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Appearing for Appellant and Real Party in Interest Craig Medeiros

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PARATRANSIT, INC. Respondent, V. UNEMPLOYMENT INSURANCE APPEALS BOARD Respondent, CRAIG MEDEIROS Appellant and Real Party in Interest.	Case No. S204221 Court of Appeal, Third Appellate District No. C063863 Sacramento County Superior Court No. 34-2009-80000249 **APPELLANT'S MOTION FOR JUDICIAL NOTICE IN SUPPORT OF OPENING BRIEF; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF STEPHEN E. GOLDBERG IN SUPPORT THEREOF; PROPOSED ORDER**

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE; THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT; RESPONDENTS AND THEIR ATTORNEYS OF RECORD:

Pursuant to California Evidence Code Section 459 and California Rules of Court 8.252 and 8.520(g), Appellant Craig Medeiros hereby moves this Court to take judicial notice of the following documents:

1. Pursuant to Evidence Code Sections 452(c) and 459, *Matter of Gertler*, Precedent Benefit Decision No. 321 (1951), a true and correct copy of which is attached as Exhibit 1.
2. Pursuant to Evidence Code Sections 452(c) and 459, *Matter of McCoy*, Precedent Benefit Decision No.183 (1976), a true and correct copy of which is attached as Exhibit 2.
3. Pursuant to Evidence Code Sections 452(c) and 459, *Matter of Santos*, Precedent Benefit Decision No. 66 (1970), a true and correct copy of which is attached as Exhibit 3.
4. Pursuant to Evidence Code Sections 452(c) and 459, *Matter of Thaw*, Precedent Benefit Decision No. 362 (1977), a true and correct copy of which is attached as Exhibit 4.
5. Pursuant to Evidence Code Sections 451(e) and 459, the Merriam-Webster Dictionary definition of the term "state," a true and correct copy of which is attached as Exhibit 5.

This motion is made on the grounds that all of the above are properly noticeable under the Evidence Code and are relevant to the issues before this Court. It is based upon this motion, the attached memorandum of points and authorities, and the Declaration of Stephen E. Goldberg.

DATED December 26, 2012

Respectfully submitted,

LEGAL SERVICES OF NORTHERN CALIFORNIA

By: _____
STEPHEN E. GOLDBERG
Attorneys for Appellant
Craig Medeiros

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE

The Court of Appeal can take judicial notice of official acts of California executive departments. (Evid. Code § 452(c); Evid. Code § 459.) Appellant Craig Medeiros asks the Court to take judicial notice of four California Unemployment Insurance Appeals Board Precedent Benefit decisions, *Matter of Gertler*, Precedent Benefit Decision No. 321 (1951), *Matter of McCoy*, Precedent Benefit Decision No.183 (1976), *Matter of Santos*, Precedent Benefit Decision No. 66 (1970), and *Matter of Thaw*, Precedent Benefit Decision No. 362 (1977), that address issues raised in this case. (*See* Appellant's Opening Brief at pp. 14, 29-30.) Appellant further requests the Court take judicial notice of the Merriam-Webster Dictionary definition of the term "state" pursuant to Evidence Code Sections 451(e) and 459.

Neither the decisions nor the dictionary definition were presented to the courts below. However, all are relevant to review of the majority opinion of the Court of Appeal. Specifically, *Matter of Gertler* demonstrates that the Appeals Board has recognized the relevance of collective bargaining agreements in evaluating good cause in unemployment matters. (*Matter of Gertler* (1951) P-B-321 at pp.2-3.) It is therefore relevant to reviewing the holding of the majority that the

collective bargaining agreement at issue in this matter was irrelevant. (*See* Appellant's Opening Brief at p. 14.) Additionally, *Matter of McCoy*, *Matter of Santos,* and *Matter of Thaw* are all relevant to the issue of whether the Court of Appeal erred in failing to address whether the employer's interest was injured by the alleged misconduct. (*See* Appellant's Opening Brief at pp. 29-30.) Because the Appeals Board is charged with interpreting the Unemployment Insurance Code and accompanying regulations, this Court has determined that its interpretation of the same is entitled to great weight unless clearly erroneous, unauthorized, or otherwise contrary to legislative intent. (*Pacific Legal Foundation v. California Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 111.) Accordingly, Precedent Benefit decisions are persuasive authority in deciding cases involving unemployment insurance benefits.

Furthermore, the "true signification" of words are judicially noticeable under Evidence Code Section 451(e). Reference to dictionary definitions is appropriate for courts ascertaining the ordinary and customary meaning of words. (*In re Marriage of Bonds* (2000) 24 Cal.4th 1, 16.) The dictionary definition of the word "state" is relevant to a key issue on appeal: whether the disciplinary memorandum complied with the governing collective bargaining agreement (CBA). (*See* Appellant's Opening Brief at

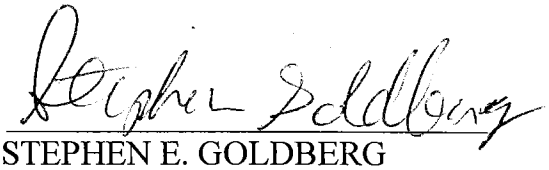
p. 21.) The CBA creates an obligation for employees to sign disciplinary memoranda or notices "provided that the notice *states* by signing, the Vehicle Operator is only acknowledging receipt of said notice and is not admitting to any fault or to the truth of any statements in the notice." (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd.* (2012) 206 Cal.App.4th 1319, 1322, review granted Sept. 26, 2012, S204221 [emphasis added].) The ordinary meaning of the word "state" is therefore relevant to interpreting what language is required by the CBA to be included in the disciplinary memorandum.

For these reasons, Appellant requests that this Court take judicial notice of the attached four Precedent Benefit decisions and Merriam-Webster dictionary definition.

DATED December 26, 2012

Respectfully submitted,

LEGAL SERVICES OF NORTHERN CALIFORNIA

By: 

STEPHEN E. GOLDBERG

Attorneys for Appellant

Craig Medeiros

DECLARATION OF STEPHEN E. GOLDBERG IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE

I, Stephen E. Goldberg, hereby declare:

1. I am an attorney licensed to practice law in the State of California. I am one of the attorneys representing Appellant and Real Party in Interest Craig Medeiros in *Paratransit, Inc. v. Unemployment Insurance Appeals Board*, California Supreme Court No. S204221.

2. The document attached as Exhibit 1 is a true and correct copy of *Matter of Gertler*, Precedent Benefit Decision No. 321 (1951), which I downloaded on December 21, 2012 from the California Unemployment Insurance Appeals Board website at http://www.cuiab.ca.gov/Board/precedentDecisions/precDecNumerical.asp#benefit.

3. The document attached as Exhibit 2 is a true and correct copy of *Matter of McCoy*, Precedent Benefit Decision No.183 (1976), which I downloaded on December 21, 2012 from the California Unemployment Insurance Appeals Board website at http://www.cuiab.ca.gov/Board/precedentDecisions/precDecNumerical.asp#benefit.

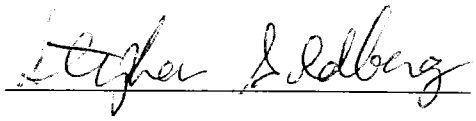
4. The document attached as Exhibit 3 is a true and correct copy of *Matter of Santos*, Precedent Benefit Decision No. 66 (1970), which I downloaded on December 21, 2012 from the California Unemployment Insurance Appeals Board website at http://www.cuiab.ca.gov/Board/precedentDecisions/precDecNumerical.asp#benefit.

5. The document attached as Exhibit 4 is a true and correct copy of *Matter of Thaw*, Precedent Benefit Decision No. 362 (1977), which I downloaded on December 21, 2012 from the California Unemployment Insurance Appeals Board website at http://www.cuiab.ca.gov/Board/precedentDecisions/precDecNumerical.asp#benefit.

6. The document attached as Exhibit 5 is a true and correct copy of the Merriam-Webster Dictionary definition of the term "state," which I downloaded on December 21, 2012 at https://www.merriam-webster.com/dictionary/states.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Executed on December 26, 2012 at Sacramento, California.



Stephen E. Goldberg

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PARATRANSIT, INC. Respondent, V. UNEMPLOYMENT INSURANCE APPEALS BOARD Respondent, CRAIG MEDEIROS Appellant and Real Party in Interest.	Case No. S204221 Court of Appeal, Third Appellate District No. C063863 Sacramento County Superior Court No. 34-2009-80000249 **PROPOSED ORDER GRANTING MOTION TO TAKE JUDICIAL NOTICE**

Pursuant to Evidence Code Sections 459 and 452(c), Appellant's motion for judicial notice is GRANTED. The Court takes judicial notice of the Precedent Benefit decisions and dictionary definition attached to the motion as Exhibits 1-5.

DATED: _____

_____
HON. CHIEF JUSTICE OR
ASSOCIATE SUPREME COURT
JUSTICE

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT DECISION NO. 5798 AS A PRECEDENT DECISION PURSUANT TO SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE.

In the Matter of:

SARAH GERTLER

PRECEDENT
BENEFIT DECISION
No. P-B-321

FORMERLY
BENEFIT DECISION
No. 5798

The above named claimant on June 21, 1951, appealed from the decision of a Referee (LA-43178) which held that the claimant was not entitled to benefits under Section 58(a)(4) of the Unemployment Insurance Act [now section 1257(b) of the Unemployment Insurance Code].

Based on the record before us, our statement of fact, reason for decision, and decision are as follows:

STATEMENT OF FACT

The claimant is a member of Cap Makers Union, Local 22, and has been employed intermittently for a number of years by various employers as a single needle operator in the garment industry at Los Angeles, California, primarily making uniform and sports caps. She last worked on April 17, 1951.

The claimant registered for work and filed an additional claim for benefits in the Los Angeles office of the Department of Employment. The claimant previously established a benefit year beginning June 24, 1950. On May 16, 1951, the Department issued a determination which held that the claimant was ineligible for benefits for five weeks beginning May 4, 1951, under Section 58(a)(4) of the Act [now section 1257(b) of the code].

The Avalon Headwear Company was a party to a collective bargaining agreement with the claimant's union. The claimant had worked on various occasions for this company, the last occasion having been from January 14, 1951, to January 19, 1951, at a wage of $1.15 per hour. On some undisclosed date after January 19, 1951, and prior to May 7, 1951, the collective bargaining agreement had been mutually modified by the parties to provide a two and one-half percent increase in wages to members of the claimant's union working for the company. On or about May 7, 1951, the company requested the union to send the claimant to it for work at the same wage that she had worked for in January, 1951. The union refused to send the claimant to work for the company unless the employer agreed to pay the claimant the wage provided for in the collective bargaining agreement as modified after the claimant had last worked for the company. The company refused to so agree and placed a request for the claimant's services with the Department of Employment. On May 7, 1951, the Department referred the claimant to work with the company. The claimant then telephoned the company and inquired about the rate of pay the company was willing to pay and was advised that her pay would be $1.15 per hour, the same as she had received in January, 1951. The claimant thereupon refused the offer of employment.

REASON FOR DECISION

Section 58(a)(4) of the Act [now section 1257(b) of the code] provides that a claimant shall be disqualified for benefits if, without good cause, he has refused to accept suitable employment when offered to him. In the present case the work offered to the claimant was suitable work and the only issue presented is whether or not the claimant had good cause for refusing it.

The term "good cause" is not defined in the Act or in the regulations of the Director of Employment. "Good cause" is a relative term and must be decided according to the facts and circumstances of each particular case. The mere advancing of an excuse is not sufficient to constitute "good cause"; there must be a substantial and compelling reason for the action taken (Benefit Decision No. 5539).

In Benefit Decision No. 5561 we held that a claimant had good cause for voluntarily leaving work within the meaning of Section 58(a)(1) of the Act [now section 1256 of the code] where the employer refused to pay her wages at the rate specified in a collective bargaining agreement in effect between the employer and a union of which the claimant was a member. We believe that the principle and reasoning in that case are applicable here and that the

company's refusal to agree to pay the claimant the wage set forth in the collective bargaining agreement between the company and the claimant's union constituted good cause for the claimant's refusal of the offered work. Accordingly, we conclude that the claimant is not subject to disqualification for benefits under Section 58(a)(4) of the Act [now section 1257(b) of the code].

DECISION

The decision of the Referee is reversed. The claimant is not subject to disqualification under Section 58(a)(4) of the Act [now section 1257(b) of the code]. Benefits are payable provided the claimant is otherwise eligible.

Sacramento, California, August 31, 1951.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

MICHAEL B. KUNZ, Chairman (Absent)

GLENN V. WALLS

EDWARD CAIN

Pursuant to section 409 of the Unemployment Insurance Code, the above Benefit Decision No. 5798 is hereby designated as Precedent Decision No. P-B-321.

Sacramento, California, May 18, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

CARL A. BRITSCHGI

HARRY K. GRAFE

RICHARD H. MARRIOTT

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT DECISION NO. 6472 AS A PRECEDENT DECISION PURSUANT TO SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE.

In the Matter of:

JOHN E. McCOY
(Claimant-Appellant)

WILLIAM J. MORAN COMPANY
(Employer)

PRECEDENT
BENEFIT DECISION
No. P-B-183

FORMERLY
BENEFIT DECISION
No. 6472

STATEMENT OF FACTS

The claimant registered for work and filed a claim for benefits in the Pomona office of the Department of Employment effective August 28, 1955. On October 7, 1955 the department issued a determination under section 1256 of the code and a ruling under section 1030 of the code holding that the claimant had been discharged for other than misconduct connected with his work and that the account of the employer was chargeable. The employer filed a timely appeal; and a hearing was held November 25, 1955. The determination and ruling of the department were reversed by the referee's decision.

The claimant was last employed as an office manager for this employer from August 5, 1948 until August 23, 1955, with a terminating wage of $650 per month. The claimant, who was interested in entering into the construction business on his own behalf, had tentatively discussed with three other employees the possibility of organizing a new company. Such discussions were concerned with general qualifications of the claimant and the other employees and the possibility of securing adequate financing for a new business. It does not appear that the claimant's activities had in any way caused any dissatisfaction among the employer's employees or disrupted the employer's business.

One of the employer's partners learned of the claimant's desire to initiate a new organization and of his discussions with the other employees. He told the claimant that the claimant would have to forget about his idea of going into business and cease his discussions with other employees or he would have to leave the employer's employment. The claimant refused to agree to abandon his idea of going into business for himself or to cease discussions with other employees; and the employer thereupon requested his resignation, which the claimant then gave.

Two issues are herein involved:

(1) Whether the employer's request that the claimant abandon his idea of going into business for himself and to cease discussions with other employees was reasonable.

(2) Whether the claimant was discharged for reasons other than misconduct.

REASONS FOR DECISION

Although an employer may discharge an employee for failure to comply with a reasonable order designed to further the employer's business (Benefit Decision No. 5672), we believe that, in this case, the claimant's conduct was not such that it had interfered with the orderly conduct of the employer's business or that the employer's order was in any way necessary to protect or preserve its business. The evidence before us merely shows that, whatever may have been the claimant's intentions with respect to starting his own firm, he and the other employees involved had always performed their duties for the employer in a satisfactory manner. Under such circumstances, we cannot classify the claimant's activities as misconduct in connection with his work.

While it appears that the claimant resigned from his employment, the evidence shows that the employer was the moving party in requesting the resignation if the claimant did not abandon his desire to start his own company and cease discussing the matter with other employees. Hence, we hold that the claimant did not voluntarily resign but was in effect discharged by the employer (Benefit Decision No. 5193).

Because the claimant was discharged for other than misconduct, he was not disqualified under code section 1256.

DECISION

The decision of the referee is reversed. Benefits are payable if the claimant is otherwise eligible. Benefits paid to the claimant which are based upon wages earned from the employer prior to August 23, 1955 are chargeable under section 1032 of the code to Employer Account No. 077-4012.

Sacramento, California, January 13, 1976

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

CARL A. BRITSCHGI

HARRY K. GRAFE

RICHARD H. MARRIOTT

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

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

ABRAHAM THAW
(Claimant)

LOS ANGELES HILTON HOTEL
(Employer)

Office of Appeals No. NH-5642

PRECEDENT
BENEFIT DECISION
No. P-B-362
Case No. 77-613

The employer appealed from the decision of the Administrative Law Judge which held the claimant not subject to disqualification for unemployment benefits under the provisions of section 1256 of the Unemployment Insurance Code and the employer's reserve account not relieved of benefit charges under section 1032 of the code, on the ground that the claimant was discharged for reasons other than misconduct connected with his most recent work.

STATEMENT OF FACTS

The claimant was last employed for approximately seven years for the above-identified employer as a maintenance engineer. The duties of this job brought the claimant into contact with clients of the employer in that he would be called upon to set up sound equipment, repair electrical equipment in clients' rooms, and other like maintenance work. When he was employed, he received a handbook for employees which contained a dress code. As testified to by a witness for the employer, the dress code provided:

> " . . . that a person should look well-kept [sic] and was [sic] neatly groomed hair and to be fresh and professional looking on the job."

During September 1974, the claimant grew a beard and permitted his hair to grow slightly over his shirt collar. Nothing was said to the claimant by his supervisor, or managerial or administrative officials employed by the employer, in regard to his beard. Occasionally, his supervisor would,

in a "joking" manner, indicate to the claimant that he should get his hair cut. The claimant did get his hair cut when directed to do so by his supervisor.

On August 11, 1976, the claimant received a memorandum from the Assistant Chief Engineer which informed him that:

> ". . . Management has received many complaints as to your appearance and the time has arrived for action. . . .
>
> "As of August 23, 1976, the hair should not be longer than shirt collar length and the beard eliminated. Failure to comply will result in days off or complete dismissal."

On August 23, 1976, the employer's personnel unit issued a memorandum identified as "GROOMING, L. A. HILTON DRESS CODE." This dress code provided, among other things, that male employees would conform to the following:

> "1) NO BEARDS
>
> "2) A CONSERVATIVE MUSTACHE IS PERMITTED, NO HANDLE BARS
>
> "3) HAIR MAY NOT BE LONGER THAN THE COLLAR OF SHIRT"

On September 1, 1976, the claimant was called in to the employer's personnel office, and accompanying him was his supervisor as well as the manager of the hotel. The claimant during this meeting was given the alternative of shaving off his beard or being discharged. The claimant refused to shave off his beard, and as a result his employment was terminated by the employer.

At the hearing, the employer's witness testified that management had, in fact, received complaints and management presumed the complaints were regarding the claimant because apparently the guests identified the person that they were complaining about as the claimant. There was no specific evidence as to what the complaints entailed and it is altogether possible that the only relationship the claimant's beard had to the complaints was as a method of identification and not as a complaint in regard to the beard per se.

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides for the disqualification of a claimant and sections 1030 and 1032 of the code provide that an employer's reserve account may be relieved of benefit charges if it is found that the claimant was discharged for misconduct connected with his most recent work.

This claimant was discharged by this employer because he refused to shave off his beard. Thus, it is necessary to decide if the claimant's refusal constituted misconduct within the meaning of the code.

In Maywood Glass Company v. Stewart (1959), 170 Cal. App. 2d 719, 339 P.2d 947, the court defined misconduct as:

> ". . . conduct evincing such willful or wanton disregard of the employer's interests as is found in deliberate violationsor disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability . . . (but not) mere inefficiency, unsatisfactory conduct . . . inadvertencies or ordinary negligence . . . ."

This Board and the courts of California have from time to time been called upon to decide the entitlement to unemployment benefits of claimants whose unemployment resulted from their refusal to meet the grooming standards established by the employer.

In January 1970 Appeals Board Decision No. P-B-66 was issued. In that case the claimant had been employed as a service station attendant in an Oakland service station. His duties included not only selling gasoline to the employer's customers but also promoting the sale of tires, batteries, and other automobile accessories distributed by the employer. At the outset of his employment the claimant was provided with an employer's handbook which contained the following paragraph:

> "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."

Also at the time of hire the claimant signed an agreement setting forth conditions of his attendance at the employer's training school. This agreement stipulated that trainees should be clean-shaven without mustache or long sideburns.

During the period of the claimant's employment he permitted his sideburns to grow below his ear lobes. Additionally, the claimant let his hair grow over his collar. When he refused to trim his sideburns or cut his hair in accordance with the employer's grooming standards he was discharged.

Evidence presented by the employer established that many customers had complained to the employer of service station attendants who had long hair and long sideburns. The employer concluded from these complaints that many of its potential customers refused to do business with the employer's service stations because of the grooming of some of the attendants. There the Board established the following test to be applied in "hair" cases: (1) Is there in the record evidence that the wearing of long hair by the service station attendants would impair the legitimate objectives of the employer? (2) Would the employer's interest in enforcing its rule outweigh the resulting impairment of the claimant's constitutional rights? and (3) What alternatives were available to the employer short of discharging the claimant? In applying the test, the Board decided that because of the claimant's refusal to meet the grooming standards of the employer, he was discharged for misconduct connected with his work.

In October of 1970 this Board issued Appeals Board Decision No. P-B-87. That case concerned employees of a winery. While these employees did not come into direct contact with the employer's customers the employer did, for public relations reasons, conduct tours through the winery and on these tours the claimants were visible to the individuals taking part in the tours. The claimants concerned permitted their hair to grow below their shoulders. As a result the employer received several complaints from the individuals who took part in the various tours through the winery.

When the claimants refused to cut their hair they were discharged. The Board again concluded that the claimants were discharged for misconduct connected with their most recent work.

Subsequent to the promulgation of these two decisions the California courts considered a series of cases dealing with the effect of personal grooming on the rights of claimants to unemployment insurance benefits.

In 1971 the Court of Appeal in Spangler v. California Unemployment Insurance Appeals Board (14 CA 3d 284, 92 Cal. Rptr 266) held that absent a showing ". . . that there was employment to be had . . . but for the voluntary failure of the petitioner to 'spruce up' " a denial of benefits could not be sustained on this fact alone. In Chambers v. California Unemployment Insurance Appeals Board (1973), 33 CA 3d 923, 109 Cal. Rptr 413, the court affirmed Spangler in a similar factual context.

In situations more directly applicable to the case at hand, the California courts have considered instances of claimants who were discharged by their employers because they would not shave off their beards or cut their hair. In King v. California Unemployment Insurance Appeals Board (1972), 25 CA 3d 199, 101 Cal. Rptr 660, the claimant was employed as a business machine repairman dealing directly with the employer's customers. After two weeks of approved vacation, the claimant returned to work with a beard. He was told that he should shave off his beard or he would be discharged. The claimant refused to shave off his beard and his employment was terminated. When he filed for unemployment insurance compensation, he was disqualified from the receipt of benefits. The court in King concluded that the wearing of a beard is a constitutionally protected right of an individual. The court also stated:

> "Our decision goes no further than to acknowledge that the state is constitutionally inhibited from denying unemployment compensation benefits to an applicant who has been discharged from employment because of personal action which is constitutionally protected; we neither hold nor suggest that a bearded person has a constitutional right to a job, and we do not reach or affect a private employer's right to manage its own business. It may also be acknowledged that payment of unemployment compensation benefits to this claimant (if such result ultimately materializes) could penalize the employer herein to the extent, if any, that its 'reserve account' with the department is affected. . . . Such event, however, may be

regarded as part of the price which the employer must pay for participating in an unemployment compensation system which is administered by the state and is, therefore, subject to the state's constitutional obligations; it does not mean that the employer is not free to hire and fire as it pleases."

In McCrea v. California Unemployment Insurance Appeals Board (1973), 30 CA 3d 89, 106 Cal. Rptr 159, the court considered our findings in P-B-87 cited above. The court found that the claimant was given the alternative of cutting his hair or wearing a hair net, and when the claimant refused to do either he was discharged. There, the court held that the claimant was not entitled to constitutional protection because he had been offered reasonable alternatives and refused to accept them. Consequently, he was disqualified from the receipt of unemployment insurance benefits.

A third case considered by the courts was Thornton v. Department of Human Resources Development (1973), 32 CA 3d 180, 107 Cal. Rptr 892. In that instance the claimant had worn a beard during his period of employment and was told he would be discharged unless he shaved off his beard. He requested that he be allowed to work his regular shift and defer a decision about his beard until the next day. This request was refused and the claimant was discharged. The court analyzed McCrea and King in reaching its decision. In citing King the court said:

". . . that the wearing of a beard is symbolic conduct entitled to the constitutional protection of the First Amendment. The court pointed to the fact that the United States Supreme Court has not directly decided this issue but '[t]he decisional law of California, however, is explicit on the point: "A beard, for a man, is an expression of his personality. On the one hand it has been interpreted as a symbol of masculinity, of authority and of wisdom. On the other hand it has been interpreted as a symbol of nonconformity and rebellion. But symbols, under appropriate circumstances, merit constitutional protection..." (Finot v. Pasadena City Bd. of Education (1967) 250 Cal. App. 2d 189, 201 [58 Cal. Rptr. 520].) Finot involved the constitutional rights of a bearded public employee (a high school teacher), as distinguished from one employed in the private sector, but we perceive no essential distinction. . . .' "

The Thornton opinion then went on to observe:

> "Both McCrea and King are in reality applying the test articulated by the Supreme Court in Bagley v. Washington Township Hospital Dist., 65 Cal. 2d 499 [55 Cal. Rptr. 401, 421 P. 2d 409] , to determine if the government as employer could restrict First Amendment rights. The court in Bagley stated that the governmental agency, before it can restrict First Amendment rights, must demonstrate: '(1) that the political restraints rationally relate to the enhancement of the public service, (2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available.' (See pp. 501-502) This test was applied in Finot v. Pasadena City Bd. of Education, 250 Cal. App. 2d 189, 199 [58 Cal. Rptr 520], where the reviewing court, after holding a school teacher possessed a constitutional right to wear a beard, turned to a consideration of the degree of protection to which this right was protected.
>
> "Translated to the area of private employment, the Bagley test requires evidence (1) that the restraint upon the protected right rationally relates to the enhancement of the employer's business, (2) that the benefit to the employer outweighs the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available. A finding that the Bagley test was not met would not necessarily mean that the private employer could not fire the employee but would mean that the Unemployment Insurance Appeals Board would have to find that the employee was discharged because of personal action which is constitutionally protected."

Turning our attention now to the situation in the instant matter, we find that at the time this claimant was employed by the employer there were no specific rules relative to grooming. The claimant had been wearing a neatly trimmed beard for at least two years. Shortly before his employment terminated the employer established specific rules in regard to personal grooming of its employees. The claimant was ordered to shave off his beard or be discharged. While it is true that clients of the employer made some complaints about the claimant, it is not at all clear as to whether these complaints were related to the claimant's beard or whether the beard was merely used as a mark of identification. There was no indication that any of the employer's clients withdrew their business from employer's establishment

because of the manner in which the claimant was groomed. Nor was there any indication that the employer offered the claimant any alternative other than employment termination.

As pointed out by the court in the Thornton opinion cited above, the Bagley test as it applies to private employment requires evidence establishing the following factors:

(1) That the restraints upon the protective rights rationally related to the enhancement of the employer's business;

(2) That the benefits to the employer outweigh the resulting impairment of constitutional rights;

(3) That no alternatives less subversive of constitutional rights are available.

Thus, while we find no substantial differentiation in the test established by the Board's decision in P-B-66 from that in Bagley, it is clear that the Board is required to adhere to the standard established in Bagley for future application of the test to be applied in grooming cases.

We turn our attention then to evaluating whether the employer in the instant case met the requirements set down in Bagley. Our review of the evidence constrains us to conclude that the restraints placed upon the claimant with reference to shaving off his beard were not rationally related to the enhancement of the employer's business as there is no indication that the claimant's wearing of his neatly trimmed facial hair affected the employer's commerce. Also, the benefits to the employer did not outweigh the resulting impairment of the claimant's constitutional rights, as it is apparent in this factual matrix that the employer's sudden reversal of its long-standing rule allowing facial hair was not reasonable. It is equally evident that there were alternatives less subversive of the constitutional rights that were available to the employer, in that it could have easily moderated the severity of its edict completely disallowing beards by requiring a neatness that conformed with its other more rational grooming rules that tolerated mustaches and relatively long hair. Consequently, we must conclude that by requiring the claimant to adhere to the newly established arbitrary rule relating to beards the employer was infringing on the constitutionally protected rights of the claimant. In this posture it is evident that the claimant was discharged for reasons other than misconduct connected with his work.

We believe that an employer may conduct his business as he sees fit and may dispense with an employee's services whenever, in the opinion of the employer and in the absence of contractual restraints, it becomes necessary to do so. However, when an employee is terminated and files a claim for unemployment compensation it is necessary to decide whether the reasons for termination are disqualifying. Here, we are obligated to conclude that the action of the claimant in refusing to forego his constitutional rights in this factual matrix does not constitute misconduct within the meaning of the code.

DECISION

The decision of the Administrative Law Judge is affirmed. The claimant is not subject to disqualification under section 1256 of the code. The employer's reserve account is subject to charges under section 1032 of the code.

Sacramento, California, July 5, 1977.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

RICHARD H. MARRIOTT

DISSENTING - Written Opinion Attached

CARL A. BRITSCHGI

CONCURRING and DISSENTING - Written Opinion Attached

HARRY K. GRAFE

CONCURRING AND DISSENTING OPINION

I concur in the result reached by my colleagues, that the claimant herein is not disqualified by reason of §1256 of the code. But I reach that conclusion for the reasons stated by the Administrative Law Judge in his decision, wherein he relied largely on King v. California Unemployment Insurance Appeals Board (1972), 25 Cal App 3d 199, and the rationale for which it stands.

I must dissent, however, from the imposition by my colleagues of the so-called "Bagley Test" on private employers. By the imposition of such test, the majority herein misinterpret the rule of the California Supreme Court set forth in Bagley v. Washington Township Hospital District (1966), 65 Cal 2d 499, and elongate the reach of the First Amendment to the United States Constitution beyond its plain and unambiguous language.

It is rudimentary that the First Amendment protection of freedom of expression is a restriction against government interference. The First Amendment is written in terms that "The Congress shall not . . ."; whereas the majority here recast that venerable expression of basic rights to read, "No private employer shall . . . ." That this Board's limited jurisdiction does not extend to rewriting the United States Constitution is a principle that needs no amplification. The application of First Amendment protection in cases such as that now before us was clearly and correctly set forth by the opinion of Mr. Justice Rattigan in King v. California Unemployment Insurance Appeals Board (supra). That rule was properly applied the Administrative Law Judge in the present case. The Administrative Law Judge reached the correct result without resort to the test adopted by the majority herein. In fact, the propriety with which Administrative Law Judges have decided the so-called "beard" cases since King impels me to question the need for a new precedent decision by this Board on said subject. But if this Board cannot resist the compulsion to place its members' names to a precedent decision on said subject, it need do no more than set forth the Court of Appeal opinion in King.

In speaking for the court in King, Mr. Justice Rattigan was careful at the outset to draw the distinction (missed by the majority, here) that the assertion of constitutional protection to beard wearers was not directed toward the discharge by the employer, but was aimed at the government's action in withholding unemployment insurance benefits:

"We first note that claimant is not challenging the reasonableness or validity of his discharge by the employer; he is advancing his constitutional argument only as to the state's action in denying him unemployment compensation benefits. A similar contention was made in Sherbert v. Verner (1962) 374 U.S. 398, where the claimant of unemployment compensation benefits, a member of the Seventh-Day Adventist Church, had been discharged by her employer because she would not work on her faith's Sabbath Day. (Id., at p. 399) Having been unable to obtain other employment for the same reason, she filed a claim for unemployment compensation benefits pursuant to the relevant law of her state (South Carolina). (Id., at pp. 399-400. The claim was denied, both administratively and judicially, under a provision of state law disqualifying insured workers who failed, 'without good cause . . . to accept . . . suitable work when offered . . .' (Id., at pp. 400-401)

"Reversing the South Carolina court, the United States Supreme Court held that the disqualifying provision of state law was constitutionally defective, as it pertained to the claimant, because it operated to infringe upon her First Amendment right to free exercise of religion (Sherbert v. Verner, supra, 374 U.S. 398 at pp. 402-405) and that no 'compelling state interest' had been shown which would justify such infringement." (Id., at pp. 406-410) (25 Cal App 3d at 204; emphasis added.)

The court then noted that, whereas Sherbert v. Verner had involved freedom of religion, which is expressly protected by the First Amendment, the pivotal question in King was whether the wearing of a beard merits similar protection under the aegis of the First Amendment's protection of freedom of speech and expression. After examining conflicting views in other jurisdictions, the court pointed out:

"The decisional law of California, however, is explicit on the point: 'A beard, for a man, is an expression of his personality. On the one hand it has been interpreted as a symbol of masculinity, of authority and of wisdom. On the other hand it has been interpreted as a symbol of non-conformity and rebellion. But symbols, under appropriate circumstances, merit constitutional protection. [Citation] (Finot v. Pasadena City Bd. of Education (1967) 250 Cal. App. 2d 189, 201.

> Finot involved the constitutional rights of a bearded public employee (a high school teacher), as distinguished from one employed in the private sector, but we perceive no essential distinction." (25 Cal. App. 3d at 205)

The last sentence of that quotation needs examination, as it appears that the majority in the case now before us (and another division of the Court of Appeal in Thornton v. Department of Human Resources Development (1973), 32 Cal App 3d 180) have taken that language out of the context used by the King court. I submit that a reading of the court's opinion in King reveals that the lack of essential distinction whether the beard-wearer is a public employee or private employee refers to the protection against infringement of his constitutional right by state action in denying him unemployment insurance benefits, as is seen from the quotation, supra, from page 204 of the court's opinion. But the language on page 205 in King does not mean that the "Bagley Test" applies to private employers, as the majority herein erroneously assert.

The court in King next proceeded to establish what, I believe, is the proper test to be applied in a case such as the matter now before us:

> "As Sherbert and Finot control this case for the reasons just stated, the terminal question is whether 'compelling state interest' has been shown which 'justifies the substantial infringement of . . . [claimant's] . . . First Amendment right.' (Sherbert v. Verner, supra, 374 U.S. 398 at p. 406.) The test of such showing involves considering (1) whether the state and the administration of its unemployment compensation law would be adversely affected if benefits were to be granted and (2), if that possibility exists, whether the state has demonstrated that no conceivable alternatives would preclude the adverse results without 'infringing First Amendment rights.' (Id., at pp. 407-408; Finot v. Pasadena City Bd. of Education, supra, 250 Cal. App. 2d 189 at pp. 199-200.)" (25 Cal. App. 3d at 206)

It is important to observe that the King court retained the proper constitutional perspective of directing its focus to the action by the state in denying benefits to the beard-wearing claimant, and not in attempting to extend the First Amendment to private employers. The court made this distinction doubly clear by stating:

> "Our decision goes no further than to acknowledge that the state is constitutionally inhibited from denying unemployment compensation benefits to an applicant who has been discharged from employment because of personal action which is constitutionally protected; we neither hold nor suggest that a bearded person has a constitutional right to a job, and we do not reach or affect a private employer's right to manage its own business. It may also be acknowledged that payment of unemployment compensation benefits to this claimant (if such result ultimately materializes) could penalize the employer herein to the extent, if any, that its 'reserve account' with the department is affected. (See, e.g., § 1026 et seq.) (footnote omitted) Such event, however, may be regarded as part of the price which the employer must pay for participating in an unemployment compensation system which is administered by the state and is, therefore, subject to the state's constitutional obligations; it does not mean that the employer is not free to hire and fire as it pleases. (25 Cal App 3d at 206-207)

The King decision itself is abundantly persuasive authority that the proposition offered by the majority herein is erroneous. Moreover, a careful reading of the decision in Bagley v. Washington Township Hospital District (supra) discloses that said case is incontestible authority that the test formulated therein is to be limited to government employees and not extended to the private sector, as the majority herein assert.

First, it is a well established principle of law that government employment may be conditioned and government employees may be regulated by measures not applicable to the labor force in the private sector. Thus, restrictions on political activity (the federal Hatch Act), time off for religious worship (Mandel v. Hodges (1976) , 54 Cal App 3d 596), and other activities unfettered in private employment, are circumscribed or prohibited entirely as to those who choose government employment (see e.g. Van Alstyne, The Constitutional Rights of Public Employees (1969), 16 UCLA Law Review 751; Linde, Constitutional Rights in the Public Sector (1965), 40 Washington Law Review 10; Powell, The Right to Work for the State (1916), 16 Columbia Law Review 99).

A decade ago, the California Supreme Court wrestled with the issue of restraints imposed on political activities of public employees who were not subject to the federal Hatch Act. In 1964, the court decided in Fort v. Civil Service Commission (61 Cal 2d 331) that only "compelling" public interest could justify restraints in such cases and that the restrictions must not be "broader than are required to preserve the efficiency and integrity of the public service." Two years later in Bagley, the court was called upon to adjudicate a challenge of the hospital district's policy encompassed in its directive, "Political Activities of Public Employees" (emphasis added). The directive was prepared under authority contained in Government Code § 3205, which itself set forth limitations on political activities of civil service employees of local government.

From beginning to end and at all points in between, the court made it abundantly clear that Bagley was a case relating to the rights of government employees. Nowhere in the court's decision is it even remotely hinted that the case relates to the private sector. For example, at pages 503-504, the court in Bagley notes: "Although an individual can claim no constitutional right to obtain public employment or to receive any other publicly conferred benefit, the government cannot condition admission to such employment or receipt of such benefits upon any terms that it may choose to impose." Again, at pages 507-508 the court stated:

> "The public employee surely enjoys the status of a person protected by constitutional right. Public employment does not deprive him of constitutional protection. In the absence of an imperative necessity to protect the public from irresponsible activity of so serious a nature that it would disrupt the public welfare, such protections are not subject to destruction by a public employer's insistence that they be waived by contract.
>
> "We recognized and applied these principles in our recent decision in Fort v. Civil Service Com., supra, 61 Cal 2d 331, holding that only 'compelling' public interests can justify a governmental entity in demanding a waiver of constitutional rights as a condition of public employment. 'Although . . . one employed in public service does not have a constitutional right to such employment [citation] it is settled that a person cannot properly be barred or removed from public employment arbitrarily or in disregard of his constitutional rights.' (61 Cal. 2d 331, 334.) (footnote omitted) We further noted in Fort, 'The principles set forth in the recent decisions do not admit of wholesale restrictions on political activities merely because the persons affected are public employees,

particularly when it is considered that there are millions of such persons. It must appear that restrictions imposed by a governmental entity are not broader than are required to preserve the efficiency and integrity of its public service.' (61 Cal. 2d at pp. 337-338 (italics added); see also Kinnear v. City & County of San Francisco (1964) 61 Cal. 2d 341, 343)"

In Fort the court had ruled that the state may constitutionally restrict the freedom of a public employee to run for office against or campaign against his own superior (which, I submit, is light years apart from any restrictions applicable to private employment). In Bagley the court found that the hospital district's directive prohibited far more activity than had been held permissible by Fort.

"The overbreadth of the statute lies in the wide swath of its prohibition of employee participation in a number and variety of elections. Subject to an exception for persons 'exempt' from civil service, the statute provides that no employee of a 'local agency 'may participate in 'any campaign for or against any candidate, except himself, for an office of such local agency.' Since Government Code section 3201 defines 'local agency' as 'a county, city, city and county, political subdivision, district or municipal corporation,' the ban of section 3205 would, for example, prevent an employee of a city from participating in the campaign of any officer of his city, and perhaps even his county, however remote might be the working relationship between such employee and such officer. So broad a rule cannot find justification in our dictum that a public employee may constitutionally be prevented from opposing the reelection of 'his own superior.' " (65 Cal 2d at 509)

Finally, the Bagley court was required to consider the question whether the plaintiff's status was that of a government employee falling within the proscription of Government Code § 3205 and the district directive.

"We turn, finally, to the suggestion that the statute does not apply to a public employee, such as plaintiff, who does not enjoy the benefit of a civil service or merit system. The statutory ban here expressly extends only to public employees who are 'not exempt from the operation of a civil service personnel or merit system.' Accordingly, the argument runs,

the employees of a government agency which, like the present defendant, has instituted no civil service or merit system for its employees are thereby rendered 'exempt from' the operation of such a system within the meaning of the statute.

"If there were no other guide to the meaning of this phrase, we might well conclude that the statutory ban applies only to persons who enjoy the protection of a civil service or merit system and that the Legislature intended to preserve intact the political freedom of all other public employees as a surrogate for the job security which they lack. We note, however, that article XXIV, section 4, of our Constitution sets forth an extensive list of 'Offices and Employments Exempt From Civil Service.' For the most part, these positions are elective or high appointive offices whose holders could not reasonably be expected to refrain from political activities without profoundly affecting the workings of our representative institutions. Since the Constitution has made explicit by definition the officers who are 'exempt from civil service,' we cannot at will vastly expand that category.

"The purpose of the Legislature in confining the ban of Government Code section 3205 to persons 'not exempt from' a civil service or merit system was to exclude only persons affirmatively exempted from the operation of such a system by its own terms or by the terms of statutory or constitutional law. Thus the failure of the defendant district to institute a civil service or merit system for its employees does not excuse them from compliance with Government Code section 3205, if that provision were otherwise valid." (65 Cal 2d at 510)

I laboriously cite to the reader the foregoing large portions of the court's opinion in Bagley to emphasize the context in which the court set forth its test. When viewed in that context, as the court intended that it must be, the conclusion appears inescapable that the test was designed only for the determination whether governmental action toward public employees in the matter of political restraints comports with the court's conception of constitutional rights. In fact, the test itself so states:

" . . . we hold that a governmental agency which would require a waiver of constitutional rights as a condition of public employment must demonstrate: (1) that the political restraints rationally relate to the enhancement of the public service,

(2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available." (65 Cal 2d at 501-502; emphasis added)

It is thus apparent beyond dispute that the majority in the case presently before us have chosen, with a total absence of authority to support their action, to impose upon the private sector of this state a test having no rational relation to any activity by that sector (or its employees), and to create a constitutional prohibition against the private sector which was never envisioned by those fine minds who drafted our fundamental law. With such excessive reach of power I cannot agree.

HARRY K. GRAFE

DISSENTING OPINION

I dissent.

I not only disagree with the conclusions reached in the proceedings below, I also cannot concur in the sweeping language used by the majority members of this Board in expressing the rationale set forth. It would appear that the creation of another layer of confusion is not necessary relative to this subject matter.

Reasonable grooming requirements to enhance the public image of an employer who is committed to the good will of the public have long been recognized, and I believe that the establishment of such reasonable rules is properly a prerogative of management which should not be fettered or otherwise restricted by this Board.

In McCrae v. California Unemployment Insurance Appeals Board (1973) 30 Cal. App. 3d 89, 106 Cal. Rptr. 159, the court itself recognized that an employer need not necessarily rely upon tangible proof of detriment after the fact. Any indication of ill will is sufficient to constitute detriment. In Thornton, cited not only in the majority opinion but in Mr. Grafe's dissenting opinion, this language of McCrae was recognized. It was also pointed out that an employer may very well establish reasonable rules for the conduct of his business and if such rules reasonably relate to the proper conduct of such business, an employee may be expected to comply.

Considerable emphasis has been placed upon Bagley v. Washington Township Hospital District (1966), 65 Cal. 2d 499, 55 Cal. Rptr. 401. It must be noted that the extreme limitations placed upon an employer as against an employee relate to a governmental entity. A comparable conclusion was reached in Finot v. Pasadena City Board of Education (1967), 250 Cal. App. 2d 189, 58 Cal. Rptr. 520, a case involving a high school teacher, also a public employee.

The Thornton case recognized from the discussion set forth in King v. California Unemployment Insurance Appeals Board, 25 Cal. App. 3d 199, 101 Cal. Rptr. 660 and McCrae v. California Unemployment Insurance Appeals Board (1973), 30 Cal. App. 3d 89, 106 Cal. Rptr. 159 that the tests established in the Bagley case would logically extend to employment in the private sector. It was also pointed out, however, that a private employer could avoid the imposition of charges if the test set forth in Bagley were met; specifically, that the restraint upon the protected right would rationally relate to the enhancement of the employer's business; that the benefit to the employer would outweigh the impairment of an employee's constitutional rights and that no other alternatives less subversive of such constitutional rights were available.

I am aware of the discussions of the courts in those decisions relating to discharges for violation of an employer's grooming requirements. I am also aware, however, that the constitutionally protected rights of appearance were similarly discussed in Spangler v. California Unemployment Insurance Appeals Board (1971), 14 Cal. App. 3d 284, 92 Cal. Rptr. 266 and in Chambers v. California Unemployment Insurance Appeals Board (1973), 33 Cal. App. 3d 923; 109 Cal. Rptr. 413. In Spangler the court stated as follows:

> "No one disputes the appellant's [Spangler's] right in the context of this controversy to dress and groom himself as he pleases. No constitutional issue is involved here. Public employment is not involved. But appellant has no constitutional right to unemployment compensation paid by former employers if his sartorial eccentricities or sloppy grooming chill his employment prospects, and he voluntarily refuses reasonable accommodation to meet the demands of the labor market. This principle has been considered authoritatively before." (citations omitted)

In Chambers, supra, the following language may be found:

> "The right of one to wear his hair and beard as he chooses is a 'liberty' protected by due process clauses 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.' (citations omitted)

"And, as contended by Chambers, only a ' "compelling state interest" ' will justify a substantial infringement of such a constitutional right." (citations omitted)

It had been urged that the state had no legitimate or compelling interest in requiring an applicant for unemployment benefits keep himself available for work where it would inhibit his First Amendment rights to appear as he chose. The court went on to state:

"We observe no substantial distinction between an unemployed person who for one reason or another voluntarily renders himself unavailable for work, and another who refuses work when it is offered. In each case the unemployed person has a clear constitutional right to do, or not to do, as he has chosen. But few would argue that the exercise of one's right not to work, somehow creates a constitutional right to unemployment relief.

"Essential to the integrity of California's unemployment relief program is the requirement that unemployed persons, when possible, render themselves available for work, for otherwise benefits would be paid to those who could be working, but choose not to, thus defeating the fundamental purpose of the statute.

"We are therefore impelled to, and do, hold that California has a 'compelling state interest' in requiring that one seeking unemployment relief shall keep himself available for employment. It follows that such 'peripheral' First Amendment or other right as Chambers may have to retain his selected hair styling must in the public interest, if he wishes unemployment benefits, yield to the dictate of Unemployment Insurance Code section 1253, subdivision (c).

"We are assisted to this conclusion by language of United States v. O'Brien, 391 U.S. 367, 376, 88 S. Ct. 1673, 1678, 20 L. Ed. 2d 672, as follows: 'We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever a person engaging in the conduct intends thereby to express an idea'; and by the case of Spangler v. Unemp. Ins. App. Bd., supra, 14 Cal. App. 3d 284, 287, 92 Cal. Rptr. 266, 267, where in a problem closely analogous to ours, the court said:

" 'No one disputes the appellant's right in the context of this controversy to dress and groom himself as he pleases. No constitutional issue is involved here. Public employment is not involved. But appellant has no constitutional right to unemployment compensation paid by former employers if his sartorial eccentricities or sloppy grooming chill his employment prospects, and he voluntarily refuses reasonable accommodation to meet the demands of the labor market.' "

As I view the basic issue, it becomes a question of the survival of a business as compared with the alleged constitutional rights of an individual employee. The opinion set forth by the majority does not consider such alternatives. It does not equally balance the rights and obligations of the claimant and the employer. Consequently, I find it objectionable, and for such reason I cannot concur.

CARL A. BRITSCHGI

[2]state *transitive verb*

stat·ed stat·ing

Definition of STATE

1 : to set by regulation or authority

2 : to express the particulars of especially in words : REPORT; *broadly* : to express in words

— **stat·able** or **state·able** *adjective*

Examples of STATE

The lawyer will *state* the facts of the case.

He *stated* his name in full.

I was merely *stating* an opinion.

"This is a difficult situation," he *stated* simply.

Please *state* the purpose of your visit.

I'd like to *state* for the record that I disagree with the board's decision.

For the reasons *stated* above, I hereby withdraw from the competition.

The rules clearly *state* that you can only draw one card.

CERTIFICATE OF SERVICE

I am a citizen of the United States of America and am employed in the County of Sacramento, State of California. I am over the age of eighteen years old and not a party to the within action. My business address is 515 12th Street, Sacramento California 95814.

On December 26, 2012, I served the within Appellant's Motion For Judicial Notice In Support Of Opening Brief; Memorandum Of Points And Authorities In Support Thereof; Declaration Of Stephen E. Goldberg In Support Thereof; Proposed Order in *Paratransit, Inc. v. Unemployment Insurance Appeals Board* (*Craig Medeiros*), California Supreme Court Case Number S204221 [Third Appellate Dist. Ct. of Appeal Case No. C063863; Sacramento County Sup. Ct Case No. 34-2009-80000249-CU-WM-GDS] by placing a true copy enclosed in a sealed envelope, addressed as follows:

Laura C. McHugh and Alex K. Levine
Rediger McHugh & Owensby, LLP.
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By U.S. Mail at the addresses above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 26th day of December 2012, at Sacramento, California.

Stephen E. Goldberg