No. 21-155

In the Supreme Court of the United States

John M. Custin,
Petitioner
v.
Harold J. Wirths, NJ Commissioner of Labor,
Hilda S. Solis, Secretary of Labor,
Jane Oates, USDOL ETA Secretary,
Seth Harris, Acting Secretary of Labor,
Joseph. Sieber, NJDOL Board of Review,
Gerald Yarbrough, NJDOL Board of Review,
Jerald L. Maddow, NJDOL Board of Review,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Petition For A Writ of Certiorari

John M. Custin
Pro Se, Petitioner
P.O. Box 5631
Christiansted, VI 00823
(340)201-3318
jocust100@yahoo.com

QUESTIONS PRESENTED FOR REVIEW

As was the situation for Josef K in Kafka's *The Trial* NJDOL's Appeals Tribunal proceedings are Inquisitorial - typical of the type of proceedings employed by autocratic governments. Actions against claimants are commenced by an accusation – the identity of the entity originating the accusation, its pleadings, and its secret documents faxed to the Tribunal are customarily withheld from a claimant's discovery.

Petitioner received a Notice in the mail from NJDOL shortly after filing his claim for UI benefits on April 26th 2010 accusing him of "misconduct connected to the work" without specifying the entity leveling it. Just as was the situation with Josef K Petitioner learned that the charge of "misconduct connected to the work" of unknown origin has unconstitutional "stickiness" attached to it: it survives initial claims hearings even when the charge is dismissed and often follows a claimant around for years and requires a Tribunal agent to physically remove it from your case file. The penalty imposed has a Draconian effect and the initial "refund" can cause a loss of the ability to pay the premiums on COBRA health insurances and disqualifies you from future UI claims such as EB and training programs (ABT). Just as was the case with the character Josef K in Kafka's "The Trial" Petitioner was forbidden from learning the identity of the unknown accuser. When Petitioner tried to discover the source of the accusation [Interrogatories 1 – 6 App. *infra* 126a- 127a]. Admissions Requests #20 - #22 App. *infra* 148a] he was told by the Respondents that they had "already produced" that information to him - when indeed they had not. When Petitioner appealed to the Magistrate Judge that the Respondents' attorney had not produced the requested information as to what

entity or person originated the accusation against him Petitioner was told by the Magistrate that his request is "moot" because the Respondents' attorney "is an officer of the court" - and of course - officers of the court do not lie. An initial hearing was held on the charge of unknown origin and was dismissed because the employer "had no answer to our detailed questions" about the misconduct charge and benefits granted – but this information was withheld from Petitioner. Relieved and believing it all must have been a mistake - Petitioner - just like "K" - soon learned his acquittal was only an "ostensible acquittal" and several weeks weeks later Petitioner received another Notice in the mail notifying him that not only was Petitioner fired for misconduct -but that Petitioner also quit voluntarily having "abandoned his job". Unbeknownst to Petitioner his employer had sent a protest letter to the Tribunal requesting an appeal because Petitioner was the moving party in the separation having "abandoned his job" not showing up for work some 21 days after the employer had told Petitioner not to report for work anymore. Another hearing was held and secret documents including the employer's attendance record for Petitioner were sent to the Tribunal without Petitioner's knowledge. At the Tribunal hearing Petitioner's employer testified from the secret documents and a secret "call-out sheet" that the employer "just printed out" in the middle of the telephone proceedings. The Inquisitor then proceeded to drill Petitioner to get him to attest to the information the employer had just testified to based on the secret documents. A guilty decision that Petitioner had been fired for misconduct was rendered based on the information in the secret call-out sheet and secret attendance record that Petitioner was fired for misconduct. Just as was the case with Josef K Petitioner was not

made aware of his accuser's pleadings until after a conviction has been reached by the Tribunal:

> "The employer contends that the claimant voluntarily left the job without good cause attributable to the work. ***There were no other issues disputed by the appellant employer"*** [App. *infra* 102a]

If there were "no other issues disputed by the Appellant employer" Wal-Mart other than "voluntary leaving" then that should have been the only issue that printed on the 6/17/2010 "Notice of A Telephone Hearing" and that should have been the only issue before the Tribunal.

In regard to Petitioner's First UI claim then the questions presented are:

1. Does it violate constitutional due process when a worker is dispossessed by the state of a property right to unemployment benefits on a charge of "misconduct connected to the work" when the only issue the employer contended was "voluntary leaving" and "there were no other issues disputed by the Appellant employer?

2) Is a "stacked" "Notice of Appeal of a Telephone Hearing" [which sets the issues to be raised for the employer's appeal hearing] that lists all the possible reasons for separation from the employer – i.e.- that the claimant both voluntarily quit and was fired for misconduct - in substance the same as the generic notice provided to Plaintiff Shaw ("all relevant issues shall be considered and passed upon") – and therefore the Notice Petitioner received from NJDOL state actors was also in substance "no notice at all" [as per the holding of the Tenth Circuit court in *Shaw v Valdez:* "Clearly, the generic notice provided Shaw was, in substance, no notice at all" [quoting *Adams v. Harris*, 643 F.2d 995, 1000 (4th Cir.1981) (Winter, J., dissenting).

"[C]onstitutional due process requires notice that gives the [IDES's] reasons for its action in enough detail that a recipient can prepare a Responsive defense."[*Tripp v. Coler*, 640 F. Supp. 848, 857 (N.D.Ill. 1986) (citing *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 1020-21, 25 L.Ed.2d 287 (1970); *Vargas v. Trainor*, 508 F.2d 485, 489 (7th Cir. 1974), cert. denied, 420 U.S. 1008, 95 S.Ct. 1454, 43 L.Ed.2d 767 (1975)).]

This court has held:

"the notice must be both timely and adequate, given within a reasonable time prior to the taking of any action, and specifying the proposed action and the grounds therefore, indicating the information needed to determine eligibility, and advising the recipient of the right to be heard and to be represented by counsel. Moreover, ***there must be full and complete disclosure of the information upon which the proposed action is based***." at page 856. [Emphasis added.] [*Pregent v. New Hampshire Dept. of Employment Security*, 361 F. Supp.782 (1973), vacated 417 U.S. 903, 94 S.Ct. 2595, 41 L.Ed.2d 207 (1974) quoting *Caldwell v. Laupheimer*, 311 F. Supp. 853 (E.D.Pa. 1969)]

2) Is preparation of a responsive defense compromised in cases where the state employment agency engages in an unconstitutional practice of withholding the employer's protest letter from the discovery of the claimant so that the claimant is left completely unaware at the appeal hearing as to what purported facts in regard to the reason for the claimant's separation have already been pleaded by the employer so that the claimant will not be able to detect that state employment agency has "stacked" the Notice against him with issues that are not the employer's "appealed issue" [as defined in *Shaw*] and/or the employer testifies to new non-pleaded facts at the appeal hearing from a secret documents not properly introduced that are contrary to those made in the protest letter and the claimant is then drilled by the Examiner as to those newly pleaded facts by the Examiner not knowing that he is being secretly set up to admit to new facts contrary to what has already pleaded by the employer and helping the opposing party re-plead its case in the middle of the appeal hearing?

In regard to Petitioner's Second, Third and Fourth UI claims the Question Presented Is:

3. Does it violate the due process provision of the Fourteenth Amendment and is an immediate federal question raised when state actors in three separate instances [constituting an unconstitutional practice] fail to reference any state law that says remuneration received as a result of a Lawsuit Against Discrimination cannot be used to establish a monetary UI entitlement because those settlement funds "does not constitute wages" and therefore Petitioner did not need to seek a state remedy before seeking a federal remedy under 42 U.S.C. 1983, since these remedies are supplemental and therefore the Opinions below erred in holding that Petitioner did not first exhaust all state remedies before seeking relief in the New Jersey District Court?

In regard to the requested review on appeal of Petitioner's Rule 52 Objection To Magistrate:

4. Does a Magistrate Judge abuse his discretion when he issues a clearly erroneous order that a Plaintiff's entire set of party discovery [Interrogatories, Admission Requests, Production Requests) under FRCP can be "mooted" upon the utterly nonsensical certification of opposing counsel that Respondents "already produced" the answers to the Interrogatories and Admissions Requests (which are not document requests) in response to a Rule 45 document subpoena and six months earlier?

List of Parties To The Proceeding

Petitioner John M. Custin was the Plaintiff in the District Court of New Jersey and the Appellant in the appeal to the Third Circuit Court of Appeals. Respondents Harold J. Wirths, Joseph Sieber, Gerald Yarbrough, Jerald Maddow, were the state Defendants in the District Court of New Jersey and the state Appellees in the Third Circuit Court of Appeals. Hilda Solis,Jane Oates, Seth D. Harris were the federal Defendants in the District Court of New Jersey and the federal Appellees in the the Third Circuit Court of Appeals.

Corporate Disclosure Statement

There are no parent corporations or publicly held companies in this case. Petitioner was a claimant for UI benefits with the New Jersey Department of Labor. That state agency's Appeals Tribunals and Board of Review heard his appeals. Respondents/Appellees are state actors acting in their official capacity as employees of the New Jersey Department of Labor. The Federal Respondents/Appellees are federal officials responsible for overseeing state conformity with the fair hearing requirement of the Social Security Act.

Table of Contents

APPENDICES

Table of Authorities

Cases

Table of Authorities

Cases

Table of Authorities (Continued)

Cases

Table of Authorities (continued)

Constitutional Provisions

Federal Statutes

Federal Administrative Law

Citations of Opinions

1. District Court of NJ; Case #12cv910 Rule 52 Objection [unpublished] App. *infra* 73a-76a
2. District Court of NJ; Case #12cv910 Summary Judgment [unpublished] App. *infra* 14a-34a
3. Third Circuit Court of Appeals; Case #20-1837 Opinion [unpublished] App. *infra* 3a-13a

Statement of the Basis for the Jurisdiction

The Judgment of the Court of Appeals for the Third Circuit was entered on March 4, 2021.

This Court's jurisdiction rests on 28 U.S.C. § 1254(1)

Constitutional Provisions and Statutes

Constitutional Provisions

US Constitution, 14th Amendment

Federal Statutes:

Section 42 of the United States Code Sec. 503(a)(3) provides:

> "The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act [26 U.S.C. 3301 et seq.], includes provision for—
>
> (3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied"

State statutes:

N.J.A.C. 1:12-14.6(d) provides:

> "(d) any party that intends to offer documentary or physical evidence at the telephone hearing shall submit a copy of that evidence to the Board of Review or appeal tribunal and all other interested parties immediately upon receipt of notice of the scheduled telephone hearing. Also, the requesting party shall provide timely notice of this request to offer evidence to all other interested parties.

1. Any evidence not submitted as required in this subsection may be admitted at the discretion of the Board of Review or the appeal tribunal provided that such evidence is submitted to the Board of Review or appeal tribunal and all other parties within 24 hours of the telephone hearing."

2. The other parties shall have 24 hours from the time of receipt of the evidence to properly respond to its admission and use."

Federal Administative Law:

USDOL ETA UIPL 10-96 "ET Handbook 382, Second Edition,

"Handbook For Measuring Unemployment Insurance Lower Authority

Appeals Quality", page 13 provides:

"Telephone exhibits will be sent to each of the parties prior to the hearing and, if a party not have all the documents does marked as exhibits, the matter may be continued to allow the opportunity to review and object."

"The record should reflect that the parties had an opportunity to review the exhibits prior to their being received into evidence. The hearing officer may state 'I have allowed the parties to read and review the documents that I have marked for exhibits' or ask the question of the parties, 'Mr. Claimant, have you had the opportunity to read the letter I marked as Exhibit 1?' The record must affirmatively show the parties were given the opportunity to examine the document. The exhibit should be clearly marked with the exhibit number or identification. It should be received if competent and relevant if there are no objections, or after the objections have been ruled on."

"it is important to realize that the hearing officer cannot consider in his/her decision making process any document that was not properly entered"

page 42 provides:

"only evidence that is properly entered into the record and that which is officially/administratively noticed can be considered as a basis for the findings of fact."

"the findings of fact must be supported by substantial evidence in the hearing record."

STATEMENT OF THE CASE

A. Factual Background

This lawsuit is about the unconstitutional practices of NJDOL state actors who took an oath to "support the constitution" but permitted routine violations of state and federal agency laws and directives that were specifically enacted/promulgated to insure due process and state conformity to the the "fair hearing" requirement of the Social Security Act. Petitioner asks himself some eleven years after the fact and in litigating the same question presented here as Petitioner's first question: how it can be that despite a right to due process of law and a right to a fair hearing under both the Fourteenth Amendment and a federal statute - that a worker can lose his health insurance on a charge that the employer never pleaded. Petitioner still does not know the identity of his accuser and other may also not know. It is the central assertion of this appeal that due process required that Petitioner have had a hearing based on the allegations in the 5/24/2010 protest letter and issue switching forbidden.

First Claim for UI benefits

The most damaging offenses occurred on Petitioner's first claim for benefits dated 4/25/2010. An initial claims hearing was conducted on 5/10/2010 – specifically to hear the charge of unknown origin that Petitioner received several weeks earlier that "You may have been separated for misconduct connected to the work". The initial

claims examiner wrote in her notes that despite her giving Wal-Mart several opportunities and a furlough for time to respond to the misconduct charge – Wal-Mart "had no reply to our detailed questions" about the misconduct charge [App. *infra* 85a]. Petitioner received a notice that he had been awarded UI benefits but the initial claims examiner's notes as to Wal-Mart's failure to respond to the misconduct charge were withheld from Petitioner's discovery. A few weeks later Petitioner received a "Notice of Appeal To The Appeals Tribunal" informing him that an appeal had been filed challenging the initial claims examiner's decision. On June 7th 2010 Petition sent an e mail protesting the rehearing of the"misconduct connected to the work" charge [App. *infra* 86a]. Petitioner received no answer. Eleven days after that Petitioner received a "Notice of A Telephone Hearing" that set a date for a telephone hearing of 6/28/2010 and contained not only the "misconduct connected to the work" charge of unknown origin that had been dismissed at the initial claims hearing - but a new charge of "voluntary leaving".

Unbeknownst to Petitioner on 5/24/2010 Wal-Mart sent a protest letter requesting the appeal to the Trenton Appeals Tribunal with the Kafkaesque contention that Petitioner "was the moving party in the separation" and that he "abandoned his job" not showing up for work some 21 days after Petitioner had been terminated by his first line supervisor Rebecca Timco on April 26th 2010 [App. *infra* 93a]. A reasonable NJDOL state actor would have rejected the appeal request on its face as the allegations it contains are utterly absurd. Unbeknownst to Petitioner the protest letter also identified its witness with "first-hand" knowledge – Rebecca Timco – who

[presumably] would testify at the 6/28/2010 appeals hearing on behalf of the employer that Petitioner simply walked off the job. At the appeal hearing the Examiner asked the HR Manager "where's Becky?" to which the HR Manager responded: "She's off today". Since Petitioner was never sent a copy of the protest letter he was caught totally unaware at the appeal hearing that the HR Manager was testifying instead of Timco. If Petitioner had a hearing based on the employer's pleadings in the 5/24/2010 protest letter and had he been given a copy before the hearing to prepare a defense and issue switching disallowed he could have challenged the HR Manager's claim to have "first-hand knowledge" and could have objected to the HR Manager testifying instead of Timco and demand that Timco testify as a witness so that he could pierce the pleadings by cross examining Timco about Petitioner's termination. Instead Petitioner confronted nothing but hearsay from the HR Manager as she testified that Petitioner never spoke at all to Timco because "I'm sure that she didn't call him" and denied Timco ever fired Petitioner. The HR Manager also claimed the only contact the store had with Petitioner was when she purportedly called Petitioner's mother on 4/23/2010 and that Petitioner's mother handed Petitioner the phone on a day Petitioner testified that he was not home. The HR Manager claimed Petitioner had never called out and that the store was completely unaware of his illness until the HR Manager called Petitioner's residence on the 4/23/2010 and had a conversation with me as to why I never reported for work. Attached to the protest letter were an "attendance record" and an "exit interview" document. Again unbeknownst to Petitioner - Wal-Mart had sent a fax on June 25th 2010 directly to the

assigned NJDOL hearing examiner attaching again the attendance record and the exit interview documents with the explicit statement that "Attached are documents employer Wal-Mart would like to use as exhibits for the hearing on John Custin." [App. *infra* 100a]. Petitioner was never sent a copy before the hearing as required by a state statute (N.J.A.C. 1:12-14.6(d)(1)) and a federal agency directive (UIPL 10-96). Those documents were necessary to an adequate defense to impeach the HR Manager's testimony that Petitioner had never called out and that the store was unaware of Petitioner's illness until 4/23/2010. One of these secret documents – Wal-Mart's "attendance record" showed that prior to the "five days" that Wal-Mart's phone system was not functioning Petitioner successfully called the store on 4/11/2010, 4/13/2010, 4/15/2010. [App. *infra* 97a]. The reason codes are set to "50" instead of "52" which is the code for "no call...no show". There was no reason Petitioner would not have continued to call out unless there was a problem with the phone system. The "exit interview" document showed that the Wal-Mart store changed Petitioner's Last Day Worked ("LDW") from 4/11/2010 [App. *infra* 85a] to 4/16/2010 [App. *infra* 95a]. Wal-Mart switched the LDW to the day just before the "five days" to cover up the fact that Petitioner had been calling out prior to the "five days". The HR Manager further testified from another secret document – a secret "call-out list" that she "just printed out" in the middle of a telephone hearing that became the Examiner erroneously interpreted and made the basis for her decision:

> "the employer contended that other employees called the hotline the days the claimant was absent without an issue and no problems were reported about the hotline" [App. *infra* 104a]

That is a direct reference to the testimony of the HR Manager testifying from the secret "call-out list". The statement is a misrepresentation of what had been testified to because the HR Manger testified about one day she referenced as "that day" without specifying the exact day she was referring to.

All of the documents Petitioner needed to prepare a responsive defense were withheld by NJDOL state actors and Wal-Mart from his discovery: 1) the employer's 5/10/2010 protest letter containing the employer's pleadings, 2) the two secret documents sent by Wal-Mart directly to the Examiner [i.e. the "attendance record" and "exit interview" 3) Wal-Mart's secret "call-out list" that she "just printed out" in the middle of a telephone hearing and from which she drew her testimony that "others called out *that day*".

Second claim dated 12/4//2011 ("EB" claim), Third Claim dated 3/11/2012, Fourth Claim dated 12/30/2012

Petitioner's complaint about his Second, Third, and Fourth claims were all the same issue: NJDOL state actors cited no state law law when it arbitrarily decided that the $13,000 Petitioner received as a settlement in a Law Against Discrimination lawsuit against Wal-Mart could not be used to establish a UI monetary entitlement. The fact that the same offense occurred across all three claims evidences an ongoing unconstitutional NJDOL practice. Even when presented with a W2 at the Appeals Tribunal Proceedings NJDOL state actors stated in all 3 decisions stated that settlement funds from lawsuits "do not constitute wages" without stating any New Jersey law. Respondents' made a *de facto* admission that no law was stated when they readily volunteered a purported New Jersey law in their Motion For Summary Judgment some

8 years after the fact:

> "Plaintiff disagrees with the Appeal Tribunal finding that the settlement monies that he received did not constitute wages. Despite his disagreement, the Appeal Tribunal's finding that the settlement monies did not constitute wages is consistent with case law. See *Sang-Hoon Kim v. Monmouth College*, 320 N.J. Super. 157,160 (Law Div. 1998) (finding that the Plaintiff's award of damages did not constitute "wages" because the award was for a period of time that plaintiff was no longer employed by or performing services for the Defendant)." [App. *infra* 136a] [D.E. 233-2 Filed: 6/21/19 Page 19 of 28 PageId:2538]

The case cited is a New Jersey case of first impression. It was clear in that case that Sang-Hoon Kim's settlement agreement compensated the plaintiff for the period following his termination until the time of trial. That was not the case here. Wal-Mart in the settlement agreement stated:

> "($13000.00) shall be made payable as wage based compensatory damages to CUSTIN,for which a W2 shall be issued" [document is sealed by the District Court]

The compensation was paid specifically for the period when Petitioner was employed at Wal-Mart. The case law in Sang-Hoon Kim is applied to the claim dated 4/25/2010 it would actually support a finding that the state underpaid my claim in the amount of $4,143.62. If the New Jersey case law in *Sang-Hoon Kim* is applied to the claim dated 4/25/2010 it would actually support a finding that the state underpaid Petitioner's claim in the amount of $4,143.62. If the New Jersey case law in *Sang-Hoon Kim* was the law that should have been stated in the three Appeals Tribunal decisions on Petitioner's Second, Third, and Fourth claims then the state

actors should have declared that it underpaid Petitioner's 4/25/2010 claim and paid to Petitioner in the amount of $4,143.62 ($159.37 underpaid per week X 26 weeks) at the time Petitioner's EUC08 benefits ran out – which was around the same time Petitioner filed for EB (12/4/2011) - a time when the funds were most urgently needed. Instead Wirth's deputies arbitrarily decided that discrimination settlement funds "do not constitute wages" for determining a monetary entitlement for UI benefits and paid Petitioner nothing.

B. Procedural Background:

There were 3 District Court orders associated with this appeal.

The first Opinion dated 1/31/2014 dismissed the federal defendants with prejudice as the The District Court held that Petitioner lacked standing on the challenge to the Secretary' s certification of New Jersey but Petitioner did have standing on the challenge to CFR 615.8(c)(2) but the statute of limitations on had run on Petitioner's constitutionality challenge to the law which disqualified Petitioner from EB benefits staked solely upon the outcome of the Petitioner's unfair 6/28/2010 Appeals Tribunal proceeding.

The second Opinion dated 3/22/2016 had a significant impact on the course of discovery in this matter and impacts directly on the Fourth question presented and argument raised below in this petition on the misrepresentation made by Respondents' attorney to a court of law that resulted in substantial prejudice to Petitioner. The Opinion stated that NJDOL has Eleventh Amendment sovereign immunity from a lawsuit but that Petitioner's lawsuit could proceed as a *lawsuit* against

the Individuals subject to the issue of the Respondents' qualified immunity at Summary Judgment and that discovery was essential to determining if the Respondents violated clearly established law:

> "I will deny the Motion To Dismiss the complaint on qualified immunity, but without prejudice to reassertion of qualified immunity via a Motion For Summary Judgment" [App. *infra* 42a].

The Opinion also dismissed "all claims under the Social Security Act" only referencing the "when due" section of the statute 42 U.S.C.§503(a)(1) without discussing at all the basis for its holding in regard to the fair hearing requirement section 42 U.S.C.§503(a)(3) which Petitioner sued under. Although Petitioner raised the issue on appeal those appeals issues were not addressed by either the District Court or the Third Circuit and remain not disposed.

Respondents saw the The 3/22/2016 decision as an opportunity to avoid disclosure in both Rule 45 and party discovery.

Most significantly – and contrary to this court's precedent - The Respondents took it upon themselves to interpret the March 22 2016 order dismissing NJDOL under Eleventh Amendment state sovereign immunity as an order also meaning that all claims against the Defendants for the unconstitutional acts they inflicted in their official capacities were also dismissed. Respondents even purported that the 3/22/2016 District Court order and that the service of document subpoenas upon its non-party Custodians of Records were invalid "because they are directed at NJDOL". Respondents used the same erroneous legal predicate to block Petitioner's 6/30/2017 and 12/14/2017 discovery that was still outstanding. On 1/16/2018 the

state Defendants wrote a letter to the Magistrate:

> "Plaintiff's December 14, 2017 submission is essentially a rehashing of his June 21st discovery requests . Plaintiff's requests were all directed to the state or to the individual Defendants in their official capacities, which have been dismissed with prejudice...it is respectfully requested that the court deny Plaintiff's discovery requests set forth in his 12/14/2017 submission." [App. *infra* 131a].

On 3/6/2018 The Magistrate used the the Respondents' certifications in the 1/16/2018 [App. *infra* 130a-131a] and 3/5/2018 [App. *infra* 132a-133a] letters to strike down all of Petitioner's lawful 12/14/2017 discovery requests as being "moot" because opposing attorney was "an officer of the court" [App. *infra* 72a] . On 3/16/2018 Petitioner filed a Rule 52 objection to the Magistrate's 3/6/2018 order objecting that the order made no sense – even if *arguendo* the Respondents did produce all the Production documents requested – [which it did not] – the certification would still be a misrepresentation because the certification could not possibly also apply to Respondents having answering interrogatories and admissions requests as they do not involve a production. On 6/21/2019 the Respondents filed their Motion For Summary Judgment.

The Third Opinion dated 3/25/2020 granted Summary Judgment to the Respondents in the Opinion Below. Petitioner filed a timely appeal to the Third Circuit and the Third Circuit issued its Opinion on 3/4/2021 and upheld the District Court. This timely Petition for Writ of Certiorari ensued.

REASONS FOR GRANTING THE WRIT

A. **The standard of review for constitutional due process employed by the Third**

Circuit's holding in *Custin* is cannot be squared with the Tenth Circuit's holding in *Shaw v. Valdez*

The Opinions below rely on a novel quantum level standard in *Custin* (affirmed by the Third Circuit) for constitutional due process. In review the Opinions below pose only a single question in review of whether this Petitioner was given a notice and whether or not a forum was provided to Petitioner that he participated in - and that the mere participation or even simple availability of a forum "defeats a due process claim". An even narrower standard is suggested in the Opinion below when the District Court comments that the Respondents did not "interfere" with the processes given and since they did not then that was all the process that was due:

> "he also had the ability to appeal the findings of that hearing multiple times, ultimately to an independent judicial forum. Because the state Defendants did not interfere with Custin's right to that process, he cannot succeed in claiming they deprived him of it" [App. *infra* 33a]

That standard cannot be reconciled with the The Tenth Circuit's holding in *Shaw* set a much broader standard:

> "We think Shaw was entitled, as a matter of right, to know in advance all of the factual and legal issues that would be presented at the hearing." *Shaw v. Valdez,* 819 F.2d 965 (10th Cir. 1987)

The *Shaw* Court in sharp contrast begins its review asking if Plaintiff Shaw was informed in enough detail by the notice to be able to prepare an adequate defense. Under the *Shaw* standard for constitutional due process *even the notice itself falls under the scope of review.* Petitioner's issue raised in the First Question Presented

never falls within the scope of the District Court's standard. That issue was that NJDOL state actors may have had had a customary practice of initiating an automatic misconduct charge that the employer never raises in its protest letter stacking the Notice with "all the factual matters" as to the reason for the claimant's separation i.e. that the claimant both quit and was fired at the same time. Similarly Plaintiff Shaw faced a generic notice that:

> "All issues and factual matters affecting claimant's eligibility and qualifications for benefits will be heard under Chapter 8 of the Colorado Revised Statutes of 1973, as amended"

Therefore both Custin and Shaw faced a defective Notice prepared by state actors and not the "appealed issue" that the employer stated in the protest letter. When a state employment agency withholds the protest letter it is impossible for the claimant to detect what the employer's precise "appealed issue" is. Even more importantly the *Shaw* court found that even if Plaintiff Shaw somehow could have obtained a copy of the protest letter that still would not be enough to insure due process if the employer raises new issues at the hearing that are not the "appealed issue" in the protest letter. To prevent this the *Shaw* court suggested that the pleadings in the protest letter should be frozen and parties advised that there will be no new issues allowed to be raised at the appeal hearing. In the case of both Plaintiff Shaw and Plaintiff Custin this was critical as the employer raised new issues at the appeal hearing that were not the "appealed issue" in the protest letter.

Had the Shaw standard been applied Petitioner would have been given the forum that due process requires: a forum where the claimant is made aware of the employers

pleadings before the hearing and confronts only those same pleadings at the appeal hearing.

B. THE OPINIONS BELOW CIRCUMVENT AND CONFLICT WITH THIS COURT'S PRECEDENT

1. In regard to the First and Second Questions Presented about Petitioner's First UI claim:

This court has held:

> "the notice must be both timely and adequate, given within a reasonable time prior to the taking of any action, and specifying the proposed action and the grounds therefore, indicating the information needed to determine eligibility, and advising the recipient of the right to be heard and to be represented by counsel. Moreover, ***there must be full and complete disclosure of the information upon which the proposed action is based***." at page 856. [Emphasis added.] *Pregent v. New Hampshire Dept. of Employment Security*, 361 F. Supp.782 (1973), vacated 417 U.S. 903, 94 S.Ct. 2595, 41 L.Ed.2d 207 (1974) quoting *Caldwell v. Laupheimer*, 311 F. Supp. 853 (E.D.Pa. 1969)

The Opinions Below conflict with this court's holding above that constitutional due process requires that there must be full disclosure of the information on which the action is going to be based. Here Petitioner was never informed that his employer's only pleading was that Petitioner "was the moving party in the separation". Discharge for misconduct was never raised by Wal-Mart until the appeal hearing when it switched its appealed issue. Compounding the due process offense were the use of secret documents at the appeal hearing without giving Petitioner a copy before the hearing. There was no disclosure here at all.

The Withholding of the Wal-Mart's pleadings in the 5/24/2010 Wal-Mart protest letter

The most important of all these secret documents were the pleadings containing Wal-Mart's only appealed issue: "voluntary leaving" in the form of the 5/24/2010 Wal-Mart protest letter

and the Kafkaesque allegation it contained that Petitioner "was the moving party in the separation" and "abandoned his job" some 21 days after Timco terminated him (the protest letter alleged Petitioner was a "no call...no show" from 5/17/2010 to 5/23/2010 [App. *infra* 93a] . The record shows Petitioner'"MC" date was 4/26/2010 [App. *infra* 85a]). A reasonable NJDOL official would have disallowed the appeal on its face based on those allegations. Even having had the benefit of the record before it that the initial claims examiner had defaulted the "misconduct connected to the work" charge because Wal-Mart "had no reply to our detailed questions" [Ibid.] - instead of dismissing the appeal NJDOL state actors prepared a Kafkaesque Notice that not only was Petitioner fired for misconduct - but that he also was the moving party in the separation and "abandoned his job". Since the Notice covered all the possible reasons for the separation [one of which had not been pleaded] the Notice was fundamentally the same generic Notice given to Plaintiff Shaw: "All issues and factual matters affecting claimant's eligibility and qualifications for benefits will be heard" that the Tenth Circuit found to be defective and tantamount to "no notice at all". In the case of Custin the Tribunal found on the charge the employer never pleaded.

The secret documents: attendance record, exit interview, "call out list"

Compounding the due process offense of customarily withholding the pleadings from a claimants' discovery was the NJDOL state actors' unconstitutional practice of gaining access to or receiving secret employer documents and then not offering a viewing and/or offering an opportunity for rebuttal or not sending a copy of the documents obtained to the claimant before the hearing as required by the state statute in the citations below. Petitioner is in the record seeking discovery on a second instance of this unconstitutional offense [App. *infra*

155a] and Defendants have not shown Petitioner could not produce the second instance as a witness at trial.

Attached to the 5/24/2010 protest letter letter and the 6/25/2010 fax directly to the Tribunal Examiner informing the Examiner that Wal-Mart intended to use those secret documents as exhibits against Petitioner. The Opinions below claim these documents were "superfluous" when they were necessary to a responsive defense to impeach the credibility of the HR Manager's testimony. That testimony claimed that the first contact the store had with Petitioner about his illness was on 5/23/2010 the last day of "the five days". Had Petitioner been given a copy of that record before the hearing a responsive defense would have impeached that testimony with the fact that the attendance record shows reason codes that are not "no call...no show" prior to those "five days" that would support that the store had knew about Petitioner's illness well before 5/23/2010 and had used the hotline to do so. Had Petitioner been given a copy of the "attendance record" before the hearing he could have confronted the HR Manager with the fact Wal-Mart had changed the LDW date in the exit interview to the day just before "the five days" to cover up Petitioner's successful call outs prior to "the five days" when the phone system was working, why the store scheduled Timco off the day she was supposed to testify, that Petitioner never spoke to Timco, and that Timco did not terminate Petitioner. Timco was necessary to confront the HR Manager's testimony in cross examination which is why Wal-Mart scheduled her off and the HR Manager appeared instead.

2. <u>In regard to the Third Question Presented that is in regard to Petitioner's second, third, and fourth UI claims:</u>

The Opinions Below claim that Petitioner must have had to exhaust all of his state remedies before he sought relief raising a classic Fourteenth Amendment federal question in the New : Jersey District Court in regard to his second, third and fourth UI claims:

> "the because he did not take advantage of the appeals process available to him, he cannot claim to have been denied due process" [App. *infra* 26a]

The District Court claims that the processes of the Board of Review processes "was anything but a sham" because Petitioner had the ability to participate in those processes. Even with thelimited discovery permitted in this case the results of such discovery does nothing but confirm that those Board of Review processes not only were a sham but resemble something out of Kafka. Petitioner has a certification from Respondents' attorney that:

> "there are no agenda or minutes Board of Review exist or ever existed for your case 284,329". [App. *infra* 112a]

At a minimum such accounting was required under the New Jersey Open Public Meetings Law. The certification above shows that there is no evidence at all that the Board of Review ever met at all to decide Petitioner's appeal. It may well have been decided by the unknown "reviewer"[the name is illegible] who did a "Pre-Hearing review". [App. *infra* 110a-111a]. The Notice of Appeal Petitioner received for the Board of Review claimed:

> "If the appeal is timely, ***The Board*** will evaluate the entire record including the cassette recording(s) of the Appeal Tribunal hearing and any written arguments submitted." [App. *infra* 109a]

Petitioner therefore then had every reason to believe that appeal to the Board of Review would be subject to that same defective process and would again be inadequate and so he

sought relief in federal District court and for which he now still seeks justice. The fact that three Tribunal decisions failed to cite to any state law that LAD settlement funds "does not constitute wages" raised an immediate federal question of due process under the Fourteenth Amendment . The Opinions Below therefore directly conflict with this court's holdings in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) and in *Patsy v. Board of Regents*, 457 U.S. 496 (1982) and *McNeese v. Board of Education*, 373 U.S. 66 (1963). The Opinions Below attempt to supplant *Monroe, Patsy, and McNeese* with Third Circuit contrary holdings in *Alvin v. Suzuki* 227 F. 3d 107, 116 (3rd Cir. 2000) and the New Jersey District Court contrary holding in *Akuma v. Comm'r of the Dep't of Labor and Workforce Dev.*, No. 07-1058, 2008 WL, 4308229 (D.N.J. Sept. 17, 2008). In attempting to circumvent this court's precedent in similar cases by misconstruing Petitioner's allegations in the Third Amended Complaint as alleging "random acts" and not as a result of custom or practice - the Opinions Below violate Article VI, Paragraph 2 of the U.S. Constitution and warrant review by this court. These state cases are inapplicable as the Plaintiffs did not raise a federal question. Petitioner's Third Amended Complaint raised a classic Fourteenth Amendment federal question in claim # 13 and #14 in the Third Amended Complaint that in the three decisions deciding his 2nd, 3rd, and 4th claims for UI benefits NJDOL state actors arbitrarily decided that settlement proceedings in a New Jersey Law Against Discrimination lawsuit "does not constitute wages" without stating any state law to support it. The three instances indicate the offensive conduct was a customary practice. Respondents' attorney attempted to offer the New Jersey case law case of *Sang-Hoon Kim v. Monmouth v. Monmouth College*, 320 N.J. Super. 157,160 (Law Div.1998) some 8 years after the offense

in their Motion For Summary Judgment. That case is does not support the Tribunal decision or reasons stated earlier in the statement of the case. Even if it did providing such a law some eight years after the offense violates the requirement of due process that the process takes place "in a timely manner" *Mathews v. Eldridge*, 424 U.S. 319,332 (1976).

This court should also grant writ because the third question presented may well be a case of first impression for the Supreme Court of the United States and the nation as it was in the instance in New Jersey of *Sang-Hoon Kim v. Monmouth v. Monmouth College*, 320 N.J. Super. 157,160 (Law Div.1998).

3. In regard to the Fourth Question Presented that is in regard to the requested review on appeal of Petitioner's Rule 52 Objection

The Respondents attempted to use an erroneous self serving interpretation of the District Court's 3/22/2016 court order as an opportunity to avoid the 2/5/2016 court order:

> "plaintiff's discovery is still directed toward the NJDOL or ***the individual defendants in their official capacities***, [my emphasis] both of which were dismissed by the Order dated March 22, 2016 For these reasons, the discovery sought by plaintiff in his letter dated June21, 2017 should be denied because he seeks discovery on claims which the court has already dismissed."

The Respondents' legal predicate used as a basis for non disclosure conflicts with this court's precedent in *Hafer v. Merlo* 502 U.S. 21(1991) and *Scheuer v. Rhodes,* 416 U.S. 232 (1974). In *Scheuer* this Court reiterated that states may not immunize officers from suit in federal court and held a private litigant may sue a state official or employee for damages for actions that employee took in his individual capacity. In *Hafer* this court held that:

> "the phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not

the capacity in which the officer inflicts the alleged injury",
Hafer, supra, Pp 3-5.

In an attempt escape their duty to fully disclose In fact, the Respondents used the same exact argument as did Plaintiff Hafer that this court dismissed some 30 years ago:

> "Hafer seeks to overcome the distinction between official and personal-capacity suits by arguing that § 1983 liability turns not on the capacity in which state officials are sued, but on the capacity in which they acted when injuring the plaintiff."[Ibid.]

Proof that Respondents used Hafer's argument in order to gut the substantive claims in the Third Amended Complaint is evidenced in Respondents 7/6/2017 letter to the Magistrate objecting to Petitioner's re-served 9/28/2015 Fourth Set of discovery requests they were still in default of:

> "Plaintiff's letter contains eighteen proposed requests for admissions all of which are directed to the NJDOL or to the individual defendants in official capacities. Every topic of the requests for admissions asks the "state defendants" to admit or deny information pertaining to the defendants' official duties in unemployment claims such as, officially supervising hearing officers, state fax numbers, handbooks, transcripts of hearings conducted, and guidelines for hearings. These should all be denied as the information sought relates to the individual State Defendants in their official capacities, not in their individual capacities." [App. *infra* 145a]

Respondents took it upon themselves to interpret the 3/22/2017 District Court order meaning that Petitioner's discovery must direct all discovery to the the time Wirths and the Board of Review were working off the clock or on a coffee break or home watching TV with a beer in hand. That the Respondents knew that this infantile view would set a stage devoid of any official actions and therefore any liability while the Respondents wore a state badge is

illustrated by their use of "if they acted at all":

> "The issue in this case going forward since March 22, 2016 has been the qualified immunity of the individual defendants, Wirths, Sieber, Yarborough, and Maddow, ***if they acted at all in individual capacities, which they did not"*** [my emphasis] [Ibid.]

The Supreme Court correctly held in *Hafer* that the Respondents' and Hafer's argument above is really a claim of absolute immunity in disguise:

> "Furthermore, Hafer's distinction cannot be reconciled with our decisions regarding immunity of government officers otherwise personally liable for acts done in the course of their official duties. Her theory would absolutely immunize state officials from personal liability for acts within their authority and necessary to fulfilling governmental responsibilities. Yet our cases do not extend absolute immunity to all officers who engage in necessary official acts".

Such a view of state Eleventh Amendment immunity would moot the Federal Rules of Civil Procedure regarding the obligations of a party to fully disclose.

C. THE OPINION BELOW CONFLICTS WITH OTHER COURTS OF LAW

The District Court Opinion Below dated 3/22/2016 dismissed all claims under the Social Security Act. The was no explanation for for dismissing the fair hearing requirement 42 U.S.C.§ 503 (a)(3). The Judge's opinion was only discussed the "when due" section of 42 U.S.C.§ 503 (a)(1). In that regard the Opinion was over-broad and runs counter to every other court of law in similar lawsuits such as *Cosby v. Ward*, 843 F.2d 967 (7th Cir. 1988), Navato v, Sletten, 560 F.2d 340 (1977) and *Camacho v. Bowling*, 562 F. Supp. 1012 (N.D. Ill. 1983).

D. THE OPINIONS BELOW FAILED TO ENFORCE THE LAW AND EXCUSED IT

There is no mention in the Opinions Below that the conduct of the Appeals Tribunal was

patently illegal. The Opinions below either ignore (Third Circuit) or excuse (The District Court) the patently illegal conduct of tacitly using secret documents not properly noticed or introduced and then permitting the employer to testify from them violated New Jersey state statute and a federal agency directive. The Opinions below should have called out the illegal conduct and enforced the law by denying Summary Judgment. Here is how the New Jersey District Court enforced the New Jersey law and a federal agency UIPL:

> "The Appeal Tribunal process was less than ideal in some respects. The documents faxed over by Wal-Mart prior to the hearing ought to have been entered into the record and provided to Custin prior to the hearing See N.J.A.C. 1:12-14.6(d). But he [i.e. Petitioner – J.C.] has not shown that this error dragged the proceedings below the federal constitutional floor of due process. And indeed, it is highly unlikely that these claimed even affected the outcome. The documents were not necessary to deny his claim." [App. *infra* 31a-32a]

The above statement made by a federal court of law is reprehensible. It makes up an excuse for the conduct. Instead of calling out the offense as violating a New Jersey statute that was enacted by the NJ state Legislature with the express intent to insure due process as part of New Jersey's conformity to the "fair hearing" requirement of SSA and the Fourteenth Amendment - the District court substitutes instead its own opinion of what the law should be - suggesting the law should be subject to some highly speculative analysis of whether the offense "affected the outcome" of a Tribunal decision. Courts of law have a duty to enforce the law. The Opinion Below that presents the above warrants full review by this court.

E. THE OPINION BELOW IS CLEARLY FACTUALLY WRONG ON THE ISSUE RAISED IN THE FIRST QUESTION PRESENTED

> "Custin was well aware of Wal-Mart's position that he had been

> separated for misconduct...The court noted that when Custin first applied for unemployment benefits, the notice scheduling an appointment with a claims examiner indicated 'in bold letters"' that "the reason for his appointment was that he may have been separated for misconduct in connection with his work". Id. At 13-14. It further noted that, when Wal-Mart appealed, Custin Received a copy of The Notice of Appeal Tribunal hearing, 'which Explicitly stated the issues involved were 'voluntary leaving' and 'discharge for misconduct.' Id. at 13-14. [Third Circuit quoting N.J. Superior Court in ECF No. 233-13 at 13.] [App. *infra* 10a].

Two documents fly in the face of the Opinion Below and the Superior Court's Opinion that it parrots without any analysis. First is the 7/6/2010 decision of the Appeals Tribunal. raised in the First Question Presented:

> "the employer contends that the claimant voluntarily left the job without good cause attributable to the work. There were no other issues disputed by the appellant employer". [App. *infra* 103a]

Corroborating that "there were no other issues disputed" by Wal-Mart other than the "voluntary leaving" issue are the pleadings in the 5/24/2010 protest letter from Ramzie Siebuhr of Equifax Workforce Solutions:

> "This is in reference to form BC26BF, Notice of Determination, dated May 13, 2010 which allows benefits to the above individual. We wish to appeal the determination based on the following. The claimant is considered to have abandoned his job after failing to return to work. The claimant did not call or show up for work From 5/17-5/23...Our records indicate that claimant quit without good cause attributable to the employer. Benefits should be denied, as the claimant was the moving party in this separation and has not established good cause" [App. *infra* 93a]

None of the above can serve as evidence that the misconduct charge originated from Wal-Mart. Both The Notice of the Initial Claims hearing and the 6/17/2010 Appeals Tribunal "Notice of A Telephone Hearing "were prepared by NJDOL state actors – not Wal-Mart. The only

document that *did* originate from Wal-Mart was the secret 5/24/2010 protest letter of its UI agent to the Appeals Tribunal and that letter specifically stated that Wal-Mart's appealed issue was "voluntary leaving", that Petitioner was the moving party in the separation having "abandoned his job".

F. PROOF THAT RESPONDENTS ATTORNEY MADE A MISREPRESENTATION TO A COURT OF LAW THAT THE COURT RELIED ON THAT RESULTED IN SUBSTANTIAL PREJUDICE TO PRO SE PETITIONER'S CASE

The only reason given by the Magistrate for blocking the 12/14/2017 discovery requests was that Respondents' attorney was "an officer of the court" and that the court relied on her telling the truth. That was not the case. Respondents' attorney – as an officer of the court – clearly lied.

Petitioner's 12/14/2017 Production Request # 1 requested:

> "Provide a true and certified transcript of Plaintiff's initial telephone hearing that took place on May 10,2010 in regard to Plaintiff's 4/25/2010 claim". [App. *infra* 119a]

Respondents answered:

> "Defendants object to this document request because it is not directed to the Individual Defendants in their personal capacities. Without waiving said objections, Defendants state that any documents in their possession that may be responsive to this request have been produced during the course of discovery in this matter." [App. *infra* 120a].

Nowhere to be found in the entire 190 page stack produced by Respondents on 7/13/2017[D.E. 231] is the requested transcript or the recorded proceedings nor was it ever

produced earlier. That the Respondents are in possession of the requested document there can be no doubt. Proof that it exists is in the initial claims examiner's notes which shows that the Respondents were in possession of the .wav file for this proceeding as file "11040-1116_custin_john_by_239.dct.wav" [App. *infra* 85a].

G. THE REQUESTED 12/14/2017 DISCOVERY WAS ESSENTIAL TO PETITIONER'S CASE

Since the 11/15/2017 text court order [App. *Infra* 71a] required Petitioner to link each request to a claim in the Third Amended Complaint it should be self evident that the requested discovery to Petitioner's case was essential to his case. Interrogatories #1 - #6 and Admissions Requests #20 - #22 were critical to the issue raised in the First Question Presented in determining what entity originated the "misconduct" charge. Admission Request #25 sought the Respondents to attest to the genuineness of the 6/24/2010 Wal-Mart protest letter and the secret documents attached to it, Request # 24 sought the same for the 6/25/2010 secret fax to the assigned hearing Examiner, Admissions Requests 26-30 sought information about the unconstitutional customary practice of NJDOL state actors sending out FORM BC-9 "Appointment" Notice with no time and date printed on it, Admissions Request #29 and #30 sought Respondents attest to the two FORM BC-9's he received with no time and date printed on them that the Respondents certified they keep no copies of. [App. *infra* 117a].

H. THE THIRD CIRCUIT OPINION BELOW RELIES ON THE RESPONDENTS' BIG LIE AND IT CONFLICTS WITH THE DISTRICT COURT ON RESPONDENTS' KEY MATERIAL FACT ABOUT THE HR MANAGER'S TESTIMONY

The the Opinion Below of the Third Circuit warrants review by this court because it parroted the Respondents' "Big Lie":

> "A personnel manager from Wal-Mart testified that Custin was discharged from employment because he violated the company's callout policy by failing to notify Wal-Mart of his absences for five consecutive days that he was scheduled to work in April 2010..***The manager testified that there were no problems reported with the phone system and other employees properly called out on those days.***" [App. *infra* 8a-9a]

Surprisingly it was the District Court that properly called out the Respondents for misrepresenting what Wal-Mart's Store HR Officer had testified to:

> "There is potential ambiguity as to 'that day'. State Defendants claim that Shuck testified that there were no other issues reported "on each of those **d**ays (App. *supra* DSMF ¶ 30).***That is inaccurate.*** Schuck testified that the phone was working on one day in particular, later stating that she 'just printed out the list from that day and there are nine people called out and would be tardy' It is not clear which day she is referring to, and Plaintiff claims "that day" is in fact April 26th – the day he was terminated" [App. *infra* 17a @f5] (PRSMF ¶ 42).

Therefore the two Opinions below themselves are deeply conflicted as to just what was testified to by the Wal-Mart HR Manager. The District Court in the Opinion below makes the correct analysis but failed to draw the necessary conclusion of law that the Respondents' key material fact is a misrepresentation as the the record and therefore Respondents failed to meet their burden of proof in Summary Judgment. Wal-Mart's HR Manager testifies to one day only

- not all of "the five days" - and even at that - that one day is ambiguous as to exactly what day she is referring to.

The Examiner's 7/6/2010 decision also violated the "critical Fair Hearing and Due Process" indice # 25 stated in UIPL 10-96 that a Tribunal's finding of fact must be based "on evidence in the record that is of sufficient quality and quantity to substantial" to support its findings. [see App. i*nfra* 134a]. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389 (1971). No reasonable mind could come to support the Tribunal Officer's finding that the phone line was working for all five days Petitioner was purported to be a "no call...no show" when the transcript shows that Wal-Mart's HR Manager refers to a single day she refers to as "that day" – not five days – and even at that the single "that day" is ambiguous as to what specific day she is referring. Petitioner says at that point in the transcript the discussion is focused about April 26th – and from the context of the conversation therefore that was the date she was referencing.

The Respondents made this "Big Lie" their key material fact in their Statement of Undisputed Material Facts:

> "30. The personnel manager testified that there were no problems reported with Wal-Mart's 1-800 phone system ***during the five days*** that Plaintiff was absent and that other employees properly called out on each of thosedays. (Ex. F at 20)." [App. *infra* 124a] [DSMF D.E. 233-1 at ¶ 30]
>
> "Plaintiff's testimony was also refuted by the Employer, who testified that no problems were reported with Wal-Mart's phone system and that other employees were all able to call the 1-800 number ***on the five days that Plaintiff was absent.***" [App. *infra* 125a], [Defs'Brf. MFSJ D.E.

233-2 at p.14].

The above misrepresentations warrant review and sanctions by this court.

I. THE OPINIONS BELOW DO NOT RENDER THE REQUIRED JUDICIAL DEFERENCE TO FEDERAL ADMINISTRATIVE LAW IN A CASE ABOUT A FEDERALLY SPONSORED PROGRAM

In its Opinion below The District Court wrote:

> "Custin has not provided, nor can I discover, any authority in the circuit that defines the process constitutionally required in connection with a denial of unemployment benefits." [App., *infra* 25a]

The statement above by the District Court affirms that it only looked for intra-circuit law and finding none applied the inapplicable Third Circuit *Paratt* analogs. It should have given the required deference to federal agency directives where a complex federally sponsored program is the subject matter under review. Departmental directives setting forth interpretative rules are entitled to deference in judicial proceedings. *British Caledonian Airways, Ltd. v. C.A.B.*, 584 F.2d 982 (D.C. Cir. 1978), is a leading case concerning the use of interpretative rules. The court stated that the agency was "construing the language and intent of the existing statute and regulations in order to remove uncertainty "which is a function peculiarly within the ability and expertise of the agency." Id. at 991. In *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944), the Supreme Court noted that an agency's interpretative bulletins and informal rulings provided a practical guide which constituted "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Id. At 140. The Supreme Court has consistently affirmed the principle of

judicial deference to administrative interpretations, in *Martin v. OSHRC*, 111 S.Ct. 1171, ,1179 (1991). See *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, Inc., 467 U.S. 837, 844, reh. den, 468 U.S. 1227 (1994). Furthermore, the U.S. Court of Appeals for the D.C. Circuit decided that an agency's own assertion that its order is purely interpretative is entitled to a significant degree of credence. *British Caledonian*, 584 F.2d at 992.

Congress, in creating the Social Security Act gave the U.S. Department of Labor responsibility for the oversight of the quality of the States' unemployment insurance (UI) appellate processes and insuring state conformity to federal minimum standards for state conformity to the "fair hearing" requirement. The District Court could have found the "floor" it was seeking in USDOL ETA UIPL 10-96. The relevant sections are in the Table of Citations below:

> "The record should reflect that the parties had an opportunity to review the exhibits prior to their being received into evidence. The hearing officer may state "I have allowed the parties to read the letter I marked as Exhibit 1?". The record must affirmatively show that the parties were given the opportunity to examine the documents" [App. *infra* 108a]

A check of the transcript of the 6/28/2010 proceeding shows that the Examiner did not do the above.

In addition:

> "It is important to realize that the Hearing Officer cannot consider in his/her decision-making process any document that was not properly entered" [Ibid.].

There can be no doubt that the Appeals Tribunal Examiner used the Wal-Mart HR Manager's testimony from the secret "call-out list" that she "just printed out" in the middle of

the proceedings. There can also be no doubt that if the HR Manager had not been allowed to testify to the information in the secret attendance record and exit interview documents then Wal-Mart would not have been able to reconstruct its pleadings at the appeal hearing.

J. THE OPINIONS BELOW DID NOT DISPOSE OF ALL THE ISSUES RAISED ON APPEAL

Neither the District Court or the Third Circuit court settled the issue of the requested injunction against NJDOL state actors sending out to claimants FORM BC-9 with no time and date printed on it; the issue of the 3/22/2016 District Court Opinion having dismissed all claims under SSA including the fair hearing requirement without any discussion.

K. THE QUESTIONS PRESENTED ARE IMPORTANT

The First Question presented: The due process right of confrontation demands that claimants have a right to know the identity of the entity originating the charge, and a copy of the precise pleadings in the employer's protest letter so that that they do not face charges at the appeal hearing that the employer never made. Loss of COBRA health insurance should not be the result of an unconstitutional practice. The Question Presented is of national importance as health insurance is the focus of national debate

The Second Question presented: the notice is important and is a recurring issue as evidenced by Plaintiff Shaw – a UI claimant who faced the same Notice as Petitioner containing all the possibilities of separation. UI claimants all over the country face the issue of stacked notices that present them with a legal dilemma on which they must stake a defense of their claim and have to guess as to which one will be actually be used by the employer.

The Third Question Presented: is important because it may be a UI case of first instance for the nation. It is important that funds received from a lawsuit against discrimination be treated as ordinary income as it is compensation for an unjust act while a person was employed.

The Fourth Question Presented is important because of the serious nature of the offense. A litigant should not have his case prejudiced because opposing attorney made made multiple misrepresentations to a court of law and that the court relied on. Such warrants review and sanctions.

CONCLUSION

The Writ should be granted for all the above reasons.

Respectfully submitted,

John M. Custin Dated: July 28th, 2021
Pro Se
P.O. Box 5631
Christiansted, VI 00823
e mail: jocust100@yahoo.com
telephone: 340-201-3318