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NOTES AND COMMENTS

by a judge normally will not be adequate, because he has neither the
strong interest nor the full knowledge that is required for effective cross
examination. A verdict is at stake. It is a substantial right, born
of evidence, that has been subjected to a system of procedural checks and
balances, and its merit deliberated and judged by twelve men. The
elaborate process of the law which produced it should provide the basic
right of cross examination to protect it.

New trials are not favored in the eyes of the law and should not be
granted in an arbitrary manner. It is felt that the methods used in the
Williams case were not based on logic and reason and should have been
considered an abuse of discretion. This case results in giving the trial
court an unusual amount of control over the regulation of a hearing for
a new trial. Perhaps the court feels that it is a wiser policy to give the
trial court a wide latitude in such hearing and that their expressed dis-
approval of the proceedings in the Williams case would be enough to
prevent its recurrence. However, it would seem that until a firmer stand
has been taken on the issues involved this case establishes a dangerous
precedent.

JOHN MARK TAPLEY.

Unemployment Insurance—Availability for Suitable Work—Effect of
Claimant’s Refusal to Work on Sabbath

Claimant, a textile worker of thirteen years’ experience, became inter-
ested in the Seventh Day Adventist Church, and, as a result, became
convinced that she should not work on the Sabbath, which, in the Seventh
Day Adventist Church, is from sundown Friday until sundown Saturday.
On at least one Sabbath, she was excused from work by her employer,
but on another Friday, she stayed away from her employment without
permission and was discharged for such absence. Within a week she
filed a claim for benefits under the Employment Security Act. During
her period of unemployment, she sought work in other mills in the area
but restricted her availability to the first shift, the only shift that would
not interfere with her Sabbath, and freely admitted that she would not
consider employment which would require her to work on her Sabbath.

The Employment Security Commission held that the claimant was
not disqualified from receiving unemployment benefits by the circum-
stances of her discharge, that she was able to work and that she had made

v. St. Louis Public Service Co., 361 Mo. 402, 406, 235 S. W. 2d 347, 350 (1950); Southern Arizona Freight Lines v. Jackson, 48 Ariz. 509, 63 P. 2d 193 (1936); Re
Murray’s Estate, 238 Iowa 112, 26 N. W. 2d 58 (1947); Anno., 23 A. L. R. 2d 846
(1952).

25 5 Wigmore, Evidence § 1368 n. 1 (3d ed. 1940).
Sutton, 207 N. C. 422, 177 S. E. 420 (1934).
an active and reasonable search for work; but that, by restricting her availability to first shift employment only, she had "so limited the circumstances under which she would accept work as substantially to eliminate herself from consideration for potential job opportunities. . . ." The Commission also found that 95% of the job openings in the area were for the third shift, that textile mills normally run from Monday morning through Friday night, that new employees are normally given second and third shift work and promoted to first shift employment. Thus, the Commission held her ineligible for benefits, and this decision was affirmed by the Superior Court of Rowan County. On appeal to the North Carolina Supreme Court, held, reversed and remanded. The court held that to interpret the statutes as the Commission had done would require a claimant, in order to be eligible for benefits, to be available for work "at any and all times, night and day, Sunday and week days alike," and would also render G. S. 96-13 and G. S. 96-14 inconsistent. The court concluded that the language of G. S. 96-13 does not sustain the strict interpretation applied by the Commission. The words, "available for work," as used in G. S. 96-13 mean "available for suitable work" in the same sense as the words "suitable work" are used in the cognate statute G. S. 96-14. The court held that "work which requires one to violate his moral standards is not ordinarily suitable work within the meaning of the statute," and that the claimant, by refusing to consider employment which would require work on her Sabbath, did not render herself unavailable for work within the meaning of the statute since such work would have been unsuitable for her.

This seems to be the first occasion on which the North Carolina Supreme Court has passed, in definite terms, on the scope and meaning of the term "available for work"—one of the requisites for eligibility for benefits under the Employment Security Act. It is certainly a case of first impression in North Carolina on a claimant's eligibility for benefits where he has, for religious reasons, placed a restriction on his availability.

A claimant's religious beliefs might affect his eligibility for unemployment benefits in several respects. These beliefs might influence the determination where the problem under consideration would be (1) voluntary leaving, where it would enter into the determination of the effect of claimant's religious beliefs on good cause, (2) refusal of work, where the religious beliefs would enter into the determination of the "suitability" of the offered work, and, (3) availability for work, where, as in the Miller case, religious beliefs caused the claimant to restrict her availability. This note will be limited primarily to a discussion of these three factors against the background of a brief history of unemployment insurance laws, their purpose and interpretation.

1 In re Miller, 243 N. C. 509, 91 S. E. 2d 438 (1956).
North Carolina passed its Unemployment Compensation Law in 1936; by 1937 all forty-eight states, the District of Columbia, Alaska and Hawaii had passed similar legislation, pursuant to the Federal Social Security Act. In August, 1935, the United States Congress, by an overwhelming bipartisan vote, had passed the Social Security Act, which, by Title III and Title IX, laid the framework for the new program of unemployment insurance. The federal act levied a tax on employers in industry and commerce, and, by means of a "tax offset," made it advantageous for the states to enact state laws which would pay unemployment benefits. This new program of unemployment insurance was designed to be on a federal-state basis, rather than on a federal basis like the Federal Old-Age Insurance program. It contemplated federal-state cooperation, but the federal government was not to make or match payments to individuals. Its grants to the states were for the proper and efficient administration of the state unemployment laws; the entire cost of administering these programs was to be financed by federal funds. In this federal-state system of unemployment insurance the individual states were free to develop the program that was most adapted to the conditions of that state. Since each state legislature enacted its own laws, specifying the workers to be covered, the taxes the employers would pay, the benefits to be paid, the requirements for receipt of benefits, and the organization within the state government to administer the law, the laws vary greatly from state to state. However, the states generally agree as to the purpose of the unemployment insurance laws, which is said to be to provide relief or protection against involuntary unemployment.


4 Ibid.

5 Ibid. "The Federal Act ... provided that when a State had an approved unemployment insurance law, its employers could credit the taxes they paid to the State against 90 per cent of the Federal Tax."


The Declaration of Public Policy of the North Carolina Employment Security Law (which is similar to that of many other states) provides:

"As a guide to the interpretation and application of this chapter, the public policy of this State is declared to be as follows:

"Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

The North Carolina court has said of the purpose of the Law that "From the clear language in which the underlying purposes of the Unemployment Compensation Act are declared... it is to be gathered that the Legislature intended to provide a wide field of usefulness for this agency for social security and for mitigating the economic evils of unemployment."

Although the roots of the unemployment compensation program lie in the Poor Laws which spoke of "sturdy beggars" and "able-bodied laborers," it is not a public assistance program nor a "dole" system where benefits are based upon need, but a type of social insurance, fi-

12 Mohler v. Dept' of Labor, 409 Ill. 79, 97 N. E. 2d 762 (1951); Ackerson v. Western Union Tel. Co., 234 Minn. 271, 48 N. W. 2d 338 (1951); Nordling v. Ford Motor Co., 231 Minn. 68, 42 N. W. 2d 576 (1950).
15 Altman, Availability for Work 2 (1950).
nanced by the persons on whom the workers are economically dependent and providing for benefits payable without proof of need. Since the program was not designed to be a public relief measure nor to "furnish a welcome sedative to those who prefer to drift more comfortably on the tides of indolence," benefits are not payable to all persons who are unemployed. Mere unemployment is not enough. The receipt of benefits is conditioned on compliance with the requirements and conditions prescribed by the various state statutes. Each state has certain requirements designed to limit payments to workers unemployed primarily as a result of economic causes, to delineate the risks which the laws cover, to exclude from benefits those persons who are only casually, temporarily, or occasionally employed, and to provide for the relief from the distress of involuntary unemployment for persons who are ordinarily workers and who would be workers now but for their inability to find jobs.

These requirements are means of ascertaining the claimant's attachment to the labor market: Is the claimant usually a worker? Has he worked for the specified period and earned a qualifying amount of wages in a type of employment covered by the laws? Does he have an honest desire to become re-employed? In short, has the claimant been a worker in the past and is he currently available for work? All states require a claimant to demonstrate his past and present labor force attachment.

Past labor force attachment is uniformly tested by the requirements that a claimant must have worked in insured employment and must have earned a specified amount of wages in such employment. These tests are easily administered since they require only the application of an arbitrary standard to the particular facts.

A claimant's present labor force attachment is more difficult to ascertain. All states attempt to test one's present attachment to the labor force by requiring that he be "able to work and available for work," and twenty-six states, including North Carolina, require, in addition, that he actively search for work. All states also require that a claimant be

16 Riesenfeld, The Place of Unemployment Insurance Within the Patterns and Policies of Protection Against Wage Loss, 8 VAND. L. REV. 218, 223 (1955).
20 COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, op. cit. supra note 8 at 75.
23 ALTSMAN, op. cit. supra note 15 at 2. 24 Id. at 75.
25 COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, op. cit. supra note 8 at 75; N. C. GEN. STAT. § 96-13 (1950). See Freeman, Active Search for Work,
free from any disqualifications under the statute. The "able to work and available for work" tests have been described as positive conditions for the receipt of benefits while the disqualifications are negative expressions of conditions under which benefits may be denied to an otherwise eligible claimant.

Since the normal administrative practice in North Carolina is to consider the disqualifications before passing on the eligibility of a claimant, the various aspects of disqualification which might be influenced by religious beliefs will be here first considered.

**Voluntary Leaving**

All states, with the exception of Montana, provide for disqualification for leaving work without good cause. In twenty states the good cause must be good cause connected with the work, or attributable to the employment, or involving fault on the part of the employer; in the other states good cause is not so restricted. For a voluntary leaving of employment without good cause connected with the employment, North Carolina disqualifies a claimant for a period of from four to twelve weeks.

Two aspects of this provision seem to cause the bulk of the litigation: (a) what constitutes voluntary leaving? and (b) what constitutes good cause?

Some courts say that "voluntary" means a free exercise of the will. Other courts recognize that, although a worker freely decides to leave his job, his decision need not necessarily be voluntary. "The pressure of necessity, of legal duty, or family obligations, or other overpowering circumstances, and his capitulation to them, may transform what is ostensibly voluntary unemployment into involuntary unemployment."

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27 Montana disqualifies for any voluntary leaving—with or without good cause. 8 CCH Unemployment Insurance Laws, op. cit. supra note 8 at 80-84.


Once it has been determined that a claimant has quit his job, and that he has done so voluntarily, then it must be ascertained whether this voluntary leaving of employment was with good cause. It should be noted that the factors constituting good cause will differ in the various jurisdictions in light of the fact that 20 states require the good cause to be connected with the work. It seems that personal reasons would more often constitute "good cause" in those jurisdictions where the criterion is not restricted to causes connected with the employment.

The Attorney General of North Carolina has given an interpretation of good cause for the use of the North Carolina Employment Security Commission:

"In ascertaining whether or not an employee voluntarily left his employment, it would be justifiable to consider the mental processes, constraining or compulsive forces or objective influences, or the freedom or lack of freedom from external compulsion or necessity which led up to the claimant's leaving work, but the Commission should in every case be fully satisfied that, where an employee has left the employment, the reasons for so doing were of an impelling character, which, in the opinion of the Commission, afforded ample and complete justification for the severance of his employment. This would exclude all fictitious or feigned reasons or excuses for failure to continue in the work and would comprehend only such causes as operated directly on the employee which made, in the opinion of the Commission, his continuance in employment impossible, or attended with such circumstances as to make it unreasonably burdensome for him to continue therein."

A Pennsylvania decision contains a discussion of good cause:

"... 'good cause' must be so interpreted that the fundamental purpose of the legislature shall not be destroyed. Even in matters connected with his employment there must be some limit to the legally approved list of good causes for quitting employment. The quitting must be such a cause as would reasonably motivate in a similar situation the average able-bodied and qualified worker to give up his or her employment with its certain wage rewards in order to enter the ranks of the 'compensated unemployed.'...

"An employee may contend that the character and habits of his fellow employees are distasteful to him, he may contend that the work he is engaged in (such as making of war munitions or..."
alcoholic beverages) offends his religious or moral principles, or he may contend that his family objects to his working in a job in which he becomes begrimed with dirt yet these and similar reasons cannot be legally accepted as 'good cause' for leaving one's employment. . . .

“If every reason which appealed to an employee's head or heart is to be accepted as a good cause for his or her voluntarily leaving a job in a locality where there is no other work available, the Unemployment Compensation Law will become in many instances an invitation to a compensated rest.”

The courts are not in agreement as to what constitutes good cause. Would a claimant's religious beliefs constitute good cause for leaving employment? It seems that those states which allow personal factors to constitute good cause would be more likely to allow compensation to a claimant who quit for religious reasons than would those which require that the good cause be "good cause connected with the work or attributable to the employment, or involving fault on the part of the employer."

Apparently there have been few decisions at the state supreme court level which have discussed this particular problem. One court held that a claimant had left work voluntarily without good cause where, in spite of having been told that he could not have time off for a religious holiday because the union contract prevented using a substitute, he nevertheless took the day off.

This question has been before the various state unemployment commissions. Generally, though not always, the commissions have held that a claimant who has left work for religious reasons has voluntarily severed the employment relation but with good cause and hence is not disquali-

38 Claimant held to have had good cause for leaving employment when the leaving was for the following reasons: to take sick wife back to her home community, Hollingsworth Tool Works v. Rev. Bd., 119 Ind. App. 191, 84 N. E. 2d 895 (1949); because employer failed to pay wages promptly, Deshla Broom Factory v. Kinney, 140 Neb. 889, 2 N. W. 2d 332 (1942); because of family obligations, Wolfson v. Unemp. Comp. Bd. of Rev., 167 Pa. Super. 588, 76 A. 2d 498 (1950); to join husband in another locality, In re Teicher, 154 Pa. Super. 250, 35 A. 2d 739 (1944); because minor claimant's parents insisted she accompany them to California, Western Printing and Lithographing Co. v. Industrial Comm., 260 Wis. 124, 50 N. W. 2d 410 (1951).
39 Claimant held not to have had good case for leaving employment when the leaving was for the following reasons: because of dissatisfaction with earnings, Dep't of Ind. Rev. v. Scott, 36 Ala. 184, 53 So. 2d 882 (1951); to get married, Moore v. Bureau of Unemp. Comp., 73 Ohio App. 362, 56 N. E. 2d 520 (1943); to join husband in another city, Stone Mfg. Co. v. S. C. Emp. Sec. Comm., 219 S. C. 239, 64 S. E. 2d 644 (1951); to care for young children, Judson Mills v. S. C. Unemp. Comp. Comm., 204 S. C. 37, 28 S. E. 2d 535 (1944); because of increase in duties, In re Anderson, 39 Wash. 2d 356, 235 P. 2d 303 (1951).
fled. These findings by the commissions seem to be well reasoned. Religious beliefs causing the severance of employment clearly appear to be the kind of "necessitous and compelling" reasons that transform voluntary unemployment into involuntary unemployment, the compensation of which is one of the basic purposes of the unemployment insurance acts.

It is significant to note that although a person may be determined to have voluntarily left his employment with good cause and thus not be disqualified, it is possible that he may still be held ineligible for benefits because of unavailability. The same causes which justify a claimant in leaving employment may also prevent his being held available, depending upon the extent to which his severing of the employment relation indicates an intention on his part to withdraw from the labor market.

Refusal of Work

All states provide for disqualification for refusal of work; the statutes contain diverse provisions concerning the extent of the disqualification, factors to be considered in determining whether work is or is not suitable and whether the claimant has good cause for refusing it, and the provisions under which new work may be refused.

States are required by the provisions of the Federal Unemployment Tax Act, in order to protect labor standards, to include the so-called "Labor Standards Provision" in their Acts. These provisions are standard throughout the states, and North Carolina's provisions would seem to be typical:

"Notwithstanding any other provisions of this chapter, no work shall be deemed suitable and benefits shall not be denied

See, e.g., Ben. Ser. Reports, 3963, N. Y. A (1952); 3759, N. Y. B (1952); 589, Pa. B (1950). This refers to Benefit Series Service, Unemployment Insurance, which is prepared by the Division of Determinations and Hearings, Bureau of Employment Security, U. S. Dept of Labor. This service contains reports of significant administrative and court decisions.


Krauss v. A. & M. Karagheusian, Inc., 13 N. J. 447, 100 A. 2d 277 (1953). An example of this would be where the claimant left his employment because of illness. In cases of this type, his ineligibility for benefits would only extend to the time when the factor causing the unavailability was abated, as contrasted with a predetermined period which would have been the case had he been held disqualified.

Comparison of State Unemployment Insurance Laws, op. cit. supra note 8 at 88. See Menard, Refusal of Suitable Work, 55 Yale L. J. 134 (1945); Machuga, Suitable Work under Unemployment Compensation Statutes, 10 Ohio St. L. J. 232 (1949).

under this chapter to an otherwise eligible individual for refusing to accept new work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (b) if the remuneration, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.47

Most statutes, in addition to the labor standards provisions, contain rather standardized criteria for ascertaining the suitability of the work offered.48 North Carolina's tests are:

"In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence."49

Under the provisions of the statutes in forty-seven jurisdictions, a person is disqualified when he fails without good cause to apply for available and suitable work to which he is directed,50 or to accept suitable work when proffered to him;51 in the four remaining jurisdictions, he may be disqualified for refusal without good cause to accept an offer of employment for which he is reasonably fitted by experience and training.52 Here again the disqualification period and factors in determining disqualification vary from state to state.53

48 New York and Delaware disqualify for refusals of work for which the claimant is reasonably fitted and Montana and Wyoming disqualify for refusal of work for which he is physically and mentally qualified.
49 N. C. Gen. Stat. § 96-14(1) (Supp. 1955). For details in the various states see Table 26, Comparison of State Unemployment Insurance Laws, op. cit. supra note 8 at 90.
53 Comparison of State Unemployment Insurance Laws, op. cit. supra note 8 at 90.
Religious beliefs are given effect under the provision that the commissions are to consider the "risk to claimant's morals." As one writer pointed out: "This element is frequently viewed broadly to give effect to one's moral precepts regardless of their consistency with prevailing ethical standards. . . . In order to make the work unsuitable, however, the connection between the condition pertaining to the job and the claimant's moral principles should be direct and not fanciful or nebulous."54 In the usual case based on refusal of work for religious reasons, the religious views of the claimant are certainly not inconsistent with the current ethical standards of a sizable minority.55 The states uniformly require the claimant to establish the sincerity of his religious beliefs; the element of good faith permeates every area of unemployment compensation, and where claimant has not acted in good faith or in furtherance of a conscientious religious belief, compensation has been denied.56

Recently the Ohio courts had occasion to consider, in the case of Tary v. Board of Review,57 the effect of a claimant's refusal of employment for religious reasons. In this case the claimant was a conscientious member of the Seventh Day Adventist Church. When her job, which had required no Saturday work, terminated, she applied for and received unemployment benefits until she refused a job referral because it would have required her to work half-day on her Sabbath. The administrator thereupon suspended her benefits; the referee affirmed this finding; the board of review disallowed her application for further appeal.

Claimant thereupon appealed to the court of common pleas which reversed the action of the board of review; this was affirmed by the court of appeals, and, on appeal to the Supreme Court of Ohio, was once again affirmed.

The court pointed out that, when Kut v. Albers Super Markets Inc.58 (an earlier Ohio decision involving religious beliefs) was decided, the Act in Ohio required the claimant to be available for work in his usual trade or occupation, or in any other trade or occupation for which he was reasonably fitted. However, by a 1949 amendment, the Act was amended to require claimant to be available for suitable work and to be ineligible for benefits for refusal without good cause to accept an offer of suitable work. It also provided that, in determining whether work was suitable, the degree of risk to claimant's morals was to be considered.

The court noted that this amendment made Ohio's statute in accord

54 Menard, Refusal of Suitable Work, 55 YALE L. J. 134, 144 (1945).
55 Usually cases based on refusal of work for religious reasons involve Orthodox Jews or Seventh Day Adventists since their Sabbath is on Saturday.
57 161 Ohio St. 251, 119 N. E. 2d 56 (1954); See Note, 30 NOTRE DAME LAW. J. 176 (1955); Note, 8 VANDELL. L. REV. 519 (1955).
with those of other states where the provisions had been interpreted to excuse rejection of proffered employment if it would involve a violation of claimant's religious conscience and tend to offend his morals and continued: "It is our interpretation that the General Assembly intended, by the 1949 Amendment, to confer rights based upon bona fide moral convictions. Conscientious religious beliefs constitute an integral part of an individual's morals."8a

It seems probable that courts in other jurisdictions would reach the same result as the Ohio court did in the preceding case since forty-seven jurisdictions require acceptance of suitable work only and generally provide very similar criteria for ascertaining this suitability.50 The commission decisions reflect a well settled rule in most jurisdictions that a conflict with a claimant's religious views renders the work unsuitable,60 although there are decisions to the contrary.61

In the four states which have no suitability requirement it would seem theoretically possible that a claimant could be disqualified for the refusal of a job even if it violated his religious beliefs. There are apparently no state supreme court decisions from these states on this point but the administrative decisions do not indicate that such a result has been reached.62

**Able to Work and Available for Work**

The "able to work" requirement seems to cause no great difficulties. The variations from state to state are minor: some states require a claimant to be "physically able" or "mentally and physically able" but the effect of these variations is negligible.63 This requisite is said to be present to distinguished unemployment insurance from workmen's compensation or health insurance.64 "Generally speaking 'able' refers to mental attitudes and physical capabilities of claimant..."65 Normally this requirement has been leniently interpreted to allow benefits to physically disabled persons unless they are utterly incapable of working.66

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8a See notes 53, 54 and 55 supra and corresponding text.
60 See cases cited in note 60 supra.
63 COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, op. cit. supra note 8 at 75.
66 ALTMAN, op. cit. supra note 15 at 130.
The term "available for work" is not defined in the North Carolina Employment Security Act nor can it be defined in precise, mechanical terms which are applicable to all cases. Consequently, more appeals are taken from determinations by the administrative agencies on availability than from any other type of determination under the state unemployment insurance laws. Although availability depends on the facts and circumstances of each case, it has generally been understood that availability is synonymous with "attachment to the labor market" and that it is designed to test each claimant's attachment thereto.

The statutory requirement that a claimant must be available for work is not ordinarily interpreted to require total availability under all circumstances, in view of the usual stipulation that only suitable work need be accepted and that work may be refused if good cause exists. However, some jurisdictions require that the claimant be exposed to the labor market unequivocally and unrestrictedly, and specify that he may not attach restrictions not customary in his occupation or in the type of employment to which he is suited. Thus, though it is clear that generally a claimant may impose some conditions or limitations on his employability without impairing his availability for work, it is equally clear that he may also restrict his labor to the point of unavailability. Certainly claimants may not impose restrictions which in effect destroy their availability.

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68 Altman, op. cit. supra note 15 at 4.
the market for their services, or show their unwillingness to accept work. The problem is, of course, whether or not the restrictions serve to limit the work which a claimant can accept to such a degree that he is no longer genuinely attached to the labor force. It is essentially a matter of degree to ascertain to what extent a claimant can impose restrictions and on what these restrictions must be based.

The North Carolina Unemployment Compensation Commission’s Statement of Policy No. 6 provides: “Whenever a claimant so limits the circumstances under which he would accept work as substantially to eliminate himself from consideration for potential job opportunities, he shall be considered unavailable for work.”

The courts, as a rule, have dealt harshly and critically with claimants who restrict their employability. One court has said that the laws were never intended to guarantee a claimant employment shackled with each and every condition he might impose. Claimants have been held ineligible where they restricted their availability to certain hours, types of work, working conditions, and wages to mention only a few of the more common restrictions.

Restrictions to a particular shift pose one of the most difficult problems in availability. Women have most often been the claimants who have imposed restrictions on their availability. This is understandable because generally it is the woman who must remain in the home during certain hours or days to perform her domestic duties and therefore it is she who most frequently imposes conditions, particularly restrictions as to time. However, the courts have usually dealt harshly with these claimants. As one court said: “It is held in most jurisdictions which have dealt with the matter (or with analagous problems) that a female worker may not limit her availability to a certain shift or period of time because she must care for her children at other times.”


claimant stands a better chance of being found available when the limitation is to the first shift, although there are decisions to the contrary. The North Carolina Employment Security Commission's decisions reflect the same attitude as that of the courts.

In considering the effect of one's religious beliefs on availability, it should be remembered that the availability requirement is designed to test the claimant's attachment to the labor market. Therefore, if a claimant's religious-inspired restriction does not serve to take him out of the labor market, he should be held available. That was the theory of the Michigan court in the case of Swenson v. Michigan Employment Security Commission. The claimants were Seventh Day Adventists who, prior to their lay-off, had been in the employ of two or more concerns in Battle Creek, where thousands of Seventh Day Adventists were employed on a full time basis. In their applications for unemployment benefits, they indicated that they could not, because of their religious beliefs, work from sundown Friday to sundown Saturday. The Commission held them ineligible for failure to establish their availability. The referee set aside the Commission's determination. The appeal board reversed the referee and the circuit court reversed the appeal board. On appeal to the Supreme Court of Michigan, claimants were found available for work and entitled to benefits under the Act.

The court pointed out that the claimants had neither been offered nor had they refused employment. The court distinguished the Koski case (an earlier Michigan case involving a restriction as to time) on the facts as not involving a religious question and pointed out that the decision in the Tary case had changed Ohio's position from that held in the Kut case.

The court quoted from the circuit court's opinion:

"The law is designed to apply to all situations within its contemplation, and the Commission's attitude, if upheld, would completely exclude thousands of citizens of this state from the benefits of the Act. That could never have been the intent of the legislature; nor should we construe the Act as to accomplish that result. Furthermore, we suggest that the policy of this state in this matter has been definitely established by the legislature in the language of the statute.

88 Altman, op. cit. supra note 15 at 230.
92 See note 57 supra.
To exclude such persons would be arbitrary discrimination when there is not sound foundation, in fact, for the distinctions and the purposes of and theory of the Act are not thereby served. Seventh Day Adventists, as a matter of fact, do not remove themselves from the labor market by stopping work on sundown Friday and not resuming work until sundown Saturday, as is apparent from the reason that employers do hire them.  

Another possible theory of holding a claimant who has placed a limitation on his availability because of religious convictions to be available nonetheless is to decide that a claimant need be available for suitable work only. Once this position is reached the court can then apply the usual criteria for the determination of suitability, one of which is to consider the risk to claimant's morals, and find that the work which would violate a claimant's conscientious religious beliefs is unsuitable for him, with a consequent finding of availability. This was the theory employed by the North Carolina Supreme Court in the Miller case.

Only seven states by statute require that a claimant be available for suitable work only. However, the majority view seems to be, even without such a statutory requirement, that the availability test is met when claimant is available for suitable work which he does not have good cause to refuse—when he is genuinely attached to the labor force. Thus, as a matter of actual practice, many other states require availability for suitable work only. It would appear that by the Miller decision North Carolina now falls into this latter group. G. S. 96-13 contains the standard availability requirement that a claimant, in order to be eligible for benefits, must be available for work, but availability is not defined. The Miller case apparently gave the North Carolina Supreme Court the first occasion for applying the concept of suitability as found in G. S. 96-14, the section on disqualifications, to the interpretation of availability, a requisite for eligibility, as found in G. S. 96-13. However, early commission decisions reflect that it has long been the policy of the commission to require availability for suitable work only.

This decision would seem sound in that it aligns North Carolina with

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94 Arkansas, Colorado, Idaho, Kentucky, North Dakota, Ohio and Pennsylvania.


*1 Ben. Ser. no. 8, 704-N. C. A (1938); 5 Ben. Ser. no. 2, 6963-N. C. A (1942). However in one case in another jurisdiction, the Board of Review was reversed by the court for requiring availability for suitable work only, in absence of express statutory authority for so doing. Brown-Brockmeyer Co. v. Bd. of Rev., Bureau of Unemp. Comp., 70 Ohio App. 370, 45 N. E. 2d 152 (1942).
the majority interpretation of availability, makes this provision more flexible to the needs of the workers, provides for minority claimants’ free exercise of their religious and moral beliefs and affirms the policy of the Commission to require availability for suitable work only.

Had the court not applied the concept of suitability to the meaning of availability, a contrary result would probably have been reached or if the same result had been reached, it would have been an exception to the general interpretations. In considering this case it is important to remember that here, unlike the Swenson case, supra, which the court cited and approved, the claimant had removed herself from 95% of the labor market by being available for first shift work only when the custom in the local labor market was to hire new employees for second and third shifts only. Ordinarily these factors would have necessitated a finding of unavailability; however, the court was not faced with this issue since their initial finding was that the work was not suitable for the claimant.

Having adopted this view the court should experience no difficulty in following the Tary case, supra, if given a similar set of facts, nor should it encounter any difficulty in holding that religious reasons constitute good cause for voluntarily leaving employment.

This case constitutes a liberal interpretation of the North Carolina Employment Security Law and a realistic judicial recognition of facts which cause claimants to restrict their employability. It should enable the North Carolina courts to give the Law a broad and liberal construction to aid in “mitigating the economic evils of unemployment.”

THOMAS P. WALKER.

Workmen’s Compensation—Death of Nightwatchman as Arising Out of and in the Course of Employment

In a proceeding under the Georgia Workmen’s Compensation Act the evidence showed that a nightwatchman was murdered while drinking coffee in a drive-in 25 feet from the premises of his employer and 100 yards from the building he was required to watch. The murder occurred about 4:00 A.M., which was during the hours of his employment. The employer had not given him permission to leave the premises but had given him permission to drink coffee on the premises. Compensation was allowed on the grounds that the injury arose by accident out of and in the course of the employment. This is typical of some of the

97 ALTMAN, AVAILABILITY FOR WORK, 180 (1950).