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CITATIONS

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STATUTES

IN THE

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

MOTION TO DISMISS

Respondents, pursuant to Rule 16 of the Revised Rules of this Court, move to dismiss the appeal in the above-entitled case on the grounds (a) that the appeal does not present substantial federal questions and (b) that in part the federal questions sought to be raised were not timely or properly raised or expressly passed on by the court below.

OPINIONS BELOW

The "decree" [1] (opinion) of the Court of Common Pleas of Spartanburg County, South Carolina, is not officially reported. The majority opinion of the Supreme Court of South Carolina and the single dissenting opinion are reported in 125 S. E. (2d) 737.[2] They are officially reported in 240 S. C. 286.

[1] The "decree" is reproduced verbatim in the Appendix of the Jurisdictional Statement, pages 1a-7a.

[2] The majority and dissenting opinions of the Supreme Court of South Carolina are reproduced verbatim in the Appendix of the Jurisdictional Statement, pages 8a-39a, inclusive.

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. The jurisdiction of this court on appeal is predicated on 28 U. S. C. Sec. 1257(2).

QUESTIONS PRESENTED

Briefly stated, the questions presented by appellant are whether:

(1) The South Carolina Unemployment Compensation Law, as construed and applied by the South Carolina Supreme Court, violates the First Amendment protection of the Federal Constitution against impairment of the free exercise of religion.

(2) The statute, as applied to the appellant, is so arbitrary and discriminatory as to violate (a) the due process clause of the Fourteenth Amendment or (b) the equal protection clause of the Fourteenth Amendment.

(The first question was raised by appellant in the proceedings leading to this appeal, as was the question whether the application of the statute violated the equal protection clause of the Fourteenth Amendment. However, the record reveals that the question with respect to the due process clause was not specifically or inferentially raised in or passed on by the court below.)

STATUTES INVOLVED

The South Carolina Unemployment Compensation Law provides (S. C. Code (1952)):

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 . . . .[3]

STATEMENT OF CASE

This action was initiated by appellant's petition in the Court of Common Pleas for Spartanburg County, South Carolina (Tr. 20-23) under Section 68-165, S. C. Code (1952) to review and reverse the decision of the State Employment Security Commission that plaintiff was:

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

(2) disqualified for five weeks benefits because she had been "discharged for misconduct"—unexcused absences on Saturday (Tr. 18-20).

The Court of Common Pleas affirmed the decision of the Commission (Tr. 29-36). The Supreme Court of South Carolina affirmed (Tr. 41-48). Bussey, J., filed a dissenting opinion (Tr. 49-54). No applications for rehearing were filed in the Supreme Court of South Carolina.

The facts of record are not substantially disputed.—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 (Tr. 4, 8) and had been so employed without interruption since August 8, 1938 (Tr. 6, 21). From the end of World War II and until June 6, 1959, Saturday work in this plant had been on a voluntary basis (Tr. 5). Appellant worked only

[3] 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 has not yet been carried into the Code Supplement. Cf. S. C. Code (1952) Sec. 68-114 (Supp. 1960).

five days a week, Monday through Friday, on the first shift —7 a.m. to 3 p.m. (Tr. 8-9).

On August 5, 1957, appellant became a member of the Seventh Day Adventist church (Tr. 13, 6).[4] 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 (Tr. 11) and labor or common work during that period is forbidden (Tr. 14). Appellant, as a member of the denomination, shares that belief and in the practice of her religious belief (Tr. 11-12) did not work during the Sabbath after she joined the church on August 5, 1957 (Tr. 13).

For twenty-two months after so joining the Seventh Day Adventist Church, without working on Saturday, she continued her uninterrupted employment with Spartan Mills until June 5, 1959 (Tr. 5-6). Her employer changed to a six-day week on that day, posting a notice that all employees would be required to work on Saturdays thereafter (Tr. 5-6, 9). (Saturday work was on a voluntary basis until June 5, 1959.) Appellant explained to her employer that she could not work on Saturday because it was her Sabbath, revealed by God (Tr. 12), and thereafter, refusing and failing to work on Saturdays, she missed work on six successive Saturdays (Tr. 6, 10). She was discharged on July 27, 1959 (Tr. 9) because of her refusal to work on Saturday (Tr. 6-12). Thereafter she applied to three other mills for employment but they were on a six-day week basis, as were most textile mills in the area (Tr. 10) and she remained unwilling to take any work that would require her to work on Saturday (Tr. 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 (Tr. 12).

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[4] At the hearing held October 2, 1959 (Tr. 6) she testified that she became a member of the Seventh Day Adventist Church "two years ago the 6th day of this past August" (Tr. 13).

The unquestioned evidence showed that, other than appellant and one other,[5] all of the 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 (Tr. 13-14).

Appellant on July 29, 1959, filed her claim with the South Carolina Employment Security Commission for unemployment compensation benefits under the law. Sec. 68.1, *et seq.*, S. C. Code (1952) (Tr. 3-4). The claims examiner found the appellant ineligible under Sec. 68-113(3) because 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 (Tr. 4-5). He also held her partially "disqualified" under Sec. 68-114(2) for a period of five weeks because discharged for misconduct—her unexcused absences for six successive Saturdays (Tr. 4-5).

The affirming decision of the Referee or Appeal Tribunal (Tr. 16-18) was affirmed by the appellee Commission (Tr. 18-20).

On the petition of the appellant, the answers of the state commission and of the employer, Spartan Mills, both appellees here, and on the basis of the record made in the administrative proceedings, the Court of Common Pleas of Spartanburg County, affirmed.

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 included in the Fourteenth Amendment and violated the First Amendment as absorbed into the Fourteenth in

[5] 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.

denying appellant the "protection and the benefits accorded by the Laws of South Carolina to those who observe Sunday as their Sabbath" (Tr. 37-38).

The Supreme Court of South Carolina, in its opinion, concluded:

(1) Appellant was ineligible because not "available for work" under Sec. 68-113(3), S. C. Code (1952) in that she was "unwilling to accept work in her usual occupation for the usual and customary days and hours under which the textile industry works."

(2) Appellant was properly disqualified for five weeks' benefits, not on the ground assigned by the court below—misconduct under Sec. 69-114(2)—but because under Sec. 68-114(3) she had "failed, without good cause . . . to accept available, suitable work when offered . . . by the employer."

As to eligibility and disqualification, the opinion of the Court amply supports the conclusions that the appellant was ineligible for benefits because not available for work, and that the five-week disqualification from benefits was proper for the reason that appellant had failed, without good cause, to accept available suitable work. The opinion is set out verbatim in the Appendix of the Jurisdictional Statement, and the respondents respectfully invite the Court's attention to the well-reasoned majority opinion supporting the construction and application of the statutes challenged here.

As to constitutional validity of the law as construed, the assignments of error to the South Carolina Supreme Court raised only two constitutional questions, *viz.*, whether the statute as construed and applied violated appellant's right to religious freedom under the First Amendment of the Federal Constitution, and whether the statute, as construed and applied, violated the equal protection clause of the Fourteenth Amendment. The State Court properly con-

sidered only these two constitutional issues, and dismissed the contentions of the appellant with the statement:

> "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."

Accordingly, the decree of the lower court was affirmed.

THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTIONS

1. 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.

We do not question 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. The First Amendment safeguards free exercise of the chosen form of religion. But the Amendment embraces two concepts, freedom to believe, and the freedom to act; and while the first is absolute, the second is not. *Warren v. United States,* 177 F. (2d) 596, cert. den. 339 U. S. 947. The court below recognized and gave effect to this distinction in upholding the unemployment compensation statute and its application against the First Amendment challenge of the appellant:

> "However, our Unemployment Compensation Act, as 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."

The State's highest Court concluded, in the light of the facts and circumstances of this case, 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 contemplation of 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 from benefits of five weeks.

The appellant characterizes this construction and application of the statute as a "substantial penalty on the exercise by appellant of her religious freedom". She also implies that the imposition of the financial burden of the "penalty" is equally as obnoxious as the exaction of a tax as a condition to the exercise of a First Amendment liberty.

These benefits are, at most, non-contractual government benefits. Cf. *Flemming v. Nestor,* 363 U. S. 603, 608-611 (Social Security benefits not akin to accrued property right); cf. also *National Labor Relations Board v. Gullett Gin Co.,* 340 U. S. 361. The factual context in which the Unemployment Compensation statute was here applied had no direct or indirect burden on the freedom of religion guaranteed under the First Amendment. The statute leaves the appellant completely free to choose her religion and to practice it without let or hindrance. It contains no provision that may be construed as impinging upon the freedom of religion. It neither purports to compel nor deny the observance of any religious duty. It is impossible to make even a convincing argument that construing the availability for work standard to deny the eligibility of the appellant for compensation benefits came from any desire of

the religious freedom of the appellant. cf. *Mitchell v. Pilgrim Holiness Church Corp.,* 210 F. (2d) 879, cert. den., 347 U. S. 1013.

People v. Friedman, 302 N. Y. 75, 96 N. E. (2d) 184, 186, appeal dismissed 341 U. S. 907, 95 L. Ed. 1345, upheld against constitutional attack a penal statute which forbade the sale of uncooked meat on Sunday. The court, although considering a so-called Sunday law, used reasoning which is apposite here:

> "Nor may we say that Section 2147 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. Const. 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 statute challenged here requires that in order to be entitled to benefits a claimant must be available for work in his usual trade or occupation. Hence, as construed by the Court, he must be available for work on Saturday if this is required in his usual trade or occupation. The appellant, like everyone else, was free to choose both her religion and her trade or occupation. If, in making these voluntary choices, she rendered herself unavailable for work in her personal trade or occupation, she, like everyone else who failed to comply with the statutory requirement, was not entitled to unemployment benefits.

The law was enacted under the police power 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. 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.

The burden was upon the claimant to show that she had met the benefit eligibility conditions. *Hyman v. Unemployment Security Commission et al.,* 234 S. C. 369, 108 S. E. (2d) 554. The appellant's disagreement with the administrative commission and with the State's highest court as to the proper construction and application of the legislative conditions contained in the Statutes cannot rise to the level of a constitutional argument by couching that disagreement in language of impairment of religious freedom, of denial of due process, or of deprivation of equal protection of laws.

The possible deterrent effect of the legislation in question upon the freedom involved is outweighed by the practical necessity of conditioning unemployment compensation to some standard. 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 Association v. Douds,* 339 U. S. 382, 398-399, and cases cited therein.

The freedom of religion guaranteed by the First Amendment does not include freedom from all legislation with respect to the appellant's acts and conduct, as distinguished from her beliefs. The State, to provide stable employment opportunities and economic security for its citizens, must be free to impose reasonable conditions upon

unemployment compensation even though the condition may be contrary to the religious scruples of some.

The application of the statutory standards challenged here do not sufficiently impinge upon the appellant's freedom of religion to require the application of a severe standard in upholding its constitutionality. Cf. *Full Salvation Army v. Portage Township,* 318 Mich. 693, 29 N. W. (2d) 297, appeal dismissed, 333 U. S. 851.

The purpose and efficiency of the public welfare legislation here challenged would be greatly impaired, if not completely defeated, if benefits were paid to persons who become unemployed, not because the employer could no longer provide them with work, but solely because of changes in their personal circumstances.

The court below held that the statute, as applied to the **facts and circumstances** of this case, did not interfere with the freedom of religion guaranteed to the appellant by the First Amendment. The decision below turns on its own facts and circumstances prevailing in the State. A review of the fact findings are of no importance save to the litigants themselves. *Rudolph v. United States,* .... U. S. ...., 8 L. Ed. 2d 484. This court could not possibly issue a decision controlling the broad question whether denial of benefits under State Unemployment Compensation laws to a Seventh Day Adventist constitutes a violation of the First Amendment freedom of religion guaranty. Local conditions vary, factual situations vary, unemployment compensation statutes vary. These conditions are further buttressed by the presumption that the legislation challenged here is constitutional.

It is submitted that the assignment of error predicated on the alleged invasion of the First Amendment right of religious freedom presents no substantial Federal question.

2. The appellant also contends that the statute is so arbitrary and discriminatory as to violate the due process clause of the Fourteenth Amendment. The record discloses that the due process question was not specifically raised by the appellant in the administrative proceedings and in the State court proceedings leading to this appeal. The South Carolina Supreme Court did not pass on the due process argument, because that argument was not timely of procedure governing appeals. Rules of the Supreme Court, Rule 4, Sections 6-8, Vol. 7, pp. 429-431, South Carolina Code of Laws, 1952. It is not the province of the highest appellate court of the State to search through the record to find specific constitutional contentions which should have been specifically listed within the assignments of error. *Brady v. Brady,* 222 S. C. 242, 72 S. E. (2d) 193, 194. It is noteworthy that the appellant filed no application for a re-hearing requesting the State Supreme Court to decide the due process question. Rules of the Supreme Court, Rule 17, Section 2.

The respondents respectfully submit that the question of whether the unemployment compensation statute, as construed by the Court, is so arbitrary and discriminatory as to violate the due process clause of the Fourteenth Amendment, is not properly before the Court in this appeal.

Nevertheless, it is further submitted that appellant's disagreement with the highest Court of the State as to the proper construction and application of the eligibility standards for compensation benefits 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. 298. The eligibility of the appellant for compensation benefits was conditioned on her availability

for work, and the State court's construction of that statutory condition, in light of the facts and circumstances of this case, should not be disturbed by this Court merely on the basis of the conclusions contained in the jurisdictional statement of the appellant that the application of the statute was so arbitrary and discriminatory as to violate the due process clause.

The history, scope, language, structure, and nature of the unemployment compensation law, as construed and applied in this case and in earlier cases cited in the majority opinion, do not indicate any punitive design against the appellant or her religious sect. No affirmative disability or restraint was imposed thereunder on the appellant; the statute does not inflict punishment or penalties without due process.

In the case of *Flemming v. Nestor,* 363 U. S. 603, this Court had occasion to construe 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 a due process argument, recognized that the statutory provision was not so lacking in rational justification as to offend due process. The legislation challenged here cannot be deemed irrational or arbitrary when considered in light of the policy and intent of the legislation to provide economic security for employees to combat periodic unemployment conditions. The legitimate police power and public policy involved here greatly overrides any minimal deterrent effect which the statute may exercise on the appellant. The majority opinion in *Flemming v. Nestor, supra,* at 363 U. S. 611, states:

> "We must conclude that a person covered by the Act has not such a right in benefit payments [as] would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment.

"This is not to say, however, that Congress may exercise its power to modify the statutory scheme free of all constitutional restraint. The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause. In judging the permissibility of Sec. 202(n) from this standpoint, it is not within our authority to determine whether the Congressional judgment expressed in that section is sound or equitable, or whether it comports well or ill within the purposes of the Act. 'Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom.' *Helvering v. Davis, supra* (301 U. S. at 644). *Particulary, when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.*

"Such is not the case here. . . ." (emphasis added.)

On its face and as applied to appellant, the South Carolina Unemployment Compensation statutes were not beyond the allowable range of State action against the Fourteenth Amendment. cf. *Martin v. Walton,* .... U. S. ...., 7 L. Ed. (2d) 5, 6. The appellant has utterly failed to show that the application of the Unemployment Compensation statute to the facts of this case manifested a patently arbitrary classification, utterly lacking in rational justification so as to present a Federal question predicated on the denial of due process.

It is, therefore, respectfully submitted, first, that the due process question is not properly before this Court, and, second, that the due process point is so frivolous as not to present a substantial Federal question.

3. The statute, as construed, does not deprive appellant of the equal protection of laws in violation of the Fourteenth Amendment. In cases arising under the Equal Protection clause 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 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, 99 L. Ed. 563, 573.

Both on its face and as applied to appellant, the South Carolina Unemployment Compensation law does not rise beyond the allowable range of state action under the Fourteenth Amendment. The fact 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, 81 L. Ed. 674, 677 (equal protection not denied where administrative resolution grouping salary reductions by classes resulted in some instances of inequality in application); also, *Martin v. Walton,* .... U. S. ...., 7 L. Ed. 2d 5, 6.

The appellant contends that the Unemployment Compensation law, as construed, discriminates between believers of different religious faiths and deprives appellant of equal rights to benefits solely on the basis of a classification without basis in reason or effectuation of the purposes of the law.

There is argument in the jurisdictional statement of appellant which predicates the denial of equal protection on an *ex parte* construction of the South Carolina Sunday laws. Sunday is set aside as the uniform day of rest [6] for the State, and appellant argues there is a resulting discrimination in the court's application of the unemployment compensation statute to render appellant ineligible for benefits because she refuses Saturday labor. That the day of rest selected by the Legislature does not coincide with the Sabbath of the appellant is no reason to invalidate the unemployment compensation statute as a denial of equal protection of the laws. It cannot be gainsaid that the Legislature may make reasonable classifications for the purpose of legislation. *Lindsley v. Natural Carbonic Gas Co.,* 220 U. S. 61, 31 S. Ct. 337, 340, 55 L. Ed. 369; also, *People v. Berman,* 19 Ill. (2d) 579, 169 N. E. (2d) 108, cert. den. 365 U. S. 804. With reference to equal protection, the Court said in the cited *Lindsley case*:

> "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 exercise 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

[6] Section 64-2, Code of Laws of South Carolina, 1952, was amended in 1962 by Act No. 850, page 2134, 1962 Acts and Joint Resolutions. The preamble recognizes that "it is in the interest of the moral, physical and mental health and the public welfare of the citizens of South Carolina that a uniform day of rest, insofar as practical, be observed . . .," that some existing statutory provisions for such day of rest were outmoded. So, here, it is the legislature's function to amend the unemployment compensation statutes to reflect changing conditions.

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."

Appellant cites three decisions of the Supreme Court: *Everson v. Board of Education,* 330 U. S. 1, 15, 18; *McCollum v. Board of Education,* 333 U. S. 203, 210; *Zorach v. Clauson,* 343 U. S. 306, 313, 314, in support of her statement that the "impartiality required of the State with respect to different religions under the First Amendment cannot be less rigid under the equal protection clause of the Fourteenth." These cases are not in point under the facts and circumstances of this case.

The first held that a State may use tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. The second cited case held that the First Amendment is violated by the religious instruction of public school children, during school hours, in tax-supported school buildings. Both cases applied the First Amendment to the Federal Constitution to State action perforce the Fourteenth Amendment. Neither was concerned with an unemployment compensation law or with a Sunday law, and they are, therefore, irrelevant here; nor is the reasoning of them applicable. In *Zorach v. Clauson,* the Court differentiated the facts of it from the *McCollum case* and upheld religious instruction of volunteer public school pupils during "released time" in other than school buildings by private instructors. Again, the decision is not in point here.

There is no merit in the contention that appellant has been denied equal protection on the ground that the statute, as construed, discriminates between believers of different

religious faiths. This conclusion of the appellant is not borne out by the facts and circumstances of this case. The record is devoid of any evidence that the court misapplied the legislative standards in determining appellant ineligible for benefits, or that the construction of the statute discriminated against the appellant or her religious sect, in violation of the equal protection clause of the Federal Constitution.

Particularly apposite to the respondent's position that no substantial Federal question is presented by this assignment of error is the Court's statement in the recent case of *Beck v. Washington,* .... U. S. ...., 8 L. Ed. (2d) 98, 111, as follows:

> ". . .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."

It is therefore respectfully submitted that the statute, as construed and applied to the facts and circumstances of this case, did not so deprive the Appellant of equal protection of law in violation of the Fourteenth Amendment as to present a substantial federal constitutional question.

4. The appellant urges that the question whether unwillingness for religious reasons to take employment involving work on the Saturday Sabbath is protected by the Federal Constitution against surrender as a condition to enjoyment of unemployyment compensation is one of broad and continuing general importance to a large number of

citizens. The appellant overlooks that facts and circumstances vary from case to case, unemployment compensation statutes differ from jurisdiction to jurisdiction, and local conditions, both religious and economic, are neither uniform nor static. The questions presented in this appeal affect only the litigants. This is also true of the decision of the South Carolina Supreme Court, whose opinion is expressly restricted to the facts and circumstances of this case. It is not controlling of all factual situations for time immemorial. The Legislature, as representative of the people, is the proper forum to effect changes in the unemployment compensation laws to reflect any change in conditions or attitude of the public, or any popular dissent with the application of the law by the administrative commission or by the courts of the State of South Carolina.

It is not sufficient to present a substantial Federal question that the question abstractly considered presents an intellectually interesting and solid problem since the Court does not sit to satisfy a scholarly interest in such issues, nor for the benefit of the particular litigants. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70.

CONCLUSION

For the foregoing reasons we do not see any important or substantial federal questions involved in this appeal. There is nothing in the record to warrant a finding that the South Carolina Supreme Court misconstrued or misapplied the State Unemployment Compensation Law, or construed and applied it in such a manner as to deprive the appellant of her First Amendment guarantee of freedom of religion, or that she was deprived of due process or equal protection of laws under the Fourteenth Amendment. In addition, the question with respect to the due process clause of the Fourteenth Amendment was not timely or specifically raised in the proceedings leading to this appeal, and it was not passed on by the State Supreme Court. It is therefore not properly raised in this appeal.

The South Carolina Supreme Court based its decision solely on the facts and circumstances of this case, and only the litigants are affected thereby. The controversy is local in nature, involving only the construction and application of South Carolina Unemployment Compensation legislation. The intrastate application of the State Unemployment Compensation laws should be left to the administrative commission and courts of the State of South Carolina. The record conclusively shows that the appellant was accorded every constitutional right in this case.

It is respectfully submitted that the appeal from the decision of the South Carolina Supreme Court should be dismissed, as it presents no substantial federal questions. It is also respectfully submitted that this case does not

justify the exercise of the discretionary *certiorari* jurisdiction of this court.

Respectfully submitted,

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