THE SUPREME COURT OF IOWA

NO. 15-0104
Linn County CVCV081063

SONDRA IRVING,

PETITIONER/APPELLANT,

vs.

EMPLOYMENT APPEAL BOARD,

RESPONDENT/APPELLEE

REHEARING APPLICATION FOR DECISION ISSUED
JUNE 3, 2016

APPELLEE'S PETITION FOR REHEARING

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PROOF OF SERVICE

I, Rick Autry, hereby certify that on the 17th day of June, 2016, I or a person acting on my behalf did serve the Appellee's Application For Rehearing on all other parties to this appeal by e-filing through EDMS 1 copy thereof to the respective counsel for said parties:

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CERTIFICATE OF FILING

I, Rick Autry, hereby certify that I or a person acting on my behalf filed the Appellee's Application For Rehearing on the 17th day of June, 2016, by e-filing through EDMS to the Clerk of the Iowa Supreme Court, Iowa Judicial Building, 1111 E. Court Avenue, Des Moines, Iowa 50319.

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The Ruling On "Spill Over" Effect Is So Broadly Stated That It Is No Longer Consistent With The Goals Of The Employment Security Law

The "spill over" effect of disqualification from supplement part-time employment should be a narrow issue. The Court's decision, however, seems to have taken a more sweeping approach, and to have completely reworked the mechanisms of disqualification in a way that is antithetical to the underlying purposes of the Employment Security Law. The Board asks that the Court expressly limit its ruling to those cases where a claimant, like the Appellant, is disqualified only from

supplemental part-time employment, or more generally, to cases where a claimant loses employment in multiple concurrently held jobs but is only disqualified for the separation from some of those jobs. If the Court continues to allow benefits despite disqualification from regular full-time employment, even when the multiple jobs are held *sequentially*, the effect on the administration of the system will be profound, and a significant increase in taxes on Iowa Employers likely. This ruling, as presently formulated, is inconsistent with the goals of the law.

It is no coincidence that the Iowa cases finding no "spill over" effect involve part-time workers who lose their supplemental employment. In *Welch v. IDJS,* 421 N.W.2d 150 (Iowa App. 1998) the worker quit part-time work during his benefit year. The Court allowed benefits primarily to encourage workers to take part-time jobs during the benefit year, thereby *reducing* unemployment liability, without fear of endangering their right to full benefits. In *McCarthy v. Iowa Employment Sec. Commission,* 76 N.W.2d 201 (Iowa 1956) the worker was a part-time *moonlighting* worker who quit the moonlighting job and *then* lost full time work. The essence of *McCarthy* is that the worker is not unemployed because they lost the moonlighting job. The EAB recognizes that the rationale of both *McCarthy* and *Welch and the other cited cases* can be applied to discharges from supplemental part-time work. It does not seek a modification of this holding.

The Court's broad ruling on disqualification, however, is out of step with the premises of the unemployment system. In 1935 the

Social Security Act created the unemployment system through the mechanism of granting federal funds, and federal tax breaks to employers, for those states in compliance with minimum federal requirements. In 1962 the Department of Labor issued its "Brown Book" describing the various policies underlying the system:

> The three principal causes of disqualification are voluntary leaving without good cause, discharge for misconduct connected with the work, and refusal of suitable work. Disqualifications for these causes are intended to eliminate from the insurance program **weeks of unemployment which are caused by certain acts of the claimant.**

Unemployment Insurance Legislative Policy Recommendations (Brown Book)[1] (1962), p. 61. Notice it's the elimination of "weeks of unemployment" caused by certain acts, not "credits from employers." In discussing misconduct the federal government agency charged with assuring compliance with the policies underlying this federally-created program wrote:

> If the facts presented by the claimant and his employer are considered by the agency as proving a deliberate act or omission by the worker which constitutes a material breach of his obligations under his contract of employment in disregard of his employer's interest, he **should receive no benefits for the period specified in the law** (for discussion of the length of the period, see page 65); however, if the agency makes no such finding, the claimant, if otherwise eligible, should receive benefits.

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1 The colored books are official DOL guidance issued to states found at: http://www.ows.doleta.gov/dmstree/pl/blue_book.pdf; http://www.ows.doleta.gov/dmstree/pl/brown_book.pdf; http://www.ows.doleta.gov/dmstree/pl/orangebookhr14705.pdf.

Brown Book p. 63; *see also Manual of State Employment Security Legislation (Blue Book)*, p. C-58 (1950) (same language on period of disqualification). Historically Iowa has followed this same approach where a disqualified claimant is not paid any benefits at all, but for a period of time fixed by statute. *E.g.* Iowa Code §96.5(2) (1946)(for misconduct "forfeit not less than two nor more than nine weeks' benefits"). The claim is "locked" and no checks are issued until the claimant has requalifying earnings following the date of the *separation* in question. The wage credits remain intact and can be drawn on after requalification. On the other hand cancellation of wage credits, which is punitive and backwards looking, is limited to criminal acts because once credits are gone they are gone forever.

Thus the federal agency describes the length of the period of disqualification by referring to the length of the postponement of payment, not cancellation of credits:

> Period of disqualification -- The length of any period of disqualification should be reasonably limited to **the period during which the unemployment originating from the claimant's own action continues to be due to that action**. It should be fixed by statute in accordance with the average length of time ordinarily required for an employable worker to find suitable work in a normal labor market.

Brown Book at 65. The same approach was described in 1970 in the *Draft Legislation to Implement The Employment Security Amendments of 1970 ("Orange Book"):*

> The period of disqualification should be limited to a **postponement of benefits for a fixed period which is related to the average length of time**

> **ordinarily required for an employable worker to find suitable work under normal economic conditions**, since this is the period of unemployment which may reasonably be considered to be the direct result of the disqualifying act.

Orange Book at 54. So disqualification has been – has heretofore always been – *postponement* of payment of benefits for a *period of time* approximating the period of unemployment caused by the claimant's disqualifying actions. This is why a limited supplemental part-time ruling is consistent with the underlying theory: Ms. Irving didn't file because she lost the Solon work, rather she filed because she lost the full-time University job. But by the same token any claimant who is disqualified from *full-time* work due to misconduct should be disqualified for a period of time fixed by statute to approximate the period of unemployment caused by the misconduct. In Iowa currently[2] this is however long it takes to earn ten times the weekly benefit amount following reemployment. 871 IAC 23.43(8).

By looking to the language used in the gross misconduct provision the Court mixes two different concepts with different effects and bases of administration. Gross misconduct does not deal with benefit disqualification. Gross misconduct deals with cancelation of wage credits from all employers, not just those in the base period. On the other hand, disqualification deals with stopping a worker from collecting benefits for a period of time following the

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2 Over the years the benefits have gotten more generous and statutory requalification has taken correspondingly longer.

disqualifying action of the claimant. Requalification following such action requires only a ten times earnings determination thus creating reattachment to the job market. It is a time limitation, and has been since 1936. But cancelled credits are gone forever, and the limitation is on *whose* credits are cancelled. So one provision deals with *how long benefits* will be withheld and the other provision deals with *whose credits* will be canceled. We do not need to know how long cancelation will last – it always lasts forever. We do not need to know who is not paying for the benefits during the disqualification period because the claimant will "receive no benefits for the period specified in the law." *Brown Book* at 63. The processes are totally different. The effect on benefits is different. The effect on charging is different. The administrative actions taken are different[3]. Thus "gross misconduct" does not refer to time, and "disqualification" does not refer to the identity of the employers. They do not make these references because it is not part of the process in question. The only inference one should draw from this is that credit cancelation and benefit disqualification are two entirely different things.

At a minimum benefits are never charged to lag-quarter employers, but gross misconduct includes these employers in the wage cancelation where the disqualifying separation takes place in the benefit year, as can happen. For example, a worker collects benefits a couple weeks, and looks for work as required. He then starts to work for a new employer within a year of losing his job. But

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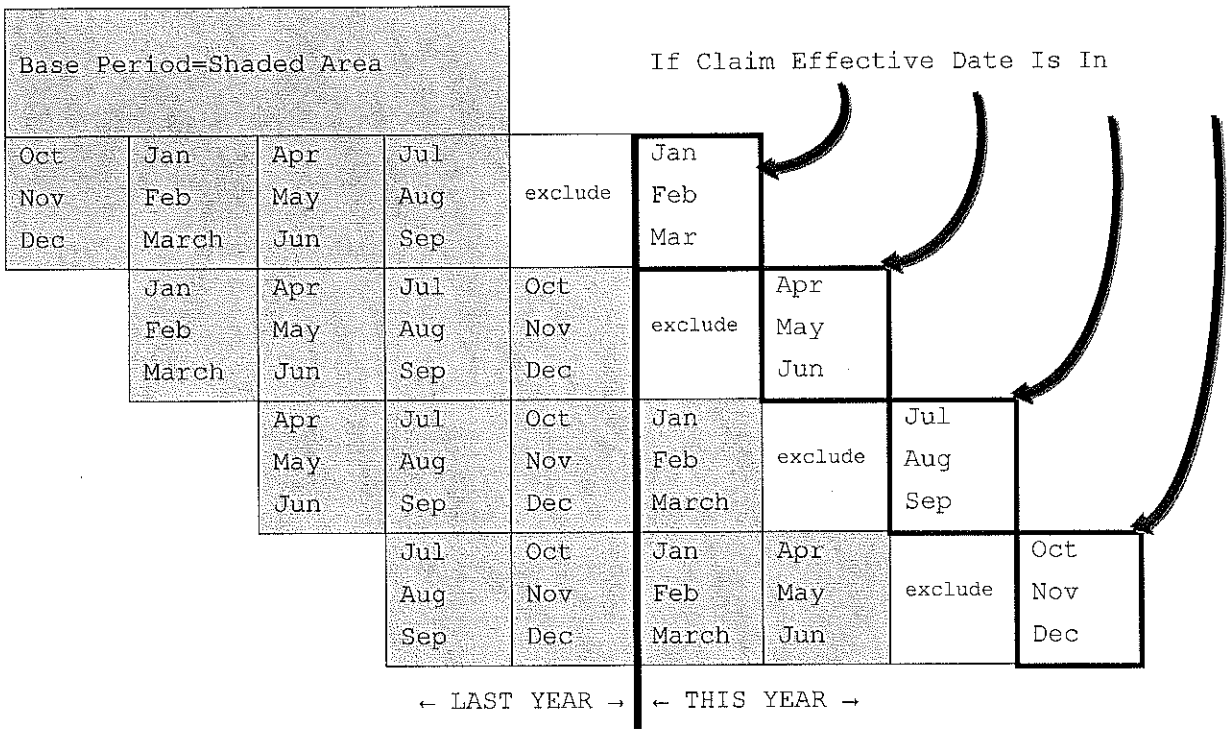
3 Locking and unlocking the claim for disqualification and requalification, but deleting credits for gross misconduct.

then he is fired by this new employer for gross misconduct. The *disqualification* resulting from this would prevent collection of benefits, but would not affect employers who only paid the claimant in the lag quarter. But for gross misconduct all wage credits from all employers, including those in the filing quarter and the lag quarter, as well as the entire base period, would be cancelled. And this would be forever with no chance of requalification. This alone explains the use of "all employers" in the gross misconduct provision but not in disqualification. In addition following requalification only the employer who discharged the worker for misconduct would have its credits transferred to the fund, thus continuing to avoid liability. For gross misconduct *all* employers who paid wages before the disqualifying *gross* misconduct would avoid all unemployment liability going forward regardless of requalification. This too makes clear why "all employers" is used in one provision and not the other. At base disqualification provides it is to be limited by time, and cancelation is to be permanent and for all employers.

To appreciate the more pronounced effects of a broad "spill over" ruling one should recognize that a worker who files for benefits draws on wage credits that *do not include* any credits earned in the current quarter or in the immediately preceding quarter. As much as the most recent six months of work simply do not count when it comes to calculating benefits. Iowa Code §96.19(3)-(4). This is illustrated by the following chart:



In addition, once a claimant starts on benefits new jobs she takes would accrue credits outside the base period. The base period *precedes* filing for benefits and thus never encompasses new jobs taken after starting on benefits. The following timelines may assist in visualizing the result of a broad ruling.

First the pre-*Irving* system (assume all employment full-time).

Example A

1. Employer X: Misconduct
2. Earns 10x Benefit Amount
3. New job at Y
4. Employer Y:Layoff

5. Files for Benefits.
6. Result: Allowed, X credits charged to fund.

Example B

1. Employer X: Layoff
2. Lag Quarter starts
3. New job at Y
4. Employer Y: Misconduct
5. Files for Benefits. (no requalification)
6. Result: Denied even though Y is outside base period.

Example C

1. Employer X: Layoff
2. Files for Benefits.
3. New job at Y.
4. Quits Y no good cause
5. Result: Denied, even though Y is outside the base period.

In example A the misconduct will not deny benefits because the claimant has reattached to the labor market by earning 10 times the weekly benefit amount. For example B credits are denied because the claimant is only experiencing the current period of unemployment because of misconduct and has *not* reattached to the market before

drawing benefits. Similarly with example C the claimant is only unemployed in the latter part of the benefit year because she quit the new job without good reason. Both in B and C the claimant is not unemployed "through no fault of their own." Iowa Code §96.2.

Now the same examples under the new rule:

Example AA

1. Employer X: Misconduct
2. Earns 10x Benefit Amount
3. New job at Y
4. Employer Y: Layoff
5. Files for Benefits.
6. Result: Allowed, X credits charged to fund. **NO CHANGE**.

Example BB

1. Employer X: Layoff
2. Lag Quarter starts
3. New job at Y.
4. Employer Y: Misconduct
5. Files for Benefits. (no requalification)
6. Result: Allowed with no reduction in benefits. **CHANGED**

Example CC

1. Employer X: Layoff
2. Files for Benefits.
3. New job at Y.
4. Quits Y for no good cause
5. Result: Allowed with no reduction in benefits. **CHANGED**

For BB and CC the key is that the new employer's credits are not in the base period so their exclusion has no effect on benefits. Even if the new employers are in the base period the exclusion of their credits would often affect benefits only slightly. The pernicious effect of the changes can be better seen if we put some flesh on the examples.

First in BB a claimant is being allowed benefits even though he created his own unemployment that he wishes to ameliorate with taxpayer money. So Joe works for Casey's for 5 years and is laid off. He immediately starts work at Safeway and starts sexually harassing the teenage sackers. Safeway fires him after five weeks. When he immediately files his initial claim for benefits, the Safeway employment falls in the excluded quarters. The Safeway credits are not in the base period. But the current period of unemployment was created by the sexual harassment, and Joe is not intended to receive benefits during "the period during which the unemployment originating from the claimant's own action continues to be due to that action." *Brown Book* at 65. Formerly Joe would have to reattach to

the labor market through requalifying earnings before he could draw benefits after his harassment caused his unemployment. Under *Irving*'s broad rule the harassment makes no difference.

Even more concerning is example CC. Once people start seeking unemployment benefits the unemployment system requires them to look for work, and to accept suitable work. 871 IAC 24.24(8); Iowa Code §96.5(3). Almost everyone gets an offer of suitable work in the first *year* of unemployment. They are then required by law to accept it else be denied unemployment benefits going forward. But, of course, credits earned in the benefit year by definition cannot be in the base period of that benefit year. If someone files for benefits and then starts a new job after a few months, the established benefit year is still in effect. If they then lose that *new* job through layoff after a few weeks they would reactivate the *existing* claim and draw on the credits that were drawn on before they took the new job. *See* 871 IAC 24.1(1). Just because you work a new job following receipt of benefits does not mean credits from that job will be available to be drawn on immediately. If you lose that new job within a year of your prior initial claim for benefits you will continue to draw on that existing claim for benefits, and use that existing claim's base period until a year has passed. *E.g.* Iowa Code §96.3(5)(a).

So, suppose Joe is laid off from Casey's after 5 years. He files for benefits and draws them for a few months. He accepts *suitable* work at Safeway, decides he likes collecting unemployment better, and quits. He reactivates his existing claim and under *Irving* experiences no reduction in benefits because Safeway credits are not

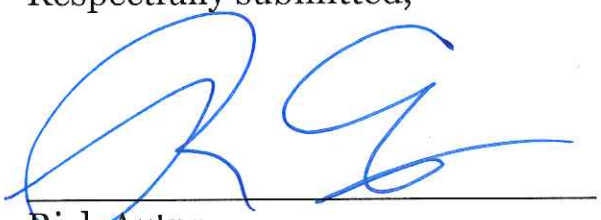
in the base period. *Irving* seemingly creates a rule requiring a worker to *take* full time work, but not requiring the worker to *stay on the job*. This undermines the purpose of the law. It would permit workers to go back on benefits because, although they took a new job, they decided they don't want to work, or cursed out the boss, or don't like following directions at the new job, or used racial epithets, etc. Such an approach undercuts the requirement that claimants must seek and accept suitable work.

The Board does not seek a change that would result in Appellant or people similarly situated to her being denied benefits. The Board asks only that the Court narrow its discussion of disqualification to address only the situation before it, that is, rule only that a claimant who is disqualified for misconduct from supplemental/concurrent employment may still draw on wage credits from other base period employers if otherwise eligible. The Board asks at a minimum that additional briefing on this technical issue be permitted. Failure to limit the ruling to part-time and/or concurrent work will significantly impair the administration of unemployment benefits in Iowa.

CONCLUSION

The EAB asks that the Supreme Court make the modifications described above, that will not adversely affect this claimant or others similarly situated, but will help reduce confusion and injustice.

Respectfully submitted,



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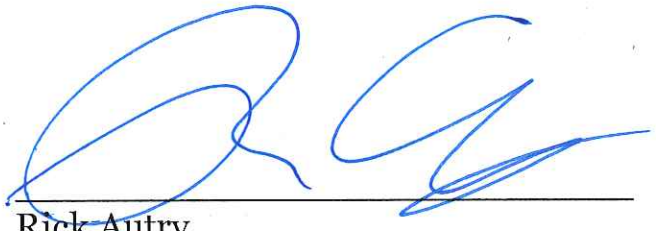
CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitation of I.R.A.P. 6.903(1)(g)(1) because this petition contains 2,794 words, excluding the parts exempted by that rule.

This petition complies with the typeface and typestyle requirements of I.R.A.P. 6.903(1)(e)-(f) because this petition in printed in 14-point Georgia for the body and 14-point Arial (sans serif font) for headings.



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