

Supreme Court of the United States

OCTOBER TERM, 1970

Supreme Court, U. S.

MAR 16 1971

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In the Matter of:

Docket No. 507

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CALIFORNIA DEPARTMENT OF HUMAN
RESOURCES DEVELOPMENT, ET AL.,

Appellants

VS.

JUDITH JAVA, ET AL.,

Appellee
----- X

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

CALIFORNIA DEPARTMENT OF HUMAN)
RESOURCES DEVELOPMENT, ET AL.,)
Appellants)
vs) No. 507
JUDITH JAVA, ET AL.,)
Appellees.)

The above-entitled matter came on for argument at
11:02 o'clock a.m., on Wednesday, February 24, 1971.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice
- HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Number 507: California against Judith Java and others.

ORAL ARGUMENT BY ASHER RUBIN, ESQ.

ON BEHALF OF APPELLANTS

MR. RUBIN: I'm Mr. Rubin, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Rubin, you may proceed whenever you are ready.

MR. RUBIN: Mr. Chief Justice and may it please the Court:

This case comes to this Court on direct appeal from the decision of a Three-Judge Federal Court in the Northern District of California. The facts of the case are these:

Judy Java was working for a small newspaper in the town of Pittsburgh, California in August of 1969. During this employment she stepped out one day about noon, with another reporter, went to a bar next to the newspaper office, stayed there for a while and returned to the office.

The managing editor of the newspaper observed that the reporter with Mrs. Java appeared to be drunk. There was some exchange; the reporter was fired on the spot and Mrs. Java was also fired on the spot.

Later, when Mrs. Java applied for unemployment insurance benefits she claimed that when she was in the bar she had had some tomato juice and nothing more. The Referee, however,

1 found that she had had alcoholic beverages; she smelled of
2 alcohol; she was glassy-eyed; she staggered; her speech was
3 slurred and the referee, in short, believed the employer, who
4 maintained that that was the reason he fired her for misconduct.

5 After her employment was terminated, Mrs. Java
6 applied for unemployment insurance benefits. She went to the
7 unemployment insurance office; she had an interview; she was
8 given some forms to fill out; she went home, came back some time
9 later after the interviewer had had a chance to verify whether
10 she had sufficient wages in her base period and a form was sent
11 out to the employer for him to state his version of the facts
12 and why she was terminated. It does not appear that this form
13 was ever returned by the employer, but when Mrs. Java returned
14 for her eligibility interview the interviewer listened to her
15 and apparently contacted the employer and the interviewer be-
16 lieved Mrs. Java, who was sitting right there.

17 The interviewer believed she had had tomato
18 juice; that there was not enough evidence otherwise and found
19 in her favor.

20 Q That is not an issue for us; is it?

21 A No, Your Honor, but the reason I outline
22 these facts is because I feel that the factual circumstances in
23 cases like these may be dispositive when we get to the point
24 later when we discuss the Goldberg versus Kelly case, I believe
25 the difference in factual approach, in factual circumstances,

1 may be --

2 Q I thought it came down to the meaning of
3 the two words: when due.

4 A Your Honor, that issue goes to the con-
5 formity question as to when --

6 Q Isn't that the main issue --

7 A I don't believe so, Your Honor, and I had
8 intended to leave that question "when due" in the context of the
9 statute, to the briefs. I believe that the Court, as you know,
10 decided this case on two grounds: on a conformity question;
11 whether we're paying when due and secondly, on a due process
12 question. It went on from the statutory ground and decided it
13 on due process.

14 And I think that that is the more important issue
15 here today. I think that the "when due" problem, while it bears
16 on due process, is essentially a statutory problem which has
17 been covered in the briefs.

18 In any event the employer --

19 Q The interviewer decided this was a
20 meretorious discharge?

21 A The interviewer did decide that she had
22 been terminated and there was no misconduct on her part.

23 Q You want us to reverse the interviewer?

24 A Well, Your Honor, the Referee reversed the
25 interviewer and that basically I'd like you to affirm what the

1 Referee found.

2 Now, after the interviewer made this determination
3 he sent a notice of this ruler to the employer. The employer
4 immediately appealed.

5 Q My recollection is that we usually dis-
6 miss a petition that is improbably -- when we discover that
7 there is nothing but a little tangle of the facts.

8 A I'm sorry, Your Honor. I didn't mean to
9 give that impression. I believe that there are serious con-
10 stitutional problems here. The lower court found that this
11 case was indistinguishable from Goldberg versus Kelly and I'm
12 about to get to what I consider to be the serious --

13 Q Did the lady in Goldberg versus Kelly end
14 up a bar? I don't understand the saloon aspect of this case.

15 A Well, Your Honor, I didn't mean to --
16 I mentioned those preliminary facts only in the interest of
17 completeness, Your Honor. I'm not trying to prejudice the case
18 by bringing up those facts.

19 The Referee later accepted the version of the
20 employer. There was disagreement, but this was in the Referee's
21 decision.

22 MR. CHIEF JUSTICE BURGER: Perhaps you should
23 direct yourself now to the legal question.

24 MR. RUBIN: Well, Your Honor, the lower court
25 found that the California procedure which suspends benefits to

1 a claimant while the employer appeals, was out of conformity
2 with the provisions of the Social Security Act. The Social
3 Security Act says that the Secretary of Labor shall certify
4 a state program for unemployment insurance only if it has
5 methods of administration which are reasonably calculated to
6 ensure full payments when due, and that's how we get to the
7 "when due" problem.

8 The lower court found that we --

9 Q If we determine that statutory question in
10 your favor we never reach the Goldberg question, the Goldberg-
11 Kelly question; do we?

12 A Well, I believe that that would be right,
13 Your Honor, because that would --

14 Q You wouldn't want us to decide the con-
15 stitutional question first?

16 A Well, Your Honor, I believe we have to
17 proceed to the constitutional question because the concept of
18 whether it's paying when due does involve some constitutional
19 problems of due process. If you find that the -- on the
20 statutory grounds, if you reverse on the statutory grounds then
21 it may simply mean that the Secretary of Labor has -- should have
22 the initial power to examine the California procedure, and I'm
23 not sure that this would totally dispose of the case.

24 The lower court did go on to talk about the con-
25 stitutional problem and we feel that it is presented here; we

1 should discuss it.

2 In any event, Your Honor, the question of whether
3 we're in conformity with this act and whether we make these
4 payments when due, is covered in our briefs. I think that here
5 we've got to look at Goldberg versus Kelly and determine
6 whether this case is indistinguishable from that one or whether
7 this one is different; whether Goldberg compels the decision
8 that the District Court made or whether it doesn't.

9 If the Court please, I believe that this Court --
10 this case is very different from Goldberg versus Kelly. In the
11 Goldberg situation firstly, you had only two parties: you had
12 the state and you had the welfare claimant. In unemployment
13 insurance you have three parties: you have the state and you have
14 the claimant and you have the employer who pays for this pro-
15 gram. It is his contributions exclusively which pay the unem-
16 ployment insurance benefits.

17 Q Is there a Federal grant at all?

18 A Well, Your Honor, the Federal Government
19 pays the cost of administering the program, but it's all
20 traceable back to the employer; he pays 90 percent of this con-
21 tribution to the state and 10 percent go to the Federal Govern-
22 ment. Out of that 10 percent the Federal Government pays the
23 cost of administration.

24 So, we have three parties here who we have to
25 work with: we have the state, we have the claimant and we have

1 the employer, and the employer interest wasn't present in
2 Goldberg.

3 Now, the second ground of distinction is that in
4 the Goldberg case this Court was concerned about termination
5 of benefits which had already been ruled eligible. That is,
6 the claimant had already been ruled eligible. There was no
7 question in Goldberg about the initial eligibility of the claim-
8 ant. The claimant was ruled eligible; the claimant was
9 receiving welfare for a period of time and then came the abrupt
10 termination.

11 In this case, Your Honors, we maintain that the
12 initial question of eligibility has not yet been made final.
13 On the very form that a claimant receives, notifying him of his
14 eligibility the form says: this determination is final unless an
15 appeal is filed. It is our contention, Your Honor, and that
16 appeal must be filed within ten days of the initial determina-
17 tion. It is our contention that all

18 It is our contention that all this is within the
19 res gestae, if you will, of the initial determination. The
20 fact that the interviewer had found this claimant eligible has
21 not completed the initial finding of eligibility, in our view.
22 And this is, we think, a critical distinction.

23 The employer still has the right to request to be
24 heard; to have an appeal, to have a hearing to present his
25 views.

1 Q At that point, Mr. Rubin, what is the fact
2 of the employer's right to appeal or be present at the inter-
3 viewer's interview?

4 A Your Honor, technically he has the right;
5 practically, he almost never appears. The claimant comes back,
6 in all candor, Your Honors, in the manual it says that the
7 interviewer may contact the employer and should contact the
8 employer while the claimant is sitting there, and get the
9 employer's point of view, his version -- of course if the em-
10 ployer isn't at this office the interviewer may speak to a
11 foreman, may speak to someone else and then the interviewer will
12 hang up and tell the claimant what the employer says and a
13 determination will be made right there.

14 And as a practical matter, it doesn't pay for the
15 employer to try to come down to this interview. Ninety-eight
16 percent of the time there would be no problem; he is not going
17 to appeal. The statistics which we have presented in the brief
18 have shown that in 98 cases out of a hundred the employer will
19 not appeal.

20 Q Let me ask now the obvious: if the inter-
21 viewer decides against the discharged employee, and I take it
22 the claimant then has the right to appeal --

23 A That's correct, Your Honor.

24 Q -- and no payments are made during the
25 pendency of that appeal?

1 A That's correct, Your Honor.

2 Q And what if he prevails upon the appeal;
3 does he get a lump sum payment then?

4 A Your Honor, if he prevails on the initial
5 appeal he gets payments which are retroactive and irrespective
6 of any further appeals by the employer, he is paid. This is
7 called the double affirmation. The interviewer has found him
8 eligible; the referee has found him eligible under Section 335(b)
9 of the California Unemployment Insurance -- the claim is
10 immediately placed.

11 Now, Your Honors, to further distinguish Goldberg,
12 and I think we are coming now to the most important grounds for
13 distinguishing that case; in welfare by hypothesis the claimant
14 is destitute; has no assets. Mr. Justice Douglas found that
15 the claimant suffers from brutal need; is in a situation where
16 he immediately desperate. And he has to spend his days just
17 finding the very means of subsistence.

18 In Unemployment Insurance need is not the basis
19 for entitlement; indeed, the needier the claimant the less he
20 gets. If he hasn't made \$720 during this past year he gets
21 nothing and he is obviously the neediest. If he makes more
22 than that he will get the minimum payment. The person who makes
23 the most receives the most. Need is not strictly relevant.

24 Indeed, if you go back to the legislative history
25 unemployment insurance was meant to be paid without any means

1 test, a means test. Just a few weeks the New York three-judge
2 District Court, in the case of Torres versus New York, decided
3 on January 7, rejected the lower court's decision in this case,
4 Java, and found that this wasn't valid grounds for distinguish-
5 ing Goldberg; that in the welfare case need is the engine that
6 pulls Goldberg. We don't believe that that engine should be
7 harnessed to unemployment insurance to pull it along the same
8 track.

9 Now, we recognize that in actuality --

10 Q What do you think the case would be like
11 if the Referee decided in favor of the claimant and there was a
12 further appeal and the state terminated the payments?

13 A Well, Your Honor, once that Referee de-
14 cides once more in favor of the claimant then, as I stated in
15 reply to Mr. Justice --

16 Q Well, I know, but what about Goldberg
17 against Kelly? What about the constitutional right of the
18 state to terminate payments after the Referee has found them
19 to be due and the employer appeals?

20 A Your Honor, that case is presented when a
21 claimant is initially ruled ineligible then appeals and the
22 Referee finds him eligible and then the employer appeals.

23 Q Yes.

24 A And that is the same situation; payments
25 are suspended --

1 Q I know, but -- oh, they are suspended?

2 A They are suspended because the --

3 Q After the Referee has found him --

4 A Your Honor, the Referee found him eligible

5 but the interviewer found him ineligible.

6 Q Well, I think Mr. Justice Blackmun just a

7 few minutes ago asked you that question. When the interviewer

8 finds him ineligible but the Referee finds him eligible.

9 A In that case, Your Honor, the payments are

10 suspended.

11 Q If the employer appeals?

12 A That's correct, Your Honor.

13 Q And you would make the same argument here

14 that that suspension is constitutional?

15 A I would, Your Honor --

16 Q Even though there's been an initial

17 determination after a full hearing of eligibility?

18 A Well, this is the reason, Your Honor: you

19 have had one decision by the interviewer, holding the claimant

20 ineligible; you have had one decision by the Referee holding the

21 claimant eligible. Now --

22 Q Yes, but I had thought that part of your

23 case was that the decision at the interview stage is really not

24 a very reliable decision because of the nature of the hearing

25 and the unlikelihood that there would be evidence that the

1 employer would respond and things like that. Isn't it?

2 A Yes it is, Your Honor.

3 That may be a more difficult case.

4 Q Of course you don't have that.

5 A That's not this case before us here,
6 Your Honor.

7 That may pose more difficult problems.

8 Q If it would, then it would also be more
9 difficult if it appeared at the hearing and the procedures
10 gone through before the interviewer really were intended to be
11 a hearing and some kind of a reliable determination of eligi-
12 bility.

13 A That's right, Your Honor. That's right.
14 In any event, I believe that we have valid grounds for dis-
15 tinguishing this case from the Goldberg versus Kelly situation.

16 Now, I think we should take a look, focus if we
17 might, on the initial interview and see if we can arrive and use
18 what Justice Cardozo called "a robust common sense."

19 The claimant comes in for an interview; there is
20 a large office; there are a number of desks. The claimant sits
21 down next to the desk of an interviewer; the interviewer looks
22 over the forms; there are other people waiting to be interviewed.
23 There is no -- it is not set up to be an adversarial proceeding;
24 nobody is sworn; there is no testimony taken under oath. There
25 are generally no witnesses. You are in a room where other

1 people are being interviewed in the same fashion. These inter-
2 views generally take about 40 to 45 minutes, including all the
3 paperwork and the claimant is right there to talk about his
4 case.

5 It is true that the interviewer may have some in-
6 formation on a form from the employer: a brief statement of the
7 employer's point of view. It is also true that the interviewer
8 calls the employer or tries to reach him on the telephone and
9 get his version and then hangs up --

10 Q That happens before the termination of the
11 interview; doesn't it?

12 A That's correct, Your Honor.

13 And then he hangs up and then he comes back to the
14 claimant. He says: your employer said this and what do you
15 have to say about that? And Mrs. Java said, "I drank tomato
16 juice. This is my version," and then the interviewer generally
17 makes a determination.

18 The employer is not there; the employer gets this
19 determination and he files his appeal --

20 Q Technically he is.

21 A Technically he could be, Your Honor, but I
22 don't believe that -- pardon me?

23 Q And then the employer could precipitate a
24 full hearing before the interviewer?

25 A I don't believe so, Your Honor, because

1 there is no testimony taken under oath and --

2 Q Oh, there isn't --

3 A No, Your Honor, and it's not transcribed;
4 whereas the hearing before the Referee is. And it doesn't have
5 any of the trappings --

6 Q It doesn't have any limitations on the
7 kind of evidence to be presented?

8 A No, Your Honor; it is totally informal
9 and for this reason: the department processes thousands and
10 thousands of claims and they just can't have the hearings where
11 you will have adversaries and hear from one and then from the
12 other and have it transcribed and have representatives and ob-
13 jections. It would be impossible. In 1968 there were 360,000
14 claims. There were close to half --

15 Q In the State of California?

16 A In California alone. There were close to
17 half a million eligibility determinations where eligibility is
18 involved. In 1971 the benchmarks figures we anticipate
19 1,230,000 claims and this is going to cost the state -- we ex-
20 pect to pay out some \$980 million in 1971.

21 Q Well, are you telling us that first, this
22 initial interview, is merely an informal process to flush out
23 the obviously clear claims, which are usually about 98 percent
24 did you say?

25 A That's right, Your Honor.

1 Q Is this your argument: the real processing
2 begins on the disputed claims which are two percent, more or
3 less?

4 A That's correct, Your Honor. Now, in those
5 two percent that's a different ballgame. The two percent where
6 the employer appeals -- we have statistics which show that he
7 is generally successful close to 50 percent of the time. Page
8 74 of the Appendix there is a table which shows that out of the
9 appeals filed a certain number are dismissed or withdrawn and
10 generally the employer, he doesn't file a frivolous appeal. In
11 these two percent of the cases he prevails very often, if you
12 take a look at the affidavits submitted in connection with the
13 motion of Southern California Edison Company to intervene and
14 you will find that they have done very well in these appeals.

15 So, these two percent of the cases that -- it's a
16 little bit different. In other words, we're saying that this
17 initial interview procedure -- let me make one more point while
18 it occurs to me -- Mrs. Java did, after the interviewer found
19 her eligible she did receive one payment before the employer
20 appealed or shortly thereafter she did receive a payment. I
21 don't think that this should be misconstrued. The District Court
22 found that our paying claimants "flies in the face of actual
23 California practice," our claim that she shouldn't be paid.

24 One payment was made and we made this payment
25 because, as I stated earlier, in 98 percent of the cases there is

1 going to be no problem. We don't feel we should penalize any-
2 body; we don't feel that they should have to wait that ten days
3 appeals period before they are paid because the chances are 98
4 percent there will never be an appeal, so let's pay him right
5 away. This is an administrative practice and it's very generous
6 and it makes good sense.

7 In the District of Columbia no payments are made
8 while the appeals time is running. The appeals time runs and
9 the claimant is not paid.

10 Q Is there anything unconstitutional with
11 that payment program, in your view? If the statute provided no
12 payments during the ten-day period after they become --

13 A I do not believe so, Your Honor; I believe
14 that's all right.

15 Your Honors, if the Court please I would like to
16 reserve my remaining time for rebuttal.

17 MR. CHIEF JUSTICE BURGER: Mr. Berzon.

18 ORAL ARGUMENT BY STEPHEN P. BERZON, ESQ.

19 MR. BERZON: Mr. Chief Justice and may it please
20 the Court:

21 Throughout this case it has been our position that
22 the reason that thousands of working people in California are
23 denied unemployment benefits each year during the time in which
24 they most need them is because they have been found eligible for
25 unemployment benefits after a thorough investigation in which

1 both sides have had a chance to participate. We believe that
2 this denial of benefits after such determination, frustrates
3 the fundamental purposes of the unemployment section of the
4 Social Security Act.

5 Therefore, we believe that this case can be
6 decided on Federal statutory grounds and that it is unnecessary
7 to reach the constitutional issues. However --

8 Q Do you have any figures in this record on
9 the mean time of waiting?

10 A Yes, we do.

11 Q May I have that figure again?

12 A First it takes three to four-and-a-half
13 weeks for an eligibility determination to be made. Then if an
14 employer files an appeal it takes a median period of seven more
15 weeks until that appeal is decided, so that in a case where the
16 claimant has been found eligible and an appeal is filed by an
17 employer and benefits are cut off, usually after two payments,
18 no further benefits are paid until over ten weeks after the
19 claimant first walks into the unemployment office.

20 Q This delay is limited to this margin of two
21 percent of the cases; is that correct?

22 A This delay is limited at present -- this delay
23 based on employer appeals -- to two percent of all the people
24 who come into an office for unemployment insurance. However, it
25 involved over 8,000 people in 1969.

1 Q Yet the 98 percent involves many more
2 hundreds of thousands, doesn't it?

3 A That's correct; that's correct, but --

4 Q Well, let me ask the same question of you
5 I asked of your opponent: suppose that the statute said no
6 payments at all until ten days after a favorable determination.
7 Would that be unconstitutional?

8 A Well, that, of course, is not this case --

9 Q I'm asking you the question, however.

10 A I believe that would be unconstitutional in
11 California. It may not be unconstitutional under a different
12 kind of procedure, that is where a different kind of initial
13 eligibility investigation is made. If a state, like California,
14 had a thorough initial eligibility determination and makes its
15 decision on information provided by all sides -- and I'd like
16 to go into that --

17 Q Then you disagree with your opponent when
18 you say this is a thorough investigation and he says that's an
19 interview, at an office desk?

20 A I disagree completely and the District
21 Court made a finding of fact that it was, indeed, a thorough
22 investigation. There are 149,000 claims every year who are
23 found ineligible because they left their last job for the wrong
24 reasons. Over 136,000 of these claimants are found ineligible
25 at the initial eligibility determination. Only 2,000-some odd

1 are found ineligible upon an employer's appeal. That means
2 that the initial eligibility determination -- there are 500,000
3 some-odd determinations, 400,000-some odd determinations made
4 each year; 136,000 claimants are found ineligible at the initial
5 level because they left their last job for an improper reason.
6 We consider that -- 99 percent of the cases are located there --
7 we consider that to be a thorough and reliable investigation.

8 Q That would be pretty hard to make 500,000
9 thorough investigations a year; wouldn't it?

10 A Well, the statistics seem to indicate that
11 it's done.

12 Q Well, does it indicate that it's done be-
13 cause the employer knows what the situation is and doesn't
14 object?

15 A No; not at all. Those determinations are
16 based on information that has been supplied by the employer and
17 the decision is made against the claimant and in those cases
18 that are appealed by employers, claimants usually prevail: the
19 initial two-thirds in 1969.

20 Q Well, how thorough an investigation is
21 there if the employers lose most of their appeals?

22 A The fact that employers lose most of their
23 appeals, Mr. Justice White, means that the investigation is very
24 thorough. The investigation decides that the employee is
25 properly entitled to benefits. Upon appeal the investigator is

1 upheld.

2 Q Yes.

3 A Now, I think it would be helpful --

4 Q When you use the term "most, you say --
5 what does it amount to in fact: two-thirds?

6 A In 1969 64 percent of employer appeals
7 were denied.

8 Q Well, that's a majority, but it isn't 98
9 percent; is it?

10 A No, it's not, but that means that those
11 5,900 claimants in 1969 who were found ineligible in the initial
12 determination and then were found eligible again upon the
13 Referee's appeal, received no benefits during the time they were
14 entitled to receive them.

15 Q Well, you're using big figures here because
16 California's a big state. If this were Nevada your figures
17 would be much smaller.

18 A That's correct; that's correct, but what
19 I would like to show is that the harm that would be caused by
20 paying employees who are found eligible after this initial
21 investigation, pending the employer's appeal, is really a rather
22 minimal amount of harm, even for a large state like California.
23 The figures are very, very low, as we point out in our brief.

24 Q You started to argue this on a statutory
25 ground, as I understood you.

1 A That is correct, Mr. Justice Harlan.

2 Q Let me put this question to you: supposing
3 California had said all of these claims, when filed, notice
4 will have to be given to the employer and there will be a hear-
5 ing before a referee and no compensation of any kind will be
6 paid until after it's determined. Would that violate the
7 statute?

8 A Yes, it would.

9 Q Why?

10 A Well, the statute requires that the state
11 procedure must be reasonably calculated to pay benefits when
12 due, to assure the payment of benefits when due.

13 Q The procedure I am suggesting would be
14 a full Goldberg -- an ultra-Goldberg and Kelly type hearing,
15 process.

16 A I may have misunderstood your question.
17 In your hypothetical --

18 Q My hypothetical was that if California,
19 instead of processing these claims in this way it is doing and
20 said: we will process the claims promptly, but we will do it on
21 a full dress hearing before a referee, where both sides can be
22 heard.

23 A Well, whether that would violate the
24 statute or not would depend in operation about how long it took
25 for those decisions to be made. That is, if it took months and

1 months for decisions of that kind to be made, then under our
2 theory of the Federal unemployment statute the statute would be
3 violated. However, if California hired many hearing referees
4 and conducted these examinations within a reasonable amount of
5 time and paid benefits during the period of eligibility, when
6 claimants are entitled to unemployment insurance, when they are
7 out of work, then it wouldn't violate the statute. But, right
8 now over 130,000 claimants are found ineligible at the initial
9 level. Now, for all of those claims to go to a referee it would
10 require the state to make an enormous expenditure of funds for
11 referees and that is totally unnecessary, because the number of
12 cases that we are asking that the benefits be paid, pending an
13 employer's appeal is a very small number of cases, relatively,
14 it's some 8,000 odd cases. Only less than 3,000 of those
15 claimants will be found not to have been entitled to benefits.
16 Two-thirds of all of the payments are recouped by the state of
17 California under their own statistics, so that we're talking
18 about a figure that's rather minimal compared to the nature of
19 the unemployment fund.

20 To hire a lot more referees would be totally cost
21 ineffective and I would be very surprised if California would
22 do that. It has not done that --

23 Q Would you tell me what you mean by
24 "recouping." Do you mean in the cases where there was an
25 erroneous payment, payments later to be discovered to be

1 erroneous, they recouped two-thirds?

2 A Two-thirds -- 64 percent.

3 Q How many people -- is that dollars or people?

4 A Dollars. Two-thirds, and it's logical
5 that they would, because unlike the Goldberg case where this
6 Court found that claimants are judgment proof, we are dealing
7 with working people here and it's very likely that they will go
8 back to work and they will not be judgment proof or that they
9 will apply for unemployment insurance some time in the future
10 and they will be out of work again and if that were to occur
11 the State would just offset the overpayments against future
12 benefits.

13 Q Well, how many weeks does the California
14 system pay?

15 A The maximum amount the California system
16 can pay is 26 weeks, but the average claimant in California gets
17 payment for a median period of seven weeks. Now, a claimant who
18 is found eligible and his employer appeals, gets no benefit
19 until some ten weeks after he first walks into the office; some
20 seven weeks after the appeal is filed.

21 Q But then he does get benefits retroactively?

22 A Right, but at the time that he was no
23 longer really entitled to receive benefits; clearly the time
24 the Congress did not intend him to be getting compensation. He
25 may be back at work, but meanwhile while he was out of work he

1 may have no work at all.

2 Q The maximum is 26 weeks?

3 A Maximum of 26 weeks.

4 Now, this case, we believe, can be decided on
5 Federal statutory grounds and the constitution need not be
6 reached. However, if the Court were to choose to reach the
7 constitutional question it is our contention that the California
8 procedure violates due process, as well as the Federal statute.

9 What I would like to do, very briefly, is to
10 review the state procedure, because I really think that it's
11 critical to an understanding of this case.

12 Now, the procedure is found in great detail on
13 pages 27 to 32 of our brief. But, to summarize the procedure
14 very briefly: an unemployed worker who believes he's eligible
15 for benefits applies his state office. He fills out a series
16 of forms, including the form revealing why he left his left
17 job. That form is sent to his employer, who is required, within
18 ten days to provide any information he has concerning claimant's
19 eligibility. He is required to do that by Section 1327 of the
20 California Code, by law.

21 And any statement made by an employer at any time
22 or any statement made by an employee at any time is made on the
23 penalty of perjury. So, it's not true that they are not made
24 under oath.

25 In addition, the employer not only can supply

1 information -- not only is required to supply information in
2 writing, but he has every opportunity to communicate with the
3 examiner who is charged with making a decision, either in
4 person or by phone; with or without witnesses.

5 After the form is returned the examiner interviews
6 the claimant, an interview at which the employer is free to
7 appear. If the claimant presents any information inconsistent
8 with facts given by an employer or any party the examiner must
9 telephone the employer for further discussion. This is assuming
10 the employer doesn't come in and appeal with witnesses, which he
11 can do. And if the employer can't be reached the examiner
12 postpones the decision for ten days. That's in the state
13 regulations.

14 Then, once the examiner has gotten all the infor-
15 mation he makes a decision. He records all facts and he gives
16 a written reason for his decision. If he decides the claimant's
17 is eligible for benefits, payments commence and in these cases
18 it is my understanding that each of the two claimants received
19 two payments.

20 Q Payments are weekly in every case?

21 A Yes; they are, and the purpose of the act
22 is to provide weekly payments so that claimants have money in
23 their pocket each week so they can buy the necessities of life
24 and keep purchasing power in the community.

25 This decision takes three to four-and-a-half weeks.

1 This is a very -- this takes quite a while; it is not a one or
2 two-day decision, as is true, for example in the District of
3 Columbia, which is a totally different kind of procedure which
4 is not before us in this case; where a claimant comes into the
5 unemployment office; the examiner looks at his papers and de-
6 cides if he's eligible for unemployment insurance on its face.
7 If he is the employer is notified that a claim has been made
8 and if the employee -- the employer then has time to file an
9 appeal. If the employer files an appeal a decision is made
10 upon an appeal. That's the first time the employer is heard.
11 The whole process is done much more quickly. The stay there
12 pending an appeal is a stay to give the employer a chance to
13 be heard, not after there has been an investigation.

14 California's own regulation, on page 116 of the
15 appendix, states in very very clear language: the initial de-
16 termination resolves all issues involving initial eligibility.
17 The District Court found, as a matter of fact, that the eligi-
18 bility determination was very thorough, and payments commence
19 at the initial eligibility investigation -- after the initial
20 eligibility investigation. The worker begins receiving bene-
21 fits.

22 If an employer then files an appeal any time,
23 even long after the ten days that he has to file an appeal has
24 expired, benefits are cut off and it doesn't matter why he
25 files an appeal. He can dislike the employee; any reason he

1 files an appeal. And until a hearing is held which is, in over
2 50 percent of the cases, is more than ten weeks. Ten weeks is
3 just the median; no benefits are paid until ten weeks after the
4 time a claimant first walks into the office. And the claimant
5 gets no funds.

6 The employer has nothing at all to lose in filing
7 this appeal -- he has everything to gain. His unemployment
8 taxes are based according to his record as an employer. That
9 is that he pays taxes based on how many of his former employees
10 get benefits. Therefore he does have an interest in preventing
11 his former employees from receiving benefits. However, he loses
12 nothing, absolutely nothing, the individual employer, if pay-
13 ments are made pending appeal, because if the employer wins an
14 appeal, at any level, including judicial review in the State of
15 California, his account is credited as if his employee has never
16 received any benefits.

17 Therefore, he gains nothing by the suspension,
18 but he has every reason to appeal and cut off his employee's
19 funds to protect his record. Therefore, the procedure we're
20 dealing with cuts off vitally needed benefits on the basis of
21 unilateral gratuitous act by one with an adverse private in-
22 terest. And he does so, despite a carefully made and fully-
23 informed decision to the contrary by a neutral state agency.

24 Q Well, that often happens in the field of
25 insurance; does it not, if the lawsuit is tried on an ordinary

1 insurance claim on a life insurance policy, the decision goes
2 against the life insurance company, let us say, on a death
3 claim; an appeal is taken. That is inconvenient, and may im-
4 pose hardships, but it is a fact of life; isn't it?

5 A That is true, but that is distinguishable
6 in two respects: first of all there is no Federal statutory
7 question. But, under the constitutional question a tort action
8 or a contract action against the insurance company is totally
9 different, Mr. Chief Justice, from an actual --

10 Q It would be a contract action on an insurance
11 claim. This is an insurance claim; is it not?

12 A This is not an insurance claim in the
13 sense of private insurance. This is a claim against the state
14 for benefits which the state is paying under a statute designed
15 to meet a particular kind of problem.

16 Q Yes; well, I'm in favor of using the term
17 "insurance claim" as putting it in quotation marks. It's a
18 statutory scheme, but it is analogous to it, is it not, on the
19 economics of it?

20 A Yes. It has a relationship. The dif-
21 ference is that it is in the nature of a contract action in a
22 court of law if benefits are not paid by a particular period of
23 time. Lawsuits are, by nature, time-consuming; payments are
24 always made retroactively. That is, Your Honor, that is a
25 claimant was determined eligible and the court says the

1 insurance company has to pay, payments are always retroactive;
2 that's the nature of the game.

3 But, in this case, in the case of unemployment
4 insurance benefits are supposed to be paid in a weekly manner.
5 Time is very critical. The Congress intended that these pay-
6 ments be made at a particular point in time: while the worker
7 is out of work, before he finds a new job.

8 That is not true with respect to insurance
9 claims.

10 Q Isn't that your strongest point, really,
11 in terms of how this action should be viewed and construed,
12 that the purpose was to fill in a gap in income and anything
13 that delays that payment is to that extent, negative with res-
14 spect to the statutory purpose?

15 A That is a very strong point, Your Honor.
16 I would just add one thing to that; a corollary to that is
17 filling in a gap for those claimants who are not eligible to
18 receive welfare and what I mean by that is that the 1945
19 Congress, faced with a desperate economic situation, saw two
20 distinct groups of people who were without wages and without
21 liquid assets.

22 They saw people who really couldn't work; old
23 people, blind people, young people, disabled people and they
24 also saw workers who couldn't find jobs, who may have been in
25 an identical economic position as, in fact this Court held --

1 explained in Steward in justifying the unemployment compensa-
2 tion law, the Federal Act; that the Congress passed the act
3 because workers were starving. The Congress did not want to
4 lump welfare recipients, or lump workers or nonworkers into
5 one program. They did not want workers to go on a dole for
6 many reasons and therefore what the Congress did was to set up
7 a separate program for unemployed workers that would pay them
8 benefits at a particular point in time. They would work for
9 these benefits. They would be there; hopefully they would find
10 a new job rather quickly and they would be off benefits. In
11 fact they would have to be off benefits rather quickly.

12 And since Congress didn't provide welfare for
13 these people they may have been absolutely penniless and not be
14 able to get on welfare. And, therefore, there is a gap and
15 this is different from an insurance company in a private situa-
16 tion for those two reasons.

17 Q If you gave the figure it escapes me now,
18 of the total number of people who apply for benefits, what is
19 the percentage, approximately, of those who are -- have their
20 claim approved on the initial interview?

21 A 900,000 people applied at the initial
22 level. There are roughly 500,000 to 600,000 determinations
23 made initially and some 350,000 to 400,000 who are considered
24 eligible. So it would be 400,000 out of 900,000, and the
25 reason for the gap between determinations and between people who

1 come into the office, is that many people who come into the
2 office aren't eligible because they haven't worked enough weeks
3 or made enough money so that they are just eliminated immedia-
4 tely.

5 Then, in other cases employers provide no infor-
6 mation and it's clear that the claimant has a valid claim so
7 no determination is made. In the 600,000 cases, I believe,
8 where the determinations are made, some 400,000 are determined
9 eligible and 200,000 are determined ineligible.

10 Q You don't have the breakdown on the
11 200,000, do you?

12 A Yes --

13 Q Do you indicate that most of them are
14 turned down simply because of basic ineligibility; that is,
15 they haven't worked?

16 A These are the first 200,000, from 900,000 to
17 600,000?

18 Q Yes.

19 A Yes. Most of them, because they haven't
20 earned enough money, they are just immediately eliminated.

21 Q Do you have a chart that shows this?

22 A No; those statistics aren't in the record.
23 We only know the number of determinations. In 1968: 960,000.

24 Q If they are not in the record I don't want
25 them anyway.

1 Q Mr. Berzon, what would be your view of
2 the District of Columbia situation if, after the initial
3 filing and interview the District started paying unemployment
4 compensation and then terminated it if the employer appealed?

5 A That would present a much more difficult
6 question than in this case. I don't think there would be any
7 statutory problem.

8 Q No statutory, but how about --

9 A Well, under the constitution that would
10 be a very close case. The individual builds up a great reliance
11 once payments do begin and the spectrum of interest does
12 change. He gets payments for one or two weeks and habits are
13 formed. On the other hand, there hasn't been a thorough in-
14 vestigation as there has been in this case.

15 Q There just hasn't been a determination
16 of eligibility --

17 A There hasn't been the same prior determina-
18 tion and it's not so arbitrary a process. I would rather
19 imagine that the fact that payments are made alone is not
20 totally -- it's not totally determinative --

21 Q Do you think this case really depends on
22 an assessment of content and substance of this determination
23 insofar as the constitutional issue is concerned?

24 A To a great extent -- it depends on that,
25 plus the fact that the state has begun making the payments in

1 this case -- chose to make the payments. It hinges on both.

2 Q Yes. But you would say that that would be
3 a statutory bar unless a man in California did not begin making
4 payments as soon as the initial interview --

5 A That's because both sides have been heard
6 and that's because the initial determination is so thorough.
7 Yes; the initial determination is critical to this case.

8 Q Mr. Berzon you said earlier, I think, that
9 the employer's experience rating account is not charged, even
10 if this would happen that the applicant was paid benefits
11 pending appeal and the employer then prevails on the appeal;
12 the employer recoups and the employer is not charged -- the
13 experience rating account is not charged?

14 A That's right; the employer is not charged.
15 The only party charged in that case is the state, which must
16 recoup benefits, and does recoup two-thirds.

17 Now, employers do have an interest in the sense
18 that, while the reserve account is not charged, all over-
19 payments come out of a general state fund and that it is con-
20 ceivable that as a taxpayer group the general taxes could go
21 up, but --

22 Q They rate for everybody, not just the
23 one --

24 A For everybody: 300,000 employees. Not --

25 Q If there were additional charges on this

1 fund as a result of this action it might get the rates into a
2 higher level, into a higher bracket.

3 Well, what I'm trying to get at is: does the
4 employer have a proper interest at stake, then --

5 A The employer has no --

6 Q Even though, as you suggest, that the
7 overall rates for everybody may go up?

8 A The only property interest the employer
9 has is the property interest, let's say, of the property tax-
10 payer with school expenditures or the property interest of some-
11 one who uses roads, if highway expenditures are raised.

12 The 300,000 employer are interested in the fund
13 in the sense that they don't want it depleted and where taxes
14 could conceivably go up. But, as we have indicated in our
15 brief, the possible amount of overpayments due to the recoup-
16 ment rate and the limited nature of this case, in that its
17 employers that have been found eligible; and it's employers,
18 not employees, who are appealing, the limited nature of this
19 case, that the maximum amount of overpayments in the State of
20 California in 1969 was some \$335,000. The reserve fund
21 presently has \$1 billion some \$304 million dollars and since
22 this case --

23 Q If the employer has no property at stake
24 here, then what's the purpose of the constitutional claim, at
25 least as it relates to the employer?

1 A The employer has absolutely no valid
2 constitutional claim. He was given a full hearing before his
3 account is charged, and as far as his interest in the property
4 -- that is his interest in the general tax fund, his ability
5 to participate in the initial determination certainly meets any
6 objection he might have as a taxpayer.

7 In the Gange case back in the mid-forties, this
8 Court held that an employer in a similar position with respect
9 to workmen's compensation did not have a sufficient due process
10 interest to have standing to bring a lawsuit based on depletion
11 of the fund.

12 Q But these points wouldn't affect
13 California's right?

14 A Oh, yes; they would, Your Honor. In
15 California the employer --

16 Q No; the State of California's right as
17 distinguished from the private employer.

18 A That's correct; that's correct.

19 Q They are on quite a different basis, aren't
20 they?

21 A They are, except you've got to analyze why
22 California is withholding benefits pending this appeal and when
23 we break out --

24 Q Well, on the constitutional question if
25 there are only California and the claimant involved because

1 there is no property interest of the employer at stake, then
2 why isn't this in the context of Goldberg and Kelly?

3 A This is identical to Goldberg and Kelly,
4 Your Honor, except it is a stronger case. It is squarely
5 controlled by Goldberg and Kelly.

6 In this case, just like in Goldberg and Kelly
7 benefits -- this initial eligibility determination is begun;
8 benefits have been commenced and benefits have then been cut
9 off. And the difference between this case and Goldberg and
10 Kelly makes this case even stronger. The individual interest
11 in this case is much like the individual interest in Goldberg.
12 The benefits case serves the same purpose as welfare benefits.
13 The median income of unemployment compensation recipients is
14 some \$3900 a year and for a family of four there are no liquid
15 assets with a median income of that kind.

16 The situation is the same except that for this
17 fact. In Goldberg the situation involved poor people and in
18 this case the situation involved working poor people who have
19 actually been at work and who have been promised these benefits
20 in the event that they would be suddenly out of work.

21 Q Why do you draw the conclusion that they
22 are working poor people. They might not be, might they?

23 A It is conceivable that some may not be, but
24 the Congress --

25 Q In California right now anyway.

1 A Well, in California right now that's true
2 that there is a high aerospace unemployment rate, but the
3 median income figure for employment recipients that I gave is
4 in California, \$3900 for a family of four. That's --

5 Q Well, Mr. Berzon, whether they are poor
6 in the vernacular sense, or whether they are not quite so poor,
7 wouldn't really reach the Congressional purpose of this scheme
8 to supply some income during the unemployed periods; would it?

9 A Yes, it would, Your Honor.

10 Q I see.

11 A It would reach it because the reason that
12 Congress set up this --

13 Q I don't think you understood my question.
14 I say that Congress wasn't concerned about whether they were
15 poor or not poor, but whether they were unemployed.

16 A That's correct, in each individual case.
17 However, the reason the 1935 Congress set up this scheme, Your
18 Honor, is precisely because it believed that people in this
19 position were in desperate need of funds. Now, in each
20 individual case it's true it's not critical.

21 Now, this case, Your Honors, is much stronger
22 than Goldberg versus Kelly for two additional reasons: first of
23 all, the interest of the state is far less, as I mentioned
24 before. Recoupment is available in this kind of a case, and
25 secondly, most of the interests of the employers are not very

1 great.

2 Q Mr. Berzon, how is recoupment so readily
3 available?

4 A Namely because workers on unemployment
5 compensation tend to be out of work again. They are the work-
6 ing poor and the marginally unemployed and the state can off-
7 set overpayments in its future benefits.

8 But, the State's figures tell us that it is at
9 64 percent.

10 Q Well, you disturb me, obviously, with
11 your generalities which you are making all through here and I

12 A There are exceptions in every case. There
13 are obviously some with overpayments that aren't recouped; some
14 one-third are not recouped.

15 MR. CHIEF JUSTICE BURGER: Very well.

16 (Whereupon the argument in the above-entitled
17 matter was recessed at 12:00 o'clock p.m. to be resumed at 1:00
18 o'clock p.m. this day)

1 1:00 o'clock p.m.

2 MR. CHIEF JUSTICE BURGER: You have five minutes,
3 Mr. Rubin.

4 REBUTTAL ARGUMENT BY ASHER RUBIN, ESQ.

5 ON BEHALF OF APPELLANTS

6 MR. RUBIN: Thank you, Your Honor.

7 If the Court please, I would like to just come
8 back if I might to what we consider the central issue in the
9 case, and that is the due process question as to whether it
10 violates due process when the state suspends payments while the
11 employer appeals.

12 Q When the State does what?

13 A When the State suspends payments to the
14 claimant after the initial interview, once the employer appeals.

15 Q Mr. Rubin, it is true that if the employer
16 wins his experience account is not charged with any payments
17 that meanwhile may be made to the employee?

18 A Your Honor, you asked that question of Mr.
19 Berzon.

20 Q Yes.

21 A The answer is that the employer is
22 definitely affected. His reserve account is not charged; that's
23 true. But, the balancing account to which he also contributes,
24 is affected and in any year or years --

25 Q What's the balancing account?

1 A This is another unemployment insurance
2 term. When the reserve accounts are depleted to a certain
3 level then the balancing account may be affected and the rate
4 will go up.

5 Q Everyone's goes up?

6 A Just the -- for all the employers, not
7 the individual --

8 Q Not just for this employer?

9 A That's correct, Your Honor, but let me just
10 refer to you (a) appendix 50 to 52 and the appendix 75 to 76.
11 I believe on those pages it's demonstrated what the effect is
12 on the employer and one more reference: there was an amicus
13 brief filed by a group of employers and I believe that brief,
14 together with the affidavits, demonstrates very graphically how
15 actual employers are affected.

16 Now, we feel that in answer to the central issue
17 as to whether due process is violated, we feel, of course, that
18 the answer is "no; it is not."

19 Q That is if we assume that that is the
20 central issue. Mr. Berzon doesn't reach that. The statutory
21 scheme affords the basis for disposing of the case and of course,
22 we're going to dispose of it on that basis.

23 A Yes, Your Honor, and Mr. Justice Harlan
24 posed that early in my argument, and I have been considering
25 that. The question as to whether we make the payments when due,

1 is a statutory question but I believe that it's also inexpli-
2 cably bound up with due process considerations. And I believe
3 that if you find that we are making the payments when due,
4 then this will implicitly validate it on due process grounds.

5 Now, perhaps I'm wrong, but we feel that these
6 are bound up together.

7 Q You mean it always violates due process
8 when a person against whom the judgment is rendered doesn't pay
9 it off

10 A Certainly. No, Your Honor, we are con-
11 tending, as a matter of fact, precisely the opposite: we are
12 contending --

13 Q I understood you to talk about due process
14 as though that was what you were arguing.

15 A Well, Your Honor, we are saying that when
16 a person wins at a trial court, let's say, and gets a judgment,
17 he is not entitled to be paid right then in a court judgment,
18 let's say. The defendant has a right to appeal the payment
19 stage pending the appeal; the prevailing party does not get
20 payment right away.

21 Q I can understand your argument now; that
22 part, but I didn't understand what you said before.

23 A I'm sorry, Your Honor; I hope that makes
24 it a little more clear.

25 Let me add this, Your Honors: we also put into our

1 brief a statement that perhaps a lesser delay, a lesser number
2 of weeks, might satisfy due process considerations. There is a
3 delay of some six or seven weeks during this appeals period.
4 Right now the backlog is being reduced and we believe that we
5 can hand that delay down to between three and four weeks and
6 a lesser delay, we think, would help a claimant; he wouldn't be
7 as prejudiced and we believe this would fall well within due
8 process considerations.

9 There is one more point that was made by --

10 Q What is the subject matter in most -- what
11 is the title in most of these employer appeals; does it have to
12 do with the circumstances under which the employment was ter-
13 minated?

14 A That is correct.

15 Q The employer claims he's discharged for
16 cause and the employee claims that he was justified in his
17 conduct, as here.

18 A Exactly, Your Honor. That's exactly right.

19 And let me just reiterate: that this is a viable
20 system. Ninety-eight percent of the time this system works with
21 extreme expediency and dispatch and it's only in these two per-
22 cent where we feel we have to give the employer a chance to have
23 a full hearing and to have his views aired and get his decision.
24 We believe we can pull the delay down to three or four weeks and
25 many claimants, as you well know, have severance pay and

1 other assets available. We believe they could weather this
2 delay.

3 Thank you, Your Honors.

4 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
5 The case is submitted.

6 (Whereupon, at 1:17 o'clock p.m. the argument in
7 the above-entitled matter was concluded)
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