ELIGIBILITY AND DISQUALIFICATION FOR BENEFITS*

Forenote: Statutory Purpose and "Involuntary Unemployment"

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CONTROVERSY over the power of free choice attended the constitutional birth in this country of unemployment compensation. "Till now," said Mr. Justice Cardozo in the *Steward Machine Company* case, "the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems."[1] If we assume, the opinion continued, that a concept of undue influence could ever be applied between state and nation, the State of Alabama had nevertheless made a choice, induced perhaps by the tax credit device of the Social Security Act but not compelled, when she enacted an unemployment compensation law; her own courts, rejecting contentions of duress, had accepted it as a true expression of her will. "We think the choice must stand." [2]

The mounting controversy in unemployment today is not over the volitional processes of the states but over those of the worker in relation to his unemployment and, more acutely, in relation to his former employer. The Supreme Court cases were little concerned with the nature of the relationship, voluntary or involuntary, culpable or blameless, between either the worker or his employer and the worker's unemployment. *Unrelieved* unemployment was the problem, and a vast one, recognized as calling for the exercise of the powers of the federal government and of the states in its solution.[3]

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* The opinions expressed herein are those of the authors and are not intended to reflect the official views of the Federal Security Agency or of the Social Security Board.

Frequent reference is made in these articles to the UNEMPLOYMENT COMPENSATION INTERPRETATION SERVICE: BENEFIT SERIES, which is a publication of the Social Security Board containing precedent unemployment compensation decisions from the various states. The Series began with six issues in 1938 and since then has been issued monthly under an annual volume number. Decisions are cited by case number, state, deciding body, volume and issue number, *e.g.*, Ben. Ser. 8995-N.H. R(V7-12). "R" after a state abbreviation indicates a decision by the highest administrative appeal body; "A," a decision of a lower appeal tribunal.

Benefit Series General Supplement No. 1 (BENEFIT DECISIONS OF THE BRITISH UMPIRE; A CODIFICATION AND TEXT OF SELECTED DECISIONS, 1938) is cited in the form: Brit. Ump. 4569/26, Ben. Ser. (Gen. Supp. 1) BU-120.

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1. Steward Machine Co. v. Davis, 301 U. S. 548, 590 (1937). Since the federal act is not coercive, the state law is not the product of coercion. Carmichael v. Southern Coal & Coke Co., 301 U. S. 495 (1937).

2. Steward Machine Co. v. Davis, 301 U. S. 548, 590.

3. In the *Steward Machine* case the requirement of the Social Security Act that moneys withdrawn by the states from the Unemployment Trust Fund should be used only for benefits paid through *public employment offices* or other agencies approved by the Social

The Court had already sustained, by an equal division and without opinion, the decision of the New York Court of Appeals upholding the New York unemployment insurance statute.[4] That statute contained a policy statement pointing to "involuntary unemployment" as a matter of general concern, but the dissenting judges in the state court perceived that under the statute one who voluntarily leaves employment or is discharged for cause may still be entitled to benefits, and this was to them a sign of constitutional infirmity. The Supreme Court in the *Carmichael* case, however, in upholding the Alabama law, laid to rest any notion that unemployment could not validly be relieved if the worker had brought about his unemployment through his own act. The Court decided the *Carmichael* case without benefit of a legislative declaration of policy since the Alabama law, one of the first enacted, contained none.

Most states which chose in some haste to respond to the federal inducement enacted statutes approximating closely the provisions of the "draft bill" offered by the Social Security Board as a specific for conformity with requirements of the Social Security Act.[5] The draft bill came complete, with a declaration of the "public policy of this State" thrown in as a rampart against the constitutional attacks which were expected. Since it might be necessary to show that the payment of benefits to the unemployed, on other than a relief basis, was an expenditure for a public purpose, and that taxes imposed on employers were not to be used to support the wilfully out of work, the hazard against which the new system was directed was labeled "*involuntary unemployment.*" The legislature of one state after another, adopting draft bill language, was moved to declare also that "in its considered judgment the public good and the general welfare of the citizens of this state require the enactment of this measure under the police power of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

The value of these words and phrases in surmounting constitutional tests in the state courts is questionable, and the words "involuntary" and "no fault of their own" were omitted from later editions of the Board's draft bill. It was suggested to the states that, with the validity of state legislation established, a declaration of public policy might no longer be useful and that a statutory rule of construction designed to

Security Board was noted only as a reasonable means of assuring a responsible disbursing agent.

4. Chamberlin, Inc. v. Andrews, 271 N. Y. 1, 2 N. E. (2d) 22 (1936), *aff'd*, 299 U. S. 515 (1936). The dissent in the state court relied heavily also on Railroad Retirement Board v. Alton R.R., 295 U. S. 330 (1935).

5. Social Security Board, Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Type, issued Jan. 1936, revised Sept. 1936.

secure a liberal construction in keeping with the broad purposes of the legislation might be preferable.[6] Both of the deplored phrases remain imbedded, however, in the policy declarations of eighteen states, and "involuntary unemployment" appears in those of at least eight additional states.

It can be no cause for surprise that language supplied as ammunition for the constitutional battlefront has been availed of in minor frays fought to determine how these constitutionally valid laws shall be interpreted and applied. There can be little quarrel, particularly in view of the *Hearst*[7] and other recent cases, that terms employed in any statute must be construed in the light of its general purpose and its provisions as a whole. In the case of unemployment compensation laws the concept of the involuntary character of the unemployment which is to be compensated is pegged by the condition, found in all laws, that the worker to be eligible must be "available for work." The federal sanction behind such provisions is the requirement that public employment offices be utilized in the claims-payment process.[8] Taken together, these provisions mean that the worker must want employment, not unemployment, and must signify his desire at the point where its authenticity may be put to realistic test. How badly he must want it is another matter. Attitude is tested, in terms which allow for a balancing of both economic and social factors, by the disqualification provided for refusal of suitable work without good cause. No exclusively subjective test is prescribed in the statute, reasonably enough, since if work is not to be had, the mental attitude of the unemployed ceases to be important as a ground for withholding benefits which are designed to compensate for loss of wages.

The term "involuntary unemployment," however, has induced unrealistic controversy over the freedom of the will and tended to blur the outlines of specific disqualifications and eligibility conditions. Thus, a Pennsylvania court, emphasizing the statutory declaration of policy, holds that a worker who quit his job on the advice of his physician because his physical condition made it impossible for him to continue heavy outdoor work left work "on his own motion" and

6. SOCIAL SECURITY BOARD, PROPOSED STATE LEGISLATION FOR UNEMPLOYMENT COMPENSATION AND PUBLIC EMPLOYMENT OFFICES (Employment Security Memorandum No. 13, Nov. 1940) and MANUAL OF STATE EMPLOYMENT SECURITY LEGISLATION (Employment Security Memorandum No. 13, revised Nov. 1942).

7. NLRB v. Hearst Publications, Inc., 322 U. S. 111 (1944).

8. Section 303 of the Social Security Act, 49 STAT. 626 (1935), as amended by 53 STAT. 1379 (1939), 42 U. S. C. § 503(a)(2) (1940), makes it a condition of administrative grant that the State law be found by the Board to provide for "Payment of unemployment compensation solely through public employment offices or such other agencies as the Board may approve." Similar provision in the state law is made a condition of approval of the state law for purposes of tax credit under Section 1603(a)(1) of the Internal Revenue Code.

therefore voluntarily.[9] In South Carolina, in the *Mills* case, a mother who can no longer work on the third shift because she can find no one to care for her young children at that time, although ready to accept work on the first or second shift, is held unavailable for work;[10] the court thinks it "obvious" that the term "involuntary unemployment," as used in the act, has reference to unemployment resulting from a failure of industry to provide stable work. The voluntary character which the court ascribes to the mother's unemployment is given its color, not from the worker's desire for work which she can accept with a decent regard for her primary responsibilities, but from her employer's need of workers on a night-shift at a time of peak production.

In both these examples, what the worker, under the pressure of personal circumstances, brought upon himself of his own will or motion was at most unemployment in terms of a particular job. Both remained in the labor market and were not willingly idle or wageless. The courts in both cases, however, though the statutory language differs, see the act as one designed to provide against the event of

9. Labor & Industry Dep't v. Unemployment Comp. Bd. of Rev. (*In re* Bush), 133 Pa. Super. 518, 3 A. (2d) 211 (1938). In the companion *Priest* case (same citation), the court held that an employee who got notice that he was to be laid off in a week and who quit to look for work elsewhere did not voluntarily leave his work. The court thus makes it clear that it is not governed by whether the circumstances compelled the worker to quit but by whether or not it was the result of dismissal or lay-off by the employer. The court apparently thought it was furnishing an objective test for determining volition and in fact admonished the Board of Review that it was not within its province to explore the mental processes which led Bush to give up his employment. The Board of Review had said: "To be voluntary, his act of leaving his work must have been free from compulsion, and free from the influence of any extraneous, disturbing cause. A voluntary act is the antithesis of an act done under compulsion, coercion, constraint, or objective necessity. . . . There is no more compelling motive for human action than the preservation of physical well-being. The conditions compelling the claimant to leave his work were not solely subjective." Ben. Ser. 814-Pa. R (V2-1).

The Pennsylvania statute was amended in 1942 to modify the disqualification for voluntarily leaving work by adding the words "without good cause." In Teicher Unemployment Comp. Case, 154 Pa. Super. 250, 253, 35 A. (2d) 739, 741 (1944), the opinion says of this change that "It is more than likely that the Amendment, following closely upon our decision in the *Bush* case [Labor & Industry Dep't v. Unemployment Comp. Bd. of Rev., 133 Pa. Super. 518, 3 A. (2d) 211 (1938)], indicates an intention on the part of the lawmakers to broaden the act so as to cover cases in which voluntary unemployment is caused by illness."

10. Mills v. Unemployment Comp. Comm., 204 S. C. 37, 28 S. E. (2d) 535 (1944). The court cites Brown-Brockmeyer Co. v. Board of Rev., 70 Ohio App. 370, 45 N. E. (2d) 152, 155 (1942), as holding that an employee quit her job because she was required to work in a draught and was subject to constant colds, was not able to work and available for work. However, the Ohio statute requires that a worker, to be eligible, must be "able to work and available for work in his usual trade or occupation, or in any other trade or occupation for which he is reasonably fitted." 1 OHIO GEN. CODE ANN. (Page, Supp. 1944) § 1345-6(a)(4). In the *Mills* case experience rating was a recognized factor in the court's conclusion as to legislative policy.

"discharge, dismissal or lay-off by the employer or other action by the employer severing relations with his employes."[11] Similarly, courts which have stressed the statutory purpose of protection against involuntary unemployment have appeared unable to separate the issue of the worker's present availability or unavailability for work from that of the voluntary or involuntary nature of his separation from a former employer, even though such employer is remote in time or space.[12]

Although the words "involuntary unemployment" in the policy declaration have lent themselves to this disposition to test eligibility in terms of the worker's relation to a past employer or employers, they are hardly the cause of it. The same tendency is occasionally reflected in opinions favorable to a worker and under statutes containing no policy declaration. In the *Pesnell* and *Drummond* cases,[13] the Alabama Court of Appeals was confronted with benefit claims from workers affected by the closing down of coal mines after the expiration, without agreement on new terms, of the operators' contract with the CIO union. The Alabama law disqualified any individual for any week in which his unemployment is "directly due to a labor dispute" still in active progress in the establishment where last employed. In the first case, as the court saw the facts, the CIO claimant brought about his own situation through his duly selected bargaining agents and was unemployed because of a labor dispute. In the *Drummond* case the claimant was a member of a union *not* involved in the negotiations; he was found to be eligible for benefits on the ground that his unemployment was due only indirectly to the labor dispute. Differences in factual situations which might have supported a distinction in result under the disqualification clause itself were ignored and the line drawn between workers on the basis of participation or non-participation in the dispute. The court attributed to the statute "the evident and well recognized purpose" of insuring the diligent worker against "enforced unemployment"; it seemed to it inescapable that the legislature never intended the worker should be denied benefits because of a labor dispute in which he was in no way involved.[14]

11. Labor & Industry Dep't v. Unemployment Comp. Bd. of Rev. (*In re* Bush), 133 Pa. Super. 518, 521, 3 A. (2d) 211, 213 (1938).

12. W. T. Grant Co. v. Board of Rev., 129 N. J. L. 402, 29 A. (2d) 853 (1943); *Ex parte* Alabama Textile Products Corp., 242 Ala. 609, 7 So. (2d) 303 (1942).

13. Department of Industrial Relations v. Pesnell, 29 Ala. App. 528, 199 So. 720 (1940); Department of Industrial Relations v. Drummond, 30 Ala. App. 78, 1 So. (2d) 395 (1941). The Chief Justice dissented in the *Drummond* case; to him the language of disqualification was plain and indicated that the risk of unemployment due to labor disputes was merely an excluded risk. The Alabama law provides for employee contributions and the fact that the worker had "purchased his protection against involuntary unemployment" was a factor in the court's interpretation.

14. Compare Bodinson Mfg. Co. v. California Employment Comm., 17 Cal. (2d) 321,

These cases illustrate how, in some jurisdictions, courts which have permitted a general concept of "involuntary unemployment" to outweigh the specific eligibility and disqualification provisions applicable to particular situations have also tended to determine what is "involuntary" with reference to the circumstances giving rise to the unemployment rather than with reference to the reasons for its present existence and continuance. The worker's conduct is therefore examined not in relation to employment generally, but in relation to the particular employer for whom he has ceased to work. The effect of such examination is to transform the state unemployment compensation laws into little labor relations acts dealing with standards of conduct applicable to the worker in his relation to his employer. The standards, with their strong emphasis upon job immobility, are not only new and, it may fairly be said, repugnant to American traditions; they do not represent rules of conduct affirmatively established by any legislative body. Their enforcement comes through negative sanctions in the form of a denial of benefits from the system to which the worker who is out of a job, and ready and able to take one, looks for aid.

No doubt the exercise of power to grant or withhold benefits, like the power to tax or to exempt from taxation, is certain to have some effects that are akin to regulation. In unemployment compensation the question is how far the system should be permitted to develop into one of control, albeit indirect, of the conduct of workers and employers, particularly vis-a-vis each other. To check the present tendency it is not necessary that the concept of "involuntary unemployment" be eliminated from declarations of policy in statutes or from the thinking of legislatures and judges. Rather, the need is to look to the nubs of the system: the unemployed worker and his relation, not to his past employers, but to suitable employment. Such an approach will limit voluntary-leaving provisions (legislatures permitting) to their original function of a temporary disqualification. It will recognize also that the test of what is voluntary is more than what is done on the worker's own motion which, like the short journey to the electric chair of the man who walks erect, may be the product of impelling circumstances.[15] Chiefly, it will clear the way to an undistorted func-

109 P. (2d) 935 (1941). The California court held that non-striking workers who refused to cross a picket line to return to their work had "left work because of a trade dispute." There was no evidence of violence or threats. The court said of their act, "This choice is one which members of organized labor are frequently called upon to make, and in the eyes of the law this kind of choice has never been deemed involuntary." *Id.* at 328, 109 P. (2d) at 940. The conclusions (1) that the disqualification depends upon voluntary action of the workers, and (2) that refusal, because of union principles, to pass a picket line represents voluntary action, seem sound; the California statute is unusual in basing the trade dispute disqualification on a leaving of work rather than the fact that the unemployment is due to a labor dispute.

15. The Minnesota Supreme Court had no difficulty, looking to the statutory declara-