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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 526

ADELL H. SHERBERT, *Appellant,*

v.

CHARLIE V. VERNER, ED. H. TATUM, ROBERT S. GALLOWAY, SR., as members of SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION and SPARTAN MILLS, *Respondents.*

On Appeal from the Supreme Court of South Carolina

APPELLANT'S OPPOSITION TO MOTION TO DISMISS

The appellees' Motion to Dismiss justifies short comment.

1. THE CHOICES APPELLEES LEAVE OPEN TO APPELLANT CONFIRM THE IMPAIRMENT OF HER RIGHT TO FREE EXERCISE OF HER RELIGION.—Appellees emphasize that under the South Carolina law a claimant, to be entitled to benefits, "must be available for work in his usual trade or occupation" (Motion to Dismiss, p. 10). They then urge that appellant has a right to choose her

religion and to choose her trade or occupation (Motion, pp. 9, 10) but assert that if in choosing either she "rendered herself unavailable for work in her personal trade or occupation" she is entitled to no benefits (Motion, p. 10). They argue that efficiency of the public welfare legislation would be greatly impaired if benefits were paid to persons who become unemployed "solely because of changes in their personal circumstances" (Motion, p. 12).

This misleadingly implies that appellant became unemployed because of a change in her personal circumstances. In fact the record is clear that, after working only five days a week for a period of twenty-two months during all of which she was a Seventh-day Adventist observing Saturday as her Sabbath, circumstances were changed by her employer's changing its plant to a six-day week. (St. of Juris., p. 6; App., p. 9a; Motion, p. 5).

If, as appellees contend, appellant, to qualify for benefits, is bound to accept the days of work to which her employer changed, as now being the usual and customary days and hours in her usual occupation (Motion, pp. 9, 10), her only escape from ineligibility for benefits is to abandon her religious beliefs. As pointed out by Altman, *Availability for Work* (1950), p. 189, such a limited "voluntary choice" is "hardly consistent with freedom of religion."

2. THERE IS NO DISPUTE AS TO THE FACTS AND THE APPEAL DOES NOT SEEK REVIEW OF THE EVIDENCE.—The South Carolina Supreme Court, in its opinion, was silent on the undisputed evidence that all of the other members of the Seventh-day Adventist Church in the Spartanburg area, some 150 in number, were gainfully

employed in that area and experienced no particular difficulty in obtaining jobs although none worked on the Saturday Sabbath (Tr. 13-14). Appellees admit this fact (Motion, p. 6). There is therefore no dispute as to the facts.

But appellees apparently confuse a review of the evidence relied upon to support ultimate findings of fact in a tax case (citing *Rudolph* v. *United States,* 370 U. S. 269 (Motion, p. 12)) with review of the constitutionality of a statute as applied in an undisputed fact situation. See *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 289. Of course, if necessary, where denial of rights under the Federal Constitution is claimed, this Court will reexamine the evidentiary basis for the lower court's conclusions. *Niemotko* v. *Maryland,* 340 U. S. 268, 271.

3. No Mere Disagreement With the State Court's Construction and Application of the State Law Is Involved.—Contrary to appellees' repeated suggestion (Motion, p. 11, first full para.; p. 13, third para.) appellant does not here disagree with the State Employment Security Commission or with the State Supreme Court "as to the proper construction and application" of the eligibility standards or legislative conditions contained in the state statute. She recognizes that the State court has the final word on construction of its own statutes. Appellant merely contends that, as so construed and applied the unemployment statute sections involved violate her constitutional rights.

4. The Appeal Presents a Novel and Substantial Constitutional Question Involving First Amendment Rights Protected by the Fourteenth Amendment.—Whether a state unemployment compensation

law may condition payment of its benefits upon surrender of the right to free exercise of religion guaranteed by the First Amendment is a question of constitutional law never passed upon by this Court and as to which the appellees suggest no controlling precedent.

5. That a Determination Here Can Settle Only the Issues Presented by Facts Peculiar to This Case in No Way Militates Against the Continuing Importance of Decision by This Court.—Appellees contend that the question here presented is not important because decision must necessarily be restricted to the facts and circumstances of the particular case and because state unemployment compensation laws vary. (Motion to Dismiss, pp. 12, 19-20)

Of course, this Court can determine only the rights of the litigants before it. *Federation of Labor* v. *McAdory,* 325 U. S. 450, 461. But a 1945 survey showed unemployment laws of most of the states to have a striking similarity in the aspect here involved. In that year, 34 required that the individual be "able to work and available for work," in six there were minor, and in eleven more substantial variations. Freeman, *Able to Work and Available for Work,* 55 Yale L. J. 123, 124. (Those that require availability for work in "usual trade or occupation" are not so numerous because this so poorly tests attachment to the labor market. A dying industry or an aging claimant may make such willingness irrelevant.)

Appellees' argument merely denies the function of decisions of this Court as precedents in like cases and as bases for analogical reasoning in others. Certainly, the considerations deemed to justify dismissal in *Rudolph* v. *United States,* 370 U. S. 269 and *Rice* v.

Sioux City Cemetery, 349 U. S. 70 (cited by appellees (Motion to Dismiss, pp. 12, 20)) find no parallel in the instant case.

In all the States the "available for work" clause has long been the greatest single source of administrative determinations and court decisions dealing with the unemployment compensation statutes. Decision here of the question in this case would, by declaring the law and disclosing the controlling principles, aid substantially in the determination of like and similar cases in the future.

6. THE UNCONSTITUTIONAL CONDITION CASES ARE PLAINLY APPLICABLE.—The appellees complain that appellant did not specifically urge below that the unemployment compensation statute is so arbitrary and discriminatory as to violate the due process clause of the Fourteenth Amendment (Motion to Dismiss, p. 13). It would appear to make little difference whether we urge that the statute is so arbitrary and discriminatory as to violate the due process clause of the Fourteenth Amendment or in greater detail spell out that the statute violates the Fourteenth Amendment, specifically the guaranty of religious freedom included in the First Amendment and incorporated in the "liberty" protected by the Fourteenth Amendment (*Cantwell* v. *Connecticut,* 310 U. S. 296, 303), particularly the due process clause thereof which specifically refers to "liberty," and provides: "nor shall any State deprive any person of life, liberty, or property without due process of law".

The decisions cited by appellant (St. as to Juris., pp. 12-13) are pertinent in either event. Neither *Flemming* v. *Nestor,* 363 U. S. 611, nor *Martin* v. *Walton,*

368 U. S. 25, upon which appellees rely, involved a First Amendment freedom. They afford no guide for determination of the instant case.

CONCLUSION

It is submitted that the federal question here presented is important and substantial and the decision thereon of the South Carolina Supreme Court should be reviewed by this Court.

Respectfully,

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