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statutory construction principles. In light of these considerations, the Court's decision may impose unnecessary hardships and loss potential on the investing public and, therefore, should be the subject of continuing controversy in the field of securities regulation.

JOHN WARSHAWSKY

## UNEMPLOYMENT COMPENSATION DURING LABOR DISPUTES: QUALIFYING THE "DIRECT INTEREST" DISQUALIFICATION

*Pulitzer Publishing Co. v. Labor & Industrial Relations Commission*<sup>1</sup>

Local No. 610 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers (Teamsters) represented less than two percent of the employees of the Pulitzer Publishing Co. (employer).<sup>2</sup> All other unions negotiated their collective bargaining agreements with the employer separately from one another and from the Teamsters.<sup>3</sup> Unsuccessful negotiations between the Teamsters and the employer resulted in a strike, and a standstill of operations existed until a settlement was negotiated.<sup>4</sup> None of the other unions or their members participated in or financially contributed to the picketing, nor did they participate in the negotiations or authorize the Teamsters to bargain in their behalf. It was undisputed that during prior negotiations with the employer, the nonstriking unions had withdrawn proposals for a fifth week of vacation for senior employees. The employer alleged, however, that the unions had been informed that if the vacation issue were successfully negotiated by any union, *all* employees would receive the same benefit.<sup>5</sup> Representatives of

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1. 596 S.W.2d 413 (Mo. En Banc 1980).

2. *Id.* at 415.

3. *Id.*

4. *Id.* at 415-16. The employer distributed a letter to members of nonstriking unions who crossed the picket lines, informing them that no work was available due to the Teamsters' action. The letter placed the blame for the work stoppage on the Teamsters and professed the employer's good faith in offering to arbitrate with the strikers in an endeavor to avoid the strike.

5. The dissent cited at length from the transcript of the administrative hearing and argued that the circumstances under which the claimants were informed of the employer's offer did, as the Commission found, constitute an agreement as to the vacation issue. See note 54 *infra*.

the nonstriking unions testified that they had not agreed to accept the employer's offer. During strike negotiations, the Teamsters included their demand for a fifth week of vacation. The issue remained unresolved, however, and was discarded before a final settlement was reached.

The nonstrikers asserted claims for determination of insured worker status for wages lost during the strike period.<sup>6</sup> Their employer protested the allowance of benefits, maintaining that the claimants were disqualified under Missouri law because their unemployment was caused by a labor dispute in which they held a direct interest by virtue of the vacation issue.<sup>7</sup> The parties' exhaustion of administrative remedies<sup>8</sup> available under

6. Procedures to be followed in submitting unemployment compensation claims are outlined in RSMO § 288.070 (Cum. Supp. 1980). Claims are filed with an Employment Security divisional deputy, who makes a "determination" of the claimant's status as an insured worker. *Id.* § 288.070.2. Notice of filing is given to the claimant's employer, who must file a protest within seven days of receipt of notice in order to become an "interested party" to the determination. *Id.* § 288.070.1. On the deputy's entry of a determination, all interested parties are notified, and unless an appeal is filed within ten calendar days, the determination becomes final. *Id.* § 288.070.4. In *Pulitzer*, the deputy found that the claimants were eligible to receive benefits.

7. *Pulitzer* was decided under RSMO § 288.040 (1978). Subsection 5 of that section states:

(1) A claimant shall be ineligible for waiting week credit or benefits for any week for which the deputy finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute in the factory, establishment or other premises in which he is or was last employed; . . . provided, further, that this subsection shall not apply if it is shown to the satisfaction of the deputy that

(a) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work, and

(b) He does not belong to a grade or class of workers of which, immediately preceding the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute.

*Id.* § 288.040.5.

8. The employer protested the allowance of benefits and sought administrative review. Generally, appeals from the deputy's determination are taken to the appeals tribunal, which permits a hearing before entering a ruling. Appeals referees are designated by the director and they may modify a disputed determination in lieu of affirmance or reversal. RSMO § 288.190.1 (Cum. Supp. 1980). Hearings are conducted according to divisional regulations, which displace rules of evidence and procedure common to judicial adversary proceedings. *Id.* § 288.190.2.

In *Pulitzer*, the appeals referee found that the claimants were disqualified by the statute and affirmed the deputy's determination. 596 S.W.2d at 416-17. The employer applied to the Commission for review of the appeals tribunal's decision.

the Labor and Industrial Relations Commission (Commission)<sup>9</sup> and judicial review by the Circuit Court of the City of St. Louis, Missouri,<sup>10</sup> was followed by a motion to transfer to the Missouri Supreme Court.

In construing what is perhaps the most perplexing area of the Missouri Employment Security Law,<sup>11</sup> the supreme court clarified a perennial source of confusion for judicial and administrative officers across the

Any party, including the Division of Employment Security, may seek review of the tribunal. Such application must be filed within ten days of notification or mailing of the tribunal's decision and may be allowed or denied in the discretion of the Commission. If the application is denied, the findings and decision of the appeals tribunal become final and are adopted by the Commission for purposes of judicial review. RSMO § 288.200.1 (1978). In *Pulitzer*, the employer's application for review was granted and the Commission affirmed. 596 S.W.2d at 416-17.

9. The Labor and Industrial Relations Commission is created and governed by the provisions of RSMO §§ 286.010-.150 (1978 & Cum. Supp. 1980). The Commission administers the Employment Security Law by powers conferred in *id.* § 286.060.1(3) (Cum. Supp. 1980).

10. The employer petitioned for judicial review in the Circuit Court of the City of St. Louis. 596 S.W.2d at 414. The application for judicial review must be filed in the appropriate circuit court by the director or any party aggrieved by the decision within ten days after the ruling of the Commission becomes final. RSMO § 288.210 (1978). The application must state specific ground on which error is claimed and is not taken properly until all administrative remedies have been exhausted. *Id.* See also Wheaton & Blackmar, *Procedural Forms*, 11 MISSOURI PRACTICE SERIES § 288.210, Form 1 (1962 & Supp. 1978). A petition for judicial review does not act as a supersedeas or stay on the proceedings. Venue in the circuit court is determined by the county of the claimant's residence, by the county of the employer's business location if multiple claimants are involved, or in Cole County if the determination involves a nonresident claimant. RSMO § 288.210 (1978). The circuit court is required to take judicial notice of the division's regulations. *Id.* The judicial scope of review is statutorily limited to questions of law. See notes 15 & 16 and accompanying text *infra*.

In *Pulitzer*, the circuit court reversed, determining that the Commission's findings were unsupported by the evidence and not in accordance with the law. 596 S.W.2d at 417. Claimants' motion to transfer followed an unsuccessful appeal to the Missouri Court of Appeals for the Eastern District. *Pulitzer Publishing Co. v. Labor & Indus. Relations Comm'n*, [1979] 6 UNEMPL. INS. REP. (CCH) ¶ 8363 (Mo. App., E.D. July 3, 1979), *rev'd*, 596 S.W.2d 413 (Mo. En Banc 1980). Much of the court of appeals opinion, which would have affirmed the circuit court, was adopted by the dissenting judges on the supreme court.

11. RSMO §§ 288.010-.400 (1978 & Cum. Supp. 1980). The present Missouri Employment Security Law is based on draft bills prepared by the Social Security Committee on Economic Security, which were enacted as Missouri law in 1937 in order to qualify the state for credits under the Federal Social Security Act. Some jurisdictions have limited or altered the draft bill language. Michigan, for example, has added numerous provisions defining terms contained in the disqualification section. MICH. COMP. LAWS ANN. § 421.29 (1978).

country.<sup>12</sup> Latent ambiguity in the "direct interest" disqualification provision coupled with a conspicuous lack of judicial interpretation<sup>13</sup> created the issue presented to the court: the proper construction and application of the eligibility conditions in light of the policy of the statute and within the permissible scope of judicial review. While emphasizing the necessity to defer to the findings of the Commission, the court established a standard for application of the benefits disqualification provision. The court held that under the Missouri disqualification provision, the prospect of receiving increased vacation benefits of a speculative nature did not constitute a "direct interest" in the outcome of the dispute, and that the nonstriking members of separate skilled trade and craft unions were not of the same "grade or class of workers" as the striking Teamsters.<sup>14</sup> A four-member majority remanded for reinstatement the order of the Commission, which held that the nonstriking claimants were eligible for compensation of wages lost during the labor dispute work stoppage.

The court explained two practical reasons for reinstating the Commission's finding that the claimants had no direct interest in the Teamsters' strike. First, the statutory restriction on judicial review of administrative findings of fact<sup>15</sup> makes facts which are supported by competent and sub-

12. See Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. CHI. L. REV. 294, 329-37 (1950); Note, *Eligibility for Unemployment Benefits of Persons Involuntarily Unemployed Because of Labor Disputes*, 49 COLUM. L. REV. 550, 563-65 (1949).

13. A number of prior decisions have dealt with the disqualification provision. See generally *Adams v. Industrial Comm'n*, 490 S.W.2d 77 (Mo. 1973) (lockout constituted "work stoppage" due to labor dispute); *O'Dell v. Division of Employment Security*, 376 S.W.2d 137 (Mo. 1964) (construction of "work stoppage" provision with dictum as to requalifying conditions); *Producers Produce Co. v. Industrial Comm'n*, 365 Mo. 996, 291 S.W.2d 166 (En Banc 1956) (construction of "work stoppage"); *Tri-State Motor Transit Co. v. Industrial Comm'n*, 509 S.W.2d 217 (Mo. App., Spr. 1974) (construction of "work stoppage"); *Poggemoeller v. Industrial Comm'n*, 371 S.W.2d 488 (Mo. App., St. L. 1963) (primarily dealing with "direct interest" disqualification); *Huck v. Industrial Comm'n*, 361 S.W.2d 332 (Mo. App., St. L. 1962) (claimants admitted members of striking group and thus disqualified); *Kroger Co. v. Industrial Comm'n*, 314 S.W.2d 250 (Mo. App., St. L. 1958) (retail store was "factory, establishment or other premises" as to employees at chain store's bakery); *Meyer v. Industrial Comm'n*, 240 Mo. App. 1022, 223 S.W.2d 835 (St. L. 1949) (refusal to cross picket lines constituted voluntary unemployment).

14. 596 S.W.2d at 421.

15. RSMO § 288.210 (1978) provides in part: "In any judicial proceeding under this section, the findings of the commission as to the facts, if supported by competent and substantial evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law."

The elusive distinction between questions of law and questions of fact is worthy of extended treatment, particularly as affecting administrative law. No court

stantial evidence binding and conclusive on the reviewing court.<sup>16</sup> Interpretation of the direct interest provision arose in this context as an initial consideration of the standard by which the claimants' interest should be measured. The court declared that, as used in the disqualification provision, the term "directly interested" is "used in its causative sense of happening without anything intervening, as opposed to indirectly,"<sup>17</sup> and that the Commission was supported by the evidence in its conclusion that any possibility of benefits accruing to the claimants was speculative and no more than an indirect interest.<sup>18</sup> The court also discerned a potential abuse of the disqualifying provisions should an employer's conditional promise of benefits be held to create a direct interest in the dispute. By creating such an interest, an employer could be motivated to exert

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has been constrained to affirm factual decisions of an administrative body with which the court disagreed, for the question whether the facts are sustained by sufficient competent evidence is one of law to which the court is not bound. *S.S. Kresge Co. v. Unemployment Comp. Comm'n*, 349 Mo. 590, 162 S.W.2d 838 (1942). In deciding that the direct interest issue was not subject to judicial review, the Oregon Supreme Court, in *Henzel v. Cameron*, 228 Or. 452, 365 P.2d 498 (1961), provided a helpful discussion:

Whether a finding is a "finding of fact" or a "conclusion of law" depends upon whether it is reached by natural reasoning or by fixed rules of law. Where the ultimate conclusion can be arrived at only by applying rules of law the result is a "conclusion of law." . . . A "finding of fact" is a conclusion drawn by way of reasonable inference from the evidence. . . .

There are no rules of law to be applied in determining whether or not these claimants were directly interested in the labor dispute. Such a determination can be arrived at only by an examination of the facts. Therefore, when the commissioner found that the claimants were "directly interested" in the labor dispute which caused their unemployment, he had made a "finding of fact" . . . and not a "conclusion of law." *Id.* at 463, 365 P.2d at 503 (citations omitted).

Before *Pulitzer* was transferred to the supreme court, the court of appeals described the scope of review as follows: "The Industrial Commission is to determine the facts, and to those facts it is to apply the applicable law . . . . As to what the law is, and whether it has been correctly applied to the facts are issues of law for the ultimate determination by the court." [1979] 6 UNEMPL. INS. REP. (CCH) ¶ 8363, at 28,783.

16. See *Von Hoffman Press, Inc. v. Industrial Comm'n*, 478 S.W.2d 403 (Mo. App., St. L. 1972). Missouri courts have expanded the language of the provision limiting review to require reversal only when the decision of the Commission is against the "overwhelming" weight of the evidence. *Board of Educ. v. Shank*, 542 S.W.2d 779, 782 (Mo. En Banc 1976); *Govreau v. Farmington Transfer Co.*, 473 S.W.2d 750, 751 (Mo. App., St. L. 1971); *Mid-Continent Aerial Sprayers, Inc. v. Industrial Comm'n*, 420 S.W.2d 354, 356 (Mo. App., Spr. 1967).

17. 596 S.W.2d at 418.

18. *Id.*

pressure on strikers by damaging the employees who were not involved in the strike.<sup>19</sup> The holding is noteworthy not only because it clarifies the Missouri position regarding the "direct interest" rule, but also because *Pulitzer* may serve as precedent<sup>20</sup> in other jurisdictions that have enacted similar legislation.<sup>21</sup>

19. *Id.* at 419. See text accompanying note 34 *infra*.

20. Decisions construing the Missouri unemployment statutes may be persuasive authority in foreign jurisdictions that have enacted similar legislation because "unemployment legislation is an integral part of the national plan for social security, representing a cooperative effort by the states and the national government in working for the general welfare." *Carter v. J.P. King & Sons*, 381 So. 2d 71, 74 (Ala. Civ. App. 1980) (applying *Agri-Foods, Inc. v. Industrial Comm'n*, 511 S.W.2d 898 (Mo. App., K.C. 1974)). See also *Mid-Continent Aerial Sprayers, Inc. v. Industrial Comm'n*, 420 S.W.2d 354, 358 (Mo. App., Spr. 1967) (compilation of cases therein); *Pioneer Potato Co. v. Division of Employment Security*, 17 N.J. 543, 547, 111 A.2d 888, 890 (1955).

21. See note 11 *supra*. Nearly all jurisdictions have enacted employment security legislation based on the 1937 Social Security draft bills, and for a number of years the provisions remained unchanged by state lawmakers. An informative tabulation of various provisions adopted by several states is contained in Lewis, *The Law of Unemployment Compensation in Labor Disputes*, 13 LAB. L.J. 174, 177-78 (1962). See also Shadur, *supra* note 12, at 295 n.5; Note, *supra* note 12, at 550 n.1.

For current provisions substantially similar to Missouri law, see ALASKA STAT. § 23.20.380(9) (1972) (repealed 1980); ARK. STAT ANN. § 81-1105(f) (1976); COLO. REV. STAT. § 8-73-109(2) (Cum. Supp. 1979); CONN. GEN. STAT. ANN. § 31-236(3) (West Cum. Supp. 1980); D.C. CODE ANN. § 19-3315(4) (1979); FLA. STAT. ANN. § 443.101(4) (West Supp. Pamphlet 1981); GA. CODE ANN. § 54-610(d) (Cum. Supp. 1980); HAWAII REV. STAT. § 385-7(4) (1976); IDAHO CODE § 72-1366(h) (Cum. Supp. 1980); ILL. ANN. STAT. ch. 48, § 434 (Smith-Hurd Cum. Supp. 1980-1981); IND. CODE ANN. § 22-4-15-3 (Burns Cum. Supp. 1980); IOWA CODE § 96.5(4) (1979); KAN. STAT. ANN. § 44-706(d) (Cum. Supp. 1980); MD. ANN. CODE art. 95A, § 6(e) (1979); MASS. GEN. LAWS ANN. ch. 151A, § 25(b) (West 1971); MONT. REV. CODES ANN. § 87-106(d) (1964 & Cum. Supp. 1977); NEB. REV. STAT. § 48-628(d) (1978); NEV. REV. STAT. § 612.395(2) (1963); N.H. REV. STAT. ANN. § 282:4.F (1966 & Supp. 1973); N.J. STAT. ANN. § 43:21-5(d) (West Cum. Supp. 1980-1981); N.M. STAT. ANN. § 59-9-5(d) (Supp. 1975); N.D. CENT. CODE § 52-06-02(4) (Supp. 1979); OKLA. STAT. ANN. tit. 40, § 2-410 (West Cum. Supp. 1980-1981); OR. REV. STAT. § 657.200(3) (1979); PA. STAT. ANN. tit. 43, § 802(d) (Purdon 1964); S.C. CODE § 41-35-120(4) (1976); S.D. CODIFIED LAWS ANN. § 61-6-19 (1967 & Supp. 1978); TEX. STAT. ANN. art. 5221b-3(d) (Vernon Supp. Pamphlet 1980-1981); VT. STAT. ANN. tit. 21, § 1344(a)(4) (1978); VA. CODE § 60.1-52(b) (Cum. Supp. 1980); WASH. REV. CODE ANN. § 50.20.090 (1962); W. VA. CODE § 21A-6-3(4) (Cum. Supp. 1980); WYO. STAT. § 27-3-106(d) (1977).

The remaining jurisdictions did not adopt the draft bill or subsequently amended their original enactments. See ALA. CODE tit. 26, § 214(A) (Cum.

Determining benefit eligibility based on a claimant's "direct interest" in a labor dispute as an individual or member of a grade or class has long posed problems of interpretation. The broad statutory language, as applied to the often intricate factual detail of strike situations, at best has served as a cumbersome implement in paring away unwarranted claims for compensation without harming the basic policies of the Employment Security Law.<sup>22</sup> Although justified<sup>23</sup> as a preventive measure against strike tactics that would evade the labor dispute disqualification,<sup>24</sup> the provision is flawed structurally as an effective tool in disqualifying undeserving claimants because of an inherent inability to distinguish between workers unemployed by choice and those involuntarily separated from work.<sup>25</sup>

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Supp. 1973) (disqualifies claimants whose unemployment is due directly to labor dispute still in progress at place of employment with no requalifying provisions); ARIZ. REV. STAT. ANN. § 23-777(A) (Supp. Pamphlet 1980-1981) (requalifying provisions disjunctively connected); CAL. UNEMP. INS. CODE §§ 1262, 1262.5 (West 1972 & Cum. Supp. 1981) (former provides benefit disqualification if claimant left work due to strike; latter provides for determination of persons ineligible by reason of their grade); DEL. CODE ANN. tit. 19, § 3315(4) (1979) (similar to Alabama statute); KY. REV. STAT. § 341.360(1) (Cum. Supp. 1980) (provides disqualification for unemployment caused by "strike or other bona fide labor dispute"); LA. REV. STAT. ANN. § 23:1601(4) (West 1964) (disqualifies if unemployment due to labor dispute in active progress, requalification if claimant proves not participating or interested in dispute); MICH. COMP. LAWS ANN. § 421.49 (1978) (provides detailed definitions of "grade or class" language); MINN. STAT. ANN. § 268.09.1(1) (West Cum. Supp. 1981) (disqualification turns on voluntary nature of termination); MISS. CODE ANN. § 71-5-513(5) (Cum. Supp. 1980) (claimants eligible if unemployment due to lockout not occasioned by individual acting alone or in concert with others); N.Y. LAB. LAW § 593 (McKinney 1977) (similar to Minnesota provision); N.C. GEN. STAT. § 96-14(5) (1975) (disqualifies if work stoppage due to dispute at another plant owned by same employer which provides necessary supplies to claimant's plant); OHIO REV. CODE ANN. § 4141.29(D) (Page Supp. 1980) (disqualifies for disputes other than lockouts); R.I. GEN. LAWS § 28-44-16 (1979) (allows requalification if claimant does not belong to group responsible for strike and is not directly interested in dispute); TENN. CODE ANN. § 50-1324.D (1977) ("participating" disqualifies, no reference to direct interest); UTAH CODE ANN. § 35-4-5(d) (1953) (disqualifies members of grade or class, or individual found to be party to agreement to foment strike, and any person unemployed because of strike involving his grade or class of worker); WIS. STAT. ANN. § 108.04(10) (West 1974) (similar to Kentucky).

22. RSMO § 288.020 (1978).

23. Evaluation of the direct interest disqualification in terms of policy or principle is not within the scope or purpose of this Casenote. Mr. Shadur suggests that disqualification is justified only when the claimant's interest is both direct and beneficial. Shadur, *supra* note 12, at 329.

24. See note 37 and accompanying text *infra*.

25. See cases cited note 27 *infra*.



American decisions are replete with instances in which this insufficiency has led the courts to inequitable conclusions<sup>26</sup> that are inconsistent with the basic purpose of unemployment insurance, providing security to those unemployed through no fault of their own.<sup>27</sup>

Prior Missouri decisions dealing with the direct interest provision have not proven particularly helpful in resolving the difficulties of interpretation evident in the decisions of other states.<sup>28</sup> The most extensive treatment of the problem was made by the St. Louis Court of Appeals in *Pogge-moeller v. Industrial Commission*.<sup>29</sup> In that case, claimants were unemployed due to a valid lockout instituted by the employer when a dispute arose during negotiations of a new contract concerning the terms and conditions of claimants' employment.<sup>30</sup> After the court surveyed the decisions of several jurisdictions, it quoted with approval the test as it is commonly stated: " 'The prevailing rule is that an employee is 'directly interested' in a dispute, when his wages, hours or conditions of work will be affected favorably or adversely by the outcome of a strike.' " <sup>31</sup> The court

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26. Courts have held employees to be directly interested in a labor dispute even though they did not approve of the demands made by their bargaining agent and in fact voted against the strike, *Huiet v. Boyd*, 64 Ga. App. 564, 571, 13 S.E.2d 863, 867 (1941); whether in fact the area of common interest was attended by success or failure, *Local 658, Boot & Shoe Workers Union v. Brown Shoe Co.*, 403 Ill. 484, 490, 87 N.E.2d 625, 630 (1949); *Nobes v. Michigan Unemployment Comp. Comm'n*, 313 Mich. 472, 480, 21 N.W.2d 820, 823 (1946); although unemployment was unquestionably involuntary, *Kemiel v. Review Bd.*, 117 Ind. App. 357, 358-59, 72 N.E.2d 238, 238-39 (1947); although they were not members of any union, *Nobes v. Michigan Unemployment Comp. Comm'n*, 313 Mich. at 476, 21 N.W.2d at 821; although it is unknown whether the claimants' wages will be affected until after settlement of the dispute, *Chrysler Corp. v. Smith*, 297 Mich. 438, 452, 298 N.W. 87, 92 (1941); whether the interest is immediate or remote, *In re Deep River Timber Co.'s Employees*, 8 Wash. 2d 179, 183-84, 111 P.2d 575, 577 (1941).

Classification of claims on a broad basis is sometimes justified as facilitating administration of employment security laws. *See, e.g., Queener v. Magnet Mills*, 179 Tenn. 416, 424-25, 167 S.W.2d 1, 4 (1942). This advantage would appear far outweighed by the inequitable results of such applications.

27. *See Sain v. Labor & Indus. Relations Comm'n*, 564 S.W.2d 59 (Mo. App., St. L. 1978); *Beal v. Industrial Comm'n*, 535 S.W.2d 450 (Mo. App., K.C. 1975); *Crawford v. Industrial Comm'n*, 482 S.W.2d 739 (Mo. App., St. L. 1972); *Bussman Mfg. Co. v. Industrial Comm'n*, 335 S.W.2d 456 (Mo. App., St. L. 1960).

28. *See cases cited note 26 supra.*

29. 371 S.W.2d 488 (Mo. App., St. L. 1963).

30. *Id.* at 490.

31. *Id.* at 505 (quoting *Burak v. American Smelting & Ref. Co.*, 134 Colo. 255, 259, 302 P.2d 182, 184 (1956)). *See Huiet v. Boyd*, 64 Ga. App. 564, 567, 13 S.E.2d 863, 865 (1941); *Martineau v. Director of the Div. of Employment Security*, 329 Mass. 44, 49, 106 N.E.2d 420, 424 (1952); *Chrysler Corp. v. Smith*, 297

concluded that “[a] claimant is directly interested in the labor dispute when he stands to gain or lose by the outcome of the dispute.”<sup>32</sup>

Although the *Pulitzer* majority factually distinguished *Poggemoeller*,<sup>33</sup> it is clear that the latter does not extend to the more narrow issue presented before the *Pulitzer* court: whether under these particular circumstances claimants actually stood to “gain or lose by the outcome of the dispute.” The *Pulitzer* court may well have conceded the earlier case without disturbing the reasoning of its opinion since *Pulitzer* is an interpretative refinement rather than a divergence from principle. If the *Pulitzer* court had found that the alleged vacation offer was sufficiently firm to be said to directly affect the claimants, the *Poggemoeller* rule apparently would have required disqualification. Having determined, however, that the facts indicative of the speculative nature of the vacation issue could support a finding that claimants would not be affected directly by the outcome of the strike, the court was not required to rule on the validity of *Poggemoeller*. Although it is perhaps unfortunate that *Poggemoeller* was not recognized simply as authority for a principle of greater latitude than was necessary for the court’s decision, the acknowledgment of its validity clearly is implicit.

A second practical reason compelled the court to approve the findings of the Commission on the issue of direct interest. A definition of “direct interest” that includes interests created by an “unsolicited conditional promise by the employer” would open the door for potential abuse and subversion of the Act by allowing the employer to exert pressure on strikers by making the strike economically harmful to nonunion employees.<sup>34</sup> Terms of employment contained in a conditional agreement are contingent on the bargaining power, ability, and volition of another representative unit as well as the employer’s own willingness to negotiate the term. Therefore, these terms should not be categorized as constituting a direct interest in the outcome of the dispute. Although such an interest may be ascertainable, *Pulitzer* insulates the unemployed, nonstriking worker from benefit disqualification by requiring that the interest also be direct and by refusing to recognize interests that are remote or speculative. Thus, offers that cannot be expected to affect directly the terms of the claimant’s employment should not disqualify otherwise deserving<sup>35</sup> employees from receiving the benefits of unemployment insurance.

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Mich. 438, 451-52, 298 N.W. 87, 92 (1941); *A. Borchman Sons v. Carpenter*, 166 Neb. 322, 328, 89 N.W.2d 123, 127 (1958); *Henzel v. Cameron*, 228 Or. 452, 465, 365 P.2d 498, 504 (1961); *Wicklund v. Commissioner of Unemployment Comp.*, 18 Wash. 2d 206, 216, 138 P.2d 876, 881 (1943).

32. 371 S.W.2d at 505.

33. 596 S.W.2d at 418.

34. *Id.* at 419.

35. See cases cited note 27 and accompanying text *supra*.

In addition to the no-direct interest provision is a second condition of eligibility imposed by the statute that extends the direct interest disqualification. The statute requires that the claimant not belong to a grade or class of workers that has any member with a direct interest.<sup>36</sup> This provision works in tandem with the direct interest disqualification to prevent actions of the unions intended to evade the statute by implementing "key-man" strike tactics which place all workers out of employment while directly involving only a small number of pivotal employees.<sup>37</sup> Since, however, the same premise underlies the direct interest disqualification,<sup>38</sup> the effect of only key personnel striking should be mitigated or largely dispelled<sup>39</sup> by the direct interest provision, which disqualifies all employees affected by the dispute regardless of their grade or class, whether union or nonunion. Thus, in practice, disqualification because of membership in a grade or class should occur only in those limited instances where the employee whose interest alone is insufficient to render him ineligible for benefits is associated with other disqualified employees to such an extent that to allow benefits would violate the purposes of the Act.<sup>40</sup>

Authorities have argued that the grade or class provision is an unjustifiable, arbitrary<sup>41</sup> principle of vicarious guilt,<sup>42</sup> the operation of which results in disqualification of workers often involuntarily unemployed by acts of their fellow employees. Certainly, any distinction between voluntary and involuntary unemployment must derive from a source other than the statute itself because this provision, like its counterpart, structurally is not capable of excepting those who have no personal involvement in the dispute. Despite the unsatisfactory results which flow from disqualification by vicarious involvement, the needed changes cannot be accomplished by the judiciary alone.

While subject to broad interpretation, application of the grade or class provision is intrinsically a factual determination<sup>43</sup> that should involve con-

36. See note 7 *supra*.

37. *F.R. Orr Constr. Co. v. Industrial Comm'n*, 188 Colo. 173, 183, 534 P.2d 785, 791 (1975). The argument continues that employees receiving compensation benefits thereby reduce the drain on the union strike fund, violating the doctrine of state neutrality in labor disputes. *Id.* See also *Chrysler Corp. v. Smith*, 297 Mich. 438, 450, 298 N.W. 87, 91 (1941); *Spielmann v. Industrial Comm'n*, 236 Wis. 240, 248-49, 295 N.W. 1, 5-6 (1940). For an excellent discussion of the doctrine of neutrality in both England and the United States, see Haggart, *Unemployment Compensation During Labor Disputes*, 37 NEB. L. REV. 668, 688 (1958).

38. See Shadur, *supra* note 12, at 333.

39. *Id.*

40. *Id.* See also Note, *supra* note 12, at 553.

41. See Note, *supra* note 12, at 565.

42. See Shadur, *supra* note 12, at 332.

43. 596 S.W.2d at 420 n.4. The court cited *F.R. Orr Constr. Co. v. Indus-*

sideration of all relevant factors present in the dispute. Although the provision has been the law in Missouri since 1937,<sup>44</sup> the *Pulitzer* court wrote on a slate relatively clean of judicial efforts of interpretation.<sup>45</sup> Before *Pulitzer*, the primary authority construing the grade or class provision was dictum in *O'Dell v. Division of Employment Security*.<sup>46</sup> In *O'Dell*, the court determined that the proper class included all those employees "doing essentially the same type of work," finding that employees on either side of merging automobile production lines were of the same class of workers within the meaning of the statute.<sup>47</sup> The claimants in *O'Dell* were members of the same local union, which was their exclusive bargaining agent.<sup>48</sup> If *O'Dell* had been accepted by the *Pulitzer* majority, it clearly would have required a finding that the *Pulitzer* claimants were of the same class of workers as the Teamsters.<sup>49</sup> To this extent, *O'Dell* has been disapproved. If the decision was found wanting, however, it was not rejected, because the majority opinion merely distinguished *O'Dell* factually

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trial Comm'n, 188 Colo. 173, 534 P.2d 785 (1975), which is factually similar to *Pulitzer*. In *Orr*, striking carpenters prevented members of various craft unions from continuing construction work. The employer was a member of an associated bargaining unit that implemented a lockout at all construction sites whether picketed or not. Claimants' unions had previously negotiated and signed separate contracts and were determined to be of a different grade or class than the strikers in the absence of a community of interest, notwithstanding a high degree of integration in the work. *Id.* at 183, 534 P.2d at 791. Judicial review of the Commission's findings as to grade or class are limited as are those made as to direct interest.

44. 1937 Mo. Laws 591, § 10 (current version at RSMO § 288.040 (1978)).

45. See cases cited note 13 and accompanying text *supra*.

46. 376 S.W.2d 137 (Mo. 1964). The central issue in *O'Dell* was whether claimants' unemployment was due to a stoppage of work that existed because of a labor dispute within RSMO § 288.040.4 (1959) (current version at RSMO § 288.040.5 (1978)). Determining that the claimants failed to show that the disqualification was inapplicable, the court further indicated that claimants did not sustain their burden of proof concerning the requalification provisions. Hence, *O'Dell* may be read to hold against the claimants therein because of their failure to prove the first eligibility requirement, individual noninvolvement. The remarks concerning the second requirement, therefore, would be dicta.

47. 376 S.W.2d at 146.

48. *Id.*

49. *O'Dell's* grade or class language was based on the authority of *Unemployment Comp. Comm'n v. Martin*, 228 N.C. 277, 45 S.E.2d 385 (1947) and *Dravo Corp. v. Unemployment Comp. Bd.*, 187 Pa. Super. Ct. 246, 144 A.2d 670 (1958). *Martin* determined that finishers and boarders at a hosiery mill were of the same grade or class because of the interdependence of operations. 228 N.C. at 279, 45 S.E.2d at 386. *Dravo* held that truck drivers, operating engineers, and general laborers were all "construction workers" and, therefore, of the same class. 187 Pa. Super. Ct. at 251, 144 A.2d at 672.

without passing on its validity as precedent.<sup>50</sup> Although it remains to be decided whether Missouri law now contains two inconsistent standards for grade or class determinations, the factual nature of the inquiry makes inevitable the conclusion that administrative and judicial officers will continue to have wide latitude in which to make their findings and will remain subject to limited review.<sup>51</sup> In fact, *Pulitzer's* actual contribution in clarifying the application of the grade or class disqualification may be limited to the broad proposition that findings of fact by the Commission will be sustained if supported by the evidence in the record presented to the reviewing court.<sup>52</sup>

The dissent in *Pulitzer* complained that the majority's approach excluded "relevant similarities" between the claimants and the striking Teamsters,<sup>53</sup> arguing that those employees who would gain a contractual right to additional vacation benefits should be disqualified as a class despite the fact that they had little else in common with the strikers.<sup>54</sup>

50. The *Pulitzer* court avoided a possible conflict by declaring the issues in *O'Dell* to be "markedly different" than those before them and not controlling their determination that the type of work done by claimants was not of such nature as to bring them within a class with the Teamsters. 596 S.W.2d at 420. While the majority factually distinguished *O'Dell*, it remains difficult to reconcile the conflict of authority relied on in that opinion *supra* with the decision in *Pulitzer*.

51. See note 43 and accompanying text *supra*.

52. 596 S.W.2d at 421.

53. *Id.* at 425 (Welliver, J., dissenting).

54. *Id.* (Welliver, J., dissenting). Judge Welliver first noted that a justiciable controversy existed only between the Commission and the employer since the claimants would retain benefits paid to them regardless of the outcome of the controversy. RSMO § 288.070.6 (Cum. Supp. 1980). The employer, however, would be charged with the payments made to claimants in the event the court found claimants eligible and affirmed the circuit court. *Id.* § 288.070.7. Judge Welliver argued that the majority erred in concluding that the nonstriking employees did not constitute a "grade or class" in the sense contemplated by the statute by virtue of their common interest in the fifth week of vacation. Assuming, as did the dissent, that claimants held a direct interest in the dispute, it would appear difficult to defend this conclusion because subsections (a) and (b) are written conjunctively, indicating that the two exceptions are separate and distinct issues to be proven by the claimant. Moreover, because subsection (b) contains both "grade or class" and "direct interest" language, it is a strained construction to assert that a shared interest, whether direct or not, *per se* forms a class. This reading of the statute has been rejected uniformly by other courts construing identical provisions. In *Westinghouse Elec. Corp. v. Unemployment Comp. Bd.*, 165 Pa. Super. Ct. 385, 68 A.2d 393 (1949), the court stated:

No person unemployed because of a labor dispute can recover unemployment compensation unless he can prove that he is not directly interested, *and* he is not a member of the striking union, *and* he is not of the same grade or class of workers as the strikers. There is no justification for the position that the three conjunctive tests are merely one test

Although the majority did not respond to that proposition, a careful reading of the Missouri statute and substantial authority from other jurisdictions indicate that the "direct interest" and "grade or class" provisions are to be established by the claimant as separate and distinct elements.<sup>55</sup>

Despite the shortcomings of the labor dispute disqualification statute, *Pulitzer* accomplishes a significant advancement in application of the provision's ambiguous language to achieve equitable results. A more concise approach, focusing on the causal relationship between the claimant's interest and the outcome of the dispute, reduces the tendency to apply inflexible standards to the determination of benefit disqualification.<sup>56</sup> The court has turned properly<sup>57</sup> the focus of inquiry to the nature of the in-

phrased in three different ways.

*Id.* at 392, 68 A.2d at 396.

In *Brown Shoe Co. v. Gordon*, 405 Ill. 384, 91 N.E.2d 381 (1950), the court summarily disposed of the employer's contention that the claimants' interest in the labor dispute constituted a class in itself: "Obviously, this meaning includes something more than the group directly interested in the dispute, for otherwise the second condition would be superfluous." *Id.* at 394, 91 N.E.2d at 386.

Prefacing the court of appeals' discussion of the *Pulitzer* grade or class issue was its recognition that such a determination was not essential due to its opinion that claimants held a direct interest in the Teamsters dispute. [1979] 6 UNEMPL. INS. REP (CCH) ¶ 8363, at 28,785. Regardless of the merits of the argument for a construction that would encompass, as a grade or class, workers who hold an interest in the dispute, such an approach cannot impact on eligibility because the situation to which it is applicable cannot arise. Manifestly, if a claimant is found to have a direct interest in the dispute, he has failed to satisfy one of the two mandatory conditions of eligibility and will be disqualified whether he is found to be within a given "grade or class" or not. Conversely, if no direct interest is discovered, it quite obviously could not be used as a basis for finding membership in a grade or class. Moreover, disqualifying provisions are to be narrowly construed to most nearly effect the purposes of the Act. *O'Dell v. Division of Employment Security*, 376 S.W.2d 137, 142 (Mo. 1964); *Kroger Co. v. Industrial Comm'n*, 314 S.W.2d 250, 254 (Mo. App., St. L. 1958).

The limited theoretical area in which such an application could operate to disqualify would be that in which the claimant has no individual interest in the dispute, but other persons concededly of the same class will be affected. Practically, an absence of individual direct interest will indicate a fortiori nonmembership in an affected class.

55. See note 54 *supra*.

56. See text accompanying note 25 *supra*.

57. The result appears to be sustained by the general weight of authority, although the definition is novel to most courts. *Nestle Co. v. Johnson*, 68 Ill. App. 3d 17, 385 N.E.2d 793 (1979) was strikingly similar to *Pulitzer*. In *Nestle*, two unions negotiated separate contracts with the employer, although the terms were usually identical and the employees expected as much. When one union called a

terest, discarding mechanical distinctions employed in other jurisdictions.<sup>58</sup> An actual definition of the term "directly" ascribes substance to the substantive portion of the phrase. In providing a definitive interpretation, the court has taken an approach advocated by critics<sup>59</sup> of this portion of employment compensation law, for the term is useful only when it is recognized that some claimants may be only indirectly interested in the subject matter of the dispute. The undesirable effects of the provision's inherent structural flaws<sup>60</sup> are mitigated by an analysis that inquires into the substantive validity of the asserted claim rather than relying on the time-worn precedents of other jurisdictions. Although the faults of labor dispute disqualifications ultimately may be repaired only by legislative action, *Pulitzer* is a noteworthy example of the judicial attempt to mitigate the statute's harsh results in the interim.

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strike during negotiations, the others became unemployed and were held not directly interested. The court stated that

[t]he mere expectancy of better economic terms in their own new contract upon conclusion of the machinists' strike did not give the operating engineers a direct interest in the machinists' labor dispute. . . . At the most, this record reveals an indirect interest in the outcome of the machinists' strike; that is not sufficient for the denial of benefits.

*Id.* at 20, 385 N.E.2d at 796.

58. See, e.g., *Local 658, Boot & Shoe Workers Union v. Brown Shoe Co.*, 403 Ill. 484, 491, 87 N.E.2d 625, 630 (1949), wherein the court stated that when a work stoppage occurs because of a labor dispute, "every employee thereby put out of employment is directly interested." Predictably, this decision has been the subject of criticism. See Shadur, *supra* note 12, at 331.

59. See Reuben & Schuckers, *The Labor Dispute Disqualification of the Pennsylvania Unemployment Compensation Law*, 50 TEMP. L.Q. 211, 243 (1977); Shadur, *supra* note 12, at 330.

60. See text accompanying note 27 *supra*.

