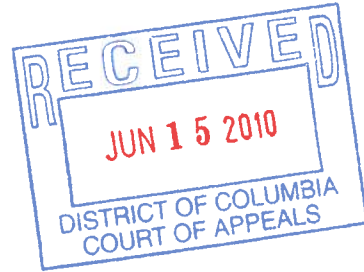


DISTRICT OF COLUMBIA COURT OF APPEALS

DERRICK K. MITCHELL,)
)
 Petitioner,)
)
 v.)
)
 ALL STAFF TECH/DHS,)
)
 Respondent.)
 _____)

No. 10-AA-109



REPLY IN SUPPORT OF PETITIONER’S MOTION FOR SUMMARY REVERSAL

The Department of Employment Services (“DOES”) does not oppose petitioner Derrick Mitchell’s Motion for Summary Reversal insofar as Mr. Mitchell asks this Court to vacate the final order of the Office of Administrative Hearings (“OAH”) and remand for further consideration in light of the Unemployment Compensation Reform Act of 2010, Act 18-0401, which the Council projects will become law on July 22, 2010. DOES disagrees, however, with Mr. Mitchell’s contention that he is entitled to summary reversal now and a remand for consideration of his claim on the merits, on the strength of this Court’s decision in *Wright-Taylor v. Howard University Hospital*, 974 A.2d 210 (D.C. 2009).

DOES is wrong on the latter point for three reasons. Before discussing why, it is important that the Court appreciate why the disagreement makes a difference. First, holding Mr. Mitchell’s case in abeyance until the new law goes into effect necessarily entails further delay in Mr. Mitchell’s receipt of these vital safety-net benefits. Mr. Mitchell is still unemployed, and any further delay in his receipt of unemployment benefits would impose a significant hardship. Second, the proceedings on remand to OAH will differ depending on whether the Court vacates and remands OAH’s final order for further consideration in light of the new law (assuming that the law is not disapproved by Congress) or whether the Court reverses and remands because the

Notice of Appeal Rights received by Mr. Mitchell was inadequate. A remand for the first reason would require that OAH consider whether Mr. Mitchell has shown “excusable neglect or good cause” before proceeding to the merits of his unemployment claim. *See* Bill 18-455, § 2(c) (Exh. 7 to Motion for Summary Reversal). Although Mr. Mitchell has little doubt that he would satisfy that standard, the need for further proceedings relating to timeliness will delay still further his receipt of benefits. By contrast, if the Court reverses and remands because the Notice of Appeal Rights was inadequate, then the remand would be for further proceedings on the *merits* of Mr. Mitchell’s claim—the same as in *Wright-Taylor*. *See* 974 A.2d at 218.¹

ARGUMENT

THIS COURT SHOULD REVERSE OAH’S FINAL ORDER IN THIS CASE AND REMAND FOR A DETERMINATION ON THE MERITS.

1. DOES intimates that the Court should attach little weight to its ruling in *Wright-Taylor* because the claimant proceeded *pro se* before the Court, the employer did not file a brief, and DOES did not participate. The Court should reject this attack on what should be controlling precedent in this case. The Court’s decisions are not diminished in consequence because the petitioner is proceeding without counsel; as the Court knows well, the vast majority of petitions for review in the unemployment context involve *pro se* litigants. Similarly, it is often the case that private employers lack the financial incentive to participate in the proceedings before this Court. If the Court’s decisions in this setting were of limited precedential value for these reasons, the Court would lose the ability to develop the law on important unresolved questions

¹ Respondent AllStaff Technical Solutions has indicated in a letter to OAH that it is “no longer interested in pursuing this matter brought by the Petitioner, Mr. Derrick Mitchell, and will not contest his receiving the previously disputed unemployment benefits.” *See* AllStaff Letter (Exh. 6 to Motion for Summary Reversal).

and to direct the manner in which OAH addresses claims for unemployment compensation and other vital public benefits.

DOES has the right to participate in every unemployment case, just as other agencies do when judicial review is sought of a final agency action based on an OAH determination. Furthermore, as a matter of course, the Court sends DOES copies of its initial orders in unemployment cases seeking review of OAH final orders. *See, e.g.*, Order (Feb. 24, 2010) (Exh. 4 to Motion for Summary Reversal). It is well within DOES's power to monitor and to participate in the unemployment cases before this Court; its choice not to participate has no bearing on the standing of this Court's precedential published decisions.

2. DOES admits that the Notice of Appeal Rights appended to Mr. Mitchell's claim determination lacks the warning the Court admonished was necessary in *Wright-Taylor* before a claimant's appeal can be dismissed as untimely when an unemployment administrative appeal is timely mailed but not received. DOES Response at 2. The agency also admits that the missing warning likely would have made a difference to Mr. Mitchell because "Mr. Mitchell might have avoided his insufficient postage problem by either paying the USPS the postage necessary to deliver his appeal by registered mail or by hand-delivering it to OAH." *Id.*

However, DOES "doubts that *Wright-Taylor* was correctly decided." *Id.* It complains that DOES "should not be required to tell claim determination recipients the obvious—that registered mail and hand-delivery are safer routes than regular first-class mail to ensure that an important document timely arrives at its destination. Nor should DOES be required to tell recipients to make sure that their appeals bear the proper postage." *Id.* at 3.

DOES's criticism of the Court's ruling is unfounded. Unlike the claimant who waits "until the 11th hour" to make a hand-delivery and is delayed by intervening circumstances, *id.*, it would not be at all obvious to a typical claimant, unschooled in the law, that his appeal would be

dismissed as untimely when he has timely delivered the envelope, bearing standard first-class postage, to the U.S. Postal Service, *even when* his testimony that he mailed the envelope timely is expressly credited by OAH. As in *Wright-Taylor*, a claimant lacking legal training “could reasonably conclude” that if he “took the letter personally” to a U.S. Post Office or U.S. mailbox “for mailing within the given time limit,” with standard first-class postage affixed to the envelope, that he “would have complied with the filing requirements.” 974 A.2d at 218. And as the Court observed, “it would not take much to conclude that the end sought by the mailing exception was properly served by the showing here.” *Id.* at 216. DOES’s protestations to the contrary, OAH’s current mailing rule, accompanied by DOES’s inadequate notice, does indeed set a trap for the unsuspecting claimant.

The Court’s decision in *Wright-Taylor* governs the proper disposition of this case. The Notice of Appeal Rights received by Mr. Mitchell was inadequate as a matter of law to invoke the jurisdictional bar of the ten-day filing deadline. Accordingly, as it did in *Wright-Taylor*, this Court should reverse OAH’s dismissal of Mr. Mitchell’s appeal and remand to OAH for further proceedings on the merits of his claim.

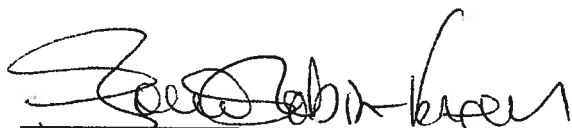
3. If the Court determines that summary reversal is inappropriate, then Mr. Mitchell concurs with DOES’s recommendation that the Court hold this case in abeyance pending Congress’s review of the new unemployment law. If and when the law goes into effect, the Court should vacate OAH’s final order and remand for further proceedings.

CONCLUSION

For the foregoing reasons and those stated in the Motion for Summary Reversal, this Court should reverse OAH's final order and remand to OAH with instructions that it treat petitioner's administrative appeal as timely and consider the merits of his claim for unemployment compensation benefits.

Dated: June 15, 2010

Respectfully submitted,



Bonnie I. Robin-Vergeer (No. 429717)
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, D.C. 20005
(202) 628-1161
Fax (202) 727-2132

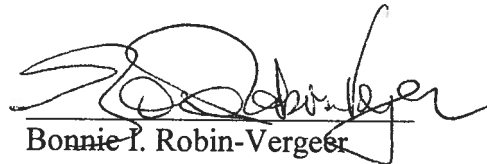
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2010, I caused a true and correct copy of the foregoing Reply in Support of Petitioner's Motion for Summary Reversal to be served by first-class mail, postage prepaid, on:

All Staff Tech/DHS
Attn: Human Resources
1935 Cliff Valley Way, Suite 225
Atlanta, GA 30329

Todd S. Kim, Solicitor General
Office of the Solicitor General
441 4th Street, N.W.
Suite 600 South
Washington, D.C. 20001



Bonnie I. Robin-Vergeer