SUPREME COURT NO. S235903

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

UNITED EDUCATORS OF SAN FRANCISCO, AFT/CFT, AFL-CIO, NEA/CTA,
Petitioner and Appellant,

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,
Defendant, Cross-Defendant and Appellant,

SAN FRANCISCO UNIFIED SCHOOL DISTRICT,
Real Party in Interest and Respondent.

After a Decision by the Court of Appeal
First Appellate District, Division One, No. A142858/A143428

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

AND

AMICUS CURIAE BRIEF OF THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO IN SUPPORT OF PETITIONER/APPELLANT UNITED EDUCATORS OF SAN FRANCISCO, AFT/CFT, AFL-CIO, NEA/CTA

GLENN ROTHNER
(CSB No. 67353)
Rothner, Segall & Greenstone
510 South Marengo Avenue
Pasadena, CA 91101
Telephone: (626) 796-7555
Facsimile: (626) 577-0124
E-Mail: grothner@rsglabor.com

DAVID J. STROM, *pro hac vice pending*
SAMUEL J. LIEBERMAN, *pro hac vice pending*
American Federation of Teachers, AFL-CIO
555 New Jersey Avenue, NW
Washington, DC 20001
Tel. 202-393-7472
Fax. 202-393-6385
E-Mail: dstrom@aft.org

Attorneys for *Amicus Curiae*
American Federation of Teachers, AFL-CIO

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Facsimile: (626) 577-0124
E-Mail: grothner@rsglabor.com

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SAMUEL J. LIEBERMAN, *pro hac vice pending*
American Federation of Teachers, AFL-CIO
555 New Jersey Avenue, NW
Washington, DC 20001
Tel. 202-393-7472
Fax. 202-393-6385
E-Mail: dstrom@aft.org

Attorneys for *Amicus Curiae*
American Federation of Teachers, AFL-CIO

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER/APPELLANT UNITED EDUCATORS OF SAN FRANCISCO, AFT/CFT, AFL-CIO, NEA/CTA

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to California Rule of Court 8.520(f), the American Federation of Teachers, AFL-CIO hereby respectfully requests leave to file the accompanying brief amicus curiae in support of petitioner/appellant United Educators of San Francisco, AFT/CFT, AFL-CIO, NEA/CTA.

Interest of the *Amicus Curiae*

The American Federation of Teachers, AFL-CIO ("AFT" or "*Amicus*") is a union of 1.6 million professionals that champions fairness; democracy; economic opportunity; and high-quality public education, healthcare and public services for students, their families and communities.

AFT is committed to advancing these principles through community engagement, organizing, collective bargaining and political activism, and especially through the work done every day by AFT members.

This case concerns whether summer school in a K-12 public school district constitutes an "academic term" when determining eligibility for unemployment benefits pursuant to the California Unemployment Insurance Code. AFT has a direct sincere interest in this question. AFT, through its locals, represents public school district employees throughout

California who may be impacted by a ruling in this case. Additionally, experience teaches that decisions from the California Supreme Court often break new ground in the law and, therefore, a ruling by the Court could well be highly influential to other courts throughout the country. This case may have a significant effect on the interests of AFT members far beyond California's borders.

Reasons Why the Proposed Amicus Brief Will Assist the Court

Moreover, *Amicus* has experience that can assist this Court in resolving the main legal question at issue in this case, which is a matter of first impression in California. As discussed in AFT's brief, the unemployment insurance system in California is part of a national system of reserves designed to provide insurance for unemployed workers. The Federal Unemployment Tax Act requires that a state's unemployment law must contain a provision similar to that at issue in this case. AFT has experience dealing with this provision at the national level and assisting its state and local affiliates with this matter outside of California. It is the AFT's intention to bring this experience and expertise to bear in assisting this Court in its deliberations over this important matter.

California Rule of Court 8.520(f)(4) Disclosure

No party or counsel for any party in this case authored this *amicus* curiae brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of this brief. No person or entity

other than AFT and its members, made any monetary contribution intended to fund the preparation or submission of this brief.

Conclusion

For the foregoing reasons, AFT's request for leave to file the accompanying *amicus curiae* brief should be granted.

Dated: April 18, 2017

Respectfully submitted,

GLENN ROTHNER
Rothner, Segall & Greenstone

DAVID J. STROM
SAMUEL J. LIEBERMAN
American Federation of Teachers, AFL-CIO

By 
GLENN ROTHNER
Attorneys for *Amicus Curiae*
American Federation of Teachers, AFL-CIO

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GLENN ROTHNER
(CSB No. 67353)
ROTHNER, SEGALL & GREENSTONE
510 South Marengo Avenue
Pasadena, CA 91101
Telephone: (626) 796-7555
Facsimile: (626) 577-0124
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DAVID J. STROM, *pro hac vice pending*
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Tel. 202-393-7472; Fax. 202-393-6385
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Attorneys for *Amicus Curiae*
American Federation of Teachers, AFL-CIO

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INTRODUCTION

The American Federation of Teachers, AFL-CIO ("AFT" or "*Amicus*") submits this brief in order to assist the Court with its deliberations over this question, a matter of first impression in California. This case raises the issue of the impact of the existence of the summer school session and whether that session qualifies as part of the "academic year" in California for purposes of Unemployment Insurance Code § 1253.3(b) and (c). The twenty-six individuals impacted by this case have been denied unemployment insurance because the weeks for which they claimed unemployment compensation "UC") occurred during the summer, or "between two successive academic years or terms," for purposes of § 1253.3. Petitioner has made a compelling case in its briefs for why the summer session should be considered part of the academic year, which would therefore result in the Claimants being eligible for UC pursuant to the unemployment insurance code.

Amicus submits this brief not to reiterate Petitioner's claims under California law, but rather to assist the Court in situating Claimants' claims within the context of the purposes of the unemployment insurance system

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and to suggest that California's robust system of collective bargaining can be useful in facilitating a just outcome based on Petitioners' claims.

ARGUMENT

I. The Granting of Unemployment Benefits to the Twenty-Six Claimants in this Case is Consistent with the Policy Considerations Underlying the American System of Unemployment Insurance.

The issue of whether the twenty-six claimants are entitled to UC is one of California law, but the Court's decision must be grounded in the policy considerations underlying the unemployment insurance laws. For the reasons discussed in Petitioner's briefs, the Claimants are entitled to UC for the period of May 27, 2011, to August 15, 2011. Their claims fall well within the scope of those that were contemplated in the establishment of our federal/state cooperative system of unemployment insurance.

A. Background on the Statutory Underpinnings of the Federal/State Unemployment System

Congress established the United States system of unemployment insurance in the Social Security Act of 1935. (Pub. L. No. 74-271, 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 301-1397 (1994)). The purpose of the program was, in large part, to provide a first line of defense for American workers who were unemployed through no fault of their own. In a law review article published only a few years after the system was implemented, a scholar stated that a "distinguishing characteristic of unemployment insurance as compared with other measures for dealing with

income loss due to unemployment is that payments are always limited to persons who are involuntarily unemployed and who have had some attachment to the labor market in some defined period prior to claiming benefit. This period may however, be so short as to be almost insignificant." *Eveline N. Burns, Unemployment Compensation and Socio-Economic Objectives*, 55 Yale L.J. 1, 3 (1945). In 1970, Congress amended the Federal Unemployment Tax Act of 1954 ("FUTA") to require states to pay UC to employees of educational institutions. (Pub. L. No. 83-591, 68A Stat. 439 (codified as amended at 26 U.S.C. §§ 3301-11 (1994)). Since then, in order to remain in compliance with FUTA, the states have enacted versions of the federally mandated unemployment insurance language that are nearly identical. California's version of this language is codified at Cal. Unemp. Ins. Code § 1253.3.

In 1976 and 1977, the amendments were made to FUTA that affect the Claimants in the instant matter. The 1976 amendments extended UC to employees of elementary and secondary schools. (Pub. L. No. 94-566, 90 Stat. 2667 (1976) (codified at 26 U.S.C. § 3304 (1994)). Much like the 1970 amendment, the 1976 amendment denied UC between academic terms or years to elementary and secondary school employees who work in an instructional, research, or principal administrative capacity and have a reasonable assurance of returning to work. (26 U.S.C. § 3304 (1994). The 1977 amendment permitted the denial of UC during established or

customary vacation periods or holiday recesses to all employees employed in an instructional, research, or principal administrative capacity in institutions of higher education and to employees working in any capacity in elementary and secondary schools. (Pub. L. No. 95-19, s 302, 91 Stat. 39, 44 (1977) (codified at 26 U.S.C. § 3304 (1994)).

B. Policy Reasons for "Between and Within Terms" Denial and their Inapplicability to Claimants

Courts, in interpreting language analogous to Cal. Unemp. Ins. Code § 1253.3, have stated that the between and within terms denial provisions are intended to eliminate the payment of UC to employees who can plan for temporary unemployment and thus do not truly suffer from economic insecurity. (*See e.g.*, *Haynes v. Commonwealth*, (Pa. 1982) 442 A.2d 1232, 1233). This is most assuredly not the situation with the Claimants in the instant matter. Each of the Claimants received reasonable assurance that they would be employed in the 2011-12 school year. Stipulated Facts at 7. The California Unemployment Insurance Appeals Board ("CUIAB") held that Claimants each had a reasonable expectation of employment during the summer of 2011. Stipulated Facts at 14. Some Claimants worked during part of summer 2011; others did not. Stipulated Facts at 14. There is no dispute that Claimants were eligible to work during that summer, regardless of whether each individual did, in fact, work.

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Claimants are, therefore, a group of individuals who had a reasonable expectation of work but were not granted UC during the relevant dates in the summer of 2011. The decision to assign them work during that summer was made by the district and Claimants found themselves unemployed for much or all of that time through no fault of their own. To the extent that the summer session is an academic term that is part of the academic year in California, as Petitioner has argued, Claimants are individuals who find themselves in the same situation as any individual who was unemployed through no fault of their own. The public policy underlying the unemployment insurance system in the United States demands that they receive unemployment insurance compensation.

C. Claimants' Reasonable Expectation for the Academic Year Should Be Accorded Deference.

As employees who had a reasonable expectation of employment in the summer of 2011, Claimants *ipso facto* understood the summer session to be part of the academic year. This expectation should be accorded deference by this Court. In *Chicago Teachers Union v. Johnson* (7th Cir. 1980) 639 F.2d 353, the United States Court of Appeals for the Seventh Circuit held that where public school teachers lost their jobs three weeks before the end of the academic year because of a lack of funds, they were eligible for three weeks of benefits because they had a reasonable expectation that the academic year would have been three weeks longer.

The court reasoned that since the teachers had worked during the academic year, they could not be disqualified from receiving benefits, even though they had a reasonable assurance of returning to work after the summer recess. *Id.* at 357. Similarly, Claimants in the instant matter had a reasonable expectation that the academic year would include the summer session for which they had a reasonable assurance of employment but, in fact, they were not called to work. Consistent with the reasoning in *Johnson*, Claimants should receive UC for the relevant dates in the summer of 2011.

II. Labor Unions Representing Educators Similarly Situated to the Twenty-Six Claimants in this Case Are Able to Negotiate Provisions in their Collective Bargaining Agreements That Will Limit the Impact of the Decision in this Matter.

This case has a limited impact in terms of the number of employees affected, though the financial impact on the affected employees could be significant. As noted by Petitioner in their Reply Brief:

> ...this case involves only 26 claimants. This does not involve the unemployment benefit issues of employees who are paid a yearly salary and who do not work during the summer session. It does not involve most SFUSD employees whose work was limited to the fall and spring term. For most of the SFUSD employees, the summer term was not an academic term for which work was available or for which the SFUSD had to give reasonable assurance until the fall term. The SFUSD can negotiate its employment practices with the UESF in the Memoranda of Understanding so as to define those who are year-round employees paid on a salary, for whom there is no entitlement to unemployment benefits in the summer term provided they are given reasonable assurances

> at the conclusion of the spring term that they will be employed for the fall term. UESF Reply Brief at 30.

In light of the limited impact of this case, *Amicus* respectfully suggests that the Court consider the possibility and, indeed, likelihood that substitute educators and their unions in California can negotiate the impact of this Court's ruling utilizing the collective bargaining process.

Federal wage and hour law provides a model for labor/management negotiation of alternative compensation plans that serve the purpose of protecting the financial security of public employees while managing the public fisc. "Belo plans," named after the Supreme Court's decision in *Walling v. A. H. Belo Corp.* (1942) 316 U.S. 624, provide an authorized exception to use of the regular rate to compensate employees for overtime work. The purpose of a Belo plan is to allow an employer to pay employees who work irregular hours the same amount each week without regard to the number of hours worked, unless the hours worked in a week exceed sixty. In order to make use of this exception, all statutory requirements set forth in 29 U.S.C. § 207(f) must be met. Those requirements are: (1) the employees' duties must require irregular hours of work from week to week; (2) the existence of an individual or collective bargaining agreement specifying a regular rate of pay not less than minimum wage and requiring payment of 1 1/2 times the regular rate for

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overtime hours; and (3) a weekly guarantee of pay for all hours up to 60 worked in a week.[1]

The principle underlying the utilization of Belo plans is that the weekly guarantee must be set at a rate that equals what would be paid for sixty hours of work at minimum wage, if overtime compensation were paid for hours in excess of forty. If this is true, then the employee is paid the guaranteed wage in all weeks where she works sixty or fewer hours, and receives overtime compensation for hours in excess of sixty in a week. Typically, such plans are included within collective bargaining agreements between public employers and public employees, most notably firefighters, who have unusual schedules in that they sleep at the firehouse and technically are on duty at that time.

Beyond Belo plans, there are other examples of statutes that permit employers and labor unions to negotiate alternative arrangements to the minimum standards mandated by the statute. For example, the Fair Labor Standards Act provides that the compensability of time spent "changing clothes or washing at the beginning or end of each workday" is a subject appropriately suited to collective bargaining. (29 U.S.C. § 203(o)). In a recent case, the U.S. Supreme Court held that time spent donning and doffing protective gear was time spent "changing clothes" § 203(o), thus

[1] The regulations that describe permissible Belo plans are found at 29 C.F.R. §§ 778.402-414.

permitting the parties to collectively bargain over the compensability of time spent changing clothes at the beginning or end of the workday. (*Sandifer v. U.S. Steel Corp.*, (2014) 134 S.Ct. 870).

California law also allows unions and employers to negotiate alternatives to state minimum standards. For example, Labor Code § 245.5(a)(1) exempts employees covered by collective bargaining agreements (pursuant to certain conditions) from application of certain aspects of California's wage and hour laws. Cal. Labor Code § 510(2) permits the use of an alternative workweek schedule adopted pursuant to a collective bargaining agreement in place of the eight-hour day requirement set by statute. Labor Code § 514 holds that employees covered by collective bargaining agreements meeting certain minimum standards are not governed by the state's overtime rules. Labor Code § 512 exempts certain employees covered by collective bargaining agreements from minimum meal period requirements. Labor Code § 3201.5 permits the use of alternative dispute resolution for workers compensation claims under a collective bargaining agreement. All of these Labor Code sections contemplate that unions and employers may implement standards or procedures other than the minimum set by statute.

In the instant matter, we do not purpose that the union and the school district may waive entitlement to Unemployment Compensation. Rather, we point out that a union and public school employer may negotiate

schedules, seniority, and expectation of summer school work all to provide for the designation of which employees have an expectation of work during the summer school term and those who would have no such expectation.

Amicus contends that school districts and the unions that represent substitute educators who work during the summer could negotiate provisions to deal with this unique situation, much as municipal fire departments and the unions that represent firefighters negotiate Belo plans to deal with the unusual circumstance of firefighters who work irregular hours. Should this Court rule in favor of Petitioner in this case, it is likely that the UESF and all other school districts in California that employ substitute educators could address the situation through bargaining in order to define the educators who are year-round employees paid on a salary, for whom there is no entitlement to UC in the summer term, provided they are given reasonable assurances at the conclusion of the spring term that they will be employed for the fall term.[2]

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[2] It is important to note that the California Public Employment Relations Board has held that the structure of the school year is a mandatory subject of bargaining. *See e.g. Pasadena Area Community College District* (2015) PERB Dec. No. 2444 [40 PERC ¶ 37] (holding that a community college district violated EERA provisions by unilaterally adopting a tentative calendar incorporating a trimester academic calendar).

CONCLUSION

For these reasons, *Amicus* respectfully submits that this Court should rule in favor of Petitioner/Appellant, reverse the decision of the Court of Appeal, and remand this matter to the Superior Court with instructions to grant the writ and determine Claimants were entitled to benefits for the period of May 27, 2011, to August 15, 2011, subject to any waiting period.

Dated: April 18, 2017

Respectfully submitted,

GLENN ROTHNER
Rothner, Segall & Greenstone

DAVID J. STROM
SAMUEL J. LIEBERMAN
American Federation of Teachers, AFL-CIO

By: 

GLENN ROTHNER
Attorneys for *Amicus Curiae*
American Federation of Teachers, AFL-CIO

CERTIFICATE OF COMPLIANCE

I certify that this *Amicus Curiae* Brief of the American Federation of Teachers, AFL-CIO in Support of Petitioner/Appellant United Educators of San Francisco, AFT/CFT, AFL-CIO, NEA-CTA complies with the requirements of California Rules of Court Rule 8.520(c)(1). This brief contains 2,446 words, excluding the tables and this certificate, pursuant to Rule 8.520(c)(3). I make this representation in reliance upon the word count program accompanying the Microsoft Word software that was used to create this brief.

Date: April 18, 2017

By _____
GLENN ROTHNER

PROOF OF SERVICE

United Educators of San Francisco v. California Unemployment Insurance Appeals Board (San Francisco Unified School Dist.)

Case No. S235903

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 510 South Marengo Avenue, Pasadena, California 91101.

On April 18, 2017, I served the foregoing document described as **APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND *AMICUS CURIAE* BRIEF OF THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO IN SUPPORT OF PETITIONER/ APPELLANT UNITED EDUCATORS OF SAN FRANCISCO, AFT/CFT, AFL-CIO, NEA/CTA** on the interested parties as follows:

SEE SERVICE LIST

(By Mail)

[X] I placed a true copy thereof enclosed in a sealed envelope addressed as shown on the attached Service List. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice I place all envelopes to be mailed in a location in my office specifically designated for mail. The mail then would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Pasadena, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

(State Court)

[X] I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
Executed on April 18, 2017.

Jerry Cohen

SERVICE LIST

Stewart Weinberg David A. Rosenfeld Weinberg, Roger & Rosenfeld 1001 Marina Village Parkway, Suite 200 Alameda, CA 94501-1091	Attorneys for Plaintiff and Appellant, United Educators of San Francisco AFT/CFT, AFL-CIO, NEA/CTA
Gregory David Brown Beverley R. Meyers Office of the Attorney General 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102	Attorneys for Defendant, Cross-Defendant and Appellant, California Unemployment Insurance Appeals Board
John Yeh Burke Williams & Sorensen, LLP 1503 Grant Road, Suite 200 Mountain View, CA 90071	Attorneys for Real Party in Interest and Respondent, San Francisco Unified School District
Clerk San Francisco Superior Court For Honorable Richard B. Ulmer, Jr., Judge 400 McAllister Street San Francisco, CA 94102	
Clerk California Court of Appeal First Appellate District, District One 350 McAllister Street San Francisco, CA 94102	