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Unemploymenet Compensation - Disqualification - Employee's Refusal to Discuss Alleged Communist Party Membership with His Employer Constitutes Misconduct Connected With His Work

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UNEMPLOYMENT COMPENSATION — DISQUALIFICATION — EMPLOYEE'S REFUSAL TO DISCUSS ALLEGED COMMUNIST PARTY MEMBERSHIP WITH HIS EMPLOYER CONSTITUTES MISCONDUCT CONNECTED WITH HIS WORK—Claimant was discharged after he refused to explain or deny charges of Communist

Party membership, made against him before a congressional committee, at a hearing conducted by his employer, a private contractor engaged in defense work. The Unemployment Compensation Board of Review rejected his claim for unemployment compensation benefits upon a finding that this refusal constituted "willful misconduct connected with his work."[1] On appeal, *held,* affirmed. An employee's refusal to discuss alleged Communist Party membership with his employer, who is engaged in defense work, creates doubt as to his loyalty and jeopardizes his employer's defense contracts. His consequent discharge is for "misconduct connected with his work," which disqualifies him from receiving unemployment compensation benefits.[2] *Ault v. Unemployment Compensation Board of Review,* (Pa. Super. 1958) 146 A. (2d) 729.

Absent controlling contractual or statutory provisions, a private employer may discharge an employee with or without cause.[3] However, not every discharge disqualifies the employee from participating in the unemployment compensation fund, for the generally accepted purpose of unemployment compensation is to pay benefits to persons who are involuntarily unemployed through no fault of their own.[4] The standard for determining fault, established by the legislatures of almost all states, is whether the employee was discharged for "willful misconduct connected with his work."[5] In determining what constitutes willful misconduct, the first element in the statutory test of disqualification, the courts have formulated two basic tests: (1) does the employee's conduct evince a disregard for the standard of behavior which the employer has a right to expect of the employee,[6] or (2) is his conduct prejudicial to the interests of the employer.[7]

1 Pa. Stat. Ann. (Purdon, 1945) tit. 43, §402: "An employee shall be ineligible for compensation for any week . . . (e) In which his unemployment is due to his discharge . . . for willful misconduct connected with his work. . . ."

2 In companion cases the court remanded for further evidence where it did not appear that the claimants had been given an opportunity to answer their employer's questions, Panzino v. Unemployment Compensation Board of Review, (Pa. Super. 1958) 146 A. (2d) 736, and denied compensation where the claimant, though neither invoking the Fifth Amendment before a congressional committee nor refusing to answer her employer's questions, refused to discuss her alleged Communist Party activities before the Unemployment Compensation Board of Review. Darin v. Unemployment Compensation Board of Review, (Pa. Super. 1958) 146 A. (2d) 740. Since Communist Party membership would be misconduct, the claimant's refusal to discuss this matter prevented the board from obtaining all relevant facts bearing upon her right to compensation.

3 Bell v. Faulkner, (Mo. App. 1934) 75 S.W. (2d) 612. See Odell v. Humble Oil & Refining Co., (10th Cir. 1953) 201 F. (2d) 123, cert. den. 345 U.S. 941 (1953).

4 Kempfer, "Disqualifications for Voluntary Leaving and Misconduct," 55 YALE L.J. 147 at 149 (1945).

5 U.S. BUREAU OF EMPLOYMENT SECURITY, DEPARTMENT OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 71 (1949).

6 Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941); Johns v. Kress & Co., 78 Idaho 544, 307 P. (2d) 217 (1957). The refusal of an employee to comply with the reasonable rules of the employer constitutes "misconduct." Bigelow Co. v. Waselik, 133 Conn. 304, 50 A. (2d) 769 (1946). An employee's refusal to discuss with his employer activities which adversely reflect on his loyalty could perhaps be considered a deliberate disregard of a reasonable rule of the employer.

An employee's refusal to discuss alleged Communist Party membership with his employer seems to fall within each of the above definitions of misconduct. First, the analogies from the public employment area suggest that the employee's refusal to answer the employer's questions, while not justifying an imputation of guilt,[8] nevertheless supports inferences of untrustworthiness and unreliability which the employer could reasonably expect the employee to refute satisfactorily.[9] Second, an employer has a right to inquire into the outside activities of its employees which might adversely affect the work done by them or might otherwise jeopardize the interests of the employer.[10] In the principal case, the claimant could reasonably understand that his failure to explain or deny charges of membership in an organization which advocated forceful overthrow of government would jeopardize his employer's interests in retaining government defense contracts. Under either of the accepted tests discussed above, it would have been difficult for the court in the principal case to conclude that the claimant's discharge was not attributable to misconduct on his part.[11]

The second element in the determination that an employee is not qualified to receive unemployment compensation benefits is the requirement that the misconduct for which he is discharged be "connected with his work." Although the courts have not been articulate in formulating adequate criteria for determining when a sufficient connection with the work exists, their inquiries have generally been directed toward the connection between the employee's misconduct and the employment relationship.[12] A sufficient connection with the employee's work has been found when he refuses to discuss his alleged Communist Party membership with his employer,[13] but not when he refuses to answer similar questions before a

7 Mundy v. Unemployment Compensation Board of Review, 183 Pa. Super. 359, 133 A. (2d) 587 (1957); MacFarland v. Unemployment Compensation Board of Review, 158 Pa. Super. 418, 45 A. (2d) 423 (1946). The duty of loyalty to the employer's interests is implied in every contract of employment. See Sawyer v. Drew & Co., (D.C. N.J. 1953) 111 F. Supp. 1 at 2. Cf. Garner v. Board of Public Works, 98 Cal. App. (2d) 493, 220 P. (2d) 958 (1950), affd. 341 U.S. 716 (1951). Arguably an employee's refusal to explain charges indicating untrustworthiness, when the employer is entitled to an explanation, could be considered a breach of this contractual duty.

8 See Slochower v. Board of Education, 350 U.S. 551 at 557 (1956), which held that the summary dismissal of a public school teacher who invoked the Fifth Amendment before a congressional committee was arbitrary and resulted in a denial of due process of law.

9 See Lerner v. Casey, 357 U.S. 468 (1958), which held that an inference of doubtful trust and reliability could be drawn from the invocation of the Fifth Amendment by a public employee. Cf. Beilan v. Board of Education, 357 U.S. 399 (1958).

10 Principal case at 735; Ostrofsky v. Maryland Employment Security Board, (Md. 1959) 147 A. (2d) 741 at 743; Panzino v. Unemployment Compensation Board of Review, note 2 supra, at 739.

11 Cf. Bodinson Mfg. Co. v. California Employment Commission, 17 Cal. (2d) 321, 109 P. (2d) 935 (1941).

12 Kempfer, "Disqualifications for Voluntary Leaving and Misconduct," 55 YALE L.J. 147 at 165 (1945).

13 Principal case at 735; Ostrofsky v. Maryland Employment Security Board, note 10 supra.

congressional committee.[14] This distinction does not appear reasonable, for it is when the employee refuses to answer questions before the congressional committee that the adverse effect on the employer's interests, because of unfavorable publicity, would seem to be the greatest.[15] However, this result can perhaps be explained by the reluctance of the courts to base a disqualification on the exercise of a constitutional right.[16] It can be argued that the connection requirement should be relevant in denying unemployment compensation benefits only when the employee's conduct is incompatible with the responsibilities of his employment. Each case, then, would involve a consideration of the nature of the employer's business and the work done by the employee. Where the employment has no relation to work involving national security, the employee's refusal to discuss his political views with his employer might not be regarded as having any connection with his work. Although the principal case found a connection between the employee's misconduct and his work because of the employer's interest in retaining its defense work, the court failed to indicate the nature of the work done by the claimant.[17] In this latter respect the court seems to have ignored what should be considered an essential criterion in determining whether a sufficient connection with the work is present.

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[14] Fino v. Maryland Employment Security Board, (Md. 1959) 147 A. (2d) 738; Panzino v. Unemployment Compenation Board of Review, note 2 supra. In the Fino case the court held that a waitress' refusal to answer questions concerning Communist Party membership before a congressional committee, while constituting "misconduct," was not connected with her work.

[15] In the principal case the employer claimed that the employee's conduct in refusing to answer the committee's questions so aroused his fellow employees that they refused to work with him, and a work stoppage resulted. Resolution of the issue on the basis of whether the misconduct occurred on the employer's premises seems artificial and overtechnical, especially when the alleged misconduct consists of refusal to discuss political affiliations.

[16] Because an arbitrary discrimination in the distribution of unemployment compensation benefits might violate the Fourteenth Amendment, it would seem that a classification of workers for the purpose of disqualification must be pertinent to the objectives of the unemployment compensation program. Cf. Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580 at 583 (1935); Truax v. Corrigan, 257 U.S. 312 (1921). Disqualification based on invocation of the Fifth Amendment might be deemed arbitrary, and result in a denial of due process. See Slochower v. Board of Education, note 8 supra. Cf. Steinberg v. United States, (Ct. Cl. 1958) 163 F. Supp. 590. But cf. Orloff v. Willoughby, 345 U.S. 83 (1953); United Electrical Radio and Machine Workers of America v. General Electric Co., (D.C. D.C. 1954) 127 F. Supp. 934. The right to receive unemployment compensation benefits has been conditioned on the filing of an affidavit disavowing advocacy of forceful overthrow of government. Dworken v. Collopy, (Ohio Comm. Pl. 1950) 91 N.E. (2d) 564.

[17] E.g., if the claimant in the principal case had been a parking lot attendant in the employer's parking lot, it would not appear that his subversive affiliations would be in any way connected with the performance of his employment duties.