

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

CLARENCE GOSHA
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-260

EMPLOYMENT DEVELOPMENT DEPARTMENT

Case No. 75-9088

Office of Appeals No. SF-11449

The Department appealed from the decision of the Administrative Law Judge which held that the claimant was able to work and available for work under section 1253(c) of the Unemployment Insurance Code during the three-week period commencing July 6, 1975.

STATEMENT OF FACTS

The claimant filed a claim for benefits and established a benefit year beginning June 1, 1975.

The claimant last worked on May 30, 1975 in his regular occupation as a plumber apprentice. As a member of Local 38, Plumbers and Pipe Fitters Union, he obtains employment by being dispatched from the union hiring hall. When a member is unemployed, he notifies the union which places his name on the union availability list in the order in which the notification is made. When employers call in for plumbers, such workers are referred from the aforementioned list in numerical order. A member who has been unemployed the longest is on the top of the list. The Employment Development Department recognizes the union hiring hall arrangement as meeting the "seek work" requirements of the code.

On July 10, 1975, the claimant left California for Columbus, Georgia, for the purpose of comforting an aunt whose sister had recently passed away. He returned to California on July 22, 1975 and, on that same day, reported to the Department. The claimant's mode of travel to and from Columbus, Georgia was by commercial airlines.

At the time the claimant left California, he was approximately eight or nine on the union's list. Work was slow and the claimant did not anticipate being called for work for some period of time. However, prior to leaving, the claimant notified his union through a co-worker of his circumstances and informed them that his wife would be home to relay any referrals of work to him. The claimant assured the co-worker that he would return within a day of being referred to work. This procedure met with the union's approval and satisfied the union's registration requirements. During his absence from the area, the claimant was not referred to any work and it was not until two or three weeks after the claimant had returned from Georgia that work was offered.

On July 23, 1975 the Department determined the claimant ineligible for benefits under section 1253(c) of the code for two weeks ending July 12, July 19 and July 26, 1975, on the ground that the claimant was not available for work. At the time of the hearing, the Department offered no evidence that there was employment to be had during the period the claimant was absent from the area.

The Administrative Law Judge reversed the determination of the Department on the ground that the claimant met the seek work requirements of the Department and was available within 24 hours for a referral of work from the union. He also found that the claimant had lost no job opportunity.

REASONS FOR DECISION

Section 1253(c) of the Unemployment Insurance Code provides as follows:

"An unemployed individual is eligible to receive unemployment compensation benefits with respect to any week only if the director finds that:

"(c) he was able to work and available for work for that week."

In construing the availability for work requirements, we must at all times use a realistic approach in deciding labor market conditions and the need for claimants to be ready, willing and able to accept suitable work in order that their unemployment may not be unduly extended. Thus, we have held that in order to meet the eligibility requirements of section 1253(c) of the code,

the claimant must be ready, willing and able to accept suitable employment during the days and hours customarily worked in such employment in a labor market where there is a demand for his services (Appeals Board Decision No. P-B-61). However, he is not available for work if, through personal preference or force of circumstances, he imposes unreasonable restrictions on suitable work such as limitations on hours, days, shifts or wages which materially reduce the possibilities of obtaining employment (Appeals Board Decision No. P-B-17).

The above decisions have been in conformity with the underlying philosophy on which the Unemployment Compensation Program is founded. The stated policy of the legislature is found in section 100 of the code, which provides in pertinent part:

"As a guide to the interpretation and application of this division the public policy of this State is declared as follows:

"Experience has shown that large numbers of the population of California do not enjoy permanent employment by reason of which their purchasing power is unstable. This is detrimental to the interests of the people of California as a whole."

* * *

"The Legislature therefore declares that in its considered judgement the public good and the general welfare of the citizens of the State require the enactment of this measure under the police power of the State, for the compulsory setting aside of funds to be used for a system of unemployment insurance providing benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum.

"It is the intent of the Legislature that unemployed persons claiming unemployment insurance benefits shall be required to make all reasonable effort to secure employment on their own behalf."

In prior decisions, we have formulated a basic concept regarding availability which is within the stated policy promulgated by the legislature. Such concept is stated in Appeals Board Decision No. P-B-170 (formerly Benefit Decision No. 4172) as follows:

"It is not only generally but almost universally accepted in the various jurisdictions that availability for work cannot be measured entirely by a person's willingness to work, although willingness is unquestionably an indispensable factor entering into the determination. Willingness to work must be considered in relation to the employment field in which the claimant voluntarily, or perhaps through force of circumstance, has marked as the area beyond which employment will not or cannot be considered. There must be a dual finding where availability for work is at issue: First, that there is a willingness as well as readiness and ability to work, and second, that there exists some reasonable probability in the claimant's locality for obtaining suitable employment so that the willingness to work, coupled with some prospects of work, can result in a finding that during the weeks for which benefits are claimed, the claimant has been ready, willing, and able to accept suitable employment in a labor market where that willingness may result in gainful employment. If employment fails to materialize under such circumstances, due to the inability of the Employment Service to match the worker to a suitable job opening, the ensuing unemployment is properly viewed as involuntary and, unless some act of the claimant gives rise to a disqualification period, is compensable with benefits."

We now turn to the facts in the present case to determine if the claimant was available for work as we have defined that term.

It is apparent that but for the claimant's absence from the area he would have been eligible for benefits under section 1253(c) of the code. In all other respects, the claimant was complying with the Department's requirements to match him to a suitable job opening. The claimant was requested to seek work with his union hiring hall and he complied with this instruction. His unemployment was not the result of his actions but the inability of the labor market to provide work. The claimant's unemployment was involuntary and there was nothing to indicate to the contrary; in fact, the Department concedes that the claimant's act of leaving the state did not cause him to lose a potential job opportunity. We find that this is an essential element in determining a claimant's eligibility for benefits.

In Spangler v. California Unemployment Insurance Appeals Board (1971), 14 C. A. 3d 284, 92 Cal. Rptr. 266, the Court of Appeal held that in order to find a claimant for unemployment compensation benefits unavailable for work because of some voluntary act on his part, there must be adequate

showing that there was employment to be had but for the voluntary action of the claimant. In that case, it was the claimant's failure to spruce up which caused the Department to hold him ineligible under section 1253(c) of the code. The court stated:

"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.

"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 judgement is reversed, with directions to the trial court to issue a peremptory writ as prayed."

In Chambers v. California Unemployment Insurance Appeals Board (1973), 33 C. A. 3d 923, 109 Cal. Rptr. 413, the Court of Appeals of the First District held that a finding that an automotive mechanic had not kept himself available for work because, due to his long hair, moustache and beard, only 10 to 13 percent of employers would consider him for employment, did not preclude the mechanic from obtaining unemployment compensation benefits where there was no job available in the mechanic's potential labor market.

The court cited Spangler with approval and stated:

"Spangler v. California Unemp. Ins. App. Bd., supra, 14 Cal. App. 3d 284, is closely pertinent to the instant contention. The appellate court there found (p. 288), '[N]o 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.' It was held, in effect, that

a person seeking unemployment relief was under no duty to keep himself available for work that did not appear to exist.

"This holding seems not unreasonable, for the Department should readily be able to produce evidence that work was probably available at the pertinent place and time. The decision was made by another division of this district of the Court of Appeal, and should for that reason ordinarily be followed. (See 6 Witkin, Cal. Procedure (2d ed. 1971) § 667, P. 4580.) We choose to follow it. The instant contention will be sustained."

Although both the Spangler and Chambers cases dealt with personal appearance of a claimant for unemployment compensation benefits, the rationale of both cases must be applied to any voluntary act of the claimant which the Department claims causes a claimant to be unavailable for work. The claimant's voluntary act in this case was leaving the area. However, this act did not render him unavailable for work since there was no work available to him at the pertinent place and time.

Prior to the court cases of Spangler and Chambers, we held in Appeals Board Decision No. P-B-32 that a truck driver who was in court, involved in a lawsuit for two days was not available for work under section 1253(c) of the code. In that decision we found that the Department of Employment or any prospective employers did not attempt to contact the claimant to offer him a work opportunity. Based on such finding, we stated:

"In Benefit Decisions Nos. 6581, 6620, 6625, 6645 and others, there developed what might be designated the 'lost work opportunity' concept. Briefly stated, this concept holds that a claimant who is unavailable for work for a short period of time is not ineligible for benefits under section 1253(c) of the code if the facts show that during the period of his unavailability he lost no work opportunities. To follow this concept to its logical conclusion would require us to first ascertain if during a period when the claimant was unavailable for work he lost any work opportunities. If no such work opportunities were lost, then we would have to hold the claimant eligible for benefits under section 1253(c) of the code even though the facts showed that during the period he was entirely unavailable for work."

* * *

"Benefit Decisions Nos. 6581, 6620, 6625, 6645 and others which apply the 'lost work opportunity' concept are overruled."

In light of recent court decisions, and our endeavor to follow the legislative dictates of this state, we must overrule our decision in Appeals Board Decision No. P-B-32 and reinstate those decisions which were expressly overruled by Appeals Board Decision No. P-B-32.

We hold that the claimant was available for work because his activities did not in any way impair his availability for work and did not reduce or jeopardize his opportunities for employment.

By this decision we impose on the Department an affirmative duty to ascertain that the claimant lost a work opportunity during a period when a claimant is allegedly unavailable for work. Losing a work opportunity is a factor which must be considered and weighs heavily in showing that the claimant is unavailable.

DECISION

The decision of the Administrative Law Judge is affirmed. The claimant is not ineligible for benefits under section 1253(c) of the code.

Sacramento, California, March 9, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

CARL A. BRITSCHGI

RICHARD H. MARRIOTT

DISSENTING - Written Opinion Attached

HARRY K. GRAFE

DISSENTING OPINION

I dissent.

In the instant case the facts are undisputed that during a 12-day period in July 1975, the claimant was in Columbus, Georgia. To say, as do my colleagues, that the claimant was able to work and available for work in California within the meaning of section 1253(c) of the code during that 12-day period is an absurdity. As the majority opinion in Appeals Board Decision No. P-B-32 accurately states, the California Attorney General has pointed out in the opinions cited therein that a claimant, to be able and available within the meaning of section 1253 (c), must be ready, willing and able to go to work on each day of his normal work week during each week that he claims benefits (10 Ops. Cal. Atty. Gen. 208; 24 Ops. Cal. Atty. Gen. 81). The only exceptions to this requirement are those provided for by the legislature in section 1253.1 of the code, which are not applicable to the present case.

The California courts have held uniformly that the burden is upon the claimant to prove availability under section 1253(c). Such rule was even stated in Spangler v. California Unemployment Insurance Appeals Board (1971), 14 Cal. App. 3d 284, a case cited by the majority herein as supportive of their position (see also Ashdown v. Department of Employment (1955), 135 Cal. App. 2d 291; Loew's, Inc. v. California Employment Stabilization Commission (1946), 76 Cal. App. 2d 231). The claimant here has certainly not met that burden.

In support of their position that loss of work opportunity is a factor which must be considered "and weighs heavily" in determining availability under section 1253(c), the majority herein cite Spangler and the case of Chambers v. California Unemployment Insurance Appeals Board (1973), 33 Cal. App. 3d 923. A careful reading of those two cases casts doubt on the empirical reliance being accorded thereon by my colleagues.

Spangler and Chambers are both so-called "hair" cases in which the Department and this Board had denied unemployment benefits because of the length of the hair worn by these male claimants and the fact they had beards, on the theory that by choosing that mode of appearance the claimants had thereby rendered themselves unavailable for work. (Personally, I have a much more liberal attitude regarding length of hair and wearing of beards than did the Department and Board in those cases.) In each of those two cases,

the claimants interposed constitutional arguments in behalf of their hair lengths and beards. Citing the leading case of Finot v. Pasadena City Board of Education, 250 Cal. App. 2d 189, the court in Chambers noted that the "right of one to wear his hair and beard as he chooses is a 'liberty' protected by the due process clause of the state and federal Constitutions, and 'although probably not within the literal scope of the First Amendment itself' is nevertheless entitled to its 'peripheral protection.'" Moreover, "only a 'compelling state interest' will justify a substantial infringement of such a constitutional right (Sherbert v. Verner, 374 U.S. 398)" and other cases so holding (33 Cal. App. 3d. at 926).

The court in Chambers did find a "compelling state interest," explaining (as had the court in Spangler) that there is "no constitutional right to unemployment compensation paid by former employers if [a claimant's] sartorial eccentricities or sloppy grooming chill his employment prospects, and he voluntarily refuses reasonable accommodation to meet the demands of the labor market." Further, the court noted that, unlike the direct impingement by the state of the First Amendment right of freedom to practice one's religion in Sherbert v. Verner, supra, the choice of hair growth and appearance is entitled only to "peripheral protection."

Nonetheless, the fact is inescapable that in each Spangler and Chambers, the cases were permeated by the issue of claimant's constitutional rights and the protection thereof versus state interference. In the case presently before us there is no such issue of a constitutional right of the claimant. To me, it is not accidental or merely coincidence that the only two judicial pronouncements requiring a loss of job opportunity test were made in cases where protection of claimants' constitutional rights were in question. To require such test universally, where no question of constitutional rights exists, seems an unwarranted extension of the Spangler and Chambers holdings.

More perplexing is the statement by the majority herein that, in addition to the Spangler and Chambers decisions, it is necessary to overrule Appeals Board Decision No. P-B-32 "to follow the legislative dictates of this state." No authority is given for that bold statement, and in reality no authority exists. In the 34 years since the decision was issued, the legislature has never voiced its dissatisfaction with the declaration in People v. Nest (1942), 53 Cal. App. Supp. 856: "The legislature in enacting the Unemployment Insurance Act did not intend to put a premium on idleness nor to discourage unemployed persons from making early and earnest attempts to reestablish themselves economically to avoid becoming or continuing to be charges on society."

If my colleagues are truly interested in the purposes on which our system of unemployment compensation benefits are founded, they would do well to examine the testimony presented to and the reports issued by the Congress at the time the federal law was written. The purpose of the federal act was to give prompt, if only partial replacement of wages to the unemployed, to enable workers "to tide themselves over, until they get back to their old work or find other employment, without having to resort to relief" (House of Representatives Report No. 615, 74th Congress, 1st Session, 7 (1935)). Providing for security during the period following unemployment was declared to be a means of assisting a worker to find substantially similar employment (Senate Report No. 628, 74th Congress, 1st Session, 12 (1935)). The Federal Relief Administrator testified that the act "covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job" (Hearings on H.R. 4120, House of Representatives, Committee on Ways and Means, 74th Congress, 1st Session, 214 (1935)). It is clear that the rule written by the majority in the present case is at odds with the purposes as expressed above.

Finally, the majority here are, in effect, amending section 1253(c) by appending thereto a qualification not enacted by the legislature. By reason of our tripartite system of three co-equal branches of government, this Board simply lacks the power or authority to amend the statutes written by the legislative branch. The no-lost-work rule has been in effect since Appeals Board Decision No. P-B-32 was issued on December 24, 1968.

Had the legislature disagreed with that holding, the legislature has had more than ample opportunity to so revise the law, but in its wisdom it deemed not to do so. That same wisdom should be displayed by this Board.

HARRY K. GRAFE