BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

DOUGLAS SANTOS
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-66
Case No. 69-1743

STANDARD STATIONS, INC.
(Employer)

The employer appealed from Referee's Decision No. OAK-10432 which held the claimant was not disqualified from receiving unemployment insurance benefits under section 1256 of the Unemployment Insurance Code and the employer's reserve account was not relieved of benefit charges under sections 1030 and 1032 of the code. The employer has submitted written argument to which the claimant has made no reply. No argument has been received from the Department.

STATEMENT OF FACTS

For six months from July 22, 1968 until January 17, 1969 the claimant was employed as a service station attendant and salesman at one of the employer's service stations in Oakland, California. The claimant worked 40 hours each week, four of the five days during daylight hours, and earned $2.60 per hour. This employment ended by discharge for alleged insubordination.

The claimant's responsibilities included not only the servicing of customer automobiles, providing them with gasoline and oil products, but, in addition, the promotion and selling of other products manufactured or distributed by the employer. During the claimant's shift, six or seven other individuals were similarly employed at this service station.

Prior to beginning work the claimant was given one week of training. He was provided with a Station Handbook in which was contained the following instruction:

> "Personal appearance and conduct are important. They are important for the success of both the employees and the Company. All employees should be clean shaven with their hair suitably trimmed. The uniform provided by the Company should be kept in presentable condition. Good appearance and alert, gentlemanly conduct, will display the individual's personal characteristics to best advantage. The responsibility of obtaining high standards of appearance and conduct rests with the Station Manager and can best be accomplished by example."

At the time of hire the claimant signed an agreement setting forth conditions for his attendance at the employer's training school. The agreement stipulated that the trainees be clean shaven without moustaches or long sideburns and be suitably groomed with a "businessman's haircut."

On December 18, 1968, the employer provided each station manager in its San Francisco region with an interpretation of the handbook instructions that employees be "clean shaven with their hair suitably trimmed." The interpretation given to this phrase meant "no moustaches, no beards, no long sideburns and no 'beatnick' or 'hippie' type haircuts." The directive in which this interpretation was given charged each of the employer's station managers with the responsibility for accomplishing the employer's objective of maintaining the high standards of appearance expected of its service station employees, suggested that a full explanation of the employer's position be given each individual failing or refusing to conform with these standards, and, if necessary, pursue conformity to these standards in accordance with "suitable disciplinary action."

The directive was posted in all of the employer's service stations within the San Francisco region, including the service station in Oakland where the claimant worked. A copy of the directive was initialed by the claimant.

The employer's reason for the aforementioned rules and their enforcement was based upon its belief that the unkempt personal appearance of employees who dealt directly with customers adversely affected the sale of its products. Accordingly, and by the claimant's own admission, his assistant service station manager, sometime in late December 1968, remonstrated the claimant for his failure to come to work with well-groomed hair. Direct and unrebutted testimony of the employer's representatives, moreover, establishes the following chronology in connection with the claimant's personal appearance thereafter:

On Monday, January 13, 1969, the employer's retail representative for seven employer-operated stations and nineteen dealer-operated stations made a routine inspection of the Oakland service station where the claimant was employed. This official personally told the claimant to get a haircut and trim his sideburns. At this time the claimant's hair had grown over his collar and his sideburns extended to the bottom of his earlobes. Since barber shops were not open on that day, the claimant was told to go home, trim his sideburns, and return to work. He was also told that he was to have his hair cut the following day. No mention was made by the claimant on Monday that he lacked funds with which to purchase a haircut on Tuesday.

The claimant worked on Tuesday, January 14, and was off, as scheduled, the following Wednesday and Thursday. He next appeared at work on Friday, January 17, 1969. He had not obtained a haircut and had not trimmed his sideburns. The claimant was then suspended and subsequently discharged for insubordination by the employer's retail representative effective that day.

The claimant testified at his hearing that he did not have his hair cut as ordered because he lacked funds. He explained that during the preceding pay period he had received only $100 because he had been absent from work several days due to illness. He further testified that on the day of his discharge he informed the employer's retail representative that he would get his hair cut that day after he was paid. However, he did not ask the retail representative to reconsider his decision to discharge the claimant. The employer's witnesses recalled that on that occasion the claimant declared his understanding of the employer's position and that, again, the claimant did not state that a lack of funds precluded his obtaining a haircut. Unrebutted testimony from the retail representative is that "Standard procedure" allows for a loan to an employee for such purposes as the purchase of a haircut.

The record in this case reflects no evidence of specific complaints from customers concerning the claimant's appearance; however, the December 18, 1968 memorandum to all station managers, as well as a similar memorandum to all retail sales managers dated December 2, 1968, was prompted by numerous complaints received from customers concerning the long hair and sideburns worn by service station attendants at other stations in the San Francisco region. The employer's position was stated for the record in the testimony of its counsel. He pointed out that the service station attendants were at the point of primary contact with customers and that, while no figures had been gathered to substantiate a conclusion that an actual monetary loss had been suffered by the employer herein, the retail representative in his (complete and authoritative or limited) control over the stations in the entire

San Francisco region was convinced that considerable business would be lost due to alienation of customers who came in contact with employees affecting long sideburns and long hair.

It is our conclusion that such evidence, unrebutted, supports a finding that direct or indirect pecuniary loss to the employer was probable if such affectations were long condoned, whether the losses were likely to occur at employer-operated stations or those operated by franchised dealers selling the employer's product. In either case, an irreparable detriment to the employer's interests would be sustained. We so find.

REASONS FOR DECISION

If a claimant has been discharged for misconduct connected with his most recent work, he is held disqualified for benefits under section 1256 of the California Unemployment Insurance Code for the period prescribed in subdivision (a) of section 1260 of the code. In these circumstances, in accordance with code sections 1030 and 1032, the employer's reserve account may then be relieved of any charges for benefits which may be paid to that particular claimant based upon wages paid to him during the base period of his claim.

A finding of misconduct must be based on probative evidence of a deliberate or wilful act or course of conduct in derogation of an employer's interests. Actual damage need not be proved for it is sufficient if the act or course of conduct "tends to injure the employer's interests." In Appeals Board Decision No. P-B-3, we reiterated this principle. We described the genesis of the term "misconduct" in the context of several judicial decisions, including the case of Maywood Glass Company v. Stewart (1959), 170 Cal. App. 2d 719, 339 Pac. 2d 947, the leading judicial authority defining this term as used in sections 1256 and 1030 of the code.

We reaffirm herein that the definition of misconduct must be considered in light of the basic purpose of the unemployment insurance program. The legislature in expressing its intent in section 100 of the statute set forth the basic purpose of the program as being the payment of unemployment benefits to those persons involuntarily unemployed through no fault of their own. Moreover, "fault" means intentional action which a claimant foresees or which it may be reasonably inferred he must have foreseen as causing, prolonging or tending to prolong a period of unemployment and from which a prudent person in like circumstances with comparable knowledge and understanding would have necessarily refrained.

Justice Holmes, speaking for the Massachusetts Supreme Court in McAuliffe v. Mayor of New Bedford (1892), 155 Mass. 216, 220, 29 N.E. 517, 517-518, affirmed -

> ". . . There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. . . ."

Section 2856 of the California Labor Code relating to private employers states:

> "2856. Compliance with employer's directions. An employee shall substantially comply with all the directions of his employer concerning the service on which he is engaged, except where such obedience is impossible or unlawful, or would impose new and unreasonable burdens upon the employee."

In this regard it has been held that the motive of an employer in giving an order is not important but that the inquiry should go to whether or not the order was reasonable (May v. New York Motion Picture Corporation (1920), 45 Cal. App. 396, 187 Pac. 785); and wilful violation of an employer's lawful and reasonable order is a breach of duty as is any other breach of contract. (Ehlers v. Langley & Michaels Company (1925), 72 Cal. App. 214, 237 Pac. 55)

Other relevant Labor Code provisions provide for termination of private employment at the will of either party upon notice where the employment has no specified term (section 2922); recognition of an employee's misconduct in the coarse of his employment as a ground for his discharge (section 3005(a)); and, of particular interest for our present discussion, that services performed by an employee shall be performed in conformity to the "usage" of the place of employment (section 2857).

In this last connection, an outstanding legal authority has stated that an employee may be discharged if his conduct damages the prestige of his employer's business. (4 Williston, Contracts, section 1020 (rev. ed., 1939))

Additional Labor Code provisions pertaining to private employment as well as judicial authority for their interpretation are more fully discussed in Appeals Board Decision No. P-B-3, supra, at page 8.

Receipt of unemployment benefits is still acknowledged as a privilege in two senses:

First, a state is not required to establish an unemployment insurance program; second, even when it does so, a claimant does not have an automatic vested property right in the receipt of unemployment Insurance benefits. (Sherbert v. Verner (1963), 374 U.S. 398, 404-405; Fleming v. Nestor (1960), 363 U.S. 603, 608-611) This reasoning has been followed by the Supreme Court of California in Thomas v. California Emp. Stab. Comm. (1952), 39 Cal. 2d 501, 504, 247 Pac. 2d 561:

> ". . . When a claimant has met all requirements of the act, and all contingencies have taken place under its terms, he then has a statutory right to a fixed or definitely ascertainable sum of money. . . . the administrative authorities [then] have no discretion to withhold benefits from any particular claimant once it is determined that the facts support his claim and the condition of the fund permit s payment. . . ." (Emphasis supplied)

The claimant in the present case was discharged for alleged insubordination. He disobeyed his superior's persistent orders to trim his sideburns and cut his hair.

While it has been held that the ". . . right to work, either in employment or independent business, is fundamental and, no doubt, enjoys the protection of the personal liberty guarantee under the Fourteenth Amendment to the Federal Constitution, as well as the more specific provisions of our State Constitution. [citations omitted] . . . this right, like others equally fundamental, is not absolute. . . ." (Bautista v. Jones (1944), 25 Cal. 2d 746, 749, 155 Pac. 2d 343)

In Mallard v. Boring (1960), 182 Cal. App. 2d 390, 6 Cal. Rptr. 171, an employee had submitted a questionnaire to a justice court indicating her availability for jury duty in disobedience of her superior's direct order not to do so. She was subsequently discharged. An argument was made in her behalf that this discharge was actionable since in violation of public policy.

Conceding that the employer's attitude was selfish and shortsighted and that the court's personal belief was that a discharge due to willingness to serve as a juror should be construed as being contrary to public policy, yet -

> ". . . to so hold would establish a rule which would apply in all instances where persons are discharged from their employment because they have made themselves available for jury service, regardless of the circumstances. If public policy requires that this protection should be afforded prospective jurors, we feel it should be done by the Legislature, as they have done in the case of election officials." (182 Cal. App. 2d at page 396; In accord, Patterson v. Philco Corporation (1967), 252 Cal. App. 2d 63, 60 Cal. Rptr. 110)

It is likewise not within the province of this board to legislate - to put into the Unemployment Insurance Code something that is not there. In enacting section 1256 of the code, we cannot assume that the legislature wilfully or ignorantly intended to violate the organic law of the United States or cognate provisions found in the constitution of the State of California. Thus, it is not our function, in the absence of actual statutory or public policy considerations, to compel an employer to accept or retain an employee. (See Marin v. Jacuzzi (1964), 224 Cal. App. 2d 549, 553-554, 36 Cal. Rptr. 880; compare Appeals Board Decision No. P-B-3, supra, pages 9-10)

In Finot v. Pasadena City Board of Education (1967), 250 Cal. App. 2d. 189, 58 Cal. Rptr; 520, the court held that the right of a public schoolteacher to wear a beard and teach in a classroom was constitutionally protected under the due process clauses of the Federal and State constitutions (Fourteenth Amendment and Article I,section 13, respectively) as they pertain to personal liberties and, further, that the wearing of a beard to work as a form of expression of one's personality may be entitled to the peripheral protections of the First Amendment to the Federal Constitution (and Article I, section 23 of the California Constitution) against prior restraints.

In that case, Finot had disobeyed his superior's personal order - not a rule of the Pasadena City Board of Education - prohibiting the wearing of beards. The court found sufficient evidence of a rational connection between the reason for the order and the restriction of Finot's rights, but insufficient evidence from which to conclude that the restriction of Finot's rights was outweighed by the purpose of the order (easier enforcement of a rule against male students wearing beards), or that there were no other more reasonable alternatives in the way of deterrents, sanctions and penalties against violators of the rule. The court stated, however:

> "This is not to say that all male teachers at all high schools, regardless of circumstances, may wear beards while they teach in classrooms and that the practice may not be prohibited or otherwise restrained under appropriate circumstances. What we hold is simply that, on the record before us, with the complete absence of any actual experience at the high school involved as to what the actual adverse effect of the wearing of a beard by a male teacher would be upon the conduct of the educational processes there, beards as such, on male teachers, without regard to their general appearance, their neatness and their cleanliness, cannot constitutionally be banned from the classroom and from the campus. . . ." (250 Cal. App. 2d at page 202)

The court in Finot reached its legal conclusion in accordance with the criteria laid down by the California Supreme Court in Bagley v. Washington Township Hospital District (1967), 65 Cal. 2d 499, 55 Cal. Rptr. 401, for the restriction of political activities of public employees. The Supreme Court had stated that the public employer must demonstrate (1) that political restraints rationally relate to enhancement of the public service; (2) that the benefits which the public gains by those restraints outweigh the resulting impairment of the constitutional rights of the public employee; and (3) that no alternative less subversive of the employees' constitutional rights be available.

Subsequent appellate court decisions following Bagley and interpreting Finot in this jurisdiction are Meyers v. Arcata School District (1969), 269 A.C.A. 633, 75 Cal. Rptr. 68; Los Angeles Teachers Union v. Los Angeles City Board of Education (1969), 269 A.C.A. 345, 74 Cal. Rptr. 561; and Akin v. Board of Education of Riverside Unified School District (1968), 262 Cal. App. 2d 161, 68 Cal. Rptr. 557.

The Los Angeles Teachers Union case evaluated the constitutional rights of public employees to protest vis-a-vis the requirement that efficiency and integrity of public service be preserved. The court stated at 269 A.C.A. page 349:

> ". . . a governmental employer, like any employer, may to a certain reasonable extent restrict an employee's exercise of his constitutional rights during working hours and while on its premises where such exercise would be detrimental to the interests of the public service in which both employer and employee are engaged. As stated in Bagley v. Washington Township Hospital Dist., 65 Cal. 2d 499, 505, 55 Cal. Rptr. 401, 406, 421 P. 2d 409, 414:

> '"[We] cannot accept the apparent suggestion of some few cases that government may never condition the receipt of benefits or privileges upon the non-assertion of constitutional rights. [citations omitted] The government employee should no more enjoy the right to wrap himself in the flag of constitutional protection against every condition of employment imposed by the government than the government should enjoy an absolute right to strip him of every constitutional protection. Just as we have rejected the fallacious argument that the power of government to impose such conditions knows no limits, so must we acknowledge that government may, when circumstances inexorably so require, impose conditions upon the enjoyment of publicly-conferred benefits despite a resulting qualification of constitutional rights.'"

In the Meyers case, supra, the court agreed with the Finot qualification that a prohibition based upon empirical evidence of disruption of the educational processes would be a legitimate exercise of public authority, and, in Akin, supra, the court distinguished the Finot result where evidence supported a finding that a student's wearing of a beard disrupted the educational process.

Although frequently cited for the general principle that disobedience to unlawful demands does not constitute insubordination even though the illegality complained of may not have been established by any court before the refusal to obey (see, for example. Appeals Board Decision No. P-B-3, page 8), Parrish v. Civil Service Commission (1967), 57 Cal. Rptr. 623, 425 Pac. 2d 223, is otherwise revealing by virtue of its conclusions regarding the denial of benefits to welfare recipients. There, the social worker who was fired had declined to participate in what was ultimately determined to be an unconstitutional search of welfare recipients' homes. The Supreme Court, sitting en banc, restated the tests earlier set down by it in Bagley, and again repudiated a "doctrine of unconstitutional conditions" which would deny welfare benefits once conferred upon any and all terms. (57 Cal. Rptr, at page 630) The Court then held that the County of Alameda had violated certain welfare recipients' constitutional rights when it conducted early morning searches of homes in an attempt to detect frauds upon the county's social welfare system.

In administering the social insurance program under our charge, we should abstain from rushing pell-mell into decisions calling for the resolution of alleged constitutional issues in private employment situations. We should not be hasty in perceiving a civil rights' issue lurking behind every assertion of

personal liberty, particularly where the claim to unemployment benefits stands in juxtaposition to equally substantial and tangible rights of a private employer. Before doing so we must be cautious to calculate the dimensions of an employee's right to employment on his own terms, for ". . . liberty is not license and consists not in a right in every man to do what he pleases . . . ." (People v. Wichliff (1956), 144 Cal. App. 2d 207, 211, 212, 300 Pac. 2d 749) In our opinion a reading of the aforementioned cases dealing with the rights of public employees quickly supports this view.

Moreover, in dealing with the rights of parties to private employment contracts an equitable balance must be struck between the employer's demands for the successful operation of his business and the employee's demands for freedom in the manner of his mode of dress and grooming. The paramount interest will be decided in any given case by a thorough search of the record for preponderant evidentiary and legal support of one or the other interest.

We performed this appellate function in Benefit Decision No. 5937, the "Ponytail Case," the rationale and language of which we now explicitly approve. The claimant when hired by the employer was advised that she was to comply with certain posted regulations pertaining to dress and personal appearance. She also acknowledged that employees were to dress in a "businesslike fashion," and that her own hair was to be worn no longer than collar length. She agreed with these conditions by acceding to the employer's demands that she either cover her hair or wear it in a style which would conform to the employer's requirements. She thereafter, however, despite numerous warnings, continued to violate the employer's regulation by wearing her hair in the objectionable style. In holding that her discharge was for misconduct, we recognized that it was "her employer's prerogative to establish such standards of dress, appearance and deportment for its employees as in its opinion would best serve to promote a businesslike atmosphere at its establishment. " The claimant's violation of the employer's standards was a wilful disregard of her employer's interests. The claimant was held to have been discharged for misconduct connected with her work.

The claimant in the present case, in accepting employment, similarly became party to an agreement to comply with his employer's reasonable and lawful policies and rules. Was his wearing of long sideburns and hair in violation of his employer's standards, being strictly a preference however credible his motive, tantamount to a legal right? In making this evaluation we must examine the purpose of the employer's rule and its effect beyond the work environment. Was the impingement upon the claimant's freedom of expression a reasonable method of controlling service station attendants and

salesmen in the conduct of their work assignments? We must ascertain whether the imposition of the employer's standards would assault the claimant's personality and individuality and offend his human dignity, thereby depriving him of his constitutionally protected liberty, and whether the employer's discharge of the claimant was a rude invasion of his constitutional rights. What follows will be as appropriate in a situation involving beards and other facial adornments as to long hair and other affectations of appearance.

From what has already been said, it must now be conceded that both private and public employees can never expect to be completely free to do as they please. They must face the prospect of discharge for refusing to perform their work in accordance with the reasonable and legal directions of their employers. Such control by any employer over any employee is indeed fundamental to the employment relationship.

We recognize that there are innumerable facets of a private employee's life which are not relevant to an employment relationship and over which his employer dare not intrude in the exercise of control. We also recognize that the line of demarcation between a private employer's reasonable demands and those which are overreaching is more difficult to define than in the public sector. In many instances the employer's pecuniary interest must be delicately balanced with the personal rights of his employee. Occasionally these competing interests will clash.

In analyzing the employer's demands for compliance with the norms set for the personal appearance and conduct of service station attendants and salesmen in the present case, we shall apply the Bagley tests. They have universal validity. We do so with the caveat, made evident hereinafter, that they must be qualified by the nature of the employment relationship under review.

1. Is there in the record evidence that the wearing of long hair by service station attendants and salesmen would impair the legitimate objectives of the employer?

Testimony was given that numerous complaints had been received from customers concerning long hair and sideburns worn by service station attendants and salesmen employed at service stations in the employer's San Francisco region. These complaints, in our opinion, formed a reliable source

of information from which the retail representative could conclude in the exercise of his expertise that policy memorandums expressing the employer's good grooming rule should be circulated to station and retail sales managers.

We may infer from evidence before us that the employer's business of selling petroleum products and services to the general public is extremely competitive and completely dependent for its success or failure upon the whim or caprice of the buying public. There is substantial evidence in the present record from which to conclude that the employer has in fact gone to considerable expense to promote its best possible image to the buying public. The claimant, as the employer's representative, was a projection of this public image, and his personal appearance was of paramount importance to the employer's objective of selling its products and services.

In a transaction between a given customer and the claimant the customer's response to the claimant's appearance might be adverse. Human beings construct their own stereotypes. They are usually not based upon objective criteria. In accordance with their experiences, they build up psychological barriers to other individuals. Over a period of time their attitudes become frozen.

The buying public need not explain its prejudices; it merely takes its business elsewhere. To this extent, the employer's business is damaged and often irreparably lost. Under these circumstances, the employer must aim its appeal at that segment of the buying public which it believes, in its considered judgment, reflects current notions of conventionality. A rational connection between the restraints imposed upon the claimant and the employer's pecuniary interest exists in the present case. We so conclude.

(2) Did the employer's interest in enforcing its rule outweigh the resulting impairment of the claimant's constitutional rights?

Evidence was adduced by the employer in the present case that profits would likely be lost due to alienation of actual or potential customers holding conventional views as to good grooming, customers who might happen to come in contact with employees affecting long sideburns and long hair, including the claimant.

In the private economy, it is competition between employers which is the central and dynamic feature of business life. In the private economy,

consumers can and do go elsewhere with no inconvenience and little expense to obtain substantially the same products as their prejudices dictate. In the public section such as in Finot, supra, the taxing power sustains governmental operations; the majority of citizens for economic reasons must use the public schools whether or not they approve of a bearded schoolteacher. This is the fundamental difference between the cases. This is why a qualified application of the second Bagley test may be harmonized with the unchallenged principle of misconduct discharges that a "tendency" toward injury of an employer's interests is all that is required to deny to a claimant unemployment benefits. (Appeals Board Decision No. P-B-3, supra)

Furthermore, the claimant expressed no deep psychological need for continuing his employment adorned with long hair. To the contrary, he testified that he had intended to purchase a haircut but was discharged before he could do so. His procrastination evidently was not due to deeply held convictions, but, if we are to credit his testimony, was a decision consciously taken because of an alleged lack of funds. The preponderance of the evidence therefore clearly leads us to conclude that the employer's interest in enhancing its prestige and obtaining and retaining customer patronage far outweighed the minimal interest of the claimant in wearing long hair and sideburns.

(3) What alternatives were available to the employer short of discharging the claimant?

Again, the evidence is clear. Prior to beginning work, the claimant was made aware of the employer's standards relating to his personal appearance. If clarification of these standards was needed, it was provided in mid-December of 1968 when each station manager in the San Francisco region was provided a copy of the employer's interpretation of these standards. The claimant not only was aware of this interpretation, but later during the month of September was remonstrated for disobeying the employer's rule. Subsequently, he was ordered by higher authority to conform. This should have been adequate to deter the claimant, but he deliberately chose to disobey what we have concluded was a reasonable order. It is difficult to imagine in these circumstances what other practical deterrents the employer then had available to it, or what other sanctions or penalties but to discharge the claimant for this obvious insubordination.

With regard to the Bagley tests, and particularly this third and most broad of the criteria used in Parrish to measure the alternatives available when dispensing publicly-conferred benefits (benefits derived from the general

taxing power, not from taxes paid by employers alone), we observe the following language of the California Supreme Court in the latter case:

> "In any event the instant operation does not meet the last of the three requirements which it must satisfy: so striking is the disparity between the operation's declared purpose and the means employed, so broad its gratuitous reach, and so convincing the evidence that improper considerations dictated its ultimate scope, that no valid link remains between that operation and its proffered justification." (57 Cal. Rptr. at page 631)

The present case, on the other hand, epitomizes the efficacy of an employer rule designed to enhance the employer's rights at no substantial loss to the claimant's. At a busy station in its San Francisco region, at which the claimant was employed during daylight hours in full view of the employer's customers, all that was required of the claimant was his adherence to the standards of good grooming expected of all other employees. Taking the long range view, it might be said that the claimant's inflexible position with respect to his personal grooming not only tended to impair the employer's success in its competitive enterprise, but, as a proximate result, adversely affected the employer's continued ability to provide jobs for others directly and indirectly employed in the merchandising of its products in proportion to the number of customers lost through the claimant's intransigence.

The claimant's discharge for his refusal to conform was for misconduct within the meaning of section 1256 of the code and the employer's reserve account is entitled to relief of benefit charges.

DECISION

The decision of the referee is reversed. The claimant was discharged for misconduct under section 1256 of the code. Any benefits paid him shall not be chargeable under section 1032 of the code to the employer's reserve account number 002-2774.

Sacramento, California, January 13, 1970

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

JOHN B. WEISS

DISSENTING - Written Opinion Attached

LOWELL NELSON

DON BLEWETT

DISSENTING OPINION

We agree with our colleagues that the Bagley criteria for weighing a nice balance between an employee's constitutional rights and an employer's right to impinge upon them because of an economic interest is as applicable in the private as in the public sector; but to state the general rule without carefully applying it to the record now before us is to arbitrarily exercise the authority vested in us by the legislature.

The language of Finot is significant. The court in holding for the individual against the institution stated that there was a complete absence of any actual experience at the location involved as to whether or not the wearing of the beard adversely affected the educational processes.

As is apparent from the cases subsequently reported and cited in the majority decision, the courts have consistently looked to the record for evidence of detriment or injury to the interest of the employer before taking from the employee an acknowledged constitutional right.

A recent federal court decision frames the issue precisely. In Breen v. Kahl, 296 F. Supp. 702, 706 (W. D. Wis. (1969)), the court extended the doctrine of constitutional protection to students wearing long hair, proclaiming that the freedom of an adult male or female to present himself or herself physically to the world in a manner of his or her choice is a highly protected freedom, and an effort to use the power of the state to impair that freedom "must bear 'a substantial burden of justification,' whether the attempted justification be in terms of health, physical danger to others, obscenity, or 'distraction' of others from their normal pursuits."

Our own appellate courts have recognized, moreover, that when a case for denying an employee's right to wear a beard rests on no more than mere hypotheses, there is insubstantial evidence to warrant an employee's discharge. There must be some empirical record upon which "results rather than hypotheses" may be tested. (Forstner v. City and County of San Francisco (1966), 243 Cat. App. 2d 625, 633, 634, 52 Cal. Rptr. 621, 626, 627)

We may likewise make our own pragmatic observation in the present case. The evidence submitted by the employer of a loss of profits was tenuous, at best, and, if we are to follow the Finot rationale, absolutely deficient. There was no showing of actual or potential damage to its interest at the service station where the claimant was employed. For all we know, that particular location may be one in a section of the City of Oakland where customers prefer their station attendants to wear long hair and extended sideburns. Thus, while we will also readily agree with our colleagues that there is no easy explanation for certain conventional syndromes, we insist under any test of "misconduct" under section 1256 of the code that some proof of injury be presented sufficient for that ultimate finding.

In order to sustain its burden and warrant relief of its reserve account of benefit charges under sections 1030 and 1032 of the code, it is not enough that the employer desire to rid itself of an unsatisfactory employee. It must demonstrate through evidence, not conjecture, that such a result is necessary. The employer in the present case has not sustained its burden. It has not shown us how a half inch or any other length of hair over the collar, or sideburns to midear or earlobe, is going to adversely and irreparably impair its business relationships. In the present case, there is no evidence that the claimant's appearance was ever tested for its alleged impairment of the employer's interest - hardly a basis for taking away a constitutional right.

When, in an appropriate case, an employer can support by demonstrable reasons why certain constitutional rights should be subjugated to its interest, then we will evaluate the concerned interests in terms of the record presented to us at that time. Because such proof is lacking in the present case, we would affirm the referee and hold the claimant entitled to benefits. He was not discharged for "misconduct" within the meaning of section 1256 of the code. The employer's reserve account should not be entitled to relief of benefit charges under sections 1030 and 1032 of the code.

LOWELL NELSON

DON BLEWETT