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STATUTES

Supreme Court of the United States

OCTOBER TERM, 1962

No. 526

ADELL H. SHERBERT, Appellant,

versus

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

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The "decree" (opinion) of the Court of Common Pleas of Spartanburg County, South Carolina, (R. 26-31) is not officially reported. The opinion of the Supreme Court of South Carolina (R. 34-49) and the dissenting opinion (R. 50-62) are reported in 240 S. C. 286, 125 S. E. (2d) 737.

JURISDICTION

The "decree" (and opinion) of the Court of Common Pleas was entered June 27, 1960. The opinion of the Supreme Court of South Carolina was filed and entered May 17, 1962. No applications for rehearing were filed. Appellant filed notice of appeal August 15, 1960 (R. 62). This Court noted probable jurisdiction December 17, 1962 (R. 64). The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(2)(1958).

QUESTIONS PRESENTED

Whether, where a state unemployment compensation law requires, as a condition to eligibility for unemployment compensation benefits, that a claimant be "available for work" and further provides for some disqualification for benefits if the claimant fails, without good cause, to "accept available suitable work," and such statute is construed and applied so as to make ineligible and to disqualify for five weeks compensation benefits a woman who, as a *bona fide* member of the Seventh-Day Adventist Church, is unwilling and refuses to work on her Sabbath, from sundown on Friday to sundown on Saturday,—either for her employer when he, 22 months after she became an Adventist, joined other textile plants in requiring a six-day work week, or for anyone else,—but who is willing to accept any suitable work not conflicting with the period of her Sabbath, whether the state statute, as so construed and applied,

(1) Violates the First Amendment protection against impairment of the free exercise of religion as absorbed into the Fourteenth Amendment.

(2) Is so arbitrary and discriminatory as to violate the due process clause of the Fourteenth Amendment including the inhibitions of the First Amendment against abridgement of the free exercise of religion.

STATUTES INVOLVED

The South Carolina Unemployment Compensation Law (S. C. Code (1952), now supplanted by S. C. Code (1962)) provides:

> "SEC. 68-113. BENEFITS ELIGIBILITY CONDITIONS.
>
> An unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that:
>
> * * *
>
> (3) He is able to work and is available for work.
>
> * * *
>
> SEC. 68-114. DISQUALIFICATION FOR BENEFITS.
>
> * * *
>
> Any insured worker shall be ineligible for benefits:
>
> * * *
>
> (2) "Discharge for misconduct." If the Commission finds that he has been discharged for misconduct connected with his most recent work prior to filing a request for determination of insured status or a request for initiation of a claim series within an established benefit year, with such ineligibility beginning with the effective date of such request and continuing not less than one nor more than the next twenty-two consecutive weeks (in addition to the waiting period).
>
> * * *
>
> (3) "Failure to accept work." If the Commission finds that he has failed, without good cause, (a) either to apply for available suitable work, when so directed by the employment office or the Commission, (b) to accept available suitable work when offered him by the employment office or the employer * * * such ineligibility shall continue for the week in which such failure occurred and for not less than one nor more than the five next following weeks (in addition to the waiting period).
>
> * * *

(a) In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals. * * *[1] "

The declaration of State public policy for the unemployment compensation laws is contained in Code Section 68-36, which provides:

"Without intending that this section shall supersede, alter or modify the specific provisions contained in this Title but as a guide to the interpretation and application of this Title, the public policy of this State is declared to be as follows: economic insecurity due to unemployment is a serious menace to health, morals and welfare of the people of this State; involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the General Assembly to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his family; the achievement of social security requires protection against this greatest hazard of our economic life; this can be provided by encouraging the employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The General Assembly therefore declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

[1] This subsection (a) was added to Section 68-114 by amendment in 1955. S. C. Acts 1955, No. 254, Secs. 17 and 18, 49 Stats. at L. 480. Apparently through oversight, it was not carried into the Code until the adoption of the new S. C. Code (1962), on January 9, 1962.

STATEMENT

Judicial action was initiated when appellant filed a petition in the Court of Common Pleas for Spartanburg County, South Carolina (R. 18-20) under Section 68-165, S. C. Code (1952) to review and reverse the decision of the State Employment Security Commission (R. 16-17) that plaintiff was:

(1) ineligible for benefits in that she refused to take work on Saturday (because of her religious belief as a Seventh Day Adventist) and hence was not "avaliable for work" as required by Sec. 68-113(3), S. C. Code (1952);

(2) disqualified for five weeks benefits because she had been "discharged for misconduct"—unexcused absences on Saturday, rendering her ineligible for benefits under Section 68-114(2), S. C. Code (1952).

The Court of Common Pleas affirmed the decision of the Commission (R. 26-31). The Supreme Court of South Carolina affirmed (R. 34-49) Bussey, J., filed a dissenting opinion (R. 50-62). No applications for rehearing were filed.

There is no conflict in the facts of record—Plaintiff-appellant, aged fifty-seven, had been employed in the Beaumont plant of Spartan Mills in Spartanburg, South Carolina, as a spool-tender for thirty-five years (R. 4-8) and had been so employed without interruption since August 8, 1938 (R. 6). From the end of World War II and until June 6, 1959, Saturday work in this plant was on a voluntary basis (R. 5), and appellant worked only five days a week, Monday through Friday, on the first shift—7 a. m. to 3 p. m. (R. 8).

On or about August 6, 1957, appellant became a member of the Seventh Day Adventist church (R. 11). The religious teaching of that church is that the Sabbath commanded by God commences at sundown Friday evening and ends at sundown on Saturday evening (R. 10) and labor or common work during that period is forbidden (R. 10, 13). Appellant,

as a member of the denomination, shares that belief and in the practice thereof did not work at Spartan Mills on her Sabbath after she joined the church August 6, 1957 (R. 11-12).

On June 5, 1959 (R. 5), Spartan Mills changed to a six-day week, posting a notice that all employees would be required to work on Saturdays thereafter (R. 5, 8). Appellant explained to her employer that she could not and would not work on Saturday because it was her Sabbath, (R.11), and thereafter she missed work on six successive Saturdays (R. 5, 9). She was discharged on July 27, 1959 (R. 9) because of her refusal to work on Saturday (R. 9-11). Thereafter she applied to three other mills for employment but they were on a six-day week basis, as were other textile mills in the area (R. 9-10) and she remained unwilling to take any work that would require her to work on her Sabbath. (R. 11). Appellant expressed willingness to work in another mill or in any other industry so long as she was not required to work on her Sabbath (R. 12).

The evidence showed that, other than appellant and one other,[2] all of approximately one hundred and fifty members of the Seventh Day Adventist Church in Spartanburg were gainfully employed in that area and experienced no particular difficulty in obtaining jobs although none worked on the Saturday Sabbath (R. 12).

Administrative Determinations—Appellant on July 29, 1959, filed her claim (R. 3-4) with the South Carolina Employment Security Commission for unemployment compensation benefits, Title 68, S. C. Code (1952). Claimant set forth in the claim that she would accept only any suitable work offered on the first shift (R. 4). The claims examiner found the appellant ineligible under Sec. 68-113(3) because

[2] In *Sally W. Lloyd v. Charlie V. Verner et al.*, pending on appeal to the Supreme Court of South Carolina, the facts are identical and the parties have stipulated to abide the result in this case.

not "available for work" in that her refusal to work on Saturday made her not "available for work during the regular work week observed in the industry and area" in which she had worked (R. 4-5). He also held her partially "disqualified" for benefits under Sec. 68-114(2) for a period of five weeks because discharged for misconduct—her unexcused absences for six successive Saturdays (R. 4-5).

The affirming decision of the Referee or Appeal Tribunal (R. 14-16) was affirmed by the appellee Commission (R. 16-17).

Judicial Review—On the petition of the appellant (R. 18-20) the answers of the state commission (R. 20-22) and of the employer, Spartan Mills (R. 23-25), both appellees here, and on the basis of the record made in the administrative proceedings, the Court of Common Pleas of Spartanburg County, affirmed (R. 26-31).

On appeal to the Supreme Court of South Carolina, appellant's exceptions asserted that the pertinent sections of the Unemployment Compensation Law, as construed, violated the free exercise of religion clause of the First Amendment as absorbed into the Fourteenth Amendment, and as well violated the same amendment by denying appellant the "protection and the benefits accorded by the Laws of South Carolina to those who observe Sunday as their Sabbath" (R. 33).

The Supreme Court of South Carolina, in its opinion and judgment here under review, concluded:

(1) Appellant was ineligible initially for unemployment benefits because she was not "available for work" within the meaning of Sec. 68-113(3), S. C. Code (1952), since she was "unwilling to accept work in her usual occupation for the usual and customary days and hours under which the textile industry works." (R. 44, 48).

(2) Appellant was properly disqualified for five weeks' benefits, not on the ground assigned by the court below—misconduct under Sec. 68-114(2)—but because under Sec. 68-114(3) she had "failed, without good cause . . . to accept available work when offered . . . by the employer" (R. 48-49).

As to the constitutional issues raised under appellant's assignments of error to the South Carolina Supreme Court, the State's highest court concluded:

> "However, our Unemployment Compensation Act, as (it) is hereinbefore construed, places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience."

ARGUMENT

I

APPELLANT HAS BEEN UNABLE TO SHOW THAT THE CONSTRUCTION AND APPLICATION OF THE "AVAILABLE FOR WORK" ELIGIBILITY STANDARD FOR UNEMPLOYMENT COMPENSATION BENEFITS UNCONSTITUTIONALLY PROHIBITS OR INTERFERES WITH THE FREE EXERCISE OF APPELLANT'S RELIGION.

The law challenged here does not violate the First Amendment of the Federal Constitution, which as applied to the states under the Fourteenth Amendment, prohibits laws respecting an establishment of religion or prohibiting the free exercise of religion.

(a) **Preliminary considerations.**

The portion of the First Amendment here involved provides:

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. * * *"

Appellant relies solely on the "free exercise" clause (Appellant's Br., p. 13) and contends that the state law, by the alleged coercion of withheld employment compensation benefits, invades the realm of her religious belief and requires her, in derogation of that belief and contrary to the tenets of her church, to profess a willingness to work on her Saturday Sabbath, and to accept a job involving work on Saturday. The standing of the appellant to invoke the Constitution can only be predicated on a showing by appellant that the enforcement of the Act deprives her of liberty without due process of law under the Fourteenth Amendment. Deprivation of life is obviously not involved, and appellant can show no accrued property interest or right to unemployment compensation benefits. Cf. *Fleming v. Nestor,* 363 U. S. 603, 608-611 (social security benefits are not accrued property rights within contemplation of due process clause of Fifth Amendment).

The constitutional right of an individual to worship God in such manner and form as he may desire, with or without affiliation of any particular denomination or creed, has long been recognized. The First Amendment safeguards free exercise of the chosen form of religion, but it embraces two concepts, freedom to believe, and freedom to act. *Cantwell v. Connecticut,* 310 U. S. 296, 303. The appellant relies on the concept that freedom of religious belief is absolute (in contrast with the conditioned nature of the freedom to act), and she contends that the unemployment compensation laws, as constructed to render her ineligible for benefits, coerces this absolute right of free religious belief.

Concededly, certain aspects of religious exercises cannot be restricted or burdened by either Federal or State legislation; compulsion by law of the acceptance of any

creed or the practice of any form of worship is forbidden. *Cantwell v. Connecticut,* 310 U. S. 296, 303; and, *cf. Reynolds v. United States,* 98 U. S. 145.

(b) **Ineligibility for benefits is not coercion to work on Sabbath in violation of freedom to believe.**

The court below concluded that the appellant was unwilling to accept work in her usual occupation for the usual and customary days and hours under which the textile industry worked, and by restricting her willingness to work to periods or conditions to satisfy her own personal circumstances, she was not "available for work" within the benefits eligibility standards contemplated by the state unemployment compensation law. The court likewise concluded that the appellant had failed to accept, without good cause, available suitable work offered her by her employer, thereby supporting a disqualification for benefits of five weeks.

The appellant characterizes this construction and application of the state unemployment compensation laws as a substantial penalty on the exercise by her of her religious freedom, and in effect characterizes the denial of unemployment compensation benefits as the imposition of a "penalty" equally as obnoxious as the exaction of a tax or fine as a condition to the exercise of a First Amendment liberty.

In the case of *Braunfeld v. Brown,* 366 U. S. 599, the emphasis was on the question whether a Sunday closing law was invalid as applied to Orthodox Jewish storekeepers who were compelled by their religion to remain closed on Sundays. In sustaining the validity of the legislation, the Court began by asserting the proposition that the state has no power to coerce belief, as opposed to the control of actions. The Court then held that the Pennsylvania statute did not directly impinge on any religious practice: "The Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their re-

ligious beliefs more expensive." (366 U. S. at 604.) Indirect burdens on religion do not violate the freedom of religion provision; the opinion of the Chief Justice in *Braunfeld* states (366 U. S. at 606-607):

> "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i. e.,* legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.
>
> "Needless to say, when entering the area of religious freedom, we must be fully cognizant of the particular protection that the Constitution has accorded it. Abhorrence of religious persecution and intolerance is a basic part of our heritage. But we are a cosmopolitan nation made up of people of almost every conceivable religious preference. These denominations number almost three hundred. Year Book of American Churches for 1958, 257 *et seq.* Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment.
>
> "Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross

> oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate individually between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."

The South Carolina unemployment compensation law does not make criminal the holding of any religious belief or opinion, nor does it force or coerce any person to embrace a particular religious belief or to state or believe anything in conflict with their religious tenets. The laws were enacted under the general police power of the state, are primarily secular in purpose, and operate within a legitimate and important sphere (unemployment conditions and effects) of predominantly local interest. As applied to the appellant, the laws may operate incidentally to make the practice of her religious beliefs more expensive under the five weeks disqualification for unemployment compensation benefits. But no person has an absolute right to unemployment compensation benefits. The indirect financial burden on appellant is not aimed at nor does it impede freedom of religion, and it does not discriminate invidiously against any personal rights of appellant guaranteed under the First Amendment. *Braunfeld v. Brown,* 366 U. S. 599; *Gallagher v. Crown Kosher Super Market,* 366 U. S. 617; *McGowan v. Maryland,* 366 U. S. 420; *Two Guys from Harrison-Allentown, Inc., v. McGinley,* 366 U. S. 582.

Appellant cites *West Virginia State Board of Education v. Barnette,* 319 U. S. 624, as holding that the absolute freedom to believe necessarily means, as a corollary, that

no one can be compelled by word or act to do an act in conflict with his religious belief (Appellant's Br., p. 15). In *Braunfeld v. Brown,* 366 U. S. 599, 603, the opinion reflects:

> "Thus, in *West Virginia State Board of Education v. Barnette,* 319 U. S. 624, * * * this court held that state action compelling school children to salute the flag, on pain of expulsion from public school, was contrary to the First and Fourteenth Amendments when applied to those students whose religious beliefs forbade saluting a flag.
>
> "But this is not the case at bar; the statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to state or believe anything in conflict with his religious tenets.
>
> "However, the freedom to act, whenever the action is in accord with one's religious convictions is not totally free from legislative restrictions. *Cantwell v. Connecticut, supra,* (310 U. S. pp. 303, 304, 306). As pointed out in *Reynolds v. United States, supra,* (98 U. S. to p. 164), legislative power over mere opinion is forbidden, but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion * * *."

And, unlike the program of religious education struck down in *McCollum v. Board of Education,* 333 U. S. 203 (1948), the South Carolina unemployment compensation law, as here construed and applied, does not involve proselytizing, persuasion, or religious indoctrination. It involves no state compelled avowal or disavowal of faith, acceptance of doctrine, or statement or belief. The "available for work" standard as a criterion for measuring eligibility for unemployment compensation benefits or privileges (the employee contributes nothing to the fund from which benefits are paid), unlike the religious oath of office in *Torcaso v. Watkins,* 367 U. S. 488 (1961), or the solemn avowal of prayer

in *Engel v. Vitale,* 370 U. S. 421 (1962), has no religious connotations; and appellant cannot reasonably say that its application prohibited her freedom of religious belief in violation of First Amendment.

The freedom of religion guaranteed by the First Amendment does not include freedom from all legislation with respect to acts and conduct, and the state, to provide stable employment conditions, must be left free to administer the standards under which its act conditions unemployment compensation benefits, even though the application of the standard in some instances may be contrary to the religious scruples of some. The legislature is the proper branch of government to ameliorate any harsh administrative and judicial application of the primary eligibility standards of this public welfare legislation. *Cf. Finklstein, Judicial Self-Limitation,* 37 Harv. L. Rev. 338, 345 (1924).

II

THE "AVAILABLE FOR WORK" ELIGIBILITY STANDARD FOR UNEMPLOYMENT BENEFITS WAS REASONABLY CONSTRUED AND APPLIED, AND ANY BURDEN ON APPELLANT IS ECONOMIC IN CHARACTER AND VALID AND NECESSARY REGULATION WITHIN THE PURPOSE AND EFFECT OF ADVANCING THE STATE'S SECULAR GOALS OF OBTAINING STABLE EMPLOYMENT.

Appellant contends that the construction below of the available for work standard for unemployment compensation benefits prohibits appellant's free exercise of religion without any compelling reason.

Subjection of appellant to the general requirement of unrestricted availability for work, as a measure conducive to the basic purposes of the South Carolina unemployment compensation act, is far from being the first instance of

exacting obedience to general laws that offend religious scruples. See *Jacobson v. Massachusetts,* 197 U. S. 11 (compulsory vaccination); *Hamilton v. University of California,* 293 U. S. 245, 267 (obligation to bear arms); *Stansbury v. Marks,* 2 Dall (PA) 213, 1 L. Ed. 353 (testimonial duties)—these are illustrations of conduct that has been compelled in the enforcement of legislation of general applicability even though the religious conscience of the individual rebelled at the exaction.

In *Hamilton v. University of California, supra,* this Court held that one attending a state-maintained university cannot refuse attendance of courses that offend his religious scruples. Attendance at the institution for higher learning was voluntary, and therefore the Court reasoned that a student could not refuse compliance with its conditions and yet take advantage of its opportunities.

(a) **"Available for work" standard was reasonably applied and did not circumvent religious freedoms.**

It is necessary to inquire what construction has been placed on the pertinent statutes by the highest court of the state, for "that construction must be accepted by the courts of the United States, and be regarded by them as a part of the provision when they are called upon to determine whether it violates any right secured by the Federal Constitution." *Lindsley v. Natural Carbonic Gas Co.,* 220 U. S. 61, 73. Appellant has the burden of proving the unreasonableness of a classification, and a statute will not be held unconstitutional on that ground unless there is no reasonable basis for the classification. *Morey v. Doud,* 354 U. S. 457, 463.

The unemployment compensation law of South Carolina was enacted under the general police power for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault

of their own. Its fundamental purpose was to protect against economic insecurity due to involuntary unemployment because of the inability of industry to provide stable employment. See Section 68-36, Code of Laws of South Carolina, 1952; *Mills v. S. C. Unemployment Compensation Commission, et al.,* 204 S. C. 37, 28 S. E. (2d) 536.

In order to qualify for unemployment benefits, a claimant must be "available for work," and this phrase includes availability on days required in the claimant's trade or occupation. The appellant, like everyone else, is free to choose and engage in a religion, and in a trade or occupation. These are voluntary choices. The court below concluded that there was "nothing in the Act itself or in circumstances surrounding its passage to indicate an intention on the part of the legislature to provide benefits for the worker compelled to give up his job solely because of a change in his personal circumstances." (R. 42, 43.)

(b) **Any deterrent effect of benefits ineligibility minimized and outweighed by dominant public interest.**

It is submitted that, on the record, any possible deterrent effect of this legislation on the appellant is economic in nature and is outweighed by the dominant public interest in conditioning unemployment compensation benefits to periods of involuntary unemployment, which can only be achieved by systematic and consistent application of benefits eligibility standards by the individual states. Cf. *Braunfeld v. Brown,* 366 U. S. 599, at 462 ("balancing of interests," concurring opinion, Mr. Justice Frankfurter). In the domain of the indispensable liberties guaranteed under the Bill of Rights, this Court has frequently upheld the constitutionality of legislation notwithstanding the possible deterrent effect of the legislation in question upon the freedoms involved. See *American Communications Assn. v. Douds,* 339 U. S. 382, 398-399, and cases cited therein.

The phrase "available for work" has also been construed to require "the claimant to actively and unrestrictively endeavor to locate suitable employment in the market where he resides," *Virginia Employment Commission v. Coleman,* .... Va. ...., 129 S. E. (2d) 6, 9 (1963). In her claim for benefits appellant conceded that she would only accept suitable work offered on the first shift (R. 10). Although the other adherents of the Seventh Day Adventist sect were gainfully employed in "suitable" employment, there is nothing in the record reflecting an active and unrestrictive endeavor by appellant to locate suitable employment in the Spartanburg area. Appellant, moreover, knew or should have known, that any upswing in the textile business cycle would result in mandatory Saturday employment. Yet she remained at Spartan Mills after joining the Seventh Day Adventist Church, and she even elected to remain there approximately six weeks after notice of mandatory Saturday work.

The policy and underlying purposes of the unemployment compensation law are easily frustrated by an interpretation that one who will work Monday to sundown on Friday has not restricted her utility and desirability in the labor market (where all textile plants operate on a six-day basis). Whether a claimant is "available for work" during a specific period is a question of fact, to be determined in the first instance by the Commission. See *In Re Dunn's claims,* 1 A. D. (2d) 722, 146 N. Y. S. (2d) 872. The burden is upon the claimant to show that she has met the benefit eligibility conditions, and she cannot show unrestricted availability for work in this case. The achievement of a five-day work week should not result from judicial mandate, but be left to the Legislatures of the individual states.

The adherence by claimant to the religious tenets of the Seventh Day Adventist Church is certainly not censur-

able but, to the contrary, is laudable. Cf. *Zorach v. Clauson,* 343 U. S. 306. But claimant's election to join the Seventh Day Adventist Church was a matter personal to her and arose in no respect out of her employment. The unemployment compensation law was designed to mitigate the effects of involuntary unemployment caused by the failure of the economy to provide stable employment. It was not intended to insure compensation benefits to persons who for personal reasons (religious or otherwise) limit their employability, since there can obviously be no absolute right or privilege to these benefits.

There is at most only a tenuous showing by appellant of coercion or infringement on her religious observance by invoking the "available for work" criterion to deny unemployment compensation benefits in this case. Cf. *Braunfeld v. Brown,* 66 U. S. 599, 602-610. The statute does not deny its monetary benefits to Seventh Day Adventists any more, for example, than it does to mothers of young children who, for personal reasons unrelated to employment, choose to restrict their utility and availability in the labor market for which they are fitted. Cf. *Judson Mills v. South Carolina Unemployment Compensation Commission,* 204 S. C. 37, 28 S. E. (2d) 535; *Hartsville Cotton Mills v. South Carolina Employment Security Commission,* 224 S. C. 407, 79 S. E. (2d) 381. The premise that one may refuse employment because of some personal belief or because of membership in a certain organization, and at the same time enjoy unemployment compensation at the indirect but real expense of another who must accept the same character of employment or suffer a loss of compensation, is untenable. Cf. *Reynolds v. United States,* 98 U. S. 145, 166.

"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in

the excesses of unrestrained abuses." *Cox v. New Hampshire,* 312 U. S. 569, 574. The regulation of local unemployment conditions and effects is certainly public welfare legislation enacted under the police power of the state in recognition of social need, and the application of the "available for work" standard in this case only operates so as to avoid a state subsidy to Saturday observers who are unwilling to work the usual hours required by their industry.

People v. Friedman, 302 N. Y. 75, 96 N. E. (2d) 184, 186, appeal dismissed, 341 U. S. 907, upheld against constitutional attack a penal statute which forbade the sale of uncooked meat on Sunday. The court, although considering a Sunday law, used reasoning which is apposite here:

> "Nor may we say that Section 21-47 of the Penal Law is unconstitutional because of infringement upon religious freedom. It is not a 'law respecting an establishment of religion, or prohibiting the free exercise thereof.' U. S. Constitution, 1st Amendment. It does not set up a church, make attendance upon religious worship compulsory, impose restrictions upon expression of religious belief, work a restriction upon the exercise of religion according to the dictates of one's conscience, provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion * * *."

The appellant relies on several cases as supporting her contention that the statute unnecessarily infringes upon her religious freedom under the First Amendment (Appellant's Br., p. 22). The decisions upon which appellants rely are not applicable. In *Cantwell v. Connecticut,* 310 U. S. 296, the statute dealt with the solicitation of funds for religious causes and authorized an official to determine whether the cause was a religious one and to refuse a solicitation permit if he determined it was not, thus establishing a censorship of religion. In *Lovell v. Griffin,* 303 U. S. 444, the ordinance prohibited the distribution of literature of

any kind at any time, at any place, and in any manner, without a permit from the city manager, thus striking at the very foundation of the freedom of the press by subjecting it to license and censorship. In *Schneider v. State,* 308 U. S. 147 (p. 163), the ordinance was directed at canvassing and banned unlicensed communication of any views, or the advocacy of any cause, from door to door, subject only to the power of a police officer to determine as a censor what literature might be distributed and who might distribute it.

Appellant also claims that "unrestricted availability," on this record, fails to further or aid the accomplishment of the purpose of the statute. ("It fails because it would exclude from eligibility as persons attached to the labor market at least 150 individuals who admittedly are presently performing services in the Spartanburg market although not available for work on Saturday." [Appellant's Br., p. 27].) But there is nothing in this record to indicate the nature or period of work for these 150 other employees, and appellant is hardly justified in observing that if they became claimants they would automatically fail to satisfy the availability for work standard for unemployment benefits.

It is obvious that the intendment of the statute is not to provide unemployment compensation where work is available, employment provided and employment terminated for personal reasons of the employee. The case at Bar presents a situation where stable employment was available, but the employee, of her own personal choice, was unavailable for work for reasons of her own.

(c) **"Risks to Morals" and disqualification for benefits for refusal to accept available suitable work.**

Appellant also suggests that she should not be disqualified because of the provision of subdivision (3) (a) of Section 68-114 of the South Carolina Code, 1952, because to

require her to work, the work must be "suitable" and the Commission must take into account "risks involving her morals." There is certainly no element of unsuitability of work in Spartan Mills which was available to appellant, for she had been engaged in textile work for thirty-five years. There is obviously no risk to her morals involved in that type of work, for she had been engaged in that work for many years, and she does not point to anything involving "moral risks" in the character of the work. When the legislature made the provision about "risks to morals," it had in mind work, the character of which would be morally objectionable to any employee, whether a Seventh Day Adventist, a Protestant, a Catholic, a Jew or unbeliever in any religion. The type of work that would involve "risks to morals" would be employment, the nature of which creates moral risks, as working in a place of business of dubious character and frequented by persons of questionable character. There is no such element involved in this case and the fact that claimant had worked in this textile employment for thirty-five years refutes conclusively any contention that the work was not "suitable" or that it involved "risks" to her morals. The "morals" argument is obviously based upon the Appellant's contention that to work at all, regardless of the character of the work, conflicted with her personal religious views—a choice made by her for personal reasons.

While no one questions the sincerity of the appellant, her reasons for refusing to work are purely personal. Elements of "morality" are also involved in the responsibility of caring for an employee's children, and of the moral responsibility of an employee going and living with her husband. Many other "moral" objections might be equally valid and sincere, but there is a distinction between a laudable

motive for leaving employment and a good cause within the meaning of the Act.

An Unemployment Compensation Act should receive a "sensible construction". While no one questions appellant's sincerity of religious belief, yet not to disqualify her for refusal to work under the circumstances, admits of opening the door to so much fraud on employers that one may doubt that such a construction of the unemployment compensation act conforms to the canon that all laws should receive a sensible construction.

The argument advanced in the present case would admit of employees, acting insincerely, to claim the right not to work on Saturday, because of asserted religious beliefs, and if discharged for refusal to work on Saturday, then to claim the right, as appellant does here, to collection of unemployment compensation. The disruptive effect upon an employer's operation and business would be untold. If substantial numbers should assert religious beliefs in this respect as a valid ground for not working on Saturday, it is plain what the effect would be on the continuity of the employer's operations, and the stability of the unemployment compensation fund.

It is submitted that the construction and application of the benefits eligibility standards here were consistent with the constitutional guarantee of religious freedom, and that there is reasonable justification for the state's action in this factual situation and as required by the secular goals of the state in obtaining stable employment conditions.

III

THE STATUTE, AS CONSTRUED, DOES NOT DEPRIVE APPELLANT OF THE DUE PROCESS AND EQUAL PROTECTION OF LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT.

(a) **Due process tenuously raised below.**

The challenge under the due process clause of the Fourteenth Amendment was at most tenuously raised by appellant in the state administrative and judicial proceedings leading to this appeal (see R. 33). The South Carolina Supreme Court did not pass specifically on the due process issue, probably because that issue was not properly raised under the rules of procedure governing appeals to that Court. Rules of the Supreme Court of South Carolina, Rule 4, §6, contained in Vol. 7, p. 429, S. C. Code (1952).[3] It is not within the province of appeal courts to search through the record for constitutional contentions which should have been appropriately listed within the assignments of error. *Beck v. Washington,* .... U. S. ...., 8 L. Ed. (2d) 98, 111; *State v. Alexander,* 230 S. C. 195, 94 S. E. (2d) 160; *Brady v. Brady,* 222 S. C. 242, 72 S. E. (2d) 193, 194. It is significant that the appellant filed no application for rehearing with the state supreme court, calling attention to any points with respect to due process supposed to have been overlooked or misapprehended by the Supreme Court. (Petitions for rehearing are authorized by the Rules of the South Carolina Supreme Court, Rule 17, §2.)[4]

[3] "§6. Each exception must contain a concise statement of one proposition of law or fact which this Court is asked to review, and the same assignment of error should not be repeated. Each exception must contain within itself a complete assignment of error, and a mere reference therein to any other exception then or previously taken, or request to charge will not be considered. The exception should *not* be long or argumentative in form."

[4] "§2. Petitions for rehearing must be filed before the judgment of this Court has been remitted to the Court below. The petition for that

(b) **Fourteenth Amendment permits states a wide scope of discretion.**

It is nonetheless submitted that appellant's disagreement as to the construction and application of the "available for work" standard cannot rise to the level of a constitutional argument by couching that disagreement in the language of due process. Cf. *Psychological Association for Psychoanalysis, Inc., v. University of State of New York,* 8 N. Y. (2d) 197, 168 N. E. (2d) 649, Appeal dismissed, 365 U. S. 28. The history, social needs, purposes and scope of the unemployment compensation law, as construed and applied in this case and in other cases cited herein and in the majority opinion, indicate no punitive design against the appellant or her religious sect. No affirmative disability or restraint was imposed on the appellant's exercise of religion by determining that she was not "available for work" and, hence, ineligible for benefits for five weeks.

In the case of *Fleming v. Nestor,* 363 U. S. 603, this Court construed a section of the Social Security Act which disqualified certain alien deportees from the receipt of Social Security benefits while they were lawfully in this country. The Court, in considering the application of the Due Process Clause of the Fifth Amendment, recognized that the disqualification was not so lacking in rational justification as to offend due process, and concluded that "a person covered by the (Social Security) Act has not such

purpose, together with five copies thereof, must be filed with the Clerk, stating particularly the points supposed to have been overlooked or misapprehended by the Court, *without argument,* with a certificate from some counsel not concerned in the case that there is merit in such grounds, accompanied with a consent in writing signed by the parties and not by counsel, that the stay of remittitur shall be granted upon condition that the status of the property involved in the case, where specific property is involved, shall not be disturbed until after the final determination of the case. Upon the filing of the required petition and copies, the Clerk will stay the remittitur, forward the original petition to the Justice who rendered the opinion, and a copy to each of the other Justices and file a copy with the record. The Justice to whom the original is forwarded will take the necessary steps in having the petition passed upon."

a right in benefit payments (as) would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment." (363 U. S. at 611.) In this case, unemployment compensation benefits do not constitute property interests, and their denial is only an indirect financial burden on appellant's religious observance which the state can impose consistent with the social welfare nature of unemployment legislation. Cf. *McGowan v. Maryland,* 366 U. S. 420, 429.

The "available for work" criterion, as applied here, was neither irrational nor arbitrary when considered in light of the declared public policy to combat the effects of periodic unemployment. *McGowan v. Maryland,* 366 U. S. 420, 426, 427. And this Court has repeatedly recognized that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The restricted scope of this Court's review of state regulatory legislation under the Equal Protection Clause is of long standing. *McGowan v. Maryland,* 366 U. S. 420, 534, 535 (concurring opinion of Mr. Justice Frankfurter, citing *Lindsley v. Natural Carbonic Gas. Co.,* 220 U. S. 61, 78, 79). At 366 U. S. 420, 535, Mr. Justice Frankfurter states:

> "The applicable principles are that a state statute may not be struck down as offensive of equal protection in its schemes of classification unless it is obviously arbitrary, and that, except in the case of a statute whose discriminations are so patently without reason that no conceivable situation of fact could be found to justify them, the claimant who challenges the statute bears the burden of affirmative demonstration that in the actual state of facts which surround its operation, its classifications lack rationality."

These standards for evaluating appellant's claims under the Due Process and Equal Protection clauses are set

forth elsewhere in the majority opinion in *McGowan v. Maryland*, 366 U. S. 420, 425, 426, as follows:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (Citing cases.)

The traditional test under the Equal Protection clause has been whether a state has made "an invidious discrimination," as it does when it selects a "particular race or nationality for oppressive treatment." *Baker v. Carr,* .... U. S. ...., 7 L. Ed. (2d) 663, 701-702, concurring opinion Mr. Justice Douglas; *Skinner v. Oklahoma,* 316 U. S. 533, 541. Universal equality is not the test; there is room for weighting. Cf. *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U. S. 483, 489. The prohibition of the equal protection clause goes no further than "invidious discrimination." *Ibid.* That the statute in its application may result in "incidental individual inequality" does not make it offensive to the Fourteenth Amendment. See *Phelps v. Board of Education,* 300 U. S. 319, 324 (equal protection not denied where administrative resolution grouping salary reductions by classes resulted in some instances of inequality in application); see, also, *Martin v. Walton,* .... U. S. ...., L. Ed. (2d) 5, 6.

Thus, the Legislature may make reasonable classifications for the purpose of legislation. *Gallagher v. Crown Kosher Super Market,* 366 U. S. 617, 624; *Lindsley v. Nat-*

ural Carbonic Gas Co., 220 U. S. 61, 78. With regard to equal protection, the Court said in *Lindsley:*

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercises of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

(c) **There is no invidious discrimination under present construction of statutory unemployment compensation standards.**

The appellant contends that the unemployment compensation law, as construed, discriminates between believers of different religious faiths and deprives her of unemployment benefits solely on the basis of a classification without basis in reason or effectuation of the purposes of the law. Appellant predicates the equal protection argument on an *ex parte* contention that the South Carolina Sunday laws permit of discrimination in favor of Sunday observers if unemployment compensation benefits are denied appellant because she refuses Saturday labor.

There is presented in the record not a trace of evidence that suggests that the "available for work" standard of the

unemployment compensation laws, as devised by the legislature and construed by the court below, discriminates invidiously against appellant and other Saturday observers. Any coincidental interplay of the Sunday laws with unemployment compensation is not automatically arbitrary or invidiously discriminatory. A statute is not to be struck down on supposition. That the uniform day of rest selected by the legislature does not coincide with the Sabbath of the appellant is no reason to invalidate this application of the state unemployment compensation laws under the Due Process or Equal Protection clauses of the Fourteenth Amendment.

The record does not warrant any inference that the construction and application of the "available for work" standard resulted in invidious discrimination among religions, or that local unemployment conditions and effects do not rationally justify the construction adopted by the court below. Cf. *Salsburg v. Maryland,* 46 U. S. 545, 552, 553. It may be conceded that religion cannot supply a basis for classification of governmental action. But the classification here relates only to the underlying causes and effects of unemployment by requiring claimants for unemployment compensation to comply with certain reasonable eligibility standards.

This is not classification in terms of religion. To permit individuals to be excused from compliance with unemployment compensation laws solely on the basis of religious preferences is to subject others (employees and employer) to penalties for failure to subscribe to those same beliefs. Cf. *Reynolds v. United States,* 98 U. S. 145, 166.

There is no merit in the contention that appellant has been denied equal protection on the ground that the statute, as construed, results in discrimination between believers of different religious faiths. In *Beck v. Washington,*

.... U. S. ...., 8 L. Ed. (2d) 98, 111, the Court recognized:

> "* * * The petitioner's argument here comes down to a contention that Washington law was misapplied. Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions * * * (or) immunity from judicial error * * *' *Milwaukee Electric R. & Light Co. v. Wisconsin,* 252 U. S. 100, 106, 64 L. Ed. 476, 480, 40 S. Ct. 306, 10 A. L. R. 892 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question."

What appellant really seeks is a five-day week. Members of the Seventh Day Adventist Church cannot, because of their religious beliefs, work on Saturday, and they can't work under the law on Sunday. Other employees can work on Saturday, but are legally proscribed from working on Sunday. All of the employees are essential to the continued operation of a mill, so if some of them can't work on Saturday, and all are prohibited from working on Sunday, the necessary normal operation of the mill cannot proceed.

Laws relating to the observance of Sunday have no relation to or predication upon religion or the enforcement of religious beliefs. It was within the Legislature's discretion to fix the day when all labor, within the limits of the state, works of necessity and charity accepted, should cease. That the uniform day of rest selected by the legislative bodies coincides with the Christian Sabbath is no reason to invalidate the construction here placed on the unemployment compensation laws.

The Legislature of South Carolina has designated Sunday, not because it is the religious day according to opinion of the majority, but because it is the day when the Legislature has provided that all secular work and activities shall cease. It has no relation to religion or the free exercise of religion. There are many, no doubt, who have no

religious objections to working, playing or engaging in any other activity on Sunday, but they are prohibited by these statutes; and others who recognize another Sabbath because of their religious beliefs are nonetheless bound by the legislative determination that Sunday is the day of rest. The Legislature has fixed Sunday as the day when all activities shall cease. That, therefore, is the legal day when secular activities must cease. The appellant in this case seeks legal rights under the Unemployment Act and thereby she asserts the right to have Saturday held to be a legal day of rest. Neither she nor any one else, according to their religious beliefs can bring about rights because of those beliefs. Religious beliefs have no relation to Sunday as the day of rest and any other day selected by any particular faith can have no legal effect based on religious grounds.

Not only does the fixing of Sunday by the legislature have no religious connotation, and not only does the fixing of that day, majority view though it may be, not amount to any discrimination or denial of equal protection of the laws, but, on the contrary, what appellant asks is discrimination in her favor, and that of other members of her church, against all others not subscribing to that tenet of faith. She asks that she be allowed a "day of rest" to which others are not entitled, and that she have two days of rest, while others have only one. Cf. *McGowan v. Maryland,* 366 U. S. 420; *Braunfeld v. Brown,* 366 U. S. 599; *Two Guys from Harrison-Allentown, Inc. v. McGinley,* 366 U. S. 582; *Gallagher v. Crown Kosher Super Market,* 366 U. S. 617.

We, therefore, submit that the administrative and judicial tribunals below were entirely correct in disqualifying appellant for unemployment compensation benefits for her unavailability for work, and that her asserted religious beliefs are not of such a character as come within the moral risks to which the unemployment statute refers.

The statute, as construed and applied to the facts and circumstances of this case, does not deprive the appellant of due process or of equal protection of laws in violation of the Fourteenth Amendment.

CONCLUSION

It is respectfully submitted that:

1. The South Carolina Unemployment Compensation Law as here construed and applied does not prohibit or interfere with appellant's free exercise of religion.

2. Although appellant relies solely on the free exercise clause, we submit that since the unemployment compensation laws do not involve religious instruction or proselytizing nor require or suggest the performance of a religious act, they do not constitute an establishment of religion within the contemplation of the First Amendment to the Constitution.

3. There is no basis on the record to warrant finding that the South Carolina Supreme Court misconstrued or misapplied the unemployment compensation eligibility standards; the standards, as construed and applied, did not deprive appellant of due process or equal protection in violation of the Fourteenth Amendment.

The respondents therefore respectfully submit that the judgment of the court below should be affirmed.

Dated: April 2, 1963.

Respectfully submitted,

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