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LABOR LAW—UNEMPLOYMENT COMPENSATION—APPLICABLE DISQUALIFICATION PROVISION WHERE CLAIMANT IS DISCHARGED FOR BREACH OF A NO-STRIKE CLAUSE

Twenty-four claimants for unemployment insurance benefits were employed by a plastic and chemical manufacturing corporation as production workers. The union representing these employees had a collective bargaining agreement with the employer which prohibited lockouts, strikes and other work stoppages while reserving to the employer the right to discharge employees for just cause. Officers of the union determined that the employer had breached the agreement when a dispute arose concerning the return of three supervisors to their former positions in the bargaining unit. Although the agreement provided for a grievance procedure, approximately 625 union members went on strike. Picket lines were established, but there were no incidents of violence or abusive language. The strike was discontinued after a few days at which time the employer discharged the twenty-four claimants because of their violation of the agreement's no-strike clause. In ruling upon the claimants subsequent filing for unemployment insurance benefits, the Unemployment Insurance Appeal Board held that the claimants, under the industrial controversy provision,[1] were disqualified from receiving benefits during the period of the strike but were not disqualified thereafter, under the misconduct provision,[2] from receiving benefits for the duration of their unemployment. An appeal was taken from that portion of the Board's decision finding the employees innocent of misconduct. The Appellate Division affirmed[3] and the employer appealed. The Court of Appeals affirmed, two judges dissenting. *Held,* the industrial controversy provision is the exclusive provision applicable to all instances of unemployment resulting from mere participation in a strike which violates a collective bargaining agreement. *Claim of Heitzenrater,* 19 N.Y.2d 1, 224 N.E.2d 72, 277 N.Y.S.2d 633 (1966).

The enactment of the federal Social Security Act of 1935[4] encouraged the states to pass unemployment insurance statutes to ameliorate the social and economic burdens caused by involuntary unemployment.[5] By July of 1937, all

1. N.Y. Labor Law § 592(1) provides:
Industrial controversy. The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed, except that benefit rights may be accumulated before the expiration of such seven weeks beginning with the day after such strike, lockout, or other industrial controversy was terminated.
2. N.Y. Labor Law § 593(3) provides:
Misconduct. No days of total unemployment shall be deemed to occur after a claimant lost his last employment prior to the filing of his claim through misconduct in connection with his employment until he has subsequently worked in employment on not less than three days in each of four weeks or earned remuneration of at least two hundred dollars.
3. Matter of Heitzenrater, 22 A.D.2d 542, 256 N.Y.S.2d 1000 (3d Dep't 1965).
4. Larson and Murrary, *The Development of Unemployment Insurance in the United States,* 8 Vand. L. Rev. 181, 188-89 (1955); *see also* Comment, *Charity Versus Social Insurance in Unemployment Compensation Laws,* 73 Yale L.J. 357, 367-69 (1963).
5. Matter of Machcinski, 277 App. Div. 634, 102 N.Y.S.2d 208 (3d Dep't 1951).

the states, the District of Columbia, Alaska and Hawaii had passed legislation complying with the basic requirements of the Social Security Act.[6] These requirements afforded the legislatures of each state wide flexibility and discretion to develop benefit, eligibility and disqualification provisions best suited to the conditions prevailing within the individual state.[7] In New York, the major causes for disqualifying an individual from benefit rights are discharge for misconduct connected with the work,[8] leaving work voluntarily without good cause[9] and refusing to accept suitable work.[10] In addition, if an individual loses his employment "because of a strike, lockout, or other industrial controversy" benefits are suspended for seven consecutive weeks or until the dispute is terminated, whichever occurs sooner.[11] The Unemployment Insurance Law purports to establish "fault" or "voluntariness" as the standard by which the operation of these provisions is to be gauged,[12] and the courts of New York frequently have asserted that the purpose behind the Act is to compensate only those persons "unemployed through no fault of their own."[13] However, the courts have not applied this standard strictly in all instances, and have recognized that although an individual's unemployment may be voluntary and therefore technically his "fault," he is not necessarily foreclosed from receiving benefits if mitigating circumstances exist.[14] This is particularly true in situations involving a voluntary leaving of work or the refusal to accept suitable employment.[15] Furthermore, the concepts of "fault" and "voluntariness" are totally irrelevant to the application

6. Larson and Murrary, *supra* note 4, at 188-89.

7. *Preface* to U.S. Dep't of Labor, B.E.S. No. U-141, Comparison of State Unemployment Insurance Laws as of January 1, 1966, at v. This periodic publication contains useful comparisons in textual and tabular form and may be obtained from the Superintendent of Documents, United States Gov't Printing Office, Washington, D.C. 20402.

8. N.Y. Labor Law § 593(3).

9. *Id.* § 593(1).

10. *Id.* § 593(2).

11. *Id.* § 592(1).

12. *Id.* § 501 provides: "Public policy of state . . . Economic insecurity due to unemployment is a serious menace to the health, welfare, and morale of the people of this state. . . . [t]he public good and the well-being of the wage earners of this state require the enactment of this measure . . . for the benefit of persons unemployed through no fault of their own." This assertion of policy has remained constant since the enactment of the original Unemployment Insurance Act, [1935] N.Y. Sess. Laws ch. 408.

13. *E.g.* Matter of Ferrara, 10 N.Y.2d 1, 176 N.E.2d 43, 217 N.Y.S.2d 11 (1961); Matter of Wentworth, 10 A.D.2d 504, 200 N.Y.S.2d 849 (3d Dep't 1960), *aff'd*, 10 N.Y.S.2d 13, 176 N.E.2d 50, 217 N.Y.S.2d 20 (1961); Matter of Marder, 16 A.D.2d 303, 227 N.Y.S.2d 730 (3d Dep't 1962); Matter of Sellers, 13 A.D.2d 204, 215 N.Y.S.2d 385 (3d Dep't 1961); Matter of Austen, 285 App. Div. 577, 139 N.Y.S.2d 690 (3d Dep't 1955).

14. The courts indicate that values and considerations other than "fault" are involved. *See, e.g.*, Matter of Lauria, 18 A.D.2d 848, 236 N.Y.S.2d 168 (3d Dep't 1963) (Claimant was entitled to unemployment compensation even though she voluntarily left her employment to follow her husband to another locality where he had moved for his health.); Matter of Kalm, 278 App. Div. 1035, 106 N.Y.S.2d 914 (3d Dep't 1951) (Although claimant was denied unemployment compensation for his voluntary refusal to accept suitable work, the Court pointed out that circumstances may exist which would justify an individual's voluntary refusal to accept work.); *see also* Matter of Walls, 26 A.D.2d 883, 274 N.Y.S.2d 205 (3d Dep't 1966); Matter of Bradstreet, 25 A.D.2d 348, 269 N.Y.S.2d 571 (3d Dep't 1966); Matter of Oscodar, 25 A.D.2d 913, 270 N.Y.S.2d 81 (3d Dep't 1966); Matter of Martino, 24 A.D.2d 772, 263 N.Y.S.2d 745 (3d Dep't 1965).

15. *See* cases cited *supra* note 14.

of the industrial controversy provision.[16] Unlike the provisions of other states,[17] New York's industrial controversy section excludes *all* employees from benefits for a maximum seven weeks suspension period if a dispute exists in the establishment in which they are employed.[18] This suspension occurs regardless of whether the particular individual is participating in the dispute, financing the dispute, or directly interested in it.[19] Further, fault on the part of the employer and the involuntariness of resulting unemployment is also irrelevant since benefits are suspended even if employment is lost due to a lockout by the employer.[20] The purpose of the industrial controversy provision is to compel "the State . . . to stand aside for a time, pending the settlement of differences between employer[s] and employees, to avoid the imputation that a strike may be financed through unemployment insurance benefits."[21] In effect, it is an attempt by the state to maintain a completely neutral role in labor disputes.[22]

Generally, the industrial controversy disqualification provisions of the various state statutes do not define the term "industrial controversy" or "labor disputes."[23] The majority of courts, however, have adopted the federal definition of "labor dispute" found in the anti-injunction and labor relations statutes.[24] Thus, in New York unemployment compensation proceedings, the term "industrial controversy" includes virtually any dispute concerning the terms and conditions of employment.[25] The courts of New York have recognized that the industrial controversy provision must be liberally construed[26] and agree with federal court decisions characterizing wildcat strikes or strikes in breach of no-strike clauses as industrial controversies.[27] Although strikes in breach of no-strike

16. Matter of Gilmartin, 10 N.Y.2d 16, 176 N.E.2d 51, 217 N.Y.S.2d 22 (1961); *see also* Williams, *The Labor Dispute Disqualification, A Primer and Some Problems*, 8 Vand. L. Rev. 338, 354-55, 367 (1955); Lesser, *Labor Disputes and Unemployment Compensation*, 55 Yale L.J. 167, 169 (1945); Fierst & Spector, *Unemployment Compensation in Labor Disputes*, 49 Yale L.J. 461, 462 (1940); *but see* Lewis, *The Concept of "Labor Dispute" in State Unemployment Ins. Laws*, 8 B.C. Ind. & Com. L. Rev. 29 (1966).

17. Comparison of State Unemployment Insurance Laws, *supra* note 7, at table ET-5.

18. N.Y. Labor Law § 592(1).

19. Matter of George, 14 N.Y.2d 234, 199 N.E.2d 503, 250 N.Y.S.2d 421 (1964); Matter of Machcinski, 277 App. Div. 634, 102 N.Y.S.2d 208 (3d Dep't 1951).

20. N.Y. Labor Law § 592(1); *see* Williams, *supra* note 16, at 371.

21. Matter of Burger, 277 App. Div. 234, 236, 98 N.Y.S.2d 932, 934 (3d Dep't 1950), *aff'd*, 303 N.Y. 654, 101 N.E.2d 763 (1951).

22. Matter of Ferrara, 10 N.Y.2d 1, 176 N.E.2d 43, 217 N.Y.S.2d 11 (1961).

23. Alabama is the only state which specifically defines the term "labor dispute" in its labor dispute disqualification provision. Its definition is taken from the Labor-Management Relations Act § 2(9), 29 U.S.C. § 152(9) (1964).

24. Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. Chi. L. Rev. 294, 300-01 (1950).

25. CCH Unemployment Ins. Rep., New York, § 1980.003 (1966); Lewis, *supra* note 16, at 53.

26. Matter of Ferrara, 10 N.Y.2d 1, 176 N.E.2d 43, 217 N.Y.S.2d 11 (1961); Matter of Machcinski, 277 App. Div. 634, 102 N.Y.S.2d 208 (3d Dep't 1951); Matter of Sadowski, 257 App. Div. 529, 13 N.Y.S.2d 553 (3d Dep't 1939); *cf.* Matter of Lasher, 279 App. Div. 505, 111 N.Y.S.2d 356 (3d Dep't 1952); *see also* Matter of Klein, 15 A.D.2d 201, 222 N.Y.S.2d 672 (3d Dep't 1961), *aff'd*, 12 N.Y.S.2d 678, 185 N.E.2d 909, 233 N.Y.S.2d 471 (1962); Matter of Sprague, 4 A.D.2d 911, 167 N.Y.S.2d 127 (3d Dep't 1957).

27. *E.g.* Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962); Carter Carburator Corp. v. NLRB, 140 F.2d 714 (8th Cir. 1944); *see also* CCH Unemployment Ins. Rep., New York, § 1980.911 (1966).

clauses thus fall within the scope of the industrial controversy provision, the question of whether the application of this provision precludes the application of the misconduct provision when employees are subsequently discharged for engaging in such strikes had not been decided in New York prior to the instant case. The courts of Michigan,[28] Illinois[29] and Alabama[30] have taken the position that the industrial controversy provision is the sole applicable section, and a determination as to misconduct or the merits of the controversy is not within the province of the unemployment insurance board or the courts. On the other hand, the courts of New Jersey,[31] Pennsylvania[32] and Wisconsin[33] consider mere employee participation in an unauthorized strike or a strike in breach of a no-strike clause as a willful or wanton disregard of the employer's interest[34] which justifies disqualification from unemployment insurance benefits under the misconduct provision.

Judge Fuld, writing the majority opinion in the instant case, held the industrial controversy provision to be the exclusive section applicable to all instances of unemployment resulting from a strike or other labor dispute.[35] The court based this determination upon an analysis of the statutory language and the purposes sought to be achieved by this provision. Maintaining that the exceedingly broad language encompasses all disputes and all strikes, whether "permissible" or "impermissible," "legal" or "illegal," the Court contended that the suspension and subsequent payment of benefits after the seven week period reflects a legislative policy of not fixing the blame for a labor dispute in an unemployment insurance proceeding.[36] The Court reasoned that the allocation of fault or misconduct in labor disputes involves complex questions of labor relations best left to federal and state labor boards qualified to resolve them.[37] Noting

28. Lillard v. Employment Sec. Comm'n., 364 Mich. 401, 110 N.W.2d 910 (1961). Michigan's disqualification statute was subsequently amended, Mich. Stat. Ann. § 17.531-(1)(g)(I)(II) (supp. 1965), to specifically disqualify from benefits an individual who is discharged for participation in a work stoppage contrary to a collective bargaining agreement or for participation in a wildcat strike.

29. Local 658, Boot and Shoe Workers v. Brown Shoe Co., 403 Ill. 484, 87 N.E.2d 625 (1949).

30. T.R. Miller Co. v. Johns, 261 Ala. 615, 75 So.2d 675 (1954).

31. *Compare* Bogue Elec. Co. v. Bd. of Review, 21 N.J. 431, 122 A.2d 615 (1956), *with* Beaunit Mills v. Bd. of Review, 43 N.J. Super. 172, 128 A.2d 20 (1956).

32. Progress Mfg. Co. v. Unemployment Comp. Bd. of Rev., 406 Pa. 163, 176 A.2d 632 (1962).

33. Streeter v. Industrial Comm'n., 269 Wis. 412, 69 N.W.2d 583 (1955).

34. Although the courts of New York have never defined "misconduct," the Unemployment Insurance Appeal Board, along with most states, has adopted this definition of the Wisconsin Supreme Court in Boynton Cab Co. v. Neubeck, 237 Wis. 429, 296 N.W. 636 (1941); *see also* CCH Unemployment Ins. Rep., New York, § 8900 (1955).

35. Claim of Heitzenrater, 19 N.Y.2d 1, 6, 224 N.E.2d 72, 75, 277 N.Y.S.2d 633, 637 (1966).

36. *Id.* at 7, 224 N.E.2d at 75-76, 277 N.Y.S.2d at 637-38.

37. *Id.* at 7, 224 N.E.2d at 76, 277 N.Y.S.2d at 638. Such questions, according to the Court, might include whether the breach of a no-strike clause by employees resulted from an unfair labor practice on the part of the employer, or whether the work stoppage was justifiable because of unsafe or unsanitary working conditions, or whether there was a work stoppage in order to bring about an unlawful objective. *Id.* at 7-8, 224 N.E.2d at 76, 277 N.Y.S.2d at 638-39.

that the misconduct provision on its face and in its intendment has nothing to do with labor disputes, the Court maintained that the provision cannot be reasonably construed to provide that employees who strike in breach of a collective bargaining agreement are guilty of "misconduct."[38] The employer's remedies are limited to discharging those who participated in the strike and bringing an action for damages against the union which breached the agreement.[39] The Court reasoned that the Legislature did not intend the Unemployment Insurance Law to serve as an additional means of disciplining or penalizing employees for breach of a collective bargaining agreement.[40] The dissent, on the other hand, took the position that the misconduct provision was intended as a means of penalizing employees who are discharged for striking in breach of a no-strike contract clause. Participation in such strikes was viewed by the dissent as constituting misconduct per se.[41] It was pointed out that this position does not effectuate a simultaneous application of the misconduct and industrial controversy provisions since the suspension of benefits during an industrial controversy, and disqualification from benefits thereafter for discharge due to misconduct, involve separate events, distinct in time and circumstances.[42] The dissent asserted that the effect of the majority decision was to dilute the effectiveness of no-strike clauses and arbitration provisions, thus relegating the employer to inadequate remedies[43] and causing employer subsidization of illegal strikes.[44]

The dual application of the industrial controversy and misconduct provisions to situations involving the breach of a no-strike clause presents no real inherent difficulty, since conduct which constitutes an industrial controversy can be viewed conceptually as also constituting misconduct. It is a settled rule in the area of labor relations that "the no-strike clause in a collective [bargaining] agreement at the very least establishes a rule of conduct or condition of employment the violation of which by employees justifies discipline or discharge."[45] Thus, if the employer is permitted to discharge employees who strike in breach of a no-strike clause, such discharge should result in a presumption of misconduct within the meaning of the Unemployment Insurance Law. Discharge for mere participation in such strikes should not constitute misconduct per se, however,

38. *Id.* at 8-9, 224 N.E.2d at 76, 277 N.Y.S.2d at 639. The Court did assert, however, that the existence of an industrial controversy does not automatically prohibit *any* finding of misconduct. Acts of violence or sabotage committed by employees on strike would constitute misconduct justifying not only discharge but also disqualification from receiving unemployment insurance benefits. *Id.* at 9, 224 N.E.2d at 76, 277 N.Y.S.2d at 639.

39. *Id.* at 9, 224 N.E.2d at 77, 277 N.Y.S.2d at 640.

40. *Id.* at 10, 224 N.E.2d at 77, 277 N.Y.S.2d at 641.

41. *Id.* at 13, 224 N.E.2d at 79, 277 N.Y.S.2d 643. However, in other circumstances, the dissent maintained that the Unemployment Insurance Board is required, under the misconduct provision, to delve into the merits of an industrial controversy whenever misconduct is alleged. *Id.* at 12-13, 224 N.E.2d at 79, 277 N.Y.S.2d at 642-43.

42. *Id.* at 11-12, 224 N.E.2d at 78-79, 277 N.Y.S.2d at 642.

43. *Id.* at 12, 224 N.E.2d 78-79, 277 N.Y.S.2d at 642.

44. *Id.* at 13, 224 N.E.2d at 79, 277 N.Y.S.2d at 643.

45. Atkinson v. Sinclair Refining Co., 370 U.S. 238, 246 (1962); *see also* NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939); NLRB v. Furrier's Joint Council, 224 F.2d 78 (2d Cir. 1955); Mead v. Int'l. Brotherhood of Teamsters, 113 N.L.R.B. 1040 (1955).

but would require an administrative inquiry to establish the alleged justification for striking. The functions of the unemployment insurance agency might then overlap those of state and federal agencies responsible for administering labor relations statutes, resulting in inconsistent and anomolous decisions.[46] However, the mere existence of the misconduct provision necessarily requires the Unemployment Insurance Board to make inquiries into employee behavior when employees have engaged in conduct which warrants their discharge. The fact that this inquiry may be made more difficult because of the existence of an industrial controversy should not cause the Unemployment Insurance Board to abdicate its fact-finding responsibility under the misconduct provision.

Although the misconduct provision can thus be applied to conduct which also falls within the scope of the industrial controversy provision, it is unlikely that the employees in the instant case were guilty of "misconduct." As previously noted, "misconduct" has been interpreted to mean a willful or wanton disregard of the employer's interest.[47] The state of mind required to disqualify an individual under the misconduct provision is that associated with "intentional wrongdoing or gross neglect rather than a simple negligence alone."[48] In the instant case, the presumption of misconduct is rebuttable since a referee of the Unemployment Insurance Appeal Board found the employees "earnestly, sincerely and in good faith" believed that their participation in the strike was justified.[49] The employer had advised the bargaining unit that its supervisory force was being reduced and that three salaried employees were being restored to the bargaining unit with seniority dating back to their last respective dates of hire.[50] Officers of the union informed the employees that the provisions of the collective bargaining agreement were rendered void by this alleged breach of the contract by the employer.[51] Since participation in the strike was thus predicated on a "good faith belief" that the union contract was no longer in effect, the requisite finding of willful and wanton behavior necessary to constitute "misconduct" did not exist. The misconduct provision, when applied, should be given a narrow interpretation in order to minimize its penal character.

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46. Shadur, *supra* note 24, at 307.
47. Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941).
48. Sanders, *Disqualification for Unemployment Insurance*, 8 Vand. L. Rev. 307, 334 (1955).
49. Abridged Record on Appeal at 22, Claim of Heitzenrater, 19 N.Y.2d 1, 224 N.E.2d 72, 277 N.Y.S.2d 633 (1966).
50. *Id.* at 20.
51. *Id.*