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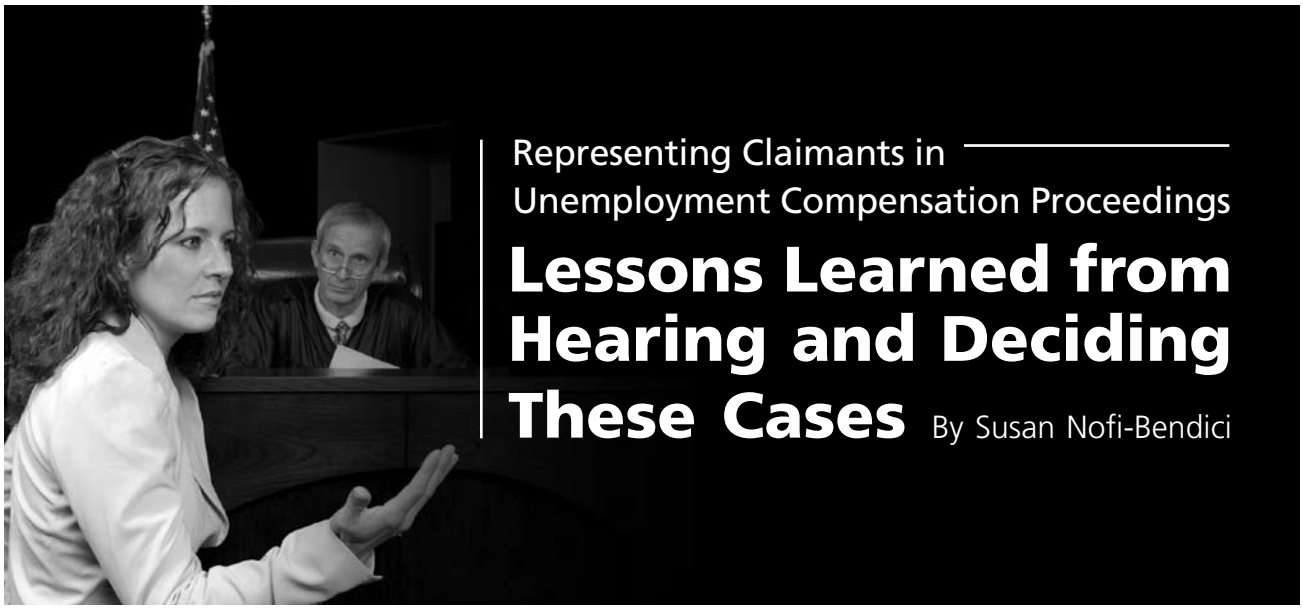

Representing Claimants in Unemployment Compensation Proceedings

Lessons Learned from Hearing and Deciding These Cases

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Low-wage workers' need for unemployment insurance benefits is obvious: unemployment insurance enables our clients to purchase their necessities for survival. With the national unemployment rate at 10 percent, the number of individuals relying on the unemployment insurance life raft has grown.[1] At the same time the recession has prompted states to furlough, lay off, and offer retirement incentives to state employees. Many states are short of personnel to handle the spike in claims and appeals. In these circumstances advocacy is more indispensable than ever if we are to ensure that the U.S. Supreme Court's mandate in *California Department of Human Resources Development v. Java*—that unemployment benefits be paid when due—is a reality.[2] Whether during a recession or not, representation can make a big difference in the outcome in unemployment insurance proceedings. One state study found that where both the claimant and employer appeared *pro se*, the claimant was successful 59 percent of the time, but if the claimant was represented, the percentage of successful claimants soared to 83 percent. In cases where the employer was represented, fewer than half of unemployment insurance claimants were awarded benefits if they were unrepresented at the unemployment insurance hearing: the percentage of successful claimants rose to 68 percent with legal representation.[3]

Monetary Versus Nonmonetary Eligibility

If you are just starting or considering representing claimants in unemployment appeals, the good news is that these cases are relatively straightforward procedurally and substantively. Although all states' unemployment insurance programs have to conform to certain federal requirements, the eligibility rules are governed by state law and vary with the jurisdiction. Generally, however, the claimant must meet both monetary and nonmonetary requirements. *Monetary eligibility* typically means that the claimant has earned enough in qualifying wages to be eligible for benefits. Other monetary issues can include whether a claimant qualifies for a dependency allowance, whether an alternative base period may be used to calculate monetary eligibility, and whether an individual has earned enough since exhausting benefits to qualify for benefits in a new benefit year.

[1]As of December 2009, the national unemployment rate reached 10 percent according to the U.S. Bureau of Labor Statistics (see Bureau of Labor Statistics, U.S. Department of Labor, Economic News Release, Employment Situation Summary, http://bit.ly/9QxM66).

[2]*California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971).

[3]Kenneth Owens, *Representation and Success: Understanding How the Two May be Connected in Massachusetts Lower Authority Appeals*, NAUIAB Navigator, Spring 2007, at 6, http://bit.ly/9VaPlw.

Nonmonetary eligibility generally means that (1) the claimant became unemployed through no fault of his or her own and (2) the claimant is able to work, available for work, and actively seeking work during each week of claiming benefits. State law sets forth the circumstances in which a claimant's separation from employment will cause the claimant to be disqualified from receiving benefits: for example, whether a claimant voluntarily quit without good cause or was discharged for misconduct. Generally, however, the outcome of these cases will depend heavily on the decision maker's findings of fact. Since the employer's version of the events surrounding the separation often conflicts with that of the claimant, the advocate plays a critical role in presenting the testimony and other evidence that will shape the findings of fact and decision. The consequences of a disqualifying separation can be severe. In most states an individual who is disqualified from receiving benefits remains ineligible until the individual returns to work and earns a specified amount in wages.[4] With an average of 6.3 unemployed workers competing for each available job, earning the wages needed to purge a disqualification is no easy task.[5]

Overpayment of Benefits

An individual who becomes unemployed through no fault of the individual, and who is able to work, available for work, and actively seeking work may nonetheless be barred from receiving benefits if the individual was previously overpaid benefits. An overpayment occurs when a claimant receives unemployment insurance benefits to which the claimant is not entitled. The overpayment may be considered a fraudulent overpayment or a nonfraud overpayment, depending on how the benefits were incurred. Nonfraud overpayments typically occur when a claimant is initially awarded benefits, but the award of benefits is later reversed as the result of an employer appeal. An individual may also incur a nonfraud overpayment as the result of administrative error or a good-faith mistake on the part of the claimant when filing the claim. All states require repayment, although twenty-three states waive such nonfraud overpayments if the claimant meets certain criteria.[6] The state may attempt to recover the overpayment by withholding your client's benefits in the future, intercepting state income tax refunds, or by civil action. Some states charge interest on the overpayment balance.[7]

The state charges a claimant with a fraudulent overpayment if the claimant fails to report earnings while filing for unemployment insurance benefits or makes some other misrepresentation in order to collect benefits to which the claimant is not entitled. In addition to pursuing repayment by the means described above, state unemployment insurance law can impose criminal sanctions and administrative penalties, which can be devastating. Representation is crucial in these cases, particularly since Internet and telephone claims filing systems used by states are susceptible to user error. A claimant's good-faith mistake can be easily mischaracterized as fraud. In Connecticut the automated telephone benefits system asks the individual filing a weekly claim to press 1 for "yes" and 2 for "no" in response to the following question: "Did you work full-time or part-time for an employer or in self-employment or return to full-time work during the week ending last Saturday which you have not already reported?" In overturning a fraud determination and administrative penalty, the Connecticut Superior Court recognized that this compound question is potentially confusing and it is unreasonable for the state "automatically to infer that the person answered it incorrectly in

[4]U.S. Department of Labor, Comparison of State Unemployment Laws 5–8 (2009), http://bit.ly/dijzXU.

[5]Bureau of Labor Statistics, U.S. Department of Labor, Economic News Release, Job Openings and Labor Turnover Survey, http://bit.ly/ckXDpO.

[6]See U.S. Department of Labor, *supra* note 4, at 6-1 to 6-4, http://bit.ly/9GuucC.

[7]*Id.*

order to defraud the system and punish him or her accordingly."[8]

Appealing a Benefits Denial

In all cases where the state denies an individual unemployment insurance benefits, the state must give the claimant an opportunity for a fair hearing before an impartial tribunal.[9] Most states have both first- and second-level administrative appeals, and all state laws provide for judicial review of the administrative determination.[10] Because the record is usually created at the administrative level, representation is critical at the administrative-hearing stage. The Massachusetts Division of Unemployment Assistance examined the impact of legal representation at unemployment insurance proceedings during a three-month period in 2006. It reported to the Massachusetts Supreme Judicial Court's Access to Justice Commission that its study showed a greater success rate for claimants who are represented by counsel:[11]

> During the months of September, October and November 2006, our study revealed that pro se claims in the Boston metro region were successful 75 percent of the time when the employer did not appear at the hearing, regardless of whether the claimant was the appellant and whether the issue was one that involved separation. The claimant's success rate rose to 90 percent, however, when the claimant was represented at the hearing. In appeals in which both the employer and the claimant appeared pro se, our study revealed that the claimant was successful 59 percent of the time; but when the employer appeared pro se and the claimant was represented, the claimant's success rate jumped to 83 percent. And, in those appeals in which the claimant appeared pro se and the employer was represented, the claimant prevailed only 49 percent of the time, but when both parties were represented, the claimant's success rate increased to 68 percent.[12]

Advocacy Tips

During what turned out to be a seven-year hiatus from legal services, I was an employment security appeals referee and then a principal attorney for Connecticut's higher authority board of review. During that time I saw countless unrepresented claimants misunderstand what they were required to prove, fail to present critical evidence, and fail to tell their stories persuasively. In those rare cases where the claimant was represented, I also saw what an impact good advocacy could make. The following are some of the lessons I took from my adventures in the decision-making side of unemployment appeals.

Know Everything There Is to Know About Your Case Ahead of Time. Thoroughly preparing your client and yourself will make for a better hearing because midhearing surprises are rarely good ones. Prior to the hearing, request copies or an opportunity to review whatever information the state agency relied upon in making the initial decision to grant or deny benefits. Even if the appeal hearing is *de novo*, statements that your client made when your client initially applied for benefits could, if not clarified at the hearing, undermine your client's credibility.

Obtain a copy of the personnel file if you believe that it contains documents—such as performance reviews, requests for leave, or prior disciplinary actions—ma-

[8]See *Aljahmi v. Administrator, Unemployment Compensation Act*, No. CV020813725, 2002 Conn. Super. LEXIS 2254 (Conn. Super. Ct. June 19, 2002).

[9]42 U.S.C. § 503(a)(3) (2005); 42 C.F.R. 503(a)(3) (2009).

[10]See U.S. Department of Labor, *supra* note 4, at 7-1, http://bit.ly/cWORJb.

[11]Massachusetts Access to Justice Commission, Barriers to Access to Justice in Massachusetts: A Report, with Recommendations, to the Supreme Judicial Court 31 (2007), http://bit.ly/9MANI1.

[12]Owens, *supra* note 3.

terial to the issue in the case.[13] If possible, have your client get a copy of the personnel file herself: if you request the file from the employer, you raise the stakes for the employer, and the employer is more likely to appear at the hearing with an attorney. If the employer does not comply with this request and you have reason to believe that the employer has critical evidence, consider a subpoena. At the very least, question the employer's representative about the failure to produce the requested personnel file at the hearing and urge the hearing officer to draw an adverse inference from the employer's failing to produce relevant evidence. If the employer attempts to introduce damaging evidence from the personnel file that you have not seen, object on the basis of surprise. If the objection is overruled, request a continuance or recess to allow you time to review the proffered evidence and prepare a response.

Request an Interpreter if Your Client's Dominant Language Is Not English. As recipients of federal funding from the U.S. Department of Labor, the state agencies that adjudicate unemployment claims must have a language assistance program, which should provide for trained and competent interpreters for individuals with limited-English proficiency.[14] That an individual speaks enough English to function in the workplace does not necessarily mean that the individual can meaningfully participate in a legal proceeding conducted in English. If English is not your client's dominant language, you should discuss whether an interpreter would be appropriate. Although informal in nature, an unemployment appeal hearing can be stressful. Nervousness and a limited vocabulary may interfere with your client's ability to express your client's version of events in a detailed and credible manner. While working on higher-authority appeals, I saw many cases in which the claimant failed to request an interpreter at the referee hearing and later unsuccessfully argued that language difficulties prevented the claimant from adequately presenting the claimant's case.[15]

Make Opening and Closing Statements, but Keep Them Simple. When considering the length of opening and closing statements, avoid either extreme. You may lose the hearing officer's interest if you launch into a blow-by-blow account of your client's ten-year employment history with the employer. However, no matter how rushed the hearing officer may appear, waiving your opening and closing statements and squandering an opportunity to state your theory of the case makes little sense. Tailor the opening and closing statements to the specific issue before the hearing officer. Unless the case is unusually complex, keep it brief. For example: "The claimant's tardiness did not rise to the level of willful misconduct because it was not excessive and was condoned by the employer." If the employer is represented, keeping the opening statement brief avoids alerting opposing counsel to your key evidence.

Always Know Which Party Has the Burden of Proof. Because the employer has the burden of proof in a discharge case, do not miss any opportunity to point out to the hearing officer when the employer fails to meet its burden. The decision should not turn on whether the hearing officer finds your client's testimony credible if the employer fails to produce a critical witness or other substantial evidence to prove its allegations. Similarly, if your client left your client's employment voluntarily, the burden of proof is on your client, and do not take that burden lightly. Know the law on good cause, present as much evidence as you possibly can, anticipate the grounds that the hearing officer could use to rule against your client, and prepare accordingly.

[13]Many states have laws requiring employers to grant former employees access to their personnel files (see, e.g., Cal. Lab. Code § 1198.5 (2009); Conn. Gen. Stat. § 31-128a (2009)).

[14]See Memorandum from Annabelle T. Lockhart, Director, Civil Rights Center, U.S. Department of Labor, to Recipients of Federal Financial Assistance from the United States Department of Labor (Jan. 3, 2001), http://bit.ly/aZSmcb; see also Exec. Order No. 13,166, 65 Fed. Reg. 50121 (Aug. 16, 2000), http://bit.ly/d9BBeS.

[15]See, e.g., *Quinones v. Arrow Building Maintenance Company*, No. 769-BR-95 (Conn. Employment Security Board of Review June 16, 1995) (claimant's request for another hearing with interpreter denied because he did not indicate that interpreter was needed at initial hearing), http://bit.ly/buwvD8.

Object to Hearsay on the Basis of Quality and Reliability. Although once or twice I had to overrule an overzealous litigator's triumphant hearsay objection, most representatives are well aware that hearsay may be used in administrative hearings and do not object to its admission. Surprisingly, however, many miss an opportunity to argue whether the proffered hearsay is sufficiently reliable to support a finding of fact. In *Richardson v. Perales* the Supreme Court set forth the factors to be considered in determining whether hearsay evidence is reliable enough to constitute substantial evidence in administrative proceedings: the nature of the administrative proceedings; whether the author is unbiased; the detail and quality of the hearsay; whether the hearsay is consistent with other evidence in the record; and whether the witnesses could have been produced for cross-examination.[16]

When the employer offers hearsay statements to prove misconduct, take the opportunity to ask why the employer did not bring the individual with the firsthand knowledge as a witness. Point out when the hearsay offered is vague or conflicts with other evidence in the record, if applicable. If the individual to whom the hearsay statement is attributed is biased or has some motive to fabricate the statement, be sure to bring this out on direct or cross-examination of the witnesses who are participating in the hearing.

If you plan to offer hearsay evidence at the hearing, make sure it is as detailed as possible. Let us say that the conduct prompting the employer to discharge your client was not willful but was in fact caused by a medical condition. A medical note confirming your client's diagnosis is relevant and admissible. However, a narrative statement from the health care provider explaining the nexus between the condition and the conduct in question will be given more weight and will be far more persuasive. You can further strengthen hearsay by producing or drawing attention to other corroborating evidence in the record. For example, you should elicit and then highlight the fact that the supervisor admits on cross-examination that your client had recently complained of difficulties at work related to your client's medical condition.

Argue in the Alternative. The nature of the claimant's separation from employment is often murky: the employer insists that it never fired your client and your client is equally adamant that your client never quit. You will want to argue that your client was discharged, thereby placing the burden on the employer to prove that it discharged your client for a disqualifying reason. However, you will not know how the hearing officer will characterize the separation until you receive the decision. Therefore you should also be prepared to argue, if possible, that your client would have had good cause to quit and should not be disqualified regardless of which party initiated the separation.

Suppose that the supervisor informed your client that her hourly rate of pay was being cut and a heated discussion ensued. The argument escalated into a shouting match that culminated in your client using profanity and the supervisor telling your client she was fired, and this the supervisor now denies. Naturally you will argue that your client's testimony that she was discharged is more credible that the supervisor's testimony. Without conceding the separation, you can and should also argue that your client is eligible for benefits even if she quit because of the verbal abuse and unilateral reduction in pay.

Create the Record You Want the Higher Administrative or Judicial Authority to See. Be mindful of the record you are creating, and conduct every case as if it were going to be appealed. When in doubt, offer more evidence than you think you need since you are unlikely to have another opportunity to supplement the record. If the employer raises new allegations or introduces unanticipated evidence, request an opportunity to present additional evidence in response. Depending on the nature of the evidence, you might ask for a continuance, ask the hearing officer to take testimony from another witness by

[16] *Richardson v. Perales*, 400 U.S. 389, 402–6 (1971).

phone, or ask the hearing officer to hold the record open so that you can send in additional documentation.

If you are getting the sense that the hearing officer is going to make a credibility determination in favor of the employer's witnesses, do not get discouraged. Create a record that will make it difficult for the higher authority to defer simply to the hearing officer's credibility call. Point out any implausibility and inconsistencies in the testimony presented by the employer: inconsistencies among the employer's witnesses or inconsistencies between the witness' testimony and statements given at the time of the initial claim. Argue, if applicable, that the employer has failed to produce any key witnesses or corroborating records that they would likely produce.

Hold the State to Federal Timeliness Standards. Sections 303(a)(1) and (3) of the Social Security Act require that state unemployment laws provide for full payment of unemployment compensation when due, and in *California Department of Human Resources Development v. Java* the Supreme Court held that California's procedures, which resulted in benefit payments being suspended for weeks while the claimants' eligibility was adjudicated, violated this requirement.[17] In response to the Court's concern with delay in payment of benefits, federal regulations were promulgated to specify timeliness standards. States must issue at least 60 percent of all first-level benefit appeal decisions within thirty days of the date of appeal, and at least 80 percent of all first-level benefit appeal decisions within forty-five days.[18]

At the same time that the states are seeing an increase in the volume of claims and appeals, many have fewer staff members with whom to adjudicate these claims and appeals. The U.S. Department of Labor takes the position that if a state's unemployment insurance program is not exempted from state personnel actions, such as hiring freezes and furloughs, the state is required to demonstrate that it adequately meets its unemployment insurance program needs.[19]

Written inquiries as to why your client's appeal is still pending, with copies to the appropriate officials, should help get a decision to be issued in your individual case. If the delay is caused by the state's lack of resources, however, such pressure may not be enough or may simply cause your client's case to be prioritized behind another appeal that has been pending for too long. To deal with such systemic delays, California Rural Legal Assistance filed a petition for writ of mandate on behalf of its clients, citing California's failure to meet federal timeliness standards for processing initial claims and for deciding appeals. The petition requests that the court order California to take all necessary action to ensure compliance with the timeliness requirements.[20]

Check Your Client's Filing History. The financial consequences of the appeal will depend on the filing history. If your client was initially denied benefits and the denial is reversed on appeal, your client will receive unemployment benefits only for the weeks that your client filed claims. If your client forgot to file claims for a week or weeks, or became discouraged and stopped filing altogether, advise your client to file late claims for the missed weeks.

If your client was receiving benefits and the employer's appeal resulted in a reversal, your client will have an overpayment when the decision becomes final. As stated above, the overpayment is a debt that your state agency may recover by withholding your client's benefits in the future, by intercepting state income tax refunds, or, if there is a judgment, by wage execution. However, twenty-three states have provisions for waiving such

[17] *Java,* 402 U.S. at 133.

[18] See 20 C.F.R. § 650.4(b) (2009).

[19] See Application of State-Wide Personnel Actions, including Hiring Freezes, to the Unemployment Insurance Program, 74 Fed. Reg. 41165 (Aug. 14, 2009).

[20] See Proposed Second Amended Petition for Writ of Mandate, *Acosta v. Henning*, No. CPF-08-508192 (Cal. Super. Ct. March 20, 2008) (Clearinghouse No. 56,143).

nonfraud overpayments on economic and other grounds.[21] Seek, if appropriate, a waiver on behalf of your client.

Consider Legislative Advocacy. Although my focus here is representing individual clients, sometimes the law itself must be changed in order to help your client and others. In Connecticut the state promulgated a regulation that defined "available for work" as being available for full-time work.[22] Part-time workers who are monetarily eligible on the basis of their work history may nonetheless be denied benefits on the basis of their being unavailable for full-time employment. Greater Hartford Legal Aid challenged the regulation on behalf of two part-time workers who were denied benefits because their disability prevented them from working full-time. The Connecticut Supreme Court declined to reach the issue of whether the regulation was enacted in violation of Connecticut's constitution and antidiscrimination statutes and Title II of the Americans with Disabilities Act.[23] However, Greater Hartford's legislative advocacy while the appeals were pending resulted in an unemployment act amendment that allows disabled individuals to limit their availability to part-time work and still qualify for benefits.[24]

Spot Issues Other than the One Listed on the Hearing Notice. The very facts that can establish that your client left the job for nondisqualifying reasons can also raise issues of availability. For example, a worker who voluntarily left her job is not disqualified if she can prove that she left in order to care for an ill family member. However, this may raise an issue as to whether the claimant's caretaking responsibilities render the claimant unavailable for work. Ensure that your client is keeping good records of your client's work-search efforts, and prepare the client for availability questions that may be asked at the hearing or at a later time.

As you familiarize yourself with the facts in preparation for the unemployment hearing, you may find that your client has other claims. For example, if your client had good cause for leaving the employer because the employer failed to pay the agreed-upon wages, your client should also file a wage claim. If the employer discharged your client for absences caused by a serious health condition, you should determine whether your client should have qualified for Family Medical Leave Act leave and whether there was a violation.

As a hearing referee, I was generally scheduled for twenty-seven hearings per week. As an attorney to the board, I drafted fifteen decisions in a typical week. Despite the volume of cases I worked on, weeks and sometimes months passed without my seeing a claimant who was represented by an advocate. That the overwhelming majority of claimants appear *pro se* is by far what left the biggest impression on me during my seven years with the Connecticut labor department. The results of a recent poll of unemployed adults highlights that "joblessness has wreaked financial and emotional havoc on the lives of many of those out of work … causing major life changes, mental health issues and trouble maintaining even basic necessities."[25] As Nobel Peace Prize laureate Jane Addams observed, "But of all the aspects of social misery nothing is so heartbreaking as unemployment."[26] Unemployment benefits can help ease some of the misery of being unemployed, and advocacy can help ensure that benefits are paid when due.

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COMMENTS?

We invite you to fill out the comment form at www.povertylaw.org/reviewsurvey. Thank you.

—The Editors

[21] See U.S. Department of Labor, *supra* note 6.

[22] See Conn. Agencies Regs. § 31-235-6(a) (2009).

[23] See *Fullerton v. Administrator, Unemployment Compensation Act*, 911 A.2d 736 (2006).

[24] See Conn. Gen. Stat. § 31-235(c)(1) (2009); see also Conn. Agencies Regs. § 31-235-6a.

[25] Michael Luo & Megan Thee-Brenan, *Poll Reveals Trauma of Joblessness in U.S.*, New York Times, Dec. 14, 2009, http://nyti.ms/aAfHOV.

[26] Jane Addams, Twenty Years at Hull-House with Autobiographical Notes 221 (1910).

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