BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

STEPHEN R. SKELTON AND OTHERS
(Claimants)
(See Appendix)
[Appendix removed in accordance with California Code of Regulations title 22, section 5109(e)]

PAUL MASSON VINEYARDS
(Employer)

PRECEDENT
BENEFIT DECISION
No. P-B-87
Case No. 70-2184
and
Case No. 70-2253

The employer appealed from Referee's Decisions Nos. SJ-10716, SJ-10717, SJ-10738, SJ-10750, SJ-10884 and SJ-11056 which held that the claimants were entitled to benefits under the Unemployment Insurance Code and that the employer's account is not relieved of charges under section 1032 of the code. All parties submitted written argument. We are consolidating our decision in these matters under the provisions of section 5107, Title 22, California Administrative Code, because the cases involve the same issue and there is no apparent prejudice to the parties. We have considered the written argument submitted by the claimants and the employer.

STATEMENT OF FACTS

The employer is engaged in the manufacturing and sale of wine. It operates a modern winery at Saratoga, California. As part of its sales promotion, the employer offers guided tours of the winery. The employer became concerned about the appearance of its employees when members of the public complained about the long hair and unkempt appearance of several workers.

Claimants Davis, McCrae, Tigue and Reed had haircuts acceptable to the employer at the time of hire. They did not cut their hair after going to work for the employer.

As a result, their hair became extremely long and extended below their shoulders. Some of them tied it up while working, others allowed it to hang loose.

Claimants Skelton and Weber were clean shaven at the time of hire but wear their hair long and down to their collars. After hire they both grew full beards.

On January 22 all of the claimants were given an interoffice communication which was issued because of the visitors' complaints and which provided as follows:

> "Our Company is engaged in food processing. All operations and personnel are viewed by the public in the course of our hospitality and guided tour program.
>
> "The Company has acquired an excellent reputation for the cleanliness and sanitary appearance of its facilities. The personal cleanliness, neatness and well-grooming of our employees has been a contributing factor.
>
> "When you applied to us for work, you were hired because you met our standards for personal appearance. However, your present appearance does not meet our standards and is considered detrimental to our Company's interest.
>
> "Consequently, we are obliged to request that you improve your grooming and general appearance.
>
> "If you fail to meet our standards of cleanliness, neatness and well-grooming by Monday, January 26, your employment will be terminated."

On February 4, 1970 another memorandum was handed to each of the claimants which provided in pertinent part as follows:

> "Several newer employees have expressed a lack of understanding of what the Company has always regarded in the past as minimum requirements for personal cleanliness and safety to be eligible for hire and continued employment. For their benefit the following minimum requirements are enumerated:

"1) Sideburns shall not extend below the bottom of the ears.

"2) Mustaches shall be neatly trimmed.

"3) Goatees shall be neatly trimmed.

"4) Front hair lengths shall not obscure sight.

"5) Back hair length shall be trimmed to at least one inch above the shoulder level - to be measured from the collar bone, rear atlas.

"6) Nothing shall be worn on the head to prevent the immediate emergency placement of a safety hat on the head.

"We expect everyone to conform to the above requirements. Those who do not will be so notified and given three (3) work days to conform. Failure to comply will result in suspension."

All of the claimants identify themselves with a general protest movement and insist on wearing their long hair or beards as political and social symbols. The claimants refused to modify their appearance in accord with the employer's request and were discharged.

REASONS FOR DECISION

We are reluctant to discuss the constitutional law aspects of this case because it is our sincere belief that the final decision is not in any way dependent upon those aspects. Nevertheless we feel impelled to do so because of the claimants' insistence that any denial of unemployment insurance benefits would be a direct infringement upon their constitutional rights.

The granting or denying of unemployment insurance benefits has never been dependent upon the exercise of, or failure to exercise, constitutional rights. In fact, in almost every case that comes to mind in which a claimant has been denied benefits the claimant was exercising a constitutional right. This is true whether the benefits are denied to a class by legislative enactment or individually by decision of this board or a court.

To give just a few examples, a claimant has a constitutional right to strike, yet the legislature has denied him benefits if he does so. Similarly a claimant has a constitutional right to move away from his labor market, demand a wage higher than the prevailing rate, restrict the hours he will work or indeed refuse to work at all. However, when he exercises any of those constitutional rights, he will usually be denied unemployment insurance benefits under specific provisions of the Unemployment Insurance Code.

The claimants have a constitutional right to grow long hair. This right, although recently recognized and the subject of much publicity, is not superior in any way to the other more fundamental constitutional rights and freedoms. A person with long hair does not have special status. He does not acquire greater privileges than a claimant exercising any other constitutional right. He may be found ineligible for unemployment insurance benefits in the same manner as other claimants.

In summary we point out that unemployment insurance is based upon the concept that benefits shall be paid to an individual who is out of work or remains out of work through no fault of his own (section 100, Unemployment Insurance Code). Benefits are not paid or denied because a specific act or activity of a claimant is protected to some extent from direct government intervention by the constitution.

Now that the constitutional rights issue has been placed in its proper perspective, the instant case will be decided in accordance with the fundamental principles of unemployment insurance law. The issue to be decided is whether or not the claimants' refusal to improve their grooming constitutes misconduct under the Unemployment Insurance Code.

Section 1256 of the Unemployment Insurance Code provides that an individual is disqualified for benefits and sections 1030 and 1032 of the code provide that the employer's reserve account may be relieved of benefit charges if the claimant has been discharged for misconduct connected with his most recent work.

In Appeals Board Decision No. P-B-3 we found that the four elements necessary to establish misconduct are:

(1) a material duty owed by the claimant to the employer under the contract of employment;

(2) a substantial breach of that duty;

(3) a breach which is a wilful or wanton disregard of that duty; and

(4) a disregard of the employer's interest, which tends to injure the employer.

In Appeals Board Decision No. P-B-66 we held that an employer has a right to insist that its employees be well groomed, especially if their appearance in some way affects the employer's business. We went on to hold that a claimant's refusal to comply with such a request constituted misconduct.

The employer in the present case manufactures wine. It hopes to promote the sale of the wine by allowing the public to view its modern sanitary facilities. Employees with long hair and beards, who appear to be "hippies," certainly destroy the image the employer is attempting to present.

In our opinion the employer's request that the claimants improve their grooming was reasonable and the claimants' refusal to do so showed a wilful and wanton disregard of the employer's interests.

We note also that there is no law which requires an employer to create special or limited jobs for employees who are willing to meet only some of the conditions of their employment. Thus there was no obligation upon the employer here to attempt to transfer or change the job scope of the claimants. At issue is only their compliance with the reasonable requirements of the job they were holding at the time of termination.

We conclude that all of the claimants were discharged for misconduct connected with their work.

DECISION

The decision of the referee is reversed. The claimants were discharged for misconduct within the meaning of section 1256 of the code. The employer's reserve account is relieved of benefit charges,

Sacramento, California, October 14, 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 cannot join in the reluctance of our colleagues to discuss the constitutional law aspects of these cases for it is our opinion that the final resolution of the issues involved is dependent to some extent upon those aspects.

The majority has stated the granting or denying of unemployment insurance benefits has never been dependent upon the exercise, or failure to exercise, constitutional rights. It is further stated that benefits are not paid or denied because a specific act or activity of a claimant is protected to some extent from direct government intervention by the constitution.

The above statements are not correct. In Sherbert v. Verner (1963), 374 U. S. 398, the Supreme Court of the United States considered a matter in which a claimant for unemployment insurance benefits under the South Carolina unemployment insurance law had been denied such benefits on the ground that her refusal to accept Saturday work, the Sabbath Day of her faith, rendered her unavailable for work and ineligible for benefits. The court stated:

> ". . . Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest. . . .

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In Syrek v. California Unemployment Insurance Appeals Board (1960), 54 Cal. 2d 519, 354 P. 2d 625, the Supreme Court of California considered a matter in which the claimant had been denied unemployment insurance benefits under California law because he had declined to apply for a civil service position chiefly because he objected to taking the loyalty oath which was required of all civil service employees. The court, although expressly refusing to pass on the alleged constitutional issues involved, stated:

> ". . . It has been held that the government may not withhold a privilege to which it has no vested right on condition that the prospective recipient surrender a constitutional right. . . ." (Citations omitted)

In view of the foregoing, we cannot conclude, as does the majority, "that the constitutional rights issue has been placed in its proper perspective." (See also Appeals Board Decision No. P-B-1) What the majority has done, in effect, is to sweep the issue under the rug so to speak. They have failed to apply the tests enunciated by the California Supreme Court in Bagley v. Washington Township Hospital District (1967), 65 Cal. 2d 499, 55 Cal. Rptr. 401. They have failed to do this despite the following statement in the majority opinion in Appeals Board Decision No. P-B-66:

> "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. . . ."

In our dissenting opinion in Appeals Board Decision No. P-B-66 we agreed with our colleagues that the Bagley criteria for weighing a balance between an employee's constitutional rights and an employer's right to impinge upon them was proper. We disagreed with the majority in the application of that criteria to the facts of the case. We concluded that the employer had not sustained its burden of showing through evidence, not conjecture, that the claimant's wearing of hair over the collar, or sideburns, was going to adversely and irreparably impair its business interests. We said 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 interest in terms of the record presented to us at that time.

We shall now evaluate the concerned interests as enunciated in Bagley in terms of the record in the instant case.

> Is there evidence that the wearing of long hair and beards by the claimants, who were laborers in the employer's wine making process, would impair the legitimate business objectives of the employer?

The business objective of the employer is, of course, to sell wine. To do so it must convince the buying public that its product is better than the product of its competitors. As to the potential buying public who have never visited the winery (and we suspect this is the vast majority) there can be no possible impairment of the employer's business objectives attributable to the appearance of the claimants. As to the potential buying public who did visit

the winery and take advantage of the guided tours, only two out of some 5,000 visitors who completed cards indicated they were disturbed by the appearance of the employees with long hair. In our opinion this evidence does not sustain the employer's burden of showing that its business objectives were impaired by the claimants' appearance.

The second question asked by Bagley is:

> Did the employer's interest in enforcing its rules outweigh the resulting impairment of the claimant's constitutional rights?

We have hereinbefore concluded that the employer's business interests were not impaired. The testimony of the claimants indicates that they wore beards and long hair as an important means of expressing their protest to wrongs they believe exist in our society and identification with those who share their views. 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." We answer the second question in the negative.

Finally, Bagley asks:

> What alternatives were available to the employer short of discharging the claimants?

The evidence shows that the employer has work areas which are not subject to view as part of the tour. We see no reason, and the employer has stated none, why these claimants who were few in number could not have been assigned to these areas. We concede the employer was under no legal obligation to do so, but it certainly appears to be a reasonable alternative to discharge.

Thus, our conclusion is that under the three tests enunciated by Bagley, the employer has failed to show that its business objectives were impaired by the claimants, that its interest in enforcing its rule outweighs the impairment of

the claimants' constitutional rights, or that reasonable alternatives were not available to the employer short of discharging the claimants.

Finally, we consider it extremely inappropriate for the majority to characterize these claimants as "hippies." While the term "hippie" is not presently capable of precise definition, generally it is associated with individuals who are unclean, drug addicted, barefooted, bearded, longhaired, nonproductive members of society. Other than the fact that these claimants had long hair and beards, there is not one scintilla of evidence of the existence of any of these other characteristics and the employer has not made any such suggestion. In fact, the employer has conceded that these claimants were productive members of its work force. The only thing the employer objected to insofar as the claimants are concerned was their failure to comply with the rather nebulous standards of grooming prescribed by the employer. In fact, the standards set up by the employer, objectively viewed, probably would not satisfy the complaints which prompted the rules in the first place. Two visitors became upset by the wearing of long hair by male employees. No mention was made of beards. The standards prescribed by the employer still permitted the wearing of long hair, but not too long.

We again reiterate that 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 claimants entitled to benefits.

LOWELL NELSON

DON BLEWETT