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The Preclusive Effect of Unemployment Compensation Determinations in Subsequent Litigation: A Federal Solution

Ann C. Hodges
University of Richmond, ahodges@richmond.edu

THE PRECLUSIVE EFFECT OF UNEMPLOYMENT COMPENSATION DETERMINATIONS IN SUBSEQUENT LITIGATION: A FEDERAL SOLUTION

ANN C. HODGES†

INTRODUCTION

The increase in employment termination litigation[1] has led to increased efforts to use unemployment compensation determina-

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† Associate Professor of Law, University of Richmond; B.A. 1973, University of North Carolina at Chapel Hill; M.A. 1974, University of Illinois at Urbana-Champaign; J.D. 1981, Northwestern University. Research for this article was funded by grants from the University of Richmond Faculty Research Committee and the Hunton & Williams Summer Research Fund. This article benefitted from comments on earlier drafts and from discussions of the issues with Ronald L. Adler, President of Laurdan Associates, Inc.; Paul E. Freehling, partner at Pope, Ballard, Shepard & Fowle, Ltd.; Richard W. McHugh, Associate General Counsel, UAW; and my colleague, Professor W. Clark Williams. I also acknowledge the valuable research assistance of John M. Craig, J.D. 1991, Judiann Chartier, J.D. 1992, and Bich Quyen Nguyen, Class of 1993, University of Richmond Law School.

1. Judicial acceptance of the theory of wrongful discharge has proceeded rapidly since 1980. J. DERTOUZOS, E. HOLLAND & P. EBENER, THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION 13 (1988). A study of court documents filed in Los Angeles since 1980 revealed a rapid rise in the number of wrongful discharge cases filed. *Id.* at 15. The number of wrongful discharge cases doubled between 1982 and 1987. BUREAU OF NATIONAL AFFAIRS, WITHOUT JUST CAUSE: AN EMPLOYER'S PRACTICAL AND LEGAL GUIDE TO WRONGFUL DISCHARGE (1989). The Bureau of National Affairs estimated that there were approximately 25,000 discharge cases pending at the time of its study. *Id.* The potential number of cases is far greater. An estimated 150,000 unjust discharges occur each year. M. ROTHSTEIN, A. KNAPP & L. LIEBMAN, EMPLOYMENT LAW 839 (2d ed. 1991).

Employment discrimination litigation also has grown exponentially in the past twenty years, increasing several times faster than the remainder of the civil caseload in the federal courts. Siegelman & Donohue, *Studying the Iceberg from its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1163 (1990); Donohue & Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 (1991). A primary factor fueling the growth of employment discrimination litigation has been the increase in unemployment. *Id.* at 990-91. Most of the growth in employment discrimination litigation has been in suits alleging discriminatory discharge. Siegelman & Donohue, *supra*, at 1164. Approximately 59% of employment discrimination suits allege unlawful discharge. Donohue & Siegelman, *supra*, at 1015.

tions to preclude subsequent litigation.[2] The number of cases holding that a decision in an unemployment compensation proceeding collaterally estops relitigation of the issue in a later lawsuit regarding the employee's discharge is not large. Nevertheless, courts in many states have recognized that preclusion will apply under appropriate circumstances.[3] Unemployment statutes typically pro-

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2. Res judicata and collateral estoppel are the two doctrines of preclusion. *See infra* notes 9-23 and accompanying text; Committee on Benefits to Unemployed Persons, *The Preclusive Effect of Unemployment Decisions in Subsequent Litigation*, 4 LAB. LAW. 69, 69 n.1 (1988). Res judicata prevents relitigation of claims on the same cause of action, while collateral estoppel prevents relitigation of identical issues in any cause of action. J. FRIEDENTHAL, M. KANE, & A. MILLER, CIVIL PROCEDURE 613 (1985). The preclusion doctrine most often relevant in the context of unemployment compensation decisions is collateral estoppel, since the later litigation is rarely on the same claim. *See* Committee On Benefits to Unemployed Persons, *supra*, at 69 n.3. Accordingly, this article uses the terms preclusion and collateral estoppel interchangeably to refer to the application of collateral estoppel.

There also have been efforts to bar unemployment compensation litigation based on discharge litigation. *See, e.g.*, Pennsylvania State Police v. Unemployment Compensation Bd. of Rev., 135 Pa. Commw. Ct. 71, 578 A.2d 1360 (1990); City of Columbia v. ESC, Unempl. Ins. Rep. (CCH) ¶ 8345 (S.C. Ct. Common Pleas 1981) (June 25, 1981); Pickaway Co. Gen'l. Health Dist. v. Administrator, Unempl. Ins. Rep. (CCH) ¶ 9582 (Ohio Ct. App. Aug. 12, 1985). Application of collateral estoppel in this context is beyond the scope of this article.

3. *See, e.g.*, cases cited *infra* notes 168-200 and accompanying text. As of 1989, fourteen states had enacted legislation barring use of unemployment compensation determinations in subsequent litigation. *Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 101st Cong., 1st Sess. 28 (1989) (testimony of Congressman Bruce A. Morrison); *see, e.g.*, WYO. STAT. ANN. § 27-3-406 (1990 Cum. Supp.); COLO. REV. STAT. § 8-74-108 (1986 Repl. Vol.). Ohio created a statutory prohibition on collateral estoppel in 1989. OHIO REV. CODE ANN. § 4141.28(5) (Baldwin Supp. 1991). In 1990, four additional states amended their unemployment statutes to prohibit estoppel based on compensation determinations. *See* Runner, *Changes in Unemployment Insurance Legislation During 1990*, 114 MONTHLY LAB. REV. 63, 63, 65, 66 (1991). While Runner cites six states as amending their statutes to preclude the use, in other proceedings, of information obtained in unemployment proceedings, *id.* at 63, the amended statutes of Minnesota and Kentucky do not appear to expressly bar preclusion based on unemployment proceedings. *See id.* at 65; KY. REV. STAT. § 341.190 (Baldwin Supp. 1990); MINN. STAT. ANN. § 268.12,12 (West Supp. 1992). In 1991, Georgia, Iowa, North Dakota, and Texas amended their unemployment compensation statutes to prohibit application of collateral estoppel based on unemployment compensation decisions. *See* Runner, *Changes in Unemployment Insurance Legislation in 1991*, 115 MONTHLY LAB. REV. 64, 66, 68 (1992); GA. CODE ANN. § 34-8-122(b) (Supp. 1991); IOWA CODE ANN. § 96.6.4 (West Supp. 1992); N.D. CENT. CODE § 52-06-37.1 (Supp. 1991); TEX. REV. CIV. STAT. ANN. art. 5221b-9(r) (Supp. 1992). *See also* Storey v. Meijer, Inc., 431

vide that employees who are discharged for misconduct or who quit without good cause are disqualified from receiving benefits.[4] These issues may be relevant in later action alleging either that the discharge was unlawful[5] or that the employee was constructively discharged unlawfully.[6] The potential overlap of issues raises the question of whether the doctrine of collateral estoppel should apply to preclude relitigation in the second forum. Both employers and employees have asserted issue preclusion arguments based on unemployment compensation decisions, and employers and employees as a group have both benefitted and suffered from the application of collateral estoppel.[7]

This article examines the use of the doctrine of collateral estoppel to preclude litigation of statutory and common law actions challenging employee discharge based on determinations in unemployment compensation proceedings. First, the article reviews the history of the doctrine of collateral estoppel and examines the policies underlying its application. Next, the article reviews un-

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Mich. 368, 429 N.W.2d 169 (1988) (according preclusive effect to unemployment compensation determinations incompatible with legislative policy underlying unemployment compensation statutes).

4. *See Unemployment Insurance*, 52 SOC. SECURITY BULL. No. 7, at 21 (July 1989); Saucier & Roberts, *Unemployment Compensation, A Growing Concern for Employers*, 4 EMPLOYEE REL. L.J. 594, 599 (1984).

5. Both statutory and common law actions challenging discharges involve inquiry into the reasons for dismissal. *See infra* notes 85-102 and accompanying text.

6. Constructive discharge is the employer's creation of a working situation that is so intolerable that the employee quits to avoid working under those conditions. Mazurak, *Effects of Unemployment Compensation Proceedings on Related Labor Litigation*, 64 MARQ. L. REV. 133, 146 (1980). The concept of constructive discharge has been recognized in various types of employment discrimination actions as well as wrongful discharge cases. *See, e.g.*, Buckley v. Hospital Corp. of Am., 758 F.2d 1525 (11th Cir. 1985) (constructive discharge under ADEA); Goss v. Exxon Office Sys. Co., 747 F.2d 885 (3d Cir. 1984) (constructive discharge under Title VII); NLRB v. Tricor Products, Inc., 636 F.2d 266 (10th Cir. 1980) (constructive discharge under National Labor Relations Act); J. P. Stevens & Co. v. NLRB, 461 F.2d 490 (4th Cir. 1972) (constructive discharge under NLRA); Bailey v. Binyon, 583 F. Supp. 923 (N.D. Ill. 1984) (constructive discharge under Title VII); Robson v. Eva's Super Market, Inc., 538 F. Supp. 857 (N.D. Ohio 1982) (constructive discharge under Title VII); Beye v. Bureau of Nat'l Affairs, 59 Md. App. 642, 477 A.2d 1197, *cert. denied*, 301 Md. 639, 484 A.2d 274 (1984) (constructive discharge actionable element in retaliatory discharge claim); Bratcher v. Sky Chefs, Inc., 308 Ore. 501, 783 P.2d 4 (1989) (constructive discharge is actionable element in retaliatory discharge claim); MONT. CODE ANN. § 39-2-903(1) (1987) (constructive discharge actionable).

7. *See* cases cited *infra* notes 108-201 and accompanying text.

employment compensation law and analyzes the cases that have considered whether unemployment compensation determinations have preclusive effect in later litigation. After examining the existing law, the article engages in a comparative analysis of the advantages and disadvantages of according preclusive effect to unemployment compensation determinations, in light of the policies underlying both collateral estoppel and unemployment compensation. This article concludes that application of the collateral estoppel doctrine serves few of the beneficial purposes that underlie the doctrine and has an adverse impact on the policies that motivated enactment and design of unemployment compensation laws. The article urges passage of federal legislation that would require states to deny preclusive effect to unemployment compensation decisions.[8]

I. THE DOCTRINE OF COLLATERAL ESTOPPEL

The doctrine of collateral estoppel, also known as issue preclusion,[9] precludes relitigation of an issue that has been conclusively resolved by one tribunal in a second forum that is considering a different but related dispute.[10] While the doctrine of collateral estoppel is currently viewed as an application of the doctrine of res judicata,[11] the two doctrines had very different origins.[12] Res judicata evolved from Roman law and provides that a prior judgment is conclusive in a second action that involves the same

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8. See *infra* notes 322-38 and accompanying text for discussion of proposed legislation that is currently pending in Congress.

9. *See* Vestal, *Res Judicata/Preclusion By Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723, 1723 (1968).

10. Comment, *Collateral Estoppel Effects of Administrative Agency Determinations: Where Should Federal Courts Draw the Line?*, 73 CORNELL L. REV. 817, 819-20 (1988). Collateral estoppel precludes relitigation of any issue that was contested and decided in the first action even where the second action is based on a different claim than the first. J. FRIEDENTHAL, M. KANE & A. MILLER, supra note 2, at 607.

11. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 426 n.19 (1983); Note, *The Collateral Estoppel Effect of Administrative Agency Actions In Federal Civil Litigation,* 46 GEO. WASH. L. REV. 65, 67 (1977). *See* Vestal, *supra* note 9, at 1723. The *Restatement (Second) of Judgments* uses the term res judicata generically to apply to both res judicata and collateral estoppel. J. FRIEDENTHAL, M. KANE, & A. MILLER, *supra* note 2, at 608. Both doctrines, res judicata and collateral estoppel, are doctrines of preclusion by judgment. *Id.* at 607.

12. Perschbacher, *supra* note 11, at 426.

parties and the same claim.[13] Application of res judicata serves, and is motivated by, the goal of finality in litigation.[14] Res judicata also serves the goals of judicial economy, fairness to litigants, and preservation of the prestige of the courts by preventing inconsistent judgments on the same claim.[15]

Collateral estoppel,[16] of Germanic origin, was based on the principle that the parties' actions in the earlier adjudication created an estoppel in the later litigation.[17] Initially, application of collateral estoppel did not require a final judgment in the earlier action because the estoppel was based on the conduct of the party in the prior litigation.[18] However, the doctrine has evolved to require a final judgment as a condition for application.[19] Despite the difference in origin, collateral estoppel serves the same goals as res judicata—finality, fairness, judicial economy, and judicial prestige.[20] The doctrine preserves finality of judgments and conserves judicial resources by preventing relitigation of an issue that was

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13. *Id.*; J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 2, at 607.

14. Res judicata applies to matters that were or could have been litigated in the earlier action. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 2, at 613.

15. Vestal, *supra* note 9, at 1723. Finality of judgments is not an end in itself, but rather has value because it furthers other goals, such as fairness to litigants, judicial economy, and preservation of the prestige of the courts. *See* University of Tenn. v. Elliott, 478 U.S. 788, 798 (1986).

16. Collateral estoppel is one form of estoppel by judgment which applies when the first and second claims are different. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 2, at 608. The other category of estoppel by judgment is direct estoppel, which applies when the first claim and the second claim are on the same cause of action. *Id.* Since res judicata typically precludes the second suit on the same claim, applications of direct estoppel are rare. *Id.*

17. Perschbacher, *supra* note 11, at 426. Estoppel evolved in English law to become "an incontestable presumption of the truth of the records made by the King's Court." J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 2, at 612.

18. Perschbacher, *supra* note 11, at 427.

19. *Id.* The finality required for application of collateral estoppel is not the same as for res judicata. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 2, at 659. For example, interlocutory orders and preliminary injunctions may have collateral estoppel effect, but are not final for purposes of application of res judicata. *Id.*

20. *See* Perschbacher, *supra* note 11, at 439. As noted, finality is important because it serves the goals of fairness, economy and prestige. *See supra* note 15; University of Tenn. v. Elliott, 478 U.S. 788, 798 (1986). Courts addressing the application of collateral estoppel have identified these same purposes for the doctrine. *See id.* at 798; Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979); Montana v. United States, 440 U.S. 147, 153-54 (1979).

decided in prior litigation, even if the earlier litigation involved a different cause of action.[21] In the second action, additional litigation is permitted only on those issues being raised for the first time.[22] The doctrine of collateral estoppel is applied in a number of contexts, and may serve each of its goals at different levels in different circumstances.[23]

Collateral estoppel is increasingly applied to give preclusive effect to findings by administrative bodies.[24] In *United States v. Utah Construction & Mining Co.*,[25] the United States Supreme Court held that a decision by the Advisory Board of Contract Appeals, an administrative agency, should be given preclusive effect by the court of claims in a contractual dispute between a contractor, Utah Construction and Mining, and the Atomic Energy Commission. While the decision was based upon the agreement of the parties and statutory construction of the Wunderlich Act,[26] the Court noted that its holding was in accord with general principles of collateral estoppel, and went on to approve the application of res judicata principles to administrative proceedings, stating:

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21. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 2, at 658.

22. *Id.*

23. Perschbacher, *supra* note 11, at 439. Perschbacher discusses the application of collateral estoppel primarily in the context of administrative proceedings and suggests that courts must balance the interests served by the application of collateral estoppel, focusing on the degree to which such purposes are accomplished in the particular case, with the adverse effects of such application, to avoid "results 'abhorrent to [our] sense of justice and to orderly law administration.'" *Id.*

24. *See* K.C. DAVIS, ADMINISTRATIVE LAW OF THE EIGHTIES: 1989 SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE 399 (1989); Note, *supra* note 11, at 66; Freehling, *Judicial Application of the Collateral Estoppel Doctrine to Administrative Agency Decisions* (unpublished manuscript on file at *The Wayne Law Review*). Professor Vestal suggests that courts are expanding the use of the doctrines of preclusion in order to deal with the significant increase in the workload of the courts. Vestal, *supra* note 9, at 1723-24. The courts have not only expanded the preclusion doctrines to apply to administrative decisionmaking, but also have expanded the use of the doctrines in other ways, such as abandoning the requirement of mutuality. Perschbacher, *supra* note 11, at 424; Vestal, *supra* note 9, at 1724. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (offensive use of collateral estoppel approved); Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313 (1971) (defensive use of collateral estoppel approved).

25. 384 U.S. 394 (1966).

26. 41 U.S.C. §§ 321-22 (1988). The Act permits "judicial review of decisions made by federal departments and agencies under standard 'disputes' clause in government contracts (footnote omitted)." United States v. Carlo Bianchi & Co., 373 U.S. 709, 710 (1963).

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose. . . . In the present case the Board was acting in a judicial capacity when it considered the Pier Drilling and Shield Window claims, the factual disputes resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. There is, therefore, neither need nor justification for a second evidentiary hearing on these matters already resolved as between these two parties.[27]

The *Utah Construction* court noted that its decision avoided unnecessary time and expense for the courts and the parties and encouraged the parties to litigate fully at the administrative level.[28]

In three subsequent decisions dealing with employment discrimination claims, the Supreme Court addressed the use of collateral estoppel in the administrative context.[29] In *Kremer v. Chemical Construction Corp.*,[30] the Court held that a state administrative decision, made without a hearing and affirmed by the state appellate court, precludes litigation of a Title VII[31] claim in federal court. The Court's decision was based on the statutory requirement[32] that the federal courts afford the same full faith and credit to state court judgments that would apply in the state's courts.[33]

Four years later, the Court held, based on its interpretation of the congressional intent underlying Title VII, that an unappealed state administrative finding does not bar litigation of a subsequent Title VII claim in federal court.[34] With respect to the plaintiff's

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27. 384 U.S. at 422 (citations omitted).

28. *Id.* at 419-20.

29. *See* Silver, *In Lieu of Preclusion: Reconciling Administrative Decisionmaking and Federal Civil Rights Claims*, 65 IND. L.J. 367 (1990) (well-reasoned criticism of the Supreme Court's current approach to use of administrative preclusion in employment discrimination cases).

30. 456 U.S. 461, *reh'g denied*, 458 U.S. 1133 (1982).

31. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race, color, religion, sex, and national origin. *See* 42 U.S.C. § 2000e (1988).

32. 28 U.S.C. § 1738 (1988).

33. 456 U.S. at 462-63.

34. University of Tenn. v. Elliott, 478 U.S. 788 (1986).

claim of race discrimination under the Reconstruction Civil Rights Acts,[35] however, the Court held that the federal court must give the unappealed state administrative finding the same preclusive effect that it would receive in the state court.[36] In order for preclusive effect to attach, the state administrative agency must have acted in a judicial capacity to resolve "disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate . . . ."[37]

In its most recent decision on collateral estoppel, the Court unanimously declined to give preclusive effect to an unreviewed state administrative decision in a subsequent federal action based on the Age Discrimination in Employment Act (ADEA).[38] While the Court recognized a presumption in favor of administrative estoppel,[39] it held that estoppel did not apply to bar relitigation

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35. Plaintiff's claim under the Reconstruction Civil Rights Acts was based on 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988 (1988). *Id.* at 790-91, 791 n.1.

36. 478 U.S. at 799 (quoting *Utah Constr. & Mining Co.*, 384 U.S. at 422). The court relied in part on its earlier decision in Allen v. McCurry, 449 U.S. 90 (1980), which held that § 1738 required state court judgments to be given preclusive effect in actions under § 1983, although the Court acknowledged that the decision was not controlling since § 1738 did not apply to administrative decisions. *Id.* at 794-95, 796-97. Critics of *Elliott* have pointed out the problems created in cases that join Title VII claims and claims under the Reconstruction Civil Rights Acts; preclusion will apply to one claim but not the other, although the claims may be based on the same operative facts. *See, e.g.*, Silver, *supra* note 29, at 391-94. In Lytle v. Household Mfg. Inc., 494 U.S. 545 (1990), the Supreme Court reviewed a decision in which the Fourth Circuit found that the district court's dismissal of plaintiff's § 1981 claim was "apparently erroneous" but nonetheless held that the district court's Title VII findings collaterally estopped plaintiff from litigating his claim under § 1981. The Supreme Court reversed, holding that in the absence of the erroneous dismissal of the § 1981 claim, plaintiff would have been entitled to a jury trial on the issues common to both claims. *Id.* at 551-52. Accordingly, the § 1981 case must be retried, and collateral estoppel could not apply to the court's determination because it would deprive the plaintiff of his right to a jury trial under the seventh amendment. *Id.* at 552-54.

37. 478 U.S. at 799 (quoting *Utah Constr. & Mining Co.*, 384 U.S. at 422).

38. Astoria Fed. Sav. and Loan Ass'n v. Solimino, 111 S. Ct. 2166, 2171 (1991).

39. The Court noted that:

> [collateral estoppel] is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have

of claims under the ADEA because of the congressional intent expressed in the statute.[40] The Court limited only the preclusive effect of administrative decisions not judicially reviewed, however.[41]

Since the Supreme Court's decision in *Utah Construction*, courts have applied the doctrine of collateral estoppel to preclude judicial litigation of issues previously determined by administrative agencies.[42] In deciding whether to apply the doctrine of collateral estoppel in this context, the courts have considered the traditional elements of collateral estoppel[43] as well as the factors cited by the Court in *Utah Construction*.[44] Collateral estoppel only applies where there is an identity of issues[45] and the original tribunal's determination is final.[46] The issue on which preclusion is urged must have been litigated in the initial action[47] and essential to the judgment.[48] In addition, the original tribunal must have had both subject matter and personal jurisdiction.[49]

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already shouldered their burdens and drain the resources of an adjudicatory system with disputes resisting resolution.

Id. at 2169.

40. *See id.* at 2171.

41. *Id.* While the *opportunity* for judicial review is sufficient to meet the general requirements for application of collateral estoppel, the Court here found that the language of the ADEA indicated that Congress intended to deny preclusive effect to *unreviewed* state administrative findings in judicial actions under the ADEA. *Id.* The Court expressly noted that § 1738, which had moved the Court to grant preclusive effect to state court judgments in the context of Title VII and § 1983, did not apply. *Id.* at 2170. *See supra* notes 30-33, 35-37 and accompanying text.

42. The RESTATEMENT (SECOND) OF JUDGMENTS § 83 (1982) expressly recognizes that with limited exceptions, "a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court."

43. The traditional requisites for the application of collateral estoppel are designed to insure that a party will not be precluded in the absence of a full and fair hearing on the issue in a competent forum. *See* Comment, *supra* note 10, at 823.

44. *Id.* at 827-28.

45. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 2, at 662; Comment, *supra* note 10, at 823. Originally there was a requirement of identity of parties as well, but that requirement has been virtually abandoned. Perschbacher, *supra* note 11, at 424 and n.14.

46. Comment, *supra* note 10, at 824; RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982).

47. This requirement is met if the parties to the initial action disputed the issue and the decisionmaker resolved it. Note, *supra* note 11, at 68.

48. *Id.* at 68-69; RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

49. Note, *supra* note 11, at 67; RESTATEMENT (SECOND) OF JUDGMENTS § 83, comment d (1982).

In addition to these traditional requirements of collateral estoppel, the *Utah Construction* factors require that in order for an administrative agency decision to preclude later litigation of an identical issue, the agency must have acted in a judicial capacity to resolve disputed issues of fact properly before it which the parties had an adequate opportunity to litigate in the proceeding.[50] The *Restatement (Second) of Judgments* sets forth the elements necessary for an agency to be acting in a judicial capacity.[51] The administrative proceeding must have contained the essential elements of adjudication which include:

> (a) [a]dequate notice to persons . . . bound by the adjudication . . .;
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> (b) [t]he right . . . to present evidence and argument . . . and [a] fair opportunity to rebut evidence and argument by opposing parties;
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> (c) [a] formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status, or a specific series thereof;
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> (d) a rule of finality . . .; and
>
> (e) [s]uch other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved and the opportunity of the parties to obtain evidence and formulate legal contentions.[52]

The *Restatement* also notes several exceptions to application of the doctrine based on administrative decisions. Preclusion will not operate if the statutory scheme of remedies permits a second claim.[53] Additionally, preclusion will not apply if the legislative policy indicates that the decision of the initial tribunal should not be given preclusive effect in subsequent proceedings or that the

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50. 384 U.S. at 422. There is some overlap between the traditional factors and those cited in *Utah Construction*.

51. RESTATEMENT (SECOND) OF JUDGMENTS § 83(2) (1982). In the section on the preclusive effect of administrative decisions, the *Restatement* has adopted the criteria set forth in *Utah Construction*. Silver, *supra* note 29, at 411.

52. RESTATEMENT (SECOND) OF JUDGMENTS § 83(2) (1982).

53. *Id.* § 83(3).

second tribunal should be free to make an independent decision.[54] These criteria have been used by courts to decide whether unemployment compensation determinations collaterally estop later employment-related litigation.

II. Unemployment Compensation and Collateral Estoppel

A. *The Unemployment Compensation System*

In order to analyze the application of collateral estoppel based on unemployment compensation decisions, an understanding of the administrative procedure for unemployment compensation claims is essential. The unemployment compensation system was established by the Social Security Act of 1935, which created a federal-state cooperative system for providing benefits.[55] The Act created incentives for the states to establish unemployment compensation systems,[56] and by 1937 each state had passed a federally approved law.[57] Using the federal requirements and a draft bill created by the Social Security Board as a basis for legislation, states enacted similar but not identical laws.[58] The following description summarizes the basic elements of the claims procedure, which vary somewhat from state to state.[59]

Initially, the employee files a claim for benefits with the state agency having responsibility for unemployment compensation claims.[60] The claim is investigated by a local deputy who gathers relevant evidence for benefit eligibility from the employer and the employee.[61] The deputy or the agency's central office then makes an initial determination of eligibility for benefits.[62] All states have

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54. *Id.* § 83(4).

55. *See* Larson & Murray, *The Development of Unemployment Insurance in the United States,* 8 Vand. L. Rev. 181, 188-89 (1955).

56. *See infra* note 283 and accompanying text (discussion of incentives).

57. Rosbrow, *The Unemployment Insurance System Marks Its 50th Anniversary*, 108 Monthly Lab. Rev. 21, 23 (September 1985).

58. *See* R. Hutchens, D. Lipsky & R. Stern, Strikers and Subsidies 18 (1989).

59. The description is taken primarily from *CCH Unemployment Insurance Reports*, but is consistent with various other sources that reveal the claims procedures in particular states. *See also* Wall, *A Survey of Unemployment Security Law: Determining Unemployment Compensation Benefits*, 42 Lab. L.J. 179 (1991). The state laws contain only general provisions regarding claims, and agency regulations further define the claims procedure. 1B Unempl. Ins. Rep. (CCH) ¶ 2020 (1986).

60. 1B Unempl. Ins. Rep. (CCH) ¶ 2020 (1986).

61. *Id.*

62. *Id.*

a procedure for employee and employer appeals from this decision, which provides an opportunity for a hearing before an impartial tribunal, frequently a referee or hearing examiner.[63] If benefits have been awarded in an initial unemployment compensation determination, the employee will continue to receive benefits pending resolution of any appeal by the employer.[64]

The hearing procedure has been simplified to allow the employee to participate without counsel.[65] Although the rules of evidence and procedure generally do not apply, the hearing officer takes documentary and testimonial evidence and makes a decision based on the record, which, in most states, is final absent appeal.[66] Approximately half of the states have an administrative body to hear appeals from the hearing officer's decision.[67] The second-level appeals are made on the record established at the hearing, but the appellate tribunal typically has the power to decide questions of fact and law and to admit additional evidence.[68] Judicial review is permitted in all states after administrative remedies are exhausted.[69] In most states, such review is limited according to general principles of administrative law.[70]

The administrative agency deciding unemployment compensation claims determines whether eligibility requirements, which include both monetary and nonmonetary standards, are satisfied.[71] Monetary eligibility requirements mandate that the employee worked in covered employment for a specified period of time and earned sufficient wages during the appropriate base period specified by the statute.[72] Nonmonetary eligibility standards relate to the reasons for separation from prior employment and the claimant's continuing availability for employment.[73] All states disqualify employees who are discharged for misconduct connected with work or who

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63. *Id.*; Wall, *supra* note 59, at 179-80.

64. 1B Unempl. Ins. Rep. (CCH) ¶ 2020 (1986) (citing California Dep't of Human Resources v. Java, 402 U.S. 121 (1971)).

65. *Id.*

66. *Id.*; Wall, *supra* note 59, at 179-81.

67. 1B Unempl. Ins. Rep. (CCH) ¶ 2020 (1986).

68. *Id.*; Wall, *supra* note 59, at 181.

69. 1B Unempl. Ins. Rep. (CCH) ¶ 2020 (1986).

70. *Id.*

71. *See* W. CORSON, A. HERSHEY, & S. KERACHSKY, NONMONETARY ELIGIBILITY IN STATE UNEMPLOYMENT INSURANCE PROGRAMS: LAW AND PRACTICE 1 (1986).

72. *See id.* at 1; 1B Unempl. Ins. Rep. (CCH) ¶ 2020 (1986).

73. W. CORSON, A. HERSHEY & S. KERACHSKY, supra note 71, at 1.

leave work voluntarily without good cause,[74] but state interpretations of good cause[75] and misconduct vary.[76] These disqualifications are relevant to the issue of collateral estoppel.[77]

B. Judicial Application of the Collateral Estoppel Doctrine

The effect of collateral estoppel in unemployment compensation determinations has become increasingly important because of the explosion of wrongful termination litigation in the 1980s.[78] Employees have successfully sued employers on causes of action based on wrongful discharge in violation of public policy,[79] breach of implied contract,[80] and breach of the covenant of good faith

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74. Rosbrow, *supra* note 57, at 28; Wall, *supra* note 59, at 179.

75. *See* W. CORSON, A. HERSHEY & S. KERACHSKY, *supra* note 71, at 63-64 (states vary in whether personal reasons may constitute good cause and if so, what personal reasons constitute good cause); Wall, *supra* note 59, at 181-82.

76. *See* W. CORSON, A. HERSHEY & S. KERACHSKY, *supra* note 71, at 64-66. Layoffs for lack of work and terminations for poor performance generally are not considered misconduct. Misconduct usually requires that the employee deliberately or negligently disregarded the employer's interest with actual or constructive knowledge of the policies being violated. To sustain the disqualification in most cases, the employer must show reasonable and consistent application of the rules, employee warning, and an attempt to resolve the problem with the employee before termination. States vary in whether they require deliberate misconduct or whether indifference or negligence is sufficient for disqualification. *Id.*; Wall, *supra* note 59, at 182-83.

77. *See infra* notes 82-102 and accompanying text.

78. *See supra* note 1.

79. Forty states, four qualifiedly, have recognized a cause of action based on wrongful discharge in violation of public policy. 9A Lab. Rel. Rep. (BNA) § 505:51-52 (Feb. 1992). The basis for this cause of action is that the employer has discharged the employee for a reason that violates the public policy of the state. *See, e.g.*, Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (employer violated public policy by firing employee who refused to participate in unlawful price fixing scheme); Petermann v. Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (employer violated public policy by terminating the employee for refusing to perjure himself); Bowman v. State Bank of Keysville, 229 Va. 534, 331 S.E.2d 797 (1985) (employer violated public policy when it discharged employee stockholders for refusing to vote their stock in favor of merger that employer favored, but employee stockholders opposed).

80. Thirty-four states, four qualifiedly, have recognized a cause of action for breach of contract based on termination of an employee in a manner or for a reason that violates oral or written representations of the employer. *See* 9A Lab. Rel. Rep. (BNA) § 505:51-52 (Feb. 1992). *See, e.g.*, Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 292 N.W.2d 880 (1980) (contract implied on basis of representations by employer); Woolley v. Hoffman-La Roche, Inc.,

and fair dealing.[81] Employers seeking defenses to avoid liability in an area where their exposure is expanding due to the erosion of the employment at will doctrine[82] have invoked the doctrine of collateral estoppel, relying most commonly on unemployment compensation determinations that the employee was discharged for misconduct.[83] Employees also have invoked the doctrine in an attempt to bind the employer to an unemployment compensation determination that the employee was not discharged for misconduct

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99 N.J. 284, 491 A.2d 1257 (1985), *modified*, 101 N.J. 10, 499 A.2d 515 (1985) (implied promise in employment manual that employees would be terminated only for just cause enforceable against employer); Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982) (contract implied on basis of employer assurance of continued employment).

81. Twelve states have recognized a cause of action by employees alleging that their termination violates a covenant of good faith and fair dealing implicit in the employment relationship. *See* 9A Lab. Rel. Rep. (BNA) § 505:51-52 (Feb. 1992). *See, e.g.*, Mitford v. de Lasala, 666 P.2d 1000 (Alaska 1983) (contracts for employment at will in Alaska contain implied covenant of good faith and fair dealing); Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988) (court recognized implied covenant of good faith and fair dealing in employment contract, but held that it provided contract rather than tort remedies); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977) (employment contract that allows termination at will contains implied covenant of good faith and fair dealing and discharge made in bad faith breaches agreement).

82. *See* P. WEILER, GOVERNING THE WORKPLACE 48-71 (1990) (discussion of the changing legal image of employment as "at will" and reasons for that change); M. ROTHSTEIN, A. KNAPP & L. LIEBMAN, *supra* note 1, at 943 ("Virtually all of the states have permitted employees to sue for wrongful discharge, although there is no uniformity in the legal basis on which such suits are allowed.").

83. *See, e.g.*, Donovan v. Diplomat Envelope Corp., 587 F. Supp. 1417, 1420-21 (1984), *aff'd without opinion*, 760 F.2d 253 (2d Cir. 1985) (Secretary of Labor collaterally estopped in OSHA action alleging employee discharged for complaining about statutory violations by determination in unemployment compensation proceeding that employee discharged for walking off job); Pullar v. Upjohn Health Care Serv., Inc., 21 Ohio App. 3d 288, 488 N.E.2d 486, 489 (1984) (unemployment compensation board's finding that employee discharged for just cause in connection with work collaterally estopped employee from raising issue of cause for her discharge in age discrimination and wrongful discharge action). Note that the *Pullar* decision was superseded by statute. *See* Noyes v. Channel Prods., Inc., 935 F.2d 806, 809 n.1, *reh'g denied en banc*, U.S. App. LEXIS 18744 (6th Cir. 1991). Employers also have argued that unemployment compensation determinations that employees voluntarily quit bar later litigation over their discharge. *See, e.g.*, Turk v. Ohio Bell Tel. Co., No. 56749 (Ohio App. Mar. 22, 1990) (1990 Westlaw 32596), *appeal denied*, 53 Ohio St. 3d 704, 528 N.E.2d 59 (1990) (unemployment compensation board determination that plaintiff voluntarily quit barred plaintiff's claim that he was discharged in violation of contract).

and remove an employer defense in the wrongful termination case.[84]

The increasing number of collateral estoppel arguments is a result of both the expansion of causes of action for wrongful discharge and the potential for issue identity between wrongful discharge cases and unemployment compensation determinations. In actions based on breach of implied contract, the employee typically is seeking to hold the employer to a written or oral promise to terminate only for just cause.[85] In actions for breach of the covenant of good faith and fair dealing, the employee is seeking to prove that the discharge was in bad faith.[86] In each case, one of the employer's defenses will be that the employee was terminated for a justifiable reason.[87] In the breach of contract action, proof of good cause for discharge will defeat the argument that the contract was breached.[88] And in breach of covenant cases,

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84. *See, e.g.*, Burka v. New York City Transit Auth., 739 F. Supp. 814 (S.D.N.Y. 1990) (employee successfully argued that award of unemployment benefits collaterally estopped transit authority from relitigating issue of employee drug use in disciplinary proceedings); Salida School Dist. v. Morrison, 732 P.2d 1160 (Colo. 1987) (teacher unsuccessfully sought to estop employer from denying retaliatory discharge claim based on referee's finding that she was discharged for her "outspokenness."); McClanahan v. Remington Freight Lines, 517 N.E.2d 390 (Ind. 1988) (employee asserted that employer in wrongful discharge action estopped from challenging Employment Security Division ruling that he was fired for refusing to commit unlawful act). Since *Burka* and *Salida*, New York and Colorado have enacted statutory prohibitions on collateral estoppel based on unemployment compensation decisions. *See infra* note 315. Employees also have urged estoppel based on unemployment compensation determinations that the employee did not voluntarily quit employment. *See, e.g*, Board of Educ. v. Gray, 806 S.W.2d 400 (Ky. Ct. App. 1991) (employee unsuccessfully argued that decision of Unemployment Insurance Commission that employee did not voluntarily quit barred employer's defense to breach of contract suit).

85. *See, e.g.*, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (employee stated claim for breach of implied contract based on oral representations and practice of terminating only for just cause).

86. *See, e.g.*, Foley v. Interactive Data, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988) (employment contracts contain implied covenant of good faith and fair dealing, but action sounds in contract rather than tort); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977) (court upheld jury finding that company violated covenant of good faith and fair dealing by bad faith termination of at will employee to prevent him from collecting commissions).

87. *See* S. HOLLOWAY & M. LEECH, EMPLOYMENT TERMINATION RIGHTS AND REMEDIES 76, 112 (1985).

88. *Id.* at 112. The employer also will defend on the basis that no contract existed. *Id.* at 86.

proof of justifiable cause for termination may defeat the claim that the termination was in bad faith.[89]

Because unemployment compensation benefits are designed to cushion the impact of lost income for employees unemployed involuntarily,[90] a common basis for denial of benefits is discharge for misconduct.[91] Arguments for applying collateral estoppel in wrongful discharge cases alleging breach of contract arise because the issues of just cause for discharge and the issues of termination for misconduct connected with the job overlap. This application is urged as providing the identity of issues required for preclusion purposes.[92] Similarly, in cases alleging breach of the covenant of good faith and fair dealing, there is overlap between a finding on the misconduct issue and a determination of whether there is bad faith with respect to the termination.[93]

Additionally, there is potential for the application of collateral estoppel in the third category of wrongful discharge cases: dis-

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89. *See id.* at 76.

90. Price, *Unemployment Insurance, Then and Now, 1935-85*, 48 Soc. Security Bull. No. 10 at 22, 24 (Oct. 1985).

91. Under all state unemployment compensation laws, employees discharged for misconduct connected with work are denied benefits. Rosbrow, *supra* note 57, at 28. As of January 1985, 39 states disqualified a claimant from benefits for the duration of unemployment, as opposed to disqualification for a specified period, where the claimant was discharged for misconduct. Price, *supra* note 90, at 30. In 1990, there were 649,968 denials of unemployment compensation claims based on discharge for misconduct, 34.7 denials per 1000 spells of unemployment. Data from U.S. Dep't of Labor, Employment and Training Administration (on file with author).

92. *See, e.g.*, Spearman v. Delco Remy Div. of Gen. Motors Corp., 717 F. Supp. 1351, 1360 (S.D. Ind. 1989) (employer barred from relitigating whether there was cause for discharge in breach of contract action based on determination in unemployment compensation proceeding that employee not discharged for just cause); Pullar v. Upjohn Health Care Servs., 21 Ohio App. 3d 288, 488 N.E.2d 486 (1984) (Unemployment Compensation Board's decision that employee discharged for just cause bars breach of contract action); Carlson v. Federal Express Corp., 107 Lab. Cas. (CCH) ¶ 55,838 (1987) (former employee disqualified from receiving unemployment compensation benefits barred from relitigating issue of "good cause" discharge in breach of contract action). The same issue may arise in the context of an action under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, alleging breach of a collective bargaining agreement requiring just cause for discharge. *See* Note, *Issue Preclusion: Unemployment Compensation Determinations and § 301 Suits*, 31 Case W. Res. L. Rev. 862, 864-65 (1981).

93. *See, e.g.*, Niles v. Carl Weissman & Sons, Inc., 241 Mont. 230, 786 P.2d 662 (1990) (decision from administrative agency that employee not entitled to unemployment compensation does not bar employee's suit for wrongful discharge and breach of covenant of good faith and fair dealing).

charge in violation of public policy. When an employee attempts to establish that a termination was motivated by a reason that violates public policy—for example, termination for filing a workers' compensation claim[94]—an unemployment compensation determination that the employee was or was not discharged for misconduct may be urged to bind the court on that issue for purposes of the litigation.[95] While the increase in wrongful discharge litigation has brought the issue of the collateral estoppel effect of unemployment compensation determinations to the forefront, both employers and employees have urged unemployment compensation determinations as bars in employment discrimination[96] litigation as well.[97] The core issue in employment discrimination

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94. *See, e.g.*, Kelsay v. Motorola Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Springer v. Weeks & Leo Co. Inc., 429 N.W.2d 558 (Iowa 1988).

95. *See, e.g.*, Ryan v. New York Tel. Co., 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984) (doctrine of collateral estoppel precluded relitigation of prior administrative finding that employee discharged for theft of company property in action by employee asserting claims of slander, false arrest, malicious prosecution, and wrongful discharge); Pullar v. Upjohn Health Care Servs., 21 Ohio App. 3d 288, 488 N.E.2d 486 (1984) (Unemployment Compensation Board's finding that employee was discharged for just cause based on her refusal to follow orders estops employee from raising issue of cause of her discharge in tort action for wrongful discharge). The unemployment compensation determination also may be urged as precluding relitigation of the question of whether the employee engaged in the misconduct alleged. *See infra* notes 126-28 and accompanying text.

96. References to employment discrimination litigation herein refer to statutory and constitutional claims alleging discrimination on the basis of race, color, religion, national origin, gender, age, disability, and exercise of constitutional or statutory rights.

97. *See, e.g.*, Delgado v. Lockheed-Georgia Co., 815 F.2d 641, 647 (11th Cir.), *reh'g denied*, 820 F.2d 1231 (11th Cir. 1987) (decisions in unemployment compensation proceedings that plaintiffs in age discrimination case were discharged for violating employer's policies denied preclusive effect); Mack v. South Bay Beer Distrib. Inc., 798 F.2d 1279, 1283 (9th Cir. 1986) (Unemployment Compensation Appeals Board decision not given preclusive effect in age discrimination suit); Hill v. Coca-Cola Bottling Co., 786 F.2d 550, 553-54 (2d Cir. 1986) (finding in unemployment compensation proceeding that plaintiff in race discrimination case engaged in misconduct does not preclude litigation of whether employer engaged in race discrimination, but does preclude litigation of whether plaintiff engaged in misconduct); Donovan v. Diplomat Envelope Corp., 587 F. Supp. 1417 (E.D.N.Y. 1984), *aff'd without opinion*, 760 F.2d 253 (2d Cir. 1985) (in action by Secretary of Labor alleging employer discharged employee for complaining to union about violations of Occupational Safety and Health Act, determination in unemployment compensation proceeding that employee discharged for walking off job had collateral estoppel effect against employee, but

cases is similar to that in public policy wrongful discharge cases: whether the discharge was motivated by employee misconduct or unlawful discrimination.

In cases alleging constructive discharge,[98] under either a wrongful discharge theory or a discrimination theory, the issue of collateral estoppel arises in a different context.[99] State unemployment compensation laws disqualify an employee who voluntarily quits employment without good cause from receiving benefits.[100] The determination on that issue is urged as preclusive in constructive discharge cases because of the issue overlap.[101] A binding deter-

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finding that employee complained of health hazard to union, which reported complaint to company, did not have collateral estoppel effect against the company); Gore v. R.H. Macy & Co., 50 Empl. Prac. Dec. (CCH) ¶ 39,154 (1989) (decision of New York Unemployment Insurance administrative law judge that plaintiff in race discrimination case not discharged for misconduct did not preclude employer from establishing defense that plaintiff discharged for cause); Board of Educ. v. New York State Human Rights Appeal Bd., 106 A.D.2d 364, 482 N.Y.S.2d 495 (1984) (finding of Unemployment Insurance Appeal Board that plaintiff in race discrimination case discharged for her own misconduct not given preclusive effect); Salida School Dist. v. Morrison, 732 P.2d 1160, 1164 (Colo. 1987) (decision in unemployment compensation proceeding that employee dismissed because of her outspokenness not binding in action alleging that dismissal violated constitutional rights under first and fourteenth amendments to United States Constitution and article II of Colorado Constitution). While *Salida* was pending, Colorado amended its unemployment compensation statute to deny collateral estoppel effect to unemployment compensation proceedings. *See* COLO. REV. STAT. § 8-74-108 (West 1990).

98. *See supra* note 6 (discussion of constructive discharge theory in various types of cases).

99. *See generally* Pennington v. Kansas City Abrasive Co., 787 P.2d 742 (Kan. App. 1990) (wrongful discharge); Rotert v. Jefferson Fed. Sav. & Loan Ass'n, 623 F. Supp. 1114 (D. Conn. 1985) (age discrimination claim).

100. Rosbrow, *supra* note 57, at 28. As of January 1985, 47 states disqualified employees for the duration of their unemployment for voluntarily leaving their jobs. Price, *supra* note 90, at 30. In 1990, there were 1,080,244 denials of unemployment compensation benefits on the basis that the claimant voluntarily quit employment, 57.7 denials per 1000 spells of unemployment. Data from U.S. Dep't of Labor, Employment and Training Administration (data on file at *The Wayne Law Review*).

101. *See, e.g.*, Rotert v. Jefferson Fed. Sav. & Loan Ass'n, 623 F. Supp. 1114 (D. Conn. 1985) (determination that employee voluntarily quit employment barred constructive discharge claim alleging age discrimination); Gear v. City of Des Moines, 514 F. Supp. 1218 (S.D. Iowa 1981) (determination in unemployment compensation proceeding that employee voluntarily quit without good cause barred sex discrimination action); Pennington v. Kansas City Abrasive Co., 787 P.2d 742 (Kan. App. 1990) (determination of referee that employee did not voluntarily quit without good cause does not bar employer from relitigating

mination of whether an employee voluntarily quit without good cause overlaps with the question of whether there was a constructive discharge.[102]

Courts faced with collateral estoppel arguments in discharge litigation based on unemployment compensation determinations have applied the standards for administrative preclusion to the issue and reached various conclusions.[103] Even courts denying collateral estoppel, however, frequently have relied on the facts of the particular dispute, not precluding the application of collateral estoppel in an appropriate factual context.[104] Most courts that have

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whether employee quit in subsequent retaliatory constructive discharge action); Weiler v. New Century Bank, 168 Mich. App. 354, 423 N.W.2d 664, *vacated*, 431 Mich. 900, 42 N.W.2d 172 (1988) (unemployment compensation determination that employee voluntarily quit barred constructive discharge action alleging wrongful discharge).

102. *See, e.g.*, Gear v. City of Des Moines, 514 F. Supp. 1218 (S.D. Iowa 1981) (determination that former officer left employment voluntarily and without good cause attributable to employer precluded relitigation of that issue in later sex discrimination action); Osborne v. Kelly, 207 Ill. App. 3d 488, 565 N.E.2d 1340, *appeal denied*, 137 Ill. 2d 266, 156 Ill. Dec. 563 (1991) (unemployment compensation determination that employee voluntarily quit disposes of employee's action for retaliatory discharge).

103. As noted in one analysis of this issue, "courts have reached inconsistent results on virtually indistinguishable facts." Committee on Benefits to Unemployed Persons, *supra* note 2, at 81.

104. *See Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 101st Cong., 1st Sess. 208 (1989) [hereinafter *Unemployment Boards' Statement*] (statement of the Nat'l Ass'n of Unemployment Ins. Appellate Bd); *see, e.g.*, Osborne v. Kelly, 207 Ill. App. 3d 488, 565 N.E.2d 1340, *appeal denied*, 137 Ill. 2d 266, 156 Ill. Dec. 563 (1991) (finding preclusion appropriate although prior case, Godare v. Sterling Steel Casting, 103 Ill. App. 3d 46, 430 N.E.2d 620 (1981) refused to bar wrongful discharge action based on Unemployment Compensation Board of Review decision); Hunt v. OSR Chem., Inc., 85 A.D.2d 681, 683, 445 N.Y.S.2d 499, 502 (1981) (refusing to apply collateral estoppel but citing prior case which "illustrat[ed] proper application" of collateral estoppel in context of unemployment compensation decision and wrongful discharge suit). *But see*, Storey v. Meijer, Inc., 431 Mich. 368, 379, 429 N.W.2d 169, 174 (1988) ("[W]e hold that MESC [Michigan Employment Security Commission] determinations are not to be used to collaterally estop the litigation of issues in a subsequent civil suit."). A number of states, including New York, have legislation that prohibits the use of unemployment compensation determinations to collaterally estop litigation of related employment termination cases. *See supra* note 3; *see also* H.R. REP. No. 5835 (101st Cong., 2nd Sess., 136 CONG. REC. 12,423, 12,676 (October 26, 1990)). Other states have rejected such legislation. *Unemployment Boards' Statement*, *supra* at 101. See *infra* notes 316-38 and accompanying text for further discussion of proposed federal legislation.

denied preclusion have done so on the basis that the facts of the case do not meet the standards for preclusion by an administrative agency decision as set forth in *Utah Construction* and the *Restatement of Judgments*.[105] Other courts have cited other policy reasons supporting their refusal to preclude litigation.[106] A review of judicial application of collateral estoppel based on unemployment compensation decisions will assist in an analysis of whether preclusion is appropriate.

1. Cases Denying Preclusion

Failure to meet the standards for giving preclusive effect to administrative decisions has doomed preclusion arguments in many cases.

a. Lack of Issue Identity

In a number of cases, courts have held that the issue identity required for collateral estoppel is not present.[107] This argument has prevailed in both discrimination cases[108] and wrongful discharge cases.[109]

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105. See *supra* notes 43-54 and accompanying text for discussion of these standards.

106. *See Delgado*, 815 F.2d at 647 (deference to unemployment compensation determinations could cause employees to forego unemployment compensation to avoid jeopardizing ADEA claims or force employers and employees to litigate discrimination claims in unemployment compensation proceedings, creating hardship for parties and others whose benefits will be delayed as result); *Mack*, 798 F.2d at 1284 (employees may forfeit unemployment benefits to avoid adversely affecting discrimination claims, and employers and employees may be forced to litigate every unemployment compensation claim as if it were discrimination case, jeopardizing expeditious process of claims for unemployment benefits). These policy reasons constitute an application of the *Restatement's* exception to application of collateral estoppel where legislative policy indicates that the decision of the first tribunal should not be given preclusive effect. RESTATEMENT (SECOND) OF JUDGMENTS § 83(4) (1982).

107. See cases cited *infra* notes 110-23.

108. *See, e.g.*, Nickens v. W.W. Grainger, Inc., 645 F. Supp. 569 (W.D. Mo. 1986).

109. *See, e.g.*, Zlotnicki v. Harsco Corp., 672 F. Supp. 161, 163 (M.D. Pa. 1987) (whether employee's conduct constituted willful misconduct that would disqualify him for unemployment compensation benefits not identical to issue whether employer had good cause to terminate employee's employment); Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1130 n.5 (Alaska 1989) (decision in unemployment compensation proceeding that employee's refusal to take drug test not disqualifying misconduct does not collaterally estop employer's claim that he was discharged for just cause); Star Pharmacy Inc. v. Roberts, 96 L.R.R.M. (BNA) 3287, 3289 (1977) (misconduct under unemployment compensation statutes not same as good cause under collective bargaining agreement).

In *Nelson v. Crimson Enterprises, Inc.*,[110] the Wyoming Supreme Court rejected the employee's argument that the Wyoming Employment Security Commission decision that his termination was not for cause precluded relitigation of the issue of whether he was terminated wrongfully in violation of either public policy or the covenant of good faith and fair dealing.[111] The court's decision was based on its conclusion that the issue of

> whether or not Nelson was discharged for misconduct so as to disqualify him for benefits is distinct from the question of whether or not Nelson's firing, as an at-will employee, was *wrongful*. . . . Any notion of preclusion, based upon the prior Commission proceeding, requires, at a minimum, that the specific issue before the Commission be the same as the issue before this court (emphasis in original).[112]

In *Mitchell v. Jewel Food Stores*,[113] the Illinois Appellate Court carefully explained its conclusion that the issues of disqualifying

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110. 777 P.2d 73 (Wyo. 1989). Wyoming now provides by statute that decisions of any tribunal regarding unemployment compensation are not binding, conclusive or admissible in any other action between the employee and the employer. *See* WYO. STAT. § 27-3-406(c) (1991). The *Nelson* court discussed the statute, which went into effect after the Unemployment Commission's hearing, and concluded that it need not decide the applicability of the statute to the case because the statute merely codified existing law. 777 P.2d at 78.

111. 777 P.2d at 78. *Accord* Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1130 n.5 (Alaska 1989).

112. 777 P.2d at 78. The court also noted that the issue of wrongful termination "was never fully and fairly litigated before the Commission, nor was it distinctly and directly ruled upon by the Commission." *Id.* (citation omitted). This statement illustrates both the interrelationship of the elements necessary for collateral estoppel and the significance of the court's determination on the question of issue identity. If the issues are not identical, then a fortiori, the issue in the judicial forum could not have been fully and fairly litigated in the administrative forum, nor could the issue sought to be precluded in the judicial forum have been actually litigated and essential to the decision of the administrative tribunal. On the other hand, even where the issue is identical, the other elements necessary for the application of preclusion may be lacking. See *supra* note 110 for a discussion of the court's reliance on the law of preclusion as codified in the Wyoming statutes in 1988. *Accord* Niles v. Carl Weissman & Sons, Inc., 241 Mont. 230, 786 P.2d 662 (1990) (collateral estoppel rejected because issues in unemployment proceeding not identical to issues in suit based on wrongful discharge in violation of public policy and breach of covenant of good faith and fair dealing).

113. 189 Ill. App. 3d 450, 545 N.E.2d 337 (1989), *rev'd on other grounds*,

misconduct under unemployment compensation law and "just cause" such as "dishonesty or other misconduct" under a contractually binding employment manual were not identical.[114]

> Section 602A of the Illinois Unemployment Insurance Act (Ill. Rev. Stat. 1987, ch. 48, par. 432(a)), applicable in unemployment compensation matters, defines "misconduct" as a "deliberate and willful violation of a reasonable rule or policy." Jewel's employment manual, on the other hand, states that a permanent employee may be discharged only for "just cause", such as "dishonesty or other misconduct." The manual does not provide for or require deliberate or willful conduct. Nor can it be assumed that the term "misconduct" as used in the manual has the same meaning as "misconduct" as used in the statute. The language of the employment manual does not in itself reference willful or deliberate conduct. Further, the testimony of Jewel's supervisor that the disciplinary rules in the manual require a showing of "intent" to be enforced is not sufficient to show that such a meaning was intended by the language of the manual.[115]

The court went on to say, quoting the Illinois Supreme Court in *Jackson v. Board of Review*,[116]

> [E]very justifiable discharge does not disqualify the discharged employee from receiving employment [sic] benefits under the Act. An employee's conduct may be such that the employer may properly discharge him. However, such conduct may not constitute 'misconduct connected with his work' which disqualifies the employee from receiving unemployment benefits.[117]

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142 Ill. 2d 152, 568 N.E.2d 827 (1990). In reversing the appellate court, the Illinois Supreme Court held that summary judgment was improperly granted against the plaintiff since there was a factual issue of whether the employer violated its employment manual in discharging the plaintiff. On the issue of collateral estoppel, however, the court agreed with the appellate court's denial of summary judgment for the plaintiff.

114. *Id.* at 455, 545 N.E.2d at 340.

115. *Id.*, 545 N.E.2d at 340-41.

116. 105 Ill. 2d 501, 475 N.E.2d 879 (1985).

117. 189 Ill. App. 3d at 456, 545 N.E.2d at 341 (quoting *Jackson*, 105 Ill. 2d at 507, 475 N.E.2d at 882-83).

Based on this analysis, the court found that estoppel did not apply because the issue of misconduct under the Unemployment Insurance Act, which was resolved in the plaintiff's favor, was not the same as the issue of whether the employer had just cause to discharge him.[118]

The absence of identical issues has precluded collateral estoppel application in employment discrimination cases as well. In *Salida School District v. Morrison*,[119] the plaintiff alleged that her discharge violated her constitutional right to free speech. The Colorado Supreme Court relied on the lack of issue identity, among other factors,[120] to deny preclusive effect to an unemployment

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118. *Id. Accord* Willoughby v. Gencorp, Inc., 809 S.W.2d 858, 860-61 (Ky. App. 1990). The court there stated:

> Neither the umpire in the arbitration proceeding nor the unemployment hearing officer had the ability to litigate Willoughby's tort claim for wrongful termination in retaliation for pursuing workers' compensation benefits. . . . That both found that Gencorp had a legitimate reason to fire Willoughby does not preclude a jury from determining that the purported reason was a pretext and that the employer was motivated by impermissible reasons in discharging Willoughby.

See also Niles v. Carl Weissman & Sons, Inc., 241 Mont. 230, 786 P.2d 662 (1990) (court refused to give collateral estoppel effect to unemployment compensation denial in action for wrongful discharge and breach of covenant of good faith and fair dealing because issues not identical); White v. Ardan, Inc., 230 Neb. 11, 22, 430 N.W.2d 27, 34 (1988) (court refused to preclude employer in wrongful discharge case from claiming, based on unemployment compensation decision, that employees engaged in misconduct, noting that employment security statute provided only that determinations thereunder were conclusive for purposes of that law); Hunt v. OSR Chem., Inc., 85 A.D.2d 681, 683, 445 N.Y.S.2d 499, 502 (1981) (breach of contract claim involved complex issues relating to several intertwined contracts that were not and could not have been litigated in unemployment compensation proceeding, which precludes application of estoppel); Zlotnicki v. Harsco Corp., 672 F. Supp. 161, 163 (M.D. Pa. 1987) ("The issue in this case is whether the defendants had good cause to terminate Zlotnicki's employment. That issue was not before the administrative agency or the Commonwealth Court in the unemployment compensation proceedings."); Caras v. Family First Credit Union, 688 F. Supp. 586 (D. Utah 1988) (lack of identity of issues precludes giving collateral estoppel effect to unemployment compensation determination in plaintiff's subsequent lawsuit alleging breach of employment contract, breach of covenant of good faith and fair dealing, and termination in violation of public policy).

119. 732 P.2d 1160 (Colo. 1987).

120. The court also relied on differences in remedies and procedures in the two actions and the absence of the employer's incentive to defend a claim for unemployment compensation benefits. *Id.* at 1164. See further discussion of these reasons for denying collateral estoppel *infra* notes 124-55 and accompanying text.

compensation determination.[121] Similarly, in *Nickens v. W.W. Grainger, Inc.*,[122] a federal district court applying Missouri law held that an unemployment compensation agency decision that an employee did not engage in misconduct sufficient to disqualify him for unemployment benefits did not have preclusive effect in a subsequent race discrimination suit because the issues were not identical.[123]

b. Full and Fair Opportunity to Litigate the Issue.

Closely related to the requirement of issue identity is the *Utah Construction* standard that denies preclusion where the party against whom preclusion is being applied did not have a full and fair opportunity to litigate the issue in the first forum.[124] A number of courts have denied preclusion because this standard was not met,

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121. 732 P.2d at 1164. The plaintiff was seeking to collaterally estop the defendant from asserting the defense that she was not discharged for her speech on the basis of the decision by the referee on her unemployment claim that she was terminated for her outspokenness.

122. 645 F. Supp. 569, 570-71 (W.D. Mo. 1986).

123. *Id.* The court stated:

> The requirement that the issue previously adjudicated be identical to the one presently under consideration is not met in this case. In order to support its award of unemployment compensation to plaintiff, the Missouri commission had only to find that he had not engaged in "misconduct" resulting in his termination. In contrast, to prevail on his § 1981 claim, plaintiff must prove that defendant intentionally discriminated against him because of his race. Although both issues may ultimately turn on the factual circumstances demonstrating plaintiff's compliance or non-compliance with defendant's attendance policy, determination of one issue does not foretell the outcome of the other.

Id. at 570.

124. Frequently courts will deny collateral estoppel because the significant issue in the second proceeding, discriminatory discharge for example, was not fully and fairly litigated in the unemployment hearing. *See* Board of Educ. v. New York State Human Rights Appeal Bd., 106 A.D.2d 364, 482 N.Y.S.2d 495, 497 (1984) (decision of Unemployment Insurance Appeal Board that plaintiff discharged for misconduct denied preclusive effect in discrimination action where allegation that she was subjected to racial slur only briefly explored at informal unemployment hearing); Hunt v. OSR Chem., Inc., 85 A.D.2d 681, 445 N.Y.S.2d 499, 502 (1981) (findings in unemployment proceeding not given preclusive effect because of both lack of issue identity and lack of full and fair opportunity to litigate, where unemployment proceeding was short hearing against only one defendant, and issues of breach of contract not adequately addressed).

focusing on several different rationales.[125] First, some courts have denied collateral estoppel effect where the issue sought to be litigated in the second suit was not fully explored in the unemployment compensation litigation. For example, in *Hill v. Coca Cola Bottling Co.*,[126] the court refused to preclude the employee's racial discrimination claim after the Unemployment Insurance Appeals Board found that he was properly terminated for misconduct because the "claim of race discrimination was barely mentioned"[127] at the appeals board hearing. Nevertheless, the plaintiff *was* precluded from relitigating the issue of whether he engaged in misconduct.[128] Similarly, in *Delgado v. Lockheed-Georgia Co.*,[129] the court denied preclusive effect since the employees did not have an adequate opportunity to litigate their age discrimination claims in the evidentiary hearing on the unemployment compensation claims. The *Delgado* court noted that there was no indication that the plaintiffs were allowed to present evidence in support of their discrimination claims in the unemployment hearing.[130]

A second aspect of the requirement of a full and fair opportunity to litigate the issue in the administrative proceeding relates to the litigation incentive. The *Restatement* provides that collateral estoppel should not apply where a party "did not have an adequate

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125. In Gilberg v. Barbieri, 53 N.Y.2d 285, 423 N.E.2d 807, 441 N.Y.S.2d 49 (1981), the New York Court of Appeals recited a number of factors relevant to the determination of whether a party had a full and fair opportunity to litigate a prior determination. The court stated:

> [W]hen collateral estoppel is in issue, the question as to whether a party had a full and fair opportunity to litigate a prior determination, involves a practical inquiry into the "the realities of litigation. A comprehensive list of the various factors which should enter into a determination whether a party has had his day in court would include such considerations as the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation" (*see also*, RESTATEMENT (SECOND) OF JUDGMENTS [Tent. Draft No. 3] § 88).

Id. at 293, 423 N.E.2d at 809, 441 N.Y.S.2d at 51 (quoting Schwartz v. Public Administrator, 24 N.Y.2d 65, 72, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 959 (1969)).

126. 786 F.2d 550, 553 (2d Cir. 1986).

127. *Id.*

128. *Id.*

129. 815 F.2d 641, 647 (11th Cir.), *reh'g denied en banc*, 820 F.2d 1231 (11th Cir. 1987).

130. *Id.* Evidence in support of the age discrimination case included "disparate treatment of younger employees guilty of the same offense." *Id.*

. . . incentive to obtain a full and fair adjudication in the initial action."[131] The comments to this *Restatement* section suggest that it would be unfair to preclude a party from relitigating an issue when the amount in controversy in the first action is significantly smaller than that in the second.[132] Courts have denied preclusive effect to unemployment compensation proceedings because, for both parties, there is a significant difference between the amount at stake in an unemployment compensation proceeding and the amount at stake in a wrongful discharge or employment discrimination case.[133] At most, in an unemployment compensation proceeding, the employer faces a future increase in the experience-based insurance rate if the employee prevails.[134] On the other hand, a wrongful discharge or employment discrimination action poses a threat of significant cost to the employer.[135] Similarly, for the

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131. RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(c) (1982).

132. *Id.*, comment j.

133. *See, e.g.*, Nickens v. W. W. Grainger, Inc., 645 F. Supp. 569, 571 (W.D. Mo. 1986) (declining to apply collateral estoppel in § 1981 discrimination claim when parties lacked incentive to litigate fully in unemployment compensation dispute); *see also* Ferris v. Hawkins, 660 P.2d 1256, 1259 n.3 (Ariz. App. 1983) (declining to apply collateral estoppel when amount in controversy in unemployment case was $1530 and amount in controversy in action under state personnel law was $17,715.77, plus reinstatement).

134. Committee on Benefits to Unemployed Persons, *supra* note 2, at 74-75. An award to one employee of benefits may not have even that minimal impact. *Id. See, e.g.*, Caras v. Family First Credit Union, 688 F. Supp. 586, 590 (D. Utah 1988) ("Defendants did not have an incentive to fully and fairly litigate the issue as the only adverse effects to the defendants would be payment of unemployment compensation, a minimal amount compared to the amount in controversy in this case [alleging violations of the ADEA and Title VII as well as breach of contract, breach of the covenant of good faith and fair dealing and wrongful termination in violation of public policy]."); Fetherston v. ASARCO, Inc., 635 F. Supp. 1443, 1446 (D. Mont. 1986), *rev'd without opinion*, 827 F.2d 772 (9th Cir. 1987) (employer who did not appeal department of labor decision that employee not disqualified from receiving unemployment benefits on basis of misconduct not estopped from relitigating issue of misconduct in wrongful discharge case because in unemployment compensation action, company not at risk of having to pay damages "out of its own pocket"); Salida School Dist. v. Morrison, 732 P.2d 1160, 1167 (Colo. 1987) (incentive to litigate unemployment compensation issues significantly different than incentive to litigate civil discharge claims, because unemployment compensation taxes remain "relatively constant" despite variation caused by payout of claims).

135. In one such case, the Supreme Court of Colorado explained:

> The liability that the School District incurs when a discharged employee is granted [unemployment] benefits is significantly different than the relief awarded to Morrison by the trial court, which included a two-

employee, the potential recovery in an unemployment compensation proceeding is much smaller than the possible award in a civil suit alleging unlawful discharge.[136] Some courts have found that the application of collateral estoppel is precluded when the lack of incentive to litigate combines with the lack of foreseeability that the unemployment determination will bar litigation in a subsequent suit in which both parties have a much greater stake.[137]

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year reinstatement and back pay and costs in excess of $31,000. . . . The School District had a greater incentive to defend Morrison's section 1983 claim than it had to defend her claim for benefits.

Salida, 732 P.2d at 1167. For further discussion of this issue, see *infra* notes 221-38 and accompanying text.

136. *See, e.g.*, Mack v. South Bay Beer Distrib., Inc., 798 F.2d 1279, 1284 (9th Cir. 1986) ("[M]oreover, an employee's incentive to litigate an unemployment benefits claim is generally much less than his incentive to litigate a discrimination claim where generally the stakes are much higher."). *See also* Lewis v. IBM Corp. 393 F. Supp. 305 (D. Or. 1974) (findings in unemployment compensation proceeding in which maximum amount at stake is $1,612 do not preclude litigation in breach of contract action when plaintiff sought $500,000 in damages because employee did not have adequate incentive to litigate issues in unemployment compensation hearing); Hunt v. OSR Chemicals, Inc., 85 A.D.2d 681, 445 N.Y.S.2d 499 (1981) ("[o]f equal weight [in denying preclusive effect], the size of plaintiff's claim for unemployment insurance benefits pales in importance compared to plaintiff's claims involved here.").

In 1982, the average total amount of unemployment benefits received by claimants in New York was $1,500. Committee on Labor and Employment Law of the Association of the Bar of the City of New York, *Unemployment Insurance Decisions and the Doctrine of Collateral Estoppel*, 40 THE REC. 738, 743 (1985) [hereinafter New York Bar Committee Report]. While the amount has increased since that time due to increases in maximum benefits, *id.* at 743 n.28, it pales by comparison to the amount at stake in discharge actions. See *infra* notes 227, 231 for data regarding recoveries in wrongful discharge and discrimination suits. As of September 1988, the maximum weekly unemployment benefit for all states ranged from a low of $96.00 to a high of $268.00, excluding dependent allowances provided by 14 states. *Unemployment Insurance*, *supra* note 4, at 22. Minimum weekly benefits varied from $5 to $58. *Id.* at 25. Most states have a maximum of 26 weeks for collection of benefits. *Id.* at 23-24. There is a program of extended benefits during periods of high unemployment. *Id.* at 25. Prior to very recent legislative provisions of extended benefits, *see infra* note 229, extended benefits were difficult to obtain, however. Rejda & Lee, *State Unemployment Compensation Programs: Immediate Reforms Needed.* 56 J. RISK AND INS. 649, 656 (1989). In December, 1988, the unemployed workers receiving benefits averaged $145 per week, and the average duration of benefits for the 12 months ending December, 1988, was 13.9 weeks. *Unemployment Insurance*, *supra* note 4, at 22.

137. *See* Dusovic v. New Jersey Transit Bus Operations, Inc., 124 A.D.2d 634, 508 N.Y.S.2d 26 (1986), *appeal dismissed without opinion*, 70 N.Y.2d 747,

The reduced amount at stake in an unemployment compensation proceeding discourages the parties from employing attorneys in such proceedings—a third factor encompassed in the adequacy of the full and fair opportunity to litigate.[138] Courts have relied on the absence of counsel to find that a party against whom estoppel is urged did not have a full and fair opportunity to litigate, thereby precluding estoppel.[139]

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514 N.E.2d 391, 519 N.Y.S.2d 1033 (1987). The court stated:

> In this case, the defendant did not initiate the administrative proceeding, and, at that prior proceeding, the defendant was not represented by counsel and only produced hearsay evidence in support of its defense. There is no suggestion that the defendant was aware of the possibility that an award of unemployment benefits to the plaintiff might later be used to conclusively establish liability in this suit for damages in the amount of $45,000, which action was not initiated until after the issuance of the Administrative Law Judge's decision.

The court contrasted the case with an earlier New York case, Ryan v. New York Tel. Co., 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984), in which the court applied collateral estoppel against the plaintiff employee because he initiated the unemployment proceeding and had the incentive to litigate the issue of his termination. 508 N.Y.S.2d at 28. *Accord* Fetherston v. ASARCO Inc., 635 F. Supp.1443 (D. Mont. 1986), *rev'd without opinion* 827 F.2d 772 (9th Cir. 1987) ("Had ASARCO foreseen that its failure to oppose plaintiff's application for redetermination [of unemployment compensation benefits] would somehow serve to foreclose its opportunity to defend a wrongful termination action, it surely would not have chosen a passive course of action in the administrative proceedings."); Lewis v. IBM Corp., 393 F. Supp. 305, 308-09 (D. Or. 1974) (court refused to collaterally estop plaintiff's litigation of breach of contract action because of lack of incentive to vigorously litigate at administrative level and lack of foreseeability of preclusive effect).

138. A 1979 study by the National Commission on Unemployment Compensation found that only seven percent of claimants and nine percent of employers are represented by counsel at unemployment compensation hearings. New York Bar Committee Report, *supra* note 136, at 742-43. Where the employer was represented by counsel and the claimant was not, the claimant's success rate was thirty percent. Where both parties were represented by counsel the claimant's success rate rose to fifty percent. *Id.* In Mack v. South Bay Distrib., 798 F.2d 1279, 1284 (9th Cir. 1986), the court noted that the amicus brief filed by the California Chamber of Commerce indicated that employers did not use counsel in unemployment compensation proceedings.

139. *See, e.g.*, Burka v. New York City Transit Auth., 680 F. Supp. 590 (S.D.N.Y. 1988) (factual issue whether parties represented by counsel in unemployment compensation hearing relevant to issue whether collateral estoppel applies in civil action based on U.S. and New York constitutional claims); McClanahan v. Remington Freight Lines, 517 N.E.2d 390 (Ind. S. Ct. 1988) (refusing to apply collateral estoppel to bar relitigation by employer of issue whether employee discharged for refusal to commit illegal act, finding no full and fair opportunity to litigate issue in unemployment hearing, relying in part

The fourth factor frequently cited by courts finding the absence of an adequate opportunity to litigate an issue in the unemployment compensation forum is the lack of the full panoply of procedural protections available in judicial proceedings.[140] This factor is also relevant to the determination of whether the administrative agency was acting in a judicial capacity, one of the *Utah Construction* factors for application of collateral estoppel.[141] Courts have cited the procedural differences between unemployment proceedings and judicial proceedings to deny collateral estoppel on both bases. In *Pennington v. Kansas City Abrasive Co.*[142] the court cited a number of differences between unemployment proceedings and judicial proceedings to support its conclusion that preclusion should not apply. Principal among these differences was the statutory admissibility of hearsay evidence in the unemployment proceeding.[143] The court also cited the different placement of the burden of proof in the two proceedings.[144] In the unemployment compensation proceeding, the employer had the burden of proving that the

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on absence of counsel for either party); Dusovic v. New Jersey Transit Bus Operations, Inc., 124 A.D.2d 634, 508 N.Y.S.2d 26, 28 (1986), *appeal dismissed without opinion*, 70 N.Y.2d 747, 514 N.E.2d 391, 519 N.Y.S.2d 1033 (1987) (finding of no employee misconduct in unemployment compensation proceeding does not preclude employer from litigating that issue in defending employee's breach of contract action. Employer did not have full and fair opportunity to litigate issue in unemployment hearing because it was not represented by counsel.).

140. Although administrative proceedings are less formal than judicial proceedings, the Supreme Court has held that collateral estoppel based on administrative proceedings is appropriate. *See* Perschbacher, *supra* note 11, at 452-53. Supporters of collateral estoppel have urged that the procedural limitations of unemployment hearings are not unique and do not support denial of collateral estoppel. *Committee on Benefits to Unemployed Persons*, *supra* note 2, at 80-81.

141. *See supra* notes 28, 51 and accompanying text.

142. 787 P.2d 742 (Kan. App. 1990) (1990 Kan. App. Lexis 79).

143. 1990 Kan. App. Lexis 79 at 6 (1990). *Accord Dusovic*, 124, A.D.2d 634, 508 N.Y.S.2d 26, 28 (1986), *appeal denied without opinion*, 70 N.Y.2d 747, 514 N.E.2d 391, 519 N.Y.S.2d 1033 (1987) ("[T]he defendant did not initiate the administrative proceeding, and, at that prior proceeding [unemployment compensation hearing], the defendant was not represented by counsel and only produced hearsay evidence in support of its defense."); McClanahan v. Remington Freight Lines, Inc., 517 N.E.2d at 395 ("Inasmuch as the rules of evidence do not strictly apply to administrative proceedings, a substantial amount of hearsay potentially inadmissible at trial was introduced without objection.").

144. 1990 Kan. App. Lexis 79 at 7. Notably, however, not all states place the burden of proof on the employer in unemployment compensation proceedings. *See* Committee on Benefits to Unemployed Persons, *supra* note 2, at 76 n.16 and cases cited therein.

employee quit without good cause and was disqualified from receiving benefits.[145] In the wrongful discharge case, the burden was on the employee to prove that he was discharged.[146] Accordingly, the court declined to afford preclusive effect to the referee's determination that the plaintiff was discharged.[147]

Similarly, in *Clapper v. Budget Oil Co.*,[148] the Minnesota Court of Appeals concluded that the procedural nature of unemployment compensation hearings precluded the full and fair opportunity to be heard which was required for application of collateral estoppel.[149] The court relied on several factors, including: the informality of the hearings;[150] the inapplicability of the statutory rules of evidence and procedure; the admissibility of, and reliance on, hearsay;[151] the absence of juries, and the emphasis on "speedy resolution" of claims.[152] Some of the same factors prompted denial of estoppel in *McClanahan v. Remington Freight Lines, Inc.*,[153] where the court denied estoppel inter alia because the referee acted as the primary questioner in the hearing and the "[c]ross-examination was minimal and ineffective."[154] The unavailability of dis-

145. 1990 Kan. App. Lexis 79 at 7.

146. *Id.*

147. *Id.* The court also relied on the lack of incentive to litigate. *Id.* at 8.

148. 437 N.W.2d 722 (Minn. Ct. App. 1989).

149. *Id.* at 727. *Accord* Board of Educ. v. Gray, 806 S.W.2d 400, 403 (Ky. Ct. App. 1991) ("[W]e do not believe that the procedures utilized in the unemployment system either grant any party a full, true opportunity to litigate issues, or even encourage any meaningful participation in the process.").

150. 437 N.W.2d at 726. Similarly, in Fetherston v. ASARCO, Inc., 635 F. Supp. 1443, 1446 (D. Mont. 1986), *rev'd without opinion,* 827 F.2d 772 (9th Cir. 1987), the court relied on the absence of a formal hearing to support its denial of collateral estoppel, noting that there was no evidence that a formal hearing was ever held. The court added that "[g]enerally Montana unemployment compensation procedures are very informal, often handled by the mere completion of forms or over the telephone." *Id.* at 1446. In Niles v. Carl Weissman & Sons, Inc., 241 Mont. 230, 236-37, 786 P.2d 662, 666 (1990), the court also noted that there were "telephonic hearings which may not have afforded Niles the full right of cross-examination," but found it unnecessary to decide whether the administrative proceeding "complied with judicial standards of substantive and procedural due process" because the issues were not the same; on that basis the court denied preclusion.

151. *See supra* note 143 and accompanying text.

152. 437 N.W.2d at 726.

153. 517 N.E.2d 390 (Ind. 1988).

154. *Id.* at 395. Similarly, in Hunt v. OSR Chem. Inc., 85 A.D.2d 681, 445 N.Y.S.2d 499, 502, (App. Div. 1981), the court noted that the lack of formality of the unemployment hearing and the limited time devoted to the hearing weighed on the side of rejecting collateral estoppel.

covery and the lack of sufficient time to investigate the facts and prepare for litigation—given the rapid processing of unemployment compensation claims—also have been cited to support denial of preclusive effect.[155]

c. *Public Policy*

In addition to the failure to comply with the judicial prerequisites for applicability of collateral estoppel, some courts have cited policy reasons to support the refusal to accord collateral estoppel effect to unemployment compensation decisions.[156] Foremost among these policy reasons is the impact on the unemployment compensation system. As stated by the court in *Mack v. South Bay Beer Distributors*,

> [T]he potentially higher awards at stake in discrimination claims could compel both employers and employees to litigate every unemployment benefits claim as if it encompassed a discrimination suit. Should this come to pass the Board may find it difficult to adjudicate unemployment benefit claims expeditiously. Consequently, an unemployed worker would be without benefits for a longer period of time than would be the case if his appeal had been decided without the additional delay created by determining a discrimination claim.[157]

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155. *See* Caras v. Family First Credit Union, 688 F. Supp. 586, 590 (D. Utah 1988).

156. The courts applying these policy rationales rely, either explicitly or implicitly, on the exception to preclusion in RESTATEMENT (SECOND) OF JUDGMENTS § 83(A) (1982), where the legislative policy indicates either that the decision of the first tribunal should not be given preclusive effect or that the second tribunal should be allowed to make an independent decision. *See id.* § 83(4).

157. Mack v. South Bay Beer Distrib. Inc., 798 F.2d 1279, 1284 (9th Cir. 1986). Notably, in *Mack*, the California Chamber of Commerce filed an amicus brief in support of the employee's contention that collateral estoppel should not apply. *Id.* at 1284 n.6. The Chamber of Commerce argued that application of collateral estoppel would "significantly alter the operating structure of California's Unemployment Compensation System by making expeditious hearings a thing of the past." *See* Cavanagh, *The Collateral Estoppel Effect of Administrative Unemployment Insurance Decisions in Subsequent State and Federal Litigation*, 4 THE LAB. LAW. 839, 847-859 (1986) (discussion of development of collateral estoppel in California prior to enactment of legislation barring courts from according collateral estoppel effect to California unemployment compensation decisions).

Other courts have relied on the same policy rationale to deny preclusion. In

The court in *Mack* suggested two other policy reasons for denying preclusion. First, employees might be forced to forego unemployment compensation benefits "rather that risk an adverse ruling that could have preclusive effect on a federal discrimination claim that [they] may not be adequately prepared to litigate before the Board."[158] This would interfere with the policy underlying the unemployment compensation statutes.[159] Second, according collateral estoppel effect to unemployment compensation determinations would encourage employers to rely on attorneys in such proceedings while unemployed workers frequently would be unable to afford counsel,[160] thereby disadvantaging employees both in the unemployment proceeding and in the later civil litigation.[161] The Arizona Court of Appeals in *Ferris v. Hawkins* relied on the latter policy

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Lewis v. IBM Corp., 393 F. Supp. 305, 309 (D. Or. 1974), the court cited a brief submitted by the state of Oregon to support its denial of preclusion because of the adverse impact on state administrative procedures. The brief asserted that according preclusive effect would increase the "length and complexity of hearings," rendering existing staffing inadequate to handle compensation claims. *Accord*, Delgado v. Lockheed-Georgia Co., 815 F.2d 641, 647 (11th Cir.), *reh'g denied en banc*, 820 F.2d 1231 (11th Cir. 1987). The court there stated:

> Granting deference to unreviewed decisions of [the Georgia Employment Security Agency] in subsequent [Age Discrimination in Employment Act] lawsuits could cause potential plaintiffs to forego their chance at unemployment compensation for fear of jeopardizing their ADEA claims or else force employees and employers to litigate unemployment compensation claims as discrimination suits. Such a result would work a hardship, not only on the parties, but on other unemployed persons awaiting determination of their claims.

Board of Educ. v. Gray, 806 S.W.2d 400, 403 (Ky. Ct. App. 1991) ("[W]e can easily imagine the untenable burden which would be placed on the [unemployment compensation] system were we to hold that any findings could conceivably bind all the parties in later proceedings.").

158. *Mack*, 798 F.2d at 1284.

159. *Id.* The unemployment insurance compensation program is the "first line of defense for . . . [a worker] ordinarily steadily employed . . . for a limited period during which there is expectation that he will soon be reemployed. This should be a contractual right not dependent on any means test . . . . It will carry workers over most, if not all, periods of unemployment in normal times without resort to any other form of assistance." *Rep. of the Comm. on Economic Security, Hearings on S. 1130 before the Senate Comm. on Finance*, 74th Cong., 1st Sess., at 1321-22 *cited in* California Dep't. of Human Resources Dev. v. Java, 402 U.S. 121, 131 (1971).

160. *Mack*, 798 F.2d at 1284.

161. See *supra* note 138 and accompanying text (noting that when employers are represented by counsel and employees are not, the employee in an unemployment compensation proceeding has a thirty percent success rate. When both parties are represented, the employee's success rate improves to fifty percent).

consideration to reject the employee's argument that findings in an unemployment proceeding barred relitigation of a discharge claim under the state personnel statute.[162] The court, in addition to relying on the dissimilarity of the statutory schemes and remedies thereunder,[163] noted,

> if we were to adopt the position advocated by Ferris, we would create an incentive for the state, acting in its capacity as an employer, to vigorously and consistently oppose a discharged employee's claim for benefits. The result would be to turn the unemployment compensation hearing into a litigation of the merits of the personnel claim. The ultimate effect would be that the state's superior resources would interfere with the beneficial purpose of the unemployment compensation laws.[164]

The Michigan Supreme Court relied on these same policy considerations to support its conclusion that the Michigan Legislature did not intend that unemployment compensation determinations be given preclusive effect in other proceedings.[165]

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162. Ferris v. Hawkins, 135 Ariz. 329, 333, 660 P.2d 1256, 1260 (1983).

163. *Id.* at 332-33, 660 P.2d at 1259-60. The court cited the differences in the amount in controversy in the two proceedings. See further discussion of this issue *supra* notes 131-36 and accompanying text.

164. 135 Ariz. at 333, 660 P.2d at 1260. Earlier, the court noted:

> Unemployment compensation is a 'social security' measure which is designed to alleviate the 'burden which . . . falls with crushing force upon the unemployed worker and his family.' A.R.S. § 23-601. The central purpose of our employment security act, establishing within Arizona a system of unemployment compensation, is to allow compensation for a limited period of time to those capable of working and available for work who are involuntarily unemployed through no fault of their own. (citation omitted).

Id. at 332, 660 P.2d at 1259.

165. *See* Storey v. Meijer, Inc., 431 Mich. 368, 429 N.W.2d 169 (1988). The court relied on the exception for collateral estoppel recited in *Restatement (Second) of Judgments*, which provides that an adjudicative decision by an administrative agency should not be given preclusive effect if it is incompatible with a legislative policy to the contrary. *Id.* at 377, 429 N.W.2d at 173 (citing RESTATEMENT (SECOND) JUDGMENTS § 83 (1982)). *See supra* note 156 and accompanying text. The court found that preclusive effect would be incompatible with the legislative policy that benefits be provided to the unemployed worker as quickly as possible because: 1) the parties would be forced to litigate the administrative claim more extensively because of the potential effect on a civil claim, delaying the determination of benefits and burdening the unemployment compensation system; 2)

Public policy underlying the statute creating the civil cause of action also may warrant denial of collateral estoppel. In *Hahn v. Arbat Systems Limited, Inc.*,[166] the New Jersey Superior Court, Appellate Division, relied on the strong public policy against employment discrimination to reject the employer's argument that an unemployment compensation decision finding that the plaintiff was not discriminated against barred the plaintiff in a later civil action alleging unlawful discrimination.[167]

2. Cases Granting Preclusive Effect

In contrast to the series of cases analyzed above, in which courts applied requirements for administrative collateral estoppel and public policy to deny preclusion, there stand a number of

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a claimant might be forced to "forego a claim for unemployment compensation" benefits to preserve the "right to pursue a civil claim;" and 3) an unemployed worker, unaware of the possible impact of the unemployment compensation determination on any potential civil claim, might unwittingly sacrifice the civil claim in the unemployment proceeding, particularly in light of the fact that employees frequently are unrepresented by counsel. *Storey* at 337-39, 429 N.W.2d at 174.

The *Storey* decision resolved an issue that had split the lower courts and the federal Sixth Circuit Court of Appeals regarding the interpretation of the Michigan statute. *Id.* at 372 n.1, 374-76, 429 N.W.2d at 171 n.1, 172-73. The Michigan statute states:

> Except as provided in this act, such information and determinations shall not be used in any action or proceeding before any court or administrative tribunal unless the commission is a party to or a complainant in the action or proceeding, or unless used for the prosecution of fraud, civil proceeding, or other legal proceeding pursuant to subdivision (2).

MICH. COMP. LAWS ANN. § 421.11(b)(1) (West Supp. 1992). One panel of the Michigan Court of Appeals in *Storey*, and the Sixth Circuit in Polk v. Yellow Freight Sys., 801 F.2d 190 (6th Cir. 1986), found § 421.11(b)(1) inapplicable. Another panel of the court of appeals, in Moody v. Westin Renaissance Co., 162 Mich. App. 743, 748, 413 N.W.2d 96, 98 (1987), specifically rejected that analysis of § 421.11(b)(1). In addition, the Sixth Circuit failed to cite a prior Sixth Circuit case which had applied § 11(b)(1) in a context at odds with its interpretation in *Polk*. *Storey*, 431 Mich. at 376, 429 N.W.2d at 173 (*citing* Herman Bros. Pet Supply, Inc. v. NLRB, 360 F.2d 176 (6th Cir. 1966)). The Michigan Supreme Court resolved this dispute in *Storey*, interpreting § 11(b)(1) to preclude according collateral estoppel effect to unemployment compensation determinations. *See* Note, *The Estoppel Effect of Misconduct Findings in Unemployment Compensation Adjudications in Future Civil Suits for Wrongful Discharge*, 34 WAYNE L. REV. 1695 (1988) (critical discussion of Michigan's approach to this issue).

166. 200 N.J. Super. 266, 491 A.2d 58 (1985).

167. *See* Unempl. Ins. Rep. (CCH) ¶ 8580 (1985).

cases in which the courts reached the opposite result.[168] These courts had no problem finding the issue identity and procedural formality necessary for the application of collateral estoppel. In *Osborne v. Kelly*,[169] the board of review in an unemployment compensation case found that the employee voluntarily left work without good cause attributable to the employer.[170] When the employee filed an action for retaliatory discharge, the Illinois Appellate Court found that the board of review's determination required dismissal of the subsequent action on the basis of collateral estoppel.[171] The court noted that the identical issue of whether plaintiff was discharged or quit was presented in both proceedings.[172] The plaintiff was therefore bound by the board of review's decision, which precluded him from establishing that he was discharged, an essential element of the wrongful discharge claim.[173] The court also found that the proceeding was sufficiently judicial in nature for the application of collateral estoppel, stating that "[p]rocedures for adjudicating disputed unemployment claims are mandated by statute and provide for judicial review. [citation

168. Some of the cases cited in this section were decided by courts in states that subsequently enacted legislation barring collateral estoppel. See *infra* note 315 for a list of states with legislation barring use of unemployment compensation decisions in later litigation. While the law in these states has changed and the cases are no longer viable precedent in that jurisdiction, they are useful to illustrate the analytical approach to this issue that permits courts to apply collateral estoppel in many factual situations. In states without definitive law precluding collateral estoppel, the analysis in these cases may well be applied.

169. 207 Ill. App. 3d 488, 565 N.E.2d 1340 (1991).

170. *Id.* at 490, 565 N.E.2d at 1341.

171. *Id.* at 492, 565 N.E.2d at 1343. The court refers to collateral estoppel as estoppel by verdict, which is distinguishable from estoppel by judgment. *Id.*

172. *Id.*; *accord* Bernstein v. Birch Wathen School, 71 A.D.2d 129, 421 N.Y.S.2d 574 (1979), *aff'd*, 51 N.Y.2d 932, 415 N.E.2d 982, 434 N.Y.S.2d 994 (1980). In *Bernstein*, as in *Osborne*, the plaintiff filed suit for breach of contract alleging that she was discharged. The court gave collateral estoppel effect to the determination by the New York State Department of Labor on her unemployment compensation claim that the plaintiff quit without good cause. The court found that the issue of voluntary termination of employment disposed of both the unemployment compensation claim and the wrongful discharge claim, distinguishing the case from those in which the issue was misconduct. *Id.* at 133, 421 N.Y.S.2d at 576. The court noted that a finding of no disqualifying misconduct for unemployment compensation purposes is not dispositive of the issue whether a discharge was proper. *Id.* The court did not discuss whether there was a full and fair opportunity to litigate the issue in the unemployment proceeding, although it noted that factor as a requirement for application of collateral estoppel. *Id.* at 132, 421 N.Y.S.2d at 576.

173. 207 Ill. App. 3d at 492, 565 N.E.2d at 1342-43.

omitted]. The administrative determination of plaintiff's claim was reached after a sufficiently extensive and adversarial hearing, conducted under oath and on the record."[174]

The Ohio Court of Appeals, in *Pullar v. Upjohn Health Care Services, Inc.*,[175] used similar analysis to uphold the application of collateral estoppel to bar relitigation of the plaintiff's termination claims in a civil action. The unemployment compensation referee determined that the plaintiff had been discharged justifiably for failing to obey a written order.[176] The court found that this decision estopped her civil action alleging age discrimination, breach of a contract of employment, and wrongful discharge, since the issue with respect to each civil cause of action (the reason for her discharge) would be the same as in the unemployment proceeding.[177] As the Illinois Appellate Court held in *Osborne*, the Ohio

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174. *Id.* at 491, 565 N.E.2d at 1342.

175. 21 Ohio App. 3d 288, 488 N.E.2d 486 (Ohio App. 1984). Subsequently, in Turk v. Ohio Bell Tel. Co., 1990 Ohio App. Lexis 1072 (1990), the same court relied on its decision in *Pullar* to hold that a determination by the Unemployment Compensation Board of Review that the plaintiff voluntarily quit his employment precluded the plaintiff from asserting that he was fired in violation of his contract. The court concluded that the *Pullar* elements necessary to apply collateral estoppel were met in *Turk*. *Id.* at 18.

176. 21 Ohio App. 3d at 289, 488 N.E.2d at 488.

177. *Id.* at 292, 488 N.E.2d at 491. The court found that the conclusion that the discharge was based on a refusal to follow orders precluded any determination that her discharge was motivated by age. *Id.* at 291, 488 N.E.2d at 489. The court ignored the possibility, recognized by other courts, that this reason could have been a pretext for discrimination, or that a dual motive may have been operating. *See Delgado*, 815 F.2d at 646-47 (denying preclusive effect to state agency finding because of inadequate opportunity to litigate age discrimination claims in unemployment compensation proceeding, noting there was no indication that plaintiffs had been able to present evidence of disparate treatment of younger employees guilty of the same offense). Such evidence could establish, despite the misconduct, that discrimination motivated the discharge, either solely or in part. The dissent in *Pullar* urged that since the plaintiff had no opportunity to argue the age discrimination issue before the unemployment referee, she should not be precluded from pursuing that action. 21 Ohio App. 3d at 296, 488 N.E.2d at 495 (Parrino, J., dissenting). Pullar's age discrimination claim was based on a state statute, rather than the federal ADEA, so the recent decision of the United States Supreme Court in Astoria Fed. Sav. & Loan Ass'n v. Solimino, 111 S. Ct. 2166 (1991), would not change the result. *See supra* notes 38-41 and accompanying text.

In Woods v. Bulova Watch Co., 88 Lab. Cas. (CCH) ¶ 12,045 (E.D.N.Y. 1980), the same result was reached in a case alleging breach of contract under § 301 of the Labor Management Relations Act. The determination in the unemployment compensation proceeding that plaintiff was discharged for insubordination, which was a proper ground for termination under the contract, collaterally estopped plaintiff from relitigating the issue, and the complaint was dismissed.

court found that procedural requirements were met, and it rejected plaintiff's contention that findings pursuant to a relaxed and abbreviated procedure such as that provided by the unemployment statute should not be given preclusive effect.[178] Although no transcript of the unemployment hearing was in the record before the court, the court presumed that the proceedings were regular and noted that plaintiff had an opportunity to produce evidence, give testimony, cross-examine witnesses, and appeal the decision of the referee.[179]

The Pennsylvania Superior Court in *Frederick v. American Hardware Supply Co.*[180] applied collateral estoppel to bar a wrongful discharge claim by employees when the Unemployment Compensation Board of Review, affirmed by the commonwealth court,

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178. 21 Ohio App. 3d at 293-94, 488 N.E.2d at 492. Plaintiff noted that the referee's determination could be based on evidence inadmissible in court, a factor that has prompted some courts to deny preclusion. See *supra* notes 140-55 and accompanying text for cases in which courts have rejected preclusion arguments on this basis.

179. 21 Ohio App. 3d at 294, 488 N.E.2d at 492; *accord* Ryan v. New York Tel. Co., 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984); Burka v. New York City Transit Auth., 739 F. Supp. 814 (S.D.N.Y. 1990).

In *Ryan*, the court found that an unemployment compensation decision finding Ryan guilty of unauthorized removal and possession of company property, which was misconduct sufficient to disqualify him from unemployment benefits, precluded his civil action for false arrest, malicious prosecution, defamation, and wrongful discharge. 62 N.Y.2d at 502-03, 467 N.E.2d at 491-92, 478 N.Y.S.2d at 827-28. The issues were identical according to the court, since the findings in the unemployment case would preclude Ryan from establishing the necessary elements of each count of his civil complaint. Further, the court found that Ryan litigated the issue, testified in the unemployment hearing, and cross-examined witnesses through his union representative. *Id.* at 503, 467 N.E.2d at 492, 478 N.Y.S.2d at 828. The absence of counsel for Ryan was not determinative since Ryan had chosen to appear without counsel and opted to be represented by a demonstrably competent union representative. *Id.* at 504, 467 N.E.2d at 492, 478 N.Y.S.2d at 828.

In *Burka*, the court held that the finding in an unemployment compensation proceeding that the employee did not engage in the misconduct of drug use had collateral estoppel effect against the employer in a later statutory civil service proceeding challenging his discharge. 739 F. Supp. at 845-47. The court found the issues identical and noted that although the employer pursued an inexpensive strategy in the hearing of relying on a drug test report alone, the failure of that strategy did not warrant denial of collateral estoppel. The court cited the *Ryan* court's conclusion that a free choice to litigate the unemployment hearing in a particular way did not indicate lack of a full and fair opportunity to litigate the issue. *Id.* at 846.

180. 384 Pa. Super. 72, 557 A.2d 779, *appeal denied*, 523 Pa. 636, 565 A.2d 445 (1989).

found that the employees were discharged for willful misconduct. The *Frederick* court focused primarily on the question of whether the issues decided in the unemployment compensation proceeding and alleged in the wrongful discharge case were identical, noting that "the other elements of collateral estoppel are clearly present . . . ."[181] According to the court, assuming arguendo that the employee handbook created an implied contract, the contract required good cause for discharge.[182] The board of review's determination that the employees engaged in willful misconduct was a binding factual finding that good cause existed.[183] Accordingly, the doctrine of estoppel required affirmation of the trial court's order of summary judgment against the plaintiffs.[184]

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181. *Id.* at 76, 557 A.2d at 781. The court cited these elements as identity of parties, an opportunity to litigate the issue on the merits in the unemployment compensation proceeding, and a final judgment in the unemployment compensation proceeding. The court did not focus on the related elements of whether the administrative forum was judicial or whether the parties had a full and fair opportunity to litigate the issue. These issues may have been encompassed by the "opportunity to litigate the issue on the merits" element.

182. *Id.* at 77-78, 557 A.2d at 781.

183. *Id.* at 78, 557 A.2d at 781.

184. *Id.* The Federal District Court for the Western District of Michigan, applying Michigan law, reached a similar result in Carlson v. Federal Express Corp., 107 Lab. Cas. (CCH) ¶ 55,838 (W.D. Mich. 1987). The court found that a determination of misconduct under the unemployment compensation statute precluded a contractual claim that the discharge was not for just cause. *Id.* An employer might have just cause for discharge which does not rise to the level of misconduct under the unemployment statute, but rarely will a contract sanction conduct more egregious than misconduct under the unemployment statute. The implication of this conclusion is that a finding of misconduct will bar an employee's wrongful discharge claim, but a finding of no misconduct will not preclude the employer from defending such a claim on the ground that just cause for discharge existed. *Cf.* Mitchell v. Jewel Food Stores, 189 Ill. App. 3d 450, 545 N.E.2d 337 (1989), *rev'd on other grounds,* 142 Ill. 2d 152, 568 N.E.2d 827 (1990).

The court in *Carlson* also found that the statutory right to a fair hearing on the unemployment claim, with a written decision setting forth findings of fact and the reasons for the decision, as well as the existence of a right to appeal from the decision, constituted adequate procedural protection for the application of collateral estoppel. 107 Lab. Cas. (CCH) ¶ 55,838 (W.D. Mich. 1987).

Similarly, the Michigan Court of Appeals found that collateral estoppel barred an employee's actions for wrongful discharge, fraud, and intentional infliction of emotional distress based on the claim that she was forced to resign, since the Michigan Employment Security Commission found that she voluntarily quit her job. Weiler v. New Century Bank, 168 Mich. App. 354, 423 N.W.2d 664 (1988), *vacated,* 431 Mich. 900, 432 N.W.2d 172 (1988).

The cases cited above were decided before the Michigan Supreme Court's

Each of the preceding cases involved preclusion of wrongful discharge actions,[185] but courts have also barred actions alleging employment discrimination. In *Gear v. City of Des Moines*,[186] the plaintiff filed a civil action under Sections 1983 and 1985 alleging that she was harassed and discharged on the basis of her gender. The court dismissed her constitutional action on collateral estoppel grounds because the Iowa Employment Security Commission had found that she voluntarily left work without good cause.[187] The

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decision in Storey v. Meijer, 431 Mich. 368, 429 N.W.2d 169 (1988), which held that, as a matter of law, unemployment compensation decisions should not be given collateral estoppel effect in subsequent civil litigation. The court vacated *Weiler* for reconsideration in light of *Storey*. *See supra* note 165 and accompanying text.

Contrary to the suggestion of the Michigan courts, the Federal District Court for the Southern District of Indiana applied collateral estoppel to bar an employer from relitigating the issue of whether there was just cause for an employee's discharge in the employee's action for breach of contract. Spearman v. Delco Remy Div. of GM Corp., 717 F. Supp. 1351 (1989). The court found that the issues were identical, that the parties had a full and fair opportunity to litigate using counsel and calling witnesses, and that the agency making the initial ruling had acted in a judicial capacity, since it was a decision by the Board of Review rather than a mere referee. *Id.* at 1357-59. The court distinguished the case from *McClanahan*, 517 N.E.2d at 390, where the Indiana Supreme Court denied collateral estoppel because the unemployment compensation determination of the referee was based on an informal hearing without counsel. A substantial amount of hearsay had been admitted at the hearing and a potential conflict of interest existed. 717 F. Supp. at 1358-59. See *supra* notes 139, 143 and *infra* note 315 for further discussion of *McClanahan*.

185. *Pullar* involved both wrongful discharge and age discrimination claims. *See supra* notes 175-79 and accompanying text.

186. 514 F. Supp. 1218 (S.D. Iowa 1981).

187. *Id.* at 1224. The court relied in part on the Supreme Court's decision in Allen v. McCurry, 449 U.S. 90 (1980), in which the Court held that the concepts of collateral estoppel and res judicata apply to actions under § 1983. While *Allen* dealt with preclusion based on a prior decision by a state court, the *Gear* court found that the same principles apply in administrative adjudication. 514 F. Supp. at 1220.

In Stall v. Bourne, 774 F.2d 657 (4th Cir. 1985), *withdrawn by an equally divided court*, 783 F.2d 476 (4th Cir. 1986) (en banc), the United States Court of Appeals for the Fourth Circuit, applying South Carolina law, held that a constitutional claim based on the first amendment was precluded by an unemployment compensation determination that the employee was discharged for misconduct connected with work. In affirming the district court's entry of summary judgment against the plaintiff on collateral estoppel grounds, the court stated:

> [T]he reasons for Stall's discharge were fully and fairly presented and litigated in an adjudicatory proceeding before the Commission and before

Gear court articulated in detail the factors to be considered in determining whether to apply collateral estoppel. The court also noted that "collateral estoppel should be employed more selectively and with a greater degree of flexibility when an administrative finding is involved."[188] The *Gear* court found that the agency process was adjudicative because it employed notice, subpoena power, discovery, evidentiary rules, and presentation of evidence and argument, including examination and cross-examination, in addition to including a provision for judicial review.[189] Although the plaintiff did not employ counsel, the court found that she introduced witness testimony and "capably prosecuted her claim for benefits."[190] The court rejected the contention that the plaintiff did not have adequate incentive to litigate the issue, relying on the narrow scope of judicial review afforded to administrative agency decisions under Iowa law.[191] Further, the court found sufficient identity of issues, noting that "material facts actually or necessarily adjudicated in the agency hearing form the sole predicate for plaintiff's constitutional challenge. . . ."[192]

> the state court on the record made in the Commission proceedings in the context of Stall's unemployment benefits claim. Stall had a full and fair opportunity to present his constitutional contentions in an adjudicatory hearing before a court of competent jurisdiction, vested with the duty to hear and resolve questions appearing in the case before it.

774 F.2d at 661. As noted, on rehearing en banc, an equally divided court affirmed the decision, but withdrew the panel opinion. 783 F.2d at 476.

188. 514 F. Supp. at 1221.

189. Although there was no statutory bar to the admission of hearsay, the court did not deem this factor sufficient to outweigh the numerous other procedural similarities to the judicial process. *Id.* Gear did not seek judicial review of the agency's decision denying unemployment compensation, but the court found the opportunity for judicial review sufficient to apply collateral estoppel. *Id.* at 1220-21.

190. *Id.* at 1221.

191. *Id.* at 1222. The court did not specifically address the argument, accepted by many courts denying collateral estoppel, that the difference in the amounts in controversy limited the incentive to litigate. *See supra* notes 131-39 and accompanying text. The court noted that the limited scope of judicial review of administrative agency actions made the ramifications of the adjudication foreseeable and provided an incentive to litigate. 514 F. Supp. at 1222. However, the court did not specifically address the foreseeability of preclusion. *See supra* note 137 and accompanying text.

192. 514 F. Supp. at 1223.

> Conclusions that plaintiff's work schedule had not been revised without notice, thus justifying her failure to report for duty were implicit in the department hearing officer's adverse findings in the record as to Lieu-

Similarly, in *Salt Creek Freightways v. Wyoming Fair Employment Practices Commission*,[193] the court found the Employment Security Commission's determination that the plaintiff voluntarily left work without good cause to attend a religious convocation collaterally estopped the Fair Employment Practices Commission (FEPC) from deciding whether she was discriminated against on the basis of her religion.[194] The issues were identical, according to the court, which reversed the FEPC's decision in

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tenant Gillespie's sexual harassment of the plaintiff, the allegedly wrongful withholding of a final paycheck, the necessity of requesting permission of male superiors to use the restroom, and the circumstances of her unexcused absences on the 27th, 28th and 29th days of October. As the hearing officer found these acts did not occur, Chief Nichols could not have fostered an environment which contributed to such alleged acts of individual sexual discrimination.

Id.

The United States District Court for the District of Connecticut reached a similar result in an age discrimination claim in Rotert v. Jefferson Fed. Sav. & Loan Ass'n, 623 F. Supp. 1114 (D. Conn. 1985). In this case, the employee was precluded from asserting in her age discrimination suit that she was constructively discharged, because she was denied unemployment compensation on the basis that she voluntarily left her employment without good cause. The issue of whether her working conditions were so intolerable that she had no choice but to resign was disposed of by the Employment Security Board of Review and the superior court on review of that decision, collaterally estopping relitigation. *Id.* at 1118. The court noted that the plaintiff was represented by counsel and had an opportunity to call witnesses, introduce evidence, and make legal argument in the unemployment hearing. *Id.* Further, the court noted that consideration of the issue of constructive discharge was a necessary element of the unemployment proceeding. *Id.* at 1118-19.

The United States District Court for the District of Maryland relied on *Gear* to hold that a determination in an unemployment compensation proceeding that the plaintiff's discharge was based on misconduct, not sex discrimination or retaliation for complaints to OSHA, barred relitigation of the sex discrimination and retaliation claims in his Title VII action. Ross v. Communications Satellite Corp., 34 Fair Emp. Prac. Cas. 260, 264 (D. Md. 1984), *rev'd*, 759 F.2d 355 (4th Cir. 1985). The decision of the Fourth Circuit in *Ross* also negates the decision of the same district court in Harding v. Ramsay, Scarlett & Co., 599 F. Supp. 180 (D. Md. 1984), which accorded collateral estoppel effect to the decision of the Maryland Employment Security Administration on an unemployment compensation claim to bar litigation in a subsequent race discrimination action. The decision of the Fourth Circuit in *Ross* relied upon analogous Maryland law to determine how Maryland courts would decide the collateral estoppel issue. 759 F.2d at 361-62. The Maryland state courts could decide the issue differently, however.

193. 598 P.2d 435 (Wyo. 1979).

194. *Id.*

favor of the plaintiff.[195] The court emphasized the importance of the policies underlying the doctrine of collateral estoppel, stating:

> In our society, which is witnessing such increases in the field of activity of administrative bodies and the proliferation of their actions, the protection of citizens from being harassed and vexed by repeated hearings on the same matter is of *monumental importance.* It may not be amiss to note the entirely human instinct that governs the operation of such administrative bodies, and that they when exposed to the temptation to do so, have difficulty resisting opportunity to enhance their power and importance by assertions of jurisdiction in matters already in the hands of some other competent administrative body.[196]

In none of these cases were the courts persuaded that the different statutory focus of unemployment compensation and discrimination laws prevented the plaintiff from having a full and fair opportunity to litigate the discrimination claim in the unemployment forum.[197] In *Hill v. Coca Cola Bottling Co.*,[198] the court did permit relitigation of the discrimination issue in the civil suit, but precluded the plaintiff from relitigating the factual issue of whether he violated company policy on the basis of the determination in the unemployment compensation proceeding.[199] Accord-

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195. *Id.* at 439-40. The court relied on the analogous decision of the Colorado Court of Appeals in Colorado Springs Coach Co. v. State Civil Rights Comm'n, 35 Colo. App. 378, 536 P.2d 837 (1975), *cert. denied*, 424 U.S. 948 (1976). In that case, the court barred plaintiff's race discrimination action brought before the Colorado Civil Rights Commission, based on a decision in the unemployment compensation case that the plaintiff was discharged for his failure to make scheduled bus runs, not for his race. Both the Colorado and Wyoming legislatures subsequently enacted statutory prohibitions on according collateral estoppel effect to unemployment compensation decisions. *See infra* note 315.

196. 598 P.2d at 440 (emphasis added).

197. *See supra* notes 119-23 and accompanying text.

198. 786 F.2d 550 (2d Cir. 1986).

199. *Id.* at 553. In Knox v. Cornell Univ., 30 Fair Empl. Prac. Cas. (BNA) 433 (1982), the United States District Court for the Northern District of New York applied New York law, as did the *Hill* court, but reached a different result on the preclusion issue. The *Knox* court held that the plaintiff was precluded altogether from relitigating the termination issue in his race discrimination case, based on the decision by the State Department of Labor that he was discharged for misconduct. 30 Fair Empl. Prac. Cas. (BNA) at 435-36. Unlike Hill, Knox did not have the opportunity to prove that, but for his race, he would not have

ingly, in order to prevail on the discrimination claim, the plaintiff had to prove that, but for his race, he would not have been discharged for the misconduct.[200]

The previous cases demonstrate the various judicial approaches to the doctrine of preclusion and provide a basis for analysis of whether such preclusion is appropriate in the context of unemployment compensation decisions.

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been terminated.

In Donovan v. Diplomat Envelope Corp., 587 F. Supp. 1417, 1420-21 (E.D.N.Y. 1984), *aff'd without opinion*, 760 F.2d 253 (2d Cir. 1985), the court applied the doctrine of collateral estoppel to the Secretary of Labor in a proceeding under the Occupational Safety and Health Act (OSHA). The court found that the Secretary's action sought to benefit the employee, who had been denied unemployment benefits because he was discharged for walking off the job. Accordingly, the decision regarding the reason for his termination was binding on the Secretary. Because the administrative agency's decision did not state that walking off the job was the sole reason for the discharge, however, the Secretary could still attempt to prove that discrimination was a motivating factor in the termination. As in *Hill*, the collateral estoppel finding did not dispose of the discrimination action. The court in *Donovan* also declined to give collateral estoppel effect to the administrative agency's findings that the employer was aware of the employee's complaint of a health hazard prior to terminating him. 587 F.Supp. at 1422. The court relied on several factors to deny estoppel: the fact that the agency's decision on this issue was not appealed to the court since the employee was denied unemployment compensation benefits, the supposition that the agency may have imposed a more stringent burden of proof than preponderance of the evidence with respect to that issue because it dealt with the culpability of the employee rather than the employer, and the fact that the agency held the first day of hearings in the absence of the employer's counsel despite the counsel's request for a postponement. *Id.* at 1422-23.

200. 786 F.2d at 553-54. The United States Supreme Court has recognized two different types of disparate treatment cases under Title VII of the Civil Rights Act when the employer has asserted a legitimate nondiscriminatory reason for the employee's discharge: the dual motive and the pretext case. In a dual motive case, where the employer was motivated by both legitimate and illegitimate considerations, if the employee proves that discrimination was a substantial motivating factor, the burden shifts to the employer to establish that the employee would have been discharged even in the absence of the discriminatory motive. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989). In a pretext case, the plaintiff must show that the legitimate nondiscriminatory reason for the dismissal articulated by the employer is a pretext for discrimination. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981). Note that § 107 of the Civil Rights Act of 1991 legislatively overruled *Hopkins*. *See* 42 U.S.C. § 2000(e)-2(m). The employer's proof that the employee would have been discharged even absent the discriminatory motive does not defeat the employee's claim but limits the remedy. *See* 42 U.S.C. § 2000(e)-(g)(12)(B).

III. Analysis of the Application of Collateral Estoppel on the Basis of Unemployment Compensation Decisions

The judicial decisions discussed above provide arguments for and against the use of collateral estoppel based on unemployment compensation decisions. These arguments will be analyzed in light of the policies underlying both collateral estoppel and unemployment compensation.

The cases analyzed demonstrate three primary arguments against application of collateral estoppel based on unemployment compensation decisions: first, the requisite issue identity between the two proceedings may not be present; second, unemployment compensation proceedings do not provide a full and fair opportunity to litigate the discharge issue;[201] and third, the application of collateral estoppel will have adverse consequences on the unemployment compensation system, interfering with the public policies underlying unemployment compensation statutes. Each of these arguments will be examined in turn, along with the counter-arguments of proponents of collateral estoppel.

A. The Absence of Issue Identity

The first requirement that may determine the use of collateral estoppel in the unemployment context is issue identity. Unless the issue is the same in both proceedings, the party against whom preclusion is sought to be applied is entitled to litigate in the second proceeding because the litigation is not repetitious.[202] Courts in many cases have found that the requisite issue identity was not present.[203] Nevertheless, there are other cases where courts have properly concluded that issue identity exists. This suggests that the

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201. The absence of a full and fair opportunity to litigate encompasses a number of different factors. *See supra* notes 125-55 and accompanying text.

202. If the issues are not identical, then a full and fair opportunity to litigate the issue in the second action did not exist in the original action. Comment, *supra* note 10, at 824. The traditional requirements of collateral estoppel also specify that the issue determined in the initial proceeding must have been essential to the judgment. *See supra* note 48 and accompanying text. Cases treating collateral estoppel in the unemployment compensation context have not relied on this factor to deny collateral estoppel. However, it has been argued that if the unemployment compensation determination made findings not essential to the judgment, collateral estoppel should be denied. *See* Committee on Benefits of Unemployed Persons, *supra* note 2, at 78-79. This argument does not support a complete ban on collateral estoppel, but supports the conclusion that its applicability in the unemployment compensation context is limited.

203. *See* cases cited *supra* notes 110-23 and accompanying text.

problem of issue identity does not require a complete ban on collateral estoppel. For example, in *Osborne v. Kelly*,[204] the court concluded that the determination in the unemployment proceeding that the employee voluntarily quit barred his action for retaliatory discharge.[205]

By way of contrast, in an employment discrimination case where motive for discharge is an essential element of the claim, the determination of whether an employee was discharged for misconduct is not identical to the issue of whether discrimination caused the discharge. While the issues may first appear identical, the determination in an employment discrimination case requires a careful analysis of the employer's motive, even if it is established that the employee engaged in misconduct.[206] The agencies and proceedings designed for quick determinations of eligibility for unemployment compensation benefits are ill-suited to make sophisticated and necessary determinations of motive in employment discrimination cases, even when the issue is raised.[207] The same is true when the issue is one of discriminatory constructive discharge. While it may appear that issues of voluntarily quiting without good cause under unemployment law and constructive discharge are the same,[208] complex issues of discrimination need to be analyzed by a proper and experienced forum.[209] In addition, similar issues of motivation will be relevant in any case alleging wrongful discharge in violation of public policy.[210]

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204. 207 Ill. App. 3d 488, 565 N.E.2d 1340, *appeal denied*, 137 Ill. 2d 666, 571 N.E.2d 150 (1991).

205. *Id.* at 492, 565 N.E.2d at 1342-43. *See supra* notes 169-74 and accompanying text. However, preclusion would not be appropriate under these circumstances if the employee alleged a discriminatory constructive discharge where motive was at issue. *See infra* notes 207-11 and accompanying text.

206. *See, e.g.*, Delgado v. Lockheed-Georgia Co., 815 F.2d 641, 646-47 (11th Cir.), *reh'g denied en banc*, 820 F.2d 1231 (11th Cir. 1987), in which the court refused to preclude relitigation of an age discrimination claim because, even though the unemployment compensation agency found that the employees engaged in misconduct, it failed to hear and consider evidence that younger employees who engaged in the same conduct were treated differently than the plaintiffs.

207. *See* Silver, *supra* note 29, at 416-17.

208. *See supra* notes 4-6 and accompanying text.

209. *See* Silver, *supra* note 29, at 417; *see also* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (courts in Title VII actions not required to defer to arbitrator's decisions because arbitrator chosen for expertise in industrial relations and contract interpretation, not in public law).

210. *See* Willoughby v. Gencorp, Inc., 809 S.W.2d 858 (Ky. Ct. App. 1990),

The issues are more likely to be identical in discharge cases involving questions of whether an employee was discharged for just cause. If an employee engaged in sufficient misconduct to disqualify the employee for unemployment compensation benefits, just cause for termination likely existed.[211] This is because the test for misconduct is generally more stringent than that for just cause.[212] The reverse is not true, however. A finding of no mis-

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where the court found that although the unemployment hearing officer found that the employer had a legitimate basis for terminating the plaintiff, a jury could determine that the reason for termination was a pretext and the plaintiff was discharged wrongfully in violation of public policy. The issue of breach of the covenant of good faith and fair dealing requires a similar analysis of the employer's motivation that is not required in an unemployment compensation proceeding. *See* Niles v. Carl Weissman & Sons, Inc., 241 Mont. 230, 786 P.2d 662 (1990).

211. The court should take care to insure that the issues are identical because there may be circumstances other than the nature of the misconduct that warrant a determination of no just cause or breach of contract. For example, if the contract requires that the employer follow progressive discipline and the employer failed to do so, the employee may prevail even if the employee committed misconduct. *See* Woolley v. Hoffman-LaRoche, Inc., 99 N.J. 284, 491 A.2d 1257, *modified*, 101 N.J. 10, 499 A.2d 515 (1985) ("If the court or jury concludes that the [employment] manual's job security provisions are binding, then, according to those provisions, even if good cause existed, an employee could not be fired unless the employer went through the various procedures set forth in the manual, steps designed to rehabilitate that employee in order to *avoid* termination."); Shields & Terrell Convalescent Hosp., 56 Lab. Arb. (BNA) 884, 887 (1971) (Statement by David G. Heilbrun, arbitrator). (Although the employee "was unequivocally instructed to perform certain duties and failed to do so without reasonable excuse," and the contract allowed the employer to discharge employees for insubordination and failure to perform work as required, the arbitrator reduced the discharge to a suspension because the employer failed to follow progressive discipline.)

212. As noted by the Illinois Supreme Court in Jackson v. Board of Review, 105 Ill. 2d 501, 507, 475 N.E.2d 879, 882-83 (1985), "every justifiable discharge does not disqualify the discharged employee from receiving [un]employment benefits under the Act." In order to be disqualified for benefits, state statutes generally require gross misconduct or deliberate and willful misconduct. *See supra* note 76; Saucier & Roberts, *supra* note 4, at 599. Gross misconduct requires intentional misconduct or gross indifference to the employer's interests. *See* Delgado v. Unemployment Ins. Appeals Bd., 41 Cal. App. 3d 788, 116 Cal. Rptr. 497 (1974), where the court noted that while the employee violated a company rule requiring employees to ring up sales as the money was received, she was entitled to unemployment compensation benefits because she acted to please customers rather than with malice toward the employer; Morgen v. CBS, Inc., 54 A.D.2d 523, 524, 386 N.Y.S.2d 239, 240 (1976), where the court refused to preclude an unemployment compensation hearing on the issue of misconduct on the basis that an arbitrator had held that just cause for discharge existed,

conduct does not negate a finding of just cause[213] unless the unemployment board determines that the employee did not commit the act of which she was accused. This conclusion suggests that in some circumstances, preclusion might be more appropriately applied to bar an employee from relitigating the issue of cause than to bar an employer.

In some cases, collateral estoppel could be applied to bar either party from relitigating the issue. When the unemployment agency decides the question of whether the employee engaged in the conduct alleged to have prompted the discharge, courts can use the approach taken by the Second Circuit in *Hill v. Coca Cola Bottling Co.*[214] to limit the issues that require litigation in the second action. In *Hill*, the employer attempted to use the unemployment board's finding—that the employee was discharged for misconduct—as a basis for barring the employee's race discrimination claim. The court rejected the argument, but precluded relitigation on the issue of whether the employee engaged in misconduct.[215] The court recognized that the complex and sensitive issues involved in the race discrimination claim were not adequately litigated in the previous unemployment proceeding.[216] Nevertheless,

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because the issues of just cause and misconduct were not identical; Fiscarelli v. Ross, 65 A.D.2d 855, 856, 410 N.Y.S.2d 170, 172 (1978) where the court stated that "[i]nefficiency, negligence and bad judgment are valid causes for discharge but do not render a claimant ineligible for benefits." Some states, however, employ a lesser standard for misconduct. *See supra* note 76.

For a discussion of issue preclusion in suits under § 301 of the Labor Management Relations Act and unemployment compensation determinations, see *Issue Preclusion: Unemployment Compensation Determinations and Section 301 Suits*, 31 CASE W. RES. L. REV. 862 (1981). The author discusses the question of whether misconduct under the unemployment statute and just cause for discharge under a collective bargaining agreement are identical issues. The author concludes that the answer depends on the state's interpretation of the unemployment statute. *Id.* at 881.

213. *See* Mitchell v. Jewel Food Stores, 189 Ill. App. 3d 450, 545 N.E.2d 337 (1989), *rev'd on other grounds*, 142 Ill. 2d 152, 568 N.E.2d 827 (1990) (misconduct under unemployment statute defined as "deliberate and willful violation of a reasonable rule or policy," while just cause under employment manual did not require deliberate and willful misconduct). Accordingly, the Board of Review's conclusion that the employee was not discharged for misconduct did not bind the employer in the breach of contract action. *See supra* notes 113-18 and accompanying text.

214. 786 F.2d 550 (1986).

215. *Id.* at 553.

216. *Id.* The same is true of other actions in which employer motive is a key issue. *See supra* notes 206-10 and accompanying text.

even in a discrimination action, some issues may be adequately litigated before the unemployment agency, therefore barring relitigation.[217] It is crucial for courts considering the application of collateral estoppel to scrutinize carefully claims of issue identity. The courts must look beyond appearances to insure that, in fact, all key elements of the issues are identical.[218]

Thus, issue identity problems alone do not render collateral estoppel inappropriate to all unemployment compensation determinations. While the number of cases where the requisite issue identity exists may not be extensive, courts can apply collateral estoppel in appropriate circumstances to prevent unnecessary relitigation of some issues and achieve some of the benefits of collateral estoppel.[219]

B. A Full and Fair Opportunity to Litigate Discharge Issues

The second argument for denying issue preclusion to unemployment determinations is that the proceedings do not provide a full and fair opportunity to litigate issues arising in later termination actions. There are a number of elements of this argument, including: 1) the issue in a discharge suit may not be fully explored in an unemployment proceeding;[220] 2) there is insufficient incentive to litigate in an unemployment proceeding where the amount at stake is much smaller than in a later lawsuit;[221] 3) the parties may not adequately litigate the issues because they frequently do not use attorneys in unemployment proceedings;[222] 4) the full panoply of procedural protections available in a lawsuit is not available in an unemployment hearing;[223] and 5) the burdens of proof in an unemployment proceeding differ from the burdens in a lawsuit.[224]

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217. Preclusion would be appropriate only if all other requirements for application of collateral estoppel are met, of course.

218. Courts should not assume that because an unemployment proceeding litigates the issue of discharge for misconduct that any later lawsuit challenging the discharge raises an identical issue.

219. Because of the need for careful and sensitive inquiry into the issue identity question, it might be argued that the risk of error by a court is so great that preclusion ought to be barred. Judicial error is a risk inherent in litigation, however, and the number of cases in which a court has reached an inappropriate decision regarding issue preclusion based on unemployment proceedings is not so large that preclusion should be outlawed on the basis of potential error.

220. *See supra* notes 126-30 and accompanying text.

221. *See supra* notes 131-37 and accompanying text.

222. *See supra* notes 138-39 and accompanying text.

223. *See supra* notes 140-55 and accompanying text.

224. *See supra* notes 144-46 and accompanying text.

This section examines these arguments to determine whether they warrant a ban on collateral estoppel based on unemployment compensation findings.

First, the failure to explore the issues fully certainly warrants denial of collateral estoppel in the particular case,[225] but it does not support a blanket denial of collateral estoppel. For example, it is conceivable that the issue of whether the employee quit or was discharged could be fully explored in an unemployment proceeding. In such a case, collateral estoppel could be appropriately applied.[226]

The necessity for an adequate incentive to litigate is more troublesome, however. Rarely will the amount at stake in an unemployment proceeding approach the amount at stake in any later discharge litigation. In December 1988, unemployed workers averaged $145.00 per week in benefits for an average of 13.9 weeks.[227] The maximum duration of benefits in most states is twenty-six weeks,[228] except in the rare circumstance when extended benefits are available due to a high unemployment rate.[229] For

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225. *See supra* notes 126-30 and accompanying text.

226. *See supra* notes 204-05 and accompanying text.

227. *Unemployment Insurance*, *supra* note 4, at 22. "The typical claimant may only collect $1,600 during his or her period of unemployment." *Unemployment Boards' Statement*, *supra* note 105, at 208. See *supra* notes 133-36 and accompanying text for further discussion of the amount of benefits at stake in an unemployment proceeding.

228. *Unemployment Insurance*, *supra* note 4, at 23-24.

229. Because of changes in the law, the extended benefit program rarely applies even in states with troubled economies and high unemployment rates. Rejda & Lee, *supra* note 136, at 656-57; Shapiro, *Uncovered: Unemployment and Jobless Workers in 1987* 11-12 (Center on Budget and Policy Priorities, June 1988). In 1990, in the midst of the recession, only two states qualified for extended benefits. Shapiro & Nichols, *Unemployed and Uninsured* 23 (Center on Budget and Policy Priorities 1991). As of mid-1991, as the recession continued, only five states qualified for the extended benefits program. *Id.* at 23-24. In late 1991, Congress finally enacted legislation providing for extended benefits on an emergency basis and President Bush signed the bill. 137 CONG. REC. D1451 (Nov. 18, 1991) (P.L. 102-164). As the recession continued, Congress again enacted to extend benefits in February 1992. 138 CONG. REC. D109 (Feb. 18, 1992) (P.L. 102-244). On July 3, 1992, President Bush signed H.R. 260, now Public Law 102-318, which extended the emergency unemployment compensation program to March 6, 1993. 138 CONG. REC. D860 (July 7, 1992). The Bill amends the Federal-State Extended Unemployment Compensation Act of 1970 to give states the option to choose a trigger for extended benefit qualification that would make it easier for unemployed workers in the state to qualify for extended benefits. *Benefits Extension Passes with Bipartisan Support*, 10 Lab. Rel. Rep. 337, 338-39 (July 13, 1992).

employers, even less is at stake. At most, the employer faces a future increase in its unemployment insurance rate if the employee prevails on a benefits claim.[230]

The amount at stake in discharge litigation, on the other hand, whether wrongful discharge or employment discrimination, for significant can often be quite. Under Title VII and the ADEA, an unlawfully discharged employee is entitled to reinstatement and back pay, and the Civil Rights Act of 1991 added limited compensatory and punitive damages to Title VII remedies.[231] Under Section 1981, the court can award the employee compensatory and punitive damages.[232] A successful breach of contract action generally will provide back pay,[233] as will an action for breach of the covenant of good faith and fair dealing.[234] A tort action for

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230. *See supra* note 134 and accompanying text.

231. *See* 42 U.S.C. § 2000e-5(g) (1988); 42 U.S.C. § 1981(a). Title VII remedies include reinstatement with or without back pay and limited compensatory and punitive damages. The ADEA also provides for liquidated damages that double the amount of back pay. 29 U.S.C. § 626(b) (1988) (incorporating liquidated damages provisions of the Fair Labor Standards Act, 29 U.S.C. § 216(c) (1988)).

A study of employment discrimination decisions in the United States District Court for the Northern District of Illinois for the period 1972 to 1986 revealed that the average award in published cases was $606,424, while the average award in unpublished cases was $12,545. Siegelman & Donohue, *supra* note 1, at 1151.

232. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975). Prior to enactment of the Civil Rights Act of 1991, the courts of appeals split on whether § 1981, as interpreted by the United States Supreme Court in Patterson v. McLean Credit Union, 491 U.S. 164 (1989), prohibits discharge based on race, however. *See, e.g.*, Hicks v. Brown Group, 902 F.2d 630 (8th Cir. 1990), *reh'g denied en banc*, 1990 *vacated sub. nom.*, Brown Group, Inc. v. Hicks, 111 S. Ct. 1299 (1991) (Section 1981 encompasses retaliatory discharge). *Compare* Overby v. Chevron USA, Inc., 884 F.2d 470, 473 (9th Cir. 1989) (allegations of retaliatory discharge do not state claim under § 1981). The Civil Rights Act of 1991 amended § 1981 to clarify that discharge is prohibited by the statute. *See* 42 U.S.C. § 1981(b). Unlike Title VII, § 1981 contains no statutory limitations on compensatory and punitive damages.

233. Contract theory generally provides for "make whole" damages. M. ROTHSTEIN, A. KNAPP & L. LIEBMAN, *supra* note 1, at 875 (2d ed. 1990). Some courts have awarded mental distress damages in a contract action. *Id.* at 875-76 (citing Mosely v. Metropolitan Life Ins. Co., 4 Individual Empl. Rights Cas. (BNA) 1744 (N.D. Cal. 1989)).

234. *See* Fortune v. National Cash Register Co. 373 Mass. 96, 364 N.E.2d 1251 (1977) (court upheld award of commissions to employee that he would have earned had he not been terminated to avoid payment of commissions). In Foley v. Interactive Data Corp., 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (1988), the California Supreme Court held that the plaintiff's claim for breach of the covenant of good faith and fair dealing sounded in contract and not in tort, thereby limiting the employee to contract damages.

wrongful discharge in violation of public policy has potential for both compensatory and punitive damages.[235] While the discharged employee has the obligation to mitigate damages, and interim earnings will be deducted from back pay,[236] unless the employee finds equally remunerative employment almost immediately, the discharge action will be worth significantly more than the unemployment action. Thus, since unemployment compensation is designed to compensate the employee for about fifty percent of the usual earnings, and frequently falls below that amount,[237] the employee in the discharge action has the potential to recover at least double the amount of unemployment compensation for the first six months and full back pay after that. In most actions, the employee's potential recovery will be far greater. For the employer, the disparity between the amounts at stake in the two proceedings will be even wider.[238]

While this disparity suggests that application of collateral estoppel would be inappropriate under any circumstance, a careful inquiry by the court to insure that the parties fully litigated the issue could result in the conclusion that preclusion is appropriate. The possibility of preclusion provides an incentive to litigate thoroughly.[239] Because the unemployment hearing takes place almost

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235. *See* M. ROTHSTEIN, A. KNAPP & L. LIEBMAN, *supra* note 1, at 858-59 (noting that awards of several hundred thousand dollars are not uncommon and in some cases awards have exceeded a million dollars). A Rand Corporation study of 120 wrongful discharge cases in California that went to verdict revealed an average award for victorious plaintiffs of $646,855. J. DERTOUZOS, E. HOLLAND & P. EBENER, *supra* note 1, at 25. The average punitive damages award was $523,170. *Id.*

236. Title VII expressly provides for deduction of interim earnings or amounts earnable with reasonable diligence by the discriminatee. 42 U.S.C. § 2000e-5(g) (1988). Deduction of amounts earnable by reasonable diligence is a rule of damages under traditional contract law, the Civil Rights Acts of 1866 and 1871, Title VII, and the ADEA. However, the burden of proving what the plaintiff could have earned is on the defendant. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1447 (2d ed. 1983). *See also* M. ROTHSTEIN, A. KNAPP & L. LIEBMAN, *supra* note 1, at 876 ("contractual remedy theory requires mitigation of damages by the plaintiffs").

237. *See Unemployment Insurance*, *supra* note 4, at 22, 25.

238. *See supra* note 134 and accompanying text.

239. *See* Committee on Benefits to Unemployed Persons, *supra* note 2, at 80; Mazurak, *supra* note 6, at 168 n.136. Mazurak suggests that applying collateral estoppel based on unemployment proceedings will improve the quality of those proceedings. *Id.* This argument ignores the cost of such improvements to the employers and employees. *See infra* notes 262-314 and accompanying text. Courts faced with collateral estoppel issues should consider that factors such as failure

immediately after discharge, however, the parties may be unaware of the possibility of a later lawsuit over the discharge.[240] Furthermore, if aware of the possibility, the employer might be encouraged to litigate every unemployment compensation claim as if a later lawsuit would be filed,[241] although in most cases no later litigation would result. The possibility of preclusion also would encourage the employee to consult and retain an attorney immediately, if possible.[242]

Even where the incentive to litigate is present, an unemployment proceeding is not identical to a judicial proceeding, and the differences may make preclusion inappropriate. All state unemployment statutes contain procedural due process requirements,[243] but reliance on the statutory provisions alone is not sufficient to insure an adequate opportunity to litigate.[244] The hearings are informal and the rules of evidence and procedure need not be followed.[245] Hearsay is admissible and a decision may be supported by, or even based on, hearsay.[246] The parties frequently are not

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to employ counsel, failure to appear for any part of the unemployment compensation hearing, and failure to take advantage of the right to appeal suggest that the incentive to litigate was not present. *See Lewis*, 393 F. Supp. at 308-09.

240. *See Unemployment Boards' Statement*, *supra* note 104, at 209-10.

241. This approach creates problems for the unemployment compensation system. *See infra* notes 279-314 and accompanying text.

242. Employees may be significantly disadvantaged if collateral estoppel is applied, however, due to the difficulty they have in obtaining representation. *See infra* notes 264-67 and accompanying text.

243. The federal Social Security Act requires that each state's unemployment law provide an opportunity for a fair hearing before an impartial tribunal for a claimant whose benefits are denied. 42 U.S.C. § 503(a)(3) (1988). In addition, most state unemployment statutes have fair hearing requirements. McHugh, *The "Fair Hearing" Concept in Unemployment Insurance Cases*, 18 CLEARINGHOUSE REV. 892, 893 (1984).

244. Perschbacher, *supra* note 11, at 457-58, notes that some courts hold that an opportunity to litigate is sufficient, applying collateral estoppel even when an issue is not actually litigated in the first action. Perschbacher found this approach to be particularly prevalent when courts were reviewing administrative determinations for possible application of collateral estoppel. *Id.* Proper application of collateral estoppel in this context requires actual litigation of the issue, however. *See supra* note 239 and accompanying text.

245. *See* 1B Unempl. Ins. Rep. (CCH) ¶ 2020:

> The attempt has been made . . . to simplify procedure so that the employee may be able to prosecute his [or her] claim without the expense of obtaining legal counsel. Many states provide that the common law or statutory rules of evidence and other technical rules of procedure need not be applied.

See also infra note 271 (information regarding the brief length of most hearings).

246. *See Clapper*, 437 N.W.2d at 726.

represented by attorneys,[247] and thus the litigation, particularly cross-examination, may be ineffective to insure adequate exploration of the issues.[248] Many state unemployment agencies use telephone hearings as a cost-saving device.[249] The use of telephone hearings can create problems in evaluating the credibility of witnesses, difficulties in conducting effective cross-examination, and complications in introducing documents and questioning witnesses about the documents.[250]

Additional procedural differences between unemployment compensation proceedings and discharge litigation include the unavailability of discovery in the former, and the lack of preparation time for unemployment hearings because of the speed of claims processing.[251] Finally, the burdens of proof may differ in the two proceedings.[252] These procedural differences limit the cases in which collateral estoppel should be applied to preclude discharge litigation based on unemployment proceedings.

The elements necessary for application of collateral estoppel have not been met unless the issue before the court was fairly and adequately litigated in a proceeding with either procedural protections similar to those available in court or differences that could not lead to a different result in the judicial action. For example, denial of preclusion is warranted when credibility of witnesses is relevant and the unemployment compensation proceeding use a telephone hearing[253] or when the effectiveness of cross examination

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247. *See* McHugh, *Lay Representation in Unemployment Insurance Hearings: Some Strategies for Change*, 16 CLEARINGHOUSE REV. 865, 866 nn.8-9 (1983) (1979 study by National Commission on Unemployment Compensation found only 7.23% of claimants represented, and only 65% of claimants' representatives lawyers); N.Y. Bar Committee Report, *supra* note 136, at 742-43 (same survey found only 9% of employers represented by counsel).

248. *See McClanahan*, 517 N.E.2d at 395.

249. *See* McHugh & Ferrazza, *Telephone Hearings as Unemployment Fair Hearings*, 19 CLEARINGHOUSE REV. 33 (1985); Note, *Telephonic Hearings in Welfare Appeals: How Much Process is Due?*, 1984 U. ILL. L. REV. 445, 445-46 (1984); Fetherston v. ASARCO, 635 F. Supp. at 1446; Niles v. Carl Weissman & Sons, Inc., 241 Mont. at 235, 786 P.2d at 666.

250. *See* McHugh & Ferrazza, *supra* note 249, at 33-34; Note, *supra* note 249, at 468-69, 473 (author argues that telephone hearings do not comply with requirements of due process).

251. See *supra* note 155 and accompanying text.

252. See *supra* notes 144-47 and accompanying text.

253. Some courts in unemployment compensation appeals have indicated skepticism regarding whether telephone hearings afford due process. *See, e.g.*, Asche v. Industrial Comm'n, 654 P.2d 813, 814 (Colo. 1982) (court reversed

at the hearing is limited by the absence of counsel or competent lay representation.[254] Similarly, preclusion should be denied when a party is hampered by the absence of discovery.[255] When the decision is based wholly or partly on evidence that is inadmissible in court, preclusion should be denied. Also, preclusion should not apply when different burdens of proof exist that might change the outcome in the second proceeding.

Careful judicial review of the unemployment compensation proceeding and the decision of the referee or board is essential to insure that procedural differences between the unemployment hearing and the judicial action could not lead to a different result in the latter proceeding.[256] Such a review will insure that collateral estoppel serves its purpose without unfairly prejudicing either the employer or the employee in subsequent litigation.[257] This careful review necessarily limits the benefits of collateral estoppel; it

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lower court's dismissal of appeal challenging fairness of telephone hearing, indicating that agency had burden to show that such hearing was valid and proper procedure); Weir v. Commonwealth Unemployment Compensation Bd. of Review, 88 Pa. Commw. 372, 489 A.2d 979, 980 (1985) (referee's call to employer witness not present at hearing for corroborating testimony unfair to claimant); Chobert v. Commonwealth Unemployment Compensation Bd. of Review, 86 Pa. Commw. 151, 154-55, 484 A.2d 223, 225 (1984) (unfair for employer to testify over the telephone from documents unavailable to the claimant).

254. Statistical evidence suggests that representation increases a claimant's chance of obtaining unemployment compensation benefits. McHugh, *supra* note 247, at 866. Due to limitations on fees and inability of claimants to pay attorneys, representation of claimants by attorneys is unlikely to occur in most cases, but lay representation by legal services paralegals, law students, and union officials can be effective. *Id.* Employers also frequently rely on lay representation when permissible. *See* Mack v. South Bay Beer Distrib., 798 F.2d 1279, 1284 (9th Cir. 1986).

255. In Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330-31 (1979), in which the Supreme Court permitted use of issue preclusion by the plaintiffs who were neither parties nor privies to the earlier adjudication, the Court was careful to note that issue preclusion should rarely be applied if the second forum provides procedural opportunities unavailable in the first forum, such as discovery or evidentiary rules, that could change the outcome.

256. *See* Comment, *supra* note 10, at 843, 846 (argues that courts should require a high degree of formality in agency proceedings before applying collateral estoppel based on any administrative determination).

257. The requirement of a full and fair opportunity to litigate the issue incorporates the concept of fairness to litigants. *See* Carlisle, *Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make An Administrative or Arbitral Determination Binding in a Court of Law?*, 55 FORDHAM L. REV. 63, 84-85 (1986); Pullar v. Upjohn Health Care Servs. Inc., 21 Ohio App. 3d 288, 488 N.E.2d 486 (1984) (court failed to conduct appropriate inquiry for

reduces judicial economy by requiring the court to devote more resources to review the administrative proceeding. Nevertheless, as long as courts carefully consider the application of collateral estoppel and limit its use to situations where procedural differences could not cause a different outcome in the discharge hearing, the procedural differences do not justify outlawing collateral estoppel based on unemployment decisions.

Of the arguments against application of collateral estoppel discussed thus far, none warrants a complete ban, but each suggests that the use of collateral estoppel based on unemployment compensation decisions will be limited. Further, because of the close judicial scrutiny required when collateral estoppel is urged, the doctrine will not significantly serve the goal of judicial economy. In addition, as employers and employees become more aware of the possibility that collateral estoppel may be applied on the basis of the unemployment compensation determination, they will devote more resources to the unemployment hearing if possible. This maneuvering could cause longer and more complex hearings and greater incentive to appeal, further reducing judicial economy and resulting in little savings for the parties.[258] This point relates directly to the final and most persuasive argument against applying collateral estoppel in the unemployment context—the potential adverse impact on the unemployment compensation system.

C. The Impact of Collateral Estoppel on the Unemployment Compensation System

Each of the arguments discussed earlier leaves room for the application of preclusion in appropriate cases. The uncertainty created by leaving the issue for the courts to resolve on a case by case basis, however, results in serious problems for the administration of the unemployment compensation system. If the possi-

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application of collateral estoppel). The *Pullar* court presumed that the unemployment proceedings were regular despite the absence of a transcript of the unemployment hearing. *Id.* at 294, 488 N.E.2d at 492. Further, the court noted that plaintiff had an *opportunity* to present evidence, give testimony, cross-examine witnesses, and appeal the administrator's decision to the board of review referee. *Id.* The decision did not indicate that plaintiff effectively took advantage of the opportunity, which would show that she had both adequate incentive to litigate and a full and fair opportunity to litigate the issues. The court also failed to note the difference between the issue in the unemployment compensation proceeding and the age discrimination action.

258. *See* Comment, *supra* note 10, at 838-39.

bility of preclusion of later litigation exists, sophisticated parties will attempt to litigate fully in the unemployment proceeding the issues that might arise in a subsequent lawsuit.[259] Unemployment hearings will not only litigate entitlement to benefits, but also the more complex issues of discriminatory discharge and wrongful discharge. For example, an employer will not only attempt to prove that an employee committed misconduct sufficient for disqualification from benefits, but also will offer evidence designed to establish that the discharge was actually motivated by the misconduct and not by any illegal reason,[260] in whole or in part. The employer will try to prove that it harbored no hostility based on the employee's race, gender, religion, or other relevant status and that it engaged in no disparate treatment of the employee. The employer also will attempt to show that the employee conduct constituted just cause for termination under the employer's collective bargaining agreement or policy manual. In order to litigate these additional claims in the unemployment forum, the employer will feel the need to use legal representation.[261]

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259. *See* Perschbacher, *supra* note 11, at 449. While the unemployment hearing officer can attempt to preclude introduction of evidence unrelated to the unemployment issue to avoid lengthy hearings, *see* Committee on Benefits to Unemployed Persons, *supra* note 2, at 19, the effort to litigate such issues, and the resulting arguments about relevance, will extend the time required for hearing. Furthermore, it will not always be easy for the hearing officer to distinguish at the hearing between information relevant to the unemployment benefits issue and information relevant only to a potential later lawsuit. The result may be either that the hearing officer errs on the side of admitting all evidence proffered, thereby lengthening the hearing process, or that more unemployment cases are reversed by appellate bodies because necessary evidence was excluded from the record. If the hearing officer prevents the parties from introducing evidence relevant to the later lawsuit, such as evidence of disparate treatment, then collateral estoppel should not be applied. *See supra* note 206 and accompanying text.

260. Potential unlawful motivations would include the employee's race, gender, religion, national origin, age, exercise of constitutional rights (for public employees), complaints to OSHA, exercise of rights under the Employee Retirement Income Security Act (ERISA) and the Fair Labor Standards Act, refusal to violate the law, exercise of other rights granted by law, and any bad faith attempt on the part of the employer to prevent the employee from obtaining the benefits of the contract.

261. Currently, employers use attorneys in only nine percent of unemployment compensation cases. *See supra* note 138 and accompanying text. Because the amount at risk in a discharge case is so much larger than in the unemployment hearing, employers anticipating preclusion will not litigate without legal representation. *See supra* notes 131-39 and accompanying text. The employee anticipating a later lawsuit also will try to prove that there is a judicial cause of action in the unemployment hearing, necessitating legal representation.

The effects of shifting discharge litigation to unemployment compensation hearings are significant. First, such a shift will reduce the benefits of collateral estoppel because it will merely move the expenditure of the resources of the parties and the judicial system from one forum to another.[262]

Second, the shift may disadvantage employees who are likely to be less sophisticated about the possibility of collateral estoppel and less likely to use attorneys in the unemployment proceeding, because of both a lack of awareness of the risk of preclusion and a lack of funds to pay the lawyer.[263] An employee who is aware of both the potential discharge claim and the impact of collateral estoppel may be able to obtain an attorney for the unemployment compensation claim in anticipation of the more lucrative discharge litigation.[264] For many employees, however, the rapid processing of the claim for unemployment compensation benefits will occur before full recognition of, or exploration of, the possibility of litigation over the discharge.[265] The employee unwittingly may find himself or herself unrepresented in a complex and extensive hearing

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262. *See* Perschbacher, *supra* note 11, at 449.

263. *See* Mack v. South Bay Beer Distrib., 798 F.2d 1279, 1284 (9th Cir. 1986); Silver, *supra* note 29, at 415 ("Explaining preclusion to those versed in the law is a formidable challenge; how can we expect unrepresented litigants to understand it and its consequences?").

264. There are three related reasons that claimants are rarely able to obtain legal representation for unemployment compensation claims. First, many statutes limit the amount of fees that a claimant's counsel can charge for litigating an unemployment claim. 1B Unempl. Ins. Rep. (CCH) ¶ 2020 (1988). Most states limit fees to amounts approved by the agency. *Id.*; *see, e.g.*, MICH. COMP. LAWS ANN. § 421.31 (West 1978) ("Any individual claiming benefits in any proceeding before the commission or a court may be represented by counsel or other duly authorized agent; but no such counsel or agents shall either charge or receive for such services more than an amount approved by the commission."). Some states set a maximum amount of fees, either as a dollar amount or a percentage of the benefits at issue. 1B Unempl. Ins. Rep. (CCH) ¶ 2020, 4544 (1988). For example, Arizona limits the fee to $300 unless the agency approves a higher amount, which may be up to $750. *Id.* The second reason that few claimants can obtain representation is that the number of claims and amount of each claim are too small to enable attorneys to build a financially stable practice of low cost, high volume representation. McHugh, *supra* note 247, at 866. Finally, because the amount at stake is so small, few claimants can afford to pay for representation. *Id.*

265. *See Unemployment Boards' Statement*, *supra* note 104, at 209. Notably, the claims procedure has been designed to allow the employee to pursue a claim for unemployment benefits without the need for an attorney. *See* 1B Unempl. Ins. Rep. (CCH) ¶ 2020 (1988).

that later precludes any legal challenge to the discharge.[266] Similarly, the employer that decides not to utilize an attorney or not to appeal an adverse decision awarding compensation to an employee because of the limited amount at risk may later find itself bound to the decision in a much more costly wrongful termination suit.[267]

Employees and employers who are aware of the potential for preclusion have several options, all of which interfere with the policies underlying unemployment compensation legislation. The employee may decide to forego the claim for unemployment compensation benefits to avoid risking the discharge claim of potentially much greater value.[268] The employee may be unprepared to litigate the discharge claim by the unemployment hearing date[269] due to the inability to gather the necessary evidence and witnesses. Also, since discovery is unavailable in the unemployment forum, an employee may be disadvantaged in pursuing a discharge claim.[270]

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266. Even the aware employee who desires representation may be unable to obtain it. *See supra* note 264. The unrepresented employee facing employer's counsel not only risks the discharge claim, but has a reduced chance of success in the claim for unemployment benefits. *See supra* note 138.

267. While preclusion has been applied more often against the employee, there is also a risk that it will be applied against the employer. See cases cited *supra* note 84, where employees sought to collaterally estop employer from defending unlawful discharge claims on the basis of unemployment compensation decisions; Burka v. New York City Transit Auth., 739 F. Supp. 814, 845-47 (S.D.N.Y. 1990); Spearman v. Delco Remy Div. of General Motors Corp., 717 F. Supp. 1351 (S.D. Ind. 1989). Testimony by the Chamber of Commerce suggests that employers support elimination of collateral estoppel based on unemployment decisions. *See Reforming the Unemployment Compensation System: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 101st Cong., 1st Sess. 116, 117 [hereinafter *1989 Subcommittee Hearing*] (statement of Warren Blue, Employee Benefits and Relations Committee, Council of State Chambers of Commerce).

268. *See* Mack v. South Bay Beer Distrib., 798 F.2d 1279, 1284 (9th Cir. 1986); *Unemployment Boards' Statement*, *supra* note 104, at 209. In an article regarding litigation strategy, the authors suggest that attorneys should not advise discharged employees to seek unemployment compensation benefits unless they are prepared to litigate all issues that might arise in later proceedings in the unemployment hearing. Culverhouse & Hollis, *Strategic Considerations in Administrative Proceedings*, 94 CASE & COM. 19 (Nov.-Dec. 1989).

269. Because of federal requirements for prompt hearings and determinations, the typical unemployment hearing normally will take place three to four weeks after the claim for benefits is filed. Postponements and continuances are discouraged. *See Unemployment Boards' Statement*, *supra* note 104, at 208, 209-10.

270. *See* Caras v. Family First Credit Union, 688 F. Supp. 586, 590 (D. Utah 1988).

Furthermore, in most cases the typical unemployment hearing officer, having a massive caseload and specific training only in unemployment compensation issues[271] will have insufficient expertise or time to determine the complex motivation questions presented in many discharge cases.[272] For all of these reasons, the employee may waive the opportunity for unemployment compensation benefits simply to preserve a discharge claim. Thus workers, perhaps unlawfully deprived of their livelihood, must make an additional financial sacrifice by foregoing the very unemployment compensation benefits designed to provide "prompt if only partial replacement of wages to the unemployed, to enable workers 'to tide themselves over, until they get back to their old work or find other employment, without having to resort to relief.'"[273]

Therefore, the application of collateral estoppel potentially interferes with the purposes of the unemployment statute. The statute was designed to provide income for the unemployed worker to avoid the necessity of resorting to welfare and to provide security

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271. *See Unemployment Boards' Statement*, *supra* note 104, at 208 ("The issues covered in unemployment compensation hearings are generally quite limited. Appeals referees, who are usually not attorneys, may hear anywhere from twenty to forty appeals each week, and hearings last approximately thirty minutes."); New York Bar Committee Report, *supra* note 136, at 741 (in New York, the hearing officer has "less than one hour to acquaint him or herself with the file, take all testimony, hear argument, research any cases cited by the parties *and* write the decision"); Lewis v. IBM Corp., 393 F. Supp. 305, 309 (D. Or. 1974) ("The average hearing lasts forty-five minutes. The referees who conduct the hearings are not necessarily lawyers.").

272. *See* Silver, *supra* note 29, at 410, 417. Courts dealing with such questions on a regular basis have struggled with such issues, casting doubt on whether the decisions of hearing officers who do not do so should be entitled to any deference. While Silver discusses civil rights questions, similar issues of motivation may be present in statutory or common law cases alleging employment discrimination for exercising one's statutory rights or refusing to violate the law. *See, e.g.*, Donovan v. Diplomat & Envelope Corp., 587 F. Supp. 1417 (E.D. N.Y. 1984), *aff'd without opinion*, 760 F.2d 253 (2d Cir. 1985). The problem of lack of expertise will be minimized when the court accords preclusive effect only to factual findings. For example, a court could defer to an administrative finding that an employee engaged in misconduct, but allow the employee nonetheless to litigate the discrimination issue. *See supra* notes 198-200 and accompanying text. When issue preclusion is determined on a case by case basis, however, neither the employee nor the employer can be certain how the court will apply the doctrine, if at all. Thus, the parties in the unemployment proceeding must decide the litigation strategy in light of the risk that the court will accord the findings their complete preclusive effect.

273. California Dep't of Human Resources Dev. v. Java, 402 U.S. 121, 131-32 (1971) (quoting H.R. REP. No. 615, 74th Cong., 1st Sess., 7 (1935)).

so that the worker could search for additional employment.[274] Additionally, unemployment benefits were intended to aid the economy by insuring continued purchasing power during a recession.[275] If employees are discouraged from applying for benefits because of the potential impact on their later discharge litigation, the beneficial purposes of unemployment compensation legislation will be frustrated.[276]

Additionally, if the employer decides not to challenge an employee's application for benefits because of the potential for issue preclusion, the policies underlying unemployment compensation legislation could be undermined. Unemployment compensation is designed to provide income to individuals who are unemployed through no fault of their own.[277] Employers who fail to challenge benefits for unqualified employees allow them to collect benefits that would otherwise remain in the fund to be paid to entitled employees. Since most states have inadequate trust fund reserves to pay benefits during times of high unemployment,[278] benefit payments to unqualified employees adversely impact the underlying basis of the unemployment compensation system.

The remaining alternative for employers and employees faced with the possibility of preclusion is to litigate every possible issue in the unemployment proceeding. As discussed, the employee who is unable to retain counsel may be disadvantaged significantly under this alternative.[279] The impact on the unemployment compensation system, however, is even more significant than the impact on the individual employee. The system was designed for the speedy processing of claims to insure prompt payment of benefits. Prompt payment of benefits serves two important goals: avoiding

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274. *Id.* at 131-32.

275. *Id.* at 132-33.

276. These purposes also will be frustrated if employees are improperly denied unemployment benefits because of their inability to litigate the issues adequately, since they are increasingly facing employers represented by counsel. See *supra* note 138.

277. *Cf.* Saucier & Roberts, *supra* note 4, at 594.

278. *See* Rejda & Lee, *supra* note 136, at 655. States with inadequate funds can borrow from the federal government. *Id.* If the funds are not repaid on time, however, employers in the state are subjected to penalty taxes which negatively affect the economy of the state, hindering the state's recovery from recession. *Id.* at 655-56.

279. *See supra* notes 263-66 and accompanying text. On the other hand, an employee with a weak discharge case and a sympathetic unemployment agency may actually be aided by the doctrine of preclusion. *See* Culverhouse & Hollis, *supra* note 268, at 22-24. The same is true of an employer, however. *Id.*

the need for the employee to resort to welfare and stabilizing consumer demand to help mitigate the effects of recession.[280] The Social Security Act requires that a state's methods of administration "be reasonably calculated to insure full payment of unemployment compensation when due."[281] The Supreme Court has held that the words "'when due' were intended to mean at the earliest stage of unemployment that such payments were administratively feasible, after giving both the worker and the employer an opportunity to be heard."[282] If the conditions are not met the Secretary of Labor may refuse to certify the state for payment of federal funds under the unemployment insurance program.[283]

To ensure that states meet the important statutory objective of the earliest possible payment of benefits to unemployed workers, the Secretary of Labor has issued regulations governing claims procedures and requiring quality control measures of the state agency involved.[284] The Secretary also has issued specific standards for timeliness of benefit payments which states must meet to insure their continued eligibility for federal funds and tax credits.[285] For example, initial benefit payments must be issued to eighty-seven percent of intrastate claimants within fourteen days of the end of the first compensable week[286] and to ninety-three percent of such

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280. *See Java*, 402 U.S. at 133.

281. 42 U.S.C. § 503(a)(1) (1988).

282. *Java*, 402 U.S. at 131. The length of time required to obtain administrative review is also relevant in determining whether the system meets the due process requirements of the United States Constitution. *See* Fusari v. Steinberg, 419 U.S. 379, 389, *reh'g denied*, 420 U.S. 955 (1975).

283. The Social Security Act, which established the unemployment compensation program, created a system of federal-state cooperation. Rosbrow, *supra* note 57, at 22. The statute encourages the states to set up unemployment compensation systems by giving employers credit for state unemployment compensation system payments against the federal unemployment compensation tax. *Id.* at 22-23. The federal tax is imposed on all employers in interstate commerce having eight or more employees. *Id.* In addition, the cost of administering the state program is paid from the federal share of unemployment insurance tax revenue paid by employers. *Id.* at 23. The federal law contains a number of standards, including the standard for administration discussed. *Id.* at 24. Failure to comply with these standards can result in either a withholding of federal funds for state administrative costs or a denial of credit to employers for state unemployment tax contributions, depending on the standard violated. *Id.* at 24-25.

284. *See* 20 C.F.R. §§ 601.5, 602.10-.40 (1990).

285. *See id.* §§ 640.1-.9, 650.1-.5.

286. In states without the noncompensable waiting week for payment of benefits, eighty-seven percent of claims must be paid within twenty-one days. *Id.* § 640.5. For interstate claims, seventy percent of the initial payments must be made within the specified time periods. *Id.*

claimants within thirty-five days.[287] Similar timeliness standards govern decisions on appeal. State law must provide for hearing and decision on appeal with the greatest promptness administratively feasible.[288] In fact, sixty percent of all first level benefit appeal decisions must be issued within thirty days of the appeal and eighty percent must be issued within forty-five days of the appeal.[289]

Brief and informal hearings are essential if a state is to meet these standards.[290] When issues are relatively limited, a hearing which contains the essential elements of due process can be conducted in thirty to forty-five minutes,[291] enabling hearing officers to conduct approximately twenty to forty hearings per week.[292]

If, as a result of the potential for preclusion, employers or employees insist on litigating all possible causes of action that may arise from a discharge and appealing any adverse decision, the impact on the unemployment compensation system will be devastating.[293] Even a few insistent parties who litigate discharge cases

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287. *Id.* § 640.5. For interstate claims, seventy-eight percent must be paid within thirty-five days. *Id.*

288. *See id.* §§ 650.3, 650.4.

289. *See id.* § 650.4(b).

290. *See Unemployment Boards' Statement*, *supra* note 104, at 208.

291. *Id.* at 208-09. See *supra* note 271 and *infra* note 292 for additional information about the average length of hearings in various states. The length of time required for the review process is also a relevant factor in determining whether the unemployment compensation claims procedure provides sufficient process to survive a constitutional challenge. *See supra* note 282.

292. *Unemployment Board's Statement*, *supra* note 104, at 208. In New York, during 1984, each hearing officer (administrative law judge) was responsible for approximately 1,300 cases, which required about six hearings per judge per day. New York Bar Committee Report, *supra* note 136, at 741. The judges not only heard six cases per day, but wrote a decision in each one as well. *Id.* The caseload for referees in Missouri is 21-25 cases per week. Richard, *Correction*, 5 J. NAT'L A. ADMIN. L. JUDGES, 97, 97 (1985). This includes both hearing the case and issuing a written decision. It has been argued that unemployment hearings are not unique, but are rather like all other administrative hearings. Thus, if collateral estoppel is inappropriate for unemployment hearings, it is inappropriate for all administrative hearings. *See* Committee on Benefits to Unemployed Person, *supra* note 2, at 80-81. The caseload of unemployment hearing officers is extremely high, however, necessitating a brief hearing to insure that statutory purposes are accomplished. In contrast to the unemployment caseload noted above, administrative law judges for the Social Security Administration, which employs seventy percent of federal administrative law judges, are expected to dispose of 37 cases per month. *See* Himelstein, *Federal Administrative Judges Seek Reform*, 124 N.J. L.J., July 27, 1989, at 208, col. 3.

293. *Unemployment Boards' Statement*, *supra* note 104, at 209. According

because of the preclusion potential will cause significant delays in the processing of unemployment compensation claims, since a hearing on all discharge issues may take several days or several weeks.[294] Lengthy hearings in even a few cases would severely restrict the hearing officer's ability to hear and decide other cases.

In addition to increasing in length, the hearings would increase in complexity, both procedurally and substantively. Few employers would proceed without attorneys in a hearing that could decide a discharge case with six-figure liability.[295] The use of attorneys would increase requests for subpoenas,[296] transcripts, and continuances.[297]

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to data from the U.S. Dep't of Labor, Employment and Training Admin., there were 18,720,006 spells of unemployment for which claims were filed in 1990. The data also revealed that there were 825,706 decisions by the lower appellate authority in the states and 131,006 decisions by the higher appellate authority, which exists in only about half of the states. *See supra* note 67 and accompanying text. Thus, there are a number of claims filed where no appeal is taken. An increase in appeals would adversely affect the ability of a state agency to meet federal standards for timeliness of appellate decisions. *See supra* notes 288-89 and accompanying text.

294. A study of 120 wrongful discharge cases that went to trial in California showed an average trial length of 10.5 days. J. DERTOUZOS, E. HOLLAND & P. EBENER, *supra* note 1, at 25. The minimum trial length was two days and the maximum 30 days. *Id.* Employment discrimination trials are also lengthy, certainly far longer than 45 minutes. See A. RUZICHO, L. JACOBS & L. THRASHER, EMPLOYMENT DISCRIMINATION LITIGATION 399-462 (1989), which gives guidance for trial preparation, for an idea of the complexity of an employment discrimination trial. "When employers are forced to defend themselves in an unemployment hearing with sufficient thoroughness to prevent unjust application of collateral estoppel, such proceeding typically needs to be continued over several days creating an expense which oftentimes exceed [sic] the amount in controversy at the hearing." *1989 Subcommittee Hearing*, *supra* note 267, at 185 (letter from Louis Fernandez, Jr., Vice-President, Chevron Corp.).

295. *See* Mack v. South Bay Beer Distrib., Inc., 798 F.2d 1279, 1284 (9th Cir. 1986).

296. While hearing officers and commission members generally have the authority to issue subpoenas, 1B Unempl. Ins. Rep. (CCH), ¶ 2020 (1986), the authority is rarely used. *See* New York Bar Committee Report, *supra* note 136, at 742.

297. Because of the federal time standards and the large caseloads of the hearing officers, continuances are discouraged. *Unemployment Boards' Statement*, *supra* note 103 at 208. *See also* New York Bar Committee Report, *supra* note 136, at 742 (without postponements, which are discouraged, "there is little . . . opportunity for parties to seek information, prepare witnesses or gather other evidence for presentation"). In contrast, a study of 120 wrongful discharge trials in California showed that the average time from initial filing to trial was 38 months, and the minimum time was 10 months. *See* J. DERTOUZOS, J. HOLLAND & P. EBENER, *supra* note 1, at 24-25.

Furthermore, attorneys would attempt to legalize the proceedings by insisting on compliance with the rules of evidence and procedure with which they are both familiar and comfortable.[298] In addition, as noted above, attorneys would attempt to litigate not only issues of disqualification for benefits based on misconduct or voluntary termination, but also issues of motive, disparate treatment, good faith, existence of any implied contract, and other evidence of discrimination.[299] Since the employer in most cases will not know what discharge claims the employee may bring, the employer's attorney may attempt to offer evidence on all issues. The resulting delay in unemployment claim processing will adversely affect all claimants, although few may bring a later discharge action.[300]

The unemployment agency faced with increasingly lengthy and complex hearings and more appeals has two alternatives. The agency can hire more hearing officers, which will increase the agency's costs, or it can allow delays in benefit payments, jeopardizing its ability to meet federal standards. The agency may be unable to increase the number of hearing officers if funds are not available. To obtain additional funds, the tax on employers would have to be increased.[301] Neither alternative is acceptable for an agency already financially strapped.[302]

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298. As lawyers have become more involved in the labor arbitration process as both arbitrators and advocates, increasing legalization of the process has reduced the advantages of labor arbitration as a quick, inexpensive alternative to litigation. A. Cox, D. Bok, R. Gorman & M. Finkin, Labor Law 747 (11th ed. 1991).

299. The increased use of attorneys and the resulting increase in the complexity of the proceedings will disadvantage claimants in many cases, which is also contrary to the purpose of the unemployment statutes. *See supra* notes 263-66 and accompanying text.

300. While the hearing officer could attempt to limit litigation of issues not relevant to the benefits decision, efforts to litigate such issues would not be discouraged where the potential for collateral estoppel existed, and such efforts could be time-consuming for the hearing officer. *See* Committee on Benefits to Unemployed Persons, *supra* note 2, at 79. It might be argued that it is more efficient to relegate these issues to the administrative proceeding rather than to force litigation into the court system, even at the cost of raising unemployment insurance taxes. This efficiency, however, is more than counterbalanced by the fact that the parties will litigate many discharge cases in the unemployment forum that never would have been filed in the court system because the hearing on the unemployment claim will occur long before the employee would have to initiate any discharge claim in court. *See supra* note 240 and accompanying text.

301. Administrative costs are paid from the federal share of employers' taxes. *See* Price, *supra* note 90, at 24.

302. Current efforts to increase the tax are meeting with strong employer

Despite the federal standards for timely processing and the serious possible consequences for failing to meet such standards, a significant number of states have consistently failed to comply with the federal standard for timeliness of appeals decisions.[303] Any increase in the length of hearings will multiply the problem of timely claim processing and delay benefits for all claimants—a result that is directly contrary to the goal of providing money to the unemployed as quickly as possible.

Recent studies of the unemployment system have found that fewer unemployed persons received benefits in the 1980s than in previous years.[304] In 1987, the percentage of the unemployed receiving benefits fell to 31.5 percent, a new record low.[305] Benefits per unemployed person also have decreased.[306] Moreover, the un-

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resistance. *See* Zuckman, *Recession May Be Good News for Unemployment Bill*, 49 CONG. Q. 422 (1991); *UI Reform Splits Business and Labor*, 136 Lab. Rel. Rep. (BNA) 380, 381 (Apr. 1, 1991). Moreover, in order to accomplish the purposes of the system, increased taxes should provide increased benefits, if possible. Furthermore, increasing staff is not an option in many states where the agencies already have been forced to reduce staff and close offices due to financial problems. *See 1989 Subcommittee Hearing*, *supra* note 267, at 16 (statement of Les AuCoin); *Id.* at 33 (statement of former Gov. James Blanchard, Michigan); *Id.* at 53 (statement of the Hon. Neil Goldschmidt, Gov. of Oregon); *Unemployment Insurance and the Recession: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 102d Cong., 1st Sess. 54-55, 59 (1991) [hereinafter *Subcommittee Hearing (2/6/91)*] (statement of Michael V. Deisz, President, Interstate Conference of Employment Security Agencies).

303. According to data from the U.S. Dep't of Labor, Employment and Training Admin., from Aug. 1, 1990 to July 31, 1991, 20 jurisdictions failed to dispose of sixty percent of appeals within 30 days, as required by federal standards, and 16 jurisdictions failed to dispose of eighty percent of appeals within 45 days, as required. This data also reveals that, regarding appeals in all jurisdictions for the same time period, only 57.5% of lower authority appeals were decided within 30 days, and only 76.9% were decided within 45 days (data on file at *The Wayne Law Review*). Thus the federal timeliness standards simply are not being met. In 1984, 17 states, along with the District of Columbia, the Virgin Islands, and Puerto Rico, failed to meet the federal standards for timeliness of appeals. *See* Sanborne & Breslau, *State Unemployment Insurance Appeals Data*, 19 CLEARINGHOUSE REV. 147, 149 (1985).

304. *See* U.S. Dep't of Labor, *An Examination of Declining UI Claims During the 1980s* ix (1988); Shapiro, *supra* note 229, at 1; Rejda & Lee, *supra* note 136, at 652.

305. Shapiro, *supra* note 229, at 1. Since 1989, the proportion of unemployed persons receiving benefits has risen slightly, with an average of thirty-seven percent collecting benefits in 1990. *Subcommittee Hearing (2/6/91)*, *supra* note 302, at 9 (statement of Mary Ann Wyrsch, Director, Unemployment Insurance Serv., Employment and Training Admin., U.S. Dep't of Labor).

306. Shapiro, *supra* note 229, at 3.

employed receive little from other government assistance programs.[307] Finally, unemployed persons remained unemployed longer in the 1980s.[308] As a result of these increases in unemployment and decreases in benefits, the unemployment compensation program is failing, in many respects, to achieve the goals of reducing poverty, stabilizing the economy, and returning employees to the work force as quickly as possible.[309]

A major reason for the recent decline in the number of unemployed receiving benefits is the presence of more restrictive state eligibility requirements and administrative practices.[310] Benefit denials for misconduct have increased,[311] and while benefit denials for voluntary terminations have declined, authors of a recent study suggest that this reduction reflects more stringent administrative practices which discourage claimants who quit from applying for benefits at all.[312] Analysts of the unemployment compensation

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307. *Id.* at 7. Government funds for employment and training programs also have decreased. *Id.* at 9.

308. *Id.* at 11. This trend has continued in the 1990s. *See Long-Term Unemployed: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 102d Cong., 1st Sess. 27 (1991) [hereinafter *Subcommittee Hearing (2/26/91)*] (testimony of Isaac Shapiro, Senior Research Analyst, Center on Budget and Policy Priorities); Shapiro & Nichols, *supra* note 229, at 6. In July 1991, a record number of unemployed workers exhausted their unemployment insurance benefits, a larger number than at any time since collection of such data began in 1951. *See Exhaustion of UI Benefits Said to Hit Record Level*, 138 Lab. Rel. Rep. (BNA) 58 (Sept. 9, 1991). The problem of long-term unemployment is clearly increasing.

309. Shapiro, *supra* note 229, at 10; Rejda & Lee, *supra* note 136, at 655; Shapiro & Nichols, *supra* note 224, at 25-28. See *supra* notes 274-76, 280-83 and accompanying text for a discussion of the goals of the unemployment compensation system.

310. U.S. Dep't of Labor, *supra* note 304, at xi-xii. Many states tightened eligibility requirements because of insolvent trust fund accounts. Rejda & Lee, *supra* note 136, at 652. *See also Subcommittee Hearing (2/6/91)*, *supra* note 302, at 88-96 (testimony of Gary Burtless, Senior Fellow, Brookings Institution). A recent empirical analysis confirms that state legislative restrictions significantly contributed to the decline in unemployment benefit recipients in the 1980s. Baldwin & McHugh, *Unprepared for Recession: The Erosion of State Unemployment Insurance Coverage Fostered by Public Policy in the 1980s* 18-19 (Economic Policy Institute 1992). The authors recommended federal standards to limit states' ability to undermine the goals of the unemployment compensation system. *Id.* at 1-2, 19.

311. *See* U.S. Dep't of Labor, *supra* note 304, at xi.

312. *See Id.* at xi, 65. Because many states changed voluntary leaving disqualifications from a specific period to the duration of unemployment, claimants who quit no longer applied for benefits, reducing the number of claims and consequently the number of denials. *Id.* at 65.

system have not identified collateral estoppel as a factor in the recent reduction of the number of unemployed persons receiving benefits. It seems clear, however, that for a number of reasons, unemployment compensation is failing to meet the goals that motivated passage of the statute. Collateral estoppel, because it discourages claimants with potential discharge actions from filing claims and increases the delay in claim processing, compounds the inability of unemployment compensation to provide the quick cushion for unemployed workers that will stabilize the economy and avoid resort to welfare. When the length of unemployment periods increases, the effects of delay will be even more devastating for the unemployed worker.

In the current recessionary economy, it is prudent to avoid any policy that prevents unemployment compensation from accomplishing its goals.[313] Barring preclusion based on unemployment compensation decisions will avoid creating additional problems for a system already in crisis.[314] Moreover, the suggested preclusion bar will not interfere significantly with the policies underlying collateral estoppel. The application of preclusion based on unemployment compensation decisions is inconsistent with the principles of collateral estoppel in many cases. And even when collateral estoppel is properly applied, it rarely serves the goal of judicial economy because it merely shifts litigation from one forum to another and requires additional judicial resources to evaluate and determine the preclusion question.

IV. THE SOLUTION: A FEDERAL LAW PRECLUDING PRECLUSION

Twenty-three states have enacted statutory limits on according preclusive effect to unemployment compensation decisions.[315] If

313. Even if the current economy were robust, however, a policy denying preclusion would be consistent with the goals of the unemployment statute. The current economic problems simply highlight the need for this change. *See Subcommittee Hearing (2/6/91)*, *supra* note 302, at 4, 5, 18-19.

314. *See supra* notes 303-10 and accompanying text; Shapiro & Nichols, *supra* note 229, at 21-28 (unemployment compensation system is ill-equipped for the current recession and the problems will become more acute if the recession does not end by mid-1991 as predicted at the time of publication); *Subcommittee Hearing (2/6/91)*, *supra* note 302, at 56-61.

315. States with statutory limitations as of 1989 are Arkansas, California, Colorado, Connecticut, Idaho, Louisiana, Missouri, Nevada, New Hampshire, New York, South Dakota, Utah, Washington and Wyoming. *Unemployment Boards' Statement*, *supra* note 104, at 210. Ohio enacted a statutory prohibition on collateral estoppel in 1989. *See* OHIO REV. CODE ANN. § 4141.28(5) (Baldwin

the issue is left to state discretion, however, preclusion will remain a possibility in many states, leading to the problems identified earlier. It has been argued that each state should determine for itself whether collateral estoppel is having an adverse impact on its unemployment system, and, if so, the state could take legislative action, as some states have.[316] This argument, however, ignores the history and structure of the unemployment compensation laws. The current unemployment compensation system is of federal origin, motivated by a desire to provide income maintenance to prevent the need for resort to other welfare systems, to maintain purchasing power, and to stabilize the economy.[317] Pursuant to the federal law, the states set up unemployment compensation systems,

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Supp. 1991). In 1990, Maine, New Mexico, Oklahoma and Vermont added statutory restrictions on the use of unemployment compensation determinations to collaterally estop later litigation. Runner, *supra* note 3, at 63, 65, 66; ME. REV. STAT. ANN. tit. 26, § 1194.12 (Supp. 1991); N.M. STAT. ANN. § 51-1-55 (1991 Repl. Part); OKLA. STAT. ANN. tit. 40, § 2-610A (West Supp. 1992); VT. STAT. ANN. tit. 21, § 1353 (Supp. 1991). Texas enacted a statute barring collateral estoppel based on unemployment decisions in 1991. *See* Runner, *supra* note 3, at 66, 68; GA. CODE ANN. § 34-8-122(b) (Supp. 1991). In addition, the Michigan Supreme Court has construed the unemployment compensation statute to deny application of collateral estoppel. *See supra* note 165 and accompanying text. The Indiana Supreme Court in *McClanahan*, 517 N.E.2d at 395, refused to accord collateral estoppel effect to an unemployment proceeding because of the informal nature of the hearing. The court indicated that collateral estoppel might be appropriate based on other administrative proceedings, suggesting that its holding precluded any application of collateral estoppel based on unemployment compensation determinations. *Id.* In Spearman v. Delco Remy Div. of General Motors Corp., 717 F. Supp. 1351, 1354 (S.D. Ind. 1989), however, the court interpreted *McClanahan* to permit application of collateral estoppel based on a decision by the Unemployment Compensation Board of Review, a more formal and judicial proceeding according to the court. For further discussion of the decision in *McClanahan*, see Pitts & Stuart, *McClanahan v. Remington Freight Lines, Inc.: Making a Mountain Out of a Molehill*, 22 IND. L. REV. 1 (1989). The Nebraska Supreme Court, in White v. Ardan, (1988) 430 N.W.2d 27, 34, 230 Neb. 11, 22, rejected the argument that the doctrine of collateral estoppel applied based on an unemployment compensation proceeding, noting that the statute stated only that conclusions were determinative for purposes of the unemployment law, not for other causes of action. *See supra* note 118. The court's language suggests that the Nebraska statute will not be interpreted to permit collateral estoppel based on unemployment compensation determinations.

316. The Interstate Conference of Employment Security Agencies (ICESA) supports state rather than federal legislation. *See* Statement by Michael V. Deisz, President, ICESA, to Subcommittee on Human Resources House Committee on Ways and Means (March 21, 1991) at 2-3. (on file with author); *1989 Subcommittee Hearing*, *supra* note 267, at 106 (statement of Joseph Weisenberg, ICESA).

317. *See* Price, *supra* note 90, at 24.

but federal law has always provided standards with which the states must comply to receive federal benefits, standards designed to insure that the goals of the program are met.[318]

Among the significant requisites of the federal law are the requirements for a fair hearing before an impartial tribunal and timely processing of claims.[319] In order to insure that these standards are not unduly at risk, it is appropriate for the federal government to preclude the states from applying collateral estoppel based on unemployment decisions.[320] The states can avoid delays caused by the potential application of preclusion only by adding hearing officers, which will increase administrative costs. Because state administrative costs are paid by federal grant, this alternative also implicates the federal interest. Thus, congressional legislation barring estoppel is consistent with the federal government's role of providing minimum standards for unemployment compensation and will help insure that the states' ability to process claims fairly and efficiently is not impaired.[321]

Congressional legislation that would require the states to deny preclusion has been introduced in several sessions of Congress, but has yet to be enacted.[322] A similar prohibition on collateral estoppel is currently before the Congress.[323] The current bill would amend

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318. *See supra* notes 280-89 and accompanying text.

319. *See* 42 U.S.C. § 503(a)(1), (3) (1988); 20 C.F.R. §§ 640, 650; *Java*, 402 U.S. at 130-35; *Fusari*, 419 U.S. at 383-84, 387-89.

320. *See Unemployment Boards' Statement*, *supra* note 104, at 210. In testimony before the Subcommittee on Human Resources, Mary Ann Wyrsch, Director of the Unemployment Ins. Serv., Employment and Training Admin., U.S. Dep't of Labor, acknowledged that application of collateral estoppel could create conflicts with federal timeliness and fair hearing requirements. *See 1989 Subcommittee Hearing*, *supra* note 267, at 72. The Department of Labor recommends state rather than federal legislation, however. *Id.*

321. *See Unemployment Boards' Statement*, *supra* note 104, at 210.

322. H.R. 5572, which would have amended the Federal Unemployment Tax Act to require states to deny preclusive effect to unemployment compensation decisions, was introduced in the 100th Congress, but was not adopted. *See Unemployment Boards' Statement*, *supra* note 104, at 210. H.R. 2369, which contained the same requirement, was introduced in the 101st Congress by Rep. Morrison. *See 1989 Subcommittee Hearing*, *supra* note 267, at 27 (testimony of Rep. Bruce A. Morrison). A companion bill, S. 3086, was introduced in the Senate by Senator Lieberman. S. 3086, 101st Cong., 1st Sess., 136 CONG. REC. 13511 (1990). Eventually the House bill became a part of the Omnibus Budget Reconciliation Act of 1990, but the conference agreement on the bill did not include the ban on collateral estoppel. 136 CONG. REC. H12676 (Oct. 26, 1990).

323. *See* H.R. 1367, 102d Cong., 1st Sess., (1991); H.R. 3040, 102nd Cong., 1st Sess. (1991). The collateral estoppel provisions are a part of comprehensive

Section 3304(a) of the Internal Revenue Code to provide as follows:

> [N]o finding of fact or law, judgment, conclusion, or final order made with respect to a claim for unemployment compensation benefits pursuant to the State's unemployment compensation law may be conclusive or binding or used as evidence in any separate or subsequent action or proceeding in another forum, except proceedings under the State's unemployment compensation law, regardless of whether the prior action was between the same or related parties or involved the same facts . . . .[324]

The bill, as proposed, would make denial of collateral estoppel a requirement for the state's eligibility for federal assistance under the Social Security Act.[325] For reasons noted above, enactment of

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legislation, proposed to amend the unemployment compensation program in several respects. The Human Resources Subcommittee of the House Ways and Means Committee held hearings on House Bill 1367, a bill entitled the Unemployment Insurance Reform Act of 1991, on Feb. 6, 20, and 26, and March 21 and 22, 1991; the bill was approved by the subcommittee on June 26, 1991. Subsequently, the collateral estoppel provisions proposed in H.R. 1367 were incorporated in H.B. 3040, which was reported out of the Committee on Ways and Means for consideration by the full House. (information from the House Subcommittee on Human Resources) *See infra* note 324.

324. H.R. 1367 (1991); 1991 H.R. 3040, § 204, (1991). H.R. 3040, which contains identical provisions on collateral estoppel to H.R. 1367, was passed by the House on September 17, 1991. 137 CONG. REC. H6628. (1991). On June 16, 1992 the Senate Finance Committee ordered H.R. 3040 favorably reported with amendments striking all of the provisions on unemployment compensation, including collateral estoppel. 138 CONG. REC. D729. On June 19, 1992, the Bill was reported in the Senate. 138 CONG. REC. S 8659 (June 23, 1992).

The Senate passed S. 1722, the Emergency Unemployment Compensation Act of 1991, on Sept. 24, 1991. 137 CONG. REC. S13475 (1991). The House and Senate agreed to a conference bill on unemployment compensation which, consistent with S. 1722, did not contain the provisions on collateral estoppel. The House agreed to the conference report on the bill on Oct. 1, 1991. 137 CONG. REC. H7137 (1991). The Senate agreed to the conference report on the bill the same date. 137 CONG. REC. S13999 (1991). President Bush vetoed the bill on Oct. 11, 1991. 137 CONG. REC. S14619 (1991). The Senate failed to override the veto. 137 CONG. REC. S14736 (1991). Subsequently Congress enacted several bills extending emergency unemployment compensation, but none contained provisions relating to collateral estoppel. *See supra* note 229.

325. By amending the Internal Revenue Code, the bill would make legislation barring preclusion a condition for obtaining federal tax credit for payments to state unemployment insurance funds. *See* Rosbrow, *supra* note 57, at 24-25; I.R.C. § 3304(a) (1988 & Supp. II 1990).

this legislation is consistent with the purposes of the unemployment compensation system and necessary to insure that the unemployment compensation statutes accomplish the purposes for which they were enacted.

Enactment of the proposed legislation would require states to amend their statutes to include a prohibition on use of unemployment compensation determinations, and findings of fact and law incorporated therein, to preclude later litigation in another forum.[326] A state's failure to include such a statutory provision would prevent approval of the state's law by the Secretary of Labor.[327] In the absence of such approval, employers in the state would be ineligible for federal tax credit for payments to the state's unemployment insurance fund.[328]

The mandated statutory provisions would require state and federal courts hearing state claims to deny preclusion, but federal courts considering federal claims would not be directly bound by the state law. Because of both the Full Faith and Credit statute[329] and previous United States Supreme Court decisions on the application of collateral estoppel, however, the proposed legislation should result in elimination of preclusion based on unemployment compensation decisions.

The Full Faith and Credit statute would require a federal court to follow the state statute and deny preclusive effect based on a state court judgment on an unemployment compensation claim.[330] Where the state administrative decision was not judicially reviewed, however, the Full Faith and Credit statute would not apply.[331] Nevertheless, the decisions of the United States Supreme Court in *Kremer*[332] and *Astoria*[333] would compel the courts to deny preclusive effect based on unreviewed administrative decisions in Title VII and ADEA claims respectively. With respect to other federal claims, the Supreme Court stated in *University of Tennessee v.*

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326. *See* H.R. 3040 § 204, 102d CONG., 1st Sess., 1992 LEXIS H.R. 3040 (Sept. 19, 1991).

327. *See* I.R.C. § 3304(a) (1988 & Supp. II 1990).

328. *See supra* note 325 and accompanying text.

329. See 28 U.S.C. § 1738 (1988) which requires the federal courts to afford the same full faith and credit to state court judgments that would apply in the state courts.

330. *See supra* notes 30-41 and accompanying text.

331. *See* University of Tenn. v. Elliott, 478 U.S. 788, 795 (1986).

332. 456 U.S. 461, *reh'g denied*, 458 U.S. 1133 (1982). See *supra* notes 30-33 and accompanying text for a discussion of *Kremer*.

333. 111 S. Ct. 2166 (1991). See *supra* notes 38-41 for a discussion of *Astoria*.

Elliott[334] that ". . . federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts."[335] Thus, the federal courts should follow the state unemployment compensation statutes and deny preclusion.[336]

The proposed bill not only prohibits application of collateral estoppel, but also precludes evidentiary use of unemployment compensation determinations in later litigation.

Several critics of the application of collateral estoppel based on administrative decisions have suggested that allowing such decisions to be used as evidence accomplishes some of the purposes of collateral estoppel without the disadvantages.[337]

While such proposals may provide an appropriate alternative to preclusion in many situations, the concern for the impact on the unemployment compensation system justifies the inclusion of a ban on evidentiary use. There may be little, if any, judicial time savings for a court that must review an unemployment compensation determination and decide whether to admit it as evidence and, if admitted, the weight to accord to the decision.[338] In addition, even the potential for evidentiary use may encourage the parties anticipating a civil suit to engage in more complex and lengthy litigation in the unemployment forum, increasing the use of counsel and the number of appeals as well. The potential for burdening the unemployment compensation system outweighs the potential beneficial effect of permitting evidentiary use of unemployment compensation determinations in later litigation.[339]

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334. 478 U.S. 788.

335. *Id.* at 799. The *Elliott* Court thus directed the lower court to accord preclusive effect to an unreviewed state administrative agency decision in plaintiff's claim based on the Reconstruction civil rights statutes so long as the *Utah Construction* standards for preclusion were met. *Id.* See *supra* notes 34-37 and accompanying text for a discussion of *Elliott*.

336. Federal application of state statutory bans on preclusion based unemployment compensation decisions also would be consistent with the exceptions to preclusion set forth in the *Restatement (Second) of Judgments*. According to the *Restatement*, courts should deny preclusion where legislative policy indicates that the decision of the first tribunal should not be given preclusive effect in subsequent proceedings. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 83(4) (1982). Enactment of the proposed legislation would establish as both state and federal legislative policy that unemployment compensation decisions should not be given preclusive effect in subsequent proceedings.

337. *See* Perschbacher, *supra* note 11, at 460-62 and sources cited at 460 n.180; Silver, *supra* note 29, at 433-42.

338. *See* Perschbacher, *supra* note 11, at 462.

339. Current state statutes prohibiting collateral estoppel vary. Some prohibit

CONCLUSION

The effectiveness of the unemployment compensation system is threatened by the increasing potential for preclusion in litigation challenging discharge based on unemployment compensation determinations. While the current system is not perfect, it provides for rapid claims processing and timely awards of benefits to unemployed workers in severe financial need. At the same time, the system provides due process for claimants seeking benefits and for employers challenging eligibility. Applying collateral estoppel will encourage introduction of rules of evidence and procedure in the system, causing delays in processing that will adversely affect all claimants. In addition, it may discourage claimants with viable discharge claims from seeking benefits because of concern for application of collateral estoppel. These risks are not outweighed by the benefits of collateral estoppel, for proper application of the doctrine will limit significantly the number of cases when preclusion is appropriate. In addition, the judicial time savings will be offset by lengthier litigation in the unemployment forum.

Accordingly, to preserve the benefits of the existing unemployment system, Congress should enact the pending legislation that would require states to prohibit the use of collateral estoppel in order to be eligible for federal assistance in the unemployment compensation program. This federal legislation is the most appropriate method for insuring effective functioning of the unemployment compensation system.

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both preclusive and evidentiary use of unemployment compensation determinations, while others bar only preclusive use. *Compare* WYO. STAT. § 27-3-406 (1990 Com. Supp.) *with* COLO. REV. STAT. § 8-74-108 (1986 Repl. Vol.). This disparity further supports enactment of federal legislation.