 of the code. Written argument was submitted by the employer. The Department did not submit such argument.

STATEMENT OF FACTS

The claimant filed a claim for unemployment insurance benefits effective November 17, 1968. In the base period of that claim the claimant had been employed as a production worker at a rate of $2.10 per hour in Saugus, California by the subject employer. He was employed approximately three months and last worked on Friday, October 13, 1967.

The claimant worked from Monday through Friday. He did not report for work on Monday, Tuesday, or Wednesday, October 16, 17, or 18, 1967, nor did he report the reason for his absence to the employer.

The employer's plant rules state in part as follows:

"PLANT RULES

"The purpose of rules and regulations is not to restrict the rights of anyone, but rather to define them, to protect the rights of all and to insure cooperation. Violation of any one of the

following rules will be grounds for discplinary [sic] action, including discharge.

* * *

"6. Being absent for a period of three consecutive working days without notifying the Personnel Office. (Employees should call in each day of absence.)"

The claimant was aware of the plant rule.

On Thursday, October 19, 1967, the claimant reported to the employer's plant. At that time he signed a termination of employment form which stated in part:

"State in detail reason for Termination. Terminated-Plant rule #6 unreported absence for a period of more than three days. P. U. [pick up] Last Check."

There is no evidence of record as to the reason for the claimant's absence or failure to notify the employer. The Department was unable to obtain any information from the claimant and the employer had no information concerning this matter. There is no evidence of record as to why the claimant reported to the employer on October 19, 1967, whether to pick up his check or whether to return to work.

REASONS FOR DECISION

Section 1032 of the Unemployment Insurance Code provides that an employer's account shall be relieved of benefit charges if it is ruled under section 1030 of the code that the claimant left his employment voluntarily and without good cause or was discharged for misconduct connected with his work.

The Attorney General of the State of California, in Attorney General Opinion No. 52-99 of July 9, 1952 (20 Ops. Cal. Atty. Gen. 23), stated in part as follows:

"If the determination by the Department of Employment is adverse to the employer and the issue to presented to a referee or the Appeals Board, the burden of proof, i.e., the burden of

> producing convincing evidence to establish the affirmative of the issue, rests upon the employer and if he produces no evidence or the evidence he produces does not carry conviction, then his account must be charged. But if the employer produces evidence which establishes a prima facie case, then the burden of going forward with the evidence shifts to the Department of Employment and if it produces no evidence or the evidence it produces is so weak as not to refute the prima facie case of the employer, then the determination should be in favor of the employer."

We quoted from this opinion in Appeals Board Decision No. P-R-15. We have been guided by this opinion in many cases over the years since its issuance. We believe that the employer has established a prima facie case that the claimant was discharged for violation of Plant Rule No. 6, unreported absence for three consecutive working days, and that the discharge was for misconduct in connection with the work. The burden of going forward with the evidence shifted to the Department and it produced no evidence to refute the prima facie case of the employer.

Inherent in the facts in this case is the issue of whether the claimant had voluntarily left his work. The issue of whether absence from work without notice to the employer constitutes a voluntary leaving or a discharge for unreported absence is one which has plagued the board for many years.

In Ruling Decision No. 121, the facts were as follows:

> "The claimant [Seipp] was employed as a cab driver by this employer commencing September 25, 1956 and last worked on October 6, 1956. He did not report for duty or contact the employer on October 7, 1956 or at any time thereafter. The employer held the claimant's time card for seven working days and then marked it as a discharge. There is no evidence that the employer ever notified the claimant of its action and it had no knowledge of the reasons for the claimant's absence from work."

We held in that case that the claimant voluntarily left the employer's employ and that marking its records with the word "discharge" was simply the performance of a clerical function by the employer.

That matter was appealed to the courts and in the case of Yellow Cab Company v. California Unemployment Insurance Appeals Board (1961), 194 Cal. App. 2d 343, 15 Cal. Rptr. 425, the District Court of Appeal stated in part, as follows:

> "Thus inherent in the inquiry is the question - did Seipp's act of failing to appear for work on October 7 constitute a voluntary leaving of his employment - if it did, it was the final act of terminating the employment relationship, regardless of why he quit or whether he had good cause to do so (respondent concedes that there is no sufficient evidence in the record to show that Seipp did not have good cause for quitting), and respondent's subsequent act of 'discharge' was wholly ineffective; if it did not, the employment relationship continued and respondent could, and did seven days later, properly discharge him for an infraction of a company rule regarding unauthorized absence from work. Respondent concedes that Seipp cannot in fact be discharged by it unless the employment relationship existed between them at the time. . . submitting that the evidence supports his discharge for misconduct 'assuming Seipp had not earlier terminated the employment relationship.' . . . Thus, if the evidence shows that the employment relationship ended on October 7, Seipp thereafter was no longer an employee of the respondent subject to its control, was under no obligation to report or duty to return to work and could be neither guilty of misconduct in connection with his work nor discharged from its employ; and that respondent after seven days marked his time card as a 'discharge' could constitute at most a clerical act or record entry made for its own convenience in keeping its books."
>
> * * *
>
> "Respondent's act of marking Seipp's time card as a 'discharge' seven working days after he quit does not alter the effectiveness of Seipp's termination. Having severed his employment relationship on October 7, Seipp neither was bound by company regulations nor continued under respondent's control, thus, he could not have been guilty of misconduct or subject to discharge by respondent. Although leaving without notice may not be the best way to sever an employment relationship, it does not here affect the validity or effectiveness of his act of quitting. Further, we entertain a doubt that respondent then actually intended its act of discharge to terminate any employment relationship, for it never attempted to notify Seipp of its action. Marking Seipp's time card as a

> 'discharge' was no more, and then intended to be no more than a clerical function merely acknowledging in respondent's books and records, for its own convenience, that the employment relationship between it and Seipp had been terminated."

In Yellow Cab Company, supra, the court concluded from the circumstances surrounding the claimant's failure to report for work that he voluntarily left the work.

In the instant case there is no evidence in the record concerning the reason that the claimant failed to report to work and failed to notify the employer of his absence. Absence alone cannot, as a matter of law, be held to be a voluntary leaving. Here, the employer did more than make a mere record entry. It notified the claimant that he was discharged and the claimant acquiesced in the employer's action as indicated by his signing of the termination notice.

Section 1030(c) of the Unemployment Insurance Code now provides that if the claimant voluntarily leaves the employer's employ without notification to the employer of the reasons therefor, and if the employer submits all of the facts within its possession concerning such leaving within the applicable time period, such leaving will be presumed to be without good cause.

We also are cognizant of our holding in Ruling Decision No. 136 to the effect that the employer may not benefit from such presumption where, having had a full opportunity to ascertain the reasons for the claimant's leaving, it made no effort to do so.

Here, however, we have found that the employer has established a prima facie case that it discharged the claimant. The department then incurred the burden of going forward with the evidence. It failed to do so, and therefore in this case we need not concern ourselves with the issue of whether the claimant voluntarily left his work and/or whether the employer was entitled to the advantage of the presumption set out in section 1030(c) of the code.

DECISION

The decision of the referee reversing the determination of the department is affirmed. The employer's reserve account is relieved of benefit charges under section 1032 of the code.

Sacramento, California, September 8, 1970.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

LOWELL NELSON

CLAUDE MINARD

JOHN B. WEISS

DON BLEWETT