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Protecting Battered Women And Their Children

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Unemployment Insurance: Responding to the Expanding Role of Women in the Work Force

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I. Introduction

Unemployment insurance is a social insurance program adopted in 1935 as part of the New Deal. /1/ The program pays benefits to unemployed workers from employer payroll tax reserves in order to provide a temporary wage replacement for workers and a counter cyclical boost to the economy. /2/ Since the adoption of the program, numerous changes have occurred in the United States economy and its labor market. /3/ Observers have noted that unemployment insurance has not fully adapted to the changes that have transformed the nation's economy and work force. /4/

Among these many changes, the "dramatic increase in the participation of women" in the formal work force has been termed "probably the most significant U.S. labor market development of the post World War II era." /5/ Both the proportions of women in the total work force and the proportion of working-age women in the labor market have increased dramatically. /6/

While the increased economic role of women has been accompanied by greater visibility and power for women in U.S. society, women workers experience significant obstacles to their equal participation in the work force. /7/ For example, although women have increasingly participated in the work force, they have not seen a corresponding reduction in their role as care givers. /8/ Women also hold a disproportionate share of the emerging, low-paying, part-time jobs in the "contingent" work force. /9/ Moreover, women workers experience widespread sexual harassment on the job. /10/ As a result of these and other aspects of women's experiences at work and at home, women workers often bring unemployment insurance claims that do not fit neatly within the traditional rules.

The expanding role of women in the work force has not met with a systematic or sympathetic response from the unemployment insurance system. Instead, the courts, state legislatures, and Congress have responded in a piecemeal fashion when women have sought unemployment compensation benefits in a variety of situations related to their

status as women workers. Consequently, unemployed women are less likely to draw benefits than other unemployed workers. /11/

A leading commentator on issues involving women and unemployment compensation has pointed out that the unemployment insurance system was premised on a "family breadwinner model" and that the breadwinner was typically male. /12/ A quotation from one of the system's "founding fathers" sums up the ideal family under this perspective: "A father who works. A mother who tends house. Children who look to mother for care and to father for support." /13/

The unemployment insurance system was not designed with the realities of women workers in the 1990s in mind but rather accepts the male breadwinner as the "normal" worker. /14/ The challenge for advocates representing women claimants is to adapt, bend, or break the existing legal guidelines in order to assist clients and move the unemployment insurance system closer to the realities of the 1990s workplace as they are experienced by women. /15/

The lack of any systematic approach to modifying unemployment insurance programs to meet the different needs and experience of women workers in the U.S. mandates creative and assertive approaches to cases involving unemployment compensation claims for women.

Advocates should, of course, employ their everyday knowledge of unemployment insurance laws and procedures. /16/ Understanding that many of the time-honored rules and practices of unemployment insurance law arise from the male breadwinner model and disadvantage women claimants, advocates can develop a useful critique of unfavorable decisions. /17/ This critique need not convert the agency or court to a feminist viewpoint but must convince the decisionmaker of both the inequity and the inflexibility of the status quo. Tactically, extensive briefing, including the assistance of amicus curiae, has been a feature of several of the cases discussed here.

There are two principal areas of legal developments concerning unemployment insurance and women's expanding role in the workplace. First, women who must restrict the time of day they are available for work or their number of hours of work per day or week due to care-giving responsibilities run afoul of traditional unemployment insurance rules regarding availability for work, seeking work, and refusing work. Here the concepts of "suitability" and "good cause" come into play. Second, women claimants sometimes leave work due to factors related to their roles as mothers, care givers, or female workers. In these cases, the "good cause" factor is again key, as well as the relationship of good cause to the employment, depending on the specific statute involved.

This article presents a selective survey of statutory developments and cases involving women's claims for unemployment insurance benefits related to the unique experiences of women workers. As a matter of convenience, and in lieu of developing an alternative conception of unemployment insurance law, the authors have elected to present their legal analysis in terms of two of the traditional categories of unemployment insurance

law: availability for work and voluntary departure. A number of subtopics within these major categories are explored. The emphasis is on positive case law developments as well as selected statutory amendments, without ignoring negative trends.

II. Availability for Work Issues

All states have unemployment insurance statutes that require that claimants be available for work. /18/ "The availability requirement is said to be satisfied when an individual is willing, able, and ready to accept suitable work which he does not have good cause to refuse, that is, when he is genuinely attached to the labor market." /19/ Women who have child care or other responsibilities that require them to work only during day shifts or prevent them from working weekends or full-time frequently have eligibility problems related to the availability requirement. /20/ In most states, the burden of proof with respect to eligibility falls on the claimant, /21/ although this burden may shift back to the state agency in some cases once a claimant shows she meets the basic labor market attachment criteria.

The seminal availability case is the California Supreme Court's decision in Sanchez v. Unemployment Insurance Appeals Board. /22/ In Sanchez, claimant had worked as a waitress and a factory worker but advised the state agency that she could not accept weekend work because she had to care for her four-year-old son. Claimant had child care from family members available during the week, but claimant's sister, who had previously baby-sat on weekends, had recently moved. The state agency, the Appeals Board, and the lower court all ruled that claimant's unwillingness to work weekends had "materially reduced" her availability for work and rendered her ineligible for unemployment insurance benefits. The California Supreme Court unanimously reversed the denial of benefits in an extensive opinion.

In reaching this favorable result, the Sanchez court made a number of preliminary rulings favorable to claimants facing ineligibility due to availability restrictions. First, the court held that the availability requirement was tempered by other state law provisions pertaining to disqualifications for refusals of "suitable" work "without good cause." Construing the provisions together, the court held that claimants need not make themselves available for unsuitable work or work that they have good cause to refuse. /23/

Next, the court balanced a claimant's willingness to accept all "nonrefusable" work by recognizing that the availability requirement was also intended to assure that claimant "remains available to a substantial employment field." /24/ The court reached this conclusion after rejecting two California Attorney General opinions requiring a claimant to be available for work seven days a week if ordinarily required in the claimant's usual occupation. /25/

The Sanchez court held that the agency could not simply find that claimant was unavailable without considering the suitability of weekend work and whether claimant

had good cause to refuse weekend work. /26/ The court held that, although restaurants in Los Angeles are open on weekends and claimant had worked weekends in the past, no substantial evidence exists to support the referee's finding that the claimant had materially reduced her availability for work. /27/ Accordingly, the court remanded the case to the agency for a hearing on whether claimant remained available to a substantial field of work despite her availability restrictions. /28/

The Sanchez court, having already made considerable headway for claimants, went on to determine that parents or guardians of minor children have "good cause" to refuse work "which conflicts with parental activities reasonably necessary for the care or education of the minor if there exists no reasonable alternative means of discharging those responsibilities." /29/ Moreover, the court held that, once claimant met her initial showing that she was available for suitable work that she had good cause for refusing, the state agency had to assume the burden of proof on the issue of whether claimant was available for work in a substantial field of employment. /30/

In short, the Sanchez court avoided what it termed the "rigid notion of 'customary' requirements [for days of work] for the more realistic and flexible tests of 'suitability,' 'good cause,' and actual labor market exposure." /31/ In so doing, the Sanchez court adopted a standard reflective of the realities of the modern work force. /32/

Although Sanchez has been frequently cited and followed, /33/ it was preceded a decade earlier by In re Watson. /34/ There the North Carolina Supreme Court held that a factory worker who was laid off her first-shift job and later refused recall to an identical job on the second shift had refused suitable work. /35/ The Watson court held that claimant had "good cause" to refuse to work the second shift because, with her spouse working out of town, she was unable to make other arrangements for child care. /36/

Watson then explored the availability requirement, holding that the claimant's refusal to work at night did not render her ineligible:

-- Personal circumstances which at all hours preclude a claimant from accepting employment make such person ineligible for the benefits of the Employment Security Act for the reason that such person is not available for work, but personal circumstances which leave an employee free to return to work during the hours of her former employment, which are the hours during which most people in her line of work are employed in the community, do not render her unavailable for work merely because they preclude her from accepting employment at an entirely different period of the day. /37/

Watson furnishes a careful statutory analysis for advocates representing claimants facing ineligibility on availability grounds.

Although women claimants have had considerable success in getting courts to recognize their needs to restrict their availability, not all courts have reached results sympathetic to care givers. For example, in Doctor v. Employment Division, /38/ the Oregon Court of Appeals deferred to agency rules that defined availability in terms of the "usual hours and

days of the week customary for the work being sought . . . ." /39/ As a result, the court found that a registered nurse who declined evening shifts at a nursing home because she was a single parent and needed to be home on school days with her son was unavailable for work, even though the agency held she had good cause to refuse the offer. The court refused to read Oregon's availability statute in conjunction with the "good cause" provision in its refusal statute, as in Sanchez. /40/ Doctor is but one example of courts that have insisted on a strict, if rather wooden, approach to availability issues.

III. Issues with Respect to Voluntary Departure from Work

A. Leaving Work Due to "Domestic Circumstances"

All states disqualify claimants who leave work without good cause. /41/ Thirty-eight states require that good cause excusing a voluntary leaving of work be "connected to the work" or attributable to the employer. /42/ In these states, good cause must be work related. States without this limiting language permit so-called personal reasons to excuse a voluntary quit. Women workers leave work for a variety of reasons related to their care-giving roles, and these separations have resulted in a number of cases addressing so-called leavings of work for domestic circumstances. Whether a state statute limits good cause to reasons attributable to the employer is key in these cases. For example, "personal causes" (like leaving work to accompany a spouse or to care for a sick relative) will excuse a voluntary leaving in a state that does not restrict the acceptable reasons for quitting to those related to the employer, while similarly situated claimants in states that do not recognize personal reasons for voluntarily quitting will be disqualified. /43/

In Truitt v. Unemployment Compensation Board of Review, /44/ the Pennsylvania Supreme Court held that difficulties in obtaining child care constituted good cause of a "necessitous and compelling" nature to excuse a voluntary leaving under Pennsylvania law. In Truitt, claimant worked as a waitress on both day and evening shifts. Claimant's mother watched her children for the first month after claimant was hired, but her mother was unable to continue after she broke her elbow. Claimant and her mother made considerable efforts to locate child care with other relatives and a commercial day care center but were unable to locate evening child care. /45/ Claimant also asked her employer to relieve her of evening shifts, but her employer refused. /46/ Claimant quit, and her claim for benefits was denied. The trial court upheld the denial, finding that a "reasonable person" would not have quit in similar circumstances. /47/

The supreme court reversed. Exhibiting considerably more understanding of claimant's situation than that shown by the lower court and the agency, the court wrote:

-- Thus, using the reasonable person standard herein, it is readily apparent that the sudden physical disability of a trusted baby-sitter and the unavailing search for a replacement within two days produced both "real and substantial pressure" on the appellant to terminate her employment. Considering the hours that appellant was required to work, we believe that any reasonable person who had to find child care on this short

notice would have done what appellant did. Claimants need not place their children with strangers or unchecked day care agencies in order to show that they have met the aforesaid standards that we impose upon them. /48/

Significantly, in Pennsylvania, claimants need not show that good cause to excuse a quit is attributable to their employers. Without some action attributable to the employer, similarly situated claimants in more restrictive states are less likely to benefit from the analysis in Truitt.

Massachusetts's courts have adopted an approach adaptable to claimants in every state, namely, that domestic responsibilities can make a leaving "involuntary" in certain circumstances. This argument avoids the necessity of tying the reasons for the quit to the employer. In Manias v. Director, Division of Employment Security, /49/ the Massachusetts Supreme Judicial Court held that a claimant who left work due to a reduction in hours and a conflict with child care demands had urgent and compelling reasons for her leaving, rendering her resignation involuntary. The ruling was extended in Zukoski v. Director, Division of Employment Security, /50/ where the court remanded an agency denial of benefits. In Zukoski, claimant left his employment after his hours were shifted from days to evenings Because claimant's spouse already worked on Monday evenings, his presence was required in the home on that night. The court stated:

> We have recognized domestic responsibilities as permitting a claimant in a situation that may be similar to the plaintiff's "to reject certain employment situations as unacceptable," rendering his termination involuntary and making him eligible for benefits. . . . /51/

A similar analysis was employed by the Michigan Court of Appeals in a case involving a construction worker who accepted a job in Cincinnati, Ohio, but quit after 25 days because of the difficulties caused by his absence from home during the week. /52/ Several cases have dealt with the question of whether a change in hours of work that conflicts with a worker's domestic responsibilities provides good cause for leaving attributable to the employer. A recent North Dakota Supreme Court case, Newland v. Job Service North Dakota, /53/ resolved the issue favorably. In Newland, claimant worked for a drug wholesaler on the day shift. When the company advised her that her shift would change to an irregular evening schedule with indefinite starting and ending times, claimant quit because she could not secure child care for her newly unpredictable schedule. /54/

Finding that her reasons for leaving were "personal" and not "attributable to the employer" as required by North Dakota's voluntary quit provision, the agency and the lower court disqualified claimant. /55/ Ignoring employer's role in making the schedule change in the first place, the agency's traditional analysis put the entire onus for the separation on claimant. In effect, the traditional "personal reasons" analysis reads the involved statute as if good cause for leaving work must be "solely" attributable to the employer. In addition, characterizing the impact of an altered schedule on a claimant and his or her family as "personal" simply reflects the persuasiveness of the male breadwinner

model and the assumption that "normal" workers have a nonworking spouse at home to provide child care. /56/

Fortunately, the North Dakota Supreme Court took a broader approach, evaluating each of claimant's reasons for quitting, including employer's substantial change in working hours. /57/ In this regard, the court determined that a substantial shift in working hours, even if the overall number of hours was not reduced or increased, could constitute good cause attributable to the employer for quitting. /58/ Under this analysis, the court found that claimant's reasons for leaving were at least partially attributable to her employer and excused her leaving work. /59/ The court remanded the case for a determination of whether claimant had made a good-faith effort to find child care before quitting. If a good-faith effort was found, the court held that claimant should be awarded benefits. /60/

Other courts have adhered to the traditional analysis, despite the employer's evident role in creating the conflict between work hours and care-giving responsibilities. In Beard v. State Department of Commerce, /61/ for example, employer changed claimant's hours to a night shift (11:45 p.m. to 7:45 a.m.). Claimant asked for her accrued annual leave, so she could make child care arrangements, but her request was denied. At this point, claimant quit. /62/ Analyzing the statute quite narrowly, the Florida court found that claimant left for reasons relating to child care, not because employer denied her request for leave. /63/

The Tennessee Supreme Court went even further in a negative direction in Aladdin Industries, Inc. v. Scott, /64/ where a woman claimant quit her job because her employer changed her schedule to a night shift. Claimant had three children at home, and her spouse already worked nights. /65/ The court held that reasons unrelated to the employer could not provide good cause for either a voluntary leaving or a refusal of work. The court also held that claimant had made herself ineligible by limiting her availability for night work. /66/

B. Quits to Accompany a Spouse or Partner

In a mobile society, workers are forced to leave work when their spouse or partner is transferred or moves to another location for work. In order to keep the family unit together and to avoid all the emotional, social, and economic stresses attendant to a separation, the worker being left behind must leave his or her job. More often than not, the worker moving to a new job is male, and the worker quitting to join the moving worker is female. /67/

When the worker without a job arrives in the new location and files an unemployment insurance claim, the question arises as to whether the worker voluntarily quit with good cause. Once again, the state statute's good-cause provision is critical. Claimants living in states that restrict good cause to work-related reasons have considerably more difficulty obtaining benefits than claimants living in states that consider personal reasons for leaving.

No area of unemployment insurance law as it relates to the special concerns of women has produced more litigation than cases involving quits to accompany a spouse or partner. The following discussion is limited to statutory and case law developments that exemplify various approaches. /68/

A number of states have explicitly passed legislation addressing the issue of quitting to accompany a spouse. A minority of states assist claimants. For example, the Maine statute provides that a quit is excused if "the leaving was necessary for the claimant to accompany, follow or join his spouse in a new place of residence." /69/ In McGivney v. Employment Security Commission, /70/ the Maine Supreme Judicial Court ruled that, where the claimant was not formally married on the last day of her work, but was married during the two-week period for which she received accumulated vacation pay immediately after her separation from work, claimant fell within the Maine provision.

In contrast, a number of state statutes explicitly disqualify claimants who move with a spouse. Several of these statutes have been subject to constitutional challenges. /71/ Chandler v. Department of Employment Security illustrates the issues raised in these cases. /72/

In Chandler, the Utah Supreme Court upheld a Utah statute that provided that "a claimant who has left work voluntarily to accompany, follow or join his or her spouse to or in a new locality does so without good cause. . . ." /73/ The court majority rejected equal protection and due process arguments, and held that the statute "bears a rational relationship to the legitimate legislative goal of limiting unemployment compensation to those who become unemployed through no fault of their own." /74/ Attempting to use the language of the statute to avoid its impact, the dissent argued that all claimants who were forced to leave their work to follow their spouses due to the financial burdens of maintaining separate households did not leave "voluntarily" as required by the statute. /75/ The majority insisted, despite the explicit text of the statute, that the focus must be on the good-cause issue, rather than the voluntariness issue. /76/

Taking an approach entirely different from that of the Virginia and Utah legislatures (and the courts that upheld those statutes), the Massachusetts Supreme Judicial Court recently awarded benefits to a claimant who left her job to accompany her long-standing nonmarital partner. /77/ The Massachusetts statute defined good cause as reasons for leaving work that were "urgent, compelling and necessitous." /78/ Noting her emotional and financial commitment to her partner, the majority in Reep v. Commissioner had no difficulty reversing the agency's position that claimant had to be married in order to establish that her reasons for leaving met this standard. Instead of requiring a claimant to be married or engaged, the court advised the agency to look to such factors as use of joint checking accounts, life insurance beneficiary designations, and other manifestations of lasting relationships. /79/ Three members of the court dissented. /80/

The California Supreme Court reached a negative result in a case involving a quit to move with a domestic partner in Norman v. Unemployment Insurance Appeals Board. /81/ There claimant moved out of state with her boyfriend. In contrast to Reep, the

claimant in Norman made little showing of commitment to the relationship, although the California court put great stress on the absence of a marriage or formal engagement in reaching its conclusion that the claimant lacked good cause for her quit. /82/ Norman demonstrates that, even in states that permit personal reasons for good cause to excuse a leaving of work, advocates must establish a compelling good personal cause.

The pattern for cases involving leavings to accompany a spouse or partner was established early in the days of unemployment compensation, with courts reaching diverse results. /83/ This pattern has continued. Much resistance stems from arguments against awarding benefits to claimants who leave work for causes unrelated to their employment. However, countervailing arguments support the importance of marital, familial, and other relationships. Given the history of this area of law, an overall resolution in the near term appears unlikely.

C. Pregnancy-Related Separations from Work

Women workers can have a variety of difficulties in obtaining unemployment benefits during or after pregnancy. Women who are forced off work due to pregnancy-related health complications confront questions regarding whether they are able to and available for work. After childbirth, women who are not reinstated to prior employment face voluntary leaving disqualifications. /84/

Pregnant women's rights to take time off work during or after a pregnancy and birth and to reinstatement to work afterward have been strengthened by the enactment of the Family and Medical Leave Act. /85/ In addition, provisions of Title VII /86/ or state civil rights statutes may prevent employers from forcing women out on maternity leave or otherwise acting adversely against them in the event they become pregnant. Still, many employers are not covered by the Family and Medical Leave Act, and many women cannot afford to take unpaid leave. Therefore, while advocates can expect some diminution in cases involving employers' refusal to reinstate women separated from work during pregnancy or due to childbirth, unemployment insurance cases will still arise in far too many cases.

In 1976, Congress provided some protection to women workers with pregnancy-related difficulties by passing an amendment to the Federal Unemployment Tax Act (FUTA) that provided that no state shall deny unemployment compensation "solely on the basis of pregnancy." /87/ This amendment followed on the heels of the Supreme Court's decision in Turner v. Department of Employment Security. /88/ In Turner, the Court declared unconstitutional a Utah statute that presumed a woman was unable to work during the last 18 weeks of her pregnancy and for several weeks after childbirth.
Subsequently, the Supreme Court weakened the holding in Turner and the impact of the FUTA pregnancy provision in Wimberly v. Labor and Industrial Relations Commission. /89/ The Court held that the FUTA pregnancy provision was merely an antidiscrimination provision and did not protect pregnant claimants who were denied unemployment insurance benefits under a Missouri state statute that disqualified claimants who left without good cause attributable to their work or their employer. Emphasizing that FUTA was not intended as a form of health or disability insurance, the Court stated:

-- [If] a State adopts a neutral rule that incidentally disqualifies pregnant or formerly pregnant claimants as part of a larger group, the neutral application of that rule cannot readily be characterized as a decision made "solely on the basis of pregnancy." /90/

Wimberly reflects a lack of recognition that pregnancy is unique to women and that so-called neutral statutes can have a discriminatory impact on women without explicit reference to pregnancy.

A dissenting judge in Tyler v. Ohio Bureau of Employment Services /91/ placed pregnancy in a different context. The majority opinion denied benefits to a pregnant woman who was sick to her stomach and forced to walk off her job when her employer would not give her the rest of the day off. The dissenting judge stated, "I am firmly convinced that if men had babies, or if the employee's medical condition was one common to middle-aged men such as angina, the result in this case would be exactly the opposite." /92/

While statutory provisions simply excluding women from benefits during specific weeks or months of pregnancy violate FUTA, women who file claims for unemployment insurance benefits during their pregnancies still face challenges to their eligibility under state law requirements mandating that claimants be "able to" and "available for" work. In general, a claimant's pregnancy should not be grounds for unwarranted assumptions about her inability to work, in the absence of specific, complicating factors.

In Bogucki v. Board of Review, /93/ claimant could no longer perform heavy work due to her pregnancy. Since her employer had no light work for her, she was separated from her employment. The court held that claimant's willingness to perform light work combined with her doctor's statement that she was able to do so satisfied the availability requirement. Claimant was also held eligible in Rhinelander Paper v. Department of Industry, Labor, and Human Relations, /94/ where the court relied upon claimant's physician's statement that she could perform light work.

In contrast, a pregnant mail carrier told by her doctor to avoid heavy lifting and excessive standing and bending was found unavailable for work in Taylor v. U.S. Postal Service. /95/ There the court relied upon the supervisor's testimony that employer had no light work that claimant could perform. The court ignored claimant's testimony that she was capable of performing sales work, which she had done before starting work at the post office. Some of the difficulty in Taylor may have arisen from the Michigan statute, which requires claimants to be available for full-time work of the type performed by the claimant in the past. /96/

Courts that deny unemployment insurance on the basis of pregnancy typically rely upon the fact that good cause to excuse a voluntary quit must be related to employer under the state statute involved. For example, in Watson v. Murdock's Food and Wet Goods, /97/ the court denied benefits to a pregnant waitress who left work after her doctor advised her to stop working. In determining whether claimant's decision was "attributable to the

employer," the court wrote:

-- In a sense, claimant's separation from employment was involuntary since she did not choose to suffer from a medical condition which required that she avoid the bending and lifting required in her job. On the other hand, the absence can be construed as a voluntary and wise decision based upon the advice of her doctor. /98/

Finding the pregnancy was not attributable to the employer, but "only to [the claimant's] own circumstances," the court disqualified claimant from benefits.

Where a claimant does not seek benefits immediately after leaving her employer, but only after her employer refuses to rehire her, the claimant can avoid the good-cause analysis since the unemployment is more clearly due to the employer's failure to offer reinstatement. In Gocke v. Weisleley, the court noted that "plaintiff did not quit her job just to take advantage of the unemployment benefits. She became pregnant and naturally was forced to quit work." /99/

Women claimants forced out on maternity leaves have also faced challenges to their claims for unemployment insurance for periods prior to their reinstatement from leave. In Frontier Airlines v. Industrial Commission, /100/ the court found that flight attendants forced onto maternity leaves were "separated from a job" under the Colorado statute. /101/ The court held that the flight attendants were available for other suitable work and must be considered separated from their jobs. The court also rejected employer's argument that claimants should not receive benefits because "they presented no evidence that they became pregnant 'through no fault of their own,'" echoing language from the preamble to the statute. The court relied instead upon the specific language of the Colorado law, which provided for benefits to a woman "who either voluntarily or involuntarily is separated from employment because of pregnancy." /102/

The Arizona Court of Appeals reached the same result without the express protective language of the Colorado statute in Harwood v. Employment Security Commission. /103/ In Harwood, employer had a policy that required employees to take a leave of absence after the sixth month of pregnancy. The court found that claimant's separation from employment was "not voluntary but was enforced in accordance with the company policy." /104/

In summary, pregnant claimants can succeed in obtaining benefits during pregnancy and after childbirth, but the route to success is far from easy. Advocates must give close attention to their state's specific statutory language, while noting both the realities facing their clients and the policy arguments that favor awarding benefits to women claimants.

D. Quits Due to Sexual Harassment

Women who have been sexually harassed at work and fear the stigma of reporting harassment or who are faced with an employer unresponsive to their complaints may have to quit their jobs, sometimes without giving prior notice. "For many women

subjected to repeated, unwanted sexual pressure at work, the only real escape from harassment lies in leaving their jobs." /105/ Whether women who quit because of sexual harassment may collect unemployment insurance depends upon both the state's statute and rules and its case law regarding voluntary quits. A woman seeking to collect unemployment insurance after quitting her job must prove that there was "good cause," "good cause connected with work," or "good cause attributable to the employer" for her voluntarily leaving. /106/

Some states have explicitly provided in their unemployment statutes that sexual harassment constitutes good cause; others at least address the issue of gender discrimination within the statute. /107/ In still other states, courts have interpreted statutes that do not explicitly address sexual harassment to find that victims may collect benefits. /108/ In so doing, courts may also interpret existing language on personal harassment to include sexual harassment. /109/ While there was much initial resistance by some state agencies, /110/ sexual harassment is now widely seen as a legitimate reason for a woman to quit her job voluntarily.

How a court or statute defines sexual harassment is critical in determining whether a claimant will receive benefits. The Minnesota statute, for example, asserts that "unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other conduct or communication of a sexual nature" is "good cause" for a voluntary quit. /111/ A truly comprehensive definition should include the following behavior: threatened or actual sexual contact that is not freely entered into and mutually agreeable; coercion designed to make the employee engage in sex with the harasser; continuing or repeated sexual abuse, including: commentaries on the employee's body, using sexually degrading words to characterize the employee, propositions, exhibitionism, descriptions of sexual acts, display of sexually offensive pictures; and employment threats if an employee does not sexually cooperate. /112/

In some states, sexual harassment need not be the sole reason for an employee to leave her job. For example, the Colorado statute provides that "personal harassment by the employer not related to the performance of the job" /113/ constitutes good cause for a woman subjected to sexual harassment to quit voluntarily. In Division of Employment Training v. Hewlett, /114/ after a woman was harassed, her husband, who worked for the same company, had his job terminated. The court allowed the woman to recover unemployment benefits although her husband's termination was another plausible explanation for her quitting. The court found that "[p]ersonal harassment need not be the sole factor in her decision to quit." /115/

One key hurdle that sexual harassment victims face in many states is showing that they alerted management of the harassment before leaving. /116/ For example, the Pennsylvania unemployment administrative agency and the state courts have endorsed the proposition that a woman who has been sexually harassed must take "commonsense action" so that the employer is "given an opportunity to understand" what the woman is objecting to and can solve the problem. /117/ The plaintiff in Homan v. Pennsylvania Unemployment Compensation Board /118/ met this requirement since she had

complained to her supervisor and applied for a transfer. The court found that plaintiff had acted as a "reasonable person" would in alerting her employer to the harassment. /119/

Case law requiring victims of sexual harassment to report or complain about the behavior before quitting ignores the fact that it may not be possible for a woman who has been sexually harassed to make such complaints:

-- Filing a formal grievance or even an informal complaint may entail significant personal hardship that a claimant ought not to be expected to undergo before quitting. /120/

Some states have recognized the difficulties a claimant may have in complaining or testifying about sexual harassment. In Melady v. Louisiana Board of Review, /121/ the court noted that a claimant's testimony was "conclusory and restrained perhaps out of a sense of delicacy" and allowed the case to be remanded for additional evidence. /122/ Other courts have recognized that "employees are understandably reticent to complain or try to prove affronts of such a personal and debasing nature [as sexual harassment]." /123/

The Nevada Supreme Court established a new standard for situations where a supervisor is the harasser in Hotel Ramada v. Mason. /124/ The court found that "when a supervisor, acting as an agent of the employer, commits the harassment, the employer is deemed the harasser. Likewise, the employer is deemed to have knowledge of the harassment."

Other courts have found that a claimant need not file a formal complaint about sexual harassment if the employer had not formulated or distributed a sexual harassment policy, complete with specified individuals responsible for addressing victims' complaints, or if the employer ignored or overlooked signs of harassment. In the leading Washington case, Hussa v. Employment Security Department, /125/ claimant "was not required to await the employer's attempt to remedy the situation" before voluntarily quitting her job. /126/ In McNabb v. Cub Foods, /127/ the Minnesota Supreme Court found that, although claimant did not specifically mention the harassment to her supervisor, another individual with authority over claimant had found the claimant crying about the harassment in a meat locker. Therefore, the court held that employer should have known about the harassment. The court noted that employer had not distributed a copy of a sexual harassment policy or the procedures claimant was to follow, did not discipline or speak to offending employees, and failed to take "timely, appropriate and remedial action." /128/

If the employee does complain about sexual harassment and is discharged for it, the burden shifts to the employer to prove that the employee engaged in misconduct connected with her work. For example, in Hollis v. Commissioner of Tennessee Employment Security, /129/ claimant received superior performance ratings until her supervisor made sexual advances. Claimant reported those advances to three coworkers and her immediate supervisor, who discharged her as a result. Under the Tennessee statute, /130/ the court found that an employer has the burden of proving that claimant should be disqualified and that, "even if the evidence supported the conclusion that Mrs.

Hollis' performance was unacceptable, it is inadequate to support disqualifying her from receiving unemployment compensation" since her performance deficiencies did not manifest the type of intentional disregard for her employer's interests that merits denying her claim for unemployment compensation. /131/

The work performance of a woman who has been subjected to sexual harassment may deteriorate as a result of the harassment. Thus, it is important to demonstrate such effects were caused by the harassment and the employer's response to employee complaints. In Morrison v. California Insurance Board, /132/ the court found that the employment relationship would worsen with sexual harassment. As one commentator noted, "the harassment might have such a debilitating effect on [the victim's] morale and performance, that the employer might have good cause to discharge her." /133/ In such a case, advocates should attempt to show that sexual harassment provoked claimant's behavior and thus set up a "good cause" defense to accusations that the discharge was warranted.

Another issue that arises is how bad the sexual harassment must be before a woman can leave her position with good cause attributable to the employer. The McEwen v. Everett, /134/ the court overturned the board of review's decision that sexual harassment had to be "unbearable" before good cause for a voluntary quit could be found. /135/ The employer in McEwen kissed and fondled claimant; and other company executives refused to take action when claimant complained. The court stated that it

> could hardly agree with the Board if it intended, by its findings, to conclude that these types of acts are not reasonably sufficient to impel the average able-bodied, qualified worker to give up his or her employment. . . . It is enough to say that we cannot agree that sexual harassment must be "unbearable" before an employee can quit. /136/

This is required in certain state statutes, such as the one in New Hampshire. /137/ In In re T & M Associates /138/ the court applied the New Hampshire unemployment statute and the agency's rule /139/ to find that claimant had quit "because of the way the company president and her supervisors treated her . . . . [T]he claimant's termination had some connection with or relation to the employment." /140/

Claimants who have been sexually harassed can succeed in obtaining benefits if the state statutes or courts recognize that sexual harassment constitutes "good cause" for quitting and do not invoke procedural hurdles to bar relief.

IV. Conclusion

Advocates face numerous and varied challenges in obtaining unemployment insurance benefits for unemployed women. The specific statutory language, case law, and policy arguments applicable to a particular claimant will significantly affect the results. Helpful case law combined with an incisive critique of the unfairness and inequity of the existing

judicial interpretations and agency practices has led to positive results in many cases.

footnotes

/1/ 49 Stat. 626 (Aug. 14, 1935). See Edwin E. Witte, Development of Unemployment Compensation, 55 Yale L.J. 21, 21-34 (1945).

/2/ Report of the Committee on Economic Security, reprinted in Hearings on S. 1130, Economic Security Act, 74th Cong., 1st Sess. 1311 (1935); William Haber & Merrill G. Murray, Unemployment Insurance in the American Economy 26-35 (1966).

/3/ See generally Bennett Harrison & Barry Bluestone, The Great U-Turn: Corporate Restructuring and the Polarizing of America 28-52, 110-38 (1988).

/4/ Two observers have noted that

> [a]s a matter of equity, the UI system must recognize that, if it is to provide wage loss protection to the work force of the country, it must recognize the characteristics of all parts of that work force. The fact that a large proportion of work force members have family responsibilities, particularly responsibilities for the care of school-aged and preschool children, should have a direct impact on many UI policies. The policies at issue are provisions for "good cause" for leaving work, separations for absenteeism as misconduct, the treatment of workers who must restrict the time when they can work, and the treatment of women during pregnancy and after childbirth.

Margaret M. Dahm & Phyllis H. Fineshriber, Women in the Labor Force, 3 Unemployment Compensation Studies & Research 737, 740 (1980). See also Janet Norwood, Remarks Before the Advisory Council on Unemployment Compensation, Washington, D.C. (May 11, 1993); Wayne Vroman, New Directions for the United States, Speech Delivered to the National Association of Unemployment Insurance Appellate Boards, Annual Conference, Portland, Maine (June 17, 1991).

/5/ Michael W. Horrigan & James P. Markey, Recent Gains in Women's Earnings, Monthly Labor Rev., July 1990, at 11.

/6/ In 1959, the total labor force over 25 years of age was 26.5 percent female. By 1989, women constituted 36.7 percent of the total work force over age 25. Paul O. Flaim, Population Changes, The Baby Boom, And the Unemployment Rate, Monthly Labor Rev., Aug. 1990, at 7. Women's overall participation in the work force grew from 53 percent of women over age 20 in 1982 to 58 percent of women over age 20 in 1990. Steven E. Haugen & Joseph R. Meisenheimer, U.S. Labor Market Weakened in 1990, Monthly Labor Rev., Feb. 1991, tbl. 3 at 7. See also Sue Shellenbarger, Work & Family: So Much Talk, So Little Action, Wall St. J., June 21, 1993, at R4 (chart showing female proportion of total work force exceeded 45 percent in 1992.).

/7/ See generally Susan Faludi, Backlash: The Undeclared War Against American Women (1991); Teresa Amott, Caught in the Crisis: Women and the U.S. Economy Today (1993).

/8/ In 1970, 28.7 percent of mothers with children under the age of six were in the work force. By 1990, 58.2 percent of mothers of young children were in the work force. Jonathan R. Veum & Philip M. Gleason, Child Care: Arrangements and Costs, Monthly Labor Rev., Oct. 1991, at 10. Lack of affordable child care is a significant barrier to work force participation for young mothers of children. Peter Cattan, Child-Care Problems: An Obstacle to Work, Monthly Labor Rev., Oct. 1991, at 3.

/9/ Lawrence Mishel & David Frankel, The State of Working America, 1990-1991 at 133-51 (1991); Richard Belous, The Contingent Economy 21 (1989).

/10/ United Nations, International Labor Office, Combating Sexual Harassment at Work,

/11/ Conditions of Work Digest 8, 160, 288-89 (1992) (summarizing research on the United States); Wendy Pollack, Sexual Harassment: Women's Experience vs. Legal Definitions, 13 Harv. Women's L. J. 35, 45-53 (1990); Martha F. Davis & Alison Wetherfield, A Primer on Sexual Harassment Law, 26 Clearinghouse Rev. 306-8 (July 1992).

/11/ The General Accounting Office reported that 38 percent of unemployed men received unemployment insurance benefits in 1990, while 31 percent of women did so. General Accounting Office, Unemployment Insurance: Program's Ability to Meet Objectives Jeopardized (Sept. 1993).

/12/ Diana Pearce, When Sexual Harassment Happens: Analysis of State Unemployment Insurance Coverage of Workers Who Leave Employment Because of Sexual Harassment 1-3 (Washington, D.C. Wider Opportunities for Women, Inc., undated manuscript) [hereinafter When Sexual Harassment Happens]; Diana M. Pearce, Toil and Trouble: Women Workers and Unemployment Compensation, 10 Signs 439 (1985).

/13/ Alan Hawley, Struggles for Justice: Social Responsibility and the Liberal State 383 (1991) (quoting Isaac Rubinow, Quest for Security (1934)).
14 Deborah Maranville, Feminist Theory and Legal Practice: A Case Study on Unemployment Compensation and the Male Norm, 43 Hastings L.J. 1081-87 (1992); Hearing Before the House Subcommittee on Human Resources, Committee on Ways and Means, 102d Cong., 1st Sess. 73-79 (Feb. 20, 1991) (testimony of Diana Pearce on unemployment insurance coverage and financing issues).

/15/ The authors recognize that, in some cases, male claimants face situations similar to those that arise most often for women claimants. However, in the overwhelming majority of cases, the legal issues we discuss here arise with women. Certainly, the legal and political analysis offered here is centered fundamentally in the economic and political realities facing women workers.

/16/ Due to space limitations, this article assumes a familiarity with basic unemployment insurance law. Readers may wish to review Jeff Gilbert's introductory article, Understanding Unemployment Compensation Benefits, 25 Clearinghouse Rev. 816 (Nov. 1991). Other good introductions to the basics of unemployment insurance law include Haber & Murray, supra note 2, and the entire December 1945 issue of the Yale Law Journal, which offers a wealth of information. In addition, the February 1955 issue of the Vanderbilt Law Review was devoted to unemployment insurance topics.

/17/ Deborah Maranville's article, "Feminist Theory and Legal Practice," describes an approach used by the Civil Law Clinic of the University of Washington School of Law in challenging an agency rule that required claimants to seek full-time work.
The Clinic built its legal strategy on two key insights of feminist jurisprudence. The first is that our current legal system often affects women differently, and less favorably, than men, and especially disadvantages the majority of women whose lives are significantly affected by their roles as mothers. This understanding allowed us to question whether the full-time work rule had a differential impact on women and thus to identify a potential challenge to that rule. The second insight is that the disfavored situation of women often results because laws implicitly have been structured to fit male life patterns--male norms that are not stated as such, but are instead mistaken for the inevitable, natural state of being. This insight provided a basis for contending that, because the existing interpretation of the statute was based on such a male norm, a more inclusive understanding of work patterns could lead to an interpretation of the statute that accommodated both women's and men's experience.
Maranville, supra note 14, at 1085-86 (footnotes omitted). A similar analysis should prove useful to advocates in other cases.

/18/ Louis F. Freeman, Able to Work and Available for Work, 55 Yale L.J. 123, 124 (1945). See also Lee G. Williams, Eligibility for Benefits, 8 Vanderbilt L. Rev. 286, 292-98 (1955). For convenience's sake, availability problems related to pregnancy are discussed in conjunction with pregnancy-related separations in Section III.C., infra.

/19/ Freeman, supra note 18, at 124.

/20/ See Elizabeth F. Thompson, Unemployment Compensation: Women and ChildrenThe Denials, 46 U. Miami L. Rev. 751 (1992); Annotation, Unemployment Compensation: Eligibility as Affected by Claimant's Refusal to Work at Particular Times or on Particular Shifts for Domestic or Family Reasons, 2 A.L.R.5th 475 (1992).

/21/ 76 Am. Jur. 2d. 118 (1992).

/22/ Sanchez v. Unemployment Ins. Appeals Bd., 569 P.2d 740 (Cal. 1977) (Clearinghouse No. 22,639).

/23/ Id. at 744-46. As the Sanchez opinion notes, this is the majority position on this issue, but not the uniform holding. Id. at 746.

/24/ Id. at 746-47.

/25/ Id. at 747-48.

/26/ Id. at 748-49.

/27/ Id. at 749 n.12.

/28/ Id. at 749.

/29/ Id. at 750.

/30/ Id. at 750-51.

/31/ Id. at 748.

/32/ See Thompson, supra note 20, at 783-84.

/33/ See Arndt v. Department of Labor, 583 P.2d 799 (Alaska 1978) (Clearinghouse No. 25,253); Huntley v. Department of Employment Sec., 397 A.2d 902 (R.I. 1979); Conlon v. Director, Div. of Employment Sec., 413 N.E.2d 727 (Mass. 1980); Shufelt v. Department of Employment & Training, 531 A.2d 894 (Vt. 1987) (Clearinghouse No. 43,410).

/34/ In re Watson, 161 S.E.2d 1 (N.C. 1968).

/35/ Id. at 6.

/36/ Id. at 7. Advocates should note that most refusal-of-work statutory provisions, unlike many voluntary leaving disqualifications, permit personal reasons for refusing a job offer. See infra notes 40-42 and accompanying text. See also When Sexual Harassment Happens, supra note 12.

/37/ Watson, 161 S.E.2d at 8. The agency had found that 70 percent of the job opportunities for the claimant's vocation and abilities were day jobs. Id. at 4.

/38/ Doctor v. Employment Div., 711 P.2d 159 (Or. Ct. App. 1985).

/39/ Id. at 160-61.

/40/ Id. at 161-62.

/41/ Katherine Kempfer, Disqualifications for Voluntary Leaving and Misconduct, 55 Yale L.J. 147 (1945).

/42/ U.S. Department of Labor, Employment & Training Admin., Comparison of State UI Laws 4-33 (1993).

/43/ Compare Cantrell v. Unemployment Ins. Comm'n, 450 S.W.2d 235 (Ky. Ct. App. 1970) (claimant who quit work to care for her terminally ill spouse had good cause to leave work), with Leeseberg v. Smith-Jamieson Nursing, Inc., 149 Mich. App. 463, 386 N.W.2d 218 (1986) (claimant who sought, but was denied, leave of absence to care for her seriously injured spouse is disqualified from benefits since personal reasons for leaving are not good cause under Michigan statute). The Kentucky statute was later amended and now requires "good cause attributable to the employment." Ky. Rev. Stat. 341.370(1)(C).

/44/ Truitt v. Unemployment Compensation Bd. of Rev., 589 A.2d 208 (Pa. 1991) (Clearinghouse No. 46,674).

/45/ Id. at 209.

/46/ Id.

/47/ Id.

/48/ Id. at 210 (citation omitted).

/49/ Manias v. Director, Div. of Employment Sec., 388 Mass. 201, 445 N.E.2d 1068 (1983).

/50/ Zukoski v. Director, Div. of Employment Sec., 459 N.E.2d 467 (Mass. 1984).

/51/ Id. at 468 (citations omitted).

/52/ Laya v. Cebar Const. Co., 101 Mich. App. 26, 300 N.W.2d 439 (1980) (Clearinghouse No. 30,446).

/53/ Newland v. Job Serv. N.D., 460 N.W.2d 118 (N.D. 1990).

/54/ Id. at 120.

/55/ N.D. Cent. Code 52-02-06(1)(a)-(b) (1989 & Supp. 1991). See Comment, Social Security and Public WelfareUnemployment Compensation: What Factors Constitute Good Cause Attributable to the Employer When an Employee Leaves Employment Voluntarily? 68 N.D. L. Rev. 225-26 (1992).

/56/ In fact, a 1991 report by the National Research Council found that less than one-third of U.S. workers have a spouse at home full-time. Paid Family Leave Is Essential to Meet Current Needs, Report Says, 198 Daily Lab. Rep. (BNA), Oct. 11, 1991, at A-5.

/57/ Newland, 460 N.W.2d at 122.

/58/ Id. at 123-24.

/59/ Id. at 122, 124. In reaching this conclusion, the Newland court distinguished Sonterre v. Job Serv. N.D., 379 N.W.2d 281 (N.D. 1985), where the court had affirmed the disqualification of a claimant who quit after her employer shifted her work hours to two hours later than her prior schedule and required the claimant to work every third weekend. The Newland court noted that, in Sonterre, claimant had not given the shift change as one of her reasons for leaving but had only listed the lack of prior notice of the schedule change and the difficulty in arranging for child care as her reasons for quitting. In such a case, none of the causes for leaving were attributable to the employer. Newland, 460 N.W.2d at 122.

/60/ Id. at 124-25.

/61/ Beard v. State Dep't of Commerce, 369 So. 2d 382 (Fla. Dist. Ct. App. 1979).

/62/ Id. at 383.

/63/ Id. at 384-85. As one commenter noted, "Through a technical reading of the statute, the court effectively delivered a message about unemployment compensation: no personal reasons, however compelling, constitute good cause for leaving a job." Thompson, supra note 20, at 768. Thompson also notes the contrast between Beard and an earlier Florida case, Yordamalis v. Florida Indus. Comm'n, 158 So. 2d 791 (Fla. Dist. Ct. App. 1963), that excused a father who quit his job and refused work due to child care responsibilities. However, Yordamalis was decided in 1963, before the Florida statute was amended to restrict good cause to reasons attributable to the employer. Thompson, supra note 20, at 769.

/64/ Aladdin Indus., Inc. v. Scott, 407 S.W.2d 161 (Tenn. 1966).

/65/ Id. at 162.

/66/ Id. at 164.

/67/ "Second to pregnancy, . . . the most frequent sex-related cause of disqualifying women has been marital or domestic obligations. Such obligation include . . . moving with [a] spouse." Margaret M. Dahm & Phyllis H. Fineshriber, Disqualification for Quits to Meet Family Obligations, 1 Unemployment Compensation: Studies & Research 9 (1980).

/68/ See also Annotation, Eligibility for Unemployment Compensation as Affected by Voluntary Resignation Because of Change of Location or Residence, 21 A.L.R.4th 317 (1983).

/69/ Me. Rev. Stat. Ann. tit. 26, 1193(1)(A) (Supp.1978).

/70/ McGivney v. Employment Sec. Comm'n, 420 A.2d 227 (Me. 1980).

/71/ See, e.g, Austin v. Berryman, 955 F.2d 223 (4th Cir. 1992) (on rehearing), cert. denied, 112 S. Ct. 2997 (1992) (Clearinghouse No. 42,895); Warren v. Board of Rev., 463 So. 2d 1076 (Miss. 1985); Pyeatt v. Idaho State Univ., 98 Idaho 424, 565 P.2d 1381 (1977); Kantor v. Honeywell, Inc., 286 Minn. 29, 175 N.W.2d 188 (1970) (upholding statutes disqualifying moving spouses in face of constitutional challenges); Thomas v. Rutledge, 280 S.E.2d 123 (W. Va.1981); Wallace v. Commonwealth. UC Bd. of Rev., 38 Pa. Commw. 342; 393 A.2d 43 (1978) (Clearinghouse No. 25,462); Shelton v. Phalen, 214 Kan. 54, 519 P.2d 754 (1974); and Boren v. Department of Employment Dev., 59 Cal. App. 3d 250, 130 Cal. Rptr. 683 (1976) (holding statutes explicitly disqualifying workers quitting for familial reasons unconstitutional).

/72/ Chandler v. Department of Employment Sec., 678 P.2d 315 (Utah 1984) (Clearinghouse No. 36,128).

/73/ Utah Code Ann. 35-4-5(a) (1983 Supp.).

/74/ Chandler, 678 P.2d at 318. Advocates faced with the "through no fault of her own" policy argument should note the early criticism of this approach. "By the usual rules of statutory construction, a general declaration of policy may be used to explain but not to contradict specific provisions of the act." Kempfer, supra note 41, at 157. Other helpful, early critiques are found in Gladys Harrison, Forenote: Statutory Purpose and Involuntary Unemployment, 55 Yale L.J. 117 (1945), and Earle V. Simrell, Employer Fault vs. General Welfare as the Basis of Unemployment Compensation, 55 Yale L.J. 181 (1945).

/75/ Chandler, 678 P.2d at 319-20.

/76/ Id. at 320-22.

/77/ Reep v. Commissioner, 593 N.E.2d 1297 (Mass. 1992).

/78/ Mass. Gen. Laws Ann. ch. 151A, 25(e)(1) (1990). This statute was amended effective April 1, 1992, to disqualify claimants leaving to accompany a spouse or other individual.

/79/ Reep, 593 N.E.2d at 1301 n.4.

/80/ Id. at 1301-5.

/81/ Norman v. Unemployment Ins. Appeals Bd., 34 Cal. 3d 1 (1983).

/82/ Id. at 4-10. Advocates should note that the court also relied upon agency regulations describing good cause in domestic circumstances as involving reasons of a "real,

substantial and compelling nature." Id. at 9 (citing Cal. Admin. Code, tit.22, 1256-9). Under this standard, the claimant in Reep might well prevail in California.

/83/ See Woodmen of the World Life Ins. Soc'y v. Olsen, 141 Neb 776, 4 N.W.2d 923 (1942) (denying benefits); Department of Labor & Indus. v. UC Bd. of Review, 154 Pa. Super. 250, 35 A.2d 739 (1944) (awarding benefits).

/84/ For an excellent overview, see Mary E. Radford, Wimberly and Beyond: Analyzing the Refusal to Award Unemployment Compensation to Women Who Terminate Prior Employment Due to Pregnancy," 63 N.Y. Univ. L. Rev. 532 (1988). Professor Radford correctly points out that the "voluntariness" of any pregnancy is a complex issue. Id. at 557 n.167. The Wall Street Journal recently reported that a government health survey had estimated that 13.3 million pregnancies in the U.S. during a five-year period in the mid-1980s were "unplanned." This was slightly more than half of all pregnancies during the survey period. Alan L. Otten, People Patterns, Wall St. J., May 25, 1993, at B1. See also Annotation, Termination of Employment Because of Pregnancy as Affecting Right to Unemployment Compensation, 51 A.L.R.3d 254 (1973).

/85/ Family and Medical Leave Act, 29 U.S.C. 2601 et seq. (1993). See also Lawrence B. Fine, et al., Family, Medical Leave Legislation, Nat'l Law. J., Mar. 8, 1993, at S7.

/86/ 42 U.S.C. 2000e to 2000e-17 (1988).

/87/ 26 U.S.C. 3304(a)(12) (1988).

/88/ Turner v. Department of Employment Sec., 423 U.S. 44 (1975) (Clearinghouse No. 16,957).

/89/ Wimberly v. Labor & Indus. Relations Comm'n, 479 U.S. 511 (1987) (Clearinghouse No. 40,724). See also Mark D. Esterle, Working Women's Woes Under Wimberly, 21 Clearinghouse Rev. 710 (Dec. 1987), and Patricia K. Masten, Unemployment Compensation: Pregnancy, 26 Duquesne L. Rev. 485 (1987).

/90/ Wimberly, 479 U.S. at 517.

/91/ Tyler v. Ohio Bureau of Employment Servs., 48 Ohio App. 3d 246, 549 N.E.2d 535 (1988).

/92/ Id. at 250, 549 N.E.2d at 540.

/93/ Bogucki v. Board of Rev., 54 Pa. Commw. Ct. 419, 421 A.2d 528 (1980).

/94/ Rhinelander Paper v. Department of Indus., Labor, & Human Relations, 120 Wis. 2d 162, 352 N.W.2d 679 (Ct. App. 1984).

/95/ Taylor v. U.S. Postal Serv., 163 Mich. App. 77, 413 N.W.2d 736 (1987)

(Clearinghouse No. 43,166).

/96/ Mich. Comp. Laws 421.28(1)(c) (1992).

/97/ Watson v. Murdock's Food & Wet Goods, 148 Mich. App. 802, 385 N.W.2d 693 (1985).

/98/ Id. at 805-6, 385 N.W.2d at 695.

/99/ Gocke v. Weisleley, 18 Utah 2d 245, 249, 420 P.2d 44, 46 (1966).

/100/ Frontier Airlines v. Industrial Comm'n, 734 P.2d 142 (Colo. Ct. App. 1986).

/101/ Colo. Rev. Stat. 8-73-108(4) (1993). Other states express this by requiring that the claimant be "unemployed" and excluding approved leaves of absence from this definition. See, e.g., Mich. Comp. Laws 421.48(3) (1992).

/102/ Colo. Rev. Stat. 8-73-108(4)(b)(I) (1993).

/103/ Harwood v. Employment Sec. Comm'n, 16 Ariz. App. 64, 490 P.2d 1192 (1971).

/104/ Id. at 66, 490 P.2d at 1192.

/105/ Note, Unemployment Compensation: Benefits for the Victim of Work-Related Sexual Harassment, 3 Harv. Women's L. Rev 173 (1980) [hereinafter Benefits for the Victim of Work-Related Sexual Harassment].

/106/ For a complete statutory analysis of states' treatment of women who leave their jobs due to sexual harassment and attempt to collect unemployment, see Diana Pearce, When Sexual Harassment Happens, supra note 12.

/107/ See, e.g., R.I. Gen. Laws . 28-44-17, (1992 Supp.) ("[V]oluntary leaving work with good cause shall include sexual harassment against members of either sex."); Cal. Unemp. Ins. Code . 1256.7 (West 1993) ("An individual shall be deemed to have left his or her most recent work with good cause if the director finds that he or she leaves employment because of sexual harassment, provided the individual has taken reasonable steps to preserve the working relation."); Mass. Ann. Laws ch. 151A, 5 (Law. Co-op 1993) (An individual shall not be disqualified . . . from receiving benefits . . . [when] such individual became separated from employment due to sexual, racial or other unreasonable harassment where the employer, its supervisory personnel or agents knew or should have known of such harassment.").

/108/ See, e.g., Homan v. Pennsylvania Unemployment Compensation Bd., 107 Pa. Commw. Ct. 172, 527 A.2d 1109 (1987) (Clearinghouse No. 42,757), where sexual harassment was found to constitute a "necessitous and compelling reason" for a quit.

/109/ See Division of Employment & Training v. Hewlett, 777 P.2d 704 (Colo. 1989), where the court found that sexual harassment was encompassed within the statutory prohibition on personal harassment.

/110/ See Diana Pearce, When Sexual Harassment Happens, supra note 12.

/111/ Minn. Stat. Ann. 268.09 Subd. 1(a) (West 1992).

/112/ Meri Arnett-Kremian, Unemployment Compensation Benefits: Part of a Balanced Package of Relief for Sexual Harassment Victims, 18 Univ. Rich. L. Rev. 1, 39 (1983). An inadequate definition of sexual harassment can create problems for claimants. For example, although the Idaho Supreme Court recognizes sexual harassment as good cause for voluntarily quitting, the court has failed adequately to identify sexual harassment and has denied benefits as a result. In Jensen v. Siemsen, 118 Idaho 1, 794 P.2d 271 (1990) (Clearinghouse No. 44,283), a doctor regularly masturbated in front of a nurse and other witnesses, including another doctor. Finding that the Idaho employment security law did not define sexual harassment in Idaho, the court looked to whether a reasonable person in plaintiff's position would have voluntarily quit, under the premise that the court would know sexual harassment when it saw it. The court found that the doctor's behavior was unprofessional but did not constitute sexual harassment. The dissent pointed out that the court should have borrowed a standard from the EEOC in order to evaluate properly whether the doctor's masturbation and sexual innuendos constituted harassment.

/113/ Colo. Rev. Stat. 8-70-103(13)xxii (1989).

/114/ See Hewlett, 777 P.2d 704.

/115/ Id. at 708. See also Dura Supreme v. Kienholz, 381 N.W.2d 92 (Minn. Ct. App. 1986) (citing Burtman v. Dealers Discount Supply, 347 N.W.2d 292 (Minn. Ct. App. 1984) ("The law does not require that cause attributable to the employer be the sole reason for termination."); Curry v. Gatson, 180 W.Va. 272, 275; 376 S.E.2d 166, 169 (1988) ("[I]f an employee is sexually or racially harassed at the workplace and this discriminatory treatment would cause a reasonably prudent person to resign, such employee is not disqualified from receiving unemployment compensation benefits. . . ."). However, other states require that sexual harassment be the sole reason for leaving. The court in Zirelli v. Director of Employment Sec., 394 Mass. 229, 475 N.E.2d 375 (1985), looked only to events directly preceding an employee's departure. The court found the state unemployment statute "does not direct inquiry into every point of friction that may have occurred in the claimant's employment history." The same court also found in Glasser v. Director of the Div. of Employment Sec., 393 Mass. 574, 577, 471 N.E.2d 1338, 1340 (1984), that "the statute focuses on the reason that the plaintiff initially left [her] employment."

/116/ This so-called exhaustion-of-remedies requirement is widely applied by state agencies in all types of voluntary leaving cases. It is not based upon anything in the statutes, and the best-reasoned cases reject the argument that the failure to seek redress

from an employer, standing alone, is a proper ground for imposing a disqualification. See Johnides v. St. Lawrence Hosp., 184 Mich. App. 172, 457 N.W.2d 123 (1990) (Clearinghouse No. 46,321); Stonco Elec. Prod. v. Board of Rev., 106 N.J. Super. 6, 254 A.2d 111 (1969).

/117/ Colduvell v. Unemployment Compensation Bd., 48 Pa. Commw. 185, 187, 408 A.2d 1207, 1208 (1979).

/118/ Homan, 107 Pa. Commw. 172, 527 A.2d 1109.

/119/ Some courts have held that victims must notify their employer of sexual harassment in order to establish eligibility for benefits, even if the evidence of harassment is clear-cut. In St. Barnabas v. Commonwealth, Unemployment Compensation Bd. of Rev., 106 Pa. Commw. 191, 525 A.2d 885 (1987), the court acknowledged that sexual harassment had occurred, but found that the victim should have followed the formal grievance procedure, and therefore denied benefits. See also Krawczyszyn v. Ohio Bureau of Employment Serv., 54 Ohio App. 3d 35, 36, 560 N.W.2d 807-8 (1989) ("The referee in this case found that the claimant had been subjected to sexual harassment by her supervisor. . . . However, the cases also recognize that where an employer provides its employees with a mechanism to air their grievances concerning such misconduct in the workplace, a victim of sexual harassment must make a good faith effort to employ that mechanism so that the employer is made aware of the problem and is afforded an opportunity to correct the problem."). See also Whitehouse v. Director of Labor, 1991 Ark. App. LEXIS 632 (Ark. Ct. App. Nov. 20, 1991), where the claimant was touched and propositioned by her project manager. The court specifically pointed out that, even though the appellant testified her supervisor had sexually harassed her for some time, she did not mention it to any management staff until after she left her job. Id. at *8. The court in O'Neal's Bus Serv. v. Employment Sec. Comm'n, 269 A.2d 247, 249 (Del. Super Ct. 1970), found "an employee does not have good cause to quit merely because there is an undesirable or unsafe situation connected with his employment. He must do something akin to exhausting his administrative remedies by, for example, seeking to have the situation corrected by proper notice to his employer." This ruling was applied to sexual harassment in Grubb v. Standard Clorine, No. 85A-FE-7 (Del. Super. Ct. Apr. 4, 1986).

/120/ Benefits for the Victim of Work-Related Sexual Harassment, supra note 105, at 194.

/121/ Melady v. Louisiana Bd. of Rev., 375 So. 2d 760 (La. Ct. App. 1979).

/122/ Id.

/123/ Zirelli, 394 Mass. at 231, 475 N.E.2d at 376 (citing Colduvell, 48 Pa. Commw. at 187, 408 A.2d at 1208).

/124/ Hotel Ramada v. Mason [1993], 7 Unempl. Ins. Rep. (CCH) 8300 (Nev. 1993).

/125/ Hussa v. Employment Sec. Dep't, 34 Wash. App. 857, 864, 664 P.2d 1286-90 (1983).

/126/ Id. at 864, 664 P.2d at 1290.

/127/ McNabb v. Cub Foods, 352 N.W.2d 378 (Minn. 1984).

/128/ Id. Similarly, in Heaser v. Learch, 467 N.W.2d 833 (Minn. Ct. App. 1991), the harasser was the designated agent of the employer to receive equal opportunity complaints, and higher level management did not have an open-door policy to receive complaints. Thus, the victim was not required to provide additional notification to higher levels of management about the harassment in order to collect benefits.

/129/ Hollis v. Commissioner of Tenn. Employment Sec., No. 85-361-II (Tenn. Ct. App. filed Nov. 28, 1985).

/130/ Tenn Code Ann. 50-7-303(a)(2)(B) (1986) (claimant disqualified "if the commissioner finds that the claimant has been discharged from his most recent work for misconduct connected with his work").

/131/ Hollis, No. 85-361-II.

/132/ Morrison v. California Ins. Bd., 65 Cal. App. 3d 245, 134 Cal. Rptr. 916 (1976).

/133/ Meri Arnett-Kremian, supra note 112, at 32.

/134/ McEwen v. Everett, 6 Ark. App. 32, 637 S.W.2d 617 (1982).

/135/ Case law had previously established a good-cause reason to quit as one that "would reasonably impel the average able-bodied, qualified worker to give up his or her employment," that was "dependent not only on the reaction of the average employee, but also on the good faith of the employee involved," and that depended also on "whether the employee took appropriate steps to prevent mistreatment from continuing." Teel v. Daniels, 270 Ark. 766, 769, 606 S.W.2d 151, 152 (Ark. Ct. App. 1980).

/136/ McEwen, 6 Ark. App. 32, 34; 637 S.W.2d 617, 619.

/137/ N.H. Rev. Stat. Ann 282-A:32. (Supp. 1992).

/138/ In re T & M Assoc., 134 N.H. 617; 598 A.2d 209 (1991).

/139/ N.H. Code Admin. R. [Employment] 503.01.

/140/ T & M Assoc., 134 N.H. at 618, 598 A.2d at 210.