BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

RICHARD F. BJORK
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-121
Case No. 71-5567

The claimant appealed from Referee's Decision No. S-12270 which held that the claimant was ineligible for benefits commencing April 18, 1971 under subdivision (c) of section 1253 of the Unemployment Insurance Code.

STATEMENT OF FACTS

The claimant was last employed in July 1970 as a member of a railroad track maintenance crew. The major portion of his work experience has been in the field of repair of central office telephone equipment. He worked in this field for four years while he was in the Army. After he got out of the service he worked for another two years in this field for a private concern.

He filed a claim for benefits effective January 3, 1971 and drew benefits in the amount of $65 a week through April 17, 1971. The claimant was informed by the Department on April 20, 1971 that benefit payments would cease unless he changed his hairstyle since his availability for work was adversely affected thereby. The claimant did not change his hairstyle and benefit payments ceased.

The claimant's hair is neat and clean and extends to approximately one inch below the top of his collar. He has sideburns which extend about one inch below his earlobes. His sideburns are concealed by his hair. He has no beard or mustache. He has worn his hair this way since he was released from the armed service in 1967. He wears it in this fashion because he likes its appearance. The claimant states that he will cut his hair if a prospective employer will show him where it would interfere with the functioning of the job that was being offered.

The claimant previously sought work in the field of electronics or telephone. No labor market exists in these fields in the Oroville area. Upon advice of the Department he has been seeking any type of work that he can get.

The occupations in which the Department believes the claimant is qualified to perform services and for which there is a labor market are lumber companies and service companies, e.g., filling stations. In April 1971 the Department telephoned 24 of these companies and was informed by 20 of these that they would not hire men with long hair. Reasons given by employers for not hiring men with long hair were that they were afraid of losing business because of customer reaction and that they felt that men with long hair would be the type of employee that would defy authority and would not be a good risk as a hire. A number of the employers said that they would not give a job applicant the reason that their hair was long as the reason for not hiring them. To avoid any trouble the employer would instead tell the job applicant that he was not needed or that they did not have any work. It was upon the basis of these telephone interviews that the claimant was determined to be ineligible for benefits by the Department on May 7, 1971.

A formal survey of employers was conducted by the Oroville office of the Department concerning the effect of the appearance of a job applicant on whether he would be hired. This survey was conducted by means of a questionnaire sent to 350 employers in the Oroville area on May 3, 1971. In regard to potential male employees questions were asked concerning hair length, sideburns, mustaches, beard styles and clothing. Clothing was the only question asked regarding potential female employees. The question asked concerning hair length was:

> "What is the longest hairstyle that you would accept for a new employee? (Check one)
>
> 1. ( ) shoulder length
> 2. ( ) over the ears
> 3. ( ) over the collar
> 4. ( ) trimmed at the neck and ears
> 5. ( ) no restrictions"

As of June 9, 1971 the Department received 260 replies to the above question. The following table shows the type of employer that responded, the number of each type of employer that responded and the number of hairstyles (1, 2, 3, 4 or 5) checked by these employers:

Type of Employer	Number	Hairstyle
Agriculture, Forestry and Fisheries	8	#4-8
Contract construction	30	#4-30
Lumber and Wood Products	42	#4-42
Motor Freight Transportation and Warehouse	3	#4-3
Wholesale	3	#4-3
Retail Building Materials, Hardware and Farm Equipment	2	#4-2
Retail - Food	1	#4-1
Automobile Dealers and Gasoline Service Stations	27	#1-1, #2-1 #4-25
Retail - Apparel and Accessories	2	#4-2
Retail - Furniture, Home Furnishings and Equipment	2	#4-2
Retail - Eating and Drinking Places	23	#2-2, #4-21
Retail - Miscellaneous Retail Stores	15	#2-4, #3-2 #4-9
Credit Agencies other than Banks	7	#2-1, #4-6
Insurance Carriers	4	#4-4
Real Estate	8	#2-1, #3-1 #4-6
Holding and other Investment Companies	1	#4-1

Type of Employer	Number	Hairstyle
Hotels, Rooming Houses, Camps and other Lodging Places	5	#2-1, #4-4
Personal Services	14	#4-14
Miscellaneous Business Services	3	#2-1, #4-2
Auto Repair Services	6	#2-1, #4-5
Miscellaneous Repair Services	3	#4-3
Amusement and Recreation Services except Motion Pictures	3	#4-3
Medical and other Health Services	20	#2-3, #4-17
Legal Services	8	#3-1, #4-7
Educational Services	1	#4-1
Nonprofit Membership Organization	4	#2-1, #4-3
Miscellaneous Services	8	#4-6, #5-2
State	2	#4-2
Nonclassifiable Establishments	4	#5-4

It is obvious from the above tabulation that the great majority (232, if our addition is correct) of employers that responded will only hire male job applicants that have a "conventional" hairstyle, one that is "trimmed at the neck and ears."

REASONS FOR DECISION

Subdivision (c) of section 1253 of the code provides that a claimant is eligible to receive benefits with respect to any week only if he was able to work and available for work for that week.

Under Appeals Board Decision No. P-B-17, to be considered available for work, a claimant must be ready, willing and able to accept suitable employment in a labor market where there is a demand for his services. Also, a claimant is not available for work if, through personal preference, he imposes unreasonable restrictions on suitable work which materially reduce the possibilities of obtaining employment.

The burden is upon the claimant to prove that he is available for work and eligible for benefits under the Unemployment Insurance Code. (Loew's Inc. et al. v. California Employment Stabilization Commission et al. (1946), 76 C.A. 2d 231, 172 P. 2d 938)

The claimant herein imposes as a restriction on suitable employment that he be hired while retaining his long hairstyle unless the prospective employer can show him that his hairstyle will interfere with the functioning of the job being offered or sought.

We find this to be an unreasonable restriction which materially reduces the claimant's possibilities of obtaining employment. The bases for this finding are the telephone interviews of 24 employers and the responses to the questionnaire which show that a vast majority of employers who could use the claimant's services would not consider him for employment because of his hairstyle, and that the claimant probably would not be told the real reason for not being hired. We also do not believe that it is incumbent upon employers that they should have to convince a prospective employee that he change his mode of appearance to be a successful candidate for employment.

In reaching this conclusion we are not unmindful of Spangler v. California Unemployment Insurance Appeals Board et al. (1971), 14 C.A. 3rd 284, 92 Cal. Rptr. 266, which held that the claimant therein was not ineligible for benefits under subdivision (c) of section 1253 of the code because the evidence presented did not warrant the opposite conclusion. The court stated conditions which would call for the opposite conclusion as follows:

> ". . . appellant has no constitutional right to unemployment compensation paid by former employers if his sartorial eccentricities or sloppy groomings chill his employment prospects, and he voluntarily refuses reasonable accommodation to meet the demands of the labor market. . . ."

* * *

> "The trial court concluded that appellant had 'voluntarily eliminated some portion of the labor market which otherwise would have been available to him,' and under Unemployment Insurance Code section 1253, subdivision (c), 'voluntarily made himself unavailable for work.' Thus if the evidence sustains the Department, referee, Appeals Board and the trial court which reached this conclusion, appellant was not entitled to benefits."

The evidence in the instant case sustains a finding of unavailability because of the elimination of some portion of the labor market due to the appearance of the claimant.

We also agree with the court that insofar as the claimant is concerned, constitutional rights are not involved. If any constitutional rights are involved in cases like the present, they rest with employers to protect their prerogative to select and to employ persons of their choice, except as union, governmental, or other controls may apply to restrict this prerogative.

We are also not unmindful of the many cases dealing with school regulations concerning personal appearance. (See 84 Harvard Law Review 1702 (May 1971) where these cases are discussed) The dissenting opinions in P-B-66 and P-B-87 rely in part on one of these decision, namely, Breen v. Kahl (W. D. Wis. 1969) 296 F. Supp. 702, in arguing that the discharges were not for misconduct where the claimants had failed to follow instructions concerning personal grooming. This case was affirmed by a divided court on appeal (Breen v. Kahl, 419 F. 2d 1034 (7th Cir. 1969), cert. denied 398 U.S. 937 (1970)) holding that since the school officials had not shown that the student's long hair was disruptive of the learning process at the school, the officials could not threaten to expel or expel a student for failure to follow the school regulations concerning hairstyle.

Where the facts warrant a finding that the learning processes had been disrupted, students have been required to follow the school regulation or suffer the consequences for such failure. (Ferrell v. Dallas Independent School District, 392 F. 2d 697 (5th Cir. 1968), cert. denied 393 U.S. 856 (1968), Jackson v. Dorrier, 424 F. 2d 213 (6th Cir. 1970) cert. denied 400 U.S. 850 (1970), Akin v. Board of Education, etc. (1968) 262 C.A. 2d 161, 68 Cal. Rptr. 557, cert. denied 393 U.S. 1041 (1968))

We do not believe that the school regulation cases have any bearing on the issue before us in the instant case. Availability for work is a far different issue than disruption of the educational process. If a person's deliberate conduct, behavior or appearance materially reduces his labor market, he is not available for work and is therefore not eligible for benefits. The issue, as we see it, is as simple as that. The claimant herein did materially reduce his labor market because of his chosen hairstyle. He is therefore unavailable for work and ineligible for benefits.

DECISION

The decision of the referee is affirmed. The claimant is ineligible for benefits under subdivision (c) of section 1253 of the code commencing April 18, 1971.

Sacramento, California, December 30, 1971.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

CARL A. BRITSCHGI

CONCURRING - Written Opinion Attached

JOHN B. WEISS

DISSENTING - Written Opinion Attached

DON BLEWETT

CONCURRING OPINION

I concur with the reasoning and the result reached by the majority in this case, however I would further comment, both on Spangler, and upon the implied constitutional aspects of the claimant's case.

In my view, the entire thrust of the Spangler decision was to the point that had there been any ". . . adequate showing that there was employment to be had but for the voluntary failure of appellant to spruce up . . ." the appellant would have been denied benefits. The Department had nothing itself and knew of no specific sales manager opportunities in the community. I do not construe Spangler to mean that the Department must have an actual job in its files to offer. It suffices if there are existing job opportunities in the marketplace. Spangler speaks in terms of "potential" employment. In Spangler the court reversed "Since there is no showing that there was any potential employer to interview. . . ." In the instant case, the Department sampled the market place of representative known employers who do employ people in all categories and produced credible evidence that the vast majority of potential employers who might have use of the claimant's services would not even consider him because of his choice of hair-styling. The claimant was seeking any employment he could get - from any employer. But he in fact chills his own prospects and voluntarily isolates himself from the majority of his potential employers by his election to affect an unconventional hairstyle. As such he renders himself unavailable under section 1253(c) of our code.

As to the claimant's last comment on appeal to this board: "Is America truly the '. . . home of the free'?" I believe that the constitutional implications it raises are perhaps best answered in the context of unemployment insurance law by reference to the decision of the U.S. District Court, Southern District of New York in Galvan v. Catherwood, 324 F. Supp. 1016 (1971) in a parallel case. There, the claimants challenged on constitutional grounds the policy of the New York Labor Department denying benefits because they had travelled to Puerto Rico, an area of high persistent unemployment, when they became unemployed. The court noted that the right to travel, although not an absolute right, was one which must not be inhibited by statutes, rules, or regulations, which unreasonably burden or restrict movement. The court then found that the limitation or restriction on travel involved in the application of the New York policy was a minor one which could not prohibit New York from denying benefits to claimants, noting that:

> ". . . claimants forfeit their rights only if they go to an area of such 'high persistent unemployment' that they are deemed to have effectively isolated themselves from any possibility of employment, . . ."

and:

> ". . . this limitation is reasonably and directly related to the long standing and valid policy of the unemployment insurance provisions of New York law - e.g., that a claimant be 'ready, willing and able to work.'"

Similarly here, the restriction imposed by a requirement of conventional hairstyle is a minor one, and claimants forfeit their rights to benefits only if they persist in isolating themselves from potential employment by affecting and persisting in unconventional hairstyles. California is not constitutionally required to provide unemployment benefits for anyone who elects to substantially lessen his employability.

JOHN B. WEISS

DISSENTING OPINION

I am not convinced that the decision of the court in Spangler can be distinguished. If it cannot, then I believe we are obligated to follow that decision regardless of our personal beliefs as to its soundness. Let us then examine the last four paragraphs of the court's decision, a portion of which has been quoted in the majority opinion.

> "The trial court concluded that appellant had 'voluntarily eliminated some portion of the labor market which otherwise would have been available to him,' and under Unemployment Insurance Code section 1253, subdivision (c), 'voluntarily made himself unavailable for work.' Thus if the evidence sustains the Department, referee, Appeals Board and the trial court which reached this conclusion, appellant was not entitled to benefits. (Cf. Garcia v. California Emp. Stab. Com. (1945) 71 Cal. App. 2d 107, 111.)
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> "An essential element, however, is challenged on the record. Testing whether the findings and conclusions of the trial court have the minimal required evidentiary support, there was no adequate showing that there was employment to be had (within the definition of Unemp. Ins. Code § 1258) but for the voluntary failure of appellant to spruce up. (Emphasis added)
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> "Appellant points out that the evidence was that the Department of Employment San Rafael office seldom if ever had job offers for a sales manager or manufacturer's representative; that he was never sent to job interviews, even in the initial period when he did not have a beard; and his unemployment therefore was not the result of his voluntary refusal of work, nor of potential employers' refusal of him as an employee, whatever he wore or did not wear.
>
> "Since there is no showing that there was any potential employer to interview, the judgment is reversed, with directions to the trial court to issue a peremptory writ as prayed."

Is there the minimal required evidentiary support in this record to show that there was employment to be had but for the failure of the claimant to spruce up? Is there evidence that the Department had potential employment

to which it could have referred the claimant had it not been for his long hair? Is there evidence that there were employers in the Oroville labor market area who had work for which the claimant is qualified but who refused to offer him work or interview him because of his appearance?

The answer to each of the foregoing questions is -"No." There is evidence in the record that some employers in the area will not hire a person having hair extending to a certain length. But, according to Spangler, this kind of evidence is not sufficient to support a finding of unavailability, although it will support a conclusion that the claimant voluntarily eliminated some portion of his labor market.

I concede that the claimant had the burden to prove that he was available for work. But, in order to take this case out of the holding in Spangler, it was incumbent upon the Department to present evidence that there was employment to be had but for the failure of the claimant to spruce up. There is no such evidence in this record. Thus, the determination of the Department and the decision of the referee should be reversed.

DON BLEWETT