

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4973-17

CLARENCE HALEY,

Appellant,

v.

BOARD OF REVIEW, NEW JERSEY
DEPARTMENT OF LABOR AND GARDEN
STATE LABORATORIES, INC.,

Respondents.

CIVIL ACTION

ON APPEAL FROM A FINAL DECISION
OF THE BOARD OF REVIEW,
DEPARTMENT OF LABOR

BRIEF OF *AMICUS CURIAE*
THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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PRELIMINARY STATEMENT

New Jersey's Unemployment Compensation Law protects people who find themselves unemployed through no fault of their own and helps New Jerseyans get back on their feet after destabilizing, involuntary job loss. Clarence Haley was exactly the person the statute's remedial purpose is designed to serve.

Haley was arrested and spent 55 days in jail before the grand jury refused to indict him. Although he was released free of all charges, he had lost his job and his apartment during his incarceration, so he filed for unemployment benefits to regain some semblance of financial stability. The Department of Labor denied his claim, reasoning that he left work voluntarily because his pretrial incarceration was not work-related, and therefore that he was disqualified from benefits under the statute and Department's regulations.

The Department's conclusion that pretrial incarceration is "voluntary" because it is not work-related - in this case or, indeed, ever - is wrong as to the law and misguided as to public policy. Under the Unemployment Compensation Law, the threshold question for disqualification is whether the departure from work was voluntary. Only in voluntary departure cases is the question of work-relatedness relevant. By answering the second question first, the Department erroneously flipped the critical order of inquiries under the statutory scheme. By further assuming that all

causes of unemployment must either be the fault of the employee or employer, the Department ignored the statutory language and case law that recognize that departures from work can be attributable to third-party causes beyond the employee or employer's control. Pretrial incarceration is clearly such a cause. (Point I, A).

The Department also erred in mechanically applying the regulations at *N.J.A.C.* 12:17-9.1(e)(10). That section provides that certain enumerated reasons for leaving work, including incarceration, shall be treated as voluntary departures, subject to fact-finding related to work attribution. The Department's blind reliance on the regulations to conclude that Haley's pretrial incarceration was *per se* disqualifying was unreasonable. Moreover, because section 9.1(e) fails to distinguish between voluntary and involuntary departures in cases of pretrial incarceration, the regulations necessarily invite determinations that violate the statutory text and purpose. (Point I, B).

Casting the jailing of an innocent man as his voluntary decision not only contorts the law, it also undermines the remedial purpose of the Unemployment Compensation Law. To the extent the Legislature considered voluntariness a proxy for fault or culpability, pretrial incarceration is clearly none of these things. As the data and this case demonstrate, people can be arrested, prosecuted and incarcerated pretrial through no fault of their own. Indeed, the data shows that people are often arrested

on less than probable cause and that a significant percentage of those prosecuted and incarcerated pretrial are ultimately cleared of charges, either through dismissal like Haley or eventual acquittal. Put simply, the data belies the equivalency between pretrial incarceration and fault or culpability. To hold otherwise would be to eviscerate the presumption of innocence that is the bedrock of our criminal justice system. (Point II, A).

Denying unemployment benefits to people who are incarcerated pretrial increases the barriers to reentry they face upon release, which disproportionately impact people of color. Research demonstrates how the experience of incarceration leads to decreased employment opportunities and economic instability, which harms not only individuals but also communities and the state and national workforce and GDP. Against the backdrop of a shameful racially disparate wealth gap between Black and white New Jersey families, the decision to deny unemployment benefits to people released from pretrial detention further entrenches the issues of incarceration and reentry in New Jersey and disserves the remedial purpose of the Unemployment Compensation Law. (Point II, B). For all these reasons, this Court should reverse the decision of the Board of Review denying Haley unemployment benefits and ensure he is not further punished for a crime he did not commit.

STATEMENT OF FACTS AND PROCEDURAL HISTORY¹

Amicus adopts the facts and procedural history laid out in Appellant's Brief and Appendix to this Court,² and recounts the following facts for clarity:

On December 14, 2017, officers from the Newark Police Department arrested Clarence Haley while he was preparing to leave home for his job. Haley appeared in court on December 20 and was denied pretrial release. Ab3.

Through his mother, Haley notified his employer of his arrest and pretrial incarceration, his confidence in beating the charges against him, and his desire to return to his job as soon as possible. On his behalf, his mother contacted his employer each day from December 14 to December 21. On December 22, the employer informed her that Haley had been terminated and they had hired someone else. Pa19; Ab4.

Six weeks later, the Essex County grand jury returned a no-bill, finding the prosecutor had insufficient evidence against Haley and therefore refusing to indict. The prosecutor dropped all

¹ The statement of facts and procedural history have been combined for the convenience of the Court.

² The following abbreviations are used in this brief:

"Ab" refers to the corrected version of Appellant's Brief filed on December 5, 2018.

"Pa" refers to Appellant's Appendix; *amicus* uses the Bates stamped references contained therein.

"Rb" refers to the brief of Respondent Board of Review, New Jersey Department of Labor.

charges against him. Ab4. On February 7, 2018, Haley was released from his pretrial incarceration. He was free of all charges, but he had spent 55 days in jail. He had lost his job, his apartment, and the stability attached to both. Ab4; Ab15.

A week later, Haley filed for unemployment benefits. Ab4. The Director of Unemployment Insurance, Department of Labor ("Department" or "Agency") denied him summarily, noting, "You state you were terminated. . . . However, evidence indicates you left your job voluntarily on 12/14/17 when you were incarcerated." Pa11. The Appeal Tribunal affirmed for the same reasons, invoking *N.J.A.C. 12:17-9.1*. Pa07. The Board of Review affirmed. Pa02.

Haley appealed the Board's decision. The ACLU-NJ filed a Motion for Leave to Appear as *Amicus Curiae* simultaneously with this brief. *R. 1:13-9*.

ARGUMENT

I. Under the Unemployment Compensation Law, When an Employer Terminates an Employee Because He Is Incarcerated Pretrial, the Employee Cannot Be Said to Have Voluntarily Quit.

The Appeal Tribunal affirmed the denial of Haley's claim with a rote adherence to the Department's regulations, finding "[a]lthough the claimant contended he was discharged, the separation was due to his incarceration, and therefore, he is considered to have left the job voluntarily in accordance with *N.J.A.C. 12:17-9.1*." Pa07. Although it recognized Haley had "a

compelling reason for leaving work," the Tribunal erroneously concluded that his departure was voluntary because it was not work-related. *Id.* That conclusion misunderstands the framework of the Unemployment Compensation Law, undermines its remedial purpose, and reveals a flaw within the regulations, or at the very least with the Agency's interpretation of them in this case.

A. Under the Statutory Scheme, the Threshold Question Is Whether Departure from Work Was Voluntary, Not Whether It Was Work-Related.

i. The Statute's Order of Inquiries Is Critical.

Under the Unemployment Compensation Law, the threshold inquiry to determine if a person is eligible for benefits focuses on the reason the person becomes unemployed. The Law was designed to protect a person who is "out of work *through no fault or act of his own*," *Yardville Supply Co. v. Bd. of Review*, 114 N.J. 371, 375 (1989) (emphasis in *Yardville*) (quoting *Schock v. Bd. of Review*, 89 N.J. Super. 118, 125 (App. Div. 1965)). It therefore protects two broad categories of people: (1) those who involuntarily lose their jobs (for example because they were fired for reasons not related to misconduct, because of downsizing, or because at-will employment was otherwise terminated) and (2) those who voluntarily leave their jobs for a work-related reason that constitutes good cause. See *N.J.S.A. 43:21-5(a)* (making a person "disqualified for benefits" when the person "has left work voluntarily without good cause attributable to such work"); *Utley v. Bd. of Review, Dep't*

of Labor, 194 N.J. 534, 543-44 (2008) (explaining that the Law “protects not only workers who are involuntarily unemployed – those who are laid-off or terminated from their jobs by their employers – but also those who voluntarily quit their jobs for good cause attributable to their work.”). For the most part, the Law does not protect people who voluntarily leave their jobs because of other reasons not related to the work, even if those reasons are compelling.³ The statutory framework thus creates a decision tree to assess disqualification. The initial question asks whether the departure from work was voluntary. Only when that is answered in the affirmative does the secondary question become relevant, whether the “voluntary” departure was related to the work itself, rather than for a personal reason.

In Haley’s case, the Tribunal summarily discounted the fact that his employer had actually terminated him. He is thus among the most easily identifiable group the statute is meant to protect, “workers who are involuntarily unemployed – those who are laid-off or terminated from their jobs by their employers.” *Utley*, 194

³ Certain statutory exceptions apply, including if the person leaves work to accept other employment within seven days, which is the subject of companion cases argued before the Supreme Court on January 14, 2019, or if the person leaves to follow a spouse on active duty in the U.S. Armed Forces. *McClain v. Bd. of Review*, 232 N.J. 377 (2018) and *Blake v. Bd. of Review, Dep’t of Labor*, 233 N.J. 296 (2018) (granting certification); *N.J.S.A.* 43:21-5(k).

N.J. at 543-44.⁴ Instead, the Appeal Tribunal focused on the underlying reason Haley was terminated - his pretrial incarceration - and concluded that "said reason is personal and [he] is therefore, considered to have left voluntarily without good cause attributable to such work and is disqualified for benefits[.]" Pa07. This reasoning misconstrues the statutory framework: the Tribunal answered the second question (was the departure for a personal reason?) first and then allowed that answer to stand in for the threshold question (was the departure voluntary?).

The fact that a departure from work did not stem from work-related reasons does not, contrary to the Tribunal's conclusion, necessarily mean it was voluntary under the statutory scheme. Indeed, the regulations clarify that the Agency should consider whether the departure reason is work-related only in connection with the clause "good cause attributable to work." See *N.J.A.C.*

⁴ In *Utley*, the claimant had chosen to quit before being fired. In concluding he was still entitled to benefits, the Supreme Court noted that the case would be even clearer had he been fired instead: "There is little question that had *Utley* been *fired* because his new shift hours did not coincide with public transportation, thus requiring him to leave early, he would have been entitled to benefits under the Act." 194 N.J. at 543 (2008) (emphasis in original) (citing *N.J.S.A.* 43:21-4 and -5; *Sweeney v. Bd. of Review*, 43 N.J. 535, 539 (1965)). Although *Utley* involved a shift change instituted by the employer, the Court's clarification that a firing is a clearer case than an employee's decision to quit, even if the underlying reasons are the same, has bearing on the present case.

12:17-9.1(b) ("For the purpose of this subchapter, 'good cause attributable to such work' means a reason related directly to the individual's employment, which was so compelling as to give the individual no choice but to leave the employment."). The statute does not import a similar work-related definition into the assessment of voluntariness.

It is, of course, reasonable that the assessment of voluntariness should be independent of whether the departure is attributable to work. For example, an employee may have to leave work for a personal medical reason. Although that reason is not attributable to the work, it is well-established that such a departure is not voluntary under the Unemployment Compensation Law. The Supreme Court has explicitly recognized that "when an employee becomes ill and does those things reasonably calculated to protect the employment and, notwithstanding that she is not reinstated, there is no voluntary leaving of work." *DeLorenzo v. Bd. of Review, Div. of Emp't Sec.*, 54 N.J. 361, 364 (1969); see also *Garcia v. Bd. of Review*, 191 N.J. Super. 602, 606-07 (App. Div. 1983) (holding personal medical reason for departure does not necessarily constitute voluntary departure). Yet if the Agency in *DeLorenzo* had done what it did in Haley's case, asking first whether the reason for the departure was for a personal reason and not whether it was voluntary, it would have found DeLorenzo disqualified: DeLorenzo's illness there, like Haley's

incarceration here, was not attributable to the work. The threshold question is therefore the critical one in both cases: incarceration, like illness, is not - and never should be considered - voluntary.

ii. The Statute and Case Law Allow for Third-Party Causes of Unemployment Beyond the Control of the Employer or Employee.

In its brief, the Board suggests that the dispositive fact is that "Haley's employer had nothing to do with his incarceration" and that Haley is asking this Court to create an "additional exception[] to the rule." Rb7.⁵ Neither of these propositions hold. First, although most cases of unemployment will result either from the voluntary actions of the employer or the employee, that is not always the case as *DeLorenzo* exemplifies. And while some courts have described *DeLorenzo* as a judicially-created exception, *Fennell v. Bd. of Review*, 297 N.J. Super. 319, 324 (1997); *Self v. Bd. of Review*, 91 N.J. 453, 457 (1982), the decision is best understood merely as the proper interpretation of the statute in light of its text and remedial purpose. *DeLorenzo*, 54 N.J. at 364

⁵ The Board cites *Fennell*, 297 N.J. at 323, to claim the Supreme Court has held that the question of the voluntariness of the quit hinges on the actions of the employer. Rb6. But at the page cited, a panel of this Court merely summarized the individualized conclusion in *Self*, 91 N.J. at 457-58, in which the Supreme Court found the claimants disqualified due to their particular transportation problems. Neither *Fennell* nor *Self* makes such a broad claim that the voluntariness inquiry is limited to the employer's actions.

(confirming Board's conclusion is warranted because "this view of the statute is correct"). The Legislature has likewise recognized that unemployment may be involuntary when the employer had nothing to do with the reason for leaving, for example when the person is a victim of domestic violence. See *N.J.S.A.* 43:21-5(j).

Neither *DeLorenzo* nor section 5(j) is an *exception* to the statutory concept of voluntariness. Instead, in both cases the employee is properly recognized to have involuntarily left work - either because of illness or because of a domestic violence situation - even though that reason was not work-related. Both are explicit examples of how the statute's threshold voluntariness inquiry can account for third-party causes of unemployment, independent of the work-related inquiry that is triggered only in cases of voluntary departures.

In its brief, the Board relies extensively on *Fennell*, in which a panel of this Court found pretrial incarceration due to inability to post money bail constituted a voluntary departure not attributable to the work. *Amicus* submits that the statutory, regulatory, and policy contexts have so shifted since *Fennell* was decided that this Court should reach a different conclusion in Haley's case. *Fennell* predates the Department's regulations, the Supreme Court's holding in *Utley*, and the current understanding of the harms of pretrial incarceration and barriers to reentry in New Jersey and across the country (see Point II, B). It also predates

amendments to the statute: for example, the *Fennell* court noted that leaving work because of domestic violence would be disqualifying, *id.* at 321-22 (citing *Pagan v. Bd. of Review*, 296 N.J. Super. 539, 687 (App. Div. 1997), decided the month before); but the statute was subsequently revised to provide that such circumstances are not disqualifying, N.J.S.A. 43:21-5(j). In light of the developments over the past two decades, *amicus* suggests *Fennell* need not control this case. Indeed, it is time to revisit its holding.

Contrary to the Board's argument, the statute does not require - nor does reason allow - that anything beyond the employer's control is automatically attributable to the personal fault or volition of the employee. The statute must instead be squared with the reality of unemployment and employees' control thereof, including accounting for third-party causes of unemployment such as illness in *DeLorenzo*, the experience of domestic violence under N.J.S.A. 43:21-5(j), and an arrest and pretrial incarceration without probable cause in Haley's case. Reason, good conscience, and the statute's purpose should not be so contorted to require that jailing an innocent man for 55 days be cast as his voluntary decision.⁶

⁶Although the Tribunal found Haley's prosecution and incarceration, based on insufficient evidence, to be a voluntary departure, it suggested it might have reached an opposite conclusion in a case of false imprisonment or mistaken identity. See Pa07 (noting "there

B. The Regulations Should Be Set Aside Inasmuch As They Treat Pretrial Incarceration As a Per Se Voluntary Departure from Work.

The Tribunal's perfunctory application of *N.J.A.C. 12:17-9.1(e)* does not save its conclusion. Promulgated in 1998, the regulations do not change the statutory analysis required. Instead, they suggest that the first question under the statute - whether the departure was voluntary - may be answered in the affirmative in ten enumerated scenarios. A fact-specific analysis is then required to answer the second question, whether the reason was attributable to the work. See 30 N.J.R. 2027(a) (June 1, 1998) (codified at *N.J.A.C. 12:17*). The last of the ten scenarios is "incarceration." *N.J.A.C. 12:17-9.1(e)(10)*.

The regulatory history and case law confirm that the regulations should not be applied mechanically: simply identifying the reason for the departure from work pursuant to *N.J.A.C. 12:17-9.1(e)* does not dispose of the case. In promulgating the regulations, the Department was explicit that the analysis remains case-specific and fact-intensive. Indeed, the initial language

was no evidence that the claimant was falsely imprisoned nor was he involved in a case of mistaken identity. As such. . . [he is] considered to have left voluntarily without good cause attributable to such work"). To *amicus'* knowledge, this carve-out is wholly unsupported by the case law or statutory and regulatory histories. It is arbitrary and capricious to suggest that pretrial incarceration on charges based on mistaken identity would result in an involuntary departure from work, and thus entitlement to benefits, but that pretrial incarceration on charges based on otherwise insufficient evidence does not.

proposed by the Department required that any of the ten reasons would be automatically disqualifying, reading "(e) An individual shall be deemed to have left work voluntarily without good cause attributable to the work for the following reasons. . ." 28 N.J.R. 4759(a) (Nov. 4, 1996). During the notice and comment period, the Department clarified that it "did not intend that this rule automatically result in a finding of voluntarily leaving work without good cause attributable to the work when the leaving was due to the reasons listed. As any of these reasons are subject to fact-finding, the Department has modified the rule. . . ." 29 N.J.R. 5158(a) (Dec. 15, 1997). Accordingly, the final language instructs that separation from employment for any of the enumerated reasons "shall be reviewed as a voluntarily leaving work issue." *N.J.A.C.* 12:17-9.1(e).

The Supreme Court has confirmed that the terms in *N.J.A.C.* 12:17-9.1(e) are "not talismanic [and do] not dispel the need to assess whether the employee left for work-related reasons." *Utley*, 194 N.J. at 548. Because the statute requires the Agency to engage in "a fact-sensitive analysis, not [a] mechanical approach," *Utley* holds that the regulations cannot be applied to *per se* disqualify people from benefits. *Id.* at 550.

Yet by limiting fact-finding to the question of *attribution* to work, the regulations take for granted that a departure from work is necessarily voluntary whenever it is for one of the

enumerated reasons. See *N.J.A.C.* 12:17-9.1(e) (stating that the list of reasons in (e)(1) through (10) "shall be reviewed as a voluntarily leaving work issue") (emphasis added); *Utley*, 194 N.J. at 548 (confirming the "fact-finding" referenced in 29 N.J.R. 5158(a) is meant "to determine whether the employee left for good cause attributable to the work.").⁷ Because incarceration will almost never be attributable to work, the Agency's failure to distinguish between voluntary and involuntary departures in cases of pretrial incarceration imposes a *per se* disqualification that violates the statutory text and purpose. At least as to (e)(10), the regulations must therefore be set aside. See, e.g., *Saint Peter's Univ. Hosp. v. Lacy*, 185 N.J. 1, 14 (2005); *Guaman v. Velez*, 421 N.J. Super. 239, 256 (App. Div. 2011) (explaining that

⁷ In response to another comment during the rulemaking process, the Agency wrote, "The rule states that the individual's separation may be 'reviewed' as a voluntarily leaving work issue." 30 N.J.R. 2027(a) (rule adoption). The use of the discretionary term "may" contrasts with the mandatory term "shall" that appears in the regulations as adopted. Additionally, the same comment addresses incarceration with some degree of confusion, instructing simultaneously that (1) the voluntariness of incarceration must be considered, (2) the statute uses the term "voluntarily" synonymously with "good cause attributable to such work," (3) "blameless" or "involuntary" separations outside the person's control but not attributable to the work are still disqualifying, and (4) incarceration for two days would likely not be considered voluntarily leaving work. Because these propositions are so internally inconsistent as well as inconsistent with the statutory framework, *amicus* does not address them here. *Amicus* merely notes this comment in the spirit of candor to the Court and to suggest that the Agency's interpretation of *N.J.A.C.* 12:17-9.1(e)(10) continues to be illogical, unreasonable, and arbitrary.

regulation will be set aside if inconsistent with the statute); see also *A.Z. ex rel. B.Z. v. Higher Educ. Student Assistance Auth.*, 427 N.J. Super. 389 (App. Div. 2012) (holding regulations cannot alter statutory terms or frustrate legislative policy). At the very least, the Agency's interpretation of the regulations to disqualify Haley was arbitrary and capricious and must be reversed.

The list contained in *N.J.A.C. 12:17-9.1(e)* has not been modified since 1998, except to add "a civil union partner" to (e)(7) in 2015. See R.2009 d.21 (effective January 5, 2009); 46 *N.J.R.* 1796(a); 47 *N.J.R.* 1009(a). Although the issue is not before this Court, *amicus* suggests that the time has come to amend the regulations to remove (e)(10). To the extent the Legislature and Agency use the concept of voluntariness to stand in for circumstances involving fault, culpability, or affirmative choice, see for example *Yardville*, 114 N.J. at 375 ("no fault or act of his own"),⁸ (e)(10) should be interpreted to apply only to post-conviction incarceration. As examined in Point II, pretrial incarceration is not fault-based.

⁸*Amicus* submits that in light of the harms caused by incarceration and the limits of reentry services in the landscape of mass incarceration, the Department of Labor's decision-making should evaluate factors beyond "voluntariness" and "fault" and look more to the purpose of the Unemployment Compensation Law.

II. The Remedial Purpose of the Unemployment Compensation Law Is Disserved By Disqualifying People From Benefits on the Basis of Pretrial Incarceration.

Haley was arrested without probable cause and jailed for 55 days. Although he was released "a free man," he faced a bleak reality: he had lost his apartment and his job and, though he had done no wrong, now had to rebuild his life without a home or a source of income. Although New Jersey allows for compensation of the wrongfully convicted and imprisoned, *N.J.S.A. 52:4C-1 et seq.*, there is no such mechanism for people released from pretrial incarceration without charge. The very purpose of the Unemployment Compensation Law is to help people like Haley, who find themselves unemployed through no fault of their own, rebuild their economic lives.

The Supreme Court recognized that the "Legislature enacted the Unemployment Compensation Law to further an important public policy: alleviating the burden of involuntary unemployment[.]" *Ardan v. Bd. of Review*, 231 N.J. 589, 601 (2018). The language of the statute's Declaration section is resounding:

economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern. . . . The achievement of social security requires protection against this greatest hazard of our economic life.

[*N.J.S.A. 43:21-2.*]

Accordingly, "to further [the Act's] remedial and beneficial purposes . . . the [Act] is to be construed liberally in favor of allowance of benefits." *Lourdes Med. Ctr. of Burlington Cty. v. Bd. of Review*, 197 N.J. 339, 364 (2009) (alteration in *Lourdes*) (quoting *Utley*, 194 N.J. at 543). Construing the statute to deny Haley unemployment benefits because his incarceration without probable cause was "voluntary" therefore not only contradicts the purpose of the statute and causes significant harm to Haley, it also undermines the presumption of innocence and makes barriers to reentry, which disproportionately impact people of color, even more difficult to overcome.

A. Pretrial Incarceration Is Wholly Unrelated to Fault.

i. People Can Be Arrested and Prosecuted Through No Fault of Their Own.

The Unemployment Compensation Law looks to whether unemployment was without "fault" of the employee. *Yardville*, 114 N.J. at 375. It is unreasonable and contrary to law - and police practice - to equate pretrial incarceration with fault, because people can be, and in fact are, arrested, prosecuted and incarcerated through no fault of their own.⁹

⁹ New Jersey has a legacy of incarcerating people for minor reasons, sometimes unrelated to criminal charges, such as failure to pay a traffic ticket or failure to appear in municipal court. Administrative Office of the Courts, *Report of the Supreme Court Committee on Municipal Court Operations, Fines, and Fees* 36 (2018). The sheer volume of people who experience incarceration for such

As an initial matter, police sometimes lack sufficient legal authority for the stops and arrests that they effectuate, and unlawful police practices often impact people of color in particular. Indeed, a U.S. Department of Justice ("DOJ") investigation into the Newark Police Department (the law enforcement agency that arrested Haley) revealed a history of stops and arrests made on less than reasonable suspicion or probable cause, respectively. U.S. Dep't of Justice, Civil Rights Division & U.S. Att'y's Office, Dist. of N.J., *Investigation of the Newark Police Department* 8-11, 12-15 (2014). The DOJ also found that arrests were disproportionately of Black Newarkers. Over a three and a half year period, more than 79 percent of arrests were of Black people and less than 7 percent were of white people, while Black residents accounted for less than 54 percent of Newark's population and white residents accounted for close to 12 percent. This means that Black people were 2.6 times more likely to be arrested than white people. The DOJ found this racial disparity to be consistent across all Newark Police Department precincts and sectors and throughout most categories of arrests.¹⁰ *Id.* at 20-21.

minor reasons is worth noting, to the extent the statute or regulations have been interpreted to make a value judgment about why people are incarcerated and lose their jobs. Separately, *amicus* submits that such a value judgment is not appropriate.

¹⁰ Racial disparities in arrests are not unique to Newark. Although Black people make up only 15 percent of the New Jersey population, in 2015 New Jersey State Police reported that nearly 39 percent of

As a result of these findings, the Newark Police Department is currently subject to a DOJ consent decree - and was in December 2017 when its officers arrested Haley. Consent Decree (docket no. 5), *United States v. City of Newark*, 2:16-cv-01731-MCA-MAH (D.N.J. May 5, 2016).

Further, it is without dispute that a significant number of people who are arrested and prosecuted are ultimately cleared of charges, either through dismissal like Haley or eventual acquittal. According to the U.S. Bureau of Justice Statistics, nationwide 22 percent of detained defendants eventually had their case dismissed or were acquitted. For those released pretrial, that number went up to 40 percent, demonstrating that pretrial incarceration negatively impacts the ability to fight one's case. Thomas H. Cohen & Brian A. Reaves, U.S. Dep't of Justice, Bureau of Justice Statistics, *Pretrial Release of Felony Defendants in State Courts* 7 (2007).

The data thus shows that Haley's case is not unique: People are often arrested, prosecuted, incarcerated pretrial when there is no or insufficient evidence that they have committed a crime. Put simply, the data belies the equivalency between arrest and fault or culpability.

state-level arrests were of Black people. N.J. State Police, *Uniform Crime Report, State of New Jersey 2015* 43, 50 (2015).

ii. Pretrial Incarceration Does Not Disqualify Someone from the Presumption of Innocence.

People lose a lot when they are incarcerated pretrial. They lose their liberty; they lose their connection to family; they lose income and perhaps their jobs and homes. But they are not supposed to lose their presumption of innocence. The presumption of innocence exists independently of whether the criminal justice system ultimately finds the person guilty of the crime: the system rests on this fundamental principle that a person remains innocent in the eyes of the law until the State proves guilt beyond a reasonable doubt. Haley - and everyone else incarcerated pretrial - did not lose his presumption of innocence during the 55 days he spent in jail. Of course, the criminal process ultimately vindicated Haley's innocence. But pretrial incarceration, whether or not it is accompanied by a grand jury refusal to indict, should never be associated with fault.

For this reason, it is not only factually inaccurate to equate pretrial incarceration with fault or voluntariness, since the data reveals people are arrested and prosecuted without sufficient evidence. It is also wrong to equate them as a matter of legal principle. For this reason, as Haley's brief examines, the majority of states take the opposite position in interpreting their unemployment compensation laws and distinguish between pretrial

incarceration and incarceration following an assignment of criminal responsibility. See Ab23-25.

B. Denying Benefits to Formerly Incarcerated People Increases the Barriers to Reentry, Which Disproportionately Impact People of Color.

Nationally, some three quarters of million people leave prison each year. Unemployment is among the most significant barriers they face to reentry. Nat'l Res. Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 195 (Jeremy Travis et al. eds., 2014). People released from pretrial incarceration confront many of the same barriers, including lost jobs and other sources of income. Ram Subramanian et al., Vera Institute of Justice, *Incarceration's Front Door: The Misuse of Jails in America* 17 (July 2015). Saddled with the stigma of an arrest record, they often struggle to secure and maintain new employment. See for example Geffen, Benjamin D., *The Collateral Consequences of Acquittal: Employment Discrimination on the Basis of Arrests without Convictions*, 20 U. Pa. J. L. & Soc. Change 81, 84 (2017). Indeed, the New Jersey Supreme Court Committee on Municipal Court Operations, Fines, and Fees has recognized, in the context of incarceration for non-payment, that "the detrimental effects [of pre-disposition incarceration] cannot be overstated. Even a brief period of incarceration may cause a person to lose his or her job and their dependents, their home, and may ultimately be more costly to taxpayers than the total fines

due." Administrative Office of the Courts, *Report of the Supreme Court Committee on Municipal Court Operations, Fines, and Fees* 21 (2018); see also *id.* at 45-46 (discussing how New Jersey has historically undervalued "the true cost of incarceration" to "both defendants and the State of New Jersey").

The data also bears this out. A 2010 study by Pew Charitable Trusts found that "past incarceration reduced subsequent wages by 11 percent, cut annual employment by nine weeks and reduced yearly earnings by 40 percent." The Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility* 11 (2010). The Center for Economic Policy Research estimates that in 2014, barriers to employment faced by people formerly incarcerated and people with felony convictions resulted in a loss of 1.7 to 1.9 million workers across the United States and a loss of between \$78 and \$87 billion in GDP. Center for Economic and Policy Research, *The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies* 3 (2016). By contrast, studies clearly show that employment opportunities for people upon reentry contribute to decreases in recidivism and promote public safety. Marina Duane et al., Urban Institute, *Criminal Background Checks: Impact on Employment and Recidivism* 12 (2017).

Because New Jersey has appalling racial disparities in incarceration and wealth, barriers to reentry and to economic

opportunity disproportionately impact people of color, especially Black New Jerseyans. New Jersey leads the country in its Black-white racial disparity in jails and prisons, incarcerating Black New Jerseyans at a rate 12.2 times higher than white New Jerseyans, more than twice the national average. Sentencing Project, *Detailed State Data: New Jersey*, <https://www.sentencingproject.org/the-facts/#detail?state1Option=U.S.%20Total&state2Option=New%20Jersey> (last visited Feb. 25, 2019). Our state also has a shameful, racially disparate wealth gap. The median net worth of white families in New Jersey is the highest in the country, at \$271,402. By contrast, the median net worth for Latino and Black families is \$7,020 and \$5,900, respectively, together totaling less than 5 percent of the net worth of white families. Elizabeth Weill-Greenberg, *64 years after Brown v. Board of Education New Jersey civil rights leaders file historic lawsuit to integrate New Jersey schools*, N.J. Inst. for Soc. Just. (May 17, 2018), https://www.njisj.org/64_years_after_brown_v_board_of_education_new_jersey_civil_rights_leaders_file_historic_lawsuit_to_integrate_new_jersey_schools; see also *Full Text of Phil Murphy's 2019 State of the State Address*, N. Jersey Rec., (Jan. 15, 2019), <https://www.northjersey.com/story/news/new-jersey/governor/2019/01/15/state-state-nj-full-text-phil-murphys-speech/2570134002/> (stating New Jersey's "wealth gap shows how far we have to go").

In enacting historic bail reform, New Jersey recognized that

pretrial incarceration disrupts people's lives, results in job loss and financial instability for entire families, and disproportionately impacts communities of color. Report of the Joint Committee on Criminal Justice 1, 28-29, 51, 69 (Mar. 10, 2014), <https://www.njcourts.gov/courts/assets/criminal/finalreport3202014.pdf>. Although bail reform has drastically reduced New Jersey's jail population, some people, like Haley, are still incarcerated pretrial and will face these disruptions and losses upon their release. Denying them unemployment benefits makes their barriers to reentry even more difficult to overcome and risks furthering the racially disparate wealth gap in our state.

CONCLUSION

By equating pretrial incarceration with notions of fault or culpability, the Board's decision undermined the remedial purpose of the Unemployment Compensation Law and the presumption of innocence that is the bedrock of our criminal justice system. Because being fired for pretrial incarceration is not a voluntary departure from work, this Court should reverse the Board's decision denying Haley unemployment benefits.

Respectfully submitted,



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