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"CONSTRUCTIVE VOLUNTARY QUIT" DISQUALIFICATION—A STUDY IN EMPLOYMENT SECURITY

CHARLES LIEBERT CRUM*

I. THE PROBLEM

Every State has enacted a statute providing in substance that a worker who voluntarily leaves employment without good cause must be denied unemployment insurance payments during part or all of his ensuing unemployment.[1] An individual to whom payments are denied by reason of such a statute is commonly said to have sustained a "voluntary quit" disqualification. The statutes are part of a Federal-State unemployment insurance program administered by the State Governments through Federal grants, made under Title III of the Social Security Act,[2] which pay for costs of program administration. They have a significant impact, as will presently appear, on a broad range of contemporary employer-employee relationships.[3] The impact presumably was not intended when the program was first established, since it was initially conceived as

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1. "An individual is disqualified for unemployment compensation benefits if the director finds that he left his most recent work voluntarily without good cause . . . ." CALIF. UNEMPLOYMENT INSURANCE CODE § 1256 (a reasonably typical provision). Roughly half the States restrict "good cause" to cause arising from the individual's employment. COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS Et-3 (Bes No. U-141, 1965). In states with statutes of the latter type, to illustrate the significance of the distinction, an unemployed individual will receive unemployment insurance if he quits because of justified dissatisfaction with his employer but not if he leaves for a personal reason such as desire to remove to a more favorable climate for reasons of health. Such "restricted" good cause provisions have been sharply criticized by the Bureau of Employment Security, which administers the Federal end of the employment security program. See UNEMPLOYMENT INSURANCE LEGISLATIVE POLICY 62 (Bes No. U-212, 1962). The period of disqualification imposed under the "voluntary quit" statutes varies widely from State to State, in some jurisdictions extending over the duration of a worker's unemployment and in others being limited to periods of approximately six weeks.

2. 42 U.S.C. §§ 501-503 (1964), 49 STAT. 626 (1935), as amended.

3. General discussions of the employment security program may be found in symposia, 8 VAND. L. REV. 179-474 (1955); 10 OHIO STATE L.J. 117-254 (1949); 55 YALE L.J. 1-263 (1945); 3 LAW & CONTEMP. PROB. 1-172 (1936). Other useful studies are HABER & MURRAY, UNEMPLOYMENT INSURANCE IN THE AMERICAN ECONOMY (1966); Griffiths, *Charity v. Social Insurance in Unemployment Compensation Laws*, 73 YALE L.J. 357 (1963); ALTMAN, AVAILABILITY FOR WORK (1950); Fierst & Spector, *Unemployment Compensation in Labor Disputes*, 49 YALE L.J. 461 (1940); and Schindler, *Collective Bargaining and Unemployment Insurance Legislation*, 38 COL. L. REV. 858 (1938).

a social insurance system protecting the worker and community from the harmful social and economic consequences of unemployment rather than as a device for directly regulating relations between labor and management.[4] Nevertheless, the system is so designed that employers have a direct financial interest in the conditions under which unemployment insurance is granted or denied to employees, and application of the "voluntary quit" disqualification is a matter of State rather than Federal law.[5] The predictable result is that a substantial controversy surrounds the operation of these statutes.

One of the numerous facets of the argument centers about a recurring problem:

> A worker is employed pursuant to a contract, which he may negotiate with his employer either in person or through the agency of a union, providing for termination of his employment upon the occurrence of a future contingency. If the contingency occurs and unemployment results, does the fact the worker voluntarily agreed to the contract provide a legal basis for imposition of a "voluntary quit" disqualification upon him?

The contingency stipulated in the contract may take many forms. To suggest the major possibilities, the contract may provide that employment will terminate (or be terminated) when the worker attains a specified age of retirement,[6] marries,[7] becomes pregnant,[8] earns more than a specified amount during a single year,[9] is "bumped" from his job by a worker with greater seniority,[10] is no longer needed for the employer's temporary purpose,[11] or when the employer's plant closes for vacation or inventory.[12] The foregoing enumeration is by no means exhaustive.[13] Since new wrinkles

4. Burns, *Unemployment Compensation and Socio-Economic Objectives*, 55 YALE L.J. 1, 2-4 (1945); Harrison, *Statutory Purpose and Involuntary Unemployment*, 55 YALE L.J. 117 (1945).

5. The financial interest possessed by employers arises from the fact that if his former employee receives unemployment insurance an employer's "experience rating" will be unfavorably affected in all but a comparative handful of States. This in turn will affect the employer's liability to pay contributions (taxes) under the State unemployment insurance law. The desirability of the experience rating system has been the subject of mixed reactions. See Griffiths, note 3 *supra*, at 368, n. 51; Temple & Nowacek, *Experience Rating: Its Objectives, Problems and Economic Implications*, 8 VAND. L. REV. 376 (1955); Arnold, *Experience Rating*, 55 YALE L.J. 218 (1945). As to the point that Federal law vests substantial discretion in the States as to questions of disqualifications, *see* HEARINGS BEFORE COMMITTEE ON WAYS AND MEANS, 89th Cong., 1st Sess., on H.R. REP. 8282, Vol. 1, page 172, August 9, 1965; 79 CONG. REC. 9271, June 14, 1935.

6. *See* "Retirement," Part II, *infra*.

7. *See* "Marriage," Part III, *infra*.

8. *See* "Pregnancy," Part IV, *infra*.

9. *See* "Share-the-Work" Plans, Part VII, *infra*.

10. *See* "Bumping," Part VI, *infra*.

11. Kentucky Unemployment Insurance Commissioner v. American National Bank & Trust Co., 367 S.W.2d 260 (Ky. 1963).

12. *See* "Vacations," Part V, *infra*.

13. To illustrate, a number of recent decisions have taken the view that an employee who violates an employer's rules and is discharged in consequence is subject to disqualifi-

are constantly developing in the employment relation, ingenuity or the simple course of events may at any time produce contracts which stipulate additional contingencies as a basis for termination of employment and thus open up new areas of the basic issue.[14]

Despite this seeming diversity of fact situations, certain legal issues invariably are encountered with respect to any case falling within the general classification above indicated. These issues are:

(1) Is the worker's unemployment voluntary within the meaning of the statute?

(2) If so, did the worker have legally sufficient cause under the statute for his election to separate himself from employment?

(3) Is denial of unemployment insurance benefits on the basis of such a contract provision consistent with statutory provisions forbidding waiver by private agreement of the right to unemployment insurance?[15]

It is convenient in the discussion which follows to treat these issues jointly, since under the statutes pertaining to the "voluntary quit" disqualification the questions of volition and cause have, or ought to have, a close relationship; it is not possible to determine accurately whether the act of a worker in leaving his job was voluntary unless one takes account of the causes which led to his action.[16] Similarly, although the anti-waiver provision has its own legal background,[17] virtually every case hereinafter cited in connection with

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cation as a "voluntary quit" on the theory that his vountary action in breaking the rules constituted implied assent to his separation from employment. Cases of this nature are not analyzed in this paper since regardless of the ground on mhich the disqualification is asserted (obviously the proper disqualification is for misconduct in connection with work) there exists no doubt as to whether benefits are properly payable in such cases.

14. A unique example is Sarja v. Iron Range Resources & Rehaibilitation, 274 Minn. 458, 144 N.W.2d 377 (1966), in which it was held that a State civil service employee suspended without pay for disciplinary purposes left employment voluntarily, on the basis of "strict principles of contract and agency," because at the time he accepted State employment he also accepted the conditions of employment set forth by the State statutes and civil service rules. His previous assent to such terms of employment made his suspension, in the view of the Court, "voluntary."

15. Like the "voluntary quit" statutes described in footnote 1, statutes forbidding waiver of the right to unemployment insurance are found in every State. They are commonly derived from a pair of draft bills circulated by the Social Security Board concurrently with the effective date of the Social Security Act of 1935 to help the States enact unemployment insurance laws meeting the requirements of the Federal law. Section 15 of both draft bills provided that: "No agreement by an individual to waive, release or commute his right to benefits or any other rights under this act shall be valid . . . ."

16. "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 circumstance." Harrison, *supra* note 4, at 122.

17. When the program was established in 1935 there was substantial precedent to the effect that the operation of statutes intended to affect employer-employee relations could be nullified by contracts between employers and employees. *See* Adkins v. Children's Hospital, 261 U.S. 525 (1926) (holding minimum-wage leyislation unconstitutional on a freedom-of-contract rationale); Lochner v. New York, 198 U.S. 45 (1905) (deemed controlling authority in the *Adkins* case). In the light of these precedents, insertion of an anti-waiver clause in the various State unemployment insurance laws was an obvious act of

the so-called "factual matrix" rule actually turns on the application of the anti-waiver statute.

II. RETIREMENT

1. *Factors peculiar to the retirement cases.*

There are several reasons why the problem outlined in the preceding section assumes its sharpest form in connection with separations from employment which occur pursuant to an employer's rule or a provision in a collective bargaining contract requiring employee retirement on attainment of a specified age.[18] From an employer's standpoint such cases often involve substantial economic issues. This is because employee retirement is increasingly associated with the grant of a private pension to the retiree.[19] Logically this should not affect entitlement to unemployment insurance any more than the claimant's possession of a home, car, or bank account,[20] but the decisions provide ample evidence that this circum-

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legal prudence. The constitutional situation as it existed in 1935 furnishes one explanation of the reason why the unemployment insurance program was established on a Federal-State basis. It was by no means certain that even the limited program of Federal grants contemplated by Title III of the Social Security Act of 1935 would survive the test of constitutionality. (It was ultimately upheld in Steward Machine Co. v. Davis, 301 U.S. 548 [1937], by a 5-4 decision). The benefit-payment provisions of the unemployment insurance program obviously could be defended far more readily from constitutional attack if enacted by the States under their reserved powers than if enacted by the Congress. *Adkins* and *Lochner* are, of course, no longer influential. *Compare,* Ferguson v. Skrupa, 372 U.S. 726, 731 (1963); *see also,* Frankfurter, *Hours of Labor and Realism in Constitutional Law,* 29 HARV. L. REV. 353 (1916); Powell, *The Judiciality of Minimum Wage Legislation,* 37 HARV. L. REV. 545 (1924).

18. It has been said the "split of authority is most clearly discernible" in connection with the mandatory retirement cases. Annotation, 90 A.L.R.2d 835, 855 (1963). On such cases generally, see Notes, 39 B.U.L. REV. 124 (1959); 59 COL. L. REV. 209 (1959); 67 HARV. L. REV. 1437 (1954); 53 MICH. L. REV. 849 (1955); 43 MINN. L. REV. 168 (1958); 28 N.Y.U. L. REV. 1332 (1953); and 44 VA. L. REV. 1343 (1958).

19. "Best estimates reflect that approximately $30 billion are presently held in pension-plan portfolios alone." SEN. REP. NO. 1440, 85th Cong., 2d Sess., 3 U.S. CODE CONG. & AD. NEWS 4137, 4139 (1958). *See* Note 23, *infra,* for additional figures. The economic issue normally will not be of comparable importance from the standpoint of the individual unemployment insurance *claimant.* The claimant's only concern is with a limited period of entitlement to unemployment insurance payments, invariably of an amount too small to repay substantial litigation.

20. Since unemployment compensation is a form of social insurance rather than a program of relief or welfare assistance, entitlement to unemployment insurance may not be conditioned, consistently with Federal law, upon a test of means or need. *See* Burns, *supra* note 4, at 2; *compare,* Mandelker, *The Need Test in General Assistance,* 41 VA. L. REV. 893 (1955). The Secretary of Labor, who has statutory responsibility for administration of the Federal law, has so found. *See* the Secretary's *Finding in the Matter of Section 1, Chapter 125, L. 1963, of the State of South Dakota,* January 3, 1964 (published by the Bureau of Employment Security, U.S. Department of Labor, as an attachment to Unemployment Insurance Program Letter No. 746, January 8, 1964). The claimant's possession of private financial assets or resources is thus irrelevant in determining his entitlement to unemployment compensation. Since statutes in many States require the amount of unemployment insurance payments to be reduced by the amount of employer-contributed pensions received by a claimant, the basis on which the Federal prohibition of a means or needs test can be reconciled with these State laws is of considerable interest. Such pension payments are treated as a form of wages—i.e., they are deemed to constitute compensation for past services rendered. "Regardless of the form they take, the employers' share of the cost of these [pension] plans or the benefits the employers provide are a form of compensation." SEN. REP. NO. 1440, 85th Cong., 2d Sess., 3 U. S. CODE CONG. & AD. NEWS 4137, 4139 (1958). That the State statutes as to pensions are not at present deemed inconsistent with Federal standards, *see, Hearings Before the Committee on Ways and Means on H.R.* 8282, 89th Cong., 1st Sess., Part 1, pp. 176-77, August 9, 1965.

stance is in fact often deemed relevant by the courts.[21] The reason for employer persistence in stressing the pension factor is readily understandable, since to the extent that mandatorily retired employees are automatically disqualified for unemployment insurance as "voluntary quits" employers are thereby enabled to offset part of the cost of their industrial pension systems by reduction of their tax liability under State unemployment insurance laws.[22] The rapid growth of private employee pension plans indicates that this is in many instances a substantial accounting item.[23]

The mandatory retirement cases are unique in respects other than the presence of the pension factor. In common with the rest of humanity, a worker has no option about growing old. Hence the mandatory retirement cases deal with a contingency which *must* occur if employment continues long enough. Accordingly they may be distinguished from cases involving such unemployment-producing contingencies as marriage or pregnancy, where at least some element of free choice is present. Similarly, it may be pointed out that the mandatory retirement cases customarily involve a relatively complete severance of the employment relation. In cases involving layoffs for vacation, pregnancy, or because of "share-the-work" plans, it is customary to discover that some incidents of the employment relation often persist in an attenuated form despite the worker's technical status of unemployment.[24] In the mandatory retirement cases, by contrast, there is normally no prospect that the worker ever will regain employment with his former employer once he has passed the prescribed age limit and been separated from his job.

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21. The growth of such plans was mentioned as early as 1950 in one of the first cases dealing with this situation. See, Keystone Mining Co. v. Board of Review, 167 Pa. Super. 256, 75 A.2d 3 (1950). *See also* note 23, *infra*.

22. This is a consequence of the experience rating system described in note 5, *supra*.

23. Figures on the growth of private pension plans for employees indicate that in 1930 there were 720 such plans in the United States covering 2,400,000 workers. By 1956 these had become a minimum of 23,000 plans covering 14,300,000 workers. SENATE REP. No. 1440, 85th Cong., 2d Sess., 3 U. S. CODE CONG. & AD. NEWS 4137, 4141 (1958). As of 1960, HOUSE REP. No. 998, 87th Cong., 2d Sess., 1 U. S. CODE CONG. & AD. NEWS 1532, 1535 (1962), reported 25,000 such plans but gave the coverage at 80,000,000 workers, an apparent error presumably caused by the inclusion of figures pertaining also to employee welfare plans (*e.g.*, Blue Cross and Blue Shield) in the pension coverage total. An unofficial estimate in 1967 was that as of 1965 there were 33,000 plans, in many instances covering more than one employer, registered with the U. S. Department of Labor, covering approximately 26,000,000 workers. It may be pointed out that the Welfare and Pension Plans Disclosure Act, 29 U.S.C. §§ 301-309 (1964), 72 STAT. 997 (1958) as amended by 76 STAT. 35 (1962), does not require disclosure of pension plans covering less than 26 employees. And annual reports are required only if a plan covers 100 or more workers. 29 U.S.C. § 306(a) (1964); 76 STAT. 36 (1962). *See also* note 19, *supra*.

24. For purpose of unemployment insurance, an individual is ordinarily deemed unemployed in any week during which he performs no services and with respect to which no wages are payable to him. COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, Par. 300 (BES No. U-141, 1965). Thus a worker laid off to await recall to work after a plant reopens may be unemployed within the meaning of a State unemployment insurance law despite the fact both worker and employer contemplate continuance of the employment relation.

2. *Cases imposing disqualification (herein of the agency theory).*

Initially it was the general view that the eligibility for unemployment benefits of a worker separated from employment after passing the age of retirement specified by his employer or by a collective bargaining agreement depended solely on whether the worker remained a bona fide member of the labor force — i.e., whether he was genuinely available for employment and able to work.[25] The view that such an individual was subject to disqualification on the ground he had left employment voluntarily without good cause gained currency only after *Bergseth v. Zinsmaster Baking Co.*,[26] decided by the Supreme Court of Minnesota in 1958 and generally regarded as the leading case for the result it reaches. The two claimants in *Bergseth* were employed by a firm which entered into a collective bargaining agreement with their union requiring employee retirement at age 65.[27] Since both claimants were 67 when the agreement took effect they were told their employment would be ended. Each accepted $200 in severance pay[28] and filed claims for unemployment insurance. The claims were denied on the ground they were disqualified as "voluntary quits." The Court reasoned that since the union was the agent of the claimants in negotiating the terms and conditions of their employment the action of the union in stipulating 65 as the age of employee retirement constituted a voluntary agreement by the claimants to quit work, thus rendering their ensuing separations from employment voluntary also.[29]

It is clear the Court found the case troublesome. This is not surprising, since it may be pointed out that in the absence of the union agreement these separations would not have been disqualifying and that the effect of the agreement on the entitlement of the claimants to compensation obviously was not contemplated by the union. In any event, the opinion was studded with a large array of citations deemed to present cognate situations and drew a vigorous dissent. Although the majority opinion superficially turned on a

25. *See, e.g.,* Fleizig v. Board of Review, 412 Ill. 49, 104 N.E.2d 818 (1952); Bennett v. Review Board, 122 Ind. App. 37, 102 N.E.2d 383 (1951); Keystone Mining Co. v. Board of Review, 167 Pa. Super. 256, 75 A.2d 3 (1950); Hall v. Board of Review, 160 Pa. Super. 65, 49 A.2d 872 (1946).

26. 252 Minn. 63, 89 N.W.2d 172 (1958), noted 59 COL. L. REV. 209 (1959); 43 MINN. L. REV. 1343 (1958).

27. Neither claimant atended the union meeting at which approval of the retirement plan was voted.

28. Each claimant had 14 years of service with the company. To qualify for pensions each needed 15 years.

29. "By and large, if the contract contains reasonable provisions encompassing appropriate subjects for collective bargaining and is properly negotiated by the authorized agent and properly ratified by the union membership, it will be deemed to be the voluntary act of each individual member of the union, including any dissenters. The ratification forecloses any subsequent claim by an employee that actions which are incumbent upon him under the terms of the contract are involuntary and against his will." Bergseth v. Zinsmaster Baking Company, 252 Minn. 63, 89 N.W.2d 172, 174 (1958).

theory of union agency, the ultimate holding also rests quite plainly on a number of subsidiary propositions:

(1) That a "voluntary quit" may be the product of a mutual agreement between employer and employee;[30]

(2) That entitlement to compensation—a statutory matter—may be determined by reference to the terms of a private contract;[31] and

(3) That to deny unemployment compensation to a mandatorily retired claimant who is receiving a pension prevents a duplication of benefits, since pensions and unemployment insurance payments both serve the identical purpose of replacing wage loss caused by unemployment.[32]

Each of these propositions is sufficiently intriguing to warrant analysis, but the subsequent history of the case also merits attention.

Quite obviously, the decision in *Bergseth* was written in carefully qualified terms indicating judicial desire to avoid interference with the processes of collective bargaining as long as these processes did not overreach the workers or impose unreasonable hardship on them. That this is so is manifest from the fact the opinion attempted to provide safeguards assuring that in future cases the worker's "consent" would be truly "voluntary." The opinion declared, for example, that union contracts would be deemed binding on individual workers represented by the union only if the contract provisions were "reasonable" and involved "appropriate subjects for collective bargaining," and even then proper negotiation and ratification of the agreement were deemed necessary.[33] The Court went so far in this connection as to affirmatively determine that the pension and severance pay provisions of the contract in the case before it appeared reasonable.[34] The opinion likewise stressed the Court's reluctance to infringe on the liberty of contract enjoyed by the parties. It was meticulously noted that the Court wished to avoid a result which "would destroy the principles of collective bargaining and render union-management contracts meaningless."[35]

All this sounds fair enough, and obviously it cannot be said that such an approach to the problem was completely implausible. Collective bargaining agreements presumably are drafted by nego-

30. *See* text to notes 54-57 *infra.*
31. *Cf.* note 17, *supra.*
32. *See* text to notes 58-65 *infra.*
33. *See* note 29, *supra.*
34. Bergseth v. Zinsmaster Baking Company, 252 Minn. 63, 89 N.W.2d 172, 178 (1958).
35. *Id.* at 63, 89 N.W.2d 177.

tiators possessing a reasonable degree of expertise in labor-management relations and are executed by parties having reasonable parity of bargaining power. Hence, a decision testing the scope of a State's unemployment insurance system by reference to such contracts, while possibly open to criticism as delegating legislative authority to private parties, could not be said to leave workers *completely* devoid of protection. The Court's opinion thus placed the case for result reached in its most favorable light. The result was that the decision rapidly produced a polarization of professional opinion which gained it a substantial number of adherents,[36] produced legislation in several States to avoid its effects,[37] and remains influential even at the present time.[38]

But it illustrates the true difficulty inherent in decisions of this type to observe that within three years after the precedent was first established that it is possible by private contract to secure the automatic disqualification of mandatory retirees as "voluntary quits," *every concession to the worker which the case nominally made had either been rescinded, ignored, or substantially qualified.* The requirement that the employee's "consent" be embodied in a "reasonable" union-management contract, properly negotiated and freely ratified by the union membership, had been eliminated. The Court's theory as to the union's status as an agent of the worker for purposes of determining when a separation from employment is voluntary[39] had been found unnecessary. In *Stream v. Continental Machines*[40] the Court held explicitly that a worker retired solely by reason of an *employer's* rule established without negotiations of any kind likewise was disqualified for benefits on the authority of the *Bergseth* case. It was the Court's view that employees, by accepting or retaining employment with knowledge of such an employer's rule or policy, embodied it by acquiescence in their contracts of employment.[41] The logic of *Bergseth* accord-

36. Ball Brothers Co. v. Review Board, 135 Ind. App. 68, (1963) (now overruled); Commissioner v. Reynolds Metals Co. 360 S.W.2d 746 (Ky. 1962); Commissioner v. Kroehler Mfg. Co., 352 S.W.2d 212 (Ky. 1961); Lamont v. Director of Employment Security, 337 Mass. 328, 149 N.E.2d 372 (1959), noted 59 COL. L. REV. 209 (1959); Ivy v. Dudley, 6 Ohio St.2d 261, 217 N.E.2d 875 (1966); Marcum v. Ohio Match Co., 4 Ohio App.2d 95, 212 N.E.2d 425 (1965); Leach v. Columbus Coated Fabrics Co., 1 Ohio Misc. 41, 205 N.E.2d 608 (1964). For contra cases, *see* note 66, *infra*.

37. "The employer, upon the retirement of an individual from employment pursuant to a pension program, plan or agreement requiring retirement on the ground of age, and any labor union or association which is a party to any such program, plan, or agreement, shall notify such individual in writing that he is not, by reason of such retirement, disqualified from receiving unemployment compensation benefits." MASS. GEN. LAWS, c. 151A, § 25. *See also* CAL. U. I. CODE § 1256; BURNS IND. STAT. ANN. § 52-1539 (Cum. Supp. 1966), to substantially the same effect.

38. The total number of decisions, administrative and unreported, following Bergseth v. Zinsmaster Baking Company, *supra* note 34, is not known with accuracy.

39. *See* note 29, *spra*.

40. 261 Minn. 289, 111 N.W.2d 785 (1961).

41. "It is our opinion that claimants . . . by continuing their employment for several years after the adoption of the retirement policy . . . with knowledge of such policy, at least impliedly agreed to accept the policy . . . It is fundamental that the relationship

ingly led inexorably to the conclusion that a separation from employment required by the terms of any contract between employee and employer was likewise "voluntary." The progression is noteworthy. One witnesses in these cases a court moving by successive stages from applying social legislation embodying an important public interest by reference to:

(a) the terms of a publicly-enacted statute to:

(b) the terms of a collective bargaining agreement between private parties assumed to possess reasonably equivalent bargaining power to

(c) an employer's substantially uncontrolled discretion in dealing with unorganized employees.

If the legislation thus committed to the tender mercies of the law of contract had been a minimum wage law, or a law regulating hours of work, or conditions of safety in employment, the anachronistic character of the theory applied by the Court would have been readily apparent.[42] Here was *Bergseth's* true significance.

In the light of this history, which has been substantially duplicated in a number of other States,[43] it is difficult to escape the

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of master and servant rests upon contract, express or implied; that the contract may be implied from the acts of the parties and circumstances; and that it may be partly expressed in words and partly implied from facts and circumstances . . . Where an employee accepts or retains employment with knowledge of new or changed terms or conditions, a contract results emboding the new or changed terms or conditions." *Id.* at 788.

42. *See supra* note 17. "It is possible," one commentator has observed, "that the application of contract principles to the collective bargaining system is exercising a stultifying effect upon the evolutioin of industrial order." Chamberlain, *Collective Bargaining and the Evolution of Contract,* 48 COL. L. REV. 829 (1948). A better illustration of the thesis than the cases under discussion would be difficult to find.

43. The cases in Kentucky have many elements of similarity. In Commissioner v. Kroehler Mfg. Co., 352 S.W.2d 212 (Ky. 1961), a claimant separated from employment under a collective bargaining contract with retirement-and-pension provisions was held disqualified as a "voluntary quit" where (a) the employee had an option not to join the plan in the first place, (b) the employee also had an option to withdraw from it after joining, (c) the employee had an option to retire early on a reduced ptnsion, and (d) the employer, under the contract, could have kept the claimant at work had the claimant so requested. Like *Bergseth,* this must be deemed a qualified acceptance of the "constructive voluntary quit" idea. But within a year after *Kroehler* was decided, Commissioner v. Reynolds Metals Co., 360 S.W.2d 746 (Ky. 1962), held that a claimant mandatorily retired under a collective bargaining contract was automatically disqualified for benefits as a "voluntary quit" despite the apparent absence of any of the contract options which had been deemed significant when *Kroehler* was decided. The *reductio ad absurdum* of this line of cases was reached thereafter when an employer logically argued that a discharged employee should be disqualified as a "voluntary quit" on the authority of the foregoing cases because he knew when he took the job that his employment was going to be temporary. At this point the Court perceived that something was wrong, and granted benefits. Commissioner v. National Bank & Trust Co., 367 S.W.2d 260 (Ky. 1963). Although the Court observed that "At first blush it appears that the reasoning of the *Kroehler* case will necessarily dictate the result in this one" (367 S.W.2d at 262), it managed to draw a distinction. The claimant "did not agree to leave the work" because " had the need for the work continued he would have continued to perform." This, of course, was true of the claimants in the *Reynolds* case as well.

Ohio went off on its own unique decisional track. After wavering for several years under the influence of *Bergseth,* the Ohio Supreme Court ultimately decided in a decision notable for ambiguity of phrasing, that a claimant mandatorily retired under a union contract could be disqualified on the theory he had been discharged "for just cause." Ivy v. Dudley, 6 Ohio St.2d 261, 217 N.E.2d 875 (1966); *See also* Marcum v. Ohio Match Co.,

conclusion that the theory of union agency on which *Bergseth* and similar decisions rest is unsound and should be discarded. That the theory totally inverts the intended effect of collective bargaining agreements so far as workers and unions are concerned, and imparts to the union's representative capacity (which is actually conferred by statute rather than contract) in dealing with questions of *employment* a scope pertaining to matters of *unemployment* which neither principal nor agent desires it to have seems tolerably clear.[44] Such, in any event, has been the view of the legal commentators,[45] who have supported, in the language of one decision, the line of cases opposed to *Bergseth* "overwhelmingly."[46]

3. *The statutory test in the retirement cases.*

The instant one rejects the agency theory as a valid tool for analysis of the problem under discussion, many issues become a great deal clearer. It becomes possible to perceive, for example, that to treat the question whether a separation from employment is or is not "voluntary" as the controlling test of decision in cases involving the "voluntary quit" disqualification ignores an important qualification. It should be emphasized that *the fact unemployment may be voluntary in its inception does not mean it is not compensable.*[47] Voluntary unemployment, by the plain language of the

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4 Ohio App.2d 95, 212 N.E.2d 425 (1965). This is in essence a holding that an employee with lifelong record of faithful service may be disqualified on the same basis as an employee dismissed for drunkenness, insubordination, or theft. A possible reason for this remarkable result is suggested in note 58, *infra*.

Indiana first adopted the *Bergseth* rule, Ball Brothers Co. v. Review Board, 135 Ind. App. 68, 189 N.E.2d 429 (1963), then enacted legislation against it, BURNS IND. STAT. ANN. § 52-1539 (Cum. Supp. 1966), and ultimately overruled its initial holding, Jenkins v. Review Board, 211 N.E.2d 42 (Ind. App. 1965)); Unverzagt v. Review Board, 211 N.E.2d 631 (Ind. App. 1965).

44. "Such [collective bargaining] agreements usually restrict the employer's right to dismiss at will until the employee reaches a certain age; they thus protect the employee from arbitrary dismissal. It would be anomalous to say that, in gaining this protection against his employer, an employee has lost a benefit which he otherwise would receive from the State—the right to rceive unemployment benefits if dismissed—on the theory that he has voluntarily agreed to quit." Warner v. Board of Review, 396 Pa. 545, 153 A.2d 906, 909 (1959).

45. *See* Fineshriber, *Effect of Collective Bargaining Agreements on Voluntary Quits*, EMPLOYMENT SECURITY LEGAL AFFAIRS CONFERENCE 78, 93 (Regions III, VI and IX, 1961); 59 COL. L. REV. 209, 213 (1959); 67 HARV. L. REV. 1437, 1438 (1954); 34 NOTRE DAME LAW. 466, 469 (1959). *Contra*: 44 VA. L. REV. 1333, 1346 (1958), which asserts that the *Bergseth* case "adheres to the fundamental principles embodied in the laws of Agency and Contracts."

46. Employment Security Commission v. Magma Copper Co., 90 Ariz. 104, 366 P.2d 84, 88 n.7 (1961).

47. The misconception to the opposite effect stems partly from the fact that the draft bills circulated by the Social Security Board in 1935 (*see supra* note 15) contained a declaration of State "public policy" which asserted that it was the public policy to protect workers against "involuntary unemployment," and also referred to "persons unemployed through no fault of their own." These provisions were not intended to regulate payment or denial of benefits in individual cases. They were intended to make clear the *constitutionality* of the statutes by demonstrating their basis in the State's power to legislate as to the public health, welfare, safety and morals. In 1935 serious doubt as to constitutionality existed. *See supra* note 17. When it subsequently became evident that the phrases "involuntary unemployment" and "persons unemployed through no fault of their own" were being misapplied, and were resulting in denial of benefits to workers eligible for benefits under the specific eligibility and disqualification provisions in the

statutes, is non-compensable only if the worker left his job *without sufficient cause*.[48] The cases imposing "voluntary quit" disqualifications on mandatory retirees often ignore the issue of causation entirely.[49]

Moreover, the proposition that a mandatorily retired employee has "voluntarily" left his employment involves highly dubious theories both as to what is "voluntary" and as to what constitutes a "leaving." The idea that an action is voluntary implies in the normal usage of language that the actor possesses a *meaningful* freedom of choice with respect to it.[50] Does such freedom of choice exist? In jurisdictions which automaticallly disqualify mandatory retirees it is impossible for a worker to retain either his employment or his right to unemployment insurance by any voluntary action within his power. It may be argued that the worker may refuse to consent to the retirement clause in the contract at the time of its execution. But if the contract is a collective bargaining agreement the action of the majority of workers in ratifying it is treated by the courts as binding upon dissenters,[51] and if the plant is not unionized the worker's action in refusing the employer's terms of employment would constitute either a voluntary quitting or a refusal of offered employment and thereby also result in the worker's disqualification,[52] precisely the result such a worker would be seeking to avoid.[53] Thus it is immaterial in jurisdictions following this view whether the employee accepts or rejects the assertedly "voluntary" contract, since regardless of the alternative he chooses his rights under the statute are lost.

State laws, such phrases were deleted from the draft bills. Unfortunately, they had been widely enacted before their susceptibility to misconstruction became apparent. The story is traced in Harrison, *supra* note 4, at 118-19. *See also,* Simrell, *Employer Fault v. General Welfare as the Basis of Unemployment Compensation,* 55 YALE L.J. 181 (1945).

48. *See* note 1 *supra.*

49. *E.g.,* Stream v. Continental Machines, *supra* note 40, which treats the "good cause" provision of the statute as seemingly non-existent and fails entirely to analyze its application to the problem before the court. It recently has been suggested that whether a State should follow the *Bergesth* rule depends on whether it has a "general" or "restricted" good cause provision (*see supra* note 1) in its voluntary quit statute. Jenkins v. Review Board, 211 N.E.2d 42 (Ind. App. 1965). As to this, see text to note 158 *infra.*

50. Watson v. United States Rubber Co., 24 N.J. 598, 133 A.2d 328, 330 (1957); Kempfer, *Disqualification for Voluntary Leaving and Misconduct,* 55 YALE L.J. 147, 154-55; 34 NOTRE DAME LAW. 466, 469 (1959); *supra* note 16.

51. *Supra* note 29.

52. *Cf.,* Hessler v. American Television & Radio Co., 258 Minn. 541, 104 N.W.2d 876 (1960) (employees who left employment by reason of modest decrease in wage rates held voluntary quits); Egely v. Board of Review, 192 Pa. Super. 141, 159 A.2d 574 (1960) (employee who quite rather than accept transfer to lower-paid position held disqualified). Nor does it make a difference if, in such a situation, the employee is regarded as having refused an offer of new work. Disqualification may be anticipated anyhow. *See,* Watson v. United States Rubber Co., 24 N.J. 598, 133 A.2d 328, 330 (1957) (dictum).

53. No case has been found in the research supporting this paper involving a separation from employment initiated by a worker solely because of unwillingness to accept an employer's retirement plan. It is believed unrealistic to expect such separations to occur, since the worker who would sacrifice present employment and accrued retirement rights merely to test entitlement to a few weeks of unemployment insurance would be distinctly unusual.

Similarly it appears inaccurate to classify a separation from employment resulting from a mandatory retirement plan as a "leaving" or "quit" within accepted usage. In terms of legal concept a separation from employment is a "leaving" or "quit" only if it is initiated by the *unilateral* action of the employee.[54] It would be difficult to classify such a separation as voluntary if this were not so, since to be genuinely voluntary an action must be unconstrained by interference and unimpelled by another's influence.[55] There has been little difficulty in recognizing the corollary proposition that a separation from employment produced by an employer's unilateral action is properly classifiable as a "dismissal" or "discharge."[56] Since this is so, where a separation from employment is the result, not of a unilateral decision by either an employer or an employee, but of a *bilateral* agreement to terminate employment,[57] it is clearly a strained construction to classify it as either a quit or a discharge. It falls within neither category and is actually a separation from employment by mutual consent. On this basis such separations do not fall within the intendment of the "voluntary quit" disqualification.

4. *The Wage-Replacement Theory.*

Disqualification of mandatory retirees is sometimes defended on the argument that it serves to avoid a duplication of benefits at the expense of the employer, who otherwise is said to be compelled to pay the worker twice, once in the form of a pension and once in the form of a charge to his experience rating record which will produce an increase in taxes.[58] This particular argument appears

54. Employment Security Commission v. Magma Cpper Co., 90 Ariz. 104, 366 P.2d 84, 86 (1961); Campbell Soup Co. v. Board of Review, 13 N.J. 431, 100 A.2d 287, 289 (1953); Warner Co. v. Board of Review, 396 Pa. 545, 153 A.2d 906, 909 (1959).

55. Kempfer, *supra* note 50 at 154.

56. "The word 'dismissal' . . . connotes an affirmative action on the part of the employer in initiating the separation . . . . Where there is mere passive acquiescence by the employer in a voluntary retirement pursuant to a contractual retirement plan . . . there is no 'dismissal' within the purview of the [Unemployment Compensation] Act." Dubois v. Maine Employment Security Commission, 150 Me. 494, 114 A.2d 359, 363-64 (1955).

57. That a bilateral agreement is present in such cases is recognized even by courts which hold that mandatory retirement is diaqualifying for unemployment insurance purposes. *See,* Lamont v. Director of Employment Security, 337 Mass. 328, 149 N.E.2d 372, 374 (1958) ("The agreement is that of both parties.")

58. This position is not stated explicitly in the *Bergseth* case but evidently was considered by the court, since the dissent points out that: "A pension agreement entered into between an employer and its union should not be considered as a substitute for benefits created by social legislation to which all employees are entitled." Bergseth v. Zinsmaster Baking Co., 252 Minn. 63, 89 N.W.2d 172, 178 (1958). For decisions more or less openly basing disqualification of mandatory retirees on the wage-replacement theory, *see,* Ball Brothers Co. v. Review Board, 135 Ind. App. 68, 189 N.E.2d 429, 431 (1963) (now overruled) (noting the effect of benefit payments on the employer's experience rating); Leach v. Columbus Coated Fabrics Co., 1 Ohio Misc. 41, 205 N.E.2d 608, 612 (1964) (declaring that an employer would be indirectly penalized for establishing a pension plan if he also had to pay unemployment compensation to retirees). It is possible the unique view ultimately reached by Ohio with respect to mandatory retirement—*see, supra* note 43—may reflect a complex aspect of this argument. Ivy v. Dudley, 6 Ohio St.2d 261, 217 N.E.2d 875 (1966), the critical decision, is written in ambiguous terms which apparently preserve the court's option to classify mandatory retirees either as voluntary quits or as

to be inaccurately predicated on the theory, popularized by Larson in his treatise on *Workmen's Compensation*,[59] that all compensation received by employees as a replacement for wage-loss, regardless of the cause of the wage-loss, should be coordinated so as to award only a single wage-loss benefit.[60]

Whether one accepts or questions the wage-replacement theory,[61] it would not support the disqualification of mandatory retirees on the basis of the *Bergseth* rule. There are four reasons for this conclusion. First, courts which follow the *Bergseth* case deny unemployment compensation to mandatorily retired claimants regardless of whether they are receiving any other compensation for the wage-loss caused by their forced retirement. As *Bergseth* illustrates, the cases deny benefits whether the claimant is entitled to a pension or not. Thus any coordination of benefits achieved by holdings of this nature is accidental and depends on a wholly extraneous factor. Second, Larson carefully points out that the coordination of benefits involves "many detailed questions . . . certain to arise which can only be handled by carefully-considered legislation."[62] Thus the judicial process is not the appropriate medium through which to establish the desired coordination. Third, Larson's analysis pertains to *publicly-financed* wage-loss benefits rather than payments

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having been discharged for cause. The Secretary of Labor determines the type of situation in which a State, consistently with § 3303(a)(1) of the INTERNAL REVENUE CODE, may omit charges to employer experience rating accounts when unemployment insurance is paid to workers. If the Secretary of Labor should alter his present interpretation of § 3303(a)(1), the opinion in *Ivy v. Dudley* conceivably could be interpreted by the Ohio court as being based on a theory which would allow omission of charges notwithstanding the change in the Federal law.

59. 2 LARSON, WORKMEN'S COMPENSATION c. XVIII (1961); *see also* Larson, *The Welfare State and Workmen's Compensation*, 5 NACCA L.J. 18 (1950); Larson, *The Future of Workmen's Compensation*, 6 NACCA L.J. 18 (1950); and also Riesenfeld, *The Place of Unemployment Insurance Within the Patterns and Policies of Protection Against Wage-Loss*, 8 VAND. L. REV. 218 (1955).

60. "Wage-loss legislation is designed to restore to the worker a portion, such as one-half to two-thirds, of wages lost due to the three major causes of wage-loss; physical disability, economic unemployment, and old age. The crucial operative fact is that of wage loss; the cause of the wage loss merely dictates the category of legislation applicable. Now if a workman undergoes a period of wage loss due to all three conditions, it does not follow that he should receive three sets of benefits simultaneously and thereby recover more than his actual wage. He is experiencing only one wage loss and, in any logical system, should receive only one wage-loss benefit. This conclusion is inevitable, once it is recognized that workmen's compensation, unemployment compensation, non-occupational sickness and disability insurance, and old age and survivor's insurance are all part of a system based upon a common principle. If this is denied, then all coordination becomes impossible and social legislation becomes a grab-bag of assorted unrelated benefits." 2 LARSON, WORKMEN'S COMPENSATION § 97.10 (1961).

61. Is it true, as the preceding footnote suggests, that society pays workmen's compensation to a man who has lost an arm in an industrial accident solely to replace the paychecks he has lost while hospitalized and convalescing? Note that such a formulation leaves no room for the concept that pain and loss of future earning capacity are compensable, and often may have the effect, since replacement of lost wages is not to be total, of dropping the worker and his family to the poverty level, with socially undesirable consequences. Whatever may be the *raison d'etre* of workmen's compensation, it may be suggested that unemployment insurance is not wholly a wage-loss scheme. See Burns, *supra* note 4, at 11-12. The coordination-of-benefits argument does not explicitly state the necessity for assurance that the desired coordination of benefits would occur at an acceptable economic level. There is no such assurance at present.

62. Larson, *op. cit. supra*, note 60, § 97.20.

under private pension plans.[63] This last is a distinction of some importance. To deny unemployment insurance to a worker because he is in substance the beneficiary of a retirement trust fund, even when done indirectly through a strained construction of the "voluntary quit" disqualification, is difficult to distinguish from denying benefits to him because he has achieved a particular level of private income. It is a fundamental characteristic of the unemployment insurance program that entitlement to benefits may not be made contingent on such a test of "means" or "need."[64] The program is one of insurance rather than charity. Fourth, in many instances the argument that the employer is paying for the pension is simply untrue. Often the worker is merely getting back in the form of a pension money which he himself has contributed to the pension fund in the form of a payroll deduction.[65]

5. *Cases awarding benefits (herein of the factual matrix rule).*

In view of the numerous objections to which the rule of *Bergseth v. Zinsmaster Baking Co.* is subject, it is not surprising that the majority of reported decisions reach an opposing result which is believed far sounder.[66] The leading case on the benefit-payment side is probably *Campbell Soup Company v. Board of Review,*[67] decided by the Supreme Court of New Jersey in 1953. The claimants in *Campbell,* like the claimants in *Bergseth,* were separated from employment under a compulsory retirement provision in a collective bargaining agreement despite their requests to remain in employment. A New Jersey Superior Court imposed "voluntary quit" disqualifications on the theory the contract made the separations compulsory so far as the employer was concerned and equally removed the separations "from the realm of involuntariness as to the employees."[68] Reversing this result, the New Jersey Supreme Court held that the agreement of a union to such a provision in a collective bargaining agreement could not bind individual workers in pro-

63. "As to private pensions, whether provided by the employer, union, or the individual's own purchase, there is ordinarily no occasion for reduction of compensation benefits." Larson, *op. cit. supra* note 60, § 97.33. The reference is to workmen's compensation benefits but is logically applicable to unemployment insurance also.

64. *Supra* note 20.

65. *See* INT. REV. CODE § 72(d); *cf.* Barclay v. Administrator, 139 Conn. 569, 95 A.2d 797 (1953); Yeager v. Board of Review, 196 Pa. Super. 162, 173 A.2d 802 (1961).

66. Reynolds Metal Co. v. Thorne, 41 Ala. App. 331, 133 So.2d 709, *cert. denied,* 272 Ala. 709, 133 So.2d 713 (1961); Employment Security Commission v. Magma Copper Co., 90 Ariz. 104, 366 P.2d 84 (1961); Douglas Aircraft Co. v. California Unemployment Insurance Appeals Board, 180 Cal. App.2d 649, 4 Cal. Rptr. 723 (1960) (separation for pregnancy); Dubois v. Maine Employment Security Commission, 150 Me. 494, 114 A.2d 359 (1955); Jenkins v. Review Board, 211 N.E.2d 42 (Ind. App. 1965); Campbell Soup Co. v. Board of Review, 13 N.J. 431, 100 A.2d 287 (1953); Warner Co. v. Board of Review, 396 Pa. 545, 153 A.2d 906 (1959); Atlantic Refining Co. v. Board of Review, 190 Pa. Super 408, 154 A.2d 336 (1959). For *contra* cases, *see supra* note 36.

67. 13 N.J. 431, 100 A.2d 287 (1953).

68. Campbell Soup Co. v. Board of Review, 24 N.J. Super. 311, 94 A.2d 514, 518 (1953).

ceedings to collect unemployment insurance because if the contract were so interpreted it would amount to an "advance surrender" of the right to unemployment compensation. Such an advance surrender, in the view of the Court, would be inconsistent with the section of New Jersey's law prohibiting waiver or release of benefit rights. The opinion, written by Mr. Justice Brennan, indicated further that only the factual situation existing at the time of termination of employment, rather than the contract entered into at its inception, could be considered in determining whether benefits were payable.

> If the inquiry is isolated to the time of termination, plainly none of the claimants left voluntarily in the sense that on his own he willed and intended at the time to leave his job. . . . The Legislature plainly intended that the reach of the [voluntary quit] subsection was to be limited to separations where the decision whether to go or to stay lay at the time with the worker alone and, even then, to bar him only if he left his work without good cause. The claimants here did not choose of their own volition to leave the employ of Campbell Soup Company when they were separated. They left because they had no alternative but to submit to the employer's retirement policy, however that policy as presently constituted was originated. Their leaving in compliance with the policy was therefore involuntary for the purposes of the statute.[69]

It is the restriction of inquiry to the time of separation from employment indicated by this opinion which is its most striking characteristic. Commonly known as the "factual matrix" rule,[70] the restriction cuts deep and its reason is not invariably apparent on the face of the opinions. The question reasonably may be asked: If an employee's representative has insisted on an employment contract with a mandatory retirement provision, why should the employer be denied the right to introduce evidence of this fact to demonstrate that the employee's retirement actually resulted from his own choice? The answer is that the factual matrix rule is the logical corollary of two separate propositions:

(1) That an individual may not by contract foreclose himself of the right to claim and receive unemployment benefits when the conditions set by law for payment of those benefits occur, and

(2) that to prove that a separation resulted from a mutual

69. Campbell Soup Co. v. Board of Review, 13 N.J. 431, 100 A.2d 287, 289 (1953).

70. The term is derived from Warner Co. v. Board of Review, 396 Pa. 545, 153 A.2d 906, 909 (1959), a hotly-contested case wherein the court declared "the factual matrix at the time of separation should govern."

> bargain falls short of the required proof that it was produced by the decision of the worker *alone*.[71]

Moreover, it should not be overlooked that the factual matrix rule is supported by highly practical considerations of simplicity of proof and administration. What is being litigated in an unemployment compensation proceeding is the statutory right of a single out-of-work individual to a relatively small amount of cash, not the proper interpretation of a contract. To require detailed exploration of the negotiations preceding the formation of an employment contract, conceivably executed many years earlier,[72] before deciding whether a worker is entitled to unemployment insurance is to insist in many cases on a practical impossibility.[73] An occasional claimant might be able to make some sort of showing on the point; but the unemployment insurance system operates on a mass coverage basis, the great bulk of the claims must be decided administratively, and simple criteria of entitlement are a necessity for its successful operation.

An additional point may be mentioned. Jurisdictions using the factual matrix rule apply it equally to union and non-union workers, precisely as is true of jurisdictions following the agency theory ennunciated in the *Bergseth* case.[74] Pretty clearly this is a necessary outcome if the courts are to avoid the establishment of conditions of entitlement based on the state of a claimant's union membership. In jurisdictions following the *Bergseth* rule, however, the result is to create a direct financial incentive for imposition by employers through contract of restrictive conditions of employment on non-unionized workers; this is so because the employer's experience rating, and hence his tax liability, will become more favorable precisely to the extent that the employer can show that separations from his employ occur pursuant to such contract provisions and

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71. *Supra* note 57.

72. Note that Bergseth v. Zinsmaster Baking Company, note 34 *supra*, was not typical in this respect. In *Bergseth* the execution of the contract and the separations were virtually contemporaneous in point of time; but the contract deemed critical in determining worker entitlement to benefits in jurisdictions following the *Bergseth* rule conceivably could have been written 30 years before the worker files his claim.

73. "The pressures of the collective bargaining process are too complex to permit this over-simplified theory to govern a determination here. They would require an inquiry into each case to determine the position of each side at the bargaining table, and even then a clearcut answer would undoubtedly not be forthcoming." Warner Co. v. Board of Review, 369 Pa. 545, 153 A.2d 906, 909 (1958). Compare Ball Brothers Co. v. Board of Review, 135 Ind. App. 68, 189 N.E.2d 429, 431 (1963), where the court stated: "The appellant-employer *may* have deliberately sacrificed other considerations in order to obtain a voluntary retirement age in the contract because the payment of unemployment compensation to these retired individuals would change the company experience rating." (Emphasis supplied). Note the significance of the word "May". It appears to indicate the court based its decision on a speculation rather than on evidence.

74. *Compare* Atlantic Refining Co. v. Board of Review, 190 Pa. Super. 408, 154 A.2d 336 (1959) *with* Stream v. Continental Machines, *supra*.

hence are legally voluntary.[75] Since the factual matrix rule treats such contract provisions as irrelevant for purposes of determining entitlement to benefits, it destroys this incentive and thus eliminates one source of pressure toward job insecurity and unfavorable employment conditions.

The factual matrix rule does not mean, of course, that all employees retiring pursuant to a retirement plan must in every case be deemed eligible for benefits. Obviously in a substantial percentage of the cases the retirement of an employee from the employ of his employer is, for practical purposes, the end of his working career. Hence it remains true that before the retiree may be found eligible for benefits there must be a finding that he remains genuinely attached to the labor force—i.e., he must be available for work and able to work.[76] Nor are the terms of the contract between the worker and employer totally irrelevant in determining whether a separation is solely the product of the worker's own choice. Such contracts often contain options which cast a revealing light on the subsequent actions of the parties. It seems clear that the existence of a contractual option on the part of an employee who approaches the age of retirement to either accept a separation or continue in employment beyond the normal age of retirement has a bearing on the question of his entitlement to unemployment insurance, since if a man can keep his job and elects to retire anyhow it is obvious that his unemployment legitimately may be classified as voluntary.[77] Similarly, if an employer has the option to retain an employee or retire him, and elects to retire him, the separation from employment clearly is not the result of the worker's unilateral decision and hence is involuntary from the worker's standpoint.[78] This last point, it may be suggested, is particularly pertinent where retirement is mandatory only because the employer, having unilaterally established it as a rule, is unwilling to alter it.

III. MARRIAGE

Although a split of authority is found in the mandatory retirement cases, decisions involving the question whether the "voluntary quit" disqualification applies to a female[79] employee who marries and is separated from employment because her employer has a rule, or has entered into a union contract, forbidding the retention

75. How varied and ingenious such contract provisions can be is indicated by the text to notes 6 through 14, *supra*.

76. Text to note 25 *supra*.

77. Krauss v. A. & M. Karagheusian, Inc., 13 N.J. 447, 100 A.2d 277 (1953); Blumberg v. Board of Review, 191 Pa. Super. 243, 159 A.2d 243 (1960). *See also,* Kentucky Unemployment Insurance Commissioner v. Kroehler Mfg. Co., 352 S.W.2d 212 (Ky. 1961).

78. Reynolds Metal Co. v. Thorne, 41 Ala. App. 331, 133 So.2d 709, *cert. denied,* 272 272 Ala. 709, 133 So.2d 713 (1961); Ferrelli v. Leach, 186 N.E.2d 868 (Ohio App. 1962).

79. No case has been found involving a male.

in employment of married women display substantial uniformity.

As of this writing the claimants have lost every reported case. An excellent illustration is *Brown v. Southern Airways,*[80] decided by a Louisiana court in 1964. The claimant was an airline stewardess who married and resigned her position in deference to a company rule requiring stewardesses to remain single as a condition of employment. In denying her claim for unemployment insurance the Court stated:

> The general rule is that employees who marry, and thereafter have resigned because of a company rule prohibiting continuation of employment after marriage, are held to have voluntarily quit their work without good cause, and are not eligible for unemployment compensation. The cases . . . are uniformly to the effect that a company rule, whether promulgated unilaterally, or in a collective bargaining agreement, providing for the discharge of female employees upon marriage, is a reasonable and valid condition of employment, the enforcement of which does not create liability for unemployment compensation.[81]

Although this opinion attempted to reinforce the result by pointing to technical conditions in the airline industry,[82] the Court's argument in this respect is not reflected in regulations or statutes pertaining to the industry[83] and thus appears to have dubious aspects.[84] Even if valid, however, the argument based on considerations peculair to aircraft operation would merely indicate that airlines following this rule were pursuing reasonable operating procedures

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80. 170 So.2d 245 (La. App. 1964), *aff'd without opinion,* 247 La. 361, 171 So.2d 478 (1965).

81. 170 So.2d at 246-47.

82. "The ban against married airline stewardesses is common to the industry. The duties required of a stewardess are such that, if she should become pregnant, she might endanger herself and her unborn child, as well as the passengers under her care. An ill or disabled stewardess cannot properly perform her duties during flight which are essential to the comfort and safety of passengers. In times of emergency the stewardess is expected to take the lead in saving lives; hence, she must be in first-rate physical condition. She is likely to be called away from home for 48 hours at a time, and is always subject to permanent transfer of station on very short notice. As a married hostess' home is with her husband, and is not as mobile as when she was unmarried, such a transfer might jeopardize her marriage. Immobility of an airline stewardess could seriously hamper her employer's ability properly to service its passengers and might endanger their safety." *Id.* at 248. As noted in the text, this argument is beside the point; the issue in the case was whether the claimant was entitled to unemployment insurance, not whether marriage disables an airline stewardess from continuing her occupation.

83. Both the Civil Aeronautics Board and Federal Aviation Agency have broad authority over flight crews of air carriers and matters of airline safety. Colorado Anti-Discrimination Commission v. Continental Air Lines, 372 U.S. 714 (1963); 49 U.S.C. §§ 1421-1422 (1964). Detailed regulations regarding certification of flight crew members have been promulgated. 14 CFR Parts 63, 65. These include medical standards, 14 CFR Part 67, and a requirement that flight attendants be supplied to passengers. 14 CFR §§ 121.391, 121.393, 127.145. While any argument based on alleged considerations of safety must be treated with respect, the absence of any regulation requiring stewardesses to be unmarried indicates that this particular argument is dubious.

84. There is nothing to prevent an airline from grounding a *pregnant* stewardess, and in most States such a layoff would not produce compensable unemployment. But it is Victorian to contend this is the same thing as discharging a *married* one.

rather than that the unemployment produced by such procedures ought to be noncompensable. Accordingly it is believed that *Brown* v. *Southern Airways* properly may be evaluated, in terms of the question under discussion, on the same basis as similar decisions involving female employees in other occupations.[85]

Treated solely as an application of the "voluntary quit" disqualification it is submitted that the general rule set forth above is unsound. This is true whether one approaches such cases from the standpoint of the "good cause" requirement or from the standpoint of inquiry as to whether the separations from employment involved in such cases are genuinely "voluntary." Note that when an employer unilaterally has promulgated a rule against retention in employment of married women he retains the right to revoke or waive the rule in any case wherein he considers such action desirable. Hence it is the *employer's* decision to enforce the rule which is the effective cause of the separation, rather than the employee's decision to marry. Obviously it cannot be said in such cases that the decision to go or stay is solely that of the employee alone, since if the matter were left to the decision of the employee the result would be a continuation of employment; and it already has been pointed out in connection with the retirement cases that unless a separation from employment is solely the product of the worker's election it is inaccurate to classify it as voluntary. Such separations are actually neither "leavings" nor "dismissals" by any accurate definition; they are simply terminations of employment by mutual act of the parties, and accordingly ought to result in compensable unemployment if the claimant meets the test of continued attachment to the labor force.[86]

Equally it would seem apparent that the employee has legally sufficient cause for such an allegedly "voluntary" separation[87] regardless of whether the particular State law under which the claim is filed has a "restricted" or "general" good cause provision.[88] A more impelling reason, more clearly connected with a worker's employment, for an asserted "voluntary quit" than the fact a worker is unable to keep her job because the employer refuses to let her stay is rather difficult to suggest. Even if one inverts the foregoing argument and considers the issue of whether there was good cause

85. Similarly disqualifying married female claimants are Huiet v. Atlanta Gas Light Co., 70 Ga. App. 233, 28 S.E.2d 83 (1943) (clerks); Standard Oil Co. v. Review Board, 119 Ind. App. 576, 88 N.E.2d 567 (1949) (clerical workers); Czarnecki v. Board of Review, 185 Pa. Super. 46, 137 A.2d 844 (1958) (factory workers); Elliott Co. v. Board of Review, 180 Pa. Super. 542, 119 A.2d 650 (1956) (secretary); Means v. Board of Review, 177 Pa. Super. 410, 110 A.2d 886 (1955) (factory worker).

86. *See* text to notes 54-57 *supra*.

87. "Probably everyone would agree . . . that it is reasonable for a woman to marry even though her employer has a rule against retaining married women." Kempfer, *supra* note 50, at 150.

88. For the distinction, *see supra* note 1.

for the separation from the standpoint of the employer rather than the employee, which appears to be what the decisions on this question commonly do, the conclusion that the employee has good cause and the employer normally does not seems clearly indicated. The proposition that any vital or serious interest of a public utility, factory, or similar establishment is substantially affected by the marriage of billing clerks or stenographers is hard to defend on a realistic basis. Such rules of employment appear to have their most common origin in a circumstance unrelated to the employer's operating requirements. They appear to reflect a feeling, generally most prevalent in periods when unemployment is at a high level, that it is unfair to employ a woman with a husband to keep her at a time when men with families to support are in need of jobs. This may be suggested as the most logical explanation of the reason why a substantial number of the cases involve provisions in union contracts.[89]

It repeatedly has been argued that to discharge a female employee by reason of her marriage violates the public policy against enforcement of contracts in restraint of marriage[90] and also constitutes discrimination against women.[91] The argument based on public policy ordinarily has failed because the law of contracts permits restraints on marriage which are "incidental to another lawful purpose of the bargain."[92] The claim of discrimination similarly has been rejected in the cases on the theory women have no legal right to employment in a particular occupation if the employer does not wish to hire them.[93] It is obvious, however, that the claim of discrimination will have a more substantial legal basis

89. *E.g.*, Standard Oil v. Review Board, 119 Ind. App. 576, 88 N.E.2d 567 (1949); Brisbin v. E. L. Oliver Lodge No. 335 of Brotherhood of Railway Clerks, 134 Neb. 517, 279 N.W. 277 (1938); Czarnecki v. Board of Review, 185 Pa. Super. 46, 137 A.2d 844 (1958); Elliott Co. v. Board of Review, 180 Pa. Super. 542, 119 A.2d 886 (1955). That such contracts are currently illegal is pointed out in the text discussion *infra*. As to whether a union's action in insisting on such a provision is consistent with its duty to fairly represent its members who are married women, *see*, Rhea Mfg. Co. v. Industrial Commission, 231 Wis. 643, 285 N.W. 749 (1939). As to whether the affected employee has an action for damages against the union, *see*, Hartley v. Brotherhood of Ry. & S.S. Clerks, 282 Mich. 201, 277 N.W. 885 (1938).

90. Standard Oil Co. v. Review Board, 119 Ind. App. 576, 88 N.E.2d 567 (1949); Grimison v. Board of Education, 136 Kan. 511, 16 P.2d 492 (1932); Note, *Marriage, Contracts, and Public Policy*, 54 HARV. L. REV. 473 (1941).

91. Grimison v. Board of Education, 136 Kan. 511, 16 P.2d 492 (1932); Ansorge v. City of Green Bay, 198 Wis. 320, 224 N.W. 119 (1929).

92. 6A CORBIN, CONTRACTS § 1474 (1962); RESTATEMENT, CONTRACTS § 581 (1932); Note, 54 HARV. L. REV. 473 (1941).

93. "Plaintiff contends the contract is discriminatory against women . . . . No constitutional, statutory, or common-law right of any woman would be infringed if the board refused, for any reason, to employ female teachers. Tender of employment to a woman may be on such terms as the board may deem to be for the best interests of the school, and acceptane of terms by an applicant for employment constitutes waiver of the privilege to object to them . . . . Plaintiff cites some constitutional provisions designed to secure equality of rights of males and females. None of the cited provisions relates to discrimination between applicants for employment as teachers . . ." Grimison v. Board of Education, 136 Kan. 511, 16 P.2d 492, 492-93 (1932).

in the future. This is because the Civil Rights Act of 1964 explicitly makes it an unlawful employment practice for employers falling within its coverage—which is, of course, limited—to "discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin."[94] This provision is sufficient to cover the discharge of a woman by reason of her marriage.[95] Although administration of the Civil Rights Act of 1964 has been confined to the Equal Employment Opportunity Commission[96] rather than State employment security agencies, it seems apparent that future cases involving this particular employment practice will inevitably take account of the change of the law, even if only in an oblique fashion. Obvious anomalies would be created by a holding which disqualified a claimant on the basis of her employer's unlawful action.

IV. PREGNANCY

In the great majority of States explicit and specialized statutory provisions regulate the eligibility of disqualification for benefits of pregnant women.[97] In consequence, cases testing application of the voluntary quit disqualification to pregnant claimants whose separations are required by contract or employer rule occur with relative infrequency. In at least one State it has been held that the existence of a specific statutory provision applicable to separations involving pregnancy renders the voluntary quit disqualification completely inapplicable to such claimants, on the ground that enact-

94. Civil Rights Act of 1964 § 703, 78 STAT. 255 (1964), 42 U.S.C. § 2000e-2(a)(1) (1964) (emphasis supplied). For the debate in the House of Representatives over addition of the word "sex" to the statute, *see* 110 CONG. REC. 2484-92, 2624-25, 2626-27. The Senate did not debate on the desirability or meaning of this amendment, which was offered in the House without prior testimony in committee. 100 CONG. REC. 2489 (February 8, 1964) (Remarks of Representative Green). It is interesting to note that a specific reference to the problems of airline hostesses occurred during the debate. 110 CONG. REC. 2486 (February 8, 1964) (Remarks of Representative Bass). While the reference is not particularly illuminating, it is obvious the House understood that its action would be significant with respect to married women. Representative Green of Oregon observed during the debate that: "I suppose that this may go down in history as 'women's afternoon' . . ." 110 CONG. REC. 2488 (February 8, 1964).

95. "(a) The [Equal Employment Opportunity] Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex. (b) It may be that under certain circumstances, such a rule could be justified within the meaning of Section 703(a)(1) of Title VII. We express no opinion on this question at this time except to point out that sex as a bona fide occupational qualification must be justified in terms of the peculiar requirements of the particular job and not on the basis of a general principle such as the desirability of spreading work." 29 CFR § 1604.3.

96. Note, *Enforcement of Fair Employment Under the Civil Rights Act of* 1964, 32 U. CHI. L. REV. 430 (1965). *See also* Note, *Classification on the Basis of Sex and the* 1964 *Civil Rights Act*, 50 IOWA L. REV. 788 (1965).

97. For a summary of the statutes *see* COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS § 450.01 (BES. No. U-141, 1965).

ment of the specific provision as to pregnant claimants indicated legislative intent to place them in a separate classification to which the voluntary quit disqualification was inapplicable.[98] Nevertheless, at least a few cases deal specifically with the narrow question whether a separation on account of pregnancy may be classified as a voluntary quit without good cause where it is required by an employer's rule or union contract. Such cases provide a striking contrast to the cases involving marriage discussed in the preceding section. As indicated in the preceding discussion, the general view until enactment of the Civil Rights Act of 1964 was that a separation from employment produced by an employer's rule or union contract forbidding retention in employment of married women was a voluntary quit without good cause. With virtually equal unanimity, however, those courts which have reached the issue have concluded that a separation produced by a rule or contract forbidding retention in employment of pregnant women is not disqualifying.[99] Absent a specific statutory provision governing the case, the view taken by such courts has been that such a claimant's entitlement to benefits depends simply on whether the evidence indicates that the claimant is in fact able to work and available for work.[100] The opposed lines of authority involving marriage and pregnancy sometimes exist concurrently in a single jurisdiction, as in Pennsylvania,[101] without any formal explanation of the difference in result. Although the fairly obvious relationship between marriage and pregnancy makes a convincing explanation of the distinction a difficult undertaking, possibly one answer to the puzzle is that the two types of claimants are often in differing practical situations when their cases come before the courts. The newly-married claimant who knew that her marriage would result in loss of her job has indicated that economic considerations were a secondary factor in her decision to face unemployment. On the other hand, loss of wages to a woman facing unemployment and increased medical expense while awaiting the birth of a child is a more serious matter, particularly to a claimant

98. Alabama Mills v. Carnley, 44 So.2d 622 (Ala.App. 1949), *cert. denied,* 253 Ala. 426, 44 So.2d 627 (1950).

99. Douglas Aircraft Co. v. California Unemployment Insurance Appeals Board, 180 Cal.App.2d 649, 4 Cal. Rptr. 723, *hearing denied,* 4 Cal. Rptr. 731 (1960), noted 49 CALIF. L. REV. 580 (1961); Boeing Co. v. Board of Review, 193 Kan. 287, 392 P.2d 904 (1964); Myerson v. Board of Review, 43 N.J. Super. 196, 128 15 (1957); Smith v. Board of Review, 396 Pa. 557, 154 A.2d 492 (1959); Klaniecki v. Board of Review, 177 Pa.Super. 550, 112 A.2d 453 (1955). *Contra*: Rzedski v. Board of Review, 182 Pa. Super. 16, 124 A.2d 651 (1956).

100. Boeing Co. v. Board of Review, 193 Kan. 287, 392 P.2d 904 (1963). To treat the eligibility of such a claimant as turning on ability to work and availability to work is consistent with the view taken by Altman, who states that there is "no convincing evidence that employment up to the time of delivery is harmful provided the physical condition of the woman is satisfactory and the work is suitable." ALTMAN, AVAILABILITY FOR WORK 226 (1950).

101. *Compare,* Smith v. Board of Review, 396 Pa. 557, 154 A.2d 492 (1959) *with* Czzarnecki v. Board of Review, 185 Pa. Super. 46, 137 A.2d 844 (1958).

of modest income. Moreover, the pregnant claimant faces difficulties in securing employment prior to childbirth which are not present in the case of the newly-married claimant. Pragmatic considerations thus may be suggested as a cause of the anomaly.[102]

To analyze the pregnancy cases by labored inquiry into whether pregnancy, and a resultant separation from employment, are acts or conditions which are "voluntary" or "for good cause" seems beside the point. It appears preferable to take the view that pregnancy is simply part of the normal life-pattern for most of the female population, and accordingly that concepts of individual volition and causation are at best of peripheral relevance. To approach the problem on a different basis has a visible tendency to produce thoroughly awkward results. The best evidence on the point is supplied by an Iowa case wherein the Court, earnestly attempting such an analysis, found itself reduced to the ungraceful conclusion that the claimant's case had "some analogy to that of one who deliberately maimed himself to unfit himself for work."[103] That such an approach is totally inadequate to yield accurate results appears self-evident.

V. VACATIONS

1. *The Problem in General.*

Obviously an employee enjoying a paid vacation is not entitled to unemployment compensation. He is neither unemployed nor in the ordinary case available for work.[104] Moreover his vacation pay may reasonably—although not necessarily, since the matter is one of statutory definition—be classified as wages.[105] In recent years, however, there has been a steady increase in cases involving claims for benefits filed by individuals nominally on vacation.[106] These cases reflect the fact that collective bargaining agreements and other employment contracts commonly stipulate that employees are not eligible for vacation pay until after completion of a specified period of employment. When a plant where such an agreement is

102. A more concise statement is that of the Alabama court: "That a valid public policy exists to support a separate classification of employees who are expectant mothers is we think clear from the mere statement of the proposition." Alabama Mills v. Carnley, 44 So.2d 622, 626 (Ala.App. 1949), *cert. denied*, 253 Ala. 426, 44 So.2d 627 (1950).

103. Moulton v. Iowa Employment Security Commission, 239 Iowa 1161, 34 N.W.2d 211, 213 (1948).

104. Kelly v. Administrator, 136 Conn. 482. 72 A.2d 54 (1950). *See generally*, Annotation, *Right to Unemployment Compensation as Affected by Vacation or Holiday or Payment in Lieu Therof.* 30 A.L.R.2d 366 (1953).

105. *See*, Wellman v. Riley, 95 N.W. 507, 61 A.2d 428 (1949), where a claimant received vacation pay after a separation from employment, and was held ineligible in consequence. *But c.f.* Renown Stove Co. v. Michigan Unemployment Compensation Comm'n, 328 Mich. 436, 44 N.W.2d 1 (1950) (where worker had right to take either a paid vacation or a bonus, at his option, and elected the bonus).

106. It has been suggested the increase derives from the growth of vacation payment clauses in employment contracts. Annotation, 30 A.L.R.2d 366 (1953).

in force closes to allow employees to take vacations those employees ineligible for vacation pay under the contract accordingly find themselves without work or wages until the plant reopens. For such individuals the vacation period thus is the equivalent of a short-term layoff for lack of work, and the fact they are neither performing services in employment nor entitled to wages for the period of vacation brings them within the common statutory definition of unemployment.[107]

When persons in the foregoing situation claim benefits, however, the issue of entitlement arises in sharp fashion. It may be pointed out that some not-insignificant aspects of the employment relation obviously persist. The individual usually remains on the employer's roster of employees and is carried on the payroll in nonpay status. He normally continues to amass seniority in employment during the vacation period. He commonly remains eligible for fringe benefits provided by the employment contract, such as care under a program of employee medical insurance. The time spent in nonpay status ordinarily will be counted as weeks of service for purposes of determining his eventual entitlement to a retirement pension. Not unreasonably, therefore, the ambivalent nature of the claimant's position in the vacation cases has led to vigorous judicial disagreement as to whether benefits for unemployment should be paid. As in the retirement cases (which actually grew out of the vacation cases), the disagreement centers in major part about the proper scope of a union's agency—i.e., the controversy revolves about the agency theory.

The cases conveniently may be divided into three groups:

(a) those denying benefits on the basis of the agency theory;

(b) those which either grant or deny benefits by distinguishing between the situation where a vacation layoff is at the employer's option and the situation where a vacation layoff is required by collective bargaining agreement; and

(c) those awarding benefits and repudiating the agency theory.

2. *Cases Denying Benefits on the Agency Theory.*

The question of the benefit rights of persons experiencing unpaid layoffs for vacation purposes first arose in an acute form in a

107. *See supra* note 24 and *infra* note 128.

Washington case, In re *Buffelen Lumber & Mfg. Co.*,[108] decided in 1948. A union and employer entered into an agreement that employees with a year of service were entitled to an annual one-week vacation with pay and those with five years were entitled to two paid vacation weeks. The claimants did not qualify for vacation pay under this agreement and accordingly claimed benefits when the employer's plant closed for the vacation period. Treating the case as one of first impression, the Supreme Court of Washington denied benefits on the theory the unemployment of the claimants was voluntary. The Court reasoned that since the union acted as the agent of the claimants in agreeing to the contract regarding vacations the unemployment produced by the operation of the agreement was consented to by the employees. Having accepted the benefits of employment under the contract the claimants were in no position to repudiate the liabilities. "In effect," said the Court, "the employees secured a leave of absence for the period of time the mill was shut down."[109]

This was a narrowly-based holding devoted almost exclusively to an application of the agency theory. It may be noted that the opinion clearly treated voluntary unemployment alone as an adequate basis for denial of benefits, without discussing the application of the "good cause" provision in the State's law. Nor did the opinion attempt a genuinely detailed analysis of the scope of a union's authority to consent to uncompensated unemployment on behalf of its membership. The Court evidently deemed the existence of such authority to be nearly self-evident and supported its conclusion with no more than citation of a single Washington case[110] involving claimant disqualification in connection with a labor dispute.

In subsequent cases a number of additional issues as to the benefit entitlement of claimants in such situations were developed. Thus in *Maatey v. Board of Review*,[111] decided by a Pennsylvania Superior Court within a few weeks of the *Buffelen* case, it was argued that such claimants were not actually unemployed. Despite the admitted fact that they appeared to fall within the definition of "unemployment" in the statute, the Court suggested the view that such claimants were not entitled to benefits because the total

108. 32 Wash.2d 205, 201 P.2d 194 (1948).

109. 201 P.2d at 197. Similar statements appear in a number of cases reaching the same result. *See*, Mattey v. Unemployment Compensation Board of Review, 164 Pa. Super. 36, 63 A.2d 429, 431 (1949) ("The effect of the agreement is the same as if claimant had himself requested time off for a vacation, or other personal reason, and it had been granted by his employer."); Jackson v. Minneapolis-Honeywell Regulator Co., 234 Minn. 52, 47 N.W.2d 449, 452 (1951) ("But those specifications indication qualification for benefits would also have been met if Jackson had asked for a two-week layoff and the company had granted his request.")

110. Appeal of Employees of Polson Lumber & Shingle Mills, 19 Wash.2d 467, 143 P.2d 316 (1943).

111. 164 Pa.Super. 36, 63 A.2d 429 (1949).

legal relation between employer and employee had not been terminated or suspended by the vacation. Unpaid though it was, the vacation was merely "a period of freedom from duty but not the end of employment. . . ."[112] Moreover it did not appear to the Pennsylvania Court that the claimant, who had delayed filing his claim until near the end of the vacation period, had been genuinely available for work during the period of his layoff. These considerations were deemed to reinforce the basic conclusion that in any event the claimant was responsible for his own predicament since he had, in law, consented to the unpaid vacation layoff through the agency of his union. The *Mattey* and *Buffelen* cases, between them, presented the case for denial of benefits at its most forceful posture. They proved widely influential, were followed by a substantial number of courts, and for several years it would have been accurate to describe them as representing the prevailing judicial viewpoint on the problem.[113]

3. *Cases Distinguishing Between Layoffs at Employer's Option and Layoffs Pursuant to Union Contract.*

By degrees, however, a further refinement of theory necessarily occurred. In not every case where disqualification was asserted were the employers able to establish the requisite consent on the part of the employee's agent. Thus where an agreement did not provide for vacations at all, Michigan held that an unpaid layoff for vacation purposes resulting from an employer's temporary shutdown of a plant resulted in compensable unemployment.[114] A slightly more complex problem was encountered in a pair of cases from Indiana and Connecticut construing identical language in a standard-form collective bargaining agreement.[115] The contract terms in both cases provided that if the employer temporarily shut down any department in its plant during the summer months it had the option to designate the period of temporary shutdown as a vacation period for any employees of the closed department

112. 63 A.2d at 431.

113. *See, e.g.*, Adams v. Review Board, 237 Ind. 63, 143 N.E.2d 564 (1957); Moen v. Director of Employment Security, 324 Mass. 246, 85 N.E.2d 779 (1949); I.M. Dach Underwear Co. v. Michigan Employment Security Commission, 347 Mich. 465, 80 N.W.2d 193 (1956); Johnson v. La Grange Shoe Corp., 244 Minn. 354, 70 N.W.2d 335 (1955); Jackson v. Minneapolis-Honeywell Regulator Co., 234 Minn. 52, 47 N.W.2d 449 (1951); Naylor v. Shuron Optical Co., 281 App.Div. 721, 117 N.Y.S.2d 775 (1952), *aff'd*, 306 N.Y. 794, 118 118 N.E.2d 816 (1954); Glover v. Simmons Co., 17 N.J. 313, 111 A.2d 404 (1955). Mississippi State Employment Security Commission v. Jackson, 237 Miss. 897, 116 So.2d 830 (1960); Philco Corp. v. Board of Review, 175 Pa. Super. 402, 105 A.2d 176 (1953). Note that many of these cases are now overruled or non-authoritative by reason of corrective legislation.

114. Hubbard v. Michigan Unemployment Compensation Commission, 328 Mich. 444, 44 N.W.2d 4 (1950).

115. American Bridge Co. v. Review Board, 121 Ind.App. 576, 98 N.E.2d 193 (1951); Schettino v. Administrator, 138 Conn. 253, 83 A.2d 217 (1951).

who were "eligible for vacations."[116] Rejecting Massachusetts precedent giving the same language a different reading,[117] both the Connecticut and Indiana courts held that the contract language gave the employer authority to designate the period of shutdown as a vacation period only in the case of those employees "eligible for vacation"—i.e., entitled to vacation pay.[118] Hence when the plants closed down, employees not eligible for vacation pay were eligible for unemployment insurance payments for the period of their layoff.

The holdings in these cases, however, involve a significant ambiguity. These decisions answer only the question whether unemployment is compensable when produced by a vacation layoff to which a union has *not* consented on behalf of a claimant. The cases do not in terms answer the more fundamental question whether the worker whose "vacation" is in fact an unpaid layoff is entitled to compensation where the union's contract with the employer *can* be read as purporting to grant consent.[119] Accordingly, this line of cases cannot be considered squarely contra to the holdings exemplified by *Buffelen* and *Mattey*. They turn instead on narrow variations in the facts presented. Possibly the clearest illustration of this may be gleaned from a dissenting opinion in a Michigan case which points out acutely that the vacation cases involve not one type of fact situation but two:

> First, those in which an employer orders a shutdown for his own benefit, and at his own option, for inventory, retooling, in accordance with his usual custom, or other matter of his own choice. In this situation, since there is to be a shutdown anyway, why not have the vacations taken then, also? . . .In contrast to this situation we have the second . . . that in which a plant-wide shutdown is agreed upon between employer and union for the purpose of granting vacations to all alike, whether paid or payless.[120]

The point that this approach to the problem is not inconsistent with a denial of benefits on the basis of the agency theory is graphically illustrated by an Arizona decision which draws precisely the distinction above outlined—i.e., "between shutdowns forced by virtue

116. The text of the provision set forth in the Indiana opinion was as follows: "It is understood and agreed that a period of temporary shutdown in any department for any reason between May 1 and October 1, unless other periods are mutually agreed upon, may be designated [by the employer] as comprising the vacation period for any employees of the department who are eligible for vacations." The Connecticut provision varied only as to dates.

117. Moen v. Director of Employment Security, 324 Mass. 246, 85 N.E.2d 779 (1949).

118. This is particularly clear in Schettino v. Administrator, the Connecticut case cited above in note 115, where the claimant was held ineligible for a week in which he received vacation pay but was compensated for a week in which he did not.

119. A concurring opinion in American Bridge Co. v. Review Board, 121 Ind. App. 576, 98 N.E.2d 193 (1951), argued that this question was properly before the court and should have been resolved in favor of the claimant.

120. Smith, J., dissenting in I.M. Dach Underwear Co. v. Michigan Employment Security Commission, 347 Mich. 465, 80 N.W.2d 193, 203-05 (1956).

of the terms of the contract and those which are wholly at the employer's option" [121] —and denies compensation for a shutdown provided for by a union contract while implying that shutdowns at the employer's option produce compensable unemployment. This case is consistent in its basic theory with the Connecticut and Indiana decisions above discussed and yet denies compensation where the other decisions grant it.[122]

4. *Cases Rejecting the Agency Theory and Granting Benefits.*

The cases applying the agency theory to deny benefits to claimants on unpaid layoffs for "vacation" purposes soon were followed by a vigorous reaction. Although the merits of the point of legal principle involved would have warranted such an outcome in any case, it seems only fair to say that the subsequent general rejection of this line of authority owed much to corrective legislation. That such legislation should be enacted was not particularly surprising, since the courts which followed the agency theory were in one important respect asserting a difficult position. Their holdings were premised on the view that the claimants had given consent to periods of voluntary unemployment. Unfortunately the claimants (who in contrast to the claimants in the retirement cases remained long-term members of the labor force with a continuing interest in labor-management relations) vehemently denied it.[123] Accordingly, as early as 1949 Massachusetts enacted legislation to reverse a ruling based on the agency theory;[124] in 1951 the Washington legislature amended

121. Beaman v. Bench, 75 Ariz. 345, 256 P.2d 721, 724 (1953). *See also,* Thornbrough v. Schlenker, 228 Ark. 1012, 311 S.W.2d 753 (1958).

122. As Justice Smith pointed out in I.M. Dach Underwear Co. v. Michigan Employment Security Commission, 347 Mich. 465, 80 N.W.2d 193, 203 (1956): "Many of these cases, although reaching contrary results, are perfectly consistent in theory. As a matter of fact, careful courts in certain of the states, (*e.g.,* Pennsylvania) have held both ways. They correctly regard their decisions as consistent, not conflicting." Justice Smith presumably had in mind the contrast between the *Mattey* case, *supra,* which denied benefits, and Golubski v. Board of Review, 171 Pa. Super. 634, 91 A.2d 315 (1952), awarding benefits on the ground the claimants had never consented to an unpaid layoff for vacation purposes. Note, however, that analogy with the retirement cases indicates that to predicate differing results on the basis of the distinction is comparable to the distinction between mandatory retirement at an employer's option and manatory retirement required by a union contract. In the cases involving mandatory retirement this distinction does not produce a difference in result, regardless of whether the jurisdiction grants or denies benefits. See the text to notes 40 and 74 *supra.* Note also that an individual who accepts or retains employment knowing that his employer reserves the right to designate vacation periods at will may be deemed to have "acquiesced" in the employer's right and made it part of his contract of employment if one accepts the reasoning used in Stream v. Continental Machines, *supra* note 41.

123. "Here is a woman who wants work, who needs work, and who has had her job taken from her against her will. When she applies for compensation, relying on the statute enacted for her economic security, she is told that what really happened to her was that she asked for a vacation and got it. The result warrants searching inquiry. Whenever the law says that what a person did, legally, is the opposite of what he did actually, that when he shouted No, what he really (legally) did was to whisper Yes, then explanation is due our people that they may guard against the evils of clear speech and forthright expression." Smith, J., dissenting in I.M. Dach Underwear Co. v. Michigan Employment Security Commission, 347 Mich. 465, 80 N.W.2d 193, 201 (1956).

124. MASS. ANN. LAWS c. 151A, §1(r)(2)(last sentence), enacted in 1949.

its law to overturn the holding of the *Buffelen* case;[125] in 1955 the Pennsylvania legislators set aside the rule of the *Mattey* case;[126] and similar legislative reversals occurred in New York and Michigan.[127]

Moreover, doubt began to be manifested in judicial opinions, as well. Even those courts which had followed the lead of the *Mattey* case, for example, often proved unwilling to agree with the suggestion in that opinion that the claimants in the vacation cases were not actually "unemployed" because of the persistence of some incidents of the employment relation during the layoff period.[128] It was all too clear that the statutory definitions of "unemployment" appearing in the various State laws were intended to preclude this precise type of common-law reasoning. Similarly, the argument that the claimants in the vacation cases were as a matter of law unavailable for work began to appear less persuasive as experience with respect to the problem was acquired. Availability for work is a particularly individualized matter with respect to which few broad generalizations are invariably supportable; it turns fundamentally on subjective attitudes toward acceptance of employment as manifested by conduct and the degree of an individual's factual attachment to the labor force.[129] In the vacation cases it was presently being pointed out that the claimants quite obviously would have been at work in their regular jobs had the employer's plant remained open to employ them. Since their unemployment was not due to any unwillingness to accept work or to any withdrawal on their part from the labor force they were at least available for their regular jobs and accordingly fell within the broad group of workers the employment security system was designed to protect.[130] It thus proved possible to answer arguments involving such collateral issues as availability and "unemployment" status.

In 1957, accordingly, New Jersey met the agency theory squarely

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125. WASH. LAWS 1951, c. 265, §12.

126. Susquehanna Collieries Division v. Bd. of Review, 404 Pa. 527, 172 A.2d 807, 809 (1961).

127. *See* N.Y. UNEMP. INS. LAW §591(3)(d), legislatively reversing Naylor v. Shuron Optical Co., 281 App.Div. 721, 117 N.Y.S.2d 775 (1952), *aff'd* 306 N.Y. 794, 118 N.E.2d 816 (1954); Employment Security Commission v. Vulcan Forging Co., 375 Mich. 374, 134 N.W.2d 749 (1965).

128. Thus, although Minnesota denied benefits to claimants experiencing unpaid "vacations," the Court had no difficulty with this particular issue of statutory construction. "During the two weeks of the vacation shutdown, Jackson performed no services and received no wages. The wording of the act and the existing facts place him squarely within the class defined by the act during those two weeks." Jackson v. Minneapolis-Honeywell Regulator Co., 234 Minn. 52, N.W.2d 449, 451 (1951).

129. For general discussion of the availability requirement *see* Freeman, *Able to Work and Available for Work*, 55 YALE L.J. 123 (1945).

130. Golubski v. Board of Review, 171 Pa. Super. 634, 91 A.2d 315 (1952); Schettino v. Administrator, 138 Conn. 253, 83 A.2d 217 (1951). Conversely, where workers acting under a union contract suspended work for a two-week "memorial period" although the employers involved in the stoppage kept their establishments open and had work available, it was properly held that the workers were "unavailable" during the period of the stoppage. Bedwell v. Review Board, 119 Ind. App. 607, 88 N.E.2d 916 (1949).

and rejected it in favor of applying the factual matrix rule to the vacation cases. The New Jersey Court had in 1955 decided *Glover v. Simmons*,[131] issuing a rather cloudy opinion based on the "public policy" section of the State's employment security law[132] in which it held that a claimant was voluntarily unemployed and hence ineligible for benefits during a plant shutdown required by a union contract under which he was ineligible for vacation pay. In 1957 in a pair of companion cases, *Watson v. United States Rubber Co.*[133] and *Teichler v. Curtiss-Wright Corporation*,[134] the Court overruled *Glover v. Simmons* and reversed its prior position.

> The eligibility and disqualification provisions [said the Court] contain nothing which would suggest that advance consent to a later shutdown is a ground of ineligibility or disqualification. . . . Mr. Watson's unemployment during the shutdown could hardly be said to have been voluntary, for he had no meaningful freedom of choice; he could not have rejected the tendered employment with the Rubber Company without rendering himself ineligible or disqualified for having refused suitable work, and when the shutdown did occur he was given no alternative but to accept his layoff or 'vacation' without pay. . . . Under the clear policy expressed in R.S. 43:21-15, N.J.S.A., his acceptance of employment with knowledge of the prospective layoff or 'vacation' without pay could in no event be viewed as a lawful waiver of his right to unemployment benefits under the law.[135]

This is, it is submitted, the simplest and most accurate approach to the problem. It is consistent with the view that entitlement to benefits under a social insurance program ought not to depend on the sometimes-dubious language of private agreements. It avoids the legal fiction inherent in telling claimants they have given legal agreement to periods of unemployment to which in fact they have not given consent. Equally, this approach simplifies the issues such cases present to the courts, and the administrative personnel who must adjudicate the bulk of the claims, by rendering irrelevant evidence as to contract negotiations at the *inception* of the employment relation and allowing the hearing officers to concentrate on the far more meaningful evidence as to the facts at the time of *termination*. In general it is believed to be the most widely prevalent view.[136]

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131. 17 N.J. 313, 111 A.2d 404 (1955).
132. As pointed out in note 47 *supra*, such statutes are not intended to regulate issues of eligibility or disqualification but to provide a basis for a holding that the statutes are constitutional.
133. 24 N.J. 598, 133 A.2d 328 (1957).
134. 24 N.J. 585, 133 A.2d 320 (1957).
135. Watson v. United States Rubber Co., 24 N.J. 598, 133 A.2d 328, 330 (1957).
136. Harmon v. Laney, 239 Ark. 603, 393 S.W.2d (1965); Employment Security Commission v. Vulcan Forging Co., 375 Mich. 374, 134 N.W.2d 749 (1965); Susquehanna

VI. BUMPING

The "bumping" cases arise from the fact that it is common to find in collective bargaining agreements provisions under which employees with high seniority may claim jobs held by employees with lower seniority in order to avert unemployment which otherwise would affect the high-seniority workers. When a job is claimed by a high-seniority worker pursuant to such a contract provision, the low-seniority worker ousted from employment is said to have been "bumped."

Bumping may occur either on an intra-plant or inter-employer basis. Intra-plant bumping occurs when a single collective bargaining agreement covers a single plant or employing unit and confers the right to "bump" only on workers employed by a single employer. To illustrate, if a plant has 1000 employees and 50 must be laid off for lack of work, a "bumping" provision in a union contract will ordinarily operate to require the separation of the 50 employees with the lowest plant seniority. Accordingly, if the reduction in force in such a case is to be achieved by the closing of a single department in the plant, the resulting unemployment will not necessarily be experienced by those individuals employed in the particular department which the employer has elected to close. Individuals in the shut-down department who possess sufficient seniority may claim jobs from workers in other departments and thus "bump" them from employment.[137]

Inter-employer bumping occurs when a single union represents all employees in a particular occupation and locality and has agreements with all employers in the locality requiring them to employ only union members. In such situations the union's contracts with the employers, or an internal union rule or regulation, may provide that high-seniority members of the union may claim jobs from low-seniority members of the union in times of job scarcity. Where inter-employer bumping exists, a high-seniority worker separated from the employ of employer A may bump a low-seniority worker employed by employer B and take his job.

In "bumping" situations the current trend of judicial authority tends to treat the "bumped" employee as having voluntarily left employment, and hence as ineligible for unemployment compensation.[138] The argument is that the worker's separation is the product

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Collieries Division v. Board of Review, 404 Pa. 527, 172 A.2d 807 (1961); Huey v. Texas Employment Commission, 332 S.W.2d 366 (Tex. Civ. App. 1959); Note, 49 CALIF. L. REV. 580, 582 (1961); Annotations 90 A.L.R.2d 835, 842 (1963); 30 A.L.R.2d 366, 367 (1963).

137. A collective-bargaining agreement may, of course, provide for seniority only on a department-by-department basis. Since "bumping" is essentially a matter of contract, numerous potential variations exist with respect to "bumping" situations.

138. Blakeslee v. Administrator, 25 Conn. Sup. 290, 203 A.2d 119 (1964) (turning on the issue of availability for work); O'Donnell v. Unemployment Compensation Commission,

of a clause in the union contract to which he voluntarily assented; if the union had not insisted on a "bumping" clause in the contract, the separation would not have occurred.[139] Only a single Pennsylvania case thus far appears to have analyzed the situation sufficiently to reach the conclusion that if the particular claimant before the Court had not been separated another worker would have been, and that accordingly it is not the bumping provision but the reduction in force which ought to be treated as the true cause of the claimant's unemployment.[140]

Commentators on the "bumping" cases have almost invariably deprecated their result,[141] and it may be suggested that the present trend of the case-law stems in part from the fact that most of the reported decisions have concerned only inter-employer bumping involving one or two claimants employed in small business establishments.[142] In these situations the true causation of the worker's unemployment is not readily apparent. Where intra-plant bumping among employees in large establishments is present, the problem of causation has not proved so difficult.[143] Since the case for compensating such claimants is strong, it may be anticipated that future cases involving "bumping" will evolve along much the same line as the vacation cases—i.e., in the direction of greater liberality toward the claimants. It may be noted that there is some Federal legislation of relevance in connection with this problem. In enacting the Trade Expansion Act of 1962,[144] which establishes a program of assistance for workers adversely affected by international trade concessions operating in part by reference to State-law criteria of eligibility for unemployment compensation,[145] Congress wrote into the statute a definition of "adversely affected worker" intended to provide that where a trade concession causes an adverse effect

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56 Del. 162, 166 A.2d 720 (1961); Anson v. Fisher Amusement Corp., 254 Minn. 93, 93 N.W.2d 815 (1958), noted 34 NOTRE DAME LAW. 466 (1959) (the leading case); Dubinsky Bros. v. Industrial Commission, 373 S.W.2d 9 (Mo. 1963); Kilgore v. Industrial Commission, 337 S.W.2d 91 (Mo.App. 1960).

139. "We conclude . . . that, when a nonmember of a union local knowingly accepts — or continues—employment with an employer who is subject to the seniority provisions of a collective-bargaining agreement with the union local, he thereby ratifies and accepts the terms of the contract, and, subject to those terms, he constitutes the union his bargaining agent, and its acts are his acts; and when, upon request of the local's business agent, he resigns his employment so that a member of the local may claim his job, his act of resignation is voluntary and without good cause attributable to the employer . . ." Anson v. Fisher Amusement Corp., 254 Minn. 93, 93 N.W.2d 815, 821 (1958).

140. Westinghouse Electric Corp. v. Board of Review, 182 Pa. Super. 491, 128 A.2d 184 (1956).

141. *See* 34 NOTRE DAME LAW. 466 (1959); Annotation, 90 A.L.R.2d 835, 842-43 (1963).

142. Three of the five cases cited in note 138 involved motion picture projectionists whose employment was under exceptionally tight union control.

143. Thus in Westinghouse Electric Corp. v. Board of Review, 182 Pa. Super. 491, 128 A.2d 184 (1956), where a large plant was involved, the Court analyzed the problem at some length.

144. 76 STAT. 872 (1962), as amended; 19 U.S.C. §1901 *et.seq.* (1964).

145. *See* § 325 of the Trade Expansion Act of 1962, 76 STAT. 894 (1962), 19 U.S.C. §1978(2).

on employment in a plant a worker ousted from employment in a division of the plant other than the division directly affected falls within the group of workers the statute was intended to protect.[146] This is a knowledgeable treatment of the "bumping" problem and it is submitted a similar result should be reached on principle under State unemployment compensation laws.

VII. SHARE-THE-WORK PLANS

A relatively new issue concerns the effect on worker entitlement to benefits of so-called "share-the-work" plans. In *Pacific Maritime Association v. California Unemployment Insurance Appeals Board,*[147] it was held, notwithstanding arguments predicated on the agency theory, that seamen were eligible for benefits where a collective bargaining agreement between their union and an employer's association required, in an effort to distribute the available work as equitably as possible among the union membership, that they be separated from employment either after completing 60 days on board ship or one voyage, whichever lasted longer. The seamen thus separated from employment were required to register at their union hiring halls and were given renewed employment on other vessels, as such employment became available, on a rotational basis. The Court concluded that since the unemployment produced by this arrangement was involuntary from the standpoint of the individual worker at the time of job termination there was no basis for application of California's "voluntary quit" disqualification. The opinion is a crisp and knowledgeable application of the factual matrix rule.

In *Department of Labor and Industry v. Board of Review*[148] the Supreme Court of Pennsylvania was almost simultaneously reaching an opposite conclusion. The employer in Pennsylvania operated a zipper factory. It proposed to the union representing its employees a contractual arrangement whereby high-seniority workers engaged in operating chain machines would be kept at work from January of each year until they had earned wages of $5,000. When a worker had earned $5,000, usually by October, the agreement required his layoff and the employment in his place of a younger worker with lower seniority for the remainder of the year. In January of the following year the high-seniority workers again would be returned to their jobs until they had again earned $5,000, at which time the low-seniority workers again would replace them. Notwithstanding the fact that Pennsylvania decisions were highly

146. *See* § 325 of the Trade Expansion Act of 1962, 76 STAT. 894 (1962); 19 U.S.C. § 1944 (1964).
147. 236 Cal. App.2d 325, 45 Cal. Rptr. 892 (1965).
148. 418 Pa. 471, 211 A.2d 463 (1965), *aff'g* 202 Pa. Super. 336, A.2d 310 (1964).

influential in establishing the factual matrix rule in the first instance,[149] and the additional fact that both the employer and union argued vigorously that no voluntary leaving was intended or contemplated, the Court denied benefits to the high-seniority workers when their separation from employment occurred and they claimed benefits. The majority of the Court rather plainly felt that the employer's fundamental purpose was to take advantage of the employment security program by using it as a device to supplement its own wage payments to its employees.[150] Thus the employer was, in the view of the majority, using the system as a subsidy.[151]

Which of the two decisions will ultimately win general acceptance is difficult to predict. It is, of course, possible to formally reconcile them by suggesting that in one case the California court found the scheme before it to be a good-faith device for spreading available work as widely as possible and in the other the Pennsylvania court concluded that what was present was no more than a raid on a public fund. Yet such an approach may possess oversimplified aspects. Pennsylvania's decision was reached by a badly split court which produced a pair of dissenting opinions sharply questioning the majority's conclusion on the ground that the theory it embodied was unsound and without support in the record. There would have been, argued the dissenters, unemployment among the workers at the plant involved in any case. The agreement between the union and the employer did not create the unemployment in question but merely attempted to regulate and control it as fairly as possible.[152] Moreover, an employer in such a position could achieve a precisely similar result without bothering to formalize its plan in a collective bargaining agreement. Layoffs *not* required by the terms of a union contract would, on the majority's reasoning, clearly create compensable unemployment. "Under the rule announced by the Majority," argued Justice Musmanno, "the appalling situation results that the worker who is not a member of a labor union may

149. *See supra* note 70.

150. Thus footnote 12 in the majority opinion stated that: "Obviously what was here planned was yearly pay of $5,000 plus whatever unemployment compensation sums could be secured during the period October 1 to December 31 of each year." And footnote 15 of the majority opinion asserted that the unemployment compensation program "was not created to subsidize such programs to the detriment of eligible beneficiaries and contributing employers."

151. Footnote 16 of the Court's opinion stated: "The record shows that [the employer involved in the case] contributed at the maximum 4% rate during the years 1960, 1961, and 1962, and that from 1939 through 1962 its total contributions amounted to $1,822,422 while the total benefits paid to its employees from the fund amounted to $3,230,752."

152. " 'Spreading the work' in no way *creates* unemployment. Viewed in terms of unemployed man hours it neither increased nor decreased unemployment. All it does is to allow more persons to work over a period of time. Rather than having 50 men continuously employed and 50 men continuously unemployed all 100 men work part of the time and are unemployed part of the time." Cohen, J., dissenting in Department of Labor and Industry v. Board of Review, *supra*, 211 A.2d at 479.

receive unemployment benefits which would be denied to a labor union member."[153] Such commentary as the case has thus far provoked has been to much the same effect. "If there was enough work in that industry available for all of the members of the available labor force, the device would not be necessary."[154] These last points seem sufficiently cogent to warrant a substantial reservation as to the soundness of the Pennsylvania outcome. Note that the spread of the guaranteed annual wage may well create additional situations of this type.

VIII. CONCLUSION

This study commenced by outlining three issues characteristically encountered in the constructive voluntary quit cases—the issues of volition, cause, and the proper scope of the anti-waiver clause which appears in every State's unemployment insurance law.[155] The apparent simplicity of these issues, as the preceding analysis may have indicated, ought not to be allowed to disguise their true significance; they touch innumerable aspects of the employment relation, and have roots deep in historic battles of American law.[156]

As originally conceived, the statutes pertaining to voluntary leaving of employment embodied an intentional effort to avoid narrow concepts of volitional behavior derived from common-law notions of modern industrial society.[157] This is, it may be suggested, the reason why the "good cause" proviso in such statutes exists in deliberate conjunction with a reference to voluntary conduct. The concurrence of the two requirements was meant to pry the concept of volition free from the grasp of theories relating to undue influence or duress by requiring consideration of a claimant's total situation.[158] When this is perceived, the true thrust of such statutes becomes apparent. They were initially intended to authorize denial of benefits to an unemployed individual only if a consideration of all the factors—social, economic, and personal—bearing on his con-

153. 211 A.2d at 474.

154. Silverstone, *Share-the-Work Unemployment is Not Voluntary Unemployment,* 1965 EMPLOYMENT SECURITY LEGAL AFFAIRS CONFERENCE REPORT 11, 27 (Regions I, VI and VII, El Paso, Texas, 1965).

155. *See* text to notes 14 and 15 *supra.*

156. *See supra* note 17.

157. *Compare* the rejection of common-law terminology discussed in Asia, *Employment Relation: Common-Law Concept and Legislative Definition,* 55 YALE L.J. 76 (1945).

158. "What is 'good cause' must reflect the underlying purpose of the act to relieve against the distress of involuntary unemployment. The seeming paradox of allowing benefits to an individual whose unemployment is of his own volition disappears when the context of the words is viewed in that light. The legislature contemplated that when an individual voluntarily leaves a job under the pressure of circumstances which may reasonably be viewed as having compelled him to do so, the termination of his employment is involuntary for purposes of the act." Krauss v. A. & M. Karagheusian, Inc., 13 N.J. 447, 100 A.2d 277, 286 (1953).

duct at the time of a separation from employment indicated that the individual possessed a genuine freedom to choose between realistically available alternatives and in the exercise of freedom thus defined elected to become unemployed as a matter of deliberate personal choice unsupported by any substantial reason. It has been pointed out earlier in this study that this concept has been realized only imperfectly, and that in many States there has been a conscious decision to restrict the operation of the statute by limiting the scope of the "good cause" provision.[159] Even in a State possessing such a restricted variation of the statute, however, it is submitted that the agency theory provides no basis for a denial of benefifts in situations of the type under discussion here. The separations involved in no instance result from the worker's own deliberate and unhampered choice and are, to the contrary, invariably produced by employer rules or collective bargaining agreements. Thus they are not produced by considerations personal to the employee, their cause is to be found in the conditions of his employment and under the statutes as now written it is submitted they should not result in disqualification.

159. *Supra* note 1.