Effects of Unemployment Compensation Proceedings on Related Labor Litigation

Steven A. Mazurak
The late Dean Roscoe Pound prophetically stated:

[M]ore laws and more administrative regulations are called for day by day and are being formulated and promulgated in enormous and continually swelling volume till, in spite of constantly increasing organization of facilities for finding applicable precepts, it is beyond the powers of any one man to know the whole of the body of law . . . even in the one jurisdiction in which he judges or administers or practices or teaches.¹

This statement was made more than forty years ago, at the dawn of the administrative form of government we currently know. One can only speculate what Dean Pound’s comments would have been had he witnessed today’s myriad of legislative and administrative regulations. The weight of Pound’s statement is nowhere greater felt than in the area of labor relations.

Employees, unions and employers are daily faced with a multitude of federal and state legislative and administrative enactments as they try to go about conducting their business. For example, what was once entitled a “simple” discharge case can no longer be so defined. If the employee is within a collective bargaining unit covered by a collective bargaining agreement the vast majority of such discharges will be subject to a grievance procedure ending in arbitration.² If the em-

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¹ R. Pound, THE TASK OF LAW 63 (1944). This book is the written form of the North Law Lectures delivered by Dean Pound on January 9, March 4 and April 18, 1941 at Franklin and Marshall College.

² The Bureau of National Affairs, Inc. maintains on file over 5,000 collective bargaining agreements. From a sample of 400 agreements selected on a cross section of industries, unions, number of employees covered and geographical areas, its survey showed that 99% of the sample contracts had grievance procedures with 96% of the agreements providing for arbitration. [1979] 2 COLL. BARG. NEG. & CONT. (BNA) 32:21, 51:1, 51:5.
ployee is female or a member of a protected minority there may be a proceeding brought under Title VII of the Civil Rights Act of 1964. If the employee claims that one of the reasons for the discharge related to a “protected activity” there may be charges or claims filed with the National Labor Relations Board, the United States Department of Labor, a state equivalent agency or a proceeding brought directly in a state court. Unless the employee immediately finds new em-


4. If the charge filed with the National Labor Relations Board claimed that the action was in violation of the employee's right to engage in protected mutual or “concerted” activity pursuant to section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1976) [hereinafter cited as NLRA] it would allege a violation of section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1) (1976). If the charge included the claim that the discharge was to encourage or discourage membership in a labor organization the provisions of section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1976), would be invoked.

5. A claim filed with the Secretary of Labor could take many forms. For example, if the employee claims that the discharge was due to a claim by the employee under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976) [hereinafter cited as FLSA], a proceeding by the Secretary of Labor could be instituted for injunctive relief pursuant to section 17 of the FLSA, 29 U.S.C. § 217 (1976) alleging a violation of section 15(a)(3), 29 U.S.C. § 215(a)(3) (1976). Section 11(a) of the FLSA, 29 U.S.C. § 211(a) (1976), authorizes the Administrator of the Department's Wage and Hour Division to initiate the injunctive remedies of section 17. The 1977 amendments to the FLSA provided, in part, that an employee could institute a proceeding alleging a violation of section 15(a)(3) and seek equitable relief, including reinstatement, prior to any action by the Secretary of Labor. Act of Nov. 1, 1977, Pub. L. No. 95-151, § 10, 91 Stat. 1245 (codified at 29 U.S.C. § 216(b) (Supp. II 1978)). If the employee claimed that the discharge was in retaliation for a safety complaint the Secretary of Labor could institute an action against the employer pursuant to section 11(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (1976). To further confuse the matter, the National Labor Relations Board has held that in both of these examples the Board has concurrent power to vindicate the employee’s claims under sections 7 and 8(a)(1) of the NLRA. Moss Planing Mill Co., 103 N.L.R.B. 414, 31 L.R.R.M. 1557 (1953), aff’d, NLRB v. Moss Planing Mill Co., 206 F.2d 557 (4th Cir. 1953) (wage claims asserted under the FLSA); Alleluia Cushion Co., 221 N.L.R.B. 999 (1975) (filing of OSHA complaint protected under sections 7 and 8(a)(1) of the NLRA).

6. See, e.g., CAL. LAB. CODE §§ 98.6-.7 (West 1980).

7. For instance, if the employee claims the action was protected under the “public policy” of the state an action against the employer may lie. Recent cases include Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3rd Cir. 1979) (discharge alleged to have been for failure to take polygraph exam violated public policy of Pennsylvania, created cause of action against employer); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (termination for refusal to engage in illegal conduct to fix retail gasoline prices established tort claim as well as claim for breach of contract); Harless v. First National Bank of Fairmont, 246 S.E.2d 270 (W.Va. 1978) (termination asserted for retaliation for attempts to make employer
ployment the employee probably will seek to obtain unemployment compensation benefits under applicable state law. An employee who has — or feels that he has — suffered a work related injury arising out of the employment relationship may commence legal proceedings in the appropriate worker's compensation forum. Each of these adjudicatory bodies will be involved with the resolution of many of the same factual disputes in determining whether a violation of a particular statute has occurred. Each may arrive at findings which contradict those of another "fact-finder" depending upon how the matter is presented and upon what the adjudicator determines to be the applicable precepts.

Taking advice from Dean Pound’s statement, this article will be limited to the effects of unemployment compensation

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8. Each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands has enacted unemployment compensation provisions in accordance with Subchapter III of the Social Security Act, 42 U.S.C. §§ 501-504 (1976), and the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 (1976). The most comprehensive compilation of the differences and similarities of these fifty-three statutes is published semiannually by the Unemployment Insurance Service of the Employment and Training Administration of the United States Department of Labor. This compilation is entitled Comparison of State Unemployment Insurance Law [hereinafter cited as U.S. Dep't Labor — Comparison]. The comparison examines eight major subject areas: (1) coverage, (2) taxation, (3) benefits, (4) eligibility, (5) administration, (6) disability, (7) federal claims, and (8) readjustment allowances. U.S. Dep't Labor — Comparison, supra, at iv. See also, Chupp, Changes in Unemployment Insurance Legislation During 1979, 103 MONTHLY LAB. REV. 36 (Apr. 1980).
proceedings upon potential claims brought before three forums of labor litigation: proceedings before the National Labor Relations Board, actions instituted under Title VII before federal district courts and matters submitted to arbitration under a collective bargaining agreement. After an initial brief examination of the general statutory scheme of unemployment compensation insurance as enacted by the various states, the article will analyze certain procedural effects of unemployment compensation proceedings on subsequent labor litigation. The substantive effects of unemployment compensation proceedings on this subsequent labor litigation will be examined next. The article will conclude with some thoughts on homogenization of the interrelationship of unemployment compensation proceedings with the subsequent labor litigation.

I. THE STATUTORY SCHEME OF UNEMPLOYMENT COMPENSATION PROCEEDINGS

Unemployment compensation benefits in American labor relations are of relatively recent vintage. The concept of payment of benefits to workers who were unemployed originated in the trade labor movement in the mid-nineteenth century.  

9. Hereinafter collectively referred to as "subsequent labor litigation." The unemployment compensation proceedings are used as the touchstone of comparison with the subsequent labor litigation because in a vast majority of the cases the former proceeding will be concluded prior to the hearing on one or more of the other proceedings. This will not be the case, of course, in every situation; the reverse may be true or the two proceedings may conclude at the same time. See note 130 infra, and Yellow Cab Co., 44 Lab. Arb. 445 (1965) (Jones, Arb.) discussed in note 72, infra.

Most of the fifty-three unemployment compensation jurisdictions do not publish their decisions for general distribution. National publications, such as Commerce Clearing House, do compile some of the more important decisions which come to their attention. Some of the agencies, such as the California Unemployment Insurance Appeals Board, do publish decisions which may be used as precedent for future cases. Many arbitrators, either because of personal beliefs or because of the desires of the parties they serve, do not submit their decisions for publication. The lack of a complete reporting system of all decisions leaves a wide gap in the available information. For this reason alone it is impossible to conduct an empirical study, even as limited above, of the effects of unemployment compensation proceedings upon the defined subsequent labor litigation. Because of these limitations the author intends this article to be the commencement of discussion of this matter, not its conclusion.

Several European countries toward the end of the nineteenth and the beginning of the twentieth century began subsidizing these voluntary union plans. Great Britain created the first compulsory unemployment insurance law in 1911 covering only the building, engineering and shipbuilding industries.\(^1\) By 1920 all manual workers and certain non-manual workers were covered by the act.

In the United States a federal system of unemployment compensation benefits was not established until 1935. At the time of the passage of the original Social Security Act\(^2\) only Wisconsin had passed a state statutory scheme of unemployment insurance.\(^3\) While some states had considered such legislation, it had been defeated primarily upon the basis that employers would be placed on an uncompetitive scale with employers in other states which had not enacted similar legislation.\(^4\) Because of this type of opposition, it became apparent to the proponents of unemployment compensation that federal legislation was necessary.

As a result of many forces, including a real fear about the constitutionality of the law,\(^5\) a system of federal-state cooperative unemployment programs was established.\(^6\) A federal tax credit was enacted which permitted employers to receive up to a 90 percent credit against their federal tax liability.\(^7\) By the date of the provisions of the Social Security Act effecting unemployment compensation tax payments all but two states had enacted state legislation providing for the credit. This "carrot-stick" approach of state-federal administration of the unemployment compensation programs continues to date.

Unlike the "flat" or standardized programs of England,

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\(^1\) Larson & Murray, supra note 10. See also Witte, Development of Unemployment Compensation, 55 Yale L.J. 21, 22 (1945) [hereinafter cited as Witte].
\(^3\) Witte, supra note 11, at 27; Larson & Murray, supra note 10, at 185.
\(^4\) Witte, supra note 11, at 28; Larson & Murray, supra note 10, at 185.
\(^5\) The constitutionality of the law was upheld by a five to four decision of the Supreme Court of the United States in Steward Machine Co. v. Davis, 301 U.S. 548 (1937).
\(^6\) Witte, supra note 11, at 30.
\(^7\) Even though the current federal tax may rise to 3.4% based upon outstanding advances in the federal extended unemployment compensation account of the state, the total credit to employers remains at 90% of 3.0% as originally enacted. U.S. Dep't Labor — Comparison, supra note 8, at 2-1.
which provided for a system of equal benefit amounts, the American state laws, from their inception have provided a system for benefits which vary as a proportion of wages, subject to minimum and maximum amounts.\textsuperscript{18} More significantly, the method of financing the programs differs from that used by the European countries. In most of those countries the employees as well as the employers made contributions to the program. In the United States, however, employee contributions initially were only required in ten states.\textsuperscript{19} Currently, only three states require employee contributions.\textsuperscript{20} Another unique characteristic of the American style of unemployment compensation is that employers are charged lower unemployment compensation amounts if their record of unemployment is low. Each state system provides for this "experience rating" based upon the history of the employer,\textsuperscript{21} although the amount, type and calculation of the credit vary from state to state. While there are five basic types of experience rating\textsuperscript{22} all systems have common characteristics. All measure and compare, in one way or another, the employer's experience with unemployment with its benefit costs. This ratio is compared with a measure of exposure, such as payrolls, to determine relative exposure for small and large employers.\textsuperscript{23}

Since the federal government has left to the states the particular ground rules upon which benefits will be paid — subject only to constitutional due process concepts\textsuperscript{24} and the general requirements of the Social Security Act\textsuperscript{25} — each state

\textsuperscript{18} Larson & Murray, \textit{supra} note 10, at 183.
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} These states are Alabama, Alaska and New Jersey. New Jersey and Alabama require an employee contribution of 0.5\%, but Alabama requires the contribution only when the fund is below the minimum normal amount. Alaska requires an employee contribution between 0.3 to 0.8\%, depending upon the rate schedule in effect. U.S. Dep't Labor — \textit{Comparison, supra} note 8, at 2-2.
\textsuperscript{21} \textit{Id.} at 2-4. Puerto Rico and the Virgin Islands do not have a system of experience rating.
\textsuperscript{22} These systems are commonly known as reserve-ratio, benefit-wage-ratio, compensable-separations, and payroll-decline formulas. The reserve ratio is the most popular and is used by 32 states. This formula is based on cost accounting principles. \textit{Id.} at 2-5. An additional explanation of the systems of experience rating may be found in [1976] 1B \textit{Unempl. Ins. Rep. (CCH)} ¶ 1120.
\textsuperscript{23} U.S. Dep't Labor — \textit{Comparison, supra} note 8, at 2-5.
\textsuperscript{25} 42 U.S.C. § 503(a) (1976) imposes several requirements upon a state plan in-
UNEMPLOYMENT COMPENSATION has established its own method of determining benefit payments. This differentiation of benefit determination between the states has led some individuals to call for a unification of the programs under the direction of the federal government.26 A discussion of the relative merits of these calls to unify the programs is not within the scope of this article. The current differentiation does render, however, a comprehensive comparison of all of the programs of the fifty states, the Commonwealth of Puerto Rico, the Virgin Islands and the District of Columbia beyond the space limitations of this format. Accordingly, this article will suggest certain precepts and suggested usage; however, the practitioner, educator or interested observer need consult carefully and completely the practice in the particular jurisdiction of interest to obtain a thoroughly accurate picture of the particular problem at issue. Certain trends do come forth, however, when the problems and interrelationships of unemployment compensation proceedings on subsequent labor litigation are considered in the abstract. For convenience — while recognizing the hazards of any labeling endeavor27 — these concepts have been separated into procedural and substantive effects.

including the requirement in subsection (3) that an individual whose claim for unemployment compensation is denied be provided the opportunity for a fair hearing before an impartial tribunal. 26 U.S.C. § 3304 (1976) makes additional demands upon the state plan. While the original Social Security Act provided for only six such requirements, the current statute has seventeen subsections and numerous requirements. 26 U.S.C. § 3304 (Supp. 1979). These requirements vary from the innocuous (the state shall reserve the power to amend or repeal the law at anytime) to the specific (an undocumented worker who is not lawfully in the United States is not entitled to benefits).


27. The task of placing labels on any type of legal endeavor, particularly as to whether an item is procedural or substantive, is frustrating, at best. At worst, it is impossible. Similar to the trial judge whose final finding of fact is always that "if any of these findings be deemed conclusions of law they are to be found to be conclusions of law" and whose final conclusion of law is always the converse, the author acknowledges that his categorization of procedural and substantive elements may not fit another person's label.
II. Procedural Effects

In the examination of the procedural effects of unemployment compensation proceedings upon subsequent labor litigation the use of the example of discharge previously mentioned will be used as a paradigm. The paradigm of discharge is not intended to indicate that other factual settings do not have equal or greater significance; rather it is meant only as a vehicle to compare the relationship of unemployment compensation proceedings with other labor proceedings. Many of the factors discussed in this comparison will apply equally to the interrelationship, *inter se*, between the National Labor Relations Board, the equal employment and the arbitration proceedings.

A. The Unemployment Proceedings as a Discovery Device

One of the sacrosanct secrets of labor law practitioners in discussing unemployment compensation proceedings is their use of it as a discovery tool to further the parties' positions in any future proceedings. Discussion of this issue is virtually non-existent, although experienced labor law practitioners daily use the proceedings for this purpose. As a practical matter this constitutes one of the primary functions of the unemployment compensation proceedings as they relate to subsequent labor litigation.28

The National Labor Relations Board in its unfair labor practice proceedings29 has long precluded the use of discovery devices available in the federal rules of civil procedure.30 While the investigating Board agent will reveal the basic facts supporting a charge to the respondent in a case, the purpose of such disclosure is to facilitate settlement not to educate the respondent.31 Even though this "trial by ambush" has received criticism by such prestigious organizations as the

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28. This is particularly true in light of the limited preclusive effect of the unemployment compensation proceeding discussed in the text accompanying notes 49-50, infra.
31. NLRB CASEHANDLING MANUAL, ¶ 10128.2 (1976).
Chairman's Task Force on the National Labor Relations Board, there is no indication that the Board's procedures will change. While practitioners tried to by-pass this hurdle to pre-hearing discovery by the use of the Freedom of Information Act and achieved limited success in lower courts, the United States Supreme Court has laid to rest the idea that the FOIA permitted a respondent to obtain pre-hearing discovery of the general counsel's case in an unfair labor practice proceeding.

Returning to our paradigm, the unemployment compensation hearing can serve a useful purpose for the employee, or the union if the employee is so represented, to discover the basis of the discharge. The employer may use the proceeding to ascertain the basis of the employee's claim of protected activity. Most of the states in their scheme of benefit determination provide for the issuance of subpeonas ad testificandum or duces tecum to gather evidence for the determination hearing. The evidence is taken under oath and a court reporter or recording device is used to memorialize testimony. Thus, the employee may obtain the testimony of the employer representatives well in advance of the National Labor Relations Board's proceeding which will enable preparation of the employee's defense to any employer's claim that the discharge was for cause under the National Labor Relations Act. Simi-


33. 5 U.S.C. § 552 (1976) [hereinafter cited as FOIA].


35. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) (prehearing affidavit of witness taken by General Counsel not subject to disclosure pursuant to the FOIA).

36. See, e.g., CAL. UNEMP. INS. CODE § 1953 (West 1972); ILL. ANN. STAT. ch. 48, § 500 (Smith-Hurd 1980); MICH. COMP. LAWS ANN. § 421.9 (1978); WIS. STAT. ANN. § 108.14 (West 1980).

37. See, e.g., CAL. UNEMP. INS. CODE § 1952 (West 1972); ILL. ANN. STAT. ch. 48, § 504 (Smith-Hurd 1980); WIS. STAT. ANN. § 108.09(5)(b) (West 1980). Other states require the memorialization of testimony through their administrative procedures act or by regulations issued by the unemployment commission agency.

38. Pursuant to the provisions of section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c) (1976), the Board is without power to reinstate or award back pay to an employee who has been discharged or suspended for cause.
larly, the employer will be able to obtain in advance an idea of the positions the employee may possibly assert before the National Labor Relations Board.

Labor arbitrators are as reluctant to permit pre-hearing discovery as is the National Labor Relations Board. In some jurisdictions the arbitrators are precluded by statute from permitting discovery unless both parties consent to the process. Where not precluded by statute most arbitrators, absent consent of the parties, will not permit discovery proceedings. These arbitrators feel, inter alia, that such proceedings are most unwise, inappropriate and contrary to the basic tenets of arbitration to keep costs at a minimum and expedite the proceedings without undue delay. Because of this policy

39. CAL. CIV. PROC. CODE § 1283 (West 1976); §§ 1283.05, 1282.2 (West 1980); § 1283.1 (West 1972). Section 1283 is limited to depositions "for use as evidence and not for discovery." Section 1282.2(a)(2) providing for witness and document lists does not apply to "matters arising out of collective-bargaining agreements." States enacting the Uniform Arbitration Act provide in section 7(b) that arbitrators may permit depositions "of a witness who cannot be subpoenaed or is unable to attend the hearing." Thus, the use of the discovery deposition would not be permitted. Many of the states enacting the Uniform Arbitration Act have excluded agreements to arbitrate between employers and employees from the coverage even though the model act expressly includes such matters. 7 UNIFORM ARBITRATION ACT 4-6. See, e.g., MICH. COMP. LAWS ANN. § 600.5001(3) (1968). Similarly, some states exclude labor relations matters from applicable arbitration statutes. WIS. STAT. ANN. §§ 788.01, 111.10 (West 1980). In Layton School of Art & Design v. Wis. Emp. Rel. Comm'n, 82 Wis. 2d 324, 262 N.W.2d 218 (1978), the Wisconsin Supreme Court interpreted the predecessor of § 788.01 to mean that an arbitrator selected from a list of arbitrators provided by the Wisconsin Employment Relations Commission was an arbitrator acting pursuant to statute, not common law. Accordingly, it could be argued that arbitrators selected from lists supplied by the state commission possess the authority to provide for depositions pursuant to WIS. STAT. § 788.07. Other jurisdictions specifically permit arbitrators to allow depositions for discovery. PA. STAT. ANN. tit. 5, § 167 (Purdon 1963). See generally, O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 121-31 (1973) [hereinafter cited as FAIRWEATHER].

40. Jones, Blind Man's Bluff and the NOW — Problems of Apocrypha, Inc. and Local 711 — Discovery Procedures in Collective Bargaining Disputes, 116 U. PA. L. REV. 571, 576 n.6 (1968). Professor Jones in this article and two subsequent articles stresses the importance of arbitral discovery in appropriate cases, the interrelationship of the National Labor Relations Board, the courts and arbitration in this process and the legal foundation upon which discovery may be based. Jones, The Accretion of Federal Power in Labor Arbitration — The Example of Arbitral Discovery, 116 U. PA. L. REV. 830 (1968); Jones, The Labor Board, The Courts, and Arbitration — a Feasibility Study of Tribunal Interaction in Grievable Refusals to Disclose, 116 U. PA. L. REV. 1185 (1968). See also E. ELKOURI & F. ELKOURI, HOW ARBITRATION WORKS 8-10, 22-23 (2d ed. 1973) [hereinafter cited as ELKOURI & ELKOURI] on the advantages of the minimum cost and expeditious proceedings of arbitration as compared with
of no pre-hearing discovery, the unemployment compensation proceedings may have the collateral effect of a party obtaining valuable information about the other parties' claims and evidence while in the process of determining the question of entitlement to unemployment compensation benefits.

In the area of equal employment opportunity litigation, the pre-trial value of the unemployment compensation proceedings has less weight due to the discovery devices available to the litigants in the federal courts pursuant to the federal rules of civil procedure. The unemployment compensation proceedings may still be of value to a litigant if the equal employment charge is still in the investigation stages of the proceedings. If a party is able to adduce evidence through the unemployment compensation proceedings which establishes the position it seeks, the evidence could have the collateral purpose of assisting in the establishment of the necessary findings by the Equal Employment Opportunity Commission that reasonable cause exists to believe that a prohibited act of discrimination occurred, or, in the alternative, that the charge should be dismissed for lack of evidence of unlawful motive.

A second purpose of discovery is to "lock-in" testimony of witnesses so that their testimony cannot be changed at any subsequent trial or hearing. The unemployment compensation proceedings are an additional aid to counsel in this respect. The Federal Rules of Evidence provide that where a witness has testified in a prior hearing, and that statement is inconsistent with the present testimony, the prior testimony may be used to impeach the witness. Most states provide similar evidentiary rules. While the federal rule is subject to require-

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traditional litigation.
42. 29 C.F.R. § 1601.15(a) (1979) provides, in part, that the Equal Employment Opportunity Commission will accept any evidence a party may wish to provide relevant to the charges made.
43. 29 C.F.R. § 1601.19 (1979) (dismissal) and 29 C.F.R. § 1601.21 (1979) (reasonable cause determination).
44. Fed. R. Evid. 801(d)(1)(A) and (d)(2); see also Fed. R. Evid. 613(b) on providing the witness the opportunity to explain the prior statement. An example of a state court permitting the use of prior testimony of a witness in an unemployment compensation proceeding for the purposes of cross examination see Sias v. General Motors Corp., 372 Mich. 542, 548-49, 127 N.W.2d 357, 361 (1964).
45. C. McCORMICK, EVIDENCE § 254 (2d ed. 1972) [hereinafter cited as McCORMICK, EVIDENCE].
ments of oath, the opportunity to cross-examine, identity of the parties and issues, and an examination of the character of the tribunal and the proceedings, the unemployment compensation proceedings appear to qualify as such a proceeding for which prior testimony could be used. Moreover, where the witness is unavailable at the time of the second proceeding, damaging testimony (or helpful testimony) could be used upon proof of the unavailability of the witness.

Through the use of subpoenas the party to an unemployment compensation proceeding could require the key witnesses on the other side to appear and testify. Once the unemployment compensation proceedings have concluded and the testimony is completed, the advocate can determine whether to call the witness to the subsequent labor litigation proceeding. Even if the witness' testimony is not useful in proving the subsequent case, the testimony in the unemployment compensation proceeding is still useful to evaluate the likelihood of success in the subsequent labor litigation. Furthermore, it may be used for impeachment purposes if the witness recants the story at the subsequent hearing. Thus, the unemployment compensation proceeding serves as a valuable discovery device in subsequent labor litigation where discovery is not normally available.

B. Preclusive Effect of the Unemployment Compensation Proceeding

The preclusive effect of unemployment compensation proceedings on subsequent labor litigation is, perhaps, the most troublesome and, yet, potentially the most useful procedural effect. Those arguing a preclusive effect urge that once the issue of termination has been decided the matter should be laid to rest. For example, an employer may claim that the termination of an employee was because the employee stole goods from the employer. The employee claims that the termination was due to union or other protected activity. The unemployment administrative law judge (ALJ) finds that the employee was terminated because of protected activity and not theft. Should this finding of fact have preclusive effect in subse-

46. Id. at §§ 255-58.
47. Id. at § 253; Fed. R. Evid. 804(b)(1).
quent labor litigation? The answer is relatively easy. In most state unemployment compensation proceedings the claim by the employer if proved would disqualify the employee from benefits because of “misconduct.” Since the ALJ found that the employee had been terminated due to protected activity no misconduct would be found. But the finding of protected activity was not essential to the finding that misconduct did not occur. All the ALJ needed to find was that the reason for discharge was not theft. Once this was found the real reason for discharge was immaterial to the decision of the ALJ, no misconduct having been found. Thus, the decision that the actions of the employee involved protected conduct was unnecessary for adjudication. It should not have a preclusive effect.

48. U.S. Dep’t Labor — Comparison, supra note 8, at 4-7 & 4-8.

49. Any examination of preclusive effect must first come to grips with terminology. As used in this article the terms “preclusion” or “preclusive effect” are defined to encompass the common concepts of res judicata and collateral estoppel as set forth in 1B J. Moore Federal Practice ¶ 0.441-.448 (2d ed. 1976). While res judicata may not be applicable to any appreciable degree in the present comparison because the “cause of action” is different in an unemployment compensation proceeding than in the subsequent labor litigation, “fact” or “issue” preclusion of collateral estoppel may be applicable. Id. at ¶ 0.441[2]. Accordingly, the trier of fact in the subsequent labor litigation may be estopped from resolving factual disputes already resolved in the unemployment compensation proceedings. This does not mean that the trier of fact in the subsequent labor litigation should not apply those “resolved” facts in its own decision. That, of course, is the function reserved for the later tribunal.

The later tribunal has the additional responsibility of determining whether the party arguing the preclusive effect of the prior proceeding has fulfilled its burden of proof on the issue. Id. at ¶ 0.408[1]. In the text example, the employer should be precluded from raising in the second proceeding that the employee was discharged for theft, that matter having been adversely decided against it. However, it does not necessarily follow that the employer violated the employee’s right to engage in protected activity. That issue was not essential to the judgment in the unemployment compensation proceeding. Thus, the second tribunal must decide whether the employee’s protected rights were violated. Id. at ¶ 0.433[5].

The second tribunal could, of course, review the employer’s claims in the unemployment proceedings to determine whether the employer is maintaining an inconsistent position in the second proceeding. See notes 44-47 supra and accompanying text. The second tribunal could, on the basis of prior inconsistent testimony, impose the sanction of preclusion. Id. at ¶ 0.405[8]. The second tribunal must also examine the identity of the parties, the nature of the controversy and the nature of the adjudicating bodies in making a decision on the preclusive nature of the prior proceeding. Vestal, Preclusion/Res Judicata Variables: Adjudicating Bodies, 54 Geo. L. Rev. 857, 861 & nn.14 & 15 (1966) [hereinafter cited as Vestal — Adjudicating Bodies]. A special problem arises concerning preclusion when National Labor Relations Board matters are involved. Since the General Counsel controls the litigation and prosecutes
A more difficult case occurs when the employee quits employment because of discriminatory treatment. This concept of "constructive discharge" could result because of union activity or because of other matters such as sexual harassment. In this hypothetical the unemployment compensation proceeding must resolve whether the employee had good or just cause to quit the employment. If the employer litigated this matter, and lost, it would appear that the traditional concept of collateral estoppel should apply, at least to the finding of fact of the employee's reason for leaving employment. If that

the claim from both a public and private perspective, the Board will have to consider carefully the concept of issue preclusion as it relates to identity of parties. Preclusion does not require an identity of parties in all instances. Vestal, Preclusion/Res Judicata Variables: Parties, 50 IOWA L. REV. 27 passim (1964). The United States Court of Appeals, Fifth Circuit, applied the principle of preclusion where in the first proceeding the actions of an employee resulted in union liability for violating § 8(b)(1)(A) of the NLRA, by precluding the General Counsel in the second proceeding (same employee, same facts) from claiming a violation of § 8(a)(1) and (3) of the NLRA against the employer. Mosher Steel Co. v. NLRB, 568 F.2d 436 (5th Cir. 1978).


The concept of constructive discharge, i.e., creation by the employer of a situation so unbearable that an employee relinquishes his position rather than continue in such situation, has been uniformly recognized by the National Labor Relations Board, the courts in equal employment opportunity matters and by arbitrators. Baltimore Transit Co., 47 N.L.R.B. 109, 112, 12 L.R.R.M. 1, 3 (1943); Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140 (6th Cir. 1975); I.U.D.S. — Midwest, Inc. 68 Lab. Arb. 962 (1977) (Cox, Arb.). On the application of unemployment compensation to claims of sexual harassment see Comment, Unemployment Compensation Benefits for the Victim of Work-Related Sexual Harassment, 3 HARV. WOMEN L.J. 173 (1980).

States use different standards to determine the validity of the reason for quitting work. "Good," "just," "sufficient cause" or "cause of a necessitous and compelling nature" are standards used by different states. U.S. Dep't Labor — Comparison, supra note 8, at 4-5 through 4-7.

In this example, a necessary finding of fact by the unemployment compensation tribunal is that the sexual harassment took place. If it did not, then the termination was voluntary and the individual would not be entitled to unemployment compensation. If the harassment did take place the employee would be entitled to receive unemployment compensation because the quit was "for cause." The finding of harassment should be final and binding on the employer. The second tribunal need only take this finding and apply it to the statute (or contract) involved to determine
reason were sufficient to sustain a finding of a violation of the law (or contract) in the subsequent labor litigation, the second tribunal should give preclusive effect to the finding. A similar result should occur where, under our previous example of claimed employee theft, the unemployment compensation tribunal finds that the employee has been discharged because of misconduct. Under this situation the employee should not enjoy a second opportunity to prove that the theft did not occur or was not the reason for the discharge.

This concept of the preclusive effect of unemployment compensation proceedings on subsequent labor litigation, however, is far from settled. The United States Supreme Court has clearly stated that administrative proceedings may form the basis of preclusive effect on subsequent court proceedings. In the Court's decision in United States v. Utah Construction & Mining Co.\(^5\) the Court — although not essential to its decision — stated:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose . . . . See also Goldstein v. Doft, 236 F.Supp. 730, aff'd 353 F.2d 484, cert. denied, 383 U.S. 960, where collateral estoppel was applied to prevent relitigation of factual disputes resolved by an arbitrator.\(^6\)

Contrasted with this strong endorsement of the use of preclusive principles to enforce repose is the Court's decision in Alexander v. Gardner-Denver Co.\(^7\)

In the Alexander decision the employee had been discharged for claimed production deficiencies. The matter had proceeded through the grievance steps. In the final pre-arbitration step the grievant raised, apparently for the first time, the claim that his discharge was because of racial discrimination.\(^8\) Prior to the formal arbitration proceeding the grievant filed a charge with the appropriate state agency claiming ra-

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\(^6\) Id. at 422.
\(^7\) 415 U.S. 36 (1974).
\(^8\) Id. at 42.
cial discrimination. The arbitration proceeded. The grievant testified that his discharge was due to racial discrimination. The arbitrator found that there was just cause to terminate the grievant, but did not refer explicitly to the discrimination claim. The district court held that the grievant, by submitting his claim to the arbitrator, was precluded from litigating the claim under Title VII. The Court of Appeals for the Tenth Circuit affirmed in a per curiam opinion.

The Supreme Court reversed, finding that the arbitration proceeding did not preclude the Title VII proceeding. As appropriate to the present examination, it specifically found that the theory of preclusion, whether cast as election of remedies, equitable estoppel, res judicata or collateral estoppel, could not be applied because the national policy reasons against discrimination required the rejection of such a concept. While the reasoning of the Court may be subject to criticism, there can be little doubt that under the Alexander rationale a prior adjudication by an unemployment compensation hearing will not preclude a subsequent proceeding for a violation of Title VII. The Court did permit the federal courts to use the prior arbitration proceeding for a type of quasi-preclusive effect, allowing the arbitrator's decision to be introduced into "evidence and accorded such weight as the court deems appropriate." This, of course, is not unlike the procedure that any court may be required to perform in an examination of the preclusive effect of any prior proceeding, except the court under the Alexander rationale will be able to ignore any preclusive effect if it views the facts differently from the arbitrator.

The National Labor Relations Board has had a similar ad-

57. Id.
59. 466 F.2d 1209 (10th Cir. 1972).
60. 415 U.S. 36, 49 n.10 (1974).
64. In the Alexander case the district court on remand determined that the discharge was proper, which determination was affirmed by the court of appeals. Alexander v. Gardner-Denver Co., 519 F.2d 503 (10th Cir. 1975), cert. denied, 423 U.S. 1058 (1976).
version to giving preclusive effect to prior arbitration proceedings. The Board has deferred to an arbitrator's award so long as that award has fulfilled certain criteria, but recently has made it more difficult to use a prior arbitration award to prevent the relitigation of the factual dispute in the unfair labor practice forum. As with Title VII proceedings, the same effect can be expected in a proceeding where the unemployment compensation proceeding is asserted as binding on the Board proceeding.

Arbitrators have been more willing to accept the preclusive effect of prior factual determinations, although the consensus is anything but unanimous. Some arbitrators accept the

65. Spielberg Mfg. Co., 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955). The Spielberg test requires that the arbitration proceedings be fair and regular. All parties must agree to be bound and the arbitration decision must not be clearly repugnant to the purposes and policies of the National Labor Relations Act. Id. at 1082, 36 L.R.R.M. at 1153.

66. Suburban Motor Freight, Inc., 247 N.L.R.B. No. 2, 103 L.R.R.M. 1113 (Jan. 8, 1980). In Suburban, the Board overruled Electronic Reproduction Service Corp., 213 N.L.R.B. 758, 87 L.R.R.M. 1211, (1974) which held that in the absence of unusual circumstances the Board would defer to an arbitrator's award even though the arbitrator had not indicated that he had considered or been presented with the unfair labor practice issue. The Board stated that it was returning to its pre-Electronic Reproduction rule that a deferral would not result unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator.

67. This is the position taken by the Board in those few cases in which it has considered the matter. Aerovox Corp., 104 N.L.R.B. 246, 247, 32 L.R.R.M. 1078, 1079 (1953) (dictum); Cadillac Marine & Boat Co., 115 N.L.R.B. 107, 108 n.1 (1956) (Michigan Employment Security Commission decision not a bar to Board proceeding; admitted for its probative value); W.K. Mfg. Co., 161 N.L.R.B. 1185, 1189 n.18 (1966) (trial examiner's decision). The Board does recognize that testimony adduced at the unemployment compensation proceeding may be used for impeachment purposes as long as the appropriate guidelines are followed. Newport Window Cleaning Co., Inc., 170 N.L.R.B. 1221 n.2, 1227 n.28 (1968). See note 44 supra. At least two of the members of the Board (Messrs. Fanning and Jenkins) believe that the rationale of Alexander requires the Board to abandon the deferral policy in toto. Roy Robinson, Inc., 228 N.L.R.B. 828, 835, 94 L.R.R.M. 1474, 1481 (1977) (dissenting opinion).


69. Floor Covering Specialists, Inc., 68 Lab. Arb. 1022 (1977) (Finston, Arb.) (NLRB proceeding not binding since arbitration is a substitute for litigation); Fawn Eng'r Corp., 63 Lab. Arb. 1307 (1974) (Fitch, Arb.) (unemployment compensation
preclusive principles of the prior adjudication, setting forth conditions which must be fulfilled prior to acceptance of the prior award.\textsuperscript{70} Other arbitrators deny the binding effect, but look to the prior decision and adopt it unless "clearly wrong."\textsuperscript{71} Still other arbitrators treat each matter as a new decision and totally ignore any preclusive effect.\textsuperscript{72} The hesitation of the courts and the administrative bodies to adopt the preclusive principles of res judicata and collateral estoppel and to deny litigants the opportunity "to blow hot and cold"\textsuperscript{73} with respect to the same transaction should not discourage the parties from raising the defense in the appropriate circumstances. Whether the use of the defense is

finding not binding although sworn testimony was used); Reynolds Metals Co., 59 Lab. Arb. 64 (1972) (Welch, Arb.) (unemployment compensation finding not binding on arbitrator); Union-Tribune Publishing Co., 51 Lab. Arb. 421 (1968) (Jones, Arb.) (determination by unemployment compensation claims examiner of no decisional consequence to arbitrator). See \textit{generally} \textsc{Elkouri & Elkouri, supra} note 40, at 373-74, and \textsc{Fairweather, supra} note 39, at 211-13.

70. Bofors-Lakeway, Inc., 72 Lab. Arb. 159, 163 (1979) (Kelman, Arb.). Arbitrator Kelman set forth four rules to determine whether the first arbitrator's award should be accepted without reexamination by the subsequent arbitrator. These were (1) the contract issue in contention was central to the earlier arbitration, (2) the parties had a fair and adequate opportunity to make their case before the first arbitrator, (3) the ruling of the first arbitrator is clear and explicit, and (4) the previous ruling, though it is unpersuasive to the current arbitrator, is something that the losing party can endure. For a thoughtful discussion of the concepts of stare decisis, res judicata and collateral estoppel as they affect an arbitrator's decision making process see the discussion of Arbitrator Boehm in Timkin Roller Bearing Co., 32 Lab. Arb. 595, 597-600 (1958) (Boehm, Arb.).

71. Brewers Board of Trade, Inc., 38 Lab. Arb. 679 (1962) (Turkus, Arb.) (will follow prior award unless "clearly and significantly wrong"); Mississippi Lime Co., 32 Lab. Arb. 1013 (1959) (Hilpert, Arb.) (will follow prior award unless it was "egregiously in error"). This school of arbitration thought is not too far removed from the United States Supreme Court's rationale in \textit{Alexander}. See note 53 and accompanying text supra.

72. Union-Tribune Publishing Co., 51 Lab. Arb. 421, 428 (1968) (Jones, Arb.); Yellow Cab Co., 44 Lab. Arb. (1965) (Jones, Arb.); Hotpoint Co., 23 Lab. Arb. 562 (1954) (Baab, Arb.). Many of these decisions which reject any binding effect of a prior decision would reach the same conclusion if normal preclusive effect reasoning were applied. For instance, in \textit{Yellow Cab Co.} the decision of the unemployment compensation referee was issued the same day as the arbitrator's initial decision. Since the decision was not final, it should have had no preclusive effect. Similarly in \textit{Union-Tribune}, the decision of the unemployment compensation agency was made by a claims examiner, not proper process under the state statute which provided for examination under oath and the right of cross-examination. This type of administrative determination would not be of the type entitled to preclusive effect. \textit{See} note 49 \textit{supra}.

73. \textsc{Fairweather, supra} note 39, at 211 quoting Lord Kenyon.
phrased in the traditional res judicata-collateral estoppel terminology or in a hybrid designation such as “appropriate weight,” or “so long as it is not clearly repugnant to the Act” the end result may be the same. The fact that a prior trier of fact has decided a matter in a particular manner may tend to influence the subsequent adjudicator, if no more than in a psychological manner. In these circumstances the unemployment compensation hearing will have a significance far beyond the hearing room where the claim is litigated.

74. See note 64 supra.

75. Vestal, Rational of Preclusion, 9 St. Louis U.L.J. 29, 33 (1964). Professor Vestal focuses on subsequent courts respecting the decisions of early courts. This author urges in Part IV, infra, that this same respect be provided the unemployment compensation proceeding.

76. State courts have had varied success in sorting out the concepts of res judicata (or claim preclusion) and collateral estoppel (or issue preclusion) as those concepts relate to the effect of unemployment compensation adjudication on subsequent proceedings. A certain amount of the problem is the responsibility of counsel in not distinguishing between the two concepts or making their argument on a claim preclusion basis when issue preclusion may be more appropriate. Courts which have grappled with the issue fairly successfully include Walsh v. Pluess-Staufier (North American), Inc., 67 Misc. 2d 885, 325 N.Y.S.2d 19 (1971); Silberman v. Penn Gen. Agencies of N.Y., Inc., 63 A.D.2d 929, 406 N.Y.S.2d 93 (1978); Bernstein v. Birch Wathen School, 71 A.D.2d 129, 421 N.Y.S.2d 574 (1979); Standard Automotive Parts Co. v. Michigan Employment Security Comm'n, 3 Mich. App. 561, 143 N.W.2d 135 (1966) (NLRB Regional Director's decision not given preclusion effect). Courts which have failed to grapple with this issue, or which have done so poorly, include Pratt v. Film Technicians of Motion Picture & T.V. Indus. Local 683, 260 Cal. Rptr. 483 (1968) (failure to distinguish between concepts of res judicata and collateral estoppel); Cross v. Hoffa, 368 Mich. 671, 118 N.W.2d 991 (1962) (failure to recognize concept of collateral estoppel); Salt Creek Freightways v. Wyoming Fair Empl. Practices Comm'n, 598 P.2d 435 (Wyo. 1979) (discussed concepts of res judicata and collateral estoppel, but applied wrong test even though result may not have changed if proper test applied). For cases applying preclusion in the unemployment compensation proceeding from a prior labor adjudication see Peak v. State Dep't of Indus. Relations, 340 So. 2d 796 (Ala. Civ. App. 1976) (NLRB proceedings — court incorrectly applied preclusion rules although correct result reached); City of Hialeah Gardens v. Prieto, 353 So. 2d 200 (Fla. Dist. Ct. App. 1977) (state court proceeding — court applied proper test).

C. Intangible Effects Upon Subsequent Proceedings

The procedural effects discussed above can have significant consequences on particular cases as the facts in each case dictate. In a greater sense — although certainly more difficult to quantify or qualify — the unemployment compensation proceeding may set the "tone" of future proceedings between the parties. If the unemployment compensation proceedings draw the parties together their differences may be resolved without the need of future proceedings. If the parties are antagonistic to each other, the gap may widen. Since the unemployment compensation proceeding generally will be the first proceeding where the parties meet in an adversarial role, the importance of establishing the future litigation stance between the parties cannot be minimized. This may be the opportunity to resolve completely the dispute between the parties, or it may be the situation to demonstrate to the other party that they will have to litigate every inch of the way. It may be the opportunity to minimize the dispute and contain it to the unemployment compensation proceedings, or it may be the time to demonstrate the seriousness and overall ramifications of the matter to the other side.

It would be presumptuous for this article to attempt to establish the precise guidelines for these considerations. Each case will depend upon the personalities involved, both parties and counsel, the facts leading to the dismissal, the prior history of the parties and all similar factors which go into the determination of a trial strategy. Suffice it to say, counsel should not await the initiation of the subsequent labor litigation to establish this strategy. It should be established at or prior to the time of the unemployment proceeding.

D. Obstacles to the Use of the Procedural Effects

The use of the evidence gathered in the unemployment compensation proceeding in subsequent labor litigation proceedings is subject to several obstacles. As a practical matter, the unemployment compensation proceeding may not be instituted, or brought to a hearing, if the reason for termination does not so warrant. If an employer terminates the employee

because the employee cannot perform the job, the employee will be entitled to receive unemployment compensation in most jurisdictions. This results because the employee has not been discharged for "misconduct." The unemployment compensation statutes are designed to pay benefits to employees who lose their employment through no fault of their own. The inability of an employee to perform the job is not considered to indicate the mala fides necessary to prove misconduct. Thus, an employer who informs the unemployment compensation agency that the employee was terminated for an inability to perform the work will have its reserve account charged for the unemployment of the employee. If the employer appealed such a determination only in order to obtain a hearing on the matter for the sole purpose of using the proceedings for discovery in the subsequent labor litigation an action may lie for abuse of process.

A similar unavailability of opportunity may result where the party seeking to use the proceeding for one or more of the procedural effects stated above, prevails at the initial determination level and the adversary does not seek an appeal. For instance, in the example immediately above, if the employee's counsel wished to learn the basis of the claim by the employer that the employee could not perform the work, but no appeal was taken of the initial determination by the agency of the grant of unemployment compensation, the employee's counsel would never have this opportunity.

Another obstacle to the use of the unemployment compensation proceeding in the subsequent labor litigation is the policy of many of the states to consider the information gathered in the unemployment compensation proceedings to be confidential and privileged from disclosure in subsequent proceed-

80. W. PROSSER, LAW OF TORTS § 121 (4th ed. 1971). If an attorney pursued such a course of action ethical considerations would also arise. A.B.A., ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 310-13; ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) & (2). Cf. Overmyer v. Fidelity & Deposit Co., 554 F.2d 539, 543 n.4 (2d Cir. 1977) (involving suit against surety on appeal bond); In re Bithoney, 486 F.2d 319 (1st Cir. 1973) (involving petitions for review in immigration cases).
81. The employee, of course, would have no grounds for appeal. See also note 80 and accompanying text supra.
ings not involving the unemployment compensation agency. Some states have enacted such a privilege in their statutory framework; others have created the privilege by judicial interpretation.

This basis of confidentiality has led two circuit courts of appeals to uphold the quashing of subpoenas in subsequent National Labor Relations Board proceedings which sought to obtain information within the files and records of the state unemployment compensation agencies, while another circuit court of appeals refused to permit the quashing of a subpoena based upon a claim of confidentiality in light of ambiguous statutory language. Other cases have indicated that the confidentiality is subject to waiver by a party to the proceeding. Thus, the argument is made that a party who seeks to obtain a remedy through a legal proceeding may have waived a privilege relevant to that remedy by putting the matter in issue. If an employee claims to have been terminated by improper means a waiver may have occurred as to what the employee told the unemployment compensation office about the termination. If an employer bases a defense to a claim of discrimination on one ground in the subsequent labor litigation the employee should be able to establish through the records of the unemployment compensation agency that the employer based its reason for termination on another ground before that agency.

84. Id.; NLRB v. Adrian Belt Co., 578 F.2d 1304, 1310 (9th Cir. 1978) (interpreting the California unemployment compensation statute). The author was one of the unsuccessful appellate counsel in this later case. See Douglas, Law Reviews and Full Disclosure, 40 WASH. L. REV. 227, 228-30 (1965).
86. Crest Catering Co. v. Superior Court, 62 Cal. 2d 274, 398 P.2d 150, 42 Cal. Rptr. 110 (1965) (employer waived statutory privilege of confidentiality by prior agreement with union in trust fund documents).
87. This, of course, is the argument made and generally sustained in the event of claim of privilege of medical records by a plaintiff in an injury action wherein the plaintiff's medical condition is in dispute and plaintiff has testified about that condition. C. MCCORMICK, EVIDENCE, supra note 45, at § 103.
88. The employee could subpoena the records of the employer instead of the unemployment compensation agency relative to the unemployment claim, but would be
The policies of confidentiality of the parties in order to encourage full disclosure by the employee and employer to the state unemployment compensation agency of the true reason for the termination evaporate when the parties have continued to litigate other issues arising out of the termination. The interest of the state and the party who wishes the documents to remain confidential must yield to the interest of the subsequent forum to obtain a complete picture of the circumstances surrounding the termination of employment. Not only will this full disclosure permit the subsequent forum to determine whether any preclusive effect should be given the prior unemployment compensation determination, it will also permit the subsequent forum to properly sift and weigh the evidence on a complete basis.

III. Substantive Effects

The procedural effects, discussed above, of an initial unemployment compensation proceeding on subsequent labor litigation will vary as the facts vary. This is also true with respect to the material discussed in this part. Unemployment compensation proceedings do in many cases materially affect the outcome of the subsequent labor litigation by permitting the parties to extend or limit the dispute in question, impose financial punishment upon each other or such other actions which lessens or increases the benefit derived by the prevailing party in the subsequent proceeding. The major effects can be categorized into two principal areas: unemployment com-

subject to the same claim of privilege by the employer. It does little good to ask the employer's representative on the witness stand the reasons given to the unemployment compensation agency for the termination if the witness has already testified to contrary reasons, particularly where the witness knows that the employee is unable to produce the unemployment compensation records.

89. There are justifiable reasons for keeping unemployment compensation proceedings confidential. One such reason is the employee's right of privacy with respect to the reasons for his termination. But these reasons are secondary when the employee and employer continue to litigate the dismissal in subsequent labor litigation. The subsequent labor litigation tribunal could place a protective order on the release of the information or place it under seal. Fed. R. Civ. P. 26(c). Since arbitration proceedings are private proceedings, the arbitrator should not publicly release the award absent agreement of the parties. Nat'l Academy of Arb., Am. Arb. Ass'n & Fed. Med. & Conc. Service, Code of Professional Responsibility for Arbitrators of Labor — Management Disputes, Part II, C (Privacy of Arbitration) (April 1975).
pensation as interim compensation, and unemployment compensation as an offset to backpay.

A. Unemployment Compensation Benefits as Interim Compensation

The award of unemployment compensation benefits as interim compensation may be viewed in two aspects. The first — an award to the employee as interim expenses until the determination of the propriety of the employer's actions can be tested — is filled with practicality, but little law. The second — an award to assist the employees in a labor dispute with their employer — has been litigated and commented upon, ad nauseum, but has little practical effect because of the statutory scheme in the vast majority of jurisdictions.

A terminated employee's first concern is to replace in full, or in part, the income which is lost as a result of the termination. If this can be replaced, in part, by the unemployment compensation benefits the employee will be assisted financially in the subsequent labor litigation attempt to obtain reemployment. If the unemployment compensation benefits are denied, the employee will have suffered a double blow to his psyche, from which he may not recover. The psychological damage to the employee as a result of the termination may be offset, however, in part by the award of unemployment compensation.90 The monies received will assist the employee in maintaining the expenses of life. It may provide sufficient income until the employee's claim can be heard before an impartial tribunal.91 If the employee does not receive unemployment compensation he may be required to accept other employment in order to subsist. As a result the award or denial of unemployment compensation benefits may materially affect whether the employee proceeds with the subsequent labor

90. There appears to be no question that a discharge from employment even for appropriate reasons results in psychological as well as economic damage to the employee. Where the discharge has been for unstated or improper reasons, the damages are multiplied. Peck, supra note 7, at 30, 38-39.

91. Weekly benefit amounts vary greatly from state to state. U.S. DEPT LABOR — COMPARISON, supra note 8, at 3-35. All states have a minimum and a maximum amount based upon a variety of factors. These include length of employment, weekly compensation and number of dependents. Minimum weekly amounts are as low as $5.00 (Hawaii). Maximum weekly amounts are as great as $183.00 (Connecticut).
Similarly, an employer who fails to dispute the employee's claimed reason for unemployment when it is inaccurate because the employer does not want to take the time or feels that employers never prevail before the unemployment compensation agency may be adding fuel to the fire of the employee's discontent with the termination. An employee who obtains a benefit based upon a mistaken statement of fact may be tempted to proceed in other forums for additional benefits. The failure of the employer to protest the employee's claim before the unemployment compensation agency may reinforce the employee's belief that the discharge was without merit.

Counsel for employees and employers should never underestimate the importance of an accurate determination of the granting or denial of the unemployment compensation benefit as it affects the ability of the employee to sustain the economic and psychological strains of the subsequent labor litigation. An employee who has not received any income for a six month period may be more willing to settle the subsequent proceeding for a smaller amount than an employee who has been receiving unemployment compensation benefits during the interim. Other instances of the effects of the unemployment compensation award are not hard to imagine.

The second area of significance of unemployment compensation benefits as interim compensation involves a factual situation different from the discharge hypothetical used up to this point in this article. This new factual situation involves the use by the employees or the employer of economic force, such as the strike or lockout, to prevail in a labor dispute. If the employees can receive unemployment compensation benefits for the duration of the work stoppage they will be in a stronger position to resist compromising their position. In addition, if the employer's unemployment compensation account is charged with the benefits paid to the employees, the em-

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92. Settlement of any proceeding will depend upon numerous factors including the tone of the proceedings. See note 77 and preceding text supra. Some employees who have been denied unemployment compensation may be less willing to settle because they feel that the employer's actions involved in the denial were wilful and malicious, where if the employer had not vigorously protested the claim of benefits the employees would be more willing to settle.
ployer will suffer an additional economic cost as a result of the work stoppage. This additional cost may cause an employer to abandon its refusal to accept the union’s solution to the dispute. A different issue arises in the event of an employer lockout.

Whether a particular state agency will award unemployment compensation benefits as a result of an employer lockout varies from state to state, lockout to lockout. One state has a statutory provision excluding payments in the event of a lockout. Other states have formulated such a rule by administrative or judicial decision. Other states determine whether the lockout is offensive or defensive, awarding unemployment compensation benefits for the former but not the latter. Several states by statute or judicial decision award benefits to employees in the event of any lockout regardless of its strategic label. An award of unemployment compensation by the

93. Haggart, Unemployment Compensation During Labor Disputes, 37 Neb. L. Rev. 668, 689 (1958). These costs can be substantial. One New York telephone company as a result of a seven month strike by its employees was charged approximately $16,000,000 extra over what it would have been charged had no strike occurred. New York Tel. Co. v. New York State Dep’t of Lab., 440 U.S. 519, 524-25 n.4 (1979). The employees of the company and three other telephone companies, a total of 38,000 employees, received about $43,000,000 in unemployment compensation. Id.

94. Ala. Code § 25-4-78(1) (1975). The definition of labor disputes includes “any controversy concerning terms, tenure or conditions of employment . . . .” Only Alabama and Minnesota define the term “labor dispute” in their unemployment compensation code. U.S. Dep’t Labor — Comparison, supra note 8, at 4-10.


97. Arkansas, Connecticut, Georgia, Kentucky, Maryland, Minnesota, Mississippi, New Hampshire, Ohio, Oklahoma, Pennsylvania, South Dakota and West Virginia. U.S. Dep’t Labor — Comparison, supra note 8, at 4-41 and 4-42, col. 7. This comparison states that California and Utah by judicial interpretation have excluded lockouts from the labor dispute category, thus entitling employees to receive benefits. That
state unemployment compensation agency to the employees in the labor dispute will materially affect the employees' ability to withstand the employer's economic attack. Denial of the benefits, even though the employee may be receiving strike benefits, may force the employees to compromise or surrender their position prior to an employer capitulation. Contrariwise, an award of the benefit when it is charged to the employer's reserve account will give the employer additional incentives to settle the dispute and return the employees to work.

Prior to 1979 many courts, legal observers and scholars, felt that state intervention into the labor dispute arena was an impermissible state interference into collective bargaining and preempted by federal labor law policy. The United States Supreme Court laid these concerns to rest in New York Telephone Company v. New York State Department of Labor. New York Telephone did not involve a lockout; rather it involved New York's statute which provided that strikers were entitled to unemployment compensation benefits after an eight week waiting period. Justice Stevens writing for a plurality of the court held that the New York statute did

98. Strike benefits are seldom more than $50 per week.
103. This resulted because there is a standard one week waiting period combined with an additional seven week waiting period because of the labor dispute. 440 U.S. at 523.
104. Consisting of Justices Stevens, White and Rehnquist. Justice Brennan filed a concurring opinion expressing reservations concerning the preemption rationale of
not impermissibly interfere with national labor relations policy. This was based upon the legislative history of the National Labor Relations Act and Title IX of the Social Security Act taken together with the important state interest of providing for unemployed workers. Justice Powell writing for the dissent felt that the statute did impermissibly distort the federal labor policy of free collective bargaining.

*New York Telephone* has had limited immediate effect since only Rhode Island has a similar statute. All other states prohibit payment to strikers at least as of the time of the initial work stoppage. There appears to be no question, however, that it has quieted those critics of the constitutionality of payment of unemployment benefits to employees who are locked out. *New York Telephone* will give impetus to labor organizations which seek changes of state laws to provide unemployment benefits to employees on strike. If states respond to such lobbying pressure, or are required to comply with federal standards requirements, an award of

the plurality. *Id.* at 546-47. Justice Blackmun and Marshall concurred, but disagreed with the analysis of the plurality concerning pre-emption. *Id.* at 547-51.

105. *Id.* at 540-46.

106. Chief Justice Burger and Justices Powell and Stewart.


110. If an award of unemployment compensation to a voluntary striker is not preempted, an award to an employee “locked out,” whether for offensive or defensive reasons, would not be preempted.


112. While early federal reports did recommend such action, Shadur, *supra* note 108, at 317 n.100, the National Commission on Unemployment Compensation has not sought to modify the labor dispute disqualification in its recent hearings. 44 Fed. Reg.
unemployment compensation benefits may materially affect the balance of power between employees and their employers, particularly if the waiting time limitation for benefits to commence is reduced.\\(^1\)\\(^1\)

This is not to suggest that states, or the federal government, do not have strong and legitimate reason why employees should receive unemployment benefits for an extended work stoppage even if the employer is in part financing such payments. The employees could, of course, receive such payments and the employer’s account would not be charged with such payments.\\(^1\)\\(^4\) The potential preemption impediments having been removed by *New York Telephone*, the role of unemployment compensation benefits as an aid to employees involved in a labor dispute with their employer has been substantially enhanced. States need now only tackle the difficult political problems of whether, and if so to what extent, they wish to re-enter the fray.

**B. Unemployment Compensation Benefits and the Award of Back Pay**

One area of the interrelationship of unemployment compensation proceedings and subsequent labor litigation has been litigated in depth. This involves the question of whether an award of unemployment compensation benefits may be used as an offset, or credit, to a subsequent award of back pay in the subsequent labor litigation proceeding. Only in the National Labor Relations Board’s arena has the answer been definitely resolved.

40, 983 (1979) (proposal 11E reads “No benefits would be paid to an individual or strike”). The report of the Commission is due to be released mid-year 1980.

113. *See* note 99, *supra*. There is a strong contrary argument that an award of benefits to strikers where there is a waiting period will not increase the length of the strike. A witness before the National Commission on Unemployment Compensation stated that based upon a twenty-six year period (1947 through 1972) in New York only 9.3% of the workers engaged in labor disputes ever received benefits and that the cost to employers was only .02% of taxable payrolls and only .01% of total payrolls. Chaiken Statement, *supra* note 26, at 384.

114. For instance, the payment of unemployment benefits in the event of a strike could come from all employers in the state, i.e., a charge against the entire state fund instead of a particular employer’s fund. Another alternative would be to make the payments from the general tax fund of the state, shifting the burden of payment to the public.
In *NLRB v. Gullet Gin Co.*, the United States Supreme Court held that it was not an abuse of discretion for the National Labor Relations Board to refuse to deduct unemployment compensation benefits from its back pay order. The court held that the benefits were in the nature of a collateral benefit for which the Board did not have to give credit. The court held the action of the Board to be within the framework of discretion given the Board to effectuate the policies of the National Labor Relations Act. As a result, the Board's concept has enjoyed limited success as a standard in federal court proceedings in the context of awarding back pay in equal employment litigation.

Some federal courts have adopted *in toto* the National Labor Relations Board's policy decision to give no credit to unemployment compensation benefits when calculating back pay. These courts, by and large, adopt the Board's theory that unemployment compensation benefits are a collateral source. Other courts have ordered deductions of the amount of compensation, sometimes on the theory that the plans are funded with employer's contributions, other times without explanation. A third group of courts have not given the em-

115. 340 U.S. 361 (1951). This was the culmination of a change of policy by the Board. Initially the Board had required the employer to reimburse the state unemployment compensation fund for the amount of the benefits received by the employee. Hanover Cordage Co., 12 N.L.R.B. 507, 509, 4 L.R.R.M. 162 (1939). This policy was subsequently abandoned and no deductions for unemployment compensation were made. Pennsylvania Furnace & Iron Co., 13 N.L.R.B. 49, 55, 4 L.R.R.M. 269 (1939). The Court in *Gullet Gin* recognized the concept of reimbursement by the employee to the state fund but did not mention the interest of the employer to have its account relieved of the charge. 340 U.S. at 365 n.1.

116. 340 U.S. at 364. The rationale of the Court is questionable in light of the non-contribution of the employee in most jurisdictions. Comment, *The Mitigating Effect on Damages of Social Welfare Programs*, 63 Harv. L. Rev. 330, 335-36 (1949). The comment concludes that while the payment of the unemployment compensation is not a collateral source for the employee the policy of the unemployment compensation program requires that the state fund be first reimbursed from the back pay the amount it has paid to the employee with the remainder to go to the employee.

117. 340 U.S. at 364.


119. EEOC v. Enterprise Ass'n Steamfitters Local 638, 542 F.2d 579, 591-92 (2d Cir. 1976).

120. Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 401 (3d Cir. 1976); Bowe v.
ployers credit for the payments, but have required the employees to reimburse the state for unemployment compensation benefits received from the back pay awarded.\textsuperscript{121}

Arbitrators, like the federal courts, are not consistent in their treatment of unemployment compensation benefits as a credit to back pay. Some arbitrators follow the policy of the National Labor Relations Board and refuse to give credit;\textsuperscript{122} others feel that the position of the arbitrator is to make the employee whole pursuant to rules of contract which require credit to be given for these payments.\textsuperscript{123} A few arbitrators give credit to the employer for unemployment compensation received by the employee, but require that the employer reimburse the state agency.\textsuperscript{124}

Because neither the federal courts nor arbitrators apply a consistent rule, situations may occur wherein inequitable results transpire. The same federal district court may apply a different rule dependent upon which judge is assigned the case.\textsuperscript{125} An arbitrator will give credit to the employer for the payment to the employee of the unemployment compensation, but the state will require the employee to make a reimbursement to the state,\textsuperscript{126} an abhorrent result to the employee. The

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\item Griggs v. Sands, _ Tenn. _, 526 S.W.2d 441 (1975); Texas Empl. Comm'n v.
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concept of reimbursement to the state is, of course, the most equitable approach from the interest of the employee, the employer and the state. By requiring reimbursement, the employee does not receive more money than he would have received if he had kept working. The employer's reserve account is credited and it is not charged with an event of unemployment in which the employee receives back pay. The state receives back its disbursement and protects the financial soundness of its unemployment compensation fund. No party receives a benefit or incurs a detriment to which it is not entitled or obligated.

An employee who does not receive full back pay because the trier of fact gives the employer credit for unemployment compensation should seek to have the trier of fact require that the employer reimburse the state in order that the employee is not later required by the state to make reimbursement. An employer who does not receive credit for unemployment compensation in the calculation of back pay should seek to have the trier of fact require the employee to make repayment to the state. If the trier of fact refuses, the employer or employee can notify the state that the other has received back pay, or credit thereon, and ask, as the case may be, that the state obtain reimbursement from the employee and relieve the employer's account from liability for that instance of unemployment or proceed against the employer for reimbursement. Alternatively, an employer may attempt to


127. But not every state requires reimbursement absent fraud. Eleven states provide that, absent fraud, misrepresentation or nondisclosure, an individual will not be responsible for reimbursement where it would defeat the purposes of the unemployment compensation act and be inequitable. Five other states provide recovery may be waived under similar conditions. U.S. DEP'T LABOR — COMPARISON, supra note 8, at 4-14. See Annot., 90 A.L.R.3d 987, 1001-03 (1979) [hereinafter cited as Annot. — Repayment].

128. See note 124 supra.

129. See note 121 supra.

130. Hiserote Homes, Inc. v. Riedemann, 277 N.W.2d 911 (Iowa 1979). In this case the employee received reinstatement and back pay as a result of a National Labor Relations Board investigation. The unemployment compensation proceeding was
issue a jointly payable check to the employee as well as the state agency, at least for the amount of the unemployment compensation received, to require that the employee settle the matter with the state agency.131

The problem of unemployment compensation as a credit for back pay should be resolved by the parties in the event of settlement of claims prior to issuances of formal orders or awards. If the National Labor Relations Board agents are unable to work out the credit of unemployment compensation in the settlement agreement, the parties may always settle by withdrawing the charge and making a non-Board settlement.132 If credit is given the employer for unemployment compensation paid, the employee should protect himself, if the employer fails to make reimbursement to the state, by requiring in the settlement agreement that the employer indemnify and hold harmless the employee if the state ever proceeds against the employee for reimbursement.133

still in litigation. The employer withdrew its claim that the employee had been discharged for cause and claimed ineligibility because of back pay provided in the Board settlement. Id. at 912. The Iowa Supreme Court ruled that if unemployment compensation was paid (the facts were uncertain) the employee need not reimburse the state, but that the employer should not have its account charged. Id. at 915.

131. This is the procedure suggested by the Illinois administrator of unemployment compensation as reported in Universal Producing Co. v. Machinists Dist. Lodge 105, 57 Lab. Arb. 1072, 1073-74 (1971) (Sembower, Arb.).

132. A private settlement is not deemed to be a settlement by the National Labor Relations Board; nor does it automatically receive Board approval. NLRB CASE-HANDLING MANUAL §§ 10140.1, 10142 (1976). Region 7 of the National Labor Relations Board located in Detroit, Michigan, provides in settlement agreements for less than full back pay a clause which reads:

M.E.S.C. Clause — The parties hereto recognize that the amount of backpay to be paid herein represents a compromise of the total amount of back pay due the discriminatee. It is agreed, therefore, that in the event the discriminatee is required to reimburse the Michigan Employment Security Commission for any unemployment compensation the discriminatee received as a result of a loss of pay because of the alleged unfair labor practices in this matter, the employer will pay over to the Michigan Employment Security Commission an amount equal to that which the discriminatee is required to reimburse the Michigan Employment Security Commission. This amount, however, shall not exceed [the difference between total back pay less the settlement amount].

This clause, or language appropriate to the particular state involved, should be adopted by the other Regional offices for use in those states requiring reimbursement by employees to state funds, when the settlement is less than full back pay. This will avoid the inequitable result of a double deduction mentioned in the text at note 126 supra.

133. Some states have held the employer liable, even absent an indemnity agree-
IV. CLOSING THOUGHTS AND PROPOSALS

The intent of this article was to bring into focus the significant role which unemployment compensation proceedings may play in the resolution of subsequent labor litigation. The need for illumination and discussion of this subject is apparent. The case authorities are inconsistent, even in the same judicial family. Many of the decisions are based upon faulty or misunderstood reasons.

Fifty-three jurisdictions have fifty-three different unemployment compensation statutes which vary in substance and form. While it is impossible to delineate herein the subtle differences between these statutory schemes, these differences often affect the application of some, or all, of the principles previously discussed. When these principles are applied to a particular set of facts in a particular jurisdiction, it is incumbent to thoroughly examine local practice and precedent. However, certain concepts, subject to these subtle differences, tend to vary little from jurisdiction to jurisdiction.

The unemployment compensation proceeding may be useful as a discovery device for the practitioner. Since neither the National Labor Relations Board nor a majority of arbitrators permit pre-hearing discovery the evidence adduced at the unemployment compensation proceeding will provide valuable insight into the adverse party's claims. Careful cross-examination at the unemployment compensation hearing will bind an adverse witness to a certain factual setting. The advocate through subsequent investigation may be able to demonstrate the factual setting to be erroneous in the subsequent labor litigation. If the adverse witness changes testimony in the subsequent proceeding, the prior testimony may be used for impeachment purposes. In brief, the unemployment compensation proceeding may have effects far beyond that proceeding's hearing room.

The preclusive effect — or lack thereof — of the unemployment compensation adjudication applied by many of the
courts and administrative bodies is troublesome. No one would urge that the unemployment compensation adjudicator should decide whether the employer has violated the National Labor Relations Act or Title VII. This does not mean that the unemployment compensation decision should have no binding effect. If a finding of fact, fully litigated (or at least the opportunity to do so), is made which is required by the unemployment compensation determination, that finding should be given preclusive effect under the normal rules. Once that fact is fairly found, no purpose of jurisprudence is served by permitting a second adjudicatory body to redetermine the same fact.

If the unemployment compensation proceeding is so inherently untrustworthy that preclusive principles are not applicable, a redetermination of that adjudicatory process is in order. A party should not be put to the test of submitting evidence under penalty of perjury if that evidence is not to be accorded significance by subsequent authorities. The rules of preclusion adequately protect against an undue effect of the prior fact determination in those cases where the prior adjudicator exceeded the scope of the issue before it. But errors in the application of the system do not warrant elimination of the system. Only by giving the level and scope of preclusive effect to unemployment compensation adjudications, which are warranted under normal preclusion rules, will the unemploy-

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135. The unemployment compensation adjudicator may have to consider the effect of these statutes in its determination, but any such consideration would not be binding on the second tribunal. See text at notes 50-51 supra.

136. The second tribunal would refuse to give the prior finding preclusive effect if the standards for preclusion were not met. See note 49 supra. Preclusive principles provide an "escape valve," at least as to questions of law, where a preclusive finding would result in injustice. Restatement of Judgments § 70 (1942); Pacific Maritime Ass'n v. California Unempl. Ins. Appeals Bd., 236 Cal. App. 2d 325, 45 Cal. Rptr. 892, 896 (1965). To the extent that the preclusive principles should be saved a similar sacrifice could be made with respect to questions of fact. Lewis v. I.B.M., 393 F. Supp. 305 (D. Ore. 1974). But see Vestal — Adjudicating Bodies, supra note 49, at 888-89, wherein Professor Vestal questions the use of preclusion to administrative agencies applying policy considerations.

137. Restatement of Judgments § 68 (1942).

138. "Although any particular decision must be held either binding or not binding, the choice is not between taking all or none of the traditional doctrine of res judicata; the doctrine may be relaxed or qualified in any desired degree without destroying its essential service." K. Davis, Administrative Law of the Seventies § 18.12, at 625 (1976).
ment compensation adjudications cease to be the stepchild of the judicial system and accorded the esteem to which they are entitled.

If the findings of the unemployment compensation adjudications were uniformly accorded the weight to which they are entitled the level of representation of claimants would surely rise. Subsequent labor litigation would diminish in scope and number if advocates understood that a prior adverse adjudication in the appropriate case would be binding. The alternative established in *Alexander* by the United States Supreme Court is not an adequate substitute. By permitting the second adjudicator to give what weight in its discretion it feels the first adjudication should receive is to let the second adjudicator totally ignore or accept the prior adjudication based upon the second adjudicator's perception of how the case should be decided. This ad hoc approach to preclusion is a poor substitute for the common law approach based upon the normal test of preclusion.

In the arena of labor arbitration, the *Alexander* case has led many parties to defer arbitration either by the terms of the agreement to arbitrate or by stipulation until after the

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139. If parties to unemployment compensation proceedings realized that such an adjudication could have preclusive effects they would be sure to have counsel present if future litigation were planned. The idea that currently "not much is at stake" in the unemployment compensation proceedings adds fuel to the fire of those who feel no preclusive effect should be granted. Vestal — *Adjudicating Bodies*, supra note 49, at 889 n.110. This, then, becomes a self-fulfilling prophecy; since there is no incentive, there is no preclusion which further supports a lack of incentive.

140. See note 53 supra.

141. The usual rules of preclusion would serve adequately in the *Alexander* factual situation. The Court focused primarily on the concept of traditional res judicata, or claim preclusion, without adequately resolving the concept of collateral estoppel, or issue preclusion, except by totally rejecting that concept. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50 (1974). The Court felt that the arbitration procedure was not the equivalent of judicial factfinding. *Id.* at 57-58. An arbitration proceeding in many states is the equivalent. See note 39 and accompanying text supra. However, where it is not, the second adjudicatory body need not provide the prior finding a preclusive effect since the prior proceeding does not fulfill the preclusive requirements. See note 49 supra. But even if the prior proceedings fit the principles of preclusion "like a glove," the second tribunal could refuse to apply preclusion if injustice would result. See note 136 supra. The Court was not presented with these concepts since the respondent chose to modify its position on preclusion in its argument before the Court. Brief of Respondent at 30-31, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).
claim of discrimination has been adjudicated. This process is used to eliminate unnecessary adjudicatory proceedings which may result in contradictory decisions. This is not possible in the unemployment compensation proceedings because of the delay in obtaining benefits to an entitled employee. However, the adversary nature of the benefit determination could be eliminated in order that the question of employee entitlement to benefits not rest upon charging the employer's account. For instance, the employee could be automatically entitled to benefits, with the only litigated question being whether the employer's account would be charged. If the employer could show a sufficient reason why its account should not be charged the benefits would be charged to the general fund of the state. If the state could demonstrate that a good reason existed why the employee should not receive unemployment benefits, the benefits would be denied. But the two determinations would not be interrelated. In brief, the unemployment compensation proceeding should be given its dignity, or relieved of its mantle of adjudicatory authority.

A common and uniform system of treatment of unemployment compensation as a set off against subsequent back pay awards is another concept which needs implementation. The most equitable method is for the subsequent labor litigation adjudicator to impose, as part of the award, the requirement that the state unemployment compensation agency be reimbursed any sums for periods of time in which full back pay is awarded to the employee in those states which require reimbursement.

142. One author takes this position one step further and urges that Title VII matters be excluded in their entirety from the arbitration process. Glanstein, Arbitration of EEO Issues: A Dissenting View, N.Y.U. THIRTY-SECOND ANN. CONF. ON LAB. 155, 166-67 (1979). Another has suggested a "two-track" grievance procedure for handling employment discrimination cases, although certain criticism has been lodged that this approach does not eliminate the multiple forum problem. Edwards, Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives, 27 LAB. L.J. 265 (1976); Aaron, Current Trends and Developments in Arbitration, S.W. LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS 1978, 143, 165-68. If the area of preclusion and labor litigation were reexamined and appropriate preclusive principles were applied, as urged herein, the need for alternative systems of forum resolution would, by and large, be eliminated.

143. There may still be partial issue preclusion under this procedure since even a stranger to a prior proceeding may use a prior adjudication against an adversary in the subsequent proceeding. Vestal, Preclusion/Res Judicata Variables: Parties, 50 IOWA L. REV. 27, 43 passim (1964).
bursu...e. The procedure of the National Labor Relations Board under Gullet Gin is unsatisfactory from the employer's standpoint since it puts the burden on the employer to be sure that the employee reimburses the state in those jurisdictions where reimbursement is required. The Board should return to its pre-Gullet Gin procedure.\textsuperscript{144}

Unemployment compensation is not a collateral source in the traditional sense of the term. Since the employer's account and experience rating is affected, the employer is penalized twice if reimbursement is not made. The employee who does not reimburse the state fund is made more than whole. The employee who receives a deduction from back pay because of unemployment compensation and then has to reimburse the state fund is penalized. Neither result comports with equity. The policy of those courts which require the employee to reimburse the state as required, but give the employer no credit for unemployment compensation received by the employee, protects the interest of the employee, the employer and the state unemployment fund. This approach should be adopted by the remainder of the courts and arbitrators.\textsuperscript{145}

Unemployment compensation boards should consider a system of establishing a statutory or contractual lien on claims by employees for back pay from their employers. This could be accomplished by asking the employer to report to the unemployment compensation agency whether any claim has been filed by the employee for reinstatement or back pay from the employer. If it has the unemployment compensation agency could notify the latter forum that it was paying benefits for which it had a lien in the event of an award of back pay.\textsuperscript{146}

\textsuperscript{144} See note 115 supra.

\textsuperscript{145} See note 121 supra. This would be consistent with the practice in Great Britain where, pursuant to regulation, an employee is not entitled to unemployment benefits for periods covered by an award for loss of wages in an Industrial Tribunal award for unfair dismissal. Mesher, \textit{Unemployment Benefit and Severance Payments—II}, \textit{J. Soc. Welfare} L., 117, 120 (Mar. 1980).

\textsuperscript{146} This procedure has worked well in California with respect to the unemployment compensation payments providing the basis for a lien on subsequent worker's compensation payments. \textit{Cal. Lab. Code} § 4903(f) (West 1971). In the present context a consensual lien of the employee would better fit the framework of the problem due to the jurisdictional differences of the subsequent adjudicatory bodies. The Social
The problems which face labor practitioners and scholars with respect to the interrelationship of unemployment compensation proceedings, National Labor Relations Board hearings, equal employment adjudication and arbitration resolution is symptomatic of the larger frustration of labor litigation in general. A need for consistent, efficient and rapid adjustment of employment claims is apparent. While partial proposals have been suggested, further discussions and ideas are needed. To borrow a phrase from another profession, a holistic approach to labor relation adjudication is needed. This approach, at the least, would resolve all factual disputes regarding employment in one proceeding; at the most, it would serve to adjudicate all claims whether workers' compensation or unemployment compensation, equal employment or occupational health and safety, wage claims or unfair labor practices. Only by such a proceeding may the repetitious, wasteful and inconsistent present system be eliminated.

Security Act's disability insurance benefit payments provide for an analogous reduction in the event of receipt of payments from the workers compensation program. 42 U.S.C. § 424a (1976).


148. The present system not only leads to inconsistent, inefficient and delayed adjustment of employee claims, it may encourage additional litigation. In Boudreaux v. Vulcan Materials Co., 485 F. Supp. 347 (E.D. Wis. 1980) the discharged employee attempted to have his January 5, 1977 termination arbitrated. After investigation by the union, the union withdrew the grievance on January 10, 1977 and refused to take the matter to arbitration. On January 12, 1977 the employee filed a charge with the National Labor Relations Board against the union. After the investigation the employee, faced with a dismissal of the charge, withdrew it. In November of 1977 the employee prevailed in the unemployment compensation hearing. When the union refused to reopen the matter the employee filed a federal action against the employer and union, respectively, for breach of contract and breach of duty of fair representation pursuant to section 301 of the NLRA, 29 U.S.C. § 185 (1976). This occurred in June of 1978. In February of 1980, over three years after the discharge, the federal district court granted the union's and employer's motions for summary judgment. The employee had spent three years attempting four different forums concerning the question of his discharge. The success of the employee before the unemployment compensation agency had erroneously led the employee to believe that the union had not properly represented him. This led to additional needless litigation. See also Bavin v. Peoples Natural Gas Co., 464 F. Supp. 622, 624 n.1 (W.D. Pa. 1979) (employee processed claim through grievance, NLRB, unemployment, state and federal equal employment proceedings). A single adjudicatory labor forum would avoid such repetitious litigation.