IN THE SUPREME COURT OF THE UNITED STATES

ABE LAVINE, ETC., Appellant	:	
v.	:	No. 74-1137
RONALD MILNE, ET AL	:	

Washington, D. C.

Tuesday, December 2, 1975

The above-entitled matter came on for argument at 10:06 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MRS. AMY JUVILER, Assistant Attorney General of the State of New York, Two World Trade Center, New York City, New York 10047
For Appellant

GERALD A. NORLANDER, ESQ., The Legal Aid Society of Westchester County, 56 Grand Street, White Plains, New York 10601
For Appellee (pro hac vice)

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in 74-1137, Lavine against Milne.

Mrs. Juviler.

ORAL ARGUMENT OF MRS. AMY JUVILER

ON BEHALF OF APPELLANT

MRS. JUVILER: Mr. Chief Justice and May it Please the Court:

This appeal presents the issue of whether legislatively-created rebuttable presumptions in civil cases will continue to be hospitably treated by the Court as long as there is some rational connection between the facts proven and the facts presumed.

Appellant, the Commissioner of Social Services of the State of New York, appeals to preserve his position that this established standard is the appropriate measure for judging rebuttable presumptions in these cases.

It is also his position that the statute, the presumption in Section 131-11 of New York Social Services Law, which was declared invalid on its face by a three-judge district court on a motion for summary judgment is, in fact, valid under the established standard.

The presumption is contained in a statute governing eligibility for public assistance in New York State.

The statute provides that a person who voluntarily terminates his employment or reduces his earning capacity for the purpose of obtaining public assistance or increasing his grant is ineligible for public assistance for a period of 75 days.

The presumption, which was declared invalid below, is an evidentiary rule for determining whether the purpose of the person in quitting his job was to obtain public assistance.

That presumption is triggered only when the person voluntarily terminates his job and when he applies for public assistance within 75 days.

Then and only then is he presumed to have terminated for the purpose of obtaining public assistance.

The statute applies to applicants for AFDC as well as to the state-created Home Relief Program. However, no plaintiff was an applicant for AFDC and the specific statutory and regulatory provisions apply differently in the cases of AFDC applicants.

Both parties now agree that the court below erred in extending its order to include AFDC applicants and question number 3 is no longer at issue between the parties.

Therefore, we will address ourselves solely to

the application of this presumption to applicants for the state-aided Home Relief Program.

Home Relief is the assistance provided by New York State to persons who are not eligible for federal categorical assistance. That is, persons who Congress has not deemed to be the most needy people. And because it is totally supported by the public money from the treasuries of the state and local governments in New York, terminations of eligibility are totally governed by state law and the issue presented in this Court is only the validity of that state law under the Constitution.

QUESTION: It is only the validity of the presumption, is it not?

MRS. JUVILER: That is correct.

QUESTION: Not of the substantive law that disallows Home Relief for somebody who has quit his job for the purpose of going on Home Relief.

MRS. JUVILER: That is correct.

QUESTION: For the first 75 days, not the substantive law. That is not in issue here, is it?

MRS. JUVILER: Well, that is the precise form of the order, is to declare the presumption invalid but as a practical matter, it precludes this very-sensitively-drafted statute from having a practical effect.

QUESTION: Well, I may be a little obtuse, but

as you go on in your argument, maybe you can clarify it for me. I felt the other side of the coin is that, as a practical matter, invalidating this presumption is not very important, so long as the substantive law remains in effect, if the applicant has the burden of proof in any event.

MRS. JUVILER: Yes, your Honor. One of the things that we find amazing about this case is that the court below found this presumption to violate the plaintiff class' rights because if one reads the statute which clearly says that he has the burden of coming forward and proving each element of eligibility --

QUESTION: Right.

MRS. JUVILER: -- in any event, the presumption merely clarifies and makes explicit his duty to do so and promotes uniformity of application throughout the state. It does not add any burdensome procedural impediment to his obtaining public assistance.

QUESTION: Well, that is what I gathered from reading the briefs and if that is so, then the invalidation of the presumption does not hurt the state's position very much, does it?

MRS. JUVILER: Yes, it does.

QUESTION: If at all.

MRS. JUVILER: Yes, it does, your Honor.

QUESTION: How?

MRS. JUVILER: The major reason that it does is that it is an injunction. The Appellant, the Commissioner of Social Services, and his agents in the local departments are now enjoined from enforcing this presumption, which means that they are enjoined from requiring a person to come forward and produce evidence of why he terminated his employment.

QUESTION: Well, if the substantive law remains wholly valid that a person is not eligible for Home Relief if he, for the first 75 days after the termination of his employment, if he has terminated his employment for the purpose of going on Home Relief.

He has to prove his eligibility. He has the burden of proof.

MRS. JUVILER: That is correct, your Honor.

QUESTION: And that remains true under this Court decision, whether or not it is going through the motions of invalidating this statutory presumption and if that is true, what difference does it make?

MR. JUVILER: The difference that it makes is as follows:

There is an injunction against Appellant from specifically requiring a person to produce evidence of the purpose. Therefore, while there is a general duty to

produce each element of evidence to prove each element of eligibility, the eligibility under 131.11, that is, the purpose for which you terminated your employment, cannot be produced or at least there is a considerable cloud on a local agent who requires a production on the one hand or on the other who made a determination unfavorable to the applicant when the record was silent as to his purpose.

That is the effect -- that is the effect of the presumption.

Now, while we agree with the court that the presumption did not add to the procedural burdens, when a court invalidates a statute and enjoins a party, he is put at his peril to continue to operate under the underlying statute in which he could impose that duty because he is subject to contempt.

I want to note that there has already been an effort to find Appellant in contempt in this case.

QUESTION: An applicant for Home Relief still has the burden of proving his eligibility, does he not?

MRS. JUVILER: I believe that that will be up to this Court to determine --

QUESTION: Well, isn't that correct as a matter of New York law?

MRS. JUVILER: Yes, except the injunction in this case raises very considerable doubt.

QUESTION: Isn't that correct as a matter of general law?

MRS. JUVILER: Yes.

QUESTION: An applicant for anything has to prove his eligibility for what he wants.

MRS. JUVILER: Yes, your Honor, that is correct.

QUESTION: I take it that you are saying to us now that this injunction does, in fact, impinge upon substantive law.

MRS. JUVILER: Yes, I think it makes it effective because of the nature of this very sensitive statute. Since the statute is only invoked when the person has terminated his employment for the purpose of obtaining public assistance, the next question for the legislature is, how do you measure a person's purpose?

And since it is always matters that are totally within his control, they place the burden explicitly on the applicant to produce credible evidence of his purpose, that his purpose was not to obtain public assistance when he quit his employment and without the presumption -- whether the presumption as explicitly written and clarified under the legislative program or the general rules of law which would enable the local administrator to enforce such a presumption, without the ability of the local administrator to put the specific burden of proof on the applicant, this

statute is unworkable.

QUESTION: Well, let me just try one more time and then --

MRS. JUVILER: Right.

QUESTION: -- I'll try to stop bothering you then and in the course of your argument maybe you can explain it.

Had there never been this presumption as a matter of New York law --

MRS. JUVILER: Yes?

QUESTION: -- it wouldn't have -- the applicant would have still had the burden of proving his eligibility.

MRS. JUVILER: Yes.

QUESTION: And in fact, the law generally would have been as though this presumption were written into the law. Wouldn't it?

MRS. JUVILER: That is correct, your Honor. The local agency could have required him to produce the evidence.

QUESTION: Right. Had there never been any statutory presumption.

MRS. JUVILER: The only --

QUESTION: And, therefore, never been this lawsuit.

MRS. JUVILER: Yes.

QUESTION: The applicant still has to prove his eligibility.

MRS. JUVILER: That is our position, that he still could be required to. The only difference the presumption made, and it is a subtle difference and I do not say that it is constitutional import, that is the whole weight of our argument, that the court below had no grounds whatsoever to find that this presumption violated anybody's constitutional rights but the only difference the presumption made was that it clarified this specific duty and it promoted uniformity throughout the district and considering the complicated administrative scheme we are talking about, that is not an insignificant matter.

QUESTION: Is there any reason why New York couldn't have provided that no person should be eligible for home aid until 75 days after he voluntarily quit his job, period?

MRS. JUVILER: There certainly is no reason, your Honor. Our near neighbor, New Jersey, does have that requirement. They say that any applicant for aid for the families of the working poor are ineligible for assistance after voluntary termination for 90 days.

Furthermore, in the federal AFDC Program for unemployed fathers, the entire family is ineligible for assistance for 30 days, irrespective of whether the person

voluntarily terminated or whether he was fired, as long as after termination of employment he was ineligible for 30 days so that there are parallel statutory schemes to say nothing of numerous parallel regulatory schemes which provide just that.

QUESTION: So the New York scheme is actually more liberal in that regard than, say, New Jersey --

MRS. JUVILER: Right.

QUESTION: -- if you have correctly described New Jersey.

MRS. JUVILER: That is correct and, indeed, I think that anyone looking at this statutory scehme sees the very narrow road that our legislature travelled. They could have done what Arizona and Delaware did and said that no employable person is eligible for the state's general assistance or they could have done what New Jersey and the Federal Government did and say that nobody is eligible after a voluntary termination of employment or they could have said, nobody is elegible after a voluntary termination for the purpose of obtaining public assistance.

And they did not do any of those things. They said, a person is elegible who voluntarily terminates for the purpose of obtaining public assistance after 75 days so that this is a very, very permissive statute and that is why the essential of the evidentiary rule that is present

here is so important because it is the only thing that allows this permissive statute to have any practical effect because if you switched the burden and imposed the burden on the State Department and the local agencies to prove purpose, you would have completely shackled them and I want to point out that Appellees do suggest that the state agency and the local department have an easier time proving the purpose with which the applicant left his employment than -- than the employment.

I think that it is plain that the applicant, no matter how uneducated and how poor he may be is in a better position to tell the agency why he quit his job than the agency, with all the learning in the world, is able to tell him why he quit his job.

QUESTION: In this particular case the Plaintiffs don't seem to have quit their jobs. They seem to have been fired.

MRS. JUVILER: Yes, your Honor. That is correct.

The problem in this case was not whether the Plaintiffs had a complaint. I think there are two problems in this case that were not really at issue.

It is clear that the main Plaintiffs, except for Joseph Beverly, had a very serious complaint and it is also clear that the statute of which they were complaining was

obviously valid by all the rules of procedural and substantive due process that have ever been enunciated by any court who seriously gave it a moment's thought.

And the problem that this case created was a terrible mix-up of these two things.

One, the Plaintiffs had this complaint about the application statute and the court, probably impatient because of the serious misapplication of the statute, decided to knock out the presumption.

Knocking out the presumption did not help Milne, Streeter or Lee.

QUESTION: It didn't, right.

MRS. JUVILER: Because the presumption was not applied to them. They were fired from their jobs.

QUESTION: Well, they were victims of maladministration by the State of New York under the statute.

MRS. JUVILER: Yes, we -- well, we don't even concede that it is under the statute.

QUESTION: Well --

MRS. JUVILER: It flies so much in the face of the statute.

QUESTION: They were victims of unfair administration of the law.

MRS. JUVILER: Administration of the law without a question and we are not here defending that

maladministration --

QUESTION: Right.

MRS. JUVILER: We have separated ourselves from it since the very beginning. Indeed, the local commissioner was separately represented and the decision below came down in which the presumption was invalidated on its face.

He did not appeal because there was no finding against him. The only thing that really we are here defending is the statute which really did not cause any of the hardships that are outlined below and that is exactly the posture of this case, Mr. Justice Stewart.

I want to point out why the presumption is inherently rational.

QUESTION: Mrs. Juviler, Mr. Justice Stewart is correct that it wouldn't make any difference whether the presumption is in or out of the case. Then there is hardly any case or controversy about that statute and the District Court should never had adjudicated it and in this event, you would vacate and dismiss the case.

MRS. JUVILER: No, your Honor --

QUESTION: And you wouldn't really care about that, would you?

MRS. JUVILER: You mean about this presumption particularly?

QUESTION: Well, I mean the judgment of

unconstitutionality would be vacated.

MRS. JUVILER: If we talk about the second phrase, yes, that is true, except for the fact that it isn't the presumption.

First of all, the presumption was deemed necessary by the legislature. It may seem petty at this stage when we are in this high court to discuss the minor service that it performs of clarification and uniformity but the legislature did deem it necessary and did formally in its sovereign power enact this presumption.

Therefore, for a court to enjoin it and declare it invalid, they have to be something unconstitutional and that very decision itself demands reversal.

Secondly, the presumption as the phrase in the statute itself may not be essential but the idea of the presumption is essential, the idea that the person can be forced to have the burden of proof, the burden of coming forward and, in the presence of silence on that subject, he can be deemed to have terminated for the purpose of obtaining public assistance.

Those are the three functions of the presumption and those are not frivolous.

So those are the two reasons why this appeal is here. I understand your Honors' impatience with such an innocuous presumption and it is, frankly -- been our

impatience from the beginning of the case. If we had been more patient, maybe we would not be here.

I do want -- because we -- our very obviously valid presumption was declared invalid, I don't want to miss my opportunity to explain to you why, in very simple terms, it is valid and that is that the relationship between the facts proved in the voluntary termination and the early application for public assistance, why they have an internal rationality and it is clear that income from income from employment is so important to us all, rich, middle class, poor, that we do not forego that major source of income without some idea of where our next source of income will come. If, after voluntarily giving up that one major source of income, we shortly thereafter appear and apply for another major source of income, it is rational within the terms of the constitutional rule to assume that the reason that we gave up the one source of income was to make ourselves eligible for the second source of income, as long as we have an opportunity to present evidence to the contrary if this was not the case.

Secondly, there is a temporal relationship between these two actions which has long been the basis of many rebuttable presumptions which are cited in our brief and in many future administrative schemes it is important that this device not be clouded by a decision such as that

rendered by the court below.

Therefore, it is clear that this rebuttable presumption allows for the individualized determinations which this Court has so long favored.

Irrebuttable presumptions have been criticized just because they do not provide that kind of individualized determinations and it is surprising to be found here, having to defend under the due process clause the very individualized determinations which have so long been held up as an example.

The Appellees also claim that the presumption is invalid under the equal protection clause.

While the court below did not reach that question, analysis under the equal protection clause only makes more cogent the validity of this presumption.

First of all, the equal protection standard is the same standard as the due process standard of rationality.

Secondly, if we look at the classifications in the statute, we see how reasonable the statute is. The distinctions are between people who quit their jobs and people who don't quit their jobs, very closely related to the purposes of the statute, which is to deter people from leaving their jobs without the means of subsistance in the near future, to encourage them to provide for themselves in

the near future and to limit the finite resources of the state to people most in need.

And the second classification under the statute is the difference between people who recently quit their employment and became eligible for public assistance and those who not-so-recently quit their jobs to become eligible.

Both of those are not attackable as classifications which could in any conceivable sense violate the equal protection clause.

I do want to point out that the procedures for dealing with the presumption are also at issue here in a limited sense. The Mobile Turnipseed rule, which is the rule of rationality which we have discussed, is a two-fold rule.

One, it requires that a presumption have a rational relationship between the facts proven and the facts presumed.

And the second part of that rule is that there must be an opportunity to rebut.

Well, the court below did not find that there was not an opportunity to rebut. There were some footnotes which made some suggestions that we feel were unjustified and, furthermore, to demonstrate the clear validity of this presumption, we did discuss the procedure for

rebuttal in our brief and they were framed as question number two.

However, that question only relates to the statute and regulations on their face, not as to the statute and regulations as applied which were issues of fact debated in the court below and not available for a decision on summary judgment.

In general, we should look at the context of these hearings. This is an administrative proceeding for application for state-created benefits and that the procedure before the social services department is informal and the hearing regulations -- the regulations regarding that informal procedure make it clear that no finding of ineligibility can be rendered without a fair opportunity given to the applicant to rebut.

Furthermore, that decision is subject to supervisory review. In all respects it meets the standards of Torres versus New York State Labor Department and those standards are stricter than are necessary in this case which is an application proceeding.

Furthermore, there is a fair hearing procedure in the state court which is regulated now and during the entire pendency of this suit by an order of Judge Motley of the Southern District Court in a case in which applicants all were members of the class protected, Nelson

versus Sugarman.

Therefore, we regard this presumption as a clearly valid exercise of the legislature's prerogative to establish evidentiary rules and as such, we request that the decision below be reversed in all respects.

I'd like to reserve my additional time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Norlander.

ORAL ARGUMENT OF GERALD A. NORLANDER, ESQ.

ON BEHALF OF APPELLEES

MR. NORLANDER: Mr. Chief Justice and May it Please the Court:

The record shows that 21 needy persons were sanctioned due to the operation of the statutory presumption.

My adversary contends in her reply brief now that 20 out of those 21 persons did not actually terminate their employment and I will turn to that question a little later. Since my adversary does concede at page 5 of the reply brief that the presumption was properly applied in the case of Plaintiff Beverly, I shall turn first to the question of the rationality of the presumption used against him.

QUESTION: In your view, Mr. Norlander, could the

legislature of a state constitutionally provide that no one would be eligible for any benefits of any kind for 75 days?

MR. NORLANDER: That question, your Honor, I believe would raise a serious problem under the equal protection clause. I think it would be a close question.

QUESTION: Why would it raise any problem at all under the equal protection clause?

MR. NORLANDER: Well, your Honor, we are dealing here with a benefit that has the impact of -- it is the last resort for a person who is destitute.

Now, whether the creation of a class of persons that is totally destitute and the rejection of their request for assistance would create a class of persons with no legitimate means of survival is a fact question that would have to arise under the statute, under such a statute.

I think that is probably what would happen if such a statute were written in New York.

QUESTION: What would you say about a state's action in providing for no welfare whatever?

MR. NORLANDER: Well --

QUESTION: Just no welfare program, rejecting all matching funds of the Federal Government and saying, in this state we are not going to have any program.

MR. NORLANDER: This Court has never held that

welfare is a constitutionally required benefit.

But on the other hand, the Court has never held that once a state offers a benefit, it may arbitrarily withdraw or deny that benefit.

QUESTION: Well, but supposing -- taking the Chief Justice's question -- it isn't any withdrawing of it. It is simply saying, for 75 days after you voluntarily quit your work, you are not eligible for welfare.

I can't imagine that would violate the equal protection clause.

MR. NORLANDER: Well, I don't see what rational purpose that would advance. I think it is a close question. The rational basis test would obviously apply in this situation.

I think that one would probably, one might even concede that it might be rational on its face. Perhaps the legislature could imagine a person who wanted to be on welfare would be encouraged to save his money for 75 days so he could survive for that time and then he could receive the benefits.

And legislature might conceive that that would rationally be advanced and encouraged by such a rule but in operation I am afraid that under such a statute I think that experience, at least in New York State, would show that such persons who would be rejected would be left with

virtually no legitimate means of survival.

QUESTION: Well, does the Constitution prevent that result?

MR. NORLANDER: Well, but what I am saying is that a class of persons would be formed as a result of the operation of that statute and it is rather hypothetical at this point. I don't know whether that class would exist. It would depend upon the record in the case.

I doubt that the creation of such a class of persons would rationally advance either the direct purposes of the New York Social Services Law or the purposes of that statute.

QUESTION: Well, but it is up to New York legislature to decide what will advance and what will not advance the purposes of the statute, isn't it?

MR. NORLANDER: Well, I would say that in operation the question would probably boil down to the question as to whether such a classification as applied would violate the equal protection clause. Now, I don't -- it might be valid on its face.

But I don't see that that question is before the Court. Most of my adversary's arguments tend to relate to the justification of the first sentence of the statute and we contend that the validity of the presumption is not measured by the validity of the substantive rule. We -- the

question before the Court is really whether the state has adopted a fair or a rational means of determining who is to be sanctioned and who is not to be sanctioned, who shall receive assistance and who shall be sanctioned and who shall have 75 days worth of benefits forfeited.

QUESTION: Well, it is who should be eligible for Home Relief and who should not. It is not a matter of a sanction, is it? It is a matter of who gets benefits.

MR. NORLANDER: Well, I think the record is quite clear in this respect, Mr. Justice Stewart, that at a very practical level we are not dealing with a label of a sanction but we are dealing with -- with --

QUESTION: Eligibility.

MR. NORLANDER: I think that the record shows that in the case of Milne, the record at Appendix page 29; Westbrook, at page 242, Brownlee, 304, Reid, at 291 -- all of these cases, they were sanctioned and the workers, I believe, by the use of that, the common use of that word, realized that they were in the business of punishing these persons for doing something that they had done wrong.

QUESTION: As I understand your sisters on the other side, they concede the maladministration of this law.

MR. NORLANDER: Well, I would point out, of course --

QUESTION: With respect to 20 out of the 21

Plaintiffs.

MR. NORLANDER: Well, we don't concede that and, in fact, they have taken a reversal of position in their papers before the Court on that question.

Let me point out that in the main brief my adversary says that Milne -- at page 10 -- "Was denied assistance by the Westchester County Department of Social Services on the basis of New York Social Services Law 131(11) on November 16, the day he applied."

And in the jurisdictional statement at page 9, virtually the same statement is made by my adversary.

QUESTION: Well, Mr. Norlander, the maladministration in this case is not before us, is it?

MR. NORLANDER: Mr. Justice Marshall, I believe that the maladministration of the --

QUESTION: I thought the only thing before us was the knocking down of the statute as being unconstitutional?

MR. NORLANDER: Well, one of the questions presented by my adversary's jurisdictional statement is whether Plaintiffs had a fair opportunity to rebut it.

We contend that the record shows, not maladministration, but the lack of a fair opportunity to rebut the presumption and the particular vice of an arbitrary presumption is that innocent persons, who no one

applying commonsense and experience to the facts of the case would ever sanction --

QUESTION: Well --

MR. NORLANDER: -- on this kind of point.

QUESTION: -- as to the people you represent, they quit their job --

QUESTION: They were fired.

QUESTION: -- or fired, either one. For this point I don't see any difference. And you don't expect the welfare people to come to them and say, "Here is the money."

They have to go and ask for it, don't they?

MR. NORLANDER: That's right.

QUESTION: And don't they have to "qualify"?

MR. NORLANDER: Oh, yes. Ordinarily --

QUESTION: And if administering the qualifications standards the officer does wrong, is that ground for knocking out the statute?

Yes or no.

MR. NORLANDER: It --

QUESTION: The answer is no, isn't it?

MR. NORLANDER: The answer is sometimes yes if the statute as applied is applied in an unconstitutional or an arbitrary manner.

QUESTION: Well, this statute was not knocked out as applied, was it?

MR. NORLANDER: The district court judgment held that the statute was unconstitutional on its face.

QUESTION: I thought so. And that is not before us.

MR. NORLANDER: Well, I -- the question of the --

QUESTION: The validity, facial validity of the statute is what is before us.

MR. NORLANDER: That is before the Court, your Honor.

QUESTION: And what else?

MR. NORLANDER: And the Plaintiffs have urged all along through this case in their motion for summary judgment and it was explicitly mentioned that we moved to have the presumption declared unconstitutional, both on its face and as applied and the critical claim in the application of the presumption is that Plaintiffs were denied a fair opportunity to rebut the presumption because they were denied an effective opportunity to have the hearing, which was delayed and my adversary raises that question specifically in question two, the jurisdictional statement where she asks this Court to determine whether Plaintiffs were given a fair opportunity to rebut the presumption.

QUESTION: Is your second point the absence of a fair opportunity to rebut the presumption based on the

facts of this case or is it a challenge to the procedure prescribed by regulations?

In other words, are we talking here about validity of a statute or a regulation or maladministration of the statute with respect to these particular claimants?

MR. NORLANDER: Well, the facts in the record illustrate the problem but our contention is that the applicable regulations and laws are not really in dispute and we have a situation where there is no law or regulation raquiring the defendant to notify people even of the existence of the presumption, nor, obviously, are people advised how to rebut or what kind of evidence rebuts it and that the hearings -- the only hearings they are offered by regulation, by statute, are -- need not be decided, again by regulation, until up to 90 days.

QUESTION: How does the burden to establish eligibility differ from the burden to rebut the presumption?

MR. NORLANDER: I think the record is quite clear in the Beverly case. It, obviously, every applicant has the burden of coming forward to submit information.

He fills out the application form. He has the obligation to answer any question that is asked about that. He has the obligation to produce verification.

QUESTION: And is one of the things he must show, that he did not voluntarily leave his job?

MR. NORLANDER: Well, obviously he will be asked why he left his employment. If he says, "I left in order to qualify for public assistance," I assume there would be no need for the presumption.

On the other hand, it is quite clear in the record of the Beverly case that the mere fact of recent employment termination is given sufficient probative weight to carry the presumed fact and that is why we are here today. It is not because Plaintiffs are being asked about why they quit work.

In fact, the postjudgment instructions issued by the Defendant there appear at the very last page of my brief on page 1c, actually, near the bottom of the page.

The implementing instructions now in force, as I understand it, direct the intake worker that they are not deny assistance unless he finds, and I quote, "From all available evidence as a fact that the applicant or recipient has quit his or her employment for the purposes of qualifying for public assistance."

QUESTION: Was that issued pursuant to the mandate or order of the court in this case?

MR. NORLANDER: Yes, your Honor. In the framing of the instructions after the judgment there was a colloquy in the district court and the District Judge Wyatt indicated that that was what the Court meant when it issued the

injunction that from now on, if there is to be a sanction imposed, it should be based upon the commonsense and experience of the case worker and they shouldn't use this rule that allows them to issue a notice, you quit your job. Come back in 75 days.

QUESTION: So this is the Court saying the Constitution requires this rather than the choice of the Department of Social Services.

MR. NORLANDER: No, the letter was drafted by the Department of Social Services. The Court merely enjoined the presumption. It did not issue any directives to the agency to draft this letter.

QUESTION: But the Court has no business telling the Department of Social Services anything other than that it be mandated by the Constitution.

MR. NORLANDER: Right. The judgment below merely says the presumption may not be enforced.

QUESTION: I take it that under New York law, if there is a hearing at some time, maybe 90 days, maybe -- well, whenever it is, if the applicant wins, I take it he doesn't get back pay, so to speak, back to the time when he should have been paid.

MR. NORLANDER: That is quite right.

QUESTION: Under the state law.

MR. NORLANDER: That is right. What we are

talking about here is that -- we are not talking only about $94 a month, which is the basic grant plus shelter for the individuals who appeared in the case because obviously, if there is a mistaken denial, as the record shows, the fair hearing process corrected a number of those and quite effectively. Except that, we are not just talking about $94, we are talking about what the use of that means to the Plaintiffs and -- yes?

QUESTION: I understand that but I just asked whether they did get back pay or not?

MR. NORLANDER: Yes.

QUESTION: And they did.

MR. NORLANDER: Yes. Yes.

Plaintiffs contend -- and contrary to what my adversary contends -- that the rational connection test denounced by this Court in Mobile versus Turnipseed does require affirmance of the judgment below.

The Court said in Mobile that there must be a rational connection between the given facts and the facts presumed and the Court consistently has relied upon commonsense and common experience to determine whether statutory presumptions satisfy the requirements of due process and/rational connection has been found lacking that where it cannot be said that the presumed fact more likely than not follows the given facts.

The question thus framed for this case, we believe, is whether it is more likely than not that the Plaintiffs terminated employment not for other reasons, but for the purpose of qualifying for public assistance.

We contend that commonsense and general experience teaches that people ordinarily do not terminate their employment in order to qualify for welfare benefits, but rather, for -- in order to resolve ordinary on-the-job conflicts, health problems, transportation problems, any number of other problems that a person would leave his employment for.

The Defendant himself recognizes these ordinary reasons and rules in the regulations and rules that he has promulgated in which he tacitly concedes that people who quit work due to illness, conflicts with their supervisors, strikes, discrimination, people who even have expectation of finding another job but don't find it -- he concedes that those are not -- persons who do that are not properly subject to the sanctions.

We contend that those reasons demonstrate the irrationality of the presumption.

QUESTION: Mr. Norlander, assuming that a man applies for Home Relief and the worker says to him, "Did you quit your job within the last 75 days?" and he says, "Yes." She says, "Why?" Isn't he obliged to say why?

MR. NORLANDER: Yes, he is.

QUESTION: Isn't he obliged to give, in great detail, why?

MR. NORLANDER: Certainly.

QUESTION: And the difference between that and the presumption is what?

MR. NORLANDER: The presumption allows the worker to really cease the inquiry at the time when it has found that the person recently terminated employment.

The fact of recent employment termination is given sufficient weight to allow presumption of the given -- of the presumed fact and as I think the record demonstrates, the accuracy of making these subjective determinations by welfare case workers is less than satisfactory and it is the -- the element of error is very, very high in this case.

The -- I would point out that if one would review the notices given to most of the Plaintiffs, we could see that the 75-day period was generally calculated as well as most people calculate periods of time but the 20 out of 21 instances -- the Defendant concedes -- the subjective purpose was erroneously determined.

QUESTION: If an applicant were asked whether he quit work to receive relief and the applicant answered no and that is all there was to it, and he didn't offer any other reason and there was no other inquiry, would the

presumption serve to reject his claim?

MR. NORLANDER: I don't know that the presumption would be needed there to reject that claim. If a person refuses --

QUESTION: Well, he just says -- he says no, I didn't quit work to get relief.

MR. NORLANDER: Well, my adversary did say in oral argument below that the presumption was necessary because you don't have to take a person's say-so and I suppose that the presumption operates to provide the presumed facts merely upon the fact that the person voluntarily terminated and the case worker is totally free to disregard the denial under that assumption.

QUESTION: The denial.

MR. NORLANDER: My adversary contends in her main brief at page 19 that Plaintiffs Milne, Lee, Streeter and Beverly engaged in unusual or suspicious behavior when they terminated their employment and requested assistance thereafter.

I would also contend that if my adversary is going to use the illustrations of Milne, Lee, Streeter and Beverly insofar as the rationality of the presumption, she tacitly concedes that they voluntarily quit or that the presumption should have applied with them.

QUESTION: Do any of these facts that you have

been talking about have anything to do with the declaration that the statute is unconstitutional on the face?

MR. NORLANDER: The events merely illustrate, your Honor, with respect to the facial issue, they merely illustrate the irrationality of the presumption. It is not -- you are quite right -- the facts with respect to the facial claim are illustrations of what happens. They are illustrations of the common reasons why people will leave a job and how they may not be able to find a new job or how their claim for unemployment insurance benefits may be erroneously denied.

The facts show that persons with health problems very often terminate employment and wind up applying for Home Relief.

And, in fact, the study shows that is the number one reason why.

In evaluating the rationality of the presumption, however, the Court has always looked to the facts in the record and the Court has looked to the facts in the case law and in the history of the similar presumptions and the Court has looked to legislative records and to other sources of information to ascertain whether common experience and commonsense present day experience support a presumption and so in that limited sense the facts in the record are relevant to point one in our brief.

The record does show, in fact, that most of the Plaintiffs first sought other work. In fact, Joe Beverly found a job as a janitor for a week. Plaintiff Milne had a record of 17 years of continuous employment and this illustrates that the presumption was neither easy to rebut nor rational.

Not only is it contrary to common sense that people would leave their jobs in order to qualify for welfare benefits, but looking at the nature of the Home Relief program in New York in its totality, there is simply nothing in that program that would cause this to depart from the common sense approach to the presumption.

The entire Home Relief program is based on the concept of less eligibility and that means that, generally speaking, the program will be less desirable than working for a living.

For instance, as a precondition for receiving any benefits, a person must first register for any available work and even if there is unemployment in the local economy, he may be assigned to perform full-time work at a public works project or work relief program for no extra pay.

Also, the Home Relief program has a stringent means test and the applicant must generally have depleted all of his savings, his assets. He may be disqualified for

owning an automobile. If he has equity in a home he will have to assign it to the Department of Social Services and all of these facets make it very undesirable for a person to give up personal possessions in order to qualify for public assistance and, finally, the benefits themselves, which are rent allowance plus $94 a month, or about $3.10 a day, are simply not the sort of benefits that would cause a person to ordinarily leave his employment for the purpose of qualifying for it.

Indeed, the benefits themselves are set at a scale to provide only for the bare necessities of life.

When one looks at the entire picture of the Home Relief program, the means test, the amount of benefits, the work rules and the other factors that --the intangible factors, perhaps, the stigma, all of these factors when combined with the ordinary reasons for terminating employment merely reaffirm what common sense tells us, that people just would not quit work in order to qualify for the benefits.

There is no evidence in the record to support the presumption and there is no evidence in the legislative record to support it.

My adversary contends, at page 10 of her reply brief, that there is no evidence available on the behavior of the Plaintiff class.

Plaintiffs submit that common experience and general experience is to the contrary and that the available empirical data actually show -- the best available information show that poor people and welfare recipients have the same kind of attitudes toward welfare and work as other people.

This is what the President's Commission on Income Maintenance programs found in 1969 in its report.

In the President's Commission report, they said, with respect to the question of the work attitudes of poor people -- and I quote, "Our observations have convinced us that the poor are not unlike the nonpoor. Most of the poor want to work. They to improve their potential and to be trained for better jobs. Like most Americans, the poor would like to do more with their lives."

QUESTION: How does that help you when the term used by that Commission is "Most"? If there are a substantial number who do otherwise, does that not warrant a legislative presumption?

MR. NORLANDER: My adversary contends that there is no evidence available with respect to that group.

QUESTION: But accepting this as evidence, which is not necessarily the case, accepting it as what someone thought about it doesn't support your position even as you read it to us.

MR. NORLANDER: The position of the President's Commission has been tested by a massive study in New Jersey in which the United States Office of Economic Opportunity spent $8 million over a three-year period to test the precise question whether people would quit their jobs in order to qualify for welfare benefits.

Basically, there are two ways to determine, I guess, whether people would quit work to qualify for benefits.

One would be to offer them a generous benefit without a work rule, which is what that experiment did, and the other way is to look at people who apply for welfare and find out why they are applying.

At both ends of those experiences we see that people have not quite work in order to qualify for welfare benefits and that interviews of people who do apply for welfare benefits and exhaustive studies of the reasons why people apply for welfare benefits all come up with common sense reasons, that people apply for welfare benefits because they couldn't find a new job, because they weren't covered by unemployment.

The number one reason in New York is health reasons.

These kinds of reasons are quite independent of any desire or motive to actually qualify for benefits.

Also, the experience under the work programs has found that most of people who are asked to go out and work actually are complying with the rules and so we really submit that the available information lends nothing to support the presumption and does confirm what common sense and common experience tell us, that the presumption is irrational.

Plaintiffs also contend that this presumption is an unfair rule to impose against the Plaintiffs. In Goldberg against Kelly, the Court stressed that fact-finding procedures should be flexible and they should be geared to the capacities of the parties.

We have here a class of persons who are not highly educated and who are not high-income persons. They are unlikely to be represented and they are unlikely to understand a sophisticated rule of procedure like the presumption that was invoked against them.

The Defendant has shown absolutely no legitimate justification for the practical use of this presumption and, in fact, the Defendant's Executive Deputy Commissioner swore in the court below -- and I quote from page 452 of the Appendix at the bottom of the page, the very last sentence, Executive Deputy Maher swore, "It is also clear that the determinations are based on evidence, not on presumption or legal conclusions."

And my adversary concedes at the top of page 18 in her reply brief that it would be possible to make the determination without the presumption.

The record shows that the presumption allows the exercise of arbitrary power by case workers. I do not think that any other conclusion can be reached from reviewing this record and the states concedes as much that the overwhelming majority of these instances were erroneous determinations. Adjectives are used that the presumption was repugnant -- that the use of the presumption was repugnant to the statute, that -- I see what she means, the first sentence of the statute.

QUESTION: Under the fairest and most valid law and regulations in the world you can have maladministration by ignorant or abusive administrators, can't you?

MR. NORLANDER: I would agree.

I believe my time is up. Thank you, your Honors.

QUESTION: Well, let me ask you -- you can answer the question.

MR. NORLANDER: Your Honor, I do believe that the fundamental concept of the rational connection test is that it prevents sweeping in of a broad class of persons and subjecting them to the liability imposed by the substantive rule and I think that the record demonstrates

that.

Thank you.

QUESTION: Mr. Norlander, let me ask you one more question. You, in your brief, at least, and I think you have intimated it again today, you say that while in terms this is a rebuttable presumption, in practical fact it is an irrebuttable presumption because by the time the fair hearing is held, the 75 days has passed.

MR. NORLANDER: Correct, your Honor.

QUESTION: Now, if that is true and if we accept the Wigmore theory that an irrebuttable presumption is not a presumption at all but merely a substantive rule of law, then aren't we faced with my brother Rehnquist's question of earlier in this argument, with, i.e., the substantive validity of a law that says that anybody who voluntarily terminates his employment shall be ineligible for Home Relief for 75 days?

Aren't we right up against that, if this is an irrebuttable presumption?

MR. NORLANDER: I think not, your Honor, because we have a situation quite unlike that in the case of Weinberger v. Salfi decided last term. In that case, it is true that the presumption there amounted to a substantive rule of law but in this case the statute does not purport to do that, the statute purports to make an individual

finding of fault.

QUESTION: But you tell us, in fact it is tantamount to an irrebuttable presumption.

MR. NORLANDER: We say that it has the same vice. We say that it is -- however, it falls under the rules for rebuttable presumption. By analogy, we --

QUESTION: You want to have it both ways.

MR. NORLANDER: Yes.

QUESTION: Okay.

MR. NORLANDER: Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mrs. Juviler?

MRS. JUVILER: Yes, I just have two things, Mr. Chief Justice.

REBUTTAL ARGUMENT OF MRS. AMY JUVILER

MRS. JUVILER: The first is, I want to point out to the Court the regulations that existed before the decision of the Court below which did make explicit the way the facts were found. They appear at -- they appear in the Appendix but they also appear more conveniently in our brief from pages 45 through 47 and those are the regulations with regard to this specific statute and the general regulations for how a determination of eligibility is made appear as an appendix to our brief at pages 1a and following.

Particularly I want to draw the Court's attention to the provisions of Section 351.8 of 18 NYCRR appearing at pages 4a and 5a which describe how determinations of eligibility are made and which make clear that there could be no determination of eligibility unless the agent found that the applicant had not produced credible evidence to overcome the presumption and furthermore, the agent is required to make investigation and to verify all conditions of eligibility.

With regard to the specific statute, the pre-existing regulations gave specific examples of kinds of reasons for leaving employment which would overcome the presumption such as illness, payment of minimum wages and so forth and the regulation went on and said, "Local districts, of course, should not consider this list as exhausting the possibilities under which a voluntary or provoked discharge is not subject to sanction but should continue to exercise reasonable discretion considering such factors as the lapse of time between termination of employment and the application for assistance."

That means, something less than 75 days, if the difference between 60 days and 15 is substantial.

"And also, and attempt to resolve the differences with the employer which led to the termination, ability to identify reasons alleged for termination and

and so forth as judgments as to whether or not the presumption has been overcome."

So the regulations were specific regarding the presumption and it was only after the decision of the court below that the determination had to be made without regard to the burden of proof.

I also -- I know that all of us have discussed this experimental data which is a bit far afield exhaustively for the Court and you have been very patient but I want to point out that the major error in all the experimental data is that they come up with the findings that most people won't quit their jobs and most people won't apply for public assistance.

And even if that is so, and we have no reason to doubt it, we are dealing here only with people who did quit their jobs and did apply for public assistance and therefore, all of that material is irrelevant.

Thank you very much.

QUESTION: May I ask you a question about procedural due process?

Appellee's brief makes some very categorical statements. I'll read one to you. "Plaintiffs were not afforded a hearing of any kind at the local agency."

And another point, "Plaintiffs were not afforded any opportunity to rebut the statutory presumption at the

time they applied for assistance."

Now, putting maladministration aside, describe for us what the procedure is.

MRS. JUVILER: At the time -- from the initial application?

QUESTION: Yes. Take an applicant who appears for the first time and describe the procedure. What opportunity does he have?

MRS. JUVILER: The applicant is interviewed and it is the interview which is the primary and original source of information.

He discusses his general situation and it comes down to the situation that he is a Home Relief applicant. He is not a caretaker for eligible children. He is not aged, blind and disabled. And they say, well, how have you been -- this is specific, I am giving specific reference to 351.8 -- "How have you been maintaining yourself in the past?" and he said, "Well, a week ago I had a job."

Let's talk about Joseph Beverly's specific case because we do have a live case.

Joseph Beverly said, "Four days ago I quit my job working on a chicken farm and I have moved down here to Geneva."

And they say to him, "Well, why did you quit

your job?"

And he says, "It wasn't worth it to me to continue because rent is so expensive and I was evicted because I just couldn't pay my rent, and therefore I left my job." That is the specific statement.

Now, they have been, and specifically in Beverly's case, which is our live case, they called the employer and, indeed, at the ultimate fair hearing which was heard only two weeks after this initial interview, the employer did testify and said, "I continue. I still want to hire Joseph Beverly back. He was a fine worker."

And the hearing officer determined -- as his decision specifically states, that he did not believe that Beverly quit his job because he could not find housing. He believed he quit his job and made it a finding of fact, an actual fact that he quit his job for the purpose of obtaining public assistance.

But with regard to somebody who might overcome the presumption, you might have a situation like this where the person comes in and says, "I quit my job because I am a legal stenographer and everyone told me that legal stenographer's jobs are available all over the place and I had a specific position that I had in mind and now two weeks later I find that that position is not available and it isn't so easy to find a legal stenographer's job."

That statement itself, because of its internal credibility, might be sufficient, whereas the statement that Justice White posited earlier, "No, I didn't quit my job for the purpose of obtaining public assistance" might not be credible and sufficient to overcome the presumption.

QUESTION: Do any regulations prescribe the procedure at this hearing?

MRS. JUVILER: Yes, there are two regulations, assuming --

QUESTION: If you just tell me what they are, then I can check them out.

MRS. JUVILER: Right, the regulations appear as an appendix to our main brief. These are the regulations which govern the application procedure and discuss the duties of the local agency to investigate. They discuss the duties of the local agency to inform the recipient of ineligibility and only to make the finding of--

QUESTION: Are these the regulations that commence at 1a of your brief?

MRS. JUVILER: At 1a and let me particularly draw your attention to page 5a. This deals with the conditions prior to a finding of ineligibility.

"Applications are denied and not accepted for assistance when, in the course of the application interview the information given by the applicant establishes without

the need for further investigation that he is ineligible.

"Ineligibility is determined in the course of or upon completion of the investigation or if the applicant refuses to comply with any requirements essential to the determination of eligibility."

Furthermore, the finding that must be made within 30 days, however, there are specific -- I just lost it -- unless there are specific adjournment granted to the applicant to produce additional information and there is a specific duty at page 3a, 351.5 for the applicant to produce the information. And be informed of his duty to produce it.

Specifically, at 351.2, appearing at pages 2a and 3a, he must produce evidence of his resources.

And the basic duty is at page 1a, the responsibility for furnishing information.

"Social Services officials shall provide applicants and recipients and others who may inquire with clear and detailed information concerning programs of public assistance, eligibility requirements therefore, methods of investigation and benefits available under such programs."

QUESTION: Are applicants given any pamphlet or written information describing the procedure?

MRS. JUVILER: Yes, your HOnor. They do have

many different detailed pamphlets available --

QUESTION: I'll just ask you one other question. The three-judge court did not reach the procedural due process issue. It is addressed by both of you in the briefs. If we should reach that point, is it your thought that we should remand to the three-judge court or try to decide it on this record?

MRS. JUVILER: I believe that the Court can decide the question of the validity of the opportunity to rebut on the face of the statute, not only 131 A(11) but the face of the regulations and the statute in effect.

However, the Court might prefer to remand it for consideration in deference to the court below, which specifically said it was not reaching the question.

The reason -- after all, I framed the questions and I will answer you in a more informal and direct way -- because of the footnotes in the opinion below, I did not feel that we could present this case to the Court without answering what we regarded as specific misstatements about the procedures available and it was not an unknowing thought with which we framed that question and presented it to the Court because we thought the footnotes in the decision presented enough question as to the procedures.

The particular footnote I have reference to is where the Court said, "There is no opportunity to rebut

before you get to the fair hearing," and we think that is decidedly not the case and could not leave that unanswered.

In fairness to our opponents, we couldnt just stick it in as a footnote ourselves and we decided to put it on its face.

QUESTION: Well, it has nothing to do with this case, but we were talking about Mr. Beverly a little while ago and the chicken farm. How much was he making?

MRS. JUVILER: He was making -- $2.25 an hour, was it? -- I think 40 hours a week, he was guaranteed 40 hours a week and he was making $2.25. Not much.

Thank you.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 11:11 o'clock a.m., the case was submitted.]