Case Western Reserve Law Review

Volume 13 | Issue 3

1962

# Social Security and Public Welfare

Edwin R. Teple

by the defendant to maintain the undercrossing indicated that the defendant was on actual notice of the contract's condition; second, since the original vendee constructed the undercrossing pursuant to the provision in the contract and since the same contract had been in existence ever since, defendant was on constructive notice of a covenant running with the land. Plaintiff's petition was held to state a cause of action and the lower court's judgment for the defendant on the pleadings was reversed.

Thus, the court of appeals found a covenant running with the land even though the contract did not state that the duty to maintain the undercrossing applied to the vendee's "successors or assigns." It is not always necessary, the court said, to use these words in an instrument in order to create a covenant running with the land provided it was the intent of the parties to enter into such a covenant. Defendants were on notice of the existence of some covenant because of the location of the undercrossing on plaintiff's land, ". . . a structure so obvious being a part of the right of way . . . ."[10]

Boiled down to its essentials, this case was decided solely on equitable considerations. The court made no mention of the doctrine of merger — that upon conveyance by deed "the contract is merged in the deed" and "no cause of action upon the prior agreement then exists."[11] While the apparent equities favored the plaintiff, it would have been a simple matter to have included the contractual provisions in the deed and to have provided specifically in the deed for a covenant running with the land.

MARSHALL I. NURENBERG

# SOCIAL SECURITY AND PUBLIC WELFARE

In this area the decisions of the Ohio courts reported during the past year concerned eligibility and disqualification for unemployment benefits, and for the most part demonstrated an encouraging recognition of the basic purpose of the unemployment compensation program.

## CASES IN WHICH CLAIMS HAVE BEEN ALLOWED

The decision in *Parent v. Administrator*[1] involved an interpretation of what constitutes "unemployment." The claimant was regularly employed by a large manufacturer in Youngstown, but in his spare time (evenings and weekends) he operated a small so-called "variety store"

10. *Id.* at 610.

11. Mayer v. Sumergarde, 111 Ohio App. 237, 239, 167 N.E.2d 516, 518 (1960) (quoting 40 OHIO JUR. *Vendor and Purchaser* § 90, at 1001 (1935)). See also Rapp v. Murray, 112 Ohio App. 344, 171 N.E.2d 374 (1960) (no merger).

selling chiefly power mowers and electrical appliances. After being laid off from his regular daytime job, he extended the hours of the store from 10:00 a.m. to 9:00 p.m., six days a week. His mother operated the store during the daytime and the claimant worked there largely during the evening hours. It was testified that the claimant spent approximately ten hours a week looking for other work, but also spent about twenty hours during the daytime each week in the store. In setting up the income from this activity, the claimant subtracted the cost of his merchandise and overhead expense from his gross receipts and the result was a net loss during the weeks in question. The court concluded that he was putting in a lot of time at what would more properly be called an avocation.

The Board of Review had concluded that the claimant was self-employed and therefore not unemployed. When the common pleas court held otherwise,[2] it was argued on appeal that the judgment of the lower court would amount to insuring the success of the claimant's business venture. The court of appeals, however, affirmed the judgment of the lower court.

The higher court said that the claimant should be placed in no worse position than a less ambitious man. The law, it was said, provides for deducting income during a week from the amount of unemployment benefits otherwise due, and income is income whether it be profit or wages. The court pointed out that a wage earner is not penalized because he happens to secure a week or two of work during a period of unemployment. A week during which a small business like this happened to make a profit, the court implied, should be treated no differently. The court added:

> We cannot see why claimants should be penalized because, through their own diligence they should happen to have an occasional good week, and we are unable to see how this could be construed as financing business ventures.[3]

Another unusual question arose in *Barna v. Board of Review*.[4] The claimant was a stenographer employed by a large firm in Youngstown.

---

1. 171 N.E.2d 522 (Ohio Ct. App. 1959).

2. Parent v. Administrator, 160 N.E.2d 560 (Ohio C.P. 1959). This case was discussed in Teple, *Survey of Ohio Law — Social Security and Public Welfare*, 11 WEST. RES. L. REV. 420, 428 (1960).

3. For a somewhat similar, and equally commendable, point of view, see Wallace v. Bonded Oil Co., 152 N.E.2d 172 (Ohio C.P. 1958), discussed in Teple, *Survey of Ohio Law — Social Security and Public Welfare*, 11 WEST. RES. L. REV. 420, 424 (1960). In that case it was held that a part-time divinity student was not disqualified as a student "regularly attending" an educational institution. In that case the court also said that the claimant's ambition to advance himself, or his expectation to eventually abandon or change his current job, was not a basis for disqualification.

4. 172 N.E.2d 488 (Ohio Ct. App. 1959).

She was laid off for lack of work and her application for unemployment benefits was allowed in due course. Subsequently, when she reported at the local office of the Bureau of Unemployment Compensation on her regular reporting day, she was told to be seated for the purpose, according to the Board of Review, of being interviewed by a claims examiner. Instead, she talked to an employment service interviewer concerning potential employment and then left the office. When the same thing happened on two succeeding visits, the Bureau suspended her benefit rights on the ground that she had failed to report as directed. When the Board of Review affirmed the administrator's action, she appealed to the common pleas court, where the Board's decision was found to be unreasonable and against the manifest weight of the evidence, and was therefore reversed and vacated, final judgment being entered for the claimant.[5]

In explanation of why she did not wait for the interview with the claims examiner, the claimant testified that she was confused. It was her first experience with the unemployment compensation program and she did not understand that the state agency was composed of two separate branches, the Unemployment Compensation Division and the Employment Service. She had obeyed the instructions given to her each time when applying at the benefit claim office and took a seat, but each time this resulted in the same procedure, interviewing a Miss Rinehart in the employment referral section of the office.

In its opinion, the court of appeals emphasized the fact that the transcript of the proceedings failed to reveal any proof that the claimant had ever been directed to take a seat specifically to wait for a benefit rights interview.[6] The benefit rights interview, according to the testimony, was to take care of all irregularities and to determine whether or not the claimant had met the requirements of the Ohio law. Actually, however, as the court pointed out, except for failing to wait for this particular interview, she had met all the requirements. Under these circumstances, the court held, the plaintiff's failure to report for a benefit rights interview did not seem to be a reasonable ground for the disallowance of the claim in the absence of a statutory requirement for such an interview. Even the Bureau's regulation, it was pointed out, at most requires the claimant to report to the Bureau's office when instructed and makes no reference to a benefit rights interview.

The next case illustrates the kind of situation where a bit of heart, as well as common sense, is needed. The claimant had worked for a

5. On the original appeal, the decision of the Board of Review was upheld, but the court reversed its own position on rehearing.

6. In her own testimony the claimant apparently denied having been told specifically to wait for a benefit rights interview. She was probably told just to sit down and wait until she was called. These offices often have long lines of claimants and long rows of chairs on which to wait for the interviews.

shoe factory in Portsmouth for approximately twelve years, and then as a seamstress for an upholstering shop. In the latter job, her rate of pay was $1.10 an hour. When the upholstering shop closed, the claimant was out of work. Her work history also revealed, however, that she had worked at different times as a part-time waitress, usually on week-ends from 6:30 p.m. until 2:30 a.m., and at this work she earned approximately seventy-five cents an hour.

At the time of her unemployment, the claimant was a widow with a daughter six years of age who had just started school. It was difficult to find employment in the Portsmouth area, however, and she was given a referral to a local restaurant for a job as a waitress serving food and drinks from 4:00 p.m. to 12:00 midnight. The pay would have been $30.00 a week for six days of work at eight hours per day, or an average hourly rate of approximately sixty-two cents. The claimant did not take the job and gave as her reasons: (1) the night work would prevent her from taking care of her daughter; (2) it might have an adverse effect upon her daughter's standing at school in the eyes of the other children (her daughter, when she was first starting to school, had been reminded by a childhood friend that her mother had worked in a bar, which had caused her daughter considerable embarrassment); and (3) she would be earning only $5.00 a day and would have to pay a babysitter $4.00 of this amount each night plus additional money for transportation.

Under the express terms of the Ohio law, like every other state unemployment insurance law, a claimant is disqualified for refusing without good cause an offer of suitable work.[7] In determining whether work is suitable for a particular claimant, the Ohio law also provides that the administrator shall

> consider the degree of risk to the claimant's health, safety, his prior earnings, and morals, his physical fitness for the work, his prior training and experience, the length of his unemployment, the distance of the available work from his residence, and his prospects for obtaining local work.[8]

In determining that the claimant had refused an offer of suitable work without good cause, the referee declared that it would behoove anyone who is unemployed not to be unreasonably particular when a work opportunity arises. The referee stressed the fact that the restaurant in question had a good reputation and there was strong likelihood that the claimant would have been able to "acquire a substantial number of tips" in addition to her regular rate of pay.

The court, however, pointed out that the claimant's regular rate of pay as a seamstress had been substantially higher than the pay for the

7. OHIO REV. CODE § 4141.29 (D) (2) (b).
8. OHIO REV. CODE § 4141.29 (F).

job offered, that the claimant had never worked as a waitress except on a part time basis, and that if she had accepted the job offered she would have had little or nothing left after paying the expense of a babysitter at night and the cost of transportation to and from her place of employment. Under these circumstances the court concluded that the claimant did have good cause for refusing the employment offer as a waitress and the decision of the Board of Review was reversed.[9] If nothing else, this carefully considered decision demonstrates that a heart of stone is not essential to the proper administration of the provisions of the unemployment compensation law in Ohio.[10]

## DISALLOWANCE OF CLAIM

A question of eligibility for unemployment benefits arose in *Leach v. Board of Review*.[11] The claimant had been a forming press helper for a Cleveland firm and was laid off due to a reduction in work force. Approximately four days after he was laid off, the claimant went back to the place of his former residence, a small town named Glen Jean in West Virginia. In answer to a question about his reason for leaving Ohio, the claimant said that he could not get a job in Cleveland and that his wife was pregnant and he had to bring her back home for someone to take care of her. It was also cheaper, he said, to live there while he was out of a job.

The claimant registered for work and filed his first claim for unemployment benefits with the local office of the West Virginia Department of Employment Security at Oak Hill, West Virginia, a town of about 5,000 population where job opportunities were limited largely to mining.

The Ohio administrator allowed the claim under the interstate benefit procedure, but this determination was reversed by the referee hearing the employer's appeal. The referee reasoned that the claimant was in an area where there would be no work as a forming press operator and therefore the claimant could not be considered available for suitable work. This decision was affirmed by the Board of Review but reversed by the common pleas court upon further appeal. Judge Skeel, speaking

9. Palmer v. B.U.C., 177 N.E.2d 806 (Ohio C.P. 1961).

10. The claimant in this case had not been out of work very long and even though the Portsmouth area did not appear to have many jobs available, the claimant was entitled to some chance to find work at her most recent rate of pay. If, after a reasonable period, usually considered to be a month or two, she had not found work at her last pay rate, she might more properly be disqualified for refusing an otherwise suitable job at a somewhat lower rate of pay. In this connection see Sanders, *Disqualification for Unemployment Insurance,* 8 VANDERBILT L. REV. 307, 328-30 (1955). In this case, however, there is the additional factor of the mother's duty to care for her child. A daytime job would have permitted this. A night job, under the circumstances of this case, might still be unsuitable, even after a lapse of time, if the pay rate were so low as to leave the claimant with an unreasonably low net income after the babysitter fee and cab fare.

11. 178 N.E.2d 94 (Ohio Ct. App. 1961).

for the majority of the court of appeals, agreed with the referee and reversed the common pleas court.

According to the higher court, the claimant is required by the Ohio law "to seek work by the methods by which an individual in his occupation normally obtains work."[12] This, the court said, the claimant failed to do, leaving an industrial area and taking up his residence at the place where the chances of finding any kind of work were remote.

That this decision is subject to considerable doubt is apparent from the dissenting opinion of Judge Hurd. It is there pointed out that the referee erroneously gave effect to the applicable section as it was worded before the 1959 amendment. The majority opinion makes no reference to this, but treats the amendment as though no change had occurred. It is safe to say that the statutory language which Judge Skeel quotes was never intended to have the effect which the opinion suggests. It was meant to allow the claimant to seek work through such established devices as hiring halls, where this is customary in a particular trade, and not as a means of limiting a worker to an area where his last type of work may be found.[13] There is no indication in the record that the claimant was unwilling to accept a mining job or anything else that might be available in the area where he had previously lived. Moreover, according to the dissenting opinion, the claimant had registered for work under the interstate claim procedure and was ready to return to Cleveland at any time. He had been in contact with his last employer in Cleveland and was told he would be called back within a week or two, at the time of his hearing. Considering the facts disclosed in both opinions, the claimant had not actually removed himself from the Cleveland area, so far as his willingness to work there was concerned. The court's decision may also demonstrate a misunderstanding of the operation and purpose of the interstate claims procedure.[14]

12. Ohio Revised Code section 4141.29 (A) provides that "no individual is entitled to a waiting period or benefits for any week unless he . . . (4) Is able to work and is both available for suitable work and making such efforts to obtain suitable work as the administrator may require, considering, along with other pertinent factors, his chances of returning to his previous work, the methods by which an individual in his occupation normally obtains work, the length of his unemployment, and the specific conditions of employment and unemployment prevailing in his locality."

13. Prior to the 1959 amendment, subparagraph four had specifically provided that the claimant, in addition to being available, must be actively seeking work either at a locality where he had earned wages subject to the terms of the act during his base period, or at a locality where such work is normally performed. This language was deleted by the amendment. The referee apparently overlooked the amendment, but the court's election to prolong the life of the deleted provision, notwithstanding its abandonment by the legislature, seems even more questionable. Also curious is the failure of the majority to consider the new factor of the claimant's chances of returning to his previous work, which in this case were very good.

14. The claimant in this case would have met the test set forth in Brown-Brockmeyer Company v. Board of Review, 70 Ohio App. 370, 45 N.E.2d 152 (1942), since he was actually ready to accept his last job as soon as it became available again. For a discussion of the fallacy of this test as well, however, see Freeman, *Able to Work and Available for Work,* 55