

BEFORE THE
STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION

In the matter of the
unemployment benefit claim of

GRETA S. JENKINS, Claimant

Hearing No. 92602768MW

SEE ENCLOSURE AS TO TIME
LIMIT ON FURTHER APPEAL.

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The Department issued an Initial Determination on September 11, 1991 which held that the claimant concealed work performed and wages earned during week 15 of 1991 (the week ending April 13). In subsequent proceedings, the Department determined that the claimant's request for hearing, filed February 17, 1992, was late for a reason beyond the claimant's control. Hearing was held on March 16, 1992 in Milwaukee, Wisconsin before Administrative Law Judge Steven P. Glick. On March 18, 1992, Administrative Law Judge Glick issued an Appeal Tribunal Decision affirming the initial determination of concealment. The claimant petitioned the Commission for review of the adverse Appeal Tribunal Decision, and the matter now is ready for disposition.

Based on the applicable law, records, and evidence in this case, and after consultation with the Administrative Law Judge regarding the credibility and demeanor of the witnesses, the Commission makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The claimant works as a package driver for the employer, a delivery service. She has had a full-time position since September of 1990, at which time she also initiated a claim for unemployment benefits. Drivers for the employer are laid off with some regularity when demand for the employer's services is low. At issue are the claimant's responses on her weeks 15 and 16 (of 1991) claim cards to the question whether the claimant is receiving holiday, vacation, or severance pay. In both instances, the claimant indicated that she was not, but she in fact did receive vacation pay for week 15, on April 19 (week 16). Under the narrow circumstances of this case, the Commission does not believe the claimant intended to conceal this fact from the Department, and so reverses the Appeal Tribunal Decision.

The claimant did not work in the weeks ending April 13 and 20, 1991 (weeks 15 and 16), and had requested vacation pay for the week ending April 13. It was the employer's practice to make checks available for vacation weeks at the end of the week preceding the vacation week. In other words, the claimant's check for week 15 was to have been ready on April 6. The claimant's check was not ready at that time, however; the employer's center manager was unsure why, but indicated to the claimant that she would find out and so inform the claimant. The next week, week 15, the manager told the claimant she was not sure the claimant would be receiving vacation pay for that week, that she was not sure whether the claimant was eligible for vacation pay. At some point

in the following week, week 16, the center manager told the claimant to come in and fill out a form which would enable her to receive the vacation pay she had requested for week 15. The claimant would have to repay the money, though, if she quit the employment before having worked a full year (as a full-time driver), pursuant to an employer policy to that effect. The claimant then received vacation pay for week 15, on April 19 (in week 16). When the claimant mailed her week 16 claim card over the subsequent weekend, she indicated that she had not received any vacation pay for that week. Finally, on Monday or Tuesday of the following week, April 22 or 23, the claimant contacted the unemployment office to inquire how to handle the "situation." The claimant indicated that she had received her vacation check two weeks late, that the claim card for the week in question had already been sent in. The Department representative with whom the claimant spoke said she would "get back" to the claimant, but did not do so. The claimant likewise did not again contact the Department about the matter.

Section 108.04 (11)(a) of the Statutes prohibits concealment by a claimant of any material facts relating to his or her eligibility for benefits. Concealment consists of a suppression of a fact and implies a purpose or design. Kamuchey v. Trzesniewski , 8 Wis. 2d 94, 99, 98 N.W.2d 403 (1959), citing 23 Am. Jur., Fraud and Deceit, p. 851, sec. 77. There must be the intent to receive benefits to which the individual knows he or she is not entitled. Krueger v. LIRC , Rock County Court, Case No. 81-CV-599 A, December 3, 1982, 1982-85 U.C. Digest at 235. There is little question but that the claimant committed no concealment with regard to her week 15 claim

card. Although she had applied for vacation pay for that week, she had not yet received it and, further, had not been told by the employer that she would be receiving vacation pay for that week.

The issue admittedly is closer with regard to week 16. The claimant had learned of her eligibility for the requested week's vacation pay and in fact had received the week's vacation pay before she submitted her week 16 claim card. The questions on the week 16 claim card, though, refer only to that week. The claimant believed she was receiving the vacation pay for week 15. That was the week for which she had requested the pay; that also was the week for which the employer deemed the check to have been issued. Most importantly, though, is the claimant's voluntary step of contacting the Department in the subsequent week to try to explain what was going on and to obtain advice as to how to proceed with her claim for benefits. Given these factors, the Commission does not believe the claimant had the purpose, design, or intent to receive unemployment benefits to which she knew she was not entitled. The Commission therefore finds that, in weeks 15 and 16 of 1991, the claimant did not commit concealment, within the meaning of section 108.04 (11)(a) of the Statutes.

DECISION

The Appeal Tribunal Decision is reversed. Accordingly, no forfeiture is imposed against the claimant for the failures at issue in this case.

Dated and mailed

July 8, 1992

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BR 335.01

/s/

Pamela I. Anderson, Chairman

/s/

Richard T. Kreul, Commissioner

/s/

James R. Meier, Commissioner

NOTE: The Commission conferred with the Administrative Law Judge prior to determining to reverse the Appeal Tribunal Decision. The Administrative Law Judge found "weak" the claimant's excuse for not having followed up her April 22 or 23 contact with the Department, that she simply "forgot" about the matter. The Commission fully agrees with the Administrative Law Judge that the claimant could have done more in following up that contact with the Department. In the Commission's opinion, though, the claimant's initial voluntary contact with the Department shows that it was not her intent to obtain benefits to which she was not entitled. The Commission's reversal thus is based upon its assignment of more weight to the claimant's voluntary contact than to the claimant's subsequent failure to have followed up that contact.