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Workplace Mythologies and Unemployment Insurance: Exit, Voice and Exhausting All Reasonable Alternatives to Quitting

Deborah Maranville

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I. INTRODUCTION

Joan and Myna, two sisters, worked as housekeepers on board a fish-processing vessel for a year and a half. On their last voyage, their supervisor, the chief steward, Mark, yelled at them at least four times a day, in sessions lasting at least ten minutes, both while they were on and off duty, and often in front of co-workers. He referred to women generally as “bitches” and “Pavlov’s dogs.” As a result of this behavior, Joan began taking medication for stress-related symptoms. In their initial orientation, Mark, the chief steward, warned Joan and Myna not to discuss anything with the ship captain. This warning was reinforced by the factory managers and engineers, who said the captain would just refer complaints back to Mark, and his conduct would become worse. Another crew member’s complaint had been handled in just that way. Before their last voyage, Joan and Myna had talked to the human resources manager, who said there was little he could do about the situation. They did not file a formal complaint, because they were afraid they would lose their jobs if they did, and they were aware that a co-employee had filed a grievance that had gone nowhere.

* Associate Professor of Law, University of Washington Law School. Thanks to the Washington Law School Foundation for summer research assistance, attendees at a presentation to the University of Washington Law School’s faculty colloquium series for helpful questions and comments, Jan Madill, Nancy Maranville, Joel Nichols, Kate O’Neill, Mary Hotchkiss, and Carrie Gaaasland for careful reading and thoughtful suggestions, Paul Marvy for thorough research assistance, and the reference staff at the University of Washington Gallagher Law Library for unfailingly cheerful and efficient research help.
Ten years ago, a student in my law school clinic represented Joan and Myna after they quit their jobs and each was denied unemployment benefits, because “you did not make every effort to resolve the problem or preserve your job.” After a hearing, an administrative law judge again denied their claims for unemployment benefits, describing the case as a “close case, and one upon which reasonable minds might disagree.” She was

bothered by the lack of any reasonable effort . . . to rectify the situation prior to resigning. Although it is understandable that a ship captain may be intimidating and should be used only as a last resort, as ship captain, the situation . . . was serious enough to warrant such intervention . . . . Additionally, . . . a reasonable and prudent person under the same or similar circumstances would have gone to the human resource office rather than waiting until after the resignation.3

The judge’s decision was subsequently reversed on the ground that “any remedial measures claimants might have taken beyond those they did take would have been futile.”4

This Article had its genesis in my “rant” over the administrative law judge’s decision in this case and similar decisions over the intervening ten years, and in my attempt to articulate why I did not think this case was a close one, and why the requirement that workers exhaust alternatives to quitting strikes me as misguided. Before proceeding with that effort, however, a bit of background is in order. In our law school Unemployment Compensation Clinic, one of the common case categories that we encounter is the “voluntary quit” case. In my state, like many others, an individual can receive unemployment benefits despite having voluntarily left her work, if she can show that she had “good cause” for quitting. In addition, however, she must show that she first “exhausted all reasonable alternatives prior to termination.”5

As is often the case with legal standards, at first blush, this exhaustion requirement seems both simple and reasonable. The unemployment system is often described as a system designed to provide benefits to individuals who are “unemployed through no fault of

2. Id.
3. Id.
4. Id.
their own.” If an individual quits work due either to problems in the workplace, or to medical or personal problems that could arguably be resolved or accommodated by the employer, but does not bring those problems to the employer’s attention, then surely the individual is somehow “at fault” in causing the unemployment. In the following pages, however, I argue that the exhaustion requirement is premised on inaccurate assumptions about the world of work and the situation of employees. Thus, it should be abandoned or severely limited in its application.

This Article first traces the development of the voluntary quit exhaustion requirement and its implementation in the case law (Part II) and identifies common themes in the cases (Part III). I then draw on Albert Hirschman’s Exit, Voice, and Loyalty theoretical framework for thinking about decisions to stay or leave in the economic and political realms (Part IV). Using empirical research from the negotiations literature, linguistics and a variety of other sources, I critique the exhaustion requirement both on its face, and as applied in practice. I argue that many workers understandably forego voice in favor of exit, given their legitimate fear that they will be subject to retaliation if they complain, the more serious consequences of being fired than quitting, and the power disparities between the typical worker and the typical employer. In addition, I suggest that the exhaustion requirement is premised on a vision of employment as more like a political community than an economic marketplace. While this vision may be an attractive aspiration, it is one with little foundation in many twenty-first century workplaces.

II. THE LEGAL FRAMEWORK

A. The Big Picture

The Great Depression of the 1930s was the incubator of three major “safety net” social welfare programs in the United States: Social Security, Aid to Families with Children (the welfare as we know it that ended under the Clinton administration) and Unemployment Insurance. Unlike its fellows, and perhaps because its federal component is less visible, the unemployment program has not been the subject of intensive, highly visible national political attention and conflict in recent

decades. Smaller scale skirmishes have continued to take place on the state level, however.

We have at least three reasons to believe that the low profile of the unemployment insurance program may not continue. First, unemployment benefits are ceasing to do the job for which they were designed, as the percentage of the unemployed who receive benefits has declined significantly over the last quarter of a century. Second, and concomitantly, workers and the workplace have changed dramatically since the unemployment insurance program was initiated. The workforce is increasingly diverse, with both men and women, and workers of many races and ethnicities performing most jobs. Fewer jobs are performed as full-time, full-year, long-term work for traditional employers. Third, the restructuring of welfare into the Temporary Assistance for Needy Families ("TANF"), with its imposition of time limits for receipt of benefits, prompts increased attention to whether the unemployment system responds to the lives of all workers.

Studies of the unemployment compensation system attribute the decline in the "take-up rate" for unemployment, that is, the decline in the portion of the workforce receiving benefits, to a combination of factors. Among these, "numerous state laws were changed to restrict eligibility

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7. In addition to the three issues cited in the text, the Clinton Administration adopted final regulations in 2000 that authorized the states to experiment with using the unemployment system on a limited basis as a vehicle for paid family leave. So far the states have not responded to this invitation, but if the proposals do not die a quiet death, they can be expected to generate maximum resistance. See 20 C.F.R. § 604.1 (2002); Loryn Lancaster & Anne Vogel, Changes in Unemployment Insurance Legislation in 2001, MONTHLY LAB. REV., Jan. 2000, at 37.


11. The President's Advisory Council cites broad demographic changes, such as an increase in two-earner households who might be less in need of benefits, increases in program coverage to workers who might be less familiar with the availability of benefits, a decline in manufacturing and other industries with high recipiency rates, a decline in unionization, and a population shift to states with historically low recipiency rates (and presumably stricter eligibility rules). See ADVISORY COUNCIL, supra note 8, at 37-43.
and reduce benefit levels." It seems likely that the decline of the union movement has resulted in a changing balance of power in many states that has had three effects: employers are more able to lobby successfully for statutory changes that disadvantage employees; top level administrative agency decision makers who approve agency regulations are appointed by governors who are oriented more towards employers than employees; and the players who grant or deny benefits—front-line agency bureaucrats, hearing examiners, or administrative law judges—have been influenced by the dominant individualistic cultural norms that blame individuals for their problems at work.

In this Article, I propose to take a ground-level look at the way these factors have converged and have led to the development and extension of the voluntary quit exhaustion requirement, to critique the resulting doctrinal developments, and then to consider the broader implications of the current approach.

B. The Voluntary Quit Exhaustion Requirement

The unemployment compensation system in the United States provides wage replacement benefits to unemployed workers. The system is significantly decentralized as a result of the initial design of the program. In 1934, Congress enacted the Federal Unemployment Tax Act, that imposes a federal payroll tax with a credit to employers for taxes paid under a state unemployment insurance system meeting minimum federal standards. In response to this Act, by 1939 all states had enacted unemployment programs, typically following the design of either of two model acts drafted by the Committee on Economic Security. The state programs continue to exhibit significant commonalities, but the current versions diverge both as to statutory details and implementation in regulations and case law. The timing of the development of the voluntary quit exhaustion doctrine is consistent with my speculation in the previous section that the decline in union

12. Id. at 39.
13. See 26 U.S.C. § 3302 (2002). In addition, the federal government provides grants to the states for the administration of their unemployment compensation programs. To qualify for these funds, the states must operate their programs in compliance with federal standards. See 42 U.S.C. §§ 501-502 (2002).
15. See id. at 196.
16. See id. at 186.
power has given employers increasing power to shape statutory and other doctrinal developments in their favor.

At least eighteen states have adopted an exhaustion requirement in some form. In eight states, the requirement is imposed by statute. The early statutory exhaustion requirements were limited to situations where the individual quits for medical reasons and typically required that the individual notify the employer of the reason for leaving as soon as possible and offer to return to work when able. The first such requirement appeared in a 1953 amendment to Arkansas’s unemployment insurance statute. Similar provisions later appeared in four states—Tennessee in 1967, Minnesota and Washington in 1977 and Kansas in 1982. In 1985, shortly after adding the medical quit exhaustion requirements, Kansas extended the concept to quits due to “personal emergency”; Minnesota added such a requirement for “adverse working conditions [attributable to] the employer” in 1999, having broadened the requirements imposed on the employee for medical quits in 1998. More recently, three states have adopted exhaustion provisions limited either to quits due to personal emergency or domestic violence. Four western states impose an exhaustion requirement by administrative regulation, all apparently adopted between 1977 and 1986. During the decade from 1979 to 1989, three

17. See infra notes 18-23.
18. See Ark. Code Ann. § 11-10-513 (Michie Supp. 2002) (effective 1952) (stating that the original exhaustion requirement was limited to quitting for “illness, injury or disability” and the current exhaustion provision also applies in cases of “personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification.”).
19. See Tenn. Code Ann. § 50-7-303(a)(1) (Supp. 2001) (effective 1963) (providing where claimant quits because “sick or disabled,” not disqualified if “notified [his] employer of that fact as soon as it was reasonably practical to do so, and returned to that employer and offered to work as soon as [he] was again able to work, and to perform [his] former duties.”).
21. See Kan. Stat. Ann. § 44-706(a)(11) (2001) (effective 1982); Minn. Stat. § 268.095 subd. 3(b) (2002) (effective 1999) (“The applicant must complain to the employer and give the employer a reasonable opportunity to correct the adverse working conditions before that may be considered a good reason caused by the employer for quitting.”).
state supreme courts and two intermediate state appellate courts imposed an exhaustion requirement through caselaw.\textsuperscript{25} Earlier, in 1970, the Delaware Superior Court had imposed such a requirement.\textsuperscript{26}

The codified exhaustion requirements found in state statutes or regulations are formulated in roughly four different ways, although it is not clear that the variations in language have significant effect in practice. Seven states focus on the reasonableness of what the claimant did, requiring that the claimant must have made "reasonable efforts to preserve his or her job rights,"\textsuperscript{27} and must "try reasonable alternatives before terminating the employment relationship,"\textsuperscript{28} or "will not quit impulsively" and "will attempt to maintain the employment except when this is impossible or impractical."\textsuperscript{29} Four additional states seem to focus more on what the claimant could have done, requiring the claimant to demonstrate that he/she had "no reasonable alternative but to leave work"\textsuperscript{30} or he/she "exhausted all reasonable alternatives prior to termination."\textsuperscript{31} In a statute limited to quits due to domestic violence,
New Hampshire requires that the “individual did all things a reasonably prudent person would have done.” Finally, two states have adopted statutes that specifically require claimants who quit due to medical problems to notify the employer of the problem and request reemployment when able to return to work.

The courts that have imposed exhaustion requirements in the absence of express language in a statute or regulation use a variety of phrasings, all similar to those found in statutes. Some courts require the claimant to make “reasonable effort[s]” to inform his employer, “retain[] his employment,” or “resolve conflicts.” Others require the worker to “do something akin to exhausting his administrative remedies” or “exhaust all alternatives less drastic.” A third approach is to assure that the individual not act “prematurely and without any real investigation into the conditions of her future employment” or has “no alternative to leaving gainful employment.”

The impetus for such requirements seems to vary. In two of the states where an “exhaustion” requirement has been imposed judicially despite the lack of such a requirement in the governing statute or agency regulations (Vermont and Virginia), the court was following the lead of

§ 50.20.050(2)(b) (West 2001) (providing that it imposes such a disqualification of unemployment benefits except in the case of quitting due to medical reasons).

32. N.H. REV. STAT. ANN. § 282-A:32(I)(a)(3)(B)(ii) (Supp. 1999) (“[T]he individual did all things that a reasonably prudent person would have done to continue the employer-employee relationship or the possibility of reemployment during the period the individual was unable to work due to the domestic abuse.”).

33. See TENN. CODE ANN. § 50-7-303(a)(1) (Supp. 2001) (requiring that the claimant “notified such claimant’s employer of that fact as soon as it was reasonably practical to do so, and returned to that employer and offered to work as soon as such claimant was again able to work, and to perform such claimant’s former duties”); WASH. REV. CODE ANN. § 50.20.050(2)(b) (requiring that the claimant “took all reasonable precautions, in accordance with any regulations that the commissioner may prescribe, to protect his or her employment status by having promptly notified the employer of the reason for the absence and by having promptly requested reemployment when again able to assume employment”); WASH. ADMIN. CODE § 192-150-055(1)(c) (effective July 26, 2002) (stating that the implementing regulations simply repeat the statutory language).


the agency administering the program. In Idaho, Illinois, and New Mexico, on the other hand, the appellate decisions make no reference to agency practice.

The exhaustion requirement has the potential of creating a Catch-22 situation. In some states that impose an exhaustion requirement, the courts have also developed a requirement that an individual who waits too long to quit in response to a change in working conditions, no longer has good cause. The Illinois appellate courts have cited this requirement as a reason to find one complaint to the employer sufficient to satisfy the exhaustion requirement.

III. THE LEGAL FRAMEWORK IN ACTION

Before attempting to evaluate whether, or in what circumstances, an unemployment insurance voluntary quit exhaustion requirement makes sense, it will be helpful to look at how such requirements are applied in practice. Thus, in the following section, I will attempt to identify typical factual circumstances that give rise to disputes over the requirement, looking at three sources of information: the appellate case law, available trial court decisions, and, more impressionistically, the way administrative agency decision makers apply the requirements.

A. The Appellate Cases

As is the case with many issues that primarily affect low and moderate income individuals, unemployment compensation claims do not generate large numbers of appellate court cases. Though unemployment benefits can be critical for getting individuals through a difficult time, the limited amount of money at stake in each case makes filing an appeal financially impractical for most employers as well as employees. In addition, representing claimants in unemployment compensation cases has often been a relatively low priority even in legal services practices, so representation is not readily available and few practitioners specialize in the issues. Nonetheless, such cases do occasionally get appealed, in part because some states provide for

42. See Stefen, 814 P.2d at 32; Barron, 517 N.E.2d at 594; Molenda, 772 P.2d at 1304.
45. In four states—Connecticut, Delaware, New Jersey, and Pennsylvania—published trial court decisions are available. In addition, I have handled a small number of cases appealed to the Washington Superior Courts that involved voluntary quit exhaustion cases.
payment of attorneys' fees to the prevailing party out of the unemployment compensation fund.\textsuperscript{46}

The forty appellate cases\textsuperscript{47} that I have located are not necessarily representative of the cases that provide the day-to-day grist for administrative hearings. Keeping in mind that limitation, it may nonetheless be useful to identify patterns in the cases that do proceed to appeal. In about 70\% of the appellate cases (twenty-eight), the claimant quit due to a problem with the working conditions on the job.\textsuperscript{48} A quarter of the cases involve claimants who quit due to their own, or a family member's medical problems.\textsuperscript{49} The remaining cases each involve a claimant who quit to preserve his marriage when his wife insisted on moving back to her hometown.\textsuperscript{50}

1. The "Working Conditions" Cases

Four subcategories of cases account for all the successful "working conditions" claimants. The court held that the claimant satisfied the exhaustion requirement in all the cases involving: (1) illegal activity, other than sexual harassment on the part of the employer;\textsuperscript{51} (2) the employer changing the type or hours of work;\textsuperscript{52} or (3) the employer issuing No Such Funds ("NSF") paychecks.\textsuperscript{53} In all of these cases, the employer was aware of the problem leading the employee to quit,

\begin{itemize}
\item \textsuperscript{46} See, e.g., WASH. REV. CODE ANN. § 50.32.160 (West 2001).
\item \textsuperscript{47} In identifying cases, I have attempted to exclude cases that refer to an exhaustion requirement, but do not discuss the application of the requirement to the facts of the case.
\item \textsuperscript{48} See tbl.1, infra text accompanying notes 51-66.
\item \textsuperscript{49} See tbl.2, infra text accompanying notes 67-71.
\item \textsuperscript{50} The reports included two of these cases. In both, the claimant was granted benefits. See Churchill Truck Lines, Inc. v. Dep't of Human Res., 837 P.2d 1322, 1324 (Kan. Ct. App. 1992); Alston v. Employment Div., 676 P.2d 940, 940-41 (Or. Ct. App. 1984).
\item \textsuperscript{51} See Garcia v. Dep't of Employment & Training, 488 A.2d 762, 763 (Vt. 1985) (involving an employee who quit after unsuccessfully attempting to blow the whistle on police chief who asked him to assist with theft); Umbarger v. Virginia Employment Comm'n, 404 S.E.2d 380, 384 (Va. Ct. App. 1991) (concerning an employee who quit after identifying sex discrimination in pay); Martini v. State, 990 P.2d 981, 983 (Wash. Ct. App. 2000) (involving an employee who quit for financial reasons after repeatedly contesting company's new requirement to pay for mandatory pager, and at hearing alleged Minimum Wage Act violations); Robinson v. Employment Sec. Dep't, 930 P.2d 926, 927 (Wash. Ct. App. 1996) (concerning an employee who quit after meeting with employer and its attorney, because employer was not properly licensed and she feared both loss of her license as escrow agent, and personal liability for processing loans).
\item \textsuperscript{52} See Davis v. Bd. of Review, 465 N.E.2d 576, 578 (Ill. App. Ct. 1984) (involving an employee who quit after job changed from working with three- to five-year-old preschoolers to working with emotionally disturbed teens and unsuccessfully raised concerns with employer); In re Grier, 715 P.2d 534, 535 (Wash. Ct. App. 1986) (concerning a full-time job that was converted to two-part-time jobs, the employer "would understand" if employee needed to quit).
\item \textsuperscript{53} See Cavitt v. Employment Div., 803 P.2d 778, 779 (Or. Ct. App. 1990) (involving an employee's paycheck that was returned for insufficient funds on two occasions).
\end{itemize}
because the employee raised the concern with a supervisor, though the employee did not necessarily give a “change your policy or I’ll quit” ultimatum.

In a fourth subcategory of cases, the results were mixed: in four of eight cases involving handling of sexual or racial harassment allegations, the court held that the claimant had exhausted alternatives to quitting, and in a fifth case, the court remanded for consideration of whether the individual’s behavior was “reasonable.” In each of the successful claims, the employee brought the problem to the attention of a supervisor, though in two of the cases the employee then promptly quit.

The eighteen “working conditions” cases in which the court found that the claimant failed to satisfy the exhaustion requirement involve a mix of reasons given for quitting, including harassment by co-workers (both sexual and non-sexual), working conditions leading to job stress, fear of losing the job, disputes over the employer’s policies, and the employer insulting the worker in some fashion.

54. In Martini, the employee repeatedly asked that the employer continue to pay for his pager, but did not raise the Minimum Wage Act violations that provided good cause. 990 P.2d at 983.

55. See Barron v. Ward, 517 N.E.2d 591, 593 (Ill. App. Ct. 1987) (stating that, after co-worker made racially derogatory comments about claimant, threatened to kill him and harassed him in other ways, claimant was transferred out of department, then transferred back and told supervisor he could not work with co-worker but was told he had no choice); Hunt v. Fairview Ridges Hosp., No. C0-90-2638, 1991 Minn. App. LEXIS 477, at *2 (Minn. Ct. App. May 8, 1991) (unpublished opinion) (concerning an employee who quit after investigation cleared him of sexual harassment allegations, but employer failed to make known that employee had requested transfer or paid leave of absence and also presented evidence of stress by psychologist’s report, so case could be characterized as a medical quit); DiGiannantoni v. Wedgewater Animal Hosp., Inc., 671 N.E.2d 1378, 1380 (Ohio Ct. App. 1996) (involving an employee who raised allegations of sexual harassment for the first time in request for reconsideration of denial of unemployment benefits and the court remanded for consideration whether a “reasonable person” would have given notice to employer in this instance); Sweitzer v. State, 718 P.2d 3, 5 (Wash. Ct. App. 1986) (concerning an employee who spoke to supervisor and grievance committee and was told it would be useless to file a grievance); Hussa v. Employment Sec. Dep’t, 664 P.2d 1286, 1287 (Wash. Ct. App. 1983) (invoking an employee who experienced ongoing verbal and physical sexual harassment by co-workers, was threatened by employee who was suspended for his behavior, worked one more shift, then quit and court held futility exception to exhaustion requirement applied in light of uncontested harassment, threats, and unsympathetic comments by supervisor).

56. See Bowman v. Ariz. Dep’t of Econ. Sec., 898 P.2d 492, 494 (Ariz. Ct. App. 1995) (stating that, after consensual relationship ended, supervisor began retaliating and employee notified night supervisor of problems and complained to owner and was offered transfers, but quit day after meeting); Jensen v. Siemsen, 794 P.2d 271, 274 (Idaho 1990) (concerning an employee who quit one day after reporting problems with doctor/supervisor); Larson v. Dep’t of Econ. Sec., 281 N.W.2d 667, 668 (Minn. 1979) (detailing that, six weeks after starting job, employee reported harassment by co-workers but harassment continued and claimant did not inform supervisors but quit instead).

57. See Ipsen v. Akiba, 911 P.2d 116, 119 (Haw. Ct. App. 1996) (stating that, after employee was advised to seek other employment opportunities after takeover, employee injured ankle and
In the three unsuccessful sexual harassment cases, the employee either quit immediately after raising the issue with the employer, or failed to raise the issue at all. In the three unsuccessful work-stress cases, the court pointed to the following alternatives available to the claimants: contacting an off-site general manager about an abusive supervisor, seeking counseling or requesting a transfer, and filing a union grievance or waiting for a supervisor to return from vacation. In two of the remaining cases, the employee did not raise her concerns with the employer. In the others the exhaustion requirement seems largely to merge with the requirement that a claimant must show good cause for quitting, either because the court views the employee as acting supervisor called injury a scam so she resigned, calling supervisor insulting and abusive and court held employee did not try reasonable alternatives to quitting when she did not speak to off-site general manager); Noor v. Agsalud, 634 P.2d 1058, 1059 (Haw. Ct. App. 1981) (involving an employee who left stressful job as psychological aide, but did not seek counseling or discuss other options, such as transfer); Glennen v. Employment Div., 549 P.2d 1288, 1289 (Or. Ct. App. 1976) (concerning a pregnant employee who was cautioned not to do heavy lifting, who was suspended for two days and required to do more lifting while others in office were on vacation and she quit, claiming physical and emotional stress, but did not file union grievance before she quit or wait until her supervisor returned from vacation).

58. See Steffen v. Davison, Copple, Copple & Copple, 814 P.2d 29, 30 (Idaho 1991) (involving a probationary legal secretary who quit after another secretary was fired and she became concerned about permanency of position and court held the record supported finding that she did not exercise reasonable alternatives to quitting, but did not discuss reasoning).

59. See Fong v. Jerome Sch. Dist. No. 261, 611 P.2d 1004, 1005-06 (Idaho 1979) (concerning a junior high school math teacher who failed 30% of students and quit after school district adopted policy that failure rate above 7% must be justified, without waiting to learn what criteria might be acceptable); Gibson v. Bd. of Review, 707 P.2d 675, 675-77 (Utah 1985) (involving an IRS employee who developed stress-related symptoms due to concern that agency regulations singled out lower- and middle-income taxpayers for audits and she quit without discussing with supervisor or seeking transfer, because she no longer wished to work for the IRS); Johns v. Dep’t of Employment Sec., 686 P.2d 517, 518-19 (Wash. Ct. App. 1984) (concerning a clinical psychologist who had philosophical differences with superiors, was dissatisfied with pay, and quit despite a transfer).

60. See Rogers v. Trim House, 588 P.2d 945, 950 (Idaho 1979) (involving an employee who quit because he thought his honesty was being questioned after he gave friend a bid on an upholstering job that the employer thought was too low, but the court did not specify available alternatives); see also Molenda v. Thomsen, 772 P.2d 1303, 1305 (N.M. 1989) (concerning an employee legal secretary who quit after attorney-boss yelled at her, but did not discuss concerns with him).


62. See Ipsen, 911 P.2d at 119; Noor, 634 P.2d at 1059; Glennen, 549 P.2d at 1289.

63. See Molenda, 772 P.2d at 1305 (concerning an employee legal secretary who quit after attorney/boss yelled at her, but did not discuss concerns with him); Gibson, 707 P.2d at 677.
precipitously, before it is clear that good cause is present, or because the court views the employee as a malcontent.

**TABLE 1: QUILDS DUE TO WORKING CONDITIONS: APPELLATE COURT**

<table>
<thead>
<tr>
<th>Reason for Quitting</th>
<th># Cases</th>
<th># Benefits Granted</th>
<th># Remanded</th>
<th># Benefits Denied</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illegal behavior by Employer</td>
<td>4</td>
<td>4</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Change in hours/type work</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>NSF paychecks</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Sexual or racial harassment</td>
<td>6</td>
<td>3</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Other harassment</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Stressful conditions</td>
<td>4</td>
<td>1</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Fear of losing job</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Disagreement over policies</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Employer insults worker (yells, questions honesty)</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Other*</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
</tbody>
</table>

2. The Medical Quit Cases

The cases in which claimants quit for medical reasons can be grouped into four subcategories. The two cases in which the claimants succeeded in obtaining unemployment benefits outright both involved a dispute over whether the individual quit or was fired, and, in my view,

64. See Steffen v. Davison, Copple, Copple & Copple, 814 P.2d 29, 30 (Idaho 1991); Fong, 611 P.2d at 1006; Rogers, 588 P.2d at 950.


67. See Moeller v. Minnesota Dep’t of Transp., 281 N.W.2d 879, 882-83 (Minn. 1979) (involving an alcoholic worker who voluntarily attempted treatment twice and, on second occasion, called employer and was told employment was terminated and court treated as voluntary quit and held that voluntarily entering rehabilitation on two occasions constituted reasonable efforts to retain job); Am. Auto. Ass’n v. George, 1995 WL 389980 (1995) (unpublished opinion) (stating that, during vacation visit to England, claimant’s mother became ill, employer denied request for
would more properly have been analyzed as firings. In a second set of cases, the individual failed to provide timely documentation of the medical problem, in addition to failing to convince the court that he satisfied the exhaustion requirement. In the third subset of cases, the workers quit while in the process of settling a worker’s compensation claim, and the court held that this action was premature. An additional set of cases involves situations where a physician advised the individual to quit, but the individual did not request a transfer.

68. In both cases, the employer initiated the job separation, and in neither case did the employee desire to end the employment relationship. Under a firing analysis, the question would be whether the employee’s conduct constituted misconduct, a standard that might have been difficult for employee to avoid in the Moeller case. See MINN. STAT. ANN. § 268.095 subd. 6 (West Supp. 2002) (limiting the discharge disqualification to certain categories of intentional or negligent conduct).

69. See generally McLafferty v. City of St. Paul Police, No. 63-92-1486, 1993 Minn. App. LEXIS 79 (Minn. Ct. App. Jan. 12, 1993) (unpublished opinion) (involving an employee who complained of harassment by supervisor, stress-related medical problems, and an arm injury; chiropractor notified employer that employee needed to take two weeks off, but employee did not make reasonable effort to retain employment because he did not respond to requests to provide additional medical information and did not accept transfer to another department with “insignificant” cut in pay); Tolbert v. Metal-Matic, Inc., No. C8-90-1818, 1990 Minn. App. LEXIS 1286 (Minn. Ct. App. Dec. 31, 1990) (unpublished opinion) (concerning an employee who quit on advice of doctor but he did not provide medical records at hearing, though he did submit them with request for reconsideration by Commissioner and court remanded for consideration of medical evidence); Bajocich v. Dep’t of Employment Sec., 739 P.2d 1155 (Wash. Ct. App. 1987) (stating that, after several hearings, employee contended he quit for medical reasons, but did not provide medical evidence and had not asked for a transfer or for permission to take breaks to accommodate problem). See also Rahey v. Ecolab, Inc., No. C4-88-2433, 1989 Minn. App. LEXIS 543, at *3 (Minn. Ct. App. May 3, 1989) (unpublished opinion) (concerning an employee who claimed she quit because she was discriminated against under policy allowing current employees first opportunity to apply for vacant positions, and later added fear of losing job and resultant stress as reasons and court held she made no reasonable effort to retain employment if she was having medical problems, which seems to imply doubt that she had documented the claimed medical problems).


71. See Daves v. Sears Roebuck & Co., 502 S.W.2d 105, 107 (Ark. 1973) (concerning an appliance sales representative who was advised by doctor to quit after two incidents of chest pain on job and who resigned without requesting leave of absence or transfer); Kingery v. Adm’r, No. 1251, 1986 Ohio App. LEXIS 8563, at *3-4 (Ohio Ct. App. Sept. 30, 1986) (involving an assembly-line worker who was advised to quit her job after she suffered cardiac condition aggravated by stress, returned to work after two months, was unable to keep up, even after trading jobs with co-worker, discussed problem with employer and applied for, but did not receive an office job and court denied benefits on grounds that she did not request transfer).


### WORKPLACE MYTHOLOGIES

**TABLE 2: QUIT FOR MEDICAL REASONS—APPELLATE COURT**

<table>
<thead>
<tr>
<th>Reason for Quitting</th>
<th># Cases</th>
<th># Benefits Granted</th>
<th># Remanded</th>
<th># Benefits Denied</th>
</tr>
</thead>
<tbody>
<tr>
<td>Quit v. Discharge</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Medical documentation</td>
<td>3</td>
<td>0</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Settling worker’s compensation claim</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Doctor’s advice</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
</tbody>
</table>

**B. Trial Court Decisions**

Twelve published trial court decisions involving the exhaustion requirement are available from four states—Delaware, Connecticut, New Jersey, and Pennsylvania. Of these, nine, or three-fourths, are working conditions cases, and an additional four, or approximately one-eighth of the total, either involve both working conditions and medical issues, or raise only medical quit issues. In four working conditions cases, the employee quit due to a change in hours or type of work, and was awarded benefits by the trial court. In three cases, the employee alleged that the employer failed to pay wages in a timely fashion. In two of these, the employee obtained benefits; in the third, a case that also involved claimed medical problems, the paycheck problems were due to errors, not to employer financial problems and benefits were denied.

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72. I have not included in this number a line of cases from Pennsylvania involving labor disputes. See, e.g., Glen Alden Coal Co. v. Unemployment Comp. Bd., 79 A.2d 796 (Pa. Super. Ct. 1951) (stating that, where employee had contract with employer for definite period and employer breached by closing mine during two-week Memorial Period called by mineworkers’ union, employee was required to pursue remedies under contract, not claim unemployment benefits).


75. See generally Koman v. Commonwealth, 435 A.2d 277 (Pa. Commw. Ct. 1981) (involving an employee who quit and alleged: (1) that she received two paychecks late, once due to the office being closed for vacation, the other due to an error, (2) that she received two incorrect paychecks that required correction, and (3) medical problems, but court denied her benefits on the grounds that errors were promptly corrected, problems were not due to employer insolvency,
Three additional cases involved miscellaneous disputes with the employer; in one the claimant received benefits, while in the remaining two, benefits were denied. Only one case involved a claim of sexual harassment. The one medical quit case involved a worker who quit in order to provide care for her father.

**TABLE 3: VOLUNTARY QUIT CASES—TRIAL COURT**

<table>
<thead>
<tr>
<th>Reason for Quitting</th>
<th># Cases</th>
<th># Benefits Granted</th>
<th># Remanded</th>
<th># Benefits Denied</th>
</tr>
</thead>
<tbody>
<tr>
<td>Working conditions</td>
<td>11</td>
<td>7</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Change in hours/type work</td>
<td>4</td>
<td>4</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>NSF paychecks</td>
<td>3</td>
<td>2</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Sexual or racial harassment</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>3</td>
<td>1</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Working conditions &amp; medical</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Medical</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Care for family member</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

employee did not request adherence to rigid payment schedule, and no medical evidence was presented).

76. See O’Neal’s Bus Serv., Inc., v. Employment Sec. Comm’n, 269 A.2d 247, 248 (Del. Super. Ct. 1970) (concerning a sixty-six year-old school bus driver who quit because children were harassing him and he feared for his safety and court upheld finding that bus driver had raised concerns with school and supervisors).

77. See Horning v. Unemployment Comp. Bd., 112 A.2d 405, 407 (Pa. Super. Ct. 1955) (concerning a dispute over whether employee quit or was discharged since employee refused to work overtime and also alleged that employer had violated hiring agreement with Veteran’s Administration); Malloy v. Commonwealth, 523 A.2d 834, 836-37 (Pa. Commw. Ct. 1987) (involving an owner’s son who told employee he was fired and owner’s wife later said son had no authority to fire employee and he should talk to her husband, but employee left anyway).

78. See Hussey Copper Ltd. v. Unemployment Comp. Bd., 718 A.2d 894, 901 (Pa. Commw. Ct. 1998) (involving employee who waited several months to report co-worker’s sexual harassment and threats of termination and after she did report, employers failed to take action, so employee quit when co-worker shattered a light above her and glass hit her head but court denied benefits because employee had constructive notice of sexual harassment policy and failed to use it).

79. See Robinson v. Commonwealth, 532 A.2d 952, 953 (Pa. Commw. Ct. 1987) (employee quit to care for ill father in another state. Court denied benefits for failure to make reasonable effort to maintain employment relationship, because she did not ask for leave of absence, tell employer why she was quitting, or consider relocating her father).
C. In the Trenches

In the following section, I look beyond the appellate and trial court decisions in exhaustion cases to see what additional recurrent issues never reach the judicial system, and to identify concerns arising out of the approaches taken at the administrative agency level. For this purpose, I have reviewed the published administrative agency decisions from the State of Washington.

In Washington State, selected agency decisions are designated as precedential decisions and published in digest form. The digested decisions are considerably sketchier in their descriptions of the facts than most of the appellate decisions. In addition, the agency decisions constitute a non-representative pool selected by the agency on topics presumably considered unsettled in Washington. Nonetheless, the ninety-three exhaustion decisions presumably addressed topics that the agency considered to be sufficiently likely to recur to justify publication. Thus, they provide a useful comparison to the appellate cases.

The Washington agency decisions are similar to the national appellate and trial courts in the types of quits involved. The agency and appellate court cases include similar percentages of cases involving quits for medical reasons, as opposed to quits due to working conditions: 29% of the agency cases, and 24% of the appellate cases, but only 15% of the trial court cases. The Washington agency decisions include only one case (1%) argued as a “quit to save marriage” case, in contrast to the three cases out of the forty from the national appellate court survey.

80. This process is authorized by WASH. REV. CODE ANN. § 50.32.095 (West 2001), though the statute gives no guidance as to weight to be given these decisions.

81. One hundred and three entries are listed under “Voluntary Leaving-Effort to Retain Employment” in the index to these decisions. Of these, I have not considered nine in my analysis. Of these, three are arguably mis-indexed and do not address efforts to retain employment: In re Brand, Comm’n Decision 2d 111 (Wash. Employment Sec. Dep’t 1975) (stating that court decided it as a firing/misconduct case); In re Harper, Comm’n Decision 1197 (Wash. Employment Sec. Dep’t 1974); In re Stebenne, Comm’n Decision 945 (Wash. Employment Sec. Dep’t 1973) (involving employee who quit because too exhausted to deal effectively with responsibility for three children, ten-, eleven-, and twelve years-old but court held this did not qualify as a “compelling personal reason” under statute, distinguishing cases involving inability to find childcare, where claimants attempted to solve situation by alternative means). An additional seven entries are indexed under “Insufficient Effort Made” or “No Effort Made,” but the decision does not rest on the exhaustion issue, simply citing the requirement, or making no reference to it: In re Bell, Comm’n Decision 2d 856 (Wash. Employment Sec. Dep’t 1996); In re Marinkovic, Comm’n Decision 2d 848 (Wash. Employment Sec. Dep’t 1995); In re Nordstrom, Comm’n Decision 1136 (Wash. Employment Sec. Dep’t 1974); In re Shute, Comm’n Decision 1176 (Wash. Employment Sec. Dep’t 1974); In re Phillips, Comm’n Decision 1033 (Wash. Employment Sec. Dep’t 1973); In re Babka, Comm’n Decision 522 (Wash. Employment Sec. Dep’t 1963); In re Ehlers, Comm’n Decision 338 (Wash. Employment Sec. Dep’t 1956).
The appellate cases include six sexual harassment cases from five jurisdictions, including two cases from the Washington intermediate court. The agency issued only one precedential decision concerning sexual harassment, perhaps because the two Washington appellate cases took a more generous approach toward the employee in considering the exhaustion requirement than did the agency, leaving little room for agency interpretation.

D. Common Themes in the Cases

1. The Relationship Between Good Cause and Exhaustion

Although on its face the exhaustion requirement is analytically separate from the question of whether the individual has good cause for leaving, the two questions are often conflated. This conflation seems to occur in three different ways.

First, in some cases the exhaustion requirement seems to be simply another way of evaluating the reason for quitting. For instance, in one appellate case, the court seems to say that the test for whether the reason for quitting is sufficiently strong is measured by whether the individual had alternatives. In Rogers v. Trim House, the court stated, “terminating employment because the employee believed his honesty was in question does not constitute such a circumstance that compels him to leave his employment. Rogers had viable options available to him to remedy the tension between himself and his employer other than to resign.”

Though other cases are less explicit, often a determination that the individual has not exhausted alternatives to quitting seems to operate as another way of saying that the reason for quitting was not sufficiently compelling, or that the decision maker simply did not believe the employee’s explanation.

83. See Sweitzer, 718 P.2d at 7; Hussa, 664 P.2d at 1290.
84. 588 P.2d 945 (Idaho 1979).
85. Id. at 950.
86. See, e.g., Molenda v. Thomsen, 772 P.2d 1303, 1304 (N.M. 1989); In re Clerico, Comm’n Decision 760 (Wash. Employment Sec. Dep’t 1984) (involving an employee who quit to be near sons in California after youngest son was killed but agency held no showing that death of son
A second, flip side of this notion, is that at least some decision makers appear to find the reason for quitting more credible, or more compelling, if the employee has been a “squeaky wheel” and raised the concerns repeatedly. 87

In a third group of cases, the decision maker seems to treat the reason for quitting and the exhaustion requirement as operating on linked scales, with less required to establish exhaustion as the reason for quitting becomes more egregious. This is demonstrated most acutely in the line of cases that waives the exhaustion requirement where the employer had knowledge that it was violating a statute. 88 It appears also to be present, however, in cases involving serious safety concerns (maybe not), or hardship on employees due to delayed payment of wages. 89

2. The Decision to Quit Rather than Risk Being Fired

In many jurisdictions, decision makers accord no weight to an employee’s decision that the appropriate choice is to quit, rather than be fired. 90 Thus, even an employee who has been given a written warning to improve performance or face firing may be found to have “jumped the gun” and failed to exhaust alternatives to quitting, because the “obvious”

necessitated leaving work, or that employee exhausted all reasonable alternatives to quitting); In re Eickmeyer, Comm’n Decision 2d 670 (Wash. Employment Sec. Dep’t 1981) (concerning an employee who failed to provide medical statement concerning medical leave, so employer terminated employment and agency treated it as a “constructive quit” case, suggesting that employee could have negotiated alternative).

87. See In re Spencer, Comm’n Decision 1168 (Wash. Employment Sec. Dep’t 1974) (stating that, out of five commissioners’ decisions, in the only case favorable to an employee who quit due to friction with supervisor, the employee had complained to personnel manager and union).


90. In some jurisdictions, this view is explicitly incorporated into a distinction between a “quit in lieu of termination,” where an employee has been told that she/he will be fired, and is permitted to resign instead, and a “quit in anticipation of termination.” In the former case, the employee is treated as having been fired, and will be eligible for benefits, unless she/he was fired for “misconduct.” In the latter case, the employee is treated as having quit, and is ordinarily denied benefits. See, e.g., In re Miller, Comm’n Decision 2d 147 (Wash. Employment Sec. Dep’t 1976); In re Trumbull, Comm’n Decision 2d 245 (Wash. Employment Sec. Dep’t 1976); cf. Anderson v. Director, 957 S.W.2d 712 (Ark. Ct. App. 1997); Thomas v. District of Columbia Dep’t of Labor, 409 A.2d 164 (D.C. 1979); Carpenter v. Dist. Unemployment Comp. Bd., 409 A.2d 175 (D.C. 1979).
alternative for the employee is to improve performance.\textsuperscript{91} Thus, an odd combination of initiative and passivity seems to be expected of workers. They should have enough initiative to improve their work performance, but not enough to independently conclude that they are unlikely to satisfy the employer’s standards, and thus, that they should quit rather than wait to be fired.

3. The Risks Placed on the Employees

Two types of cases suggest that some lower-level decision makers, especially expect employees to shoulder significant risks before they will be considered to have good cause for quitting. In the first type, involving “late paychecks,” the employer failed to pay the employee in a timely fashion, either paying in checks that bounced for insufficient funds,\textsuperscript{92} failing to pay for overtime hours despite repeated requests,\textsuperscript{93} or being asked to take pay out of the till, which was then emptied by the employer.\textsuperscript{94} In most of these cases, the employee was eventually granted benefits by the court or agency.\textsuperscript{95} The striking aspect of these cases, however, is that the lower-level decision makers expected the employees to work despite a high risk that they might never get paid, if the employer was insolvent, or that they would get paid in an untimely fashion.\textsuperscript{96} These lower-level decision makers seemed oblivious to the fact that most workers have little or no savings, and live from paycheck to paycheck.\textsuperscript{97} For most workers, the risk of never getting paid, likely to be a significantly higher one where the employer has such serious cash flow problems that employees cannot be paid on time, has unacceptably serious consequences. Even delayed payment of one or two weeks can lead to bounced checks (or in twenty-first century lives, bounced automatic payments by electronic funds transfer) or an inability to pay bills on time, with ever mounting late payment and other fees.

In a second type of case, involving safety, decision makers often require the employee to raise concerns, not just with the foreman or

\textsuperscript{91.} See, e.g., \textit{In re} Pederson, Comm’\n Decision 1224 (Wash. Employment Sec. Dep’t 1975); \textit{In re} Quen, Comm’\n Decision 1166 (Wash. Employment Sec. Dep’t 1974).

\textsuperscript{92.} See Cavitt v. Employment Div., 803 P.2d 778, 779 (Or. Ct. App. 1990) (involving employee’s paycheck which was returned for insufficient funds on two occasions).

\textsuperscript{93.} See \textit{In re} Hicks, Comm’\n Decision 1000 (Wash. Employment Sec. Dep’t 1973).

\textsuperscript{94.} See \textit{In re} Meyer, Comm’\n Decision 1158 (Wash. Employment Sec. Dep’t 1974).

\textsuperscript{95.} See Cavitt, 803 P.2d at 778; \textit{In re} Meyer, Comm’\n Decision 1158; \textit{In re} Hicks, Comm’\n Decision 1000.

\textsuperscript{96.} See Cavitt, 803 P.2d at 778; \textit{In re} Meyer, Comm’\n Decision 1158; \textit{In re} Hicks, Comm’\n Decision 1000.

\textsuperscript{97.} See Cavitt, 803 P.2d at 778; \textit{In re} Meyer, Comm’\n Decision 1158; \textit{In re} Hicks, Comm’\n Decision 1000.
immediate supervisor, but to raise them with higher-level supervisors, or the union, despite potential risks to life or limb. This expectation requires the worker to live with the risks for whatever time is required for the high level supervisors or the union to address the problem, a time period that may be substantial.

4. Specific Actions Required

The cases address five specific actions that have at times been required in order to satisfy the exhaustion requirement, but that prove controversial.

a. Going Over the Head of the Immediate Supervisor

As in the case described in the Introduction, many decision makers apparently impose a requirement that the employee must complain not only to the foreman or immediate supervisor, but must also go above the supervisor's head, to a higher-level supervisor, even an off-site one, or to the personnel department. Occasionally, this requirement is explicit. At other times, it may be submerged in a general statement that the individual did not exhaust alternatives. As I argue below, such a requirement imposes a significant risk that the individual will suffer retaliation for going outside the "chain of command."

98. See In re Vliet, Comm'n Decision 454 (Wash. Employment Sec. Dep't 1961) (involving employee who quit, due to violations of safety rules while working as a high scaler on a construction project, after complaining to foreman, but not to union, and commissioner granted benefits, setting aside initial decision, stating that good cause usually requires a complaint to a supervisor and/or the union, but applies an exception when the danger to life is such as to require immediate action); cf. In re Townsend, Comm'n Decision 2d 302 (Wash. Employment Sec. Dep't 1977) (concerning employee who quit, claiming undue risks to safety in operation of a cooling station, and produced three witnesses, including ex-foreman, who concurred and stated, "[e]mployee brought complaints to assistant superintendent, the foreman and union. All three agreed that his complaints were well founded. The petitioner made three attempts to get the superintendent to remedy the situation" and the initial decision maker denied benefits on the grounds that "the employer was regularly inspected by government safety inspectors, and the employer had not been cited . . . ." but the Commissioner reversed and granted benefits). See also Condo v. Bd. of Review, 385 A.2d 920, 921 (N.J. Super. Ct. App. Div. 1978) (involving claimant who left position, due to continuing threats of physical harm from co-employee, after he informed management and they spoke to co-worker, and agency decision denying benefits was reversed by Superior Court on grounds that claimant did not have to continue to expose himself to the risk of bodily harm).


100. See infra text accompanying note 146.
b. Filing a Grievance with the Union

In unionized workplaces, many cases require employees to raise their complaints with the union in order to be treated as having exhausted alternatives to quitting. This is especially true as to complaints that would constitute a breach of the collective bargaining contract. This makes sense where three conditions are present: the union is strong enough that it could force a change in the employer’s actions; the union has a visible enough workplace presence so that employees should be expected to know how to file a work grievance through them; and the union and its members are not beset by the type of internal conflicts or conflicts of interest that too often have resulted in the union favoring a dominant group at the expense of marginalized workers.


103. This was apparently the rationale of the agency and lower court decisions reversed in Umbarger v. Virginia Employment Commission, 404 S.E.2d 380 (Va. Ct. App. 1991).

c. Contacting a Responsible Government Agency

An occasional case suggests that an individual must contact the government agency responsible for regulating employer behavior in the area, for instance, of health and safety, or minimum wage violations. This can have the ironic effect of permitting the employer to either flout or remain ignorant of applicable government regulation, but holding the employee to both a sophisticated level of knowledge concerning the regulatory environment, and an ability to negotiate that environment. In my view, such a requirement places an inappropriate burden on employees, especially the least sophisticated and powerful among them.

d. Transfers

In many voluntary quit cases, especially those where the worker quits due to personal illness or disability, or the need to care for a family member, the individual may be denied benefits unless she talked to the employer about the problem and requested a transfer. The employee may be allowed to demonstrate that doing so would have been futile because a transfer would have been unavailable. Requiring the employee to
request a transfer, or show that doing so would be futile, raises two concerns about evidentiary burdens.

The initial concern is who should bear the burden of raising the question of transfer. Certainly, the employer can not be expected to raise the question, unless it knows that the employee has a problem that is causing difficulty with the job. But once the employee has notified the employer of these difficulties, why should the employee be required to raise the transfer issue? Placing the burden on the employer instead seems more consistent with employees' assumptions. As one employee stated in her hearing, "'I figured—you know—if there was a job he would say something.'" In addition, however, placing the burden on the employer seems consistent with normal rules concerning burdens of proof or of going forward, which place the burden on the party having superior knowledge or access to information. In these cases, the employer has superior knowledge about both policy; its willingness to authorize transfers, and practicalities; the availability of positions.

An additional concern is what type of evidence should suffice to establish futility or lack thereof. When an employee argues that requesting a transfer would have been futile, the employer typically responds by asserting that positions were available elsewhere in the company. In my experience, the employer's claim is typically credited, even if it is quite general and the employer does not cite specific jobs in specific locations. Once again, this is a situation in which the employee typically has limited access to information about the availability of other jobs. Thus, it is inappropriate to place the burden on the employee to establish that requesting a transfer would have been futile.

e. Provide Medical Evidence

In cases where individuals quit for medical reasons, some statutes require that the individual must notify the employer of the reason for quitting. Where such requirements are interpreted as requiring the

104. Kingery v. Adm'r, No. 1251, 1986 Ohio App. LEXIS 8563, at *10 (Ohio Ct. App. Sept. 30, 1986) (Grey, J., dissenting) (involving an employee who quit work on advice of doctor after she experienced heart problems after having returned to work on the assembly line, she traded jobs with a coworker because she was having trouble keeping up and continued to have difficulty keeping up, discussed the problem with the coworker, and applied unsuccessfully for an office job and the court upheld the denial of benefits on the grounds that she did not adequately discuss the possibility of other positions with her employer because she did not request a transfer).


individual to provide medical evidence documenting the medical problem, this often creates a significant barrier for the growing number of individuals who lack the medical insurance that provides easy access to care and a primary care doctor who is familiar with the individual’s situation. The requirement provides a further barrier in cases where the medical reason for quitting involves mental health concerns that the individual may not initially understand or be willing to acknowledge.

f. Requesting a Leave of Absence

An additional requirement commonly imposed in medical quit cases is that the employee must request a leave of absence, or request, either before leaving or when well, reemployment effective as of the date he is able. Typically, the individual would be ineligible for benefits during the course of the leave of absence, because the individual would not be “able and available for work” as is universally required in order to qualify for benefits. When the medical problem subsides, however, the individual will have a job waiting for him and will not need to apply for unemployment benefits.

Many employers have strenuously opposed mandatory availability of leave, as required by the Family and Medical Leave Act (“FMLA”), arguing that keeping jobs open for employees who may end up never returning imposes a significant cost burden on them. There is, thus, a certain irony in requiring a claimant to request leave under the FMLA in order to qualify for benefits, where the employee’s failure to make such a request simply substitutes one burden on the employer (increased unemployment taxes) for another (the cost of holding the position open). Absent evidence that the burden of increased unemployment taxes is higher than the cost of holding the position open, requiring the employee to request a leave of absence may result in the FMLA simply functioning as a barrier to employees receiving unemployment benefits—one more hoop for the unwary employee to jump through.

IV. A FRAMEWORK: HIRSCHMAN’S EXIT, VOICE, AND LOYALTY

In 1970, Professor Albert O. Hirschman published a volume titled *Exit, Voice and Loyalty*, whose slim size belied its future impact. Beginning with his observation of the sorry state of the Nigerian

Railway Corporation, he inquired into the circumstances (including "loyalty") that lead consumers to complain about a decline in the quality of a product ("voice"), rather than simply switching to another product ("exit"). As Hirschman understood, "exit" is the default mode within modern economic analysis. Consumers are expected to choose the cheapest, highest quality product that meets their needs, switching readily, with no expectation that they are obliged to complain to the manufacturer or service provider if quality drops. By contrast, articulation of "voice" is the expected behavior in the political realm. Citizens in a democracy are expected to exercise their voice rather than renounce their citizenship. Thus, the argument is commonly made that those who failed to vote have no right to complain about government policies.

Although exit is the norm within the economic realm, consumers do sometimes develop brand loyalty based on unique characteristics of the product, and do occasionally complain rather than simply abandon their preferred product. Indeed the modern enterprise of advertising is significantly focused on an attempt to manufacture loyalty. Much of Hirschman's project was focused on identifying both the circumstances that lead consumers to exercise voice in the economic realm rather than exit, and the circumstances in which the exercise of voice is needed for maximum economic efficiency, because the feedback generated by declining sales would come only after the firm declines beyond recovery.

Hirschman's initial focus on the economic realm broadened as he realized that his framework has important applications throughout society, shedding light on such questions as: "When do high government officials choose to resign in protest against policies they oppose, rather than raise their concerns within the government?" and "When do marriage partners choose divorce rather than working it out?" Hirschman captured broadly applicable concerns in a catchy, easy to
understand set of labels. Thus, it is not surprising that the “exit, voice, and loyalty” trilogy has been heavily used in subsequent research. 118

In her brilliant articles on battered women and on sexual harassment, Professor Martha Mahoney has argued that the ideology of exit permeates contemporary thinking about both work and love relationships. 119

Prevailing ideology in both law and popular culture holds that people are independent and autonomous units, free to leave any situation at any time, and that what happens to us is therefore in some measure the product of our choice. When women are harmed in love or work, the idea of exit becomes central to the social and legal dialogue in which our experience is processed, reduced, reconstructed and dismissed. 120

Thus, for women subjected to either battering or sexual harassment, the question asked is always: “Why didn’t she leave?” Note, however, a certain ambiguity in the ideology that Mahoney describes. The requirement of exit can be premised on an assumption that people are independent and autonomous, and thus in a certain view, powerful. Yet, this bias towards exit can also assume powerlessness, a choice to exit precisely because one lacks the power to exercise voice effectively within the context of the relationship. And indeed, in the context of both battering and sexual harassment, observers may assume that the individual subject to harassment has no access to voice within the relationship and those observers may ignore the coercion, safety concerns, subsistence needs, and emotional attachment that often prevent women from leaving.

In the case of workers voluntarily leaving their jobs, what assumptions underlie the exhaustion requirement that insists on workers exercising voice? Both empirical and normative assumptions seem to underpin the exhaustion requirement. Empirically, the exhaustion requirement assumes that workers have sufficient power to decide to exercise voice, and exercise it effectively without assuming undue risks of adverse consequences. Normatively, the requirement seems to be founded on a vision of the workplace as a community in which each participant has, if not equal voice, sufficient voice, and an obligation to

120. Exit Power, supra note 119, at 1283.
exercise it. In other words, the workplace is more like a political community than an economic marketplace.

In the pages below, I argue that for many workers the empirical assumption has little relationship to reality. In many circumstances, workers will not subjectively believe they have that power and whether they do in fact will be so context-dependent that the decision whether to exercise voice should be left up to the individual, not to legislators and judges. In addition, I argue that the vision of the workplace as more like a political community than an economic marketplace, is an attractive aspiration, but one with little foundation in many twenty-first century workplaces.

V. CHALLENGING THE ASSUMPTIONS UNDERLYING THE EXHAUSTION REQUIREMENT: THE PRACTICAL REALITIES OF EXERCISING VOICE

The unemployment compensation system is often characterized as one designed to provide benefits to workers who are “unemployed through no fault of their own.” Thus, imposing an exhaustion requirement on workers will seem justified if exercising voice is a practical choice that can be expected to make the worker better off. Yet, as I argue below, in many cases, exhausting alternatives to quitting will appear both impractical and risky.

A. The Assumptions Underlying the Exhaustion Requirement

Three assumptions underlie the exhaustion requirement, whether imposed by the legislature, the judiciary, or the agency. The first assumption is that workers in fact have alternatives to quitting. The reference to alternatives presumably does not refer to the alternative of simply staying at the job and proceeding with business as usual. That alternative is always available, but presumably is not considered a “reasonable” alternative where the individual has good cause for leaving. The requirement seems to assume that some other alternatives are available: raising concerns with the supervisor or seeking a transfer to another position. The validity of this assumption will, of course, vary with the place of employment. Supervisors may be more or less open to hearing complaints. Other positions may or may not be available, and the worker may or may not have transferable skills.

The exhaustion requirement assumes, secondly, that potential alternatives are practical. That is, that utilizing these alternatives is sufficiently “safe” that the individual can reasonably pursue them, and that the worker has the knowledge and skills to pursue them effectively.
As I will argue below, for a variety of reasons workers often seem not to feel safe enough to raise their concerns. Workers rightly understand that being fired may have a highly negative effect on their employability, and many are risk-averse about taking actions that could lead to retaliation by the employer.

The third assumption underlying the requirement is that we can fairly identify "reasonable efforts to preserve the employment" or what "things a reasonably prudent person would have done." Yet, that effort masks significant complexities. As numerous critiques of the "reasonable person" standard in tort, employment and domestic violence law have demonstrated over the last fifteen years, what seems reasonable behavior is heavily influenced by gender, race, and class factors that can be glossed over when a unitary standard is applied. What makes sense depends very much on the individual's circumstances. Yet, perhaps inevitably, each of us seems to assume that the reasonable person is the one who behaves like us. What happens all too easily in unemployment compensation hearings is that the "reasonable person" becomes the "reasonable lawyer": well-educated, aware of her rights, verbally articulate, relatively powerful, confident of being heard, and relatively unconcerned about retaliation.

Embedded in the concept "reasonable person" is another important question that has both theoretical and practical dimensions. Is the "reasonable person" determined empirically or normatively? In other words, is identifying the behavior of a "reasonable person" a matter of determining empirically what most people do, or is it a matter of deciding normatively how we think they should behave?

122. Thanks to Jean Braucher for noting the relevance of this question.
123. Historically, the reasonable person of tort law seemed to be very much a normative ideal. With the developing research on "behavioral economics," however, scholars are beginning to question the validity of the "rational actor" assumption that underlies traditional law and economics. For a recent summary, see generally, CHOICES, VALUES, AND FRAMES (Daniel Kahneman & Amos Tversky eds., 2000). As Professor Cynthia Estlund recently noted:

The law often relies on assumptions about human behavior and cognition that correspond to the economists' 'rational actor' model. The venerable 'reasonable man' himself embodies some of these assumptions.... Should the 'reasonable person' be presumed to think one way if we know that actual people process information in predictably different ways?

Cynthia L. Estlund, How Wrong Are Employees About Their Rights, and Why Does it Matter?, 77 N.Y.U. L. REV. 6, 6 (2002). While I would answer that question "no," my focus in this section is a different one: Should the "reasonable person" be presumed to act one way, if we know that many people do not act that way in practice and the empirical evidence suggests that they have good reasons for acting the way that they do? While the cognitive biases described in the behavioral...
While this Article is not the place to address that question in detail, I suggest that if most people do not in fact behave in the way we think they should, it may well be that we are overlooking good reasons why, and that our normative view of how they should behave is inappropriate given the realities of people's lives. As I demonstrate below, most people do not behave like "reasonable lawyers" in deciding whether to quit their jobs, and their behavior is often appropriate given their circumstances.

B. Challenging the Assumptions

On first glance, the assumptions underlying the exhaustion requirement may seem not merely plausible, but obvious—just basic common sense. After all, unemployment insurance is for people who are unemployed through no fault of their own, so we should not pay benefits to people who could have avoided quitting if they had only talked to their employer. In addition, the employer shouldn't be penalized by paying for unemployment benefits when the employee did not give the employer a chance to address her concerns.

Yet, we know that real people often do not raise workplace concerns with their employers. As I will argue below, the assumptions underlying the exhaustion requirement founder on three practical realities. First, given the importance of wages in modern life, employees are understandably risk-averse, and they properly fear the possibility they will be fired, or suffer other retaliation for complaining, more than they fear quitting. This fear of being fired is linked to fears of the many negative consequences that might follow from being fired. At its worst, firing may set off a chain of events that begins with being unable to pay the rent or mortgage and ends with being homeless. The fear of being a "bag lady" is a powerful one. Second, many are reluctant to exercise voice because they lack the power and skill needed to

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124. Actually, I suggest that when their jobs are at risk even many attorneys are reluctant to engage in the behaviors often demanded by judges applying the exhaustion standard.

125. Unemployment benefits are funded through state payroll taxes on the employer that are credited against the Federal Unemployment Tax Act ("FUTA") tax. See 26 U.S.C. § 3302 (2000). Most employers are subject to "experience rating" which means that their tax rate increases if more unemployment benefits are paid out to their former employees.

126. Research in the context of sexual harassment has shown that a small proportion of employees subjected to harassment make use of formal grievance procedures. See infra note 230.

127. See infra Part V.B.
exercise voice effectively, or they have learned over the course of their lives that raising their voice is dangerous and does not result in their being heard. Third, regarding certain issues that predictably arise concerning the exhaustion requirement—such as demonstrating that exhausting specified alternatives would have been futile—workers have little hope of effectively countering the employer's assertions given the short and informal nature of unemployment insurance hearings.

1. Legitimate Risk-Averseness

Most Americans short of retirement age rely primarily, or exclusively, on wages for their income. Thus, interruption of the stream of wages can have dire consequences. Without wages the worker may be unable to pay rent or mortgage payments, may find her or his automobile repossessed, or may be unable to make credit card and other debt payments. Indeed, job loss is a significant risk factor for going bankrupt. Thus, we might expect most workers to be highly "risk-averse" about losing their job. Indeed, underlying the exhaustion requirement seems to be the view that workers should be risk-averse when it comes to quitting employment. In this section, I argue that because workers are often, quite properly, more risk-averse about being fired or subjected to other forms of retaliation than about quitting, imposing an exhaustion requirement in voluntary quit cases is bad policy.

128. Wage and salary disbursements accounted for $4.469 billion of Americans' $7.776 billion in personal income for 1999. See BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS: PERSONAL INCOME BY MAJOR SOURCE, tbl.5 (June 2000), at http://www.bea.gov/bea/articles/regional/Persinc/2000/0600spi.pdf (last visited Feb. 13, 2003). In addition, according to the 1992 Survey of Consumer Finances, the first in which the question was asked, 42.9% of families saved nothing from their income, and the 1992 survey showed a higher percentage of families saving than the 1995 and 1998 surveys. See Arthur B. Kennickell et al., Recent Changes in U.S. Family Finances: Results from the 1998 Survey of Consumer Finances, FED. RESERVE BULL. 3-4, tbl.1 (Jan. 2000). I have not found data that directly tracks how many families rely solely on wages for their income, but it seems likely that it is a substantial proportion.

129. In 1998, 44.1% of American families held credit card balances after paying their most recent bills. The median amount of debt totaled $1700 and almost half of cardholders "hardly ever" (26.9%) or only "sometimes" (19.3%) pay off the balance. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 510, tbl.794 (2000).

Some observers suspect that federal reports on consumer debt understate the total credit card amount outstanding . . . . [S]elf-reported debt is far lower than the amount of debt reported by credit card issuers . . . . [T]he government reports 50 million families making credit card payments on an estimated $500 billion in outstanding credit card debt, which would suggest an average of $10,000 per family.


130. See SULLIVAN ET AL., supra note 129, at 75-108.
a. Fear of Being Fired

When asked why they did not raise their concerns with their supervisor, or pursue it up the chain of command, workers often respond, "I was afraid I'd be fired." The first time or two that I heard this response, I thought, "But you were at the end of your rope, ready to quit anyway. You were going to be out of a job one way or another, what difference does it make whether the employer fires you? The income stream will be interrupted either way." On reflection, however, it seems clear to me that I was the naïve one. The workers were sensibly protecting their interests, correctly perceiving that the consequences of being fired are much worse than the consequences of quitting, and that the risk of being fired in retaliation for complaining is not inconsequential.

i. Differing Consequences of Being Fired and Quitting

For a worker, being fired is more damaging than voluntarily quitting a job in two important ways. First, a worker who has been fired is likely to have significantly more difficulty finding the next job than a similar worker who quits. As Daniel Polsky's recent study of the changing consequences of job loss demonstrates, workers who quit their jobs had a higher probability of reemployment during both periods studied (1976-1981 and 1986-1991) than workers who were fired. In addition, "[t]he decline over time in the probability of reemployment was much smaller for quitters than for job losers." Moreover, workers subjected to involuntary job loss typically obtain lower quality jobs as measured by wages.

The serious consequences of involuntary job loss appear to be particularly serious for workers in historically marginalized groups. As Paul Attewell's recent study notes:

131. See, e.g., Steffen v. Davison, Copple, Copple & Copple, 814 P.2d 29, 30 (Idaho 1991) (involving a probationary legal secretary who quit after co-worker was fired); DiGiannantoni v. Wedgewater Animal Hosp., Inc., 671 N.E.2d 1378, 1380 (Ohio Ct. App. 1996) (concerning a woman who did not complain to boss about his sexual harassment of her because she feared she would be fired); Hussey Copper Ltd. v. Unemployment Comp. Bd., 718 A.2d 894, 897 (Pa. Commw. Ct. 1998) (involving a woman who waited several months to report sexual harassment by co-worker because she feared she would be fired).


133. Id. at 573.

134. See id. at 575.
Even though people of color are not at greater risk of initial displacement than whites, once displaced, people of color are less likely to find new jobs. Whites' odds of remaining unemployed one or more years after displacement are 52-58 percent of nonwhites' [odds].

The models show that women are more likely to remain unemployed than men (they have odds of continued nonemployment between 38 percent and 90 percent higher than men). Displaced workers who had not completed high school and those who had only a high school diploma had far higher rates of long-term unemployment. Displaced single parents were also significantly more likely to remain unemployed than other displaced employees, with other factors held constant.135

The more serious consequences of involuntary job loss as compared to quitting, is particularly striking when one considers that the involuntary job loss category lumps together two distinct categories: workers subjected to mass layoffs, and workers individually fired for incompetence or worse. Thus, one would expect that Polsky's empirical data would understate the consequences of being fired, because workers subjected to mass layoffs should be less "tainted" by the job loss than workers who have been fired.

Second, being fired from a job is much harder on a worker's psychological well-being than is quitting. Three critical factors distinguish being fired from quitting: control, shame, and exclusion. When an employee quits, he maintains a semblance of control over his life. By contrast, if the employee waits to see whether he will be fired, he turns that control over to the employer. Evidence suggests that in many settings we human beings function best when we believe that the world operates according to reason and that we have the ability to control our environment.136 An entire research subspecialty within psychology has developed to investigate the "locus of control of reinforcement." This research suggests that individuals with an "internal locus of control"—people who believe external reinforcement is contingent on their efforts—are most successful and happiest. Thus, the people with the characteristics we most want to reinforce are the least likely to wait passively to be fired, and being fired is likely to make it difficult for workers to maintain an internal locus of control.

In addition to taking away the worker’s internal sense of control, being fired has public consequences and often triggers a sense of shame and a loss of self-worth both for the worker and for his family. In modern American culture, an individual’s self-identity and self-worth, as well as social class status, are often linked to employment status. Being fired is, thus, felt as a very public statement of failure.

Closely related to both control and shame is the effect that being fired has on a worker’s inclusion needs. In differing degrees, we all want to belong, and we all need approval. Workers spend many hours at work, and for many individuals, work is both a major focus for their social life, and a major arena for receiving validation for their skills and competence. When an individual is fired, she is forcibly excluded from the work arena, often in circumstances that communicate she is incompetent.137

ii. Likelihood of Retaliation

I am aware of no general data concerning the prevalence of retaliation against workers who raise concerns with their supervisors. We do, however, have statistical data concerning retaliation in the context of discrimination claims that suggests the problem is a serious one. The Federal Equal Employment Opportunity Commission (“EEOC”) maintains statistics breaking down charges filed with the commission by subject matter.138 “The commission’s report on enforcement activity during 2001 identified retaliation as the basis for 27.5 percent of the claims filed,”139 that is, over 22,000 charges.140 Those figures represent a steady increase in retaliation claims over the past decade.141

The specific problem of retaliation against “whistle-blowers” likewise supports the view that retaliation presents a serious risk.

137. The differing psychological consequences of being fired and quitting explain why higher-level employees, especially, are often offered the opportunity to resign rather than be fired. In many states the voluntary quit rules specifically recognize that individuals may quit in lieu of being discharged and treat that circumstance as a discharge for purposes of unemployment benefits. In such cases the states grant benefits unless the employer can show that the employee engaged in willful misconduct, rather than requiring the employee to prove that she/he had good cause for quitting. See supra note 90 and accompanying text.


140. See EEOC Charge Statistics, supra note 138.

141. See id.
Whistle-blowing has received sufficient attention in recent decades to generate treatises on the subject.\(^\text{142}\) As of 1991, thirty-seven states had enacted statutes prohibiting retaliation against at least some government employees who report violations of law to the appropriate authorities.\(^\text{143}\) In addition, seventeen states had enacted statutes protecting private-sector employees in similar circumstances.\(^\text{144}\) The prevalence of these statutes, as well as a substantial body of caselaw,\(^\text{145}\) confirms that employees’ fear of retaliation for raising concerns is well-founded at least where the employer is engaged in illegal activity.

Anecdotal evidence suggests that retaliation is not limited to the extreme case of complaints about illegal activity. In our clinic we recently interviewed Ms. N., who worked as a support staffer in a small but rapidly growing medical practice. Upon taking the job, she was told that the office was a “staff driven” one and that employees were expected to “take ownership” of the clinic. Six months after being hired, however, Ms. N. and other employees raised concerns over excess workload resulting from the growth of the practice. As a result, Ms. N. was suspended and told she could not be “reinstated” unless she signed an agreement to be cooperative and positive.

In another clinic case, our client was fired, and the employer strenuously and, until the third case of review, successfully opposed the


\(^{143}\) See Westman, supra note 142, at App. A.

\(^{144}\) See id. at App. B.

grant of unemployment benefits on the grounds that the employee had engaged in misconduct. The employer had a variety of complaints about the employee that arose only after she had gone over the head of the supervisor to ask why she, unlike every other department manager, had not been eligible for a year-end bonus.\textsuperscript{146} Though certain knowledge is elusive, I strongly suspect that the "real" reason that my client was fired, is that she complained, and pursued that complaint up the chain of command. If I am right, her situation is a poignant reminder that employees' fear of being fired for raising complaints is a well-founded one.

b. Fear of Retaliation Affecting Working Conditions

Workers do not just fear that they will be fired if they raise complaints. They also fear less tangible "retaliation"—being labeled a "whiner," being penalized in pay and promotion decisions, being given less favorable assignments or inconvenient shifts, or losing "perks."\textsuperscript{147}

Stories about federal government workers who are threatened with transfer to undesirable locations abound, captured in the metaphor of being "sent to Siberia." A former student recently described to me a seminal experience in his formative years, in which his father, a federal government employee in the Department of Housing and Urban Development was transferred away from a long-time post, in retaliation for denying favors to a contributor to the incumbent president.

In her best-selling book about low-wage work, \textit{Nickle and Dimed}, Barbara Ehrenreich notes that Wal-Mart has been sued repeatedly by employees who claim that they were pressured to work unpaid overtime. The employees claim that they were subjected to a variety of threats, including "'write-ups, demotions, reduced work schedules or docked pay'" if they refused to do so.\textsuperscript{148}

\textsuperscript{146} I emphasize "eligible for" because the employer did not claim that a bonus was denied for performance reasons, but rather that the manager of this department was not covered by the bonus program.


c. Fear of Bad References

Workers’ fears are not limited to concerns about retaliation or firing—workers also fear actions that the employer may take if they do not quit, or that the employer may take if the worker quits and is honest about the reasons for doing so. They are also concerned about the employer’s very real power to affect them even after they are gone, by giving them a bad reference. Any thorough and honest employer will concede that they are very reluctant to hire a worker who indicates “fired” as the reason for leaving a past job. Our clinic has represented numerous clients who were in fact fired and found that prospective employers were prepared to hire them until they talked to the former employer.

2. Who Uses Voice?

Fear of retaliation is not the only reason that workers refrain from making complaints. The exhaustion requirement in effect mandates both notice and negotiation: the individual must bring to the attention of the employer the workplace conditions that constitute the “good cause” for quitting, and then negotiate over them. Such a requirement presupposes that workers have the power, skill, training, and confidence to make their voices heard effectively. Where those preconditions are absent, imposing an exhaustion requirement will not promote resolution of workplace conflicts. Rather, the predictable result is that more workers, especially low-wage workers, will do without unemployment benefits at a time when the percentage of unemployed workers receiving benefits is at an all-time low.

a. Economic Power and Use of Voice

When a worker complains to a supervisor, the worker is attempting to open a negotiation. Effective negotiation, however, is difficult for a

149. See, e.g., Garcia v. Dep’t of Employment & Training, 488 A.2d 762, 763-64 (Vt. 1985) (involving employee who, on the advice of union officials, indicated resignation was for “personal reasons” after he was ordered to leave city manager’s office when he attempted to report incident in which chief of police asked him to assist in stealing tables from city garage).

150. Martha R. Mahoney discusses this issue in the context of Anita Hill’s testimony in the Clarence Thomas confirmation hearings. See Exit Power, supra note 119, at 1293-96. Some employers refuse to give any information other than dates of employment for fear of defamation or discrimination charges, and some workers seem to believe that this is a legal requirement. It is not a legal requirement, as other workers well know. Thanks to Kate O’Neill for reminding me about this wrinkle.

151. See Wandner & Stettner, supra note 8, at 21.
party who lacks bargaining power and American employees tend to be singularly lacking in power.

i. Employment-At-Will

In the United States, the default legal framework for employment is the employment-at-will doctrine, under which employees are subject to firing without a showing of cause. Although this default framework is subject to both statutory and contractual exceptions, the doctrine has been eroded to some extent by the courts, the practical realities remain. Most employees can be fired at the whim of their supervisor. Employees likewise can leave their employment for no reason, and in tight labor markets, this may give them some negotiating leverage with their employer. However, unless an employee has valuable skills or training, the power balance typically favors the employer.

To the extent that workers are well-informed about the employment-at-will regime, we would expect employees' lack of legal rights to feed employees' fear of retaliation, because most employees lack any protection against reprisal. Professor Pauline Kim’s recent surveys of workers suggest that workers systematically overestimate the extent of protection the legal system affords, which might counteract this effect. However, Professor Kim’s results indicate that workers overwhelmingly understand that they can be fired for poor work performance. My own sense is that in the messy context of real life, in contrast to responding to the decontextualized, sanitized questions found on a survey, many workers, especially those who contemplate quitting their job, will understand that their job is at risk, because rightly or wrongly, the employer considers their work performance inadequate.

ii. Unionization

Employees can increase their bargaining power by acting in concert, using the threat to withhold labor jointly. This is, of course, the

152. The primary statutory exceptions to the employment-at-will doctrine are found in antidiscrimination laws, which forbid firings based on membership in a protected class, such as race and ethnicity, gender, religion, and sometimes sexual orientation. Contractual exceptions to the employment-at-will doctrine are found primarily in unionized and government settings, though individual contracts may be negotiated by high-level managerial employees.


154. See Bargaining, supra note 153, at 134.
classic strike weapon wielded by employees and legally recognized in
the U.S. since the enactment of the Wagner Act. The typical employee
in the U.S. lacks the power that comes with numbers, however, because
unions no longer play a significant role in most segments of the
American economy. The percentage of workers who are members of a
union declined steadily from a high of 24.1% in 1979 to 13.5% in
2000, with the percentage of public sector union members holding
steady, while private sector union membership continued to decline from
1983 to 1989. While experts argue over what weight should be given
the various explanations for this decline, one factor unquestionably has
been a sophisticated union-avoidance effort by employers. This has
involved both vigorous resistance to efforts to unionize new segments of
the workforce, as well as union busting efforts to oust existing unions—
efforts often backed up by the threat to move the employer’s plants
either to the southern United States or more recently, overseas.

This decline in the power of unions has significant implications for
employees’ exercise of voice in the workplace. Empirical study has
found that employees are more likely to leave non-union jobs, than
union jobs, even when controlling for the higher wage levels and more
stable workers found in union jobs. Unions seem to have a stronger
impact on the exit behavior of those workers who are dissatisfied.

In

156. See HANDBOOK OF U.S. LABOR STATISTICS, tbl.9-5, WAGE AND SALARY EMPLOYEES
2001).
157. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, U.S. DEP’T
OF COMMERCE, tbl.712 (2000).
158. See Julius G. Getman, Ruminations on Union Organizing in the Private Sector, 53 U. CHI.
L. REV. 45, 45 (1986).
159. See Benjamin Aaron, Plant Closings: American and Comparative Perspectives, 59 CHI.-
KENT L. REV. 941, 962 (1983) (quoting R. MCKENZIE, RESTRICTIONS ON BUSINESS MOBILITY 57
(1979)).
160. See Richard B. Freeman, The Exit-Voice Tradeoff in the Labor Market: Unionism, Job
Tenure, Quits, and Separations, 94 Q.J. ECON. 643, 644 (1980); Daniel Rees, Essays of Unionism
161. See Freeman, supra note 160, at 668-69.

Measured by absolute differences in quit rates, unionism clearly has a greater effect on
dissatisified than on other workers . . . . Measured as logits of the rates, the picture is less

clear. The logit of the quit rate of union workers increases more slowly than the logit of
the quit rate of nonunion workers as dissatisfaction increases from highly satisfied
persons to dissatisfied persons and from highly satisfied persons to moderately satisfied
persons. However, the logits increase more rapidly for union workers in comparisons of
moderately satisfied and dissatisfied persons. Interpretation of the evidence depends on
the metric and group used to evaluate the differences.

Id.
addition, turnover seems to be lower in segments of the economy and among employers having more comprehensive grievance systems. Both of these findings are consistent with the view that unions facilitate the use of voice as an alternative to exit.

iii. Job Tenure: Race, Gender and Core v. Peripheral Industries

Research on the roles of gender and race in voluntary job leaving provides additional support for the view that the decision to use voice, rather than exit, in response to workplace concerns is in significant part a function of power. In 1979, official government statistics indicated that “blacks, women, and youth are two to three times more likely to become unemployed from quitting than whites, men, and older employees.” Though initial analyses attributed this difference in part to unstable work habits and attitudes of these populations, subsequent research suggests otherwise.

Viscusi’s extensive study of *Sex Differences in Worker Quitting* found that “the primary difference in male and female quit behavior is a difference in their jobs’ characteristics rather than a difference in quit behavior or personal characteristics.” A subsequent 1985 study indicated that blacks, women and youths are quit-prone because “they are disproportionately employed in periphery industries where institutional arrangements and employment conditions render quitting

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162. See id. at 669-70.
163. Similarly, a recent study demonstrates that “at least for blue-collar workers, being represented by a labor union is significantly associated with the likelihood that an eligible unemployed worker will receive UI benefits, even after controlling for important demographic, job, and state UI system attributes.” John W. Budd & Brian P. McCall, *The Effect of Unions on the Receipt of Unemployment Insurance Benefits*, 50 INDUS. & LAB. REL. REV. 478, 488 (1997).
164. Daniel B. Cornfield, *Economic Segmentation and Expression of Labor Unrest: Striking Versus Quitting in the Manufacturing Sector*, 66 SOC. SCI. Q. 247, 248 (1985) (quoting BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, BULL. NO. 2000, HANDBOOK OF LABOR STATISTICS 181-84 (1979)). The comparative “job leavers” rate for women has declined over the intervening fifteen years. In four of the five years between 1995 and 2000, the job leaver rate for women was only one-tenth of one percent more than the rate for men, and in the remaining year, the rates were equal. The job leaver rate for youths aged sixteen to twenty years old continues to be double that of the general population. See HANDBOOK OF U.S. LABOR STATISTICS, supra note 156, at tbl.1-33, 9-5. I have not located current job leaver statistics by race, but the general unemployment rate for blacks has continued to be about double that of whites, with the rate for Hispanics intermediate between blacks and whites. See U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, tbl.674 (2000).
166. Id.
This study looked at the impact of economic segmentation on differences in striking and quitting in the manufacturing sector and found that the workers' decision to strike or quit is significantly affected by the size of the firm, and the wage level of the employment. Striking is most common in the large-firm industries while quitting prevails among small-firm industries. High-wage industries tend to be strike-prone while low-wage industries tend to be quit-prone. While this study compared exit—with only one form of voice—striking, the findings are suggestive in thinking about the exhaustion requirement, for they suggest that the least powerful workers—those who are socially marginalized and employed in the lowest paying, least stable jobs, will be most likely to choose exit over voice.

b. Difference and the Effective Use of Voice

Effective negotiation typically requires more than economic bargaining power. Also required are a willingness of the other party to cooperate, a threshold comfort level with making demands on behalf of oneself, and some level of skill, either innate or developed through training in linguistic and negotiation strategies. In many situations, one or more of these circumstances will be missing. Moreover, we have reason to believe that these circumstances will not be missing in a neutral fashion. Rather, race, ethnic, class, and gender dynamics may come into play in some negotiation contexts in ways that tend to disadvantage non-dominant groups.

i. Lessons from the Research on Negotiations

Though the evidence is limited, a recent meta-analysis of studies investigating gender and negotiation suggests that for a variety of reasons, women may fare worse in employment negotiations than men. The study notes that "as much as 31% to 34% of the differences between the wages of men and women can be explained by differences in their

167. Cornfield, supra note 164, at 248.
168. See id. at 247, 249.
169. Id. at 260-61.
170. The sample is not large, because "only a fraction of studies directly report, and the reported effects are small." Alice F. Stuhlmacher & Amy E. Walters, Gender Differences in Negotiation Outcome: A Meta-Analysis, 52 PERSONNEL PSYCH. 653, 653-58 (1999).
171. See id. Interestingly one of the studies included in the meta-analysis was a field study review of "archival data of union grievances." Id. at 663.
starting salaries," which suggests that women negotiate less effectively in their initial salary negotiations. At least one study considered in the meta-analysis found that "power was a better predictor of negotiation behaviors . . . than gender," which suggests that factors such as social class, race, and education would also affect negotiating success. These factors come into play in a variety of complex ways.

As noted above, the first precondition for effective negotiation is that the other party must be willing to negotiate. This includes both a willingness to enter negotiations at all and a willingness to modify demands. In his landmark research on retail car negotiations using trained, matched pairs of different gender and/or ethnicity, following an identical script, Professor Ian Ayres identified consistent patterns of discrimination by automobile dealers in their negotiations with white and black women, and black men, as compared to white men. Both the initial and final offers to white men were significantly lower than offers to any of the other three groups.

According to Ayres, "sellers’ bargaining behavior is broadly consistent with revenue-based statistical inference as a partial cause." That is, dealers apparently believed that the disadvantaged groups were willing to pay more, either because they lacked information about dealer costs, and/or were less able to comparison shop due to higher costs of search. In addition, dealers appeared to "discriminate against different buyer types for different reasons." Dealers "made the smallest concessions to and spent the longest time bargaining with black male testers," a pattern "consistent with the hypothesis that sellers enjoyed extracting dollars from black males twice as much as extracting dollars from white males." In the case of black men, this suggests that some of the discrimination is explainable as a "desire to disadvantage certain

172. Id. at 670 (quoting Barry Gerhart, Gender Differences in Current and Starting Salaries: The Role of Performance, College Major, and Job Title, 43 INDUS. & LAB. REL. REV. 418 (1990)).
173. Stuhlmacher & Walters, supra note 170, at 657 (quoting Carol Watson, Gender Versus Power as a Predictor of Negotiation Behavior and Outcomes, 10 NEGOTIATION J. 117 (1994)).
175. See Fair Driving, supra note 174, at 827-31.
176. Further Evidence, supra note 174, at 141.
177. See id. at 140-41.
178. Id. at 141.
179. Id. at 132.
180. Id. at 132-33.
buyer types—'consequential animus.' 181 On the other hand, "sellers' discrimination against black females may in part stem from a belief that black females are more averse to bargaining than white males." 182

Ayres' research is consistent with the research on racial discrimination in housing. Housing market research, including research using "testers," demonstrates that blacks have more difficulty in obtaining housing than similarly-situated whites. 183 In the case of housing, the discrimination appears to result in significant part from steering by real estate agents based on the perception that white homeowners do not want to live next to blacks. 184

What are the implications of this research for thinking about the unemployment compensation voluntary quit exhaustion requirement? We do not know, of course, to what extent the type of discrimination found in the retail automobile negotiations and the housing purchase contexts is found in the employment context. Given the well-documented history of employment discrimination in the United States, however, I would expect the findings to translate significantly across contexts. The research provides little basis for a claim that employers would refuse outright to discuss an employee's concerns. 185 It does, however, suggest that disfavored groups of employees might get limited movement in response to their attempts to raise issues. Employers, like Ayres' automobile dealers, may perceive some employees as having higher bargaining costs than others, because "they have a greater dislike for the process of bargaining," 186 or higher search costs for seeking alternative employment, due, for instance, to childcare or elder care responsibilities. 187 They may perceive some employees as being willing to accept lower wages and less favorable working conditions because, for instance, those employees face discrimination in the marketplace, or are not well-connected to the informal networks that lead to much new

181. Id. at 111.
182. Id. at 141.
184. See Galster, supra note 183, at 32, 120.
185. See generally Fair Driving, supra note 174; Further Evidence, supra note 174; Galster, supra note 183.
187. See id. at 139-40 (describing Ayres' theory on cost discrimination).
hiring.\textsuperscript{188} And that likelihood can be expected to have spillover effects on employees’ willingness to make claims.

The second precondition for effective negotiation is a threshold comfort level with making demands on behalf of oneself. A seminal article by Professors William Felstiner, Richard Abel, and Austin Sarat on the transformation of disputes reminds us that in most cases individuals are inclined to “lump it,” rather than to name a problem, blame a causal agent, or claim a right to a remedy.\textsuperscript{189} Thus, we can expect that many people may be reluctant to make such demands. In addition, we might expect that members of groups who face an unequal playing field at the front end might be more reluctant to press their claims with employers. In her work on women and bargaining, Professor Carol Rose has provided a theoretical framework to explain how women may be systematically disadvantaged in the results of negotiations.

[W]omen might systematically do worse than men with respect to acquiring property, if one makes either of two related assumptions. The first assumption is that women have a greater “taste for cooperation” than men. The second, somewhat weaker assumption is that women are merely perceived to have a greater taste for cooperation than men, even though that perception may be erroneous.\textsuperscript{190}

It is unsurprising that, to the extent that women, for instance, are socialized to be “selfless,” to put others’ needs ahead of their own, some women may find it difficult to press claims on their own behalf. On an anecdotal level this is certainly consistent with a consistent theme in informal conversations among women: we may be tenacious negotiators on behalf of others, but less comfortable negotiating on behalf of ourselves.

ii. Lessons from the Research on Linguistics

I have suggested that the third precondition for successful negotiation is a reasonable level of skill in negotiating, either innate or otherwise. No reason exists to believe that women or minorities are

\textsuperscript{188} See id. at 138-41 (describing Ayres' theory on revenue discrimination).


\textsuperscript{190} Carol M. Rose, Women and Property: Gaining and Losing Ground, 78 VA. L. REV. 421, 423 (1992) (citation omitted). A shortened version of this article appears as Bargaining and Gender, 18 HARV. J.L. & PUB. POL’Y 547 (1994).
innately less capable of negotiating effectively. We do, however, have reason to suspect that some groups will be more likely to initiate negotiations using language that can be easily ignored, both by employers and by triers of fact who hear unemployment insurance claims.

Linguistic research suggests that “women more often adopt indirect and deferential speech patterns,” as compared to the “direct and assertive language” men tend to use. In her very sophisticated analysis of the framing of requests for counsel in police interrogations, Professor Janet Ainsworth dubbed the patterns that were more typical of women, the female “register.” She was careful to note, however, that “the use of this register is not exclusively a factor of gender but varies according to other factors as well” and that “[g]ender differences . . . are magnified in some contexts, particularly when there is a power disparity between the speaker and the hearer.” In addition, drawing on the extensive work of Professor William O’Barr analyzing court testimony, she concluded that “this register tends to be adopted in situations in which the speaker is at a disadvantage in power.”

Drawing on the linguistic research, Professor Ainsworth sets out in detail the forms of speech included in the female (or powerless) register. For our purpose, it is sufficient to note that they include hedges (e.g. “kind of, sort of, to some extent, I think, I guess, I suppose, maybe”), tag questions (e.g. adding “isn’t it” or “shouldn’t I” to a declarative statement), using modal verbs (e.g. “may, might, could, should”), not using imperatives (e.g. “Could you solve my problem” rather than “Solve my problem”) and using a “rising intonation in

191. See e.g., Charles B. Craver & David W. Barnes, Gender, Risk Taking, and Negotiation Performance, 5 Mich. J. Gender & L. 299 (1999). Considerable effort has been spent investigating claims that women are less effective negotiators, and the evidence largely disproves that contention. See id.


193. See Ainsworth, supra note 192, at 273-74. The term “register” as opposed to the broader “language” or “voice” acknowledges the significance of context in discussing distinctive uses of language by women. See id. “The concept of register is typically concerned with variation in language conditioned by uses rather than users and involves consideration of the situation or context of use, the purpose, subject matter, and content of the message, and the relationship between participants.” Suzanne Romaine, Language in Society: An Introduction to Sociolinguistics 21 (2d ed. 2000).

194. Ainsworth, supra note 192, at 274.

195. Id. at 286.

196. See id. at 275-82.
Linguistic research conducted in the seven years since Professor Ainsworth’s article was published has emphasized the importance of context in determining the meaning and intent behind a given speech strategy. Professor Deborah Tannen, for instance, has argued that “all the linguistic strategies that have been taken by analysts as evidence of subordination can in some circumstances be instruments of affiliation.” Professor Janet Holmes notes that “hedges” or “pragmatic particles,” as she calls them, “can be used to invite participation in the conversation” or “to soften a critical comment,” as well as, to express uncertainty, and suggests that the same is true of “you know, sort of, and . . . the High Rising Terminal.” Despite this emphasis on the complexity and ambiguity of linguistic devices, these authors emphasize both the gendered nature of linguistic strategies and the power dynamics embedded in them, and elaborate, but do not disavow the research relied on by Professor Ainsworth.

The speech strategies characteristic of the female, or powerless, “register” protect the individual against both the possibility of retaliation and the psychic pain of rejection, because ambiguity and tentativeness allows the speaker to disavow strong interpretations by the listener. But that very ambiguity and tentativeness means that a worker who relies on such strategy may not be heard by the employer or perceived by the trier of fact as having raised a workplace issue sufficiently to satisfy the exhaustion requirement.

iii. Class, Race, Ethnicity, and the Exercise of Voice

A plausible reading of the previous section is that linguistic gender differences are in significant part a symptom of broader patterns of inequality. We might, for instance, expect that workers who use the

197. Id. at 282.
199. DEBORAH TANNEN, GENDER AND DISCOURSE 31 (1994).
201. See, e.g., TANNEN, supra note 199, at 7-11 (responding forcefully to criticism that her work ignores the role of male dominance, she contends that “consequences of style differences work to the disadvantage of members of groups that are stigmatized in our society, and to the advantage of those who have the power to enforce their interpretations.”).
female register will show other differences in their behavior. Separate research on class and race provides reason to believe that one result of inequality will be greater reluctance by the less powerful to enter into negotiations. 202

In a book documenting her own attempt to survive as a low-wage worker for a month each in three different states, Barbara Ehrenreich captures poignantly the ways in which workers in low-wage jobs internalize the messages of their surroundings.

If you are treated as an untrustworthy person—a potential slacker, drug addict or thief—you may begin to feel less trustworthy yourself. If you are constantly reminded of your lowly position in the social hierarchy, whether by individual managers or by a plethora of impersonal rules, you begin to accept that unfortunate status. 203

Ehrenreich’s concern is why the wages of low-wage workers rose so little in the tight labor market of the late 1990s. However, both the conditions she documents and the results she identifies are relevant to whether low-wage workers are likely to raise complaints with their supervisors. Among large employers, “personality” and drug tests are increasing in popularity as a part of the initial hiring process, 204 while at the same time unions are explicitly discouraged. Neither circumstance is likely to encourage independent or non-conforming behavior—like complaining—on the part of employees. And indeed Ehrenreich’s co-workers are eager to please their employers and not inclined to complain. 205

This disinclination to complain may have deep roots. Individuals who are exposed to a relatively authoritarian parenting or educational approach, as may be the case with many working class and minority children, 206 or to societal discrimination, may learn early that it is dangerous to question authority. If so, they are unlikely to believe that raising concerns with their supervisors at work will be fruitful. Some will become passive and compliant, at least in the presence of those with power; others may resist or rebel. In either case, when encountering

202. In this section, I have not attempted to canvass the sociological literature on class and race. I simply seek to identify additional reasons why an expectation that individual workers raise workplace concerns with their supervisors will predictably disadvantage those most in need of the support provided by the unemployment insurance system.
203. NICKLE AND DIMED, supra note 148, at 210.
204. See id. at 13-14, 124-25.
205. See id. at 110, 113, 180; cf. RICHARD SENNETT & JONATHAN COBB, THE HIDDEN INJURIES OF CLASS (1972).
problems with their working conditions, they are not likely to exercise voice in the systematic fashion contemplated in the exhaustion requirement.

Our national legacy of racial discrimination likely has similar effects on the willingness of many racial minorities to exercise voice, even those not disadvantaged as a matter of class. 207 We are not far removed from the days of organized lynching in which young African-American men, especially, faced grave risks if they dared to abandon the passive, compliant, and deferential role demanded of them by their white “superiors,” and often, as a result, by their worried parents. 208 This enforced loss of voice is no longer the official societal norm; but it has left a legacy of suspicion that often results in silence across the racial divide. We have no reason to believe that this silence would be less common in the workplace than elsewhere.

The link between discrimination and lack of voice is not, however, limited to African-Americans, as is illustrated by the following two examples. First, the voice of Native Americans was suppressed quite literally during the nineteenth and twentieth centuries. Among other practices imposed by the federal government, children were taken from their tribes, and sent to boarding schools where they were forbidden to speak their native tongues. 209 Again, we would expect that devastating effects of such policies would be echoed in workplace behavior.

Second, in recent years, immigration from Mexico and Central American countries has led to a large increase in the Spanish-speaking population in many states. In the wake of this increase we find the “English-only policies” currently popular among many employers. 210 Especially for workers who are not fluently bilingual, such policies can only discourage the use of voice.

207. See generally Fair Driving, supra note 174; Further Evidence, supra note 174.


209. See Allison M. Dussias, Waging War with Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages, 60 OHIO ST. L.J. 905-08 (1999).

The reluctance to exercise voice likely extends beyond complaints about working conditions. Individuals who do not feel safe in their work environment may also be very reluctant to share personal information concerning their medical or family problems with their supervisors. I suspect that this dynamic has been involved in several cases my clinic has handled involving very articulate, controlled, middle-class black women. In each case our client was denied benefits, because she failed to discuss her medical or family problems with her employer. My sense was that each woman’s work identity required that she appear to be fully “in control,” and that to discuss her “personal” problems with the employer would have shattered that necessary illusion.

To the extent that power continues to be unequally distributed in our society, we can expect that employees who are female, members of non-dominant racial or ethnic groups, or working class may be disparately disadvantaged by a requirement that they exhaust alternatives to leaving work.

iv. The Exercise of Voice in a Multi-Cultural Society

A final consideration is that in addition to class, race and ethnicity, cultural background may independently affect willingness to raise concerns about working conditions. Anyone who has read Anne Fadiman’s story of conflict between the Western medical interpretation of epilepsy and the Hmong culture’s understanding will be prepared to believe that workers’ willingness to complain to supervisors will vary significantly across cultures. Empirical research on this variable within the exit/voice framework is just beginning, however.

The cultural effects thesis was investigated in a recent field study that compared the effect of low job satisfaction on employee responses, including exit and voice, in Hong Kong and New Zealand, two countries that rank toward the extremes in “collectivism” and “individualism,” respectively. Although the authors note a variety of limitations on their results, they found that “culture directly influenced the behavioral responses of exit or voice” and that “workers in some cultures are more likely to express their dissatisfaction with their job by voicing their concerns to management.”

213. Id. at 10, 12.
3. The Employer's Advantage in Litigating Exhaustion

As the preceding sections have shown, workers have valid reasons for not taking their concerns over workplace conditions to the employer (or sharing the details of their medical histories or personal lives). A further reason exists, however, for either rejecting an exhaustion requirement entirely, or at least limiting its demands on workers. A worker will often be forced to argue that potential alternatives suggested by the employer would have been futile because they would not have resolved the problem. Given the informal nature of unemployment insurance hearings, the employee often has no effective way to counter the employer's claims.

In order to understand this claim, it is critical to understand the high-volume, short, and informal nature of the typical unemployment hearings. In my own state, formal discovery is available only at the discretion of the administrative law judge who will preside over the hearing. These judges, taking very seriously the idea that hearings are to be inexpensive and expeditious so that eligible claimants can receive their benefits promptly, are reluctant either to grant such discovery, or to encourage employers to comply with broad subpoenas. Hearings are typically scheduled for one hour when the parties are unrepresented, and the judges are under considerable time pressure to finish the current hearing in order to get on to the next one. Though in-person hearings are still available, perhaps 85% are now held by telephone. These are not conditions that make it easy to respond to information that is in the control of the employer. Yet conditions in Washington seem to be exceptionally generous compared to many other states, where all hearings are now held by telephone, or where hearing length is measured in minutes, not hours.

214. Many employers will have a generalized advantage in unemployment hearings: the fact that they are more often "repeat players" means that more of them (1) are represented, either by an attorney, or more commonly by a company such as Employer's Unity that provides lay representation for employers and (2) as repeat players they are more knowledgeable about the process. For a theoretical analysis of the advantages repeat players have in litigation, see generally, Galanter, supra note 189. The theoretical analysis has been confirmed by later empirical research. See generally Joel B. Grossman et al., Do the "Haves" Still Come Out Ahead?, 33 LAW & SOC'Y REV. 803 (1999).

215. See WASH. REV. CODE ANN. § 34.05.446 (West 2001); WASH. ADMIN. CODE § 192-04-130 (2002).


217. See, e.g., Rue v. K-Mart Corp., 713 A.2d 82, 86-87 (Pa. 1998) (holding that findings in unemployment compensation hearings should not have preclusive effect in other proceedings given the brief and informal nature of unemployment compensation hearings). The court noted that referees in Pennsylvania issue an average of 1024 decisions per year. See id. at 86 n.3.
A few examples taken from cases handled in our clinic may be helpful in understanding the disparity between employer and worker in litigating exhaustion issues. A temporary help agency representative may testify at a hearing that the employee should have called in more often at the end of an assignment, because “we had lots of jobs available then.” The worker has no way of knowing whether this is true, or whether any of those jobs were suitable for her, and due to the time pressures in hearings, many judges will not press for details. Or, the employer may testify, “Yes, Joe had been seeking relief for a couple months, but if he had only waited two more weeks, a job in a different department (shift, etc.) would have opened up. Joe jumped the gun and failed to exhaust alternatives to quitting.” Here, even if the cited job did open up eventually, the worker is not in a position to know whether it would have been offered to him or to someone else.

In an informal hearing with no discovery, only the most sophisticated and well-connected claimant comes to the hearing with good information about what other job prospects exist within the company, and even that claimant’s information may be entirely hearsay. In these circumstances, even if the trier of fact demands specifics from the employer, and the employer provides them, the employee will have little ability to challenge the claim.

VI. THE TWENTY-FIRST CENTURY AMERICAN WORKPLACE: WHY WORKERS FOREGO VOICE IN FAVOR OF EXIT

In this section, I suggest that for a significant number of workers in the American economy of the twenty-first century, the workplace norm is exit, which is the economist’s norm, not voice, the norm of the political scientist. The changing nature of the American workplace has been the subject of considerable commentary in recent decades.\(^{218}\) While many issues are disputed, wide agreement can be found on at least the following points.

First, employment relationships have become both less stable and less secure. As noted in a careful effort to reconcile conflicting data (though the media may overemphasize these developments), “the 1990s have witnessed some changes in the employment relationship consistent with weakened bonds between workers and firms.”\(^ {219}\) Layoffs by large


\(^{219}\) Id. at 23.
corporations have become normal, extending to white collar and managerial workers who formerly considered themselves exempt from the vicissitudes of the economy and expected to work with the same employer until retirement. Thus, many argue that loyalty by companies to their workers is very much the exception. In addition, "[d]uring the 1980s, the temporary help services industry increased in size by at least 100 percent." That industry epitomizes short-term relationships with no expectation of loyalty. The citizenship model, in which workers should feel loyalty toward the organization and therefore exercise voice before leaving, fits poorly in such an environment. A consumer model premised on exit seems more apt in the current environment, especially for low-wage jobs in which employers and employees are relatively fungible.

Second, the unionized workplace has reached its low point since the adoption of the Wagner Act, with less than one-seventh of workers belonging to a union. Even in unionized workplaces, the power of unions, and workers' identification with them, has arguably decreased significantly. To the extent that workers are more likely to exercise voice if they feel more powerful vis-à-vis the employer, the decline of unions makes a requirement to exercise voice unrealistic.

Third, despite management advice that favors such trends as devolving responsibility to lower levels, and reliance on "work groups," we have not yet developed alternatives to unions, such as the European works councils, that provide a realistic avenue for the expression of voice by employees.

Commentators disagree about the desirability of these trends. While many worry about an exacerbation of the trend toward a world of "haves" and "have-nots" among the employed, others celebrate a shift towards a "Silicon Valley" style world of independent contractors.

220. See HECKSCHER, supra note 118, at 3-4.
221. See id. at 8.
223. The exception is when it epitomizes long-term relationships with no expectation of loyalty or fringe benefits. See Vizcaino v. Microsoft Corp., 120 F.3d 1006, 1008 (9th Cir. 1997) (establishing an integrated workforce "over a continuous period, often exceeding two years").
224. See supra text accompanying notes 112-18.
225. See id.
226. See supra text accompanying note 156.
moving from one project to the next, always learning new skills. Whether good or bad, I argue that these trends add up to a world of work for which a model of economics and the consumer, is more on point than a model of politics and citizenship. In such a world, workers will understandably choose the exit model of economics rather than the political model of voice. Lacking stable relationships and any sense of loyalty by the employer, absent the support that a union can provide for expressing grievances, the "reasonable person's" response to problems with his or her "work connected factors" will be to quit and look for another job. I would prefer a world in which work is structured in such a way that a model of citizenship makes more sense than a model of the consumer. To apply such a model under present conditions, however, is to live in a fantasy world, and inappropriately disadvantages employees.

VII. IMPLICATIONS

I began this Article began by considering a small and nitty-gritty provision of the unemployment insurance system, the exhaustion requirement in voluntary quit cases, and then looking at the assumptions underlying that requirement. Before challenging those assumptions based on the practical realities of how the exhaustion requirement plays out in practice, I provided a theoretical framework for thinking about the exhaustion requirement and linked that theoretical framework to the current evolution of our labor market. In this part, I turn my attention back to the voluntary quit exhaustion requirement and consider the implications of the exit, voice, and loyalty framework and developments in the labor market for the exhaustion requirement in the unemployment insurance system.

229. See Levenson, supra note 222, at 335.

230. In this Article I do not attempt to address systematically the implications of my analysis outside the unemployment compensation system. I do note, however, that an analogous requirement can be found in the law of sexual harassment, and the requirement suffers from similar defects. First, in order to make out a harassment case under Title VII, a claimant must show that the harasser's attentions were "unwelcome." Especially where the harasser has supervisory authority over the victim, the victim may be reluctant to respond in a firm way—to exercise voice—for many of the reasons discussed in this Article. Indeed, considerable empirical evidence concerning responses to sexual harassment suggests that women commonly attempt to deal with harassment by ignoring it, brushing it off, or using other indirect approaches. In her recent essay discussing the empirical research, Employer Liability For Sexual Harassment—Normative, Descriptive, and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp, 24 U. ARK. LITTLE ROCK L. REV. 169, 181 n.48 (2001), Professor Linda Hamilton Krieger cites, for example, Caroline C. Cochran et al., Predictors of Responses to Unwanted Sexual Attention, 21 PSYCHOL. OF WOMEN Q. 207, 217 (1997) (observing that ignoring harassing behavior was the most common response, elicited in 60% of surveyed employees at a large Midwestern university). See also David E. Terpstra
In light of the practical realities I have described above, which are compounded by contemporary changes in the economy that have undermined the employer loyalty to workers that formerly existed in some segments of the economy, I reach three conclusions about the exhaustion requirement. First, I contend that the exhaustion requirement for voluntary quit cases involving complaints about working conditions has no legitimate place in the American unemployment compensation system. Legislatures, courts, and agencies faced with the choice whether or not to impose an exhaustion requirement, should forego the opportunity. In addition, they should repeal existing requirements wherever possible. Furthermore, the courts should adopt the per se good-cause rule that dispenses with the exhaustion requirement where the employer’s violation of labor standards contributes to the decision to leave.  

I reach this conclusion with some hesitation because I suspect that the result of abolishing the exhaustion requirement would be that many cases that are now denied on the basis of failure to exhaust would simply be denied on the ground that the individual lacked good cause for quitting. Nonetheless, it seems to me that the exhaustion requirement...
causes enough problems for employees at the administrative hearing level in cases where good cause seems strong, that abolishing the requirement makes sense. One of my major concerns is to craft an approach that is workable at the administrative agency level in the vast bulk of cases that never reach an administrative law judge, much less a higher-level court. Thus, I would prefer to abolish the requirement rather than adopt a burden-shifting regime, or a regime that obliges employers to provide notice of exhaustion requirements as a condition precedent to the exhaustion requirement.

Second, on the “street level,” administrative agency decision makers who are applying already existing exhaustion requirements should be mindful of the practical realities facing workers when they decide whether to quit. Workers face very real risks in raising their concerns about work, as well as difficult obstacles, including power differentials and lack of skill and training for effective negotiation. Given these realities, in considering what a reasonable person would do, agency decision makers should focus on how people in fact behave, not on how skilled attorneys in the same position might behave. Thus, a worker should not be expected to go over her boss’s head, or to identify and contact government agencies that might have regulatory authority over a problem. I would argue that a worker should be expected to contact his union only if the union is strong enough to have a visible presence at the place of employment; for example, where no shop steward or other union representative is visible at the workplace, filing a grievance should not be expected.

Third, in medical quit cases, the expectation that the employee should provide the employer with medical evidence concerning the problem before they quit should not apply to individuals who lack the medical insurance that would give them ready access to such evidence.

232. See supra text accompanying notes 104-08 (discussing burden shifting, which seems to me an appropriate response so long as an exhaustion requirement remains in place).

233. At a faculty colloquium on an earlier version of this Article, my colleagues suggested procedural devices of this sort, as a solution to the concerns I discussed. Thanks to Steve Calandrillo for drawing my attention to Conley v. Pitney Bowes, 34 F.3d 714 (8th Cir. 1994) (holding that, in an ERISA case, the employer’s obligation to provide notice to employee of administrative exhaustion requirement is condition precedent to allowing the employer to raise a lack of exhaustion as defense).

234. Here I mean to include both agency staffers and triers of fact at the administrative hearing level.
VIII. CONCLUSION

This Article tells the story of a “stealth” doctrinal trend. The movement toward adopting a requirement that claimants for unemployment insurance benefits exhaust alternatives to quitting has been quiet, gradual, and essentially unnoticed, both in the specialized universe of unemployment insurance benefits, and in the larger intertwined worlds of law and politics. The story is an important one, however, for three reasons. First, exhaustion requirements prevent real people, whether resisting abusive working conditions, or simply down on their luck, from getting benefits that could help them through troubled times. Second, the trend toward adopting exhaustion requirements reflects broader shifts both in the explicitly political legislative environment in which unemployment insurance statutes are amended, and the less visible political environments in which agency rules are adopted and appellate cases decided. Thus, it can serve as a symbol for the changing legal framework governing our unemployment insurance programs. Amid a shifting political climate, such small changes have cumulatively helped create an unemployment system that is decreasingly able to fulfill its original purposes. Finally, these political changes are accompanied by radical changes in our economy. Both corporate loyalty and union power are on the decline, placing in question many of the assumptions underlying our employment laws.

In addition, however, this Article tells a different story, the story of how the doctrinal trend is applied on the street level. This second story reminds us once again of the power wielded by lower-level decision makers in high-volume administrative agency tribunals. These decision makers’ understanding of how “reasonable people” behave gives content and significance to the doctrinal shift. This street-level story highlights the gap between the exit strategy relied on by many workers, and the voice alternative considered reasonable by many decision makers. We are thereby reminded once again of the importance of narrowing the gulf between theory and practice, between the dominant understanding of how reasonable people behave and the lives of those who come before the law.