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Unemployment Insurance Benefits - Refusal to Answer "Security" Questions as Wilful Misconduct - Ostrofsky v. Maryland Employment Security Board

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Unemployment Insurance Benefits — Refusal To Answer "Security" Questions As Wilful Misconduct

Ostrofsky v. Maryland Employment Security Board[1]

The claimants, employees of Bethlehem Steel Company, were summoned before the Un-American Activities Committee in Baltimore and were identified by a witness as former members of the Communist Party. The employees refused to answer questions concerning their Communist

[1] 218 Md. 509, 147 A. 2d 741 (1959).

activities, claiming the privilege against self-incrimination under the Fifth Amendment. On the following day they were suspended by Bethlehem as security risks who had engaged in conduct detrimental to the company's interests.

At a company hearing, held four days later pursuant to a contract between Bethlehem and the United Steelworkers of America, the employees' union, claimants refused to answer questions similar to those asked by the Committee, on the basis that these questions were irrelevant and not connected with the performance of their jobs, as distinguished from the grounds of self-incrimination claimed before the Committee. The Superior Court of Baltimore City affirmed a decision of the Board of Appeals of the Department of Employment Security denying the claimants compensation from the date of their suspension. The Court of Appeals, in affirming the decision of the lower court in part and reversing in part, so as to permit the claimants to draw benefits from the time of their suspension to the time of their discharge, held the claimants' refusal to answer the questions propounded by their employer about their Communist affiliations to be insubordination and therefore wilful misconduct connected with their work sufficient to deny unemployment benefits under the Maryland Unemployment Insurance Act. The Act provides that an employee will be disqualified for benefits if he is discharged by his employer for "deliberate and wilful misconduct connected with his work."[2] In the

[2] 3 MD. CODE (1951) Art. 95A, Sec. 5 (b) states:

"An individual shall be disqualified for benefits—

For any week in which his unemployment is due to his leaving work voluntarily without good cause, or to his actual or threatened deliberate and wilful misconduct connected with his work, if so found by the Board. Such disqualification shall continue until such individual has become reemployed and his earnings therein equal to at least ten (10) times his weekly benefit amount."

MD. LAWS 1957, Ch. 441, effective June 1, 1957, amended the former Sec. 5 (b), so that at present 8 MD. CODE (1957) Art. 95A, Sec. 6 (b) reads:

"An individual shall be disqualified for benefits—

For any week in which his unemployment is due to his having been discharged for gross misconduct connected with his work, if so found by the Executive Director. Such disqualification shall continue until such individual has become re-employed and has earnings therein equal to at least ten (10) times his weekly benefit amount."

This amendment of the phrase from "deliberate and wilful misconduct" to "gross misconduct" was recommended to the General Assembly by the Department of Employment Security because disqualification for criminal acts, which was expressly described as a basis for disqualification in Sec. 5 (a) of the 1951 CODE, could more easily be effected by disqualification for "gross misconduct." When the former Sec. 5 (a) was in force, criminal acts had to be proved to disqualify a person for benefits, and the Board of Appeals found such proof difficult.

The three cases noted were adjudicated under the terms of the 1951 CODE. Since no change other than the one indicated was desired in the

subject case and two other recent cases, *Employment Security Board of Maryland v. LeCates*[3] and *Fino v. Maryland Employment Security Board*[4] (decided on the same day as the Ostrofsky case), the Court of Appeals was called upon for the first time to interpret the above phrase, even though appellate courts in several other states have repeatedly dealt with this or similar phrases.[5]

The question as to what constituted "deliberate and wilful misconduct" was first raised in the *LeCates* case. There the claimant had been discharged because he had abused a privilege he possessed as a supervisor in a food processing plant. He had used a key entrusted to him to gain access to the plant after working hours, used a company truck without authorization and while not possessing a driver's license, become involved in an accident, and left the truck outside the plant without reporting the incident to anyone. The Court of Appeals, in reversing a holding of the Circuit Court of Wicomico County that LeCates was entitled to unemployment insurance benefits reinstated the decision of the Board of Appeals that LeCates was not entitled to benefits, since he was guilty of deliberate and wilful misconduct connected with his work.

In deciding the *LeCates* case the Court pointed out that, since the Unemployment Insurance Act also provides for disqualification for "misconduct,"[6] as distinguished from "deliberate and wilful misconduct," the latter must involve

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amendment of the phrase discussed, if the principal cases had been heard under the terms of the 1957 CODE, the decisions no doubt would have been the same as they were under the terms of the 1951 CODE.

[3] 218 Md. 202, 145 A. 2d 840 (1958).

[4] 218 Md. 504, 147 A. 2d 738 (1959).

[5] Pennsylvania has perhaps as many appellate decisions on this point as any other state, and the Court of Appeals cited Pennsylvania cases frequently in the noted decisions.

[6] 8 MD. CODE (1957) Art. 95A, Sec. 6 (c), formerly 3 MD. CODE (1951) Art. 95A, Sec. 5 (c), provides:

> "An individual shall be disqualified for benefits—
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> For the week in which he has been discharged, or suspended as a disciplinary measure, for misconduct connected with his work (other than for acts specified hereinabove in this section), if so found by the Executive Director and for not less than the one nor more than the nine weeks which immediately follow such week as determined by the Executive Director in each case according to the seriousness of the misconduct."

See Gordon v. Maryland Employment Security Board, Daily Record, July 7, 1955 (Md. 1955), where the court disqualified the claimant for five weeks' benefits because he had been discharged for misconduct. The claimant had had two avoidable accidents with his employer's taxi-cab. Manley, J., stated that misconduct did not consist of "minor and casual acts of negligence," but of "a series of accidents attributable to negligence, occurring periodically and with consistent regularity resulting in financial loss to the employer." Cf. Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941).

a culpability which the former does not; it must be misbehavior which evinces a flagrant disregard for the employer's welfare rather than constituting only an act or acts of simple negligence.[7] Wilful misconduct involves "'[d]eliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee . . . .'"[8] The Court found that LeCates' unauthorized taking of a company truck for his own purposes showed a disregard for his duties to his employer and "was calculated to disrupt the discipline . . . requisite to the proper management . . . of a large food processing company which had given him employment as a supervisor . . . ."[9]

In the *Ostrofsky* case, the Court had to decide whether the claimants' failure to answer their employer's questions at the company hearing was wilful misconduct. Claimants had objected to those questions only on the ground that they were irrelevant. The Court found that such questions are relevant because an industry with defense contracts for the production of steel to protect the nation should be able to inquire whether workers belong to a political organization "that has been frequently characterized as engaged in a conspiracy to overthrow the government by force and violence, and particularly by the sabotage of essential industries in the event of war."[10] The deliberate and wilful misconduct of the employee who does not answer such questions is that of insubordination, of refusing to tell the employer that which he has a right to know. Similar inquiries by municipal and state agencies have been held not to violate an employee's Constitutional rights and to be in fact the basis for discharge of employees who refused to answer them.[11]

Of more importance in these cases than the question of what constituted deliberate and wilful misconduct, was

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[7] See Kempfer, *Disqualifications for Voluntary Leaving and Misconduct*, 55 Yale L.J. 147 (1945); Sanders, *Disqualification for Unemployment Insurance*, 8 Vand. L. Rev. 307 (1955). See also annotation in 146 A.L.R. 243 (1943).

[8] 218 Md. 202, 208, 145 A. 2d 840 (1958), citing 81 C.J.S. 246, Social Security and Public Welfare, Sec. 162. This test is repeatedly used in the Pennsylvania misconduct cases; see Ault v. Unemployment Compensation Board of Review, 188 Pa. Super. 260, 146 A. 2d 729, 733 (1959).

[9] 218 Md. 202, 210, 145 A. 2d 840 (1958).

[10] 218 Md. 509, 513, 147 A. 2d 741 (1959).

[11] Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951); Beilan v. Board of Public Education, 357 U.S. 399 (1958), noted 44 Corn. L. Q. 244 (1959) and 72 Harv. L. Rev. 188 (1958); Lerner v. Casey, 357 U.S. 468 (1958), noted 44 Corn. L. Q. 244 (1959), 72 Harv. L. Rev. 188 (1958), and 12 Vand. L. Rev. 273 (1958). For a comprehensive review of cases on the right of an employer to discharge an employee for his political views, see annotation in 51 A.L.R. 2d 742 (1954).

the question whether such misconduct was connected with the work. This question was directly dealt with by the Court in *Fino v. Maryland Employment Security Board.*[12] That case presented the Court with facts similar to those of the subject case, with the exception that the claimant was discharged solely because she had refused to answer questions asked by the Un-American Activities Committee, as distinguished from her employer. The Superior Court of Baltimore City affirmed a decision of the Board of Appeals denying Mrs. Fino unemployment benefits as a person who had been discharged for deliberate and wilful misconduct in connection with her work. The Court of Appeals reversed the Superior Court and awarded Mrs. Fino compensation, holding that her misconduct, if any, was *not connected with her work.* But before approaching the problem of whether the claimant's alleged misconduct was connected with her work according to the language of Section 5(b) of Article 95A,[13] the Court had to decide whether Section 5 (a) or Section 2 of Article 95A affected Section 5 (b). Section 5 (a) disqualifies for benefits a person who has been discharged for a "dishonest or criminal act committed in connection with or materially affecting his work." The Court refused to transfer the words "materially affecting his work" to Section 5 (b), which sets up disqualification for deliberate and wilful misconduct "in connection with his work." Section 2 of Article 95A states that the general purpose of the Unemployment Compensation Act is to "benefit . . . persons unemployed through no fault of their own." The Court, following *Tucker v. American Smelting & Ref. Co.*,[14] refused to read the words "through no fault of their own" as an express disqualification in addition to those disqualifications enumerated in Section 5, but read them merely as a statement of purpose perhaps incongruous with Section 5 and remediable as such only by the Legislature.

Normally the requirement that wilful misconduct be connected with the work is fulfilled because misconduct occurs during the employee's duty hours or while he is on his employer's premises; this is so when the employee is insubordinate;[15] when he is drunk or drinking on the

[12] 218 Md. 504, 147 A. 2d 738 (1959). The Court in considering the question under discussion assumed, without deciding, that Mrs. Fino's refusal to answer the questions of the Un-American Activities Committee was misconduct.

[13] 3 MD. CODE (1951), quoted, *supra* n. 2.

[14] 189 Md. 250, 258, 55 A. 2d 692 (1947).

[15] Detterer v. Board of Review, 168 Pa. Super. 291, 77 A. 2d 886 (1951).

job;[16] when he fights with fellow-employees or his employer;[17] or when, after several warnings, he still shows a general disregard for standards which his employer has a right to expect of him.[18] Another circumstance to be considered in these cases is "'*whether the employee took advantage of the employment relation in order to commit the act.*'"[19] This circumstance existed in the *LeCates* case, where the employee by reason of his supervisory powers had access to the truck he took without permission. Although the Court thereby found LeCates disqualified for benefits, the decision concluded with the ambiguous comment that the claimant's misconduct adversely affected his suitability to continue in his position, thus leaving the impression that the Court might be adopting the test that if an employee becomes unsuitable for his job because of wilful misconduct, the misconduct is connected with his work. The suitability test has not generally been accepted and has been criticized on the ground that it would permit an employer to be the judge of whether an employee who had misbehaved, away from work on off-duty hours, had become unsuitable for his job; thus in many cases the employer would be able, through his testimony, to deny a discharged employee unemployment benefits.[20] It is relevant to note that the Maryland Unemployment Insurance Act does not equate an employer's right to discharge an employee with a denial to the employee of a right to draw unemployment benefits; the suitability test would lead toward this result in the area of disqualification for misconduct.

In the *Fino* case, in relating wilful misconduct to the phrase "in connection with his work", the Court of Appeals stated:

> ". . . we think the mere fact that misconduct adversely affects the employer's interest is not enough. It must be incident to the work, or directly related to the employment status. In substance the contention is, not that her (Mrs. Fino's) refusal to answer (the Un-American Activities Committee) was a breach of any duty to the employer, but simply that it had a tendency to alienate customers who disapproved of her

[16] Suede v. Board of Review, 162 Pa. Super. 479, 58 A. 2d 197 (1948).
[17] Thorne v. Board of Review, 167 Pa. Super. 572, 76 A. 2d 485 (1950).
[18] Sabatelli v. Board of Review, 168 Pa. Super. 81, 76 A. 2d 654 (1950).
[19] 218 Md. 202, 211, 145 A. 2d 840 (1958), citing Kempfer, *Disqualifications for Voluntary Leaving and Misconduct*, 55 Yale L. J. 147, 163 (1945).
[20] Kempfer, *supra*, n. 19, 165.

> supposed principles. There is no suggestion that her retention would create any other hazard to the business."[21]

Therefore the test for connection with the work necessitates the presence of a violation of the employee's duty toward the employer rather than the mere absence of suitability on the employee's part.[22] The Court distinguished the *LeCates* case on the ground that there the claimant "took advantage of the employment relation in order to commit the wrongful act."[23] *Fino* thus restricts *LeCates* to its strict holding and refuses to adopt the suitability test mentioned in that former decision. This conclusion is emphasized by the citing of a Tennessee case, *Milne Chair Co. v. Hake*,[24] in which the appellate court of that state recognized that the grounds on which an employer might discharge an employee differed from the grounds whereby the discharged employee might be disqualified for unemployment benefits.

The Court of Appeals in the *Ostrofsky* case found the required "misconduct connected with his work" in the employees' insubordination in refusing to answer relevant questions of their employer:

> ". . . it was implicit in the employment relationship that they should answer proper inquiries directed towards threatened misconduct. The employment contract not only obligated them to perform the work assigned, satisfactorily, but it also imposed other obligations, such as a duty to answer proper questions related to the security and safe conduct of the business. Failure to disclose their beliefs and affiliations in a matter vital to the future conduct of the business, and affecting not merely their suitability, but their trustworthiness and reliability in the work, was, we think, misconduct sufficiently connected with the work to raise a bar to benefits under the statute."[25]

The *Fino* case was distinguished in that there the claimant had merely failed to answer the Committee's questions

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[21] 218 Md. 504, 508, 147 A. 2d 738 (1959).

[22] See Kempfer, *supra*, n. 19, 165-166; Sanders, *Disqualification for Unemployment Insurance*, 8 Vand. L. Rev. 307, 336 (1955); Teple, *Disqualification: Discharge for Misconduct and Voluntary Quit*, 10 Ohio St. L. J. 191, 198 (1949).

[23] *Supra*, n. 21.

[24] 190 Tenn. 395, 230 S.W. 2d 393, 396 (1950).

[25] 218 Md. 509, 514, 147 A. 2d 741 (1959). See also cases *supra*, n. 11.

and had not in any manner breached a duty to her employer.

The only other reported case with a factual situation similar to *Ostrofsky* was that of *Ault v. Unemployment Compensation Board*,[26] a lower appellate decision in Pennsylvania. There the Pennsylvania court similarly found misconduct in the employees' refusal to answer their employer's questions, and connection with the work in the security requirements of a defense industry.

This writer thinks that the three noted cases delineate rather clearly in Maryland what connection with the work is necessary for an employee's wilful misconduct to disqualify him for benefits. While it was unfortunate that the suitability test was ever brought into the *LeCates* case, the two later cases definitely decline to use that test; and we now know that it will not be adopted in Maryland. The test is distasteful mainly because of the danger inherent in it that persons who have worked conscientiously at a job will be denied unemployment benefits because of something which had nothing to do with their loyalty to their employer, or to the state.

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[26] 188 Pa. Super. 260, 146 A. 2d 729 (1958).