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OVERVIEW

Unemployment laws vary from state to state, but all follow the same basic theme. An involuntary separation from employment (firing) normally is compensable under the unemployment laws while a voluntary separation (quitting) is not. Exceptions exist; misconduct and unavailability for work disqualify even an involuntarily discharged claimant from receiving benefits. Even a voluntary separation is compensable if the claimant had "good cause" for quitting and remains willing and able to work.

Pregnancy-related firings are not only suspect under federal[1] and state anti-discrimination laws, but also most, if not all, state unemployment laws. With the Supreme Court's decision in *Turner v. Department of Employment Security*[2] and the adoption of section 3304(12) of the Federal Unemployment Tax Act (FUTA)[3] the following year, it became clear that states' unemployment laws could not single out pregnancy for unfavorable treatment. Discriminatory state laws that proliferated prior to 1975 were ostensibly rendered ineffective.[4] States were left free, however, to treat pregnancy the same as any other temporary disability. Because one often is disqualified from benefits during a period of disability, being unavailable to work, unemployment benefits are likely to be interrupted during or immediately after the pregnancy—even if the claimant was fired because of her pregnancy.

Voluntary pregnancy-related separations are not compensable under the unemployment laws of at least twenty-

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1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (1988 & Supp. V 1993); Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1988).
2. 423 U.S. 44 (1975).
3. 26 U.S.C. § 3304(12) (1988).
4. *See* Mary F. Radford, Wimberly *and Beyond: Analyzing the Refusal to Award Unemployment Compensation to Women Who Terminate Prior Employment Due to Pregnancy*, 63 N.Y.U. L. REV. 532 (1988).

one jurisdictions. Reasons vary, but more often than not the state's unemployment law specifically requires that good cause be "attributable to" or "connected with" employment. Because pregnancy is neither "attributable to" nor "connected with" employment, benefits are denied regardless of whether the pregnancy otherwise amounts to good cause. As explained by the Supreme Court in *Wimberly v. Labor and Industrial Relations Commission of Missouri*,[5] excluding pregnancy is permissible so long as all other non-occupational illnesses and disabilities are treated similarly.

Of those states not disqualifying pregnancy altogether, only a handful afford immediate unemployment benefits, and then only if the claimant's separation was medically necessary. These states also commonly require that the claimant remain available for other work—a difficult standard to meet if health is what caused the separation in the first place. Texas law, for example, provides that "an individual who is [otherwise] available to work may not be disqualified for benefits because the individual left work because of: (1) a medically verified illness . . .; (2) injury; (3) disability; or (4) *pregnancy*."[6]

The most common approach among those states allowing benefits, followed in about sixteen jurisdictions, provides unemployment benefits *after* childbirth when the mother again makes herself available for employment. In effect, the claimant is required to take an unpaid disability/maternity leave, with unemployment benefits being available only if the former job does not remain open. Missouri, for example, amended its unemployment insurance law in response to *Wimberly* so as not to disqualify a claimant who

> presents evidence supported by competent medical proof that she was forced to leave her work because of pregnancy, notified her employer of such necessity as soon as practical under the circumstances, and returned to that employer and offered her services to that employer as soon as she was physically able to return to work, as certified by a licensed and practicing physician, but in no event later than ninety days after the termination of the pregnancy.[7]

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5. 479 U.S. 511 (1987).
6. TEXAS LAB. CODE ANN. § 207.045(d) (West 1995) (emphasis added).
7. MO. REV. STAT. § 288.050 1.(1)(c) (Supp. 1993).

Of those jurisdictions that do not address pregnancy, do not explicitly provide for disability leave, and do not require a connection between good cause and employment, four likely would hold that disability or illness amounts to good cause under certain circumstances. Because equal treatment is mandated by FUTA, unemployment benefits also would need to be made available for pregnancy in these states. The almost universal "availability" requirement, however, likely would postpone unemployment benefits until after childbirth.

In sum, a substantial minority of jurisdictions altogether deny unemployment benefits for pregnant workers who voluntarily quit. Although an award of benefits is possible in most jurisdictions, the claimant is required either to be "available" for other work or to take an unpaid maternity leave. The result in either situation is that benefits often are available only postpartum.

I. AN INTERNAL CRITIQUE OF THE SYSTEM: GENDER BIAS AND FAVORITISM

Because most employers would rather not pay *any* unemployment benefits and would like to avoid potential liability under the anti-discrimination laws, few are willing to admit to discharging a worker because of her pregnancy. Employers naturally are encouraged to dissemble and argue either that the claimant was justifiably discharged or quit. A composite of factors, including agency favoritism for employers and gender bias, creates a serious risk that discharged pregnant claimants will be wrongly denied benefits. Viewed under its own terms, then, the current unemployment laws modeled on the anti-discrimination principle can fail pregnant workers.

To illustrate, consider the case of *Jenny Brown v. Kentucky Unemployment Insurance Commission*. Jenny worked for her employer for over two years before becoming pregnant; she was separated from her employment within four months of becoming pregnant. Jenny claimed that her employer unilaterally reduced her hours, hired a new employee, transferred her duties to the new employee, and warned her not to complain to the EEOC. The employer, meanwhile, argued that Jenny's reduced hours had nothing to do with her pregnancy and that Jenny inexplicably quit work one day for no reason. Not-

withstanding documentation signed by the employer that Jenny's hours and duties were being transferred to the new employee "because of [Jenny's] condition," Jenny was found by an unemployment hearing officer to have voluntarily quit without good cause.

Two months after this denial of benefits, Jenny, still pregnant and in need of income, located part-time, temporary employment through a placement service. Needless to say the job paid substantially less than Jenny previously earned. Within weeks of beginning this part-time job, Jenny's appeal of the hearing officer's decision proved successful; she was awarded full benefits retroactive to the date of her separation. Because of her pregnancy, the part-time nature of her current job, its lower pay and lack of benefits, and the award of unemployment benefits from the previous job, Jenny did not return to her part-time employment. Because Jenny was close to term and her assigned duties were informal, her part-time employer assumed that she took maternity leave when she failed to report for work. Only after Jenny's delivery did the employer learn that she would not return to work, and at this time the employer reported her as a voluntary quit.

Because it viewed her separation from her most recent part-time employment as a voluntary quit, the Unemployment Division again disqualified Jenny from receiving benefits from her first employer. A different hearing officer found that Jenny's subsequent employment was "suitable" because prior to her separation the part-time job had matured into full-time status. This conclusion itself was based on Jenny's failure to prove that she had not been offered full-time work. The hearing officer explained her conclusion as a function of the burden of proof, "as the testimony between claimant and the employer's office manager on this determinative point is at equipoise, and because claimant bears the burden of proof she has not overcome."

Jenny's appeal to the Unemployment Commission was unsuccessful. The Commission concluded that the burden of persuasion properly was assigned to Jenny as the claimant, and in any event that Jenny's accepting and later quitting even part-time work, at a substantially reduced salary, was still disqualifying. Whether Jenny was under an obligation to accept the work in the first instance and whether full-time employment resulted in substantially reduced wages were held irrelevant. Moreover, in response to the argument that Jenny's

separation did not occur until after childbirth, when the part-time employer formally removed her from its books, the Commission stated "[e]ven if we were to rule, as counsel now argues, that claimant did not quit until she failed to return to work after her baby was born, we would also rule that she was on a maternity leave, and not eligible for benefits . . . during the duration of that leave."

Jenny's appeal to the courts proved successful. Eighteen months after her initial, compensable separation from employment, the Jefferson County Circuit Court reversed the Commission and ordered an award of benefits. The Commission's appeal is pending.

Eliminating agency favoritism toward employers and bureaucratic gender bias is necessary if the current anti-discrimination-based system is to protect pregnant claimants like Jenny Brown. The first hearing officer's plain error in denying Jenny benefits can only be explained as a result of gender-based and employer-based bias. Jenny's subsequent wrongful disqualification for quitting part-time work, though not as damning, further illustrates the system's inability to empathize with pregnant workers.

II. AN EXTERNAL CRITIQUE: CHANGING THE RULES TO ACCOMMODATE PREGNANCY

A more progressive (and better) approach is to step beyond the anti-discrimination model and accommodate biological differences between men and women. Current anti-discrimination laws foster disparate treatment in the workplace because they fail to account for women's reproductive capacities. Elyse Rosenblum and Professor Samuel Issacharoff have cogently argued that a central reason for disparate treatment of female employees is the "birth effect," which forces women to interrupt their employment.[8] They conclude:

> If the objective of a regulatory intervention into the employment market is to allow women the opportunity for career-wage profiles comparable to those of men, ... the

8. Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2164 (1994).

> predictable mid-career interruptions caused by pregnancy must be accommodated under a regulatory scheme aimed at protecting the ability of women to continue their career work force participation through the predictable periods of fertility.[9]

Issacharoff's and Rosenblum's arguments are compelling. A systemic response to gender-based discrimination in the workplace is needed, one that affirmatively recognizes women's unique capacity for childbirth. As noted by Issacharoff and Rosenblum: "The simplest model to provide for maternity benefits is a governmental program funded through general revenues. . . . [However,] [t]here is little purpose in suggesting benefits approaches whose political viability approaches absolute zero."[10] For this reason, unemployment insurance provides the most realistic alternative. The solution is to amend the unemployment laws, preferably on the federal level, to provide immediate unemployment benefits to otherwise eligible workers who leave employment because of pregnancy.

The benefits of an insurance model are several. First and foremost, insurance will foster gender equality in the workplace. More specifically, it will financially accommodate pregnant women who voluntarily interrupt their careers and are unable to privately negotiate protection. The new Family and Medical Leave Act of 1993[11] is an important piece of legislation, but it will benefit only those who can afford unpaid leaves. Those in the lower economic strata can hardly view unpaid leaves with optimism. Unemployment insurance also will protect those who are involuntarily separated from the workplace and find themselves either unprotected by anti-discrimination laws or, like Jenny, unable to enforce them. In large measure, these are the at-risk employees who live month-to-month, week-to-week, and even day-to-day, and who need the safety-net unemployment insurance affords.

The monetary cost of extending unemployment insurance to pregnant workers is not necessarily minimal. Expenditures on the insurance side, however, are likely to be offset by savings in welfare dollars. Much is to be said for preventing mothers on the brink of poverty from falling into the well. A more

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9. *Id.* at 2171.
10. *Id.* at 2215.
11. 5 U.S.C.A. §§ 6381–6387, 29 U.S.C.A. §§ 2601, 2611–2619 (West Supp. 1994).

troubling and less tangible cost is the possibility of employer backlash against females. This can be overcome in part by not debiting the accounts of individual employers.