SUPREME COURT OF NEW JERSEY
DOCKET NO. 60,750

JOHN M. UTLEY,	**CIVIL ACTION**
Plaintiff-Petitioner,	**ON PETITION FOR CERTIFICATION FROM**
-vs-	**APPELLATE DIVISION**
	Docket No. Below: A-3810-05T5
BOARD OF REVIEW, NEW JERSEY DEPARTMENT OF LABOR,	Sat Below:
	Judges
Defendants - Respondents	S.L. Reisner, J.A.D.
	C.L. Miniman, J.A.D.

BRIEF of AMICUS CURIAE LEGAL SERVICES OF NEW JERSEY

Legal Services of New Jersey
Melville D. Miller, Jr., President
100 Metroplex Drive, Suite 402
P.O. Box 1357
Edison, New Jersey 08818-1357
Phone Number: (732) 572-9100
Fax Number: (732) 572-0066

ATTORNEYS FOR AMICUS CURIAE
Legal Services of New Jersey

On the Brief:

Lazlo Beh
Kristin Mateo
Keith Talbot
Melville D. Miller, Jr.

TABLE OF CONTENTS

CASES **PAGE**

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES AND REGULATIONS

OTHER AUTHORITIES

INTRODUCTORY STATEMENT

This appeal from a denial of unemployment compensation involves the issues of whether an employer-initiated, unilateral change of shift and hours, which ultimately resulted in a loss of transportation home from work, and consequently the inability to continue employment, constitutes a departure from a job with "good cause attributable to such work." Appellant John Utley contends that where his employer initiated the shift change, setting off a chain of events which nine months later forced him to quit because he could not get home from work, the statutory standard of "good cause attributable to such work" is satisfied.

The facts and equities in this case are overwhelmingly in favor of Mr. Utley: an employee for 23 years, who was visited with a unilateral shift change, was unable to drive because of poor eyesight, was therefore wholly reliant on public transportation, and, due to the shift change, was unable to secure public transportation home from work. Nonetheless, Mr. Utley made considerable efforts to find alternative transportation - a ride home from a co-worker. These efforts were successful until the co-worker had to take a brief emergency leave to care for a sick relative. The employer then denied Mr. Utley's own request for leave - leave which he had earned and had available - during the two weeks his co-worker would be away. To deny unemployment compensation in such

circumstances runs contrary to applicable law, prevailing public policy, and common sense.

PROCEDURAL HISTORY

Amicus relies on the procedural history set forth in the Petition for Certification.

STATEMENT OF FACTS

John Utley began work with Myron Manufacturing Corporation ("Myron") in 1982, and was a 23-year veteran of the company at the time of his job separation in 2005. T4; App. Div. at 2. Prior to February 14, 2005, Mr. Utley worked from 7:00 p.m. until 5:30 a.m. ("the overnight shift"). T5; App. Div. at 2. Mr. Utley, who has a visual impairment, must rely upon public transportation or rides to work from others.[1] T6; Brief in Opp to Cert. at 4; App. Div. at 2.

On February 14, 2005, Myron changed Mr. Utley's shift from the overnight shift, for which public transportation was available, to a shift which began at 3:30 p.m. and ran until midnight ("the midnight shift"). T5-6, 10; App. Div. at 2. Public transportation home was not available from the midnight shift. T6, 7, 9, 10; App. Div. at 2. Once the shift change

[1] The Appellate Division acknowledges that Mr. Utley "was and is not able to drive", but omits that this is due to an eyesight problem.

took effect, therefore, Mr. Utley was forced to rely on co-workers for transportation home or face the loss of his job. T6, 7, 9, 10; App. Div. at 2.

In an effort to preserve his job of more than 20 years, Mr. Utley sought rides from co-workers and a supervisor to assist him with transportation home after the midnight shift. T6, 7, 8, 10; App. Div. at 2. He found a co-worker who could reliably provide him with a ride home from the midnight shift. T6, 7; App. Div. at 2. This arrangement worked well for a while. *Id.* Nine months later, however, in November of 2005, the co-worker with whom Mr. Utley commuted was granted a two-week leave to care for a sick relative. T6; App. Div. at 2. Mr. Utley then looked for other co-workers from whom he might get a ride to bridge the two-week gap, but he could find none. T6, 8, 10.

Mr. Utley also requested to use two weeks of his earned and available vacation time, to coincide with the leave of his co-worker, and intended to return to work commensurate with the resumption of his ride home. T6, 7; App. Div. at 2-3. Myron denied Mr. Utley's request, stating that it was none of their concern if Mr. Utley had transportation home from work. T7; App. Div. at 2-3.

Mr. Utley made reasonable efforts to preserve his job, testifying that with "no buses running. I did the best I could...I worked as long as I could with the grace that somebody

give me a ride to work but once I lost my ride, I had no way to get home." T7, 8. Rather than be fired, Mr. Utley gave notice that he could not continue working the midnight shift. T8, 9, 10, 11; App. Div. at 3.

BACKGROUND

Unemployment insurance programs are federal-state cooperative programs established under Subchapter III of the Social Security Act and financed in part by federal grants. 42 *U.S.C.* 501, *et seq.* States administer and implement the program, but no federal payments are to be made unless certified by the United States Secretary of Labor. 42 *U.S.C.* 502(a). Certification is not to occur unless the state conforms to the federal requirements, including an "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 *U.S.C.* 503(a)(3). Such elements have been recognized as fundamental components of due process. *Rivera v. Board of Review*, 127 *N.J.* 578, 583 (1992), citing *Mullane v. Central Hanover B. and T. Co.*, 339 *U.S.* 306, 313 (1950); *Malady v. Board of Review*, 166 *N.J. Super.* 523, 528 (App. Div. 1979). Benefits "such as welfare and unemployment compensation are matters of statutory entitlement...no less valuable or deserving of Fifth Amendment protection than more traditional forms of common-law property."

Rivera v. Board of Review, *supra* at 584, citing *Goldberg v. Kelly*, 397 *U.S.* 254, 262 (1970).

Monetary benefits for unemployed workers in New Jersey are provided under New Jersey's Unemployment Compensation Law, *N.J.S.A.* 43:21-1, *et seq.* The law was created to protect against economic insecurity due to unemployment, which has been deemed a menace to the health and welfare of the people of this state. *Brambila v. Board of Review*, 124 *N.J.* 425, 431 (1991), citing *N.J.S.A.* 43:21-2. Such protection "represents the policy of the State to further the welfare of the people by affording protection against the shocks and rigors of unemployment." *Provident Inst. For Sav. In Jersey City v. Division of Employ. Sec.*, 32 *N.J.* 585, 590 (1960). In order to "further its remedial and beneficial purposes, the law is to be construed liberally in favor of allowance of benefits." *Yardville Supply Co. v. Board of Review*, 114 *N.J.* 371, 374 (1989).

Administrative hearing processes in New Jersey thus must meet the fair hearing and impartiality goal set forth in the Social Security Act for unemployment insurance. Nearly three decades ago, *N.J.S.A.* 52:14F-1 *et seq.* created the new Office of Administrative Law. The major purpose of this legislation was "to bring impartiality and objectivity to agency hearings and ultimately to achieve higher levels of fairness in administrative adjudications." *Unemployed-Employed Council of*

New Jersey, Inc. v. Horn, 85 *N.J.* 646, 650 (1981), citing Committee Statement to Senate No. 76-L.1978, c. 67 ("Committee Statement"). Although the *Horn* case exempted unemployment hearing processes from the OAL, this Court made clear that the exclusion "should not be construed or applied so that the evils sought to be conquered by the new law continue to survive." *Id.* at 661. As a result, by virtue of the federal requirements and this Court's decision is *Horn*, as well as the constitutional imperatives that lie behind them, appellate review of unemployment cases has the clear and heightened responsibility to protect against the "aspects of institutional bias in the adjudications of quasi-judicial administrative agencies" noted by this court in *Horn*. *Id.* at 655. The "touchstone of adequate process is not abstract principle but the needs of the particular situation." *Rivera*, 127 *N.J.* at 583. Due process "calls for such procedural protection as the *particular situation demands.*" *Id., citing Township of Montville v. Block 69, Lot 10*, 74 *N.J.* 1, 13 (1977) (emphasis added). The parallel concerns for insuring fair hearings and impartiality contained in the Social Security Act provisions on unemployment insurance, New Jersey administrative law, and constitutional due process mandates as exemplified by this Court's decision in *Rivera*, require careful scrutiny and constrained deference with regard to unemployment benefit cases. This is especially true in light

of the well-established public policy of protecting vulnerable unemployed workers in this state. *See Vazquez v. Glassboro Servs. Ass'n*, 83 *N.J.* 86, 98-100 (1980), and *State v. Shack*, 58 *N.J.* 297, 303-04 (1971).

The issues presented by this case primarily involve issues of law - the proper interpretation of statutory language - and reviewing courts therefore are not bound by an administrative agency's conclusions of law. *Brambila*, 124 *N.J.* at 437 (*citing Mayflower Sec. Co. v. Bureau of Sec.* 64 *N.J.* 85, 93 (1973)). In addition, the present case raises the legal question of how the defendant agency's decisions concerning good cause are constrained by the legal requirements embedded in the Law Against Discrimination and the Americans with Disabilities Act, also compelling heightened scrutiny and diminished deference.

LEGAL ARGUMENT

I. AN EMPLOYEE MUST BE DEEMED TO HAVE LEFT EMPLOYMENT FOR GOOD CAUSE ATTRIBUTABLE TO THE WORK WHERE THE EMPLOYER UNILATERALLY MADE A SHIFT CHANGE WHICH SUBSEQUENTLY LED TO THE EMPLOYEE BEING UNABLE TO SECURE TRANSPORTATION HOME FROM WORK, FORCING HIM TO LEAVE THE JOB.

The purpose of New Jersey's Unemployment Compensation Act ("the Act") is to provide protection from the financial instability associated with lack of work, *Brambila v. Board of Review*, 124 *N.J.* 425, 431 (1991) (*citing N.J.S.A.* 43:21-2); while encouraging workers to seek suitable employment and to retain their jobs. *Wojcik v. Board of Review*, 58 *N.J.* 341, 345-46 (1971). The Act seeks to aid both the common good and the individual interest of the affected worker. *Brady v. Board of Review*, 152 *N.J.* 197, 212 (1997). In keeping with these purposes, the law is liberally construed in favor of claimants who have made good faith efforts to preserve their employment but who are nevertheless separated from work through no fault of their own. *Id.*

The Act provides that an individual who voluntarily quits a job "without good cause attributable to such work" is disqualified from unemployment benefits. *N.J.S.A.* 43:21-5. The regulations define "good cause attributable to such work" to mean "a reason related directly to the individual's employment, which was so compelling as to give the individual no choice but

to leave the employment." *N.J.A.C.* 12:17-9.1(b). The test thus involves two elements. First, a claimant must have "good cause" to leave work. Second, the underlying cause for the separation must be "attributable to" the employer.

Prior to 1961, claimants who left their jobs voluntarily, for any reason, were eligible for unemployment benefits, so long as they had "good cause" for leaving the employment. *Gerber v. Board of* Review, 313 *N.J. Super.* 37, 42 (App. Div. 1998) (citations omitted). The New Jersey Supreme Court found that "[t]he Legislature contemplated that when an individual voluntarily leaves a job under the pressure of circumstances which may reasonably be viewed as having compelled him to do so, the termination of his employment is involuntary for the purposes of the act." *Krauss v. A. & M. Karagheusian, Inc.*, 13 *N.J.* 447, 464 (1953). The Court in *Krauss* explained that when "the pressure of real not imaginary, substantial not trifling, reasonable not whimsical, circumstances compel the decision to leave employment, the decision is voluntary in the sense that the worker willed it, but involuntary because outward pressures have compelled it." *Id.* (quoting *Bliley Elec. Co. v. Unemployment Comp. Bd. of* Review, 45 *A.*2d 898, 903 (Pa. Super. Ct. 1946)). Thus, a personal reason, unrelated to the job, was grounds for benefits, so long as the reason was viewed as having reasonably compelled the claimant to leave. There can be no

reasonable dispute that the facts in this case - a loss of transportation home from work - constitute good cause.

The Act was subsequently amended in 1961 to limit unemployment benefits to those claimants who voluntarily quit their jobs with "good cause *attributable to the work.*" L. 1961, c. 43, §3 (emphasis added). The language change directed that claimants leaving for reasons, which were not work related, would no longer qualify for benefits. The change, however, did not fundamentally alter or undermine the Court's previous interpretation of "good cause." As this Court found in its 1998 decision *Brady v. Board of Review*, an employee's decision to terminate his employment must be "compelled by real, substantial and reasonable circumstances, not imaginary trifling and whimsical ones." 152 *N.J.* at 214. The only change imposed by the new language was the clarification that to be eligible for unemployment the reason for leaving work must originate with the employer.

Separation from employment is deemed "attributable to the work" when it is the employer, rather than the employee, who has "initiated the chain of events" which led to the claimant's separation. *Self v. Board of Review*, 91 *N.J.* 453, 456, 459 (1982) (finding, in accord with the Board of Review, that "The claimants... initiated the chain of events which led to their separation"); *Gerber*, 313 *N.J. Super.* at 44 (*citing Self*, 91

N.J. at 460) (explaining that "[t]he critical element was that the employer had done nothing to bring about the employees' problems.")

In determining whether an employee left his job with good cause attributable to the work, "the test is one of ordinary common sense and prudence." *Brady*, 152 *N.J.* at 214. In the face of workplace problems, an employee must do what is necessary and reasonable in order to remain employed. *Domenico v. Board of Review*, 192 *N.J. Super.* 284, 288 (App. Div. 1983) (citations omitted). An employee, however, is not required to establish that his employer's actions amounted to that of a constructive discharge. *See Zubrycky v. ASA Apple, Inc.*, 381 *N.J. Super.* 162, 168 (App. Div. 2005)("The unemployment benefit law does not require that a plaintiff be either fired or constructively discharged in order to qualify for benefits") (citation omitted). Where an employer's actions precipitate the underlying separation and an employee makes reasonable efforts to preserve the job, the claimant has "good cause attributable to such work" and is not be disqualified from receiving unemployment benefits. *N.J.S.A.* 43:21-5(a); *Brady*, 152 *N.J.* at 212; *Wojcik*, 58 *N.J.* at 345-46.

Whether an employee's difficulty commuting to and from work is "good cause attributable to such work" requires "a discrete balancing and evaluation of all factors." *Rolka v. Board of*

Review, 332 *N.J. Super.* 1, 5 (App. Div. 2000). The question is ultimately "whether a claimant's separation from work was "reasonably the product of [the] employer's choice… and, therefore, attributable to the employer; or whether it was wholly or essentially a reaction to the stresses of claimant's personal life and, therefore, attributable to [the employee]." *Id.* In the instant case, Mr. Utley's separation from work was initiated by his employer's shift change and further precipitated by the employer's failure to grant leave, which would have preserved the employment relationship. Under these facts the separation was "attributable to such work."

New Jersey courts have previously addressed the issue of whether a transportation problem can be considered "good cause attributable to the work." *Self*, 91 *N.J.* 453; *Rolka*, 332 *N.J. Super.* 1; *Bateman v. Board of Review*, 163 *N.J. Super.* 518 (App. Div. 1978); *Morgan v. Board Of Review*, 77 *N.J. Super.* 209 (App. Div. 1962). *While* transportation has often been found to be a personal issue on the facts of the particular cases, each of these decisions also has contemplated scenarios where transportation issues can be deemed attributable to the employer. *See Rolka*, 332 *N.J. Super.* at 5 (holding that there is "no mandatory rule of disqualification" in unemployment transportation cases); *Morgan*, 77 *N.J. Super.* at 214 (finding that "there may be some circumstances in which travel connected

with the employment would be so harmful as to justify voluntary departure from the job"); *Bateman*, 163 *N.J. Super.* at 521 (observing that "a sudden change in employment circumstances greatly increasing the commuting distance from home to job would properly be regarded as a condition attributable to the work rather than the employee); *Self*, 91 *N.J.* at 460(finding claimant disqualified for benefits because "the employer did nothing to increase the commuting problems of claimant").

Rolka, decided in 2000, is the last in this line of cases and the most developed doctrinally. In *Rolka*, the employer's change in the location of its business operations increased the claimant's commute from 15 to 20 minutes each way to between an hour and 15 minutes and two hours each way. *Rolka, 332 N.J. Super.* at 3. The claimant attempted to preserve her job for four months but ultimately found that the increased child care costs necessitated by the longer commute and "tolls, plus the gas money and everything else" made continuing with work impossible. *Rolka*, 332 *N.J. Super.* at 4. Importantly, the court in *Rolka* established that *Self* could not be viewed as "embodying a mandatory rule of disqualification" in transportation cases. *Rolka*, 332 *N.J. Super.* at 5. Using unemployment case law addressing the underlying purposes and remedial nature of the Act to inform its holding, the court clarified that "*Self* and *Bateman*, especially with the gloss of

Brady and *Gerber*, and in the light of *Yardville*, *Schock*, and *Battaglia*, stand instead for the proposition that a discrete balancing and evaluation of all factors is required..." *Id.*

Despite reciting *Rolka's* admonition that *Self* did not create a mandatory rule of disqualification in commuting cases, the Appellate Division below held that Mr. Utley "does not fall under the mantle of *Rolka* because he succeeded in commuting to work for ten [sic] months" after the February 14th shift change. App. Div. at 8. The Appellate Division, however, provides no explanation of their basis for distinguishing Mr. Utley's nine months (February 14 (T-5) to November 14 (T-4)) from Ms. *Rolka's* four months. Rather, the Appellate Division relies on *Bateman* and *Morgan*, cases in which the claimants worked, respectively, for *five years* and *three years, eight months* before leaving work. *Bateman*, 163 *N.J. Super.* at 520 (finding claimant maintained changed work schedule "from 1971 until he retired on July 9, 1976"); *Morgan*, 77 *N.J. Super.* at 214 (finding claiming worked "for three years and eight months without any appreciable ill effects."). Further, the Appellate Division's holding ignores the primary factual issues at play in both *Bateman* and *Morgan:* the claimants in those cases were found to have left for reasons other than the commute.

In *Bateman* and *Morgan* both claimants were individually found to have significant ulterior motivations for quitting

work. The *Bateman* court found that the employee's claim that the quit was due to an onerous commute was not credible, and that the employee was instead motivated to leave by his recent eligibility for retirement and a consequent pension. *Bateman*, 163 *N.J. Super.* at 520 ("We read the agency tribunal's ruling as a holding that claimant's termination of his employment was not motivated by the disadvantageous commute he encountered every two days but by his desire to take advantage of his right under the applicable federal employment regulations to retire, presumably on pension. We regard that determination as supported by substantial credible evidence.") Similarly, the claimant in *Morgan* was disqualified by the Board of Review because of her recent eligibility for Social Security and pension benefits. 77 *N.J. Super.* at 212. The Board of Review's factual findings were upheld by the Appellate Division. *Id.* at 215.

In other words, the claimants in *Bateman* and *Morgan* were found to have been "motivated" by personal factors and compelled to quit by reasons other than their commutes. *Bateman*, 163 *N.J. Super.* at 520; *Morgan*, 77 *N.J. Super.* at 871-72. By contrast, Mr. Utley's resignation was the direct and sole consequence of his employer's change in the work schedule and further denial of Mr. Utley's request for leave. As such, the Appellate Division's reliance on these cases is in error.

The Appellate Division's disqualification of Mr. Utley based on the number of months he remained employed after the shift change is similarly misplaced. While time may be a factor the court should consider, as recognized in *Rolka* it is but one of many. "Common sense and prudence" and strong public policy in favor of work must dictate that an individual who makes - as Mr. Utley did - reasonable attempts to preserve his job, only to have these efforts collapse through no fault of his own nine months later, should not be penalized.

There can be no serious question that if Mr. Utley had been unable to find alternative transportation at the time of the shift change, he would have been eligible for unemployment compensation because he left for a good cause attributable to the work. Surely this result cannot change solely because for nine months he was able to patch together alternative transportation, on his own initiative, but then due to external circumstances and the further action of the employer (the denial of leave), the alternative finally failed.

A conclusion of eligibility is consistent with this Court's holding in *Wojcik v. Board of Review*, 58 *N.J.* 341, 345-46 (1971). In *Wojcik*, the New Jersey Supreme Court held that the sanction associated with a voluntary quit is an incongruent result for an individual who has attempted to meet new job demands but finds he is unable to continue with the work. *Id.*

The claimant in *Wojcik* was laid off from his job as a chemical engineer. Unable to find work in his field he accepted factory work. The claimant left his job at the factory approximately one month later, after he was diagnosed with back problems. Thereafter, the claimant applied for unemployment benefits, but was denied on the basis that he voluntarily left his job without good cause attributable to such work. The Court reversed, finding that

> The question is whether a person who takes work he is not required to take should suffer the loss of unemployment benefits when he is unable to cope with that work. We do not believe he should. A contrary result would inhibit persons who are temporarily unemployed from taking work which, although not commensurate with their former employment, is nevertheless gainful activity which serves the general public interest. We do not believe a person should be penalized for so laudable an effort. The philosophy of the Unemployment Compensation Law, *N.J.S.A.* 43:21-1 et seq., is to encourage persons to work and, although the Law wisely recognizes that persons should not be compelled to accept employment which is unsuitable, it is contrary to the spirit of the Law to penalize persons who take such work.

Wojcik, 58 *N.J.* at 345-46. The theory underlying this Court's holding in *Wojcik* is equally applicable to the instant case.

Indeed, pursuant to unemployment regulations, when an employer substantially changes an employee's shift or schedule, the change is viewed essentially as a discharge and an offer of

"new work". *N.J.A.C.* 12:17-11.5. In pertinent part, "new work" is defined as "[a]n offer of work made by an individual's present employer of substantially different duties, terms or conditions of employment from those he or she agreed to perform in his or her existing contract of hire. Examples of factors [to consider] include... the *employer's change of hours or shift…*" *N.J.A.C.* 12:17-11.3 (emphasis added). A claimant is not ordinarily disqualified from benefits unless he fails to accept "suitable" offers of new work. *N.J.A.C.* 12:17-11.5 In other words, a claimant may reject "unsuitable" offers of new work without penalty. See N.J.A.C. 12:17-11.5; *Wojcik*, 58 *N.J.* at 345 ("It is clear that one need only... accept suitable work"); *Goodman v. Board of Review*, 245 *N.J. Super.* 551, 560 (App. Div. 1991) (finding that because the job in question was not 'suitable employment', the claimant would not have been required to accept it in the first place and, therefore, no disqualification followed for leaving it).

Whether an offer of "new work" is "suitable" depends upon a variety of factors, including the distance of the available work from the individual's residence and the shift or schedule that is offered. *See N.J.S.A.* 43:21-5(c)(1).[2] In the instant case,

[2] The statute states that "[i]n determining whether or not any work is suitable for an individual, consideration shall be given to the degree of risk involved to health, safety, and morals, the individual's physical fitness and prior training, experience and prior earnings, the individual's length of unemployment and prospects for securing local work in the individual's customary occupation, and

the employer's change to Mr. Utley's work schedule constituted an "unsuitable" offer of "new work" under the regulations, since it left him stranded without transportation home after the job let out at midnight, or even later.

The employer's denial of Mr. Utley's request for two weeks vacation time - leave that was earned and due - is a particularly troubling aspect of this case. At core, the philosophy underlying the unemployment compensation law is to encourage and promote work. *Wojcik*, 58 *N.J.* at 345. Therefore, employees who seek unemployment benefits must first do what is "necessary and reasonable" to remain employed. *Domenico*, 192 *N.J. Super.* at 288. The obvious corollary to this rule is that employers must make reasonable efforts to cooperate with workers who seek temporary accommodations in order to remain employed. *See Self*, 91 *N.J.* at 456 (in holding that claimant's lack of transportation was personal and not attributable to the work, the Court noted that "[n]o projection was made that their absence from work would be of a short duration."). Mr. Utley left for good cause attributable to the work, after reasonable efforts on his part to find other transportation, and a lack of reasonable efforts by the employer to accommodate his situation.

---

the distance of the available work from the individual's residence." *N.J.S.A.* 43:21-5(c)(1). Presumably, other considerations may be taken into account, such as shift and schedule changes, when determining whether work is suitable. *See N.J.A.C.* 12:17-11.5. There does not seem to be any good reason to distinguish a change in job location from a change in shift or schedule for the purpose of determining whether a job is "suitable".

II. AN EMPLOYER'S FAILURE TO ACCOMMODATE AN EMPLOYEE'S DISABILITY - POOR EYESIGHT - BY EITHER REVERSING A PRIOR UNILATERAL SHIFT CHANGE OR APPROVING LEAVE DURING THE PERIOD OF A CO-WORKER'S ABSENCE, PREVENTED THE EMPLOYEE FROM HAVING TRANSPORTATION HOME AND, IN VIEW OF THE OBLIGATIONS UNDER THE LAW AGAINST DISCRIMINATION AND THE AMERICANS WITH DISABILITIES ACT, CONSTRAIN THE DEFENDANT AGENCY TO DETERMINE THE SITUATION TO BE A QUIT "WITH GOOD CAUSE ATTRIBUTABLE TO SUCH WORK".

There is a similar line of analysis under New Jersey's law protecting people with disabilities, the Law Against Discrimination ("LAD"), and under its federal analogue, the Americans With Disabilities Act ("ADA"). *N.J.S.A.* 10:5-29.1; 42 U.S.C. 1210, *et seq.* The LAD proscribes employers' attempts to impede a disabled individual's ability to "obtain or maintain" work. *N.J.S.A.* 10:5-29.1. Both the Unemployment Act and the LAD are remedial in nature and work not only to support the individual but also to address resultant societal harms. *N.J.S.A.* 43:21-1 ("economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state"); *N.J.S.A.* 10:5-3 ("because of discrimination, people suffer personal hardships, and the State suffers a grievous harm.")

Employment and disability laws complement and inform each other, working in tandem to support mutual goals. *See*, Peter Blanck, *Employment of People with Disabilities: Twenty-Five*

Years Back and Ahead, 25 Law & Ineq., 323, 328 (2007) (finding "Successful employment plays a central role in eliminating social and economic barriers faced by people with disabilities. Employment opens the door to social inclusion, skill and career advancement, asset accumulation and home ownership, and increased economic and civil involvement"). To this end, both the LAD and the Unemployment Compensation Act incorporate workplace protections for disabled individuals.

The LAD provides that "it is an unlawful employment practice to deny to an otherwise qualified *handicapped, blind* or deaf person the opportunity to obtain or *maintain* employment..." *N.J.S.A.* 10:5-29.1 (emphasis added). The LAD therefore requires employers to make reasonable accommodations, which allow disabled employees to remain employed. Such accommodations may include "[j]ob restructuring, part-time or modified work schedules or *leaves of absence*." *N.J.A.C.* 13:13-2.5 (emphasis added). Similarly, unemployment compensation regulations incorporate protections to ensure that disabled individuals who have made "reasonable efforts" to preserve their job are not denied benefits. Specifically, the regulations instruct that:

> an individual who has been absent **because of a personal illness or physical and/or mental condition shall not be subject to disqualification for voluntarily leaving work if the individual has made a reasonable effort to preserve his or her**

> **employment**, but has still been terminated by the employer. **A reasonable effort is evidenced by the employee's notification to the employer, requesting a leave of absence** or having taken other steps to protect his or her employment.

N.J.A.C. 12:17-9.3(c)(emphasis added). Both the LAD and the Act, then, specifically identify that an employer's granting of a "leave of absence" provides a safe harbor from a finding of wrongful conduct.

In the instant case, the remedial nature and strong public policies underlying the LAD and the Act compel a finding that the employer's refusal to allow Mr. Utley a temporary two week leave accommodation that he requested constitutes "good cause attributable to the work".

In a similar vein, the ADA has fostered a web of protective regulations and case law for disabled workers. Federal ADA requirements also are made applicable to the UI program by virtue of its federal nature and funding, although they do not supersede or preempt state requirements.

Applying these principles to the decisions of the Department and the Appellate Division in Mr. Utley's case, a tribunal making a determination as to whether there has been good cause attributable to work in an unemployment insurance claim must take into account the adequacy of the employer's efforts under these statutory protections for people with

disabilities. If, as here, an employer has created the problem for the disabled person (here by the original unilateral shift change, making return transportation unavailable in light of Mr. Utley's disability), and then further has failed to accommodate an employee's reasonable request (here by denying Mr. Utley's request for a two-week leave during his co-worker's absence), the employer's actions must be viewed as unreasonable under the LAD and ADA, thus constraining the Department of Labor from concluding that the employer acted reasonably - or the employee unreasonably - in connection with the unemployment compensation claim, and compelling a conclusion of there was a quit with good cause attributable to the work.

CONCLUSION

For the reasons set forth above, *amicus* urges this Court to reverse the decision of the Appellate Division and find Mr. Utley eligible for unemployment compensation.

Legal Services of New Jersey

DATE: 11/14/07

By: _____

Melville D. Miller, Jr.
Lazlo Beh
Kristin Mateo
Keith Talbot
Attorneys for Amicus Curiae

SERVICE LIST

Stephen Townsend, Clerk
Supreme Court of New Jersey
Hughes Justice Complex
25 Market Street
P.O. Box 970
Trenton, New Jersey 08625-0970

Counsel for John M. Utley
Stanley G. Sheats, Esquire
Northeast New Jersey Legal Services
152 Market Street, Sixth Floor
Paterson, New Jersey 07505

Andrea Grundfest, Deputy Attorney General
Office of the Attorney General
Department of Law and Public Safety
Division of Law
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625-0112

CERTIFICATE OF SERVICE

I certify that on the date noted below, an original and nine copies of the within motion for leave to appear *amicus curiae*, supporting certification and proposed brief of *Amicus Curiae* Legal Services of New Jersey were hand delivered to the court on November 14, 2007, and two (2) copies were sent by Federal Express to the following:

Counsel for John M. Utley
Stanley G. Sheats, Esquire
Northeast New Jersey Legal Services
152 Market Street, Sixth Floor
Paterson, New Jersey 07505

Andrea Grundfest, Deputy Attorney General
Office of the Attorney General
Department of Law and Public Safety
Division of Law
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625-0112

Maria S. Giovene

Dated: November 14, 2007