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Unemployment Compensation - Layoff and Expectation of Strike is Lockout and Therefore Compensatory

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abstract rule of absolute immunity. The law is not static and must follow and conform to changing conditions and new trends in human relations to justify its existence as a servant and protector of the people.[26]

This extension in the Illinois rule may be the necessary first step toward complete abandonment of the old immunity doctrine.

[26] Ibid., at 564, 565 and 86, 87.

UNEMPLOYMENT COMPENSATION–LAYOFF AND EXPECTATION OF STRIKE IS LOCKOUT AND THEREFORE COMPENSATORY

Kendall Refining Co. resisted the claims of several of its employees for Unemployment Compensation, contending that their unemployment resulted from a strike. The employees were members of the Oil Workers International Union. Sixty days before its contract was about to expire, the union and the company began negotiations for a new agreement. Four days before the end of the old contract term, union officials informed the company that a vote had been taken authorizing a strike, but that no date had been set. The next day, the company submitted a written proposal for an orderly shutdown of the plant in the event of a strike. The union rejected this and submitted a counterproposal which proved unsatisfactory to the company. The day after the contract expired, employees reported for work and were informed by the company that the plant was closed. The question presented to the court was whether these employees were disqualified from receiving unemployment compensation because of participation in a labor dispute or whether, under Pennsylvania law, they were eligible for benefits because their employer had locked them out. The Pennsylvania Superior Court held they were entitled to benefits because they had been locked out. *Kendall Refining Co. v. Unemployment Compensation Board of Review*, 184 Pa. Super. 95, 132 A. 2d 749 (1957).

All states have in effect some provision disqualifying from unemployment compensation benefits claimants whose idleness results from a labor dispute at their place of employment.[1] Eight states, including Pennsylvania, specifically exclude a lockout from the definition of a labor dispute, thus making employees whose idleness is so caused eligible for benefits.[2] A few states which disqualify where idleness results from a strike rather than from a "labor dispute" permit benefits when idleness is caused by a

[1] For a comprehensive discussion of the labor dispute disqualification from unemployment compensation benefits refer to Williams, The Labor Dispute Disqualification, A Primer and Some Problems, 8 Vanderbilt L. Rev. 338 (1955).

[2] Ibid., at 365. The states are: Arkansas, Connecticut, Kentucky, Minnesota, Mississippi, New Hampshire, Ohio and Pennsylvania.

lockout.[3] While the Pennsylvania statute[4] poses some special problems, courts in all of the states have the problem of determining whether employees idled when their employer shuts down his plant to conserve and protect his property in the face of a strike threat are to be considered as "participating in a labor dispute." The problem assumes particular importance in such mass production industries as steel and oil where extensive damage may result unless equipment is cooled down or chemical reactions brought to a stop before the plant is closed.

In opposing the payment of unemployment compensation to its idled employees, Kendall took the position that as it had reason to believe that a strike would occur, it was justified, in the absence of written assurance of an orderly shutdown, in taking steps to protect its plant while still in control of the labor situation. The union, arguing on behalf of the employees, contended that Kendall discontinued operations to gain an advantage in collective bargaining. A strike had actually not been called; the employees were ready and willing to work beyond the expiration date of the contract under existing terms and conditions and had given verbal assurance of an orderly shutdown in the event of a strike.

In this case, the court determined that the employer had no reasonable ground for believing that a strike would occur. Neither the expiration of the collective bargaining agreement nor the calling of the strike vote so signified a strike in this situation, the court found, because the union had never called a strike during previous negotiations even though strike votes had been taken. In the light of the whole history of the collective bargaining relationship, the employer had reason to know that another vote would be taken before a strike was actually called. Moreover, despite the refusal of written assurance, the employer had reason to know that the union would take steps to insure an orderly shutdown.

In previous cases, however, the same court has held that employees are disqualified from receiving benefits where the employer, in anticipation of a strike, curtails operations and employment to protect his property. The court has said that if a union says it intends to strike and an employer, relying on this statement, cuts down activity to permit an orderly cessation of operations and avoid damage to his property, such a shutdown will not constitute a lockout. The responsibility for the stoppage, in that case, would rest upon the union.[5]

[3] Authority cited note 1 supra, at 365. The states are: Colorado and Utah.

[4] Penn. Stat. Ann. (1952) c. 43, § 802 (d): An employee shall be ineligible for compensation for any week: "[i]n which his unemployment is due to a stoppage of work, which exists because of a labor dispute (other than a lockout) at the factory, establishment or other premises at which he is or was last employed. . . ."

[5] Bako v. Unemployment Compensation Board of Review, 171 Pa. Super. 222, 90 A. 2d 309 (1952). In another case, the same court said: "When a strike is imminent, when an employer has been officially notified that a strike will occur, and has reasonable

The "labor dispute" disqualification applies not only to the period preceding the strike during which the employer curtailed operations and employment in order to protect his property, but also to the period after the announced end of a strike reasonably required to put the plant in normal operation. This has been so held in a number of states.[6] The Illinois Supreme Court has stated the usual rule as follows:

> [The] ineligibility of a claimant for Unemployment Compensation benefits does not automatically terminate upon the settlement of the labor dispute or strike and conversely, where the stoppage of work continued to exist as a necessary aftermath of the labor dispute . . . the claimant's ineligibility for benefits remains.[7]

How long the disqualification continues depends on the circumstances of the case. The Pennsylvania Superior Court has pointed out some of the guiding considerations:

> What is a reasonable period will always "depend upon the kind of work and the circumstances in which it is conducted." In a department store, for instance, resumption of employment might follow the strike's termination in the course of a few hours. Perhaps a textile mill would require a longer time. In an industry, such as Bethlehem Steel, operating several departments which are dependent for power upon a central plant, with equipment to be repaired, machinery to be cleaned, and other preparatory steps to be taken, a longer time must necessarily be allowed. Possibly the duration of the strike becomes a relevant factor. At all events, the Board will consider all the circumstances and override the management only when it finds that it failed to exercise honest judgment. It follows that, however willing employees may be to return to work immediately after the termination of the strike, the continuing stoppage of work must be held to be due to the original labor dispute.[8]

One of the arguments which resulted in the inclusion of the "labor dispute" disqualification in the original Social Security Board Draft Bill, and hence in all of the state Unemployment Compensation Statutes was: The government should remain neutral in labor disputes. The payment of unemployment compensation would violate this neutrality not only by providing a source of strike benefits to the employees, but by paying those

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grounds for a belief that a strike will actually take place, he may, prior to and in anticipation thereof, take reasonably necessary measures to protect his property during the pendency of the strike. The nature and extent of such measures depend upon the kind of work and the circumstances in which it is conducted, and ordinarily the board will not overrule the honest judgment of an employer." Lavely v. Unemployment Compensation Board of Review, 166 Pa. Super. 481, 72 A. 2d 300, 302 (1950).

[6] American Steel Foundries v. Gordon, 404 Ill. 174, 88 N.E. 2d 465 (1949); Saunders v. Maryland U. C. Board, 188 Md. 677, 53 A. 2d 579 (1947); Chrysler Corp. v. Review Board, 120 Ind. App. 425, 92 N.E. 2d 565 (1950); Carnegie-Illinois Steel Corp. v. Review Board, 117 Ind. App. 379; 72 N.E. 2d 662 (1947).

[7] American Steel Foundries v. Gordon, 404 Ill. 174, 88 N.E. 2d 465 (1949).

[8] Bako v. Unemployment Compensation Board of Review, 171 Pa. Super. 222, 225, 90 A. 2d 309, 312 (1952).

benefits out of the taxes which the employer has paid.[9] In addition, today, the payment of benefits would increase the employer's taxes in most states by assessing him a relatively unfavorable experience rating which would automatically raise his tax.

In states which, like Pennsylvania, make the lockout exception, the agency which determines eligibility for benefits and the courts which review the agency's decisions cannot maintain true neutrality because they must assess "fault" for the stoppage. If the employer is "at fault," the stoppage is a lockout and the employees are eligible for compensation. If the employee or the union is "at fault," claimants are disqualified.

The majority of states have wisely chosen to avoid this issue. None of the states, however, can avoid the problem of determining when the curtailment of operations resulting from a labor dispute begins and ends. Where operations are completely shut down before a strike, the issue may be relatively clear. But there are situations in which, moved by both economic considerations and the probability of disagreement at the bargaining table, the employer lays off some people. Later a strike ensues. Similarly, at the end of a strike, some companies may find their operations curtailed because of lack of orders, or may decide for purely business reasons to discontinue some portion of their operations. In these situations, the courts will be hard put to distinguish between unemployment due to a "labor dispute" and unemployment due to economic conditions.

Although the "labor dispute" disqualification applies only to those at the factory or establishment at which the stoppage of work occurs,[10] the unemployment compensation agencies are frequently faced with the problem of the employee who is idled either directly or indirectly by a dispute in some establishment other than the one in which he works.

The Pennsylvania Superior Court was recently faced with such a problem. Claimant worked for a company that sold merchandise to department stores and their customers. His duties had been to ship his employer's products by parcel post. Because the department stores were on strike, he refused to ship when the store was the consignee although he willingly shipped direct to the store's customer. The question before the court was whether he was ineligible for compensation by reason of discharge for wilful misconduct connected with his work. Denying compensation, the court pointed out: "In passing, it may be noted that as a result of his dismissal, claimant filed a grievance with his union, and that when the dispute went to arbitration, claimant's dismissal was upheld.[11]

[9] Williams, The Labor Dispute Disqualification—A Primer and Some Problems, 8 Vanderbilt L. Rev. 338 (1955).

[10] Authority cited note 4 supra.

[11] Smolensky v. Unemployment Compensation Board of Review, 183 Pa. Super. 344, 132 A. 2d 698 (1952).

The court's decision follows the prevailing view in labor administrative agencies and among those charged with determining whether an employee has been discharged for cause under statutes and labor agreements. The employee cannot pick and choose his tasks. The Eighth Circuit Court of Appeals sets forth rationale as follows:

> It was implied in the contract of hiring that these employees would do the work assigned to them in a careful and workmanlike manner; that they would comply with all reasonable orders and conduct themselves so as not to work injury to the employer's business; that they would serve faithfully and be regarded of the interests of the employer during the term of their service, and carefully discharge their duties to the extent reasonably required. . . . Any employee may, of course, be lawfully discharged for disobedience of the employer's directions, in breach of his contract. . . . While these employees had the undoubted right to go on a strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid to them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work.[12]

Thus, in the *Smolensky* case, the insubordination was clear. However, where the employee refuses to cross a picket line to perform his duties, another element is introduced—namely, the fear of violence. The courts have, in these cases, therefore, sought to maintain a distinction: voluntary refusal to cross a picket line constitutes participation in a labor dispute,[13] but refusal to cross the line because of a justifiable fear of bodily harm will not disqualify the employee from unemployment compensation.[14]

[12] NLRB v. Montgomery Ward & Co., 157 F. 2d 486, 496 (C.A. 8th, 1946).

[13] Lloyd E. Mitchell, Inc. v. Md. Employment Security Board, 209 Md. 237, 121 A. 2d 198 (1956); Schooley v. Board of Review, 43 N.J. Super. 381; 128 A. 2d 708 (1957).

[14] Shell Oil Co. v. Cummins, 7 Ill. 2d 329; 131 N.E. 2d 64 (1956).