SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 526

ADELL H. SHERBERT, APPELLANT,

vs.

CHARLIE V. VERNER, ET AL., AS MEMBERS OF SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION AND SPARTAN MILLS.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

INDEX

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[fol. A]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Appeal from Spartanburg County.

Honorable J. Woodrow Lewis, Judge.

ADELL H. SHERBERT, Appellant,

against

CHARLIE V. VERNER, ED. H. TATUM, ROBERT S. GALLOWAY, SR., as members of South Carolina Employment Security Commission and SPARTAN MILLS, Respondents.

Transcript of Record

[fol. 1]

IN SUPREME COURT OF SOUTH CAROLINA

STATEMENT

This is an appeal from a Decree of the Court of Common Pleas for Spartanburg County affirming a decision of the South Carolina Employment Security Commission.

The legal and factual issues involved in the instant case are identical with those involved in the case of *Sally W. Lloyd* v. *Charlie V. Verner et al.* Both cases were argued at the same time before Judge J. Woodrow Lewis. Similar Decrees were issued in both cases. The parties in both cases are represented by the same counsel. The Petitioners in both cases have appealed to this Court on the same issues. In order to avoid duplication of appeals, it has been agreed by and between all the parties to the *Lloyd* case that the decision of this Court in the instant case shall control and be binding in the *Sally W. Lloyd* case.

Appellant had been employed by Spartan Mills, Beaumont Division, for approximately thirty-five years. Immediately prior to June 5, 1959, she was working as a spool tender, Monday through Friday, on the first shift and her

hours were from 7 a.m. until 3 p.m. On June 5, 1959, she was notified by her employer that, commencing June 6, 1959, she would be required to work on Saturday. This she refused to do, although the employer's plant was operating on that day. Prior to June 5, 1959, Saturday work in employer's mill was on a voluntary basis, and Appellant had not worked at any time between sundown on Friday and sundown on Saturday, after she became a member of the Seventh Day Adventist Church. After she had failed to report for work for six successive Saturdays, she was discharged on July 27, 1959, because of her refusal to work as instructed. The reason given by her for refusing to work on Saturday, as directed by the employer, was that for nearly two years prior to her discharge she had been [fol. 2] a member of the Seventh Day Adventist Church, and that it was the teaching of her Church that the Sabbath Day begins at sundown Friday and ends at sundown Saturday, during which time she should not perform work or labor of any kind. She had applied for work at three other textile plants in the Spartanburg area, but had been unable to find employment since these plants and practically all of the other textile plants in that area operate six days a week, including Saturday. Appellant, on account of her religious belief, as a member of the Seventh Day Adventist Church, would not accept employment requiring work between sundown on Friday and sundown on Saturday. The first shift of the employer's operations included work on Saturday and the second and third shifts likewise included work on Saturday. Appellant, therefore, refused to work for the employer because of her religious belief.

On July 29, 1959, Appellant filed an additional claim for unemployment compensation benefits, which claim was contested by the employer. A Claims Examiner of the Commission issued a determination holding that the claimant had been discharged for misconduct connected with her work, and that she was unavailable for work and, therefore, ineligible for benefits.

Thereupon, the Appellant appealed from this determination to the Appeal Tribunal of the Commission. After a hearing, at which the testimony of the Appellant and her witness was taken, the Appeal Tribunal filed a decision affirming the determination of the Claims Examiner.

Appellant appealed to the Commission from the decision of the Appeal Tribunal. After a hearing, at which the Appellant was represented, the Commission, on December [fol. 3] 18, 1959, issued its decision affirming in all respects the decision of the Appeal Tribunal.

On January 5, 1960, Appellant commenced an action in the Court of Common Pleas for Spartanburg County for the purpose of obtaining judicial review of the decision of the Commission. The Commission and the Employer duly filed their respective Answers, and the Commission, as required by law, certified and filed with the Court all documents, papers and a transcript of the testimony taken in the case.

The case was heard before The Honorable J. Woodrow Lewis, Presiding Judge of the Seventh Circuit, on March 29, 1960, at which time arguments of counsel were heard. Thereafter, by Decree dated June 27, 1960, Judge Lewis affirmed the decision of the Commission holding that a disqualification had been properly imposed upon Appellant and that, because of the restrictions which she had placed upon her availability for employment, she was unavailable for work within the contemplation of the South Carolina Unemployment Compensation Law.

Appellant gave timely Notice of Intention to Appeal to the Supreme Court. The points made by Appellant's exceptions to Judge Lewis' Decree are in substance those made by Appellant in the proceedings below.

Before South Carolina Employment Security Commission

Additional Claim Filed by Appellant and Determination of the Claims Examiner

Additional claim filed by Appellant and the determination of the Claims Examiner are as follows:

Additional Claim

1. Claimant's name Adell H. Sherbert; 2. SSN 242-10-3181-B-3; 3. Home Address 639 Southern St., Spartanburg,

[fol. 4] S. C.; 4. Local Office & L. O. or I. P. No. Spartanburg 42; 5. Date this claim filed 7-29-59; 6. Effective date 7-28-59; 7. I was separated 7-27-59 from my last employer for the following reason: Discharged; 8. Last employer Spartan Mill, Beaumont Mill, P. O. Drawer 690, Spartanburg, S. C.

Explanation: Mr. "Mitch" Allen, Spinning Room overseer said he would have to lay me off due to fact that I could not work on Saturday due to my religion—7th Day Adventist.

9. I received dismissal wages, No; 10. Location of last job Spartanburg; 11. I was working on the following shift when separated: First; 12. I hereby register for work and file a claim for benefits. I am unemployed. Able to work and available for work and will accept any suitable work offered on the following shift or shifts: First.

13. Claimant's Signature /s/ Adell H. Sherbert.

* * * * * * *

14. DETERMINATION:

Date: 9-4-59.

Claimant is not available for work and is therefore ineligible; Claimant disqualified (5) weeks for 7-28-59 to 9-1-59 for: Discharged for misconduct connected with most recent work.

Benefit year ends 12-21-59; Weekly benefit Amount $26.00; Explanation The claimant was discharged for unexcused absences from work. (B) The claimant is a Seventh Day Adventist and is not willing to work on Saturday. Since she is not available for full-time work because of her religious belief, she is not entitled to benefits. A Court's decision has ruled that a claimant must be available for work during the regular work week observed in the industry and area in which he has worked. 15. Examiner /s/ [fol. 5] Marion H. King; 16. Employers for whom claimant has worked since last filing a claim: (list most recent one on line A); A. Same as Item 8; Dates: From 1-58 to xxx; Amount paid $208.00; 17. Remarks by claimstaker; C.

states she has worked at Beaumont 35 years and has been a Seventh Day Adventist for past two years—not working on Saturday.

18. Claimstaker's Signature /s/ C. Huskey.

South Carolina Employment Security Commission, Box 995, Columbia, S. C.

BEFORE SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

REPORT OF EMPLOYER ON CAUSE OF APPELLANT'S SEPARATION—August 17, 1959

On August 17, 1959, the employer reported the cause of Appellant's separation by letter from Henry M. Davis, Personnel Manager, to South Carolina Employment Security Commission dated August 17, 1959.

Spartan Mills, Beaumont Division, Post Office Box 690, Spartanburg, S. C.

August 17, 1959

W. L. Montgomery, Pres. & Treas.

S. C. Employment Security Commission
P. O. Box 995
Columbia, S. C.

Re: Adell H. Sherbert
248-10-3181 B 3

Gentlemen:

From World War II until June 6th, 1959, our Saturday work was on a voluntary basis. In as much as most textile plants require Saturday work when scheduled, we felt that our work must run as needed. Therefore, a notice to this [fol. 6] effect was posted in the mill on June 5th. Realizing that the Claimant had a problem, we gave her an extra step in our disciplinary set-up to be sure she was informed of all the circumstances.

After being out for six (6) Saturdays she was terminated in accordance with our posted company policy for being out unexcused absence.

Not once, did her Overseer talk to her as to her religious beliefs but as to her being at work when scheduled.

Mrs. Sherbert, during her last employment, was employed 8-1938 and terminated 7-30-59.

Sincerely,

/s/ Henry M. Davis, Personnel Manager.

BEFORE SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

Transcript of Testimony

Date of Hearing: October 2, 1959.

Place of Hearing: S. C. State Employment Service, Spartanburg, S. C.

APPEARANCES:

For Claimant: Claimant, Witness, and represented by Mr. James O. Cobb, Jr., Attorney, 721 Law Bldg., Charlotte, N. C.

For Employer: No Appearances.

This is Appeal 28,800 in the case of Mrs. Adell H. Sherbert, 639 Southern Street, Spartanburg, S. C., SS No. 248-10-3181. The liable employer is Spartan Mills, Beaumont, Division, Box 690, Spartanburg, S. C. This hearing is being held on October 2 at Spartanburg before R. N. Sealy, Appeals Referee for the S. C. Employment Security Commission. The claimant appealed on September 9 from a claims examiner's determination dated September 4 whereby she was disqualified for five weeks from July 28 [fol. 7] to September 1, 1959 for misconduct connected with work upon the finding that she was discharged for unexcused absences. She was also held unavailable for work and therefore ineligible for benefits as of July 28, the effective date of an additional claim on the ground that she is not available for the regular work week observed in the industry and area in which she has worked.

The issues in this case are (1) whether or not claimant was separated under circumstances warranting a disqualification and (2) whether or not claimant is and has been available within the meaning of the law as of July 28, 1959.

The claimant, Mrs. Sherbert, is present and has two witnesses, Mrs. Sally Lloyd, who was a former fellow employee or co-worker, and also Dr. Harold Moody.

I'm going to ask Mr. Cobb at this time to explain exactly who the witness, Dr. Harold Moody, is. Mr. Cobb.

By Mr. James O. Cobb, Jr.
Attorney for Claimant:

Dr. Harold Moody is a practicing physician in Spartanburg, South Carolina, is a member of the Seventh Day Adventist Church in Spartanburg and is the duly elected medical advisor for the Carolinas Conference Association of Seventh Day Adventist League (?), which organization is the official body of the Seventh Day Adventist Church for North and South Carolina. In addition to his official connection with the organization which is the parent organization for the Seventh Day Adventist Church activities throughout the Carolinas, Dr. Moody is an elder in the Spartanburg Seventh Day Adventist Church.

By Mr. Sealy:

The claimant will be represented by two attorneys, Mr. Frank Lyles, P. O. Box 426, Spartanburg, S. C., and Mr. [fol. 8] James Cobb, 721 Law Building, Charlotte, N. C. Now, these two attorneys have requested that all papers in connection with this case be sent to each of their offices —copies to each of their offices, one at Spartanburg and one at Charlotte.

Now, you people understand that this testimony has to be taken under oath, so will you please—the three witnesses—raise your right hands?

Claimant and witnesses sworn. Claimant testifying.

Q. What is your age at the present time, please, ma'am?
A. Fifty-seven.
Q. Are you in good physical condition?
A. Yes, sir, as far as I know.
Q. In other words, would you be able to work a full 40-hour week or could you still handle the job?
A. Yes, sir.
Q. In fact, I believe you been down there about—what? About 35 years?
A. Thirty-five years.
Q. Thirty-five years. I believe I saw that somewhere. Who was your last employer?
A. Beaumont Plant.
Q. I believe that's called Spartan Mills. All right. And what type of work did you do down there, please, ma'am?
A. Winder-tender. Yarn winder.
Q. Yarn winder. All right.
A. Spool tender.
Q. Spool tender. Is that what it is? All right. I can change that. What shift did you work on?
A. First.
Q. And what are those hours?
A. From 7 to 3.
[fol. 9] Q. And how many days a week was the mill operating when you left there?
A. Six days a week.
Q. Now, as I understand it, before that they used to operate on a 5-day proposition. Do you recall the date, Mrs. Sherbert, that the mill started working the six days a week?
A. Well, I don't remember.
Q. Mrs. Sherbert, let me ask the question in this manner. When did the employer first demand that you work on Saturday?
A. Well, I don't recall the exact day.
Q. Was it sometime in June?
A. June, yes, sir.
Q. Now, just for the record, the employer wrote in that it was actually on June 5, so that's about as close as we can

get to it. All right, now. I believe that the record shows you've been working down there for close to 35 years, is that about right? And the last date you worked was June twenty—was it June 27—July 27, pardon me, July 27. That was on a Monday?

A. That's correct.

Q. Was that actually the last day? Were you separated on that same day, or was it later on that week that you actually were separated?

A. Was separated on that same day.

Q. Same day. That's July 27. Now, who was it that talked with you on the day of the separation?

A. Mr. Mitch Allen.

Q. Mr. Allen, and what is his title?

A. Well, he just told me—

Q. I mean, what is his title? Pardon me. What is his job down there?

A. Oh, he's an overseer in the spinning room.

[fol. 10] Q. Now, just what did he actually tell you as close as you can get to it—just in your own words.

A. Well, he just said he would have to get shut of me because I wouldn't come in on Saturday to work and that he was sorry that it had to happen like this, but it just had to happen like this so I was just out.

Q. Now, how many Saturdays—can you recall how many Saturdays that you had to stay out after he demanded—this man, the personnel manager, said six Saturdays from the time that they demanded you to go in.

A. Several Saturdays.

Q. Now, Mrs. Sherbert, first, did you ever go back down there to talk to these same people about work?

A. No, sir, I didn't.

Q. Well, have you tried anywhere else to get work?

A. Yes, sir.

Q. Now, would you give us the names of those places—some of the places that you've been to?

A. Saxton. Arkwright. Clifton.

Q. Now, do these places there, do they work just a 5-day week?

A. Six days a week they told me.

Q. And what type of work did you ask them for?

A. Just like I was at Beaumont.

Q. Well, now, if those places worked 6 days you wouldn't be in much better shape there, would you?

A. No, sir, I wouldn't.

Q. Well, I checked up with the Employment Service here, and they report that most of the textile plants operate on a 6-day basis in this area, and, of course, that all second and 3rd shift plants which, as I understand, a new person would have—you know, changing would have to go on. You can't just start out on the first shift. You have to start on [fol. 11] the third and all of those run on into Saturdays, you see. And now, just for the record, what days and hours would you be available for, please, ma'am?

A. Well, it would run into my Sabbath if I worked 40 hours a week anywhere, if I worked from Monday to Saturday which would be six days, and my Sabbath starts Friday night and ends Saturday night at sundown.

Q. It's from sundown Friday to sundown Saturday. All right. And, of course, you would not be interested in taking work that required you to work between those times?

A. No, sir.

Q. I mean you would not be interested in working on that—

A. No, sir.

Q. On your Sabbath day. Of course, I don't know if any of the plants work on Sunday. Now, this is the Referee. The employer—it's well after the scheduled hearing time and the employer has made no appearance or sent any witnesses up until now, so we are continuing with the hearing.

By Mr. James O. Cobb.
Attorney for Claimant:

Q. Mrs. Sherbert, of what church are you a member?

A. The Seventh Day Adventist.

Q. Do you know what—first, what view does your church hold with respect to working on the Sabbath?

A. They just don't hold with it at all. I mean they just don't believe in it because it's not right.

Q. And your Sabbath is from sundown Friday until sundown Saturday?

A. Yes, sir.

[fol. 12] Q. During the many years you were employed at Spartan were you ever reprimanded for misconduct on the job?

A. No, sir.

Q. During the many years you were employed at Spartan were you ever laid off for any sort of misconduct?

A. No, sir.

Q. Was your dismissal July of 1959 solely because of your refusal to work on the Sabbath?

A. Yes, sir.

Q. Did you advise your employer prior to the time that you were discharged of the reason for your refusal to work on your Sabbath?

A. Yes, sir, I did. I told him that the Lord had revealed it to me that it was the Sabbath—Saturday was the Sabbath, and I would not work on the Sabbath and that I wouldn't, I just couldn't work.

Q. And were your unexcused and unexplained absences from work due to your observance of your Sabbath?

A. Yes, sir.

Q. Mrs. Sherbert, would you be willing to work in another mill so long as it did not require work on your Sabbath?

A. Yes, sir, I would.

Q. Would you be willing to go to work in another industry so long as the job was a decent job and so long as you were not required to work on your Sabbath?

A. That's right. I sure would.

Q. And your health is good enough for you to hold down any job that the average woman in her fifties could hold down?

A. Yes, sir.

[fol. 13] Q. You are able to read and write?

A. Yes, sir.

Q. Mrs. Sherbert, when did you become a member of the Seventh Day Adventist Church?

A. I became a member two years ago the 6th of this past August.

Q. And from the time—from the day that you became

a member of that church, how much work have you done on the Sabbath?

A. Not any.

DR. HAROLD MOODY testifying:

Q. Dr. Moody, were you present at the time that I gave your connection with the Seventh Day Adventist Church to the examiner, Mr. Sealy?

A. I was.

Q. And was the information given by me to Mr. Sealy correct?

A. Yes, sir.

Q. And Dr. Moody, you were sworn by Mr. Sealy before this examination?

A. I was.

Q. Dr. Moody, I wonder if you would be good enough to tell us whether or not you know how many members of the Seventh Day Adventist Church there are in Spartanburg—your best guess?

A. One hundred and fifty.

Q. And do you of your own knowledge know whether or not some, many, or all of those members are gainfully employed in the Spartanburg area?

A. To my knowledge, all are employed except these two. [fol. 14] Q. In other words, the members of your church, to your knowledge, have no particular difficulty in obtaining jobs?

A. No, sir.

Q. Do any members of your—do you know whether or not any members of your church work on the Seventh Day Adventist Sabbath?

A. No, sir. They do not.

Q. Would you tell us, please, very briefly the view of the Seventh Day Adventist Church, the doctrine of the Seventh Day Adventist Church with respect to the Sabbath and with respect to whether or not work is desirable, permissible, or forbidden on the Sabbath?

A. Believing in the authenticity of the inspired Scriptures and holding to a literal translation of these Scriptures, Seventh Day Adventists believe that the seventh day of the

week, Saturday, is the Sabbath of God, that it was instituted by God at creation, that it was kept by Jesus Christ while here on earth, that it was kept by his disciples, and that it will be kept in the new earth. Seventh Day Adventists do not believe in labor or common work of any type on the seventh day. According to the Scriptures, the day begins and ends at sunset. As a result of this, we do not work from the time the sun goes down until it goes down the following day.

Q. That would be from sunset Friday?

A. Yes, sir.

Q. Until sunset Saturday?

A. Yes, sir.

Q. As I understand the matter the serious question to be decided is whether or not Mrs. Sherbert is available for work. It appears to me that this question is covered by the 1952 Code of South Carolina, Title 68, Sections 113 and [fol. 15] 114. We note that Section 113 makes a worker otherwise eligible, eligible to receive benefits if he is, in accordance with subsection 3, able to work and is available for work. On the other hand, Section 114 contains the disqualification clauses, and in subsection 3 it is provided that a claimant becomes disqualified only by, among other things, failure to apply for available work when so directed by the employment office or the Commission or (b) to accept available suitable work when offered him by the employment office or the employer. We contend that the available suitable work must be construed in to Section 113. In addition, when determining whether or not work is suitable, Section 114, subsection 3 (a) provides that determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to, among other things, his morals, and we submit very seriously and strenuously that it would undermine Mrs. Sherbert's morals to require her to work on her Sabbath or be denied the benefits of unemployment compensation. This precise question has been before the North Carolina Supreme Court. We would like to enter into the record that *in re Miller,* 243 N. C. 509, 91 S. E. (2d) 241, was decided in favor of a claimant under circumstances and facts identical with Mrs. Sherbert. In addition, we feel that a denial of this claim would be an un-

constitutional infringement upon the religious liberty guaranteed by the United States Constitution and by the Constitution of South Carolina.

By Mr. Sealy.
Referee:

Q. Mrs. Sherbert, would you have anything further to testify to in this hearing?
[fol. 16] A. No more than I just want to keep my Sabbath. That's what I want to do. I want to please God instead of man.
Q. Thank you. Would the Attorneys have any further examination or information?
A. No, sir.
Q. Thank you. This hearing is closed.

BEFORE SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

DECISION OF APPEAL TRIBUNAL—October 12, 1959

Claimant appealed on September 9, 1959, from a claims examiner's determination, dated September 4, 1959, whereby she was disqualified for five weeks from July 28, 1959, to September 1, 1959, for misconduct connected with work upon the finding that she was discharged for unexcused absences. She was also held unavailable for work and therefore ineligible for benefits as of July 28, 1959, the effective date of an additional claim, on the ground that she is not available for the regular work week observed in the industry and area in which she has worked.

Notice was furnished interested parties and a hearing was held on October 2, 1959, at Spartanburg, South Carolina. Claimant appeared, testified, presented witnesses who also testified and was represented by Counsel. No appearance was made in behalf of the employer.

The issues are (1) whether or not claimant was separated under circumstances warranting a disqualification, and (2) whether or not claimant is and has been available, within the meaning of the Law, as of July 28, 1959.

Findings of Fact

Claimant, a spooler tender, had been employed for many years prior to her separtion in July of 1959.

[fol. 17] Since August 6, 1958, she has been a member of the Seventh Day Adventists who believe that the Sabbath should be observed from sundown on Friday until sundown Saturday.

Around the first of June, 1959, the employer notified all employees that they would henceforth be required to work six days per week, Monday through Saturday. Prior to this notice Saturday work had been on a voluntary basis.

Claimant notified the employer that she would not work on Saturdays due to her religious inclinations. She was discharged for being absent without permission several Saturdays thereafter.

She named several textile employers to whom she had applied; however, these employers also operate on a six-day work week basis. She will not accept employment that will require her to work on Saturdays.

Practically all textile plants in this area operate six days per week.

Decision

Claimant remained on the job after the general notice that a six-day schedule had been adopted. She thereby became accountable, although she protested her personal objections and advised that she would not work on Saturdays. She did not quit but she was absent several times without permission. Since she remained under the new conditions and failed to meet them, the employer terminated her in accord with policy and notice thereof.

Such separations are subject to some disqualification.

Eligibility requirements also include that a claimant must be available for work without limitation or restriction which would interfere with a reasonable chance of finding employment.

[fol. 18] Under the circumstances the Tribunal is of the opinion that claimant has so limited her chances of procur-

ing employment as to prevent her from meeting the test of availability.

R. N. Sealy, Appeal Tribunal for South Carolina Employment Security Commission.

Columbia, S. C.,
October 12, 1959.
/p/1/c

BEFORE SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

DECISION OF COMMISSION

Appeal Tribunal Decision No. 59-A-1134, issued October 12, 1959, affirmed a claims examiner's determination that claimant had been discharged for misconduct connected with her work, for which a disqualification of five weeks was imposed, and that claimant was unavailable for work. Claimant appealed.

Notice of hearing was given the interested parties and the Commission has considered the appeal.

DECISION

Decision No. 59-A-1134 of the Appeal Tribunal is hereby affirmed.

Claimant stated on her additional claim that she was separated from employment because she could not work on Saturdays, she being a Seventh Day Adventist.

The employer reported that claimant was notified on June 5 that commencing June 6 she would be required to work on Saturdays and that after she had stayed out for six Saturdays her services were terminated on July 30, 1959, because of her unexcused absences. The employer also reported that claimant's last employment commenced on [fol. 19] August 8, 1938, and terminated on August 8, 1938, and terminated on July 30, 1959.

Claimant testified that she worked for this employer for about thirty-five years; that her work was that of a spool tender on the first shift and that her hours were from seven to three o'clock; that at the time of her separation the plant was operating six days a week; that some time in June her

employer notified her that she would be required to work on Saturdays but that she did not report for work on any Saturday between that date and July 27, 1959, because she had joined the Seventh Day Adventist Church; that she cannot work between sundown Friday and sundown Saturday since that is her church's Sabbath; that she was dismissed by her employer solely because of her refusal to work on Saturday; that she had applied for work at a number of other textile plants but that since they all operate six days a week, she would not be interested in working for any of them.

An official of the Seventh Day Adventist Church testified that there are one hundred and fifty members of his church in Spartanburg and that all of them except two are gainfully employed; that to his knowledge, members of his church have no particular difficulty in obtaining jobs; that the Sabbath of his church is from sunset Friday until sunset Saturday and that its members do not work on their Sabbath.

The employer did not appear at the hearing.

According to the testimony, claimant refused to work on Saturdays, although her employer's plant and all other textile plants in that area operate on that day. Because of her refusal to work as instructed, claimant was discharged. Under our law, a discharge under such circumstance requires the imposition of a disqualification. Furthermore, claimant testified that she could not and would not work [fol. 20] on Saturdays, although as stated above, her employer's plant and all other textile plants in that area operate on that day. The placing of such a limitation and restriction upon the type of work which she would accept prevented her from meeting the requirements of availability established under our law, which are that an unemployed individual seeking benefits must be available for regular full time work. The decision of the Referee is therefore affirmed.

South Carolina Employment Security Commission, Charlie V. Verner, Chairman, Ed. H. Tatum, Vice-Chairman, Rob't. S. Galloway, Sr., Commissioner.

Date of Hearing: December 16, 1959.

Decision Mailed: December 18, 1959.

IN COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY

PETITION OF APPELLANT

The Petition of Appellant, filed in the Court of Common Pleas for Spartanburg County (to which was attached a Summons), is as follows:

Petitioner alleges:

1. That she is a resident of the County of Spartanburg, State of South Carolina.

2. That the Respondents, Charlie V. Verner, Ed. H. Tatum and Rob't. S. Galloway, Sr., are the duly qualified and acting members of the South Carolina Employment Security Commission.

3. That the Respondent, Spartan Mills, is a Corporation with its principal place of business in Spartanburg County, South Carolina.

[fol. 21] 4. That for approximately thirty-five (35) years preceding July, 1959, Petitioner was in employed by Beaumont Mill which is owned and operated by the Respondent, Spartan Mills, as Spartan Mills Beaumont Division.

5. That in the month of August, 1957, Petitioner became a member of the Seventh Day Adventist Church and she has been a member of that Church continuously since that time; that the Seventh Day Adventist Church observes as its Sabbath the period from sundown each Friday until sundown each Saturday; that it is a violation of the Church Law to pursue gainful employment on the Sabbath; that specifically this Petitioner has held a firm conviction that it would be immoral and a violation of the laws of God for her to pursue gainful employment during the period commencing sundown Friday and ending sundown Saturday.

6. That since she became a member of the Seventh Day Adventist Church in August, 1957, Petitioner has refused to work during any period which she and the members of her Church regard as the Sabbath.

7. That she has been a faithful and valuable employee of Beaumont Mills during her thirty-five years' service there until she was discharged in July, 1959, for the sole reason that she refused to violate her Sabbath; that from 1957 until June, 1959, the employer, Beaumont Mill, retained the Petitioner in its employment, although she was not available for work during the hours of her Sabbath each week and notwithstanding the fact that the mill was in operation frequently and for continuous periods on her Sabbath and it was necessary that some other person be secured to perform the customary duties of Petitioner when she was absent from work for the observance of her Sabbath.

[fol. 22] 8. That Petitioner filed a claim for Unemployment Benefits under the provisions of the South Carolina Unemployment Compensation Law. The claim was denied respectively by the Claims Examiner, an Appeals Tribunal and the full Commission because the claimant was not "available" for work between sundown Friday and sundown Saturday.

Wherefore, by this Petition an Appeal is taken from the decision of the Commission, dated December 18, 1959, and this Court is asked to review and reverse the decision of the full Commission, as well as the decisions preliminary to it upon the following grounds:.

(1) That it was error to hold that the claimant by refusing to work on her Sabbath has so limited her chances of procuring employment as to prevent her from meeting the requirement of availability under our Employment Security Law, the error being that the Employment Security Law does not require the claimant to be available for work at all hours of every day and night seven days each week.

(2) That it was error to hold that a person who holds a sincere religious belief that the Sabbath is from sundown Friday until sundown Saturday and that it is morally wrong to do any type work on the Sabbath must in spite of this belief be willing to work during

that time in order to be considered available for work under the South Carolina Employment Security Law.

(3) That it was error to hold that an "unemployed individual seeking benefits must be available for regular full-time employment", the error being that the holding is in conflict with the statute which only requires that the individual be available for suitable work.

[fol. 23] (4) That the holding of the Commission is in conflict with the South Carolina Constitution of 1895, Article I, Section 4, which guarantees the free exercise of religion in that the holding of the Commission imposes an economic penalty on the claimant thereby denying to her this constitutional guarantee.

(5) That the holding of the Commission is in conflict with the South Carolina Constitution of 1895, Article I, Section 5, which guarantees equal protection of the laws in that the Commission's holding would deny Petitioner the right to practice her religion if she is to enjoy the protection and the benefits accorded those who observe Sunday as their Sabbath.

(6) The holding of the Commission is in conflict with the first Amendment to the Constitution of the United States in that the holding denies Petitioner the free exercise of her religion.

(7) The holding of the Commission is in conflict with the first Amendment to the Constitution of the United States in that it denies Petitioner equal protection of the laws.

IN COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY

ANSWER AND RETURN OF COMMISSION

The Answer and Return of the Commission is as follows:

The Respondents, Charlie V. Verner, Ed. H. Tatum and Rob't. S. Galloway, Sr., as members of South Carolina Employment Security Commission, by way of Answer and Return to the Petition of the Petitioner, respectfully show unto the Court and allege:

[fol. 24] *For a First Defense*

1. That they deny each and every allegation in said Petition contained.

For a Second Defense

1. That the Respondents, Charlie V. Verner, Ed. H. Tatum and Rob't. S. Galloway, Sr., are now and were at the times hereinafter mentioned the duly constituted members of the South Carolina Employment Security Commission, an agency of the State of South Carolina, and, as such, charged with the duty and responsibility of administering the South Carolina Unemployment Compensation Law.

2. That on July 28, 1959, the Petitioner filed with said South Carolina Employment Security Commission, hereinafter referred to as the Commission, an additional claim for unemployment compensation benefits stating thereon that she had been discharged from her employment because she had refused to work on Saturday.

3. That on September 4, 1959, a claims examiner of the said Commission, pursuant to Section 68-153, Code of Laws, 1952, issued a determination holding that Petitioner had been separated under disqualifying circumstances for which a disqualification of five weeks was imposed and that Petitioner was unavailable for work as of July 28, 1959.

4. That Petitioner was promptly notified of said determination and that on September 9, 1959, she filed an appeal from said determination to the Appeal Tribunal of the Commission.

5. That on October 2, 1959, a hearing was held by an Appeals Referee, constituting an Appeal Tribunal, at which the testimony and the evidence in this case was received and recorded.

[fol. 25] 6. That on October 12, 1959, the Appeal Tribunal issued its Decision No. 59-A-1134, whereby it affirmed the determination of the claims examiner and held that Peti-

tioner had been discharged under disqualifying circumstances for which a disqualification of five weeks was imposed and that Petitioner was unavailable for work as of July 28, 1959.

7. That within the time allowed by law, the Petitioner appealed from the decision of the Appeal Tribunal to the Commission, and that these Respondents, constituting said Commission, heard said appeal on December 16, 1959.

8. That under date of December 18, 1959, said Commission rendered its decision in which it made findings of fact and conclusions of law and affirmed the decision of the Appeal Tribunal by finding that Petitioner had been discharged under disqualifying circumstances for which a disqualification of five weeks was imposed and that Petitioner was unavailable for work as of July 28, 1959.

For a Third Defense

1. That the findings of fact by the Commission in this case are supported by the evidence, and that pursuant to Section 68-165, Code of Laws, 1952, such findings of fact are conclusive and not subject to review.

2. That the Commission has properly interpreted the pertinent provisions of the South Carolina Unemployment Compensation Law, and that its decision is in accord with the facts of this case and with the appropriate law applicable thereto.

WHEREFORE, these Respondents respectfully pray that the Petition of the Petitioner be dismissed, that the decision of the Commission be affirmed, and for such other and further relief as the Court may deem just and proper.

[fol. 26]
IN COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY

ANSWER AND RETURN OF THE EMPLOYER

The Answer and Return of Spartan Mills, the Employer, omitting caption and Attorney's signature, is as follows:

The Respondent, Spartan Mills, answering the Petition of the Petitioner, respectfully shows unto the Court:

For a First Defense

1. That it admits the allegations of Paragraphs 1, 2, 3, 4 and 8.

2. That as Respondent is informed and believes, the Petitioner was employed on or about August 8, 1938, as a Spooler Tender by The Beaumont Manufacturing Company, the predecessor of Spartan Mills in the operation of its plant known as the Beaumont Division of Spartan Mills; that since 1949, she has continued to be employed by Spartan Mills until July 30, 1959; that up until the month of August, 1957, the Petitioner's work had been satisfactory, but at that time Petitioner became a member of the Seven Day Adventist Church and thereafter declined to work from sundown on Friday until sundown on Saturday, which made her unavailable for work on the second and third shifts on Friday while the mill was operating on a five-day schedule and unavailable for work on any shift on Saturday when the mill was operating on a six-day schedule; that during the period between August, 1957, and July 30, 1959, the Respondent made special effort to accommodate Petitioner by getting someone else to fill her job on occasions when she failed to report for work, and even made effort, without success, to obtain work for her elsewhere compatible with her desires and availability for work; that the business of the Beaumont Division of Spartan Mills [fol. 27] is manufacture of textile, forming a part of the textile industry in the Piedmont section of South Carolina which operates upon a three-shift basis and on a six-day work week when the demand for its products requires that schedule; that the demand for its products varies and in

periods of high demand, a six-day operation is normal in the industry and in the area in which the Beaumont plant is located; that on June 5, 1959, the Respondent posted a notice that Saturday work would be on a required basis, the same as any other work day when the employee's job was running and that no exceptions to this rule would be allowed; that after several warnings and layoffs for failure to report for work on Saturday after being notified, the Petitioner was terminated on July 30, 1959, under the Company's posted regulations dealing with unexcused absences.

3. Except as hereinabove admitted, each and every allegation in said petition is denied.

For a Second Defense

1. That the Respondents, Charlie V. Verner, Ed. H. Tatum and Rob't. S. Galloway, Sr., are now and were at the times hereinafter mentioned the duly constituted members of the South Carolina Employment Security Commission, an agency of the State of South Carolina, and as such, charged with the duty and responsibility of administering the South Carolina Unemployment Compensation Law.

2. That on July 28, 1959, the Petitioner filed with said South Carolina Employment Security Commission, hereinafter referred to as the Commission, an additional claim for unemployment compensation benefits stating thereon [fol. 28] that she had been discharged from her employment because she had refused to work on Saturday.

3. That on September 4, 1959, a claims examiner of the said Commission, pursuant to Section 68-153, Code of Laws, 1952, issued a determination holding that Petitioner had been separated under disqualifying circumstances for which a disqualification of five weeks was imposed and that Petitioner was unavailable for work as of July 28, 1959.

4. That Petitioner was promptly notified of said determination and that on September 9, 1959, she filed an appeal from said determination to the Appeal Tribunal of the Commission.

5. That on October 2, 1959, a hearing was held by an Appeals Referee, constituting an Appeal Tribunal, at which the testimony and the evidence in this case was received and recorded.

6. That on October 12, 1959, the Appeal Tribunal issued its Decision No. 59-A-1134, whereby it affirmed the determination of the claims examiner and held that Petitioner had been discharged under disqualifying circumstances for which a disqualification of five weeks was imposed and that Petitioner was unavailable for work as of July 28, 1959.

7. That within the time allowed by law, the Petitioner appealed from the decision of the Appeal Tribunal to the Commission, and that these Respondents, contituting said Commission, heard said appeal on December 16, 1959.

8. That under date of December 18, 1959, said Commission rendered its decision in which it made findings of fact and conclusions of law and affirmed the decision of the Appeal Tribunal by finding that Petitioner had been discharged under disqualifying circumstances for which a disqualifica-
[fol. 29] tion of five weeks was imposed and that Petitioner was unavailable for work as of July 28, 1959.

For a Third Defense

1. That the findings of fact by the Commission in this case are supported by the evidence, and that pursuant to Section 68-165, Code of Laws, 1952, such findings of fact are conclusive and not subject to review.

2. That the Commission has properly interpreted the pertinent provisions of the South Carolina Unemployment Compensation Law, and that its decision is in accord with the facts of this cause and with the appropriate law applicable thereto.

WHEREFORE, the Respondent, Spartan Mills, respectfully prays that the Petition of the Petitioner be dismissed, that the decision of the Commission be affirmed, and for such other and further relief as the Court may deem just and proper.

IN COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY

DECREE

The petitioner, hereinafter referred to as the claimant, instituted this action pursuant to Section 68-165, Code of Laws of South Carolina, 1952, seeking judicial review of a decision of the South Carolina Employment Security Commission in which it was held that a disqualification of five weeks had been properly imposed upon her and that because of her unavailability for work she was not entitled to unemployment benefits. The decision of the Commission affirmed the prior decision of the Appeal Tribunal which had, in turn, affirmed the initial determination of the Claims Examiner.

This case has been considered on the basis of the record made in the proceedings which culminated in the decision of the Commission and has been fully argued before me by [fol. 30] the General Counsel for the Commission and the attorneys for the claimant and the employer.

The essential facts are not in dispute. Claimant had been employed by Spartan Mills, Beaumont Division, for more than thirty years. She was working as a spool tender on the first shift and her hours were from 7 a. m. to 3 p. m. On June 5, 1959, she was notified that commencing June 6, 1959, she would be required to work on Saturday. This she refused to do, although her employer's plant and all other textile plants in that area were operating on that day. After she had stayed out for six Saturdays, she was discharged because of her refusal to work as instructed. The reason given by her for refusing to work on Saturday was that she had joined the Seventh Day Adventist Church, whose Sabbath is from sundown Friday until sundown Saturday, during which time its members do not work. She has applied for work at a number of other textile plants, but since they all operate six days a week she would not accept employment with any of them. Furthermore, she testified that on account of her religion she would accept work only on the first shift from Monday to Friday.

By this action, claimant seeks judicial review of the decision of the Commission, both as to the imposition of the disqualification and as to the finding of unavailability.

The facts and the issues in the instant case are identical with those in the case of *Pierce W. Strange against the Commission,* which was heard and decided by Judge Joseph R. Moss, the Presiding Judge of the Court of Common Pleas for Greenville County.

In the *Strange* case, the claimant had been discharged by his employer because he refused to work on Saturday, giving as his reason therefor that he had joined the Seventh [fol. 31] Day Adventist Church, whose Sabbath is from sundown Friday until sundown Saturday, during which time its members do not work. He had testified that he would not accept any job with his former employer or any other employer on a normal five-day week basis if he were told that the might be sometimes required to work on Saturdays. He also testified that his former employer was operating at that time, in part, on a six-day week basis and that other plants in the area, providing similar jobs, were likewise operating. The Commission had held in that case, as it did in the instant case, that the claimant had been discharged for misconduct connected with his work, for which a disqualification was imposed, and that he was unavailable for work as of the date upon which he had filed his claim for benefits.

The claimant, Pierce W. Strange, thereupon brought an action seeking judicial review of the decision of the Commission, both as to the imposition of the disqualification and as to the finding of unavailability.

In passing upon the disqualification issue Judge Moss held as follows:

"Section 68-114 (1) and (2) authorizes the Commission in its discretion to impose a disqualification in any case where an employee leaves his work voluntarily without 'good cause' or is discharged for 'misconduct connected with his work'. The 'good cause', or the want of it, and the 'misconduct connected with the work' thus contemplated need not have any relation to censorable conduct. When the motivating reason for the termination of employment stems from considerations personal to the employee, the fact that the employee pursues the course which society would gen-

erally approve, does not necessarily mean that it amounts to 'good cause' or does not amount to 'misconduct connected [fol. 32] with work' within the contemplation of the Act. What is contemplated by the Act, insofar as a disqualification is concerned, is the protection of employees who become unemployed by reason of the particular employer's failure to provide the particular employee with continued job opportunities under reasonable conditions.

"Thus, the Supreme Court of South Carolina, in *Stone Manufacturing Company* v. *South Carolina Employment Security Commission,* 219 S. C. 239, 64 S. E. (2d) 644, quoting with approval from *Sun Shipbuilding & Drydock Company* v. *Unemployment Compensation Board of Review,* 358 Pa. 224, 56 A. (2d) 254, said:

> "'A laudable motive for leaving employment and a "good cause" within the meaning of the Act are entirely different things.'

"In the *Stone Manufacturing Company* case, the claimant left her employment at the employer's plant at Columbia, South Carolina, when her husband, a member of the Armed Forces, was transferred from Fort Jackson, near Columbia, S. C., to Fort Bragg, near Fayetteville, N. C. Certainly the first duty of a wife is to be with her husband and to maintain a home for her family. Instead of criticizing her for discharging that duty, society would expect it of her. But while her reason for leaving was personally a good one, it was wholly unrelated to any failure upon the part of the employer to provide her with employment under reasonable conditions as he had in the past, and the Court held that her laudable motive nevertheless was not 'good cause' within the meaning of the Act.

"In this case, the claimant, during his more than twenty years of employment by the employer, had worked on Saturdays from time to time whenever Saturday work was necessary. His refusal to continue to work on Saturdays [fol. 33] as he had in the past did not arise out of anything connected with the employment, but solely by reason of the fact that he had become a member of the Seventh Day Adventist Church. His adherence to his new religious belief

is certainly not blameworthy or censorable, but his election to join that church was a matter personal to him, and arose in no respect out of his employment. Just as the wife who found it impossible to continue her employment because of the requirements of her duties to her husband, so the claimant here found it impossible to continue his employment as he had in the past because of the impact of his new religious beliefs. No one has suggested that the actions of the claimant in either case would not be approved by society in general, but in each case, the claimant chose to be faithful to a belief or duty entirely personal to him and inconsistent with his continued employment upon the same basis as theretofore."

Judge Moss thereupon held that the imposition of the disqualification was clearly required by the facts.

In my opinion the imposition of the disqualification in the instant case was likewise required by the facts. The decision of the Commission on that issue is therefore affirmed.

In passing upon the issue of availability, Judge Moss held as follows:

"It is contended by the claimant that since becoming a Seventh Day Adventist, he believes that the Sabbath should be celebrated from sundown on Friday until sundown on Saturday and that to require him to work within those hours would be offensive to his religious beliefs and would involve risk to his morals within the contemplation of Section 68-114 (3) (a). He was thus emphatic that he would not accept any job with his former employer or [fol. 34] anyone else if he were told that he might sometimes be required to work on Saturdays.

"In imposing this restriction upon his availability, he seems clearly to have made himself totally unavailable for work in the textile industry in the Piedmont Section of South Carolina, for the record discloses, and the claimant concedes, that such work is, upon occasion, generally required by textile plants in that area. Indeed, the limitations imposed by the claimant would make him available for only four days a week for second shift operation, which normally starts at 4:00 o'clock in the afternoon and runs to midnight.

For a job on the second shift, the claimant would thus be available for work only on Mondays, Tuesdays, Wednesdays and Thursdays. By the limitations imposed by him, he would be unavailable on Fridays and Saturdays, and the laws of the State of South Carolina prohibit an employer in the textile industry from suffering or permitting anyone, with certain exceptions not here applicable, to work on Sunday. For job openings on any other shift, the claimant would be available, at the most, for work on Mondays through Fridays, inclusive, for he has made himself unavailable for work on Saturdays, and the statutory prohibition prevents his working on Sundays.

"As a practical matter, the Court must conclude under the circumstances that the claimant fails to meet the availability requirements of the law. * * * The reason for the termination of his employment (his refusal to work on any job in which work on Saturdays might sometimes be required) prevents his acceptance of like work with any other employer in the area, and practically viewed, there is an absolute unavailability of the claimant for employment in the textile industry in this Section."

* * * * * * *

[fol. 35] "Clearly the general purpose of the act was to mitigate the disastrous effects of involuntary unemployment, resulting from a failure of industry to provide sufficient employment opportunities. It was not intended to provide compensation for any person, who, because of considerations personal to him, became unavailable for employment when industry generally provided abundant job opportunities for the people in the area.

"Thus, the Supreme Court of South Carolina, in *Judson Mills* v. *South Carolina Unemployment Compensation Commission,* 204 S. C. 37, 28 S. E. (2d) 535, held the claimant unavailable for work where it appeared that, because of considerations personal to her, she became unavailable for employment on the third shift, upon which she had been working, even though she was apparently available for employment on either the first or second shifts. The claimant in that case was a textile worker. She was the mother of four children. A relative took care of the young children during the hours of her employment. The relative became

unavailable for the care of the children and the claimant quit her employment and limited her availability for employment to the first or second shifts.

"The duty of the claimant in the *Judson Mills* case to take care of her young children is certainly paramount to any consideration in connection with her employment. But if the restrictions imposed by her upon her availability for employment led the Supreme Court of the State to conclude that she was unavailable for employment within the meaning of the Act, then clearly, the claimant in this case was unavailable for employment."

* * * * * * *

[fol. 36] "Since the claimant's restrictions upon his own availability for employment in the industry in which he was employed for over twenty years and in the locality in which he lived and worked, makes him unavailable for employment in that industry in that locality, it must be concluded that he is unavailable for employment within the meaning of the Act."

In my opinion, the restrictions which claimant in the instant case placed upon her availability for employment made her unavailable for employment within the contemplation of the South Carolina Unemployment Compensation Law. The decision of the Commission on that issue is therefore affirmed.

It is therefore ordered, adjudged and decreed that the decision of the South Carolina Employment Security Commission holding that a disqualification of five weeks had been properly imposed upon petitioner and that because of her unavailability for work she was not entitled to unemployment benefits be and the same is hereby affirmed. It is further ordered that the petition of the petitioner be dismissed with costs.

IN COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY

NOTICE OF INTENTION TO APPEAL

Appellant gave due Notice of Intention to Appeal from the Decree of Judge Lewis and brings this appeal upon this record and the exceptions hereinafter printed.

EXCEPTIONS

1. That it was error to hold that the claimant by refusing to work on her Sabbath has so limited her chances of procuring employment as to prevent her from meeting the requirement of availability under our Employment Security Law, the error being that the Employment Security Law does not require the claimant to be available for work [fol. 37] at all hours of every day and night seven days each week.

2. That it was error to hold that a person who holds a sincere religious belief that the Sabbath is from sundown Friday until sundown Saturday and that it is morally wrong to do any type work on the Sabbath must in spite of this belief be willing to work during that time in order to be considered available for work under the South Carolina Employment Security Law.

3. That it was error to hold that an "unemployed individual seeking benefits must be available for regular full-time employment," the error being that the holding is in conflict with the statute which only requires that the individual be available for suitable work.

4. That the Commission and the Court, in holding petitioner, because of her refusal based on religious considerations to work from sundown Friday to sundown Saturday, to be "disqualified" for benefits and "unavailable for employment" within the meaning of Sections 67-113 (4) (c), 68-114 (2) and 68-114 (3), erred in failing to hold that said Sections of the South Carolina Code of Laws, as construed and applied to the facts and the petitioner in this case, violate Article I, Section 4, of the South Carolina Constitution of 1895, which guarantees the free exercise of religion in that the holding of the Commission imposes an economic

penalty on the claimant because of her exercise of her religion.

5. That the Commission and the Court erred in failing to hold that Sections 68-113 (4) (c), 68-114 (2) and 68-114 (3) of the South Carolina Code of Laws, as construed and applied to the claimant in this case, violate the equal protection clause of the South Carolina Constitution of 1895, Article I, Section 5, in that the Commission's holding denies [fol. 38] to petitioner, in the practice of her religion, the protection of the benefits accorded those who observe Sunday as their Sabbath.

6. That the Commission and the Court erred in failing to hold that Sections 68-113 (4) (c), 68-114 (2) and 68-114 (3) of the South Carolina Code of Laws, as construed and applied to petitioner in this case, violate the guarantee of free exercise of religion contained in the First Amendment to the Constitution of the United States as absorbed into the Fourteenth Amendment to the Constitution of the United States.

7. That the Commission and the Court erred in failing to hold that Sections 68-113 (4) (c), 68-114 (2) and 68-114 (3) of the South Carolina Code of Laws violate the First Amendment to the Constitution of the United States as absorbed into the Fourteenth Amendment to the Constitution of the United States in that it denies petitioner, in the practice of her religion, the protection and the benefits accorded by the Laws of South Carolina to those who observe Sunday as their Sabbath.

8. That it was error to find that all other textile plants in the area were operating on Saturday, as the testimony shows only that most of the textile plants in the area were operating on Saturday.

9. That it was error to find that Appellant testified that she would accept work "only on the first shift" from Monday to Friday in that such finding is not supported by the record.

[fol. 41]
IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Case No. 4819

ADELL H. SHERBERT, Appellant,

v.

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

Appeal From Spartanburg County, J. Woodrow Lewis, Judge.

Affirmed

Lyles & Lyles, of Spartanburg, and Dockery, Ruff, Perry, Bond & Cobb, of Charlotte, North Carolina, for appellant.

Jas. Julien Bush, of Columbia; Benjamin O. Johnson and Butler & Chapman, all of Spartanburg, for respondents.

OPINION No. 17915—Filed May 17, 1962

Moss, A. J.: Adell H. Sherbert, the appellant herein, did, on July 29, 1959, file her claim with the South Carolina Employment Security Commission, one of the respondents herein, for unemployment compensation benefits under the "South Carolina Unemployment Compensation Law." Section 68-1, et seq., 1952 Code of Laws of South Carolina.

The appellant, a textile employee, had worked for Spartan Mills, Beaumont Division, a respondent herein, for approximately thirty-five years. Immediately prior to June 5, 1959, she was working as a spool tender Monday through Friday, on the first shift, and her hours were from 7:00 A. M. until 3:00 P. M. On June 5, 1959, she was notified by her employer that, commencing June 6, 1959, she would be required to work on Saturday. This she refused to do, although the employer's plant, and other textile plants in the area, were

operating on a six day basis, which included Saturday. Prior to June 5, 1959, Saturday work in Spartan Mills was on a voluntary basis and the appellant had not worked at any time between sundown Friday and sundown on Saturday after she became a member, on August 5, 1957, of the Seventh Day Adventist Church. The appellant failed to report for work on six successive Saturdays and she was discharged on July 27, 1959, because of her refusal to work on Saturdays. The reason given by the appellant for refusing to work on Saturdays was that for nearly two years prior to her discharge she had been a member of the Seventh Day Adventist Church and it was the teaching of her Church that the Sabbath begins at sundown Friday and ends at Sundown Saturday, during which time she should not perform work or labor of any kind. The appellant applied for work at three other textile plants in the Spartanburg area but had been unable to find employment since these plants and practically all of the other textile plants in the area operated six days a week, including Saturday. The first, second and third shifts of Spartan Mills included work on Saturday.

It appears that on September 4, 1959, a claims examiner of the Commission, pursuant to Sections 68-152-4 of the 1952 Code, issued a determination holding that the appellant had been separated from her employment because she was unavailable for work as of July 28, 1959, and imposed a disqualification of five weeks, thereby preventing her from receiving unemployment compensation benefits for said period. He further held that the appellant was not available for the regular work week observed by Spartan Mills and by the textile industry in the area in which she worked.

The claimant appealed from the initial determination of the claims examiner to the Appeal Tribunal of the Commission, and a hearing was held by an Appeals Referee pursuant to Section 68-160 of the Code, at which the testimony of the appellant and her witness was taken. On October 12, [fol. 42] 1959, the Appeal Tribunal affirmed the determination of the claims examiner and held that the appellant had been discharged under disqualifying circumstances because she was not available for work as of July 28, 1959.

Pursuant to Section 68-161 of the Code, and within the time allowed by law, the claimant appealed from the decision of the Appeal Tribunal to the Full Commission. This appeal was heard by said Commission on December 16, 1959 and, thereafter, on December 18, 1959, the Commission rendered its decision in which it made findings of fact and conclusions of law affirming the decision of the Appeal Tribunal.

The appellant commenced an action on January 5, 1960, in the Court of Common Pleas for Spartanburg County, for the purpose of obtaining a judicial review of the decision of the Commission. Section 68-165 of the Code. The case was heard by The Honorable J. Woodrow Lewis, Presiding Judge of the Seventh Circuit. Thereafter, by a decree dated June 27, 1960, Judge Lewis affirmed the decision of the Commission, holding that a disqualification had been properly imposed upon the appellant and that, because of the restrictions which she had placed upon her availability for employment, she was unavailable for work within the meaning of the South Carolina Unemployment Compensation Law. Timely notice of intention to appeal to this Court was given by the appellant.

The first question for determination is whether the appellant was able and available for work, under the facts here involved, within the contemplation of the South Carolina Unemployment Compensation Law, or was she discharged for misconduct connected with her work. The determination of this question involves consideration of the two sections of the Unemployment Compensation Law which prescribe the general rules of eligibility for unemployment compensation benefits. These are Sections 68-113, which provides for basic conditions which have to be met in order to qualify; and Section 68-114 enumerates a series of disqualifications.

Section 68-113 provides that:

> "An unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that:

"(1) He has made a claim for benefits with respect to such week in accordance with such regulations as the Commission may prescribe;

"(2) He has registered for work, * * *

"(3) He is able to work and is available for work. * * * "

Section 68-114 provides:

"Any insured worker shall be ineligible for benefits:

"(1) Leaving work voluntarily. If the commission finds that he has left voluntarily without good cause his most recent work prior to filing a request for determination of insured status * * *

"(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. * * *

"(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. * * * "

At the 1955 session of the General Assembly of South Carolina, Section 68-114 was amended by adding to subdivision (3) thereof a subsection (a) (49 Stats. 490), the following:

[fol. 43] "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, * * * "

It is a fundamental principle of statutory construction that statutes must be construed in the light of the evil they

seek to remedy and in the light of the conditions obtaining at the time of their enactment. Judson Mills v. South Carolina Unemployment Compensation Commission, et al., 204 S. C. 37, 28 S. E. (2d) 535.

The public policy and the purpose of the enactment of the Unemployment Compensation Law of this State is fully set forth in Section 68-36 of the 1952 Code and 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. * * * "

In the case of Judson Mills v. South Carolina Unemployment Compensation Commission, et al., supra, this Court adopted the decree of the lower Court, where with reference to the Unemployment Compensation Act, it was said:

> "This statute was passed in 1936, at a time when this State, in common with the entire nation, was suffering from a prolonged depression which had resulted in industry laying off many workers, many of whom were left without the means of obtaining even the barest necessities of life. This unquestionably was the evil which the Legislature was seeking to remedy. Unemployment due to changes in personal conditions of the employee, making it impossible for him to continue on his job had existed for many years, but there is no reason to believe that the evil resulting therefrom was employee, making it impossible for him to continue on

his job had existed for many years, but there is no reason to believe that the evil resulting therefrom was any more pronounced in 1936 than it had been prior to that time. I find nothing in the Act itself or in the circumstances surrounding its passage to indicate an intention on the part of the Legislature to provide benefits for a worker compelled to give up his job solely because of a change in his personal circumstances.

"It will be noted that one of the remedies proposed by the Legislature in its declaration of State policy was the encouragement of industry to provide more stable employment. In furtherance of this objective, the Act imposed upon the employer the entire burden of creating and maintaining a fund for the payment of unemployment benefits. * * * "

* * * * * * *

"The primary purpose of this provision would be greatly impaired, if not completely defeated, if benefits were paid to persons who became unemployed, not because the employer could no longer provide them with work but solely because of changes in their personal circumstances. I am constrained, therefore, to conclude that in order to be entitled to benefits under the Act the unemployed individual must be able to and available for the work which he or she has been doing."

It is obvious, therefore, that the fundamental purpose of the Unemployment Compensation Law is to protect against economic insecurity due to involuntary unemployment because of the inability of industry to provide stable employment and not to provide unemployment compensation where work is available and the employee is able to work and is available for such work.

In Stone Mfg. Co. v. South Carolina Employment Security Commission, et al., 219 S. C. 239, 64 S. E. (2d) 644, it was held that the term "involuntary unemployment" as [fol. 44] used in the declaration of policy, "had reference to unemployment resulting from a failure of industry to provide stable employment," and that the statute was not intended "to provide benefits for a worker compelled to give up his job solely because of a change in his personal circumstances." We quote from the Stone case, the following:

> "The courts elsewhere generally recognize that the statute was enacted ' "for the benefit of persons unemployed through no fault of their own." ' Sun Shipbuilding & Dry Dock Co. v. Unemployment Compensation Board of Review, 358 Pa. 224, 56 A. (2d) 254, 259. And it has been held that the word 'fault' as used in the declaration of policy is not limited to something that is blameworthy, culpable or wrong. Moulton v. Iowa Employment Security Commission, 239 Iowa 1161, 34 N. W. (2d) 211. In Walter Bledsoe Coal Co. v. Review Board of Employment Security Division, 221 Ind. 16, 46 N. E. (2d) 477, 479, the court said: 'Appellees say that the word "fault" means "something worthy of censure". We cannot believe that the word as used in the statute was intended to have such a meaning. * * * Thus "fault" must be construed as meaning failure or volition.' "

In the case of Hyman v. South Carolina Unemployment Security Commission, et al., 234 S. C. 369, 108 S. E. (2d) 554, this Court held that where a claimant files an application for unemployment compensation benefits, the burden is upon the claimant to show that he has met the benefit eligibility conditions. It was further held that findings of fact made by the Security Commission are conclusive and this Court will not review such findings except to determine whether there is any evidence to support such findings.

The Commission has found that all of the textile plants, including the Spartan Mills, operate six days per week. The six day work week schedule of Spartan Mills was put into effect on July 5, 1959. The appellant remained on her job after notice that such a schedule had been adopted requiring all employees to work six days per week, Monday through Saturday. The appellant did not quit her employment but was absent, without permission, for six Saturdays, and because thereof her employer had to employ a substitute to do her work on Saturdays.

The appellant testified that she was able to work but she was not available for work between sundown on Friday and sundown on Saturday because it conflicted with her religious belief as a member of the Seventh Day Adventist Church. She further testified that she would not accept any employ-

ment requiring work during this period of time. She further testified of making application to a number of other textile plants but since they all operated six days a week, she would not be interested in working in any of them. The appellant, being able to work, it must be determined whether she "is available for work" within the contemplation of the Unemployment Compensation Law.

The basic purpose of the requirement that a claimant must be available for work to be eligible for benefits is to provide a test by which it can be determined whether or not the claimant is actually and currently attached to the labor market, which in this case is unrestricted availability for work.

The case of Unemployment Compensation Commission v. Tomko, 192 Va. 463, 65 S. E. (2d) 524, was one in which unemployed miners, who were willing to work only three days per week, in obedience to labor union officers' directive, instead of five days per week, as was customary in mining industry, were held not available for work within the Unemployment Compensation Act of the State of Virginia, and hence were not eligible for unemployment benefits. We quote from the cited case, the following:

> "As used in the statute, the words 'available for work' imply that in order that an unemployed individual may be 'eligible to receive benefits' he must be willing to accept any suitable work which may be offered to him, without attaching thereto restrictions or conditions not usual and customary in that occupation but which he may desire because of his particular needs or circumstances. Stated conversely, if he is unwilling to accept work in his usual occupation for the usual and customary number of days or hours, or under the usual and customary conditions at or under which the trade [fol. 45] works, or if he restricts his offer or willingness to work to periods or conditions to fit his particular needs or circumstances, then he is not available for work within the meaning of the statute.
>
> "The courts have universally held that a claimant who undertakes to limit or restrict his willingness to work to certain hours, types of work, or conditions, not

> usual and customary in the trade, is not 'available for work.'"

In 81 C. J. S., Social Security and Public Welfare, Section 204, at page 304, it is said:

> "A claimant may render himself unavailable for work by imposing conditions and limitations as to his employment, so as to bar his recovery of unemployment compensation, since a willingness to be employed conditionally does not necessarily meet the test of availability. Accordingly, it has been held that a claimant who undertakes to limit or restrict his willingness to work to certain days, hours, types of work, or conditions, not usual in his occupation or trade, is not available for work."

The availability for work requirement has been said to be satisfied when an individual is willing, able, and ready to accept suitable work or employment, which he does not have good cause to refuse, that is, when he is genuinely attached to the labor market. Unemployment Compensation Commission of Virginia v. Dan River Mills, Inc., 197 Va. 816, 91 S. E. (2d) 642.

In the case of Judson Mills v. South Carolina Unemployment Compensation Commission, et al., supra, it was held that the claimant was unavailable for work where it appeared that, because of considerations personal to her, she became unavailable for employment on the third shift upon which she had been working. The claimant was a textile worker and the mother of four children. During her employment on the third shift a relative took care of her children and when such relative became unavailable for the care of the children the claimant quit her employment and limited her availability to either the first or second shifts. The lower Court and this Court concluded that the claimant was unavailable for employment within the meaning of the Unemployment Compensation Act and said there is "nothing in the Act itself or in the circumstances surrounding its passage to indicate an intention on the part of the Legislature to provide benefits for a worker compelled to give

up his job solely because of a change in his personal circumstances."

In the case of Hartsville Cotton Mill v. South Carolina Employment Security Commission, 224 S. C. 407, 79 S. E. (2d) 381, the claimant, a textile worker, and the mother of young children, limited her availability for work to the second shift. She had previously worked on the third shift but had let her cook go and had no one with whom to leave her children. This Court approved an order of the lower Court which held that the claimant's "unemployment did not result from the failure of her employer to provide stable employment, but arose out of a change in her domestic circumstances which rendered her unavailable for work. It must follow that while she is unavailable for work due to her own personal circumstances, she falls outside the class which the Act was intended to benefit."

In Kut v. Albers Super Markets, Inc., et al., 146 Ohio St. 522, 66 N. E. (2d) 643, app. dismd. 329 U. S. 669, 91 L. Ed. 590, 67 S. Ct. 86, reh. den. 329 U. S. 827, 91 L. Ed. 702, 67 S. Ct. 186, it appears that a claimant was employed as an order clerk and as a checker in a super market. His employment was terminated by his refusal to continue to perform the work assigned to him. He was referred to two companies, each of which was willing to employ him as a shipping clerk. However, each company refused to accept him for the reason that he refused to work on Saturday, which because of his religious beliefs, he observed as his Sabbath. He filed an application for unemployment compensation and benefits were disallowed because the facts established that the claimant was unavailable for work on any Saturday. The Supreme Court of Ohio affirmed the disallowance of unemployment benefits to the claimant, saying:

> "The statute does not designate particular days of the week. It provides that in order to be entitled to benefits a claimant must be 'able to work and available for work in his usual trade or occupation, or in any [fol. 46] other trade or occupation for which he is reasonably fitted.' Hence, he must be available for work on Saturday if this is required by his usual trade or occupation, as in this instance.

> "Is this provision of the statute a violation of the constitutional right to religious freedom or the right to equal protection of the law? The plaintiff, like everyone else, is free to choose both his religion and his trade or occupation. If in making these voluntary choices he renders himself unavailable for work in his chosen trade or occupation or in any other for which he is reasonably fitted, he, like everyone else who fails to comply with the statutory requirement, is not entitled to unemployment benefits. Hence, the statute is not unconstitutional."

Here, the appellant attempted to limit or restrict her willingness to work to certain days and a certain shift, not usual in the textile industry in the Spartanburg area. She attached restrictions and conditions upon her continued employment with Spartan Mills because of her own particular circumstances and religious creed. It is implicit in the record that it is usual and customary for the textile plants in the Spartanburg area to operate on Saturdays and work was required of their employees on said days. The refusal of the appellant to work on Saturdays did not arise out of anything connected with her employment but was due to the fact that she had become a member of the Seventh Day Adventist Church. Her adherence to the tenets and dogma of the Seventh Day Adventist Church is not blameworthy or censorable, but her election to join that church was a matter personal to her and arose in no respect out of her employment.

Section 68-114 (1) and (2) of the Code, authorizes the Commission, in its discretion, to impose a disqualification in any case where an employee leaves his work voluntarily without "good cause" or is discharged for "misconduct connected with his most recent work." Section 68-114 (3) of the Code, authorizes the Commission, in its discretion, to impose a disqualification if it finds that the insured worker has failed "without good cause" to either apply for available suitable work or to accept suitable work when offered him by the employment office or the employer. It is then provided that 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.

The undisputed testimony shows that the appellant had worked in the textile industry and for the Spartan Mills for thirty-five years. There can be no dispute that the appellant was experienced in the textile work in which the Spartan Mills was engaged. She was, therefore, capable and fitted to perform, by past experience and training, the work offered her by her employer.

In the case of Sweeney v. Unemployment Compensation Board of Review, 177 Pa. Super. 243, 110 A. (2d) 843, it was held that work offered mine workers which was identical with previous employment fell within the category of "suitable work" contained in statute providing that employee shall be ineligible for unemployment compensation for any week in which unemployment is due to failure, without good cause, to accept suitable work when offered to him by an employer. Likewise, in Hess Bros. v. Unemployment Compensation Board of Review, 174 Pa. Super. 115, 100 A. (2d) 120, it was held that work is "suitable work" within the meaning of the Unemployment Compensation Act disqualifying unemployment compensation claims for benefits for failure to accept offer of "suitable work" only if claimant is capable of performing the work.

In the case of Stone Mfg. Co. v. South Carolina Unemployment Security Commission, et al., supra, it was held that the words "good cause" as used in the Unemployment Compensation law contemplates, ordinarily at least, a cause attributable to or connected with claimant's employment. In the case of Gatewood v. Iowa Iron & Metal Co., 102 N. W. (2d) 146, it was held that under a statute disqualifying an employee for unemployment compensation benefits for voluntarily quitting his work without good cause attributable to his employer, the "good cause" for which an employee may voluntarily quit work must involve some fault on the part of the employer. In the case of Sun Shipbuilding & Drydock Co. v. Unemployment Compensation Board of Review, 358 Pa. 224, 56 A. (2d) 254, it was held that where an employee quits employment because habits of his fellow employees are distasteful to him, because work offends his [fol. 47] religious or moral principles, or because his family objects to the type of work, does not quit for "good cause" within the meaning of a provision of the Unemployment

Compensation Act that employees shall be ineligible for compensation where unemployment is due to voluntarily leaving work without "good cause". In the last cited case, the Court said: "A laudable motive for leaving employment and a 'good cause' within the meaning of the Act are entirely different things."

The appellant asserts that she should not be disqualified because Section 68-114, subdivision 3 (a), of the Code, requires that in determining whether or not work is suitable for an individual, the Commission shall consider the degree of risk involved to her morals. As is heretofore stated, it cannot be said that there is any unsuitability of work in the Spartan Mills in which the appellant has been engaged for thirty-five years, nor can there be any risk to her morals involved in that type of work. When the General Assembly provided that in determining whether any work is suitable for an individual, the Commission should consider the degree of risk involved to morals, it obviously had in mind work, the character of which would be morally objectionable to any employee. No matter what the faith or creed of the employee was, we think this is made crystal clear because the Commission was required to consider also the degree of risk to the health and safety of the employee. Certainly, this had application to the kind and character of work in which the employee was engaged. The appellant admits that the work she was called upon to perform in Spartain Mills is suitable work and does not involve any moral risk to her on any day except her Sabbath.

The appellant directs our attention to the cases of Tary v. Board of Review, 161 Ohio St. 251, 119 N. E. (2d) 56, and Swenson v. Michigan Unemployment Security Commission, 340 Mich. 430, 65 N. W. (2d) 709, and asserts that the holding in these cases should be controlling. We cannot agree with this contention for these two cases involve very different situations from that with which this Court is now confronted. In neither of these cases did the restrictions imposed by the claimants upon their availability for work have anything to do with the termination of their last employment. In neither case was it made to appear that the restrictions imposed by the claimants were inconsistent with the prevailing standard for similar work in the particular

area involved. In the Swenson case, the Court was careful to point out that the Seventh Day Adventists were organized as a religious denomination in 1863 in Battle Creek, Michigan, and there were thousands of Seventh Day Adventists in that city and the community provided them with full time employment. The fact that one of the claimants refused to work from sundown on Friday until sundown on Saturday had no connection with the termination of their employment, because the opinion definitely asserts that the claimants were unemployed "due to lack of work". A careful study of the Swenson case convinces us that the community in which the claimants worked had adjusted itself to the beliefs of the Seventh Day Adventists and the opinion indicates that the prevailing standard of employment in the locality was consistent with their beliefs.

The Tary case involved a claim for unemployment benefits by a Seventh Day Adventist who refused a job referral involving Saturday work. The Court held, in a four to three decision, that under the statute, as amended, since the decision in the Kut case above referred to, the claimant was not disqualified for benefits since her morals would be affected by having to violate her religious beliefs by working on her Sabbath. There was a strong dissenting opinion filed by Justice Hart, joined in by two other Justices. In our opinion, this dissent is logical and a realistic statement of the rule as we conceive it to be and we apply such to the factual situation here involved. We quote, therefrom, the following:

> "In my opinion, the suitability of the work here offered, so far as it related to morals, is not involved. If the work was properly suitable for another person as to morals, it was so suitable for the claimant so far as the character of the work itself was concerned. The claimant chose not to work because of a religious belief concerning the observance as the Sabbath of one of the days of the work-week period, which she had a perfect right to do. However, if she thus voluntarily disqualified herself on that account, she disqualified herself under the law to receive unemployment compensation for that same week period, including the day upon

> which she could not, because of religious belief, work in any event. Incidentally, the position of the claimant [fol. 48] reveals an odd type of conscience, the philosophy of which precludes her from working on Saturday but approves her seeking of compensation for that same day of unemployment."

Our attention is also directed to a decision of the Supreme Court of North Carolina, In Re Miller, 243 N. C. 509, 91 S. E. (2d) 241, as sustaining the position of the appellant. It appears that Imogene R. Miller was employed by Cannon Mills, Inc., and during the period of her employment she became a Seventh Day Adventist, and because thereof she would not work as a spinner between sundown Friday and sundown Saturday. The Employment Security Commission of North Carolina held that since the employee restricted her services as stated she was not available for work. The North Carolina Supreme Court held that if the interpretation applied by the Commission was correct, then "the rationale of the statute would seem to be that in order to be eligible for benefits a claimant must be 'available for work' at any and all times, night and day, Sunday and weekdays alike." If we placed this interpretation upon our unemployment compensation statute, such would be in conflict with Sections 64-4 and 64-5 of the Code, which makes it unlawful for an employer to require or permit an employee, especially a woman, to work in a mercantile or manufacturing establishment on Sunday, except as is provided in Section 64-6 of the 1952 Code.

The authorities cited and relied on by the appellant are either factually or legally distinguishable or are not considered controlling with us.

We conclude, in the light of the facts and circumstances of this case, that since the appellant was unwilling to accept work in her usual occupation for the usual and customary days and hours under which the textile industry works, and by restricting her willingness to work to periods or conditions to fit her own personal circumstances, then she was not available for work within the meaning of our Unemployment Compensation Law. Likewise, we find that the ap-

pellant failed to accept, without good cause, available suitable work offered her by her employer.

The appellant asserts that if this Court concludes, as we have hereinbefore, such construction violates her rights to religious freedom and to the equal protection of the laws guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and Article I, sections 4 and 5 of the South Carolina Constitution of 1895.

The right of a person to worship God in such manner and form as he may desire, with or without affiliation of any particular denomination or creed, is guaranteed by the Constitution of this State and by the Constitution of the United States.

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.

In Kuts v. Albers Super Markets, above cited, it was held that the Unemployment Compensation Act, when construed as not entitling one who refuses employment because of religious belief precluding Saturday work to benefits under the Act, is not unconstitutional as violative of constitutional right to religious freedom. It was further held that the allowance of unemployment compensation to one who refused employment because of religious belief precluding Saturday work, would be unconstitutional as discriminating in favor of such person. Cf. Carolina Amusement Co. v. Martin, 236 S. C. 558, 115 S. E. (2d) 273.

It is our conclusion that the decision of the South Carolina Employment Security Commission, as affirmed by the Circuit Court, was correct.

The exceptions of the appellant are overruled and the judgment of the lower Court is affirmed.

Taylor, C. J., and Lionel K. Legge and William L. Rhodes, Jr., Acting Associate Justices, concur. Bussey, A. J., dissents.

[fol. 49] Bussey, A. J. (dissenting): It is with reluctance that I find myself unable to concur in the majority opinion herein and feel conscientiously compelled to state my dissenting views thereabout. With only minor exceptions the facts are rather fully set forth in the majority opinion. I shall add thereto only the following facts.

It was stipulated by the parties that the decision of this court in the instant case shall control and be binding in the case of Sally W. Lloyd against the respondents, the issues in that case being the same as in the instant case. It appears from the record that the appellant and the said Sally W. Lloyd were the only two Seventh Day Adventists in the Spartanburg area who were unemployed at the time of the hearing.

From World War II until June 5, 1959 work on Saturdays at Spartan Mills was optional with all employees. When appellant was notified on June 5, 1959 that commencing June 6, 1959 she would be required to work on Saturday, she acquainted her employer with her religious beliefs and declined to report to work on Saturday. There is no question as to her conscientious adherence to the teaching of her church that the Sabbath day begins at sundown on Friday and ends at sundown on Saturday, during which time Seventh Day Adventists do not perform work or labor of any kind. Thereafter, she continued to work for six weeks on the same, identical schedule that she had been working prior to the notice, and then was separated by the employer because of her refusal to work on Saturday. There is nothing in the record to indicate that she had been other than an exemplary employee for thirty-five years and the evidence is that she had never even been reprimanded for any misconduct. Prior to her separation from employment, the employer used a substitute for appellant when and as needed on Saturdays.

Appellant's claim for unemployment compensation benefits was filed on July 29, 1959, and up until the time of the hearing before the claims examiner, she had not been able to find other work, although she had applied for work at three other textile plants in the Spartanburg area, but had been unable to find employment since these plants, like most but not all other textile plants in the area, were at the time

operating six days a week, including Saturdays. It appears that a new employee of a textile plant generally is required to work on either the second or third shift, either of which would require work beyond sundown on Friday, and, therefore, it is difficult, if not impossible, for appellant to obtain new shift work, even in a textile plant operating on a five day week, which would not conflict with her Sabbath.

However, the record shows that the appellant was available for the very same work which she had been doing for many years prior to her discharge, and that she was able, willing and available for work in the textile industry or for any other available, suitable work which did not require her to violate her Sabbath. The fact, supported by the record, is that Seventh Day Adventists, including the appellant, are available for work in the labor market generally in the Spartanburg area. The record shows that there are approximately one hundred fifty Seventh Day Adventists in that area and that all of them, with the exception of the appellant and Sally Lloyd, were, at the time of the hearing, gainfully employed but not working on their Sabbath.

Although the exceptions are several in number, there are only two exceptions which I deem necessary for this court to decide, they being as follows:

1. Was the appellant able and available for work within the contemplation of the South Carolina Unemployment Compensation Law?

2. Was the appellant discharged for misconduct connected with her work within the contemplation of the South Carolina Unemployment Compensation Law?

The answers to both of these questions involve the construction to be placed upon various sections of the South Carolina Unemployment Compensation Law, the pertinent provisions of which are set forth in the majority opinion and will not be repeated here.

[fol. 50] This court recognized that the statutory law under consideration is to be liberally construed in order to effect its beneficent purpose. Stone Manufacturing Co. v. South Carolina Employment Security Commission, 219 S. C. 239, 64 S. E. (2d) 644. The precise questions here in-

volved have not been passed upon by this court. However, for several reasons, little difficulty is involved in arriving at what I deem to be the correct answer to the first question. The instant case is clearly distinguishable from that line of cases wherein an employee is held to be ineligible because the employee has quit work for purely personal reasons totally unrelated to the employment. The appellant here did not quit her employment of long standing and made no change in connection therewith which resulted in her discharge. She was faithfully discharging her duties, just as she had for thirty-five years, in compliance with what had been the established practice of her employer for some fourteen years, and in keeping with her established, sincere and conscientious religious belief. The employer, on the other hand, made the decision to stop the practice of using a substitute, when needed, for the appellant on Saturdays, and forced her to thereafter either work in violation of her Sabbath or be discharged.

In the cited personal convenience case of Judson Mills v. South Carolina Unemployment Compensation Commission, 204 S. C. 37, 28 S. E. (2d) 535, the opinion of then Circuit Judge Oxner, adopted by this court, contains the following statement:

> "I am constrained, therefore, to conclude that in order to be entitled to benefits under the act the unemployed individual must be *able to and available for the work which he or she has been doing.*" (Emphasis added.)

The opinion in that case quoted with approval from the opinion in Brown-Brockmeyer Co. v. Board of Review, etc., 70 Ohio App. 370, 45 N. E. (2d) 152, 155, the following language:

> "In our judgment subdivision 1 is applicable and determinative under the facts of the instant case. This means capable and available for the work she had been doing."

Here the appellant was admittedly able to do and available for the work which she had been doing for many years,

but which work the employer decided to change to a schedule which conflicted with her Sabbath.

Even if the foregoing be not a sufficient answer to the first question, it must be borne in mind that the provisions of Secs. 68-113 and 68-114, being in pari materia, have to be construed together. Sec. 68-113 prescribes basic conditions which have to be met in order to qualify for benefits, while Sec. 68-114 enumerates a series of disqualifications; together they provide the overall formula governing the right to benefits. To make a claimant eligible only in the event he is willing to accept work without any limitation whatsoever, but to disqualify him under Sec. 68-114 only in the event he should refuse to accept "suitable work" would fix it so that the disqualification would be meaningless since a person willing to take only "suitable work" would always be ineligible in the first instance by virtue of Sec. 68-113.

There is a presumption against inconsistency and where there are two or more statutes on the same subject, in the absence of an express repealing clause, they are to be harmonized and every part allowed significance, if it can be done by any fair and reasonable interpretation. Locke v. Dill, 131 S. C. 1, 126 S. E. 747; First Presbyterian Church of York v. York Depository, 203 S. C. 410, 27 S. E. (2d) 573. I, therefore, conclude that the words "available for work" and "able to work and is available for work" as used in the statute mean "able to work and is available for *suitable* work" in the same sense as the words "suitable work" are used in Sec. 68-114.

Section 68-114 (3) (a) expressly commands the Commission to consider the degree of risk involved to one's morals in determining whether or not work is suitable for a particular individual.

It is urged by respondents that when the legislature made the provision about "risks to morals" it had in mind only work the character of which would be morally objectionable to any employee regardless of the moral or religious beliefs of the particular employee. This contention is answered [fol. 51] by the specific provisions of Sec. 68-114 (3) (a) which uses the words *"suitable for an individual,* the Commission shall consider the degree of risk involved to

his * * * morals." (Emphasis added.) This clearly shows that the legislature intended that the Commission should take into consideration the moral risk involved to the particular claimant, rather than applying the test of what might or might not be morally objectionable to claimants collectively or to the public in general. It might not be amiss to point out that there is far from a unanimity of opinion on moral issues and that it would be exceedingly difficult, if not impossible, to say in all instances just what would or would not offend the morals of the public in general. It may very well be that the legislature had these fundamental facts in mind when it adopted the specific language of the statute making the risks to the morals of the individual claimant the test.

The respondents further urge that the statute in its entirety must, of course, be construed in the light of the evil which it sought to remedy, and in the light of conditions obtaining at the time of its enactment. They contend that the factual situation here does not bring this case within the evils sought to be remedied by the enactment of the statute, it being shown that one of the principal objectives of the statute was to "provide more stable employment." They argue that claimant's separation from her employment did not result from the failure of industry to provide stable employment.

Here, the claimant enjoyed stable employment provided by industry, one employer, for a period of thirty-five years, and moreover, stable employment which did not conflict with her religious beliefs. The appellant, in 1959, made no change in her religious faith which led to her discharge, nor did she attach any new condition to her stable employment of many years duration. The decision, the change, was made by the employer when it elected to no longer put a substitute in appellant's place on Saturdays, as it had done in the past. The only change or decision made by anyone at or near the time of appellant's separation from her employment was made by the employer and not by the employee. The employer simply elected not to continue to provide the particular employee the stable employment which had been provided for years.

Moreover, the general language of the declaration of policy contained in Section 68-36 is in the nature of a preamble to the specific provisions of the Act and the specific language of Sec. 68-114 is a very definite limitation on the provisions in the preamble. Johnson v. Pratt, 200 S. C. 315, 20 S. E. (2d) 865.

The precise issues involved in this appeal have not previously been before this court. However, the question of whether or not a Seventh Day Adventist is to be deprived of unemployment compensation benefits because of refusal to work on Saturday has been before the Supreme Courts of Michigan, Ohio and North Carolina, all of whom have decided the issue favorably to the contention of the appellant here. No appellate court decision to the contrary has come to my attention.

It is stated in appellant's brief and not challenged by the respondents here that the vast majority of State Commissions which have considered the problem under discussion have decided in favor of claimants such as the appellant here. Reference is made in the brief of appellant to a publication of the Labor Department of the Federal Government entitled Benefits Series Service, Unemployment Insurance, available at the office of the South Carolina Unemployment Security Commission, according to which Service the States of Arizona, California, Colorado, Connecticut, Idaho, Illinois, Kansas, Maryland, Michigan, New York, Pennsylvania, Tennessee, Virginia, Washington and the District of Columbia have held administratively that persons who refuse to work on their Sabbath were not ineligible for benefits.

While none of these authorities is binding upon us, they strongly persuade me to the view that we should not lightly adopt or adhere to the position taken by the respondents here.

The North Carolina case of In Re Miller, 91 S. E. (2d) 241, is more nearly in point with the instant case than any other. That case arose in Rowan County, North Carolina, approximately one hundred miles from Spartanburg. Rowan County has a large textile industry and there was a finding of fact that 95% of the job openings in the textile plants [fol. 52] of the area would require work in violation of the

Seventh Day Adventist Sabbath. The claimant was a Seventh Day Adventist and was discharged by Cannon Mills because she would not work on her Sabbath, and she was denied benefits on the theory that she was not "available for work." The North Crolina statute is substantially identical with the South Carolina statute. On the facts and statute law almost identical with those in the present case, the North Carolina court had the following to say:

> "We do not undertake to formulate an all-embracing rule for determining in every case what constitutes being 'available for suitable work' within the meaning of G. S. Sec. 96-13. The phrase is not susceptible of precise definition that will fit all fact situations. Necessarily, what constitutes availability for work within the meaning of the statute depends largely on the facts and circumstances of each case. However, we embrace the view that work which requires one to violate his moral standards is not ordinarily suitable work within the meaning of the statute. And necessarily the precepts of a religious belief to which one conscientiously and in good faith adheres is an essential part of one's moral standards. Therefore, where, as here, a person embraces a religious faith, the tenets and practices of which impel her to treat as her true Sabbath the period from sundown Friday until sundown Saturday, and to refrain from all secular work during this period, it would offend the moral conscience of such person to require her to engage in secular work during such period.
>
> "We conclude that to have forced the claimant to work on her Sabbath would have been contrary to the intent and purpose of the statute, G. S. 96-13. The claimant, by refusing to consider employment during her Sabbath, did not render herself unavailable for work within the meaning of the statute."

The Supreme Court of Michigan, independently of the morals provision in its statute, which incidentally is substantially identical with that of South Carolina, held Seventh Day Adventists to be entitled to benefits in the case of Swenson v. Michigan Employment Security Commission,

340 Mich. 430, 65 N. W. (2d) 709. In that case it was contended that certain claimants were not entitled to benefits because they stated in their applications for benefits that they could not work from sundown on Friday to sundown on Saturday because they were Seventh Day Adventists. The Supreme Court of Michigan, sustaining the lower court in reversing the Commission and holding these claimants entitled to benefits, said:

> "The law is designed to apply to all situations within its contemplation and the Commission's attitude, if upheld, would completely exclude thousands of citizens of this State from the benefits of the act. That could never have been the intent of the legislature; nor should we so construe the act as to accomplish that result."

The Supreme Court quoted with approval the following from the trial judge in that case:

> "'To exclude such persons would be arbitrary discrimination when there is no sound foundation, in fact, for the distinction, and the purposes of and theory of the act are not thereby served. Seventh Day Adventists, as a matter of fact, do not remove themselves from the labor market by stopping work on sundown Friday and not resuming work until sundown Saturday, as is apparent from the reason that employers do hire them.'"

While admittedly Seventh Day Adventists are no doubt more numerous in the State of Michigan than they are in the State of South Carolina, and there are before us in the record no figures as to the total number thereof in this State, it does clearly appear that there are approximately one hundred fifty of them in the Spartanburg area alone, all of whom are gainfully employed, other than the individuals concerned with this appeal. In addition to Seventh Day Adventists, there are, of course, many other citizens who conscientiously celebrate Saturday as the true Sabbath and it cannot be said that the legislature in the passage of the Unemployment Compensation Law had any intent or purpose to discriminate against these persons. Just as was the case in Michigan, these persons have not removed them-

selves from the labor market as is apparent in that virtually all of them are employed.

[fol. 53] In the Ohio case of Tary v. Board of Review, etc., 119 N. E. (2d) 56, the claimant was employed until termination on November 11, 1949, and at no time during her period of employment was she required to work on Saturday. She applied for unemployment benefits are received benefits until she was referred for employment which would have required her to work half a day on Saturday. She refused to accept such employment because of her being a Seventh Day Adventist. The Supreme Court held her entitled to benefits and pointed out the fact that the General Assembly of Ohio by a 1949 amendment had adopted a statutory provision, almost identical with the provisions of our Sec. 68-114 (3) (a), dealing with risk to the morals of the individual. In that decision the court distinguished its earlier decision in Kut v. Albers Super Markets, Inc., 66 N. E. (2d) 643, decided prior to the 1949 amendment, and one of the principal authorities relied on by the respondents here.

All of the above cited cases are, in my judgment, extremely well reasoned, logical decisions and of strong persuasive force with us.

The majority opinion seeks to distinguish these cases, but in my humble opinion, they are not truly distinguishable, bearing in mind that the various sections of our law, being in pari materia, have to be construed together. The North Carolina case is, on the facts and the law, identical with the instant case.

The recent case of Texas Employment Commission, et al. v. Hays, 353 S. W. (2d) 924, did not involve a religious or moral issue, but strongly supports the position of the appellant here independently of the moral issue. In that case a high school student was available for employment on a very limited schedule but was available for work in suitable part time employment under the same part time employment conditions under which he had previously acquired his right to unemployment benefits. The court held that he was entitled to benefits. The holding there is entirely in keeping with the test of availability as laid down by this court in the Judson Mills case, the test being whether the claimant was available for the same work which he had been doing.

The respondents here cite no case in point from this or any other jurisdiction which sustains their position, but would urge this court to disregard the great weight of authority in other jurisdictions and adopt, without precedent, a different rule in South Carolina. They rely principally upon the cases of Stone Manufacturing Co. v. South Carolina Employment Security Commission, supra, and Judson Mills v. South Carolina Unemployment Compensation Commission, supra, and the Ohio case of Kut v. Albers Super Markets, Inc., supra. In addition, the majority opinion cites Hartsville Cotton Mill v. South Carolina Employment Security Commission, 224 S. C. 407, 79 S. E. (2d) 381.

The South Carolina cases are clearly distinguishable. They involved situations where women claimants had voluntarily quit the work which they had been doing for laudable but entirely personal, family reasons, unconnected with any religious belief, and in neither instance were they still available for the same work which they had been doing. Here, appellant has been constantly available for the very same work which she had been doing for a long time before she was discharged and was, and is, still, available for any other work, her only limitation being that she would not work on her Sabbath. The appellant here is not unemployed as a result of any decision on her part which removed her either from her previous employment or the labor market generally.

In the Kut case the claimant was an Orthodox Jew who had been employed five days a week and was transferred to a position which required him to work on his Sabbath, to which he objected. His employer then offered to return him to his former position which required no work on his Sabbath and Kut declined, thus voluntarily making himself unavailable for the same work he had been doing all along, and it was on this basis that the Supreme Court of Ohio was unanimous in denying him the right to benefits. At the time of the Kut case, Ohio did not have the equivalent of our Section 68-114 (3) (a) in its statutory law, which fact is specifically pointed out in Tary v. Board of Review, supra.

The language quoted in the majority opinion from the Kut case, supra, is, in my humble view, obiter dictum and was clearly so regarded by two members of the Ohio Su-

[fol. 54] preme Court, it being totally unnecessary in that case to go any further than the simple basis upon which the Supreme Court was unanimous in denying Kut the right to benefits.

The cases of Unemployment Compensation Commission v. Tomko, et al., 192 Va. 463, 65 S. E. (2d) 524; Unemployment Compensation Commission of Virginia v. Dan River Mills, Inc., 197 Va. 816, 91 S. E. (2d) 642; Sweeney v. Unemployment Compensation Board of Review, 177 Pa. Super. 243, 110 A. (2d) 843; Hess Bros. v. Unemployment Compensation Board of Review, 174 Pa. Super. 115, 100 A. (2d) 120; Gatewood v. Iowa Iron & Metal Company, 102 N. W. (2d) 146, and Sun Shipbuilding & Dry Dock Co. v. Unemployment Compensation Board of Review, 358 Pa. 224, 56 A. (2d) 254, are all clearly distinguishable from the instant case, and, in my humble opinion, are simply not in point of the facts.

I shall not attempt to review the factual situations in each of said cases here, but do wish to point out that the case of Sun Shipbuilding & Dry Dock Co. v. Unemployment Compensation Board of Review, supra, involved no issue of an employee quitting because habits of his fellow employees were distasteful to him, because the work offended his religious or moral principles, etc., and any language thereabout in the opinion of the Pennsylvania court is pure obiter dictum. The facts of that case were simply that the claimant had quit his job solely because he wanted to go into business for himself, in which he failed, and the court simply held that he had forfeited his status as an employee by said action and was, therefore, not entitled to benefits.

With respect to the second question, what has heretofore been said largely disposes of the same. The respondents contend that appellant was discharged for misconduct connected with her work. The evidence shows that she was discharged solely because she would not work on her Sabbath. Since appellant was available for work within the contemplation of the statute, she was not disqualified because she refused to accept work which was unsuitable within the purview of the statute. Therefore, her refusal to perform such work at the direction of her employer was not miscon-

duct connected with her work within the contemplation of the South Carolina Unemployment Compensation Law.

In addition to the foregoing questions, the appellant contends that the ruling of the Commission and the lower court violated the right of claimant to religious freedom and equal protection of the laws guaranteed by the first and fourteenth amendments to the Constitution of the United States and Article I, Sections 4 and 5 of the South Carolina Constitution of 1895.

The majority opinion disposes of these questions by saying that our Unemployment Compensation Act places no restrictions upon the appellant's freedom of religion and by relying upon the obiter dictum language in the per curiam opinion from Kut v. Albers Super Markets, supra. This disposition of the constitutional questions does not, to my mind, squarely meet the issues. The appellant does not contend that the Act in itself in any sense is unconstitutional, but does contend that the construction placed thereon by the Commission, the lower court and the majority opinion, is in violation of her constitutional rights to both religious freedom and equal protection of the laws. It is worthy of note that in addition to two members of the Ohio Supreme Court, the United States Supreme Court regarded the language in the per curiam opinion in the Kut case dealing with the constitutional issues as nothing more than obiter dictum. The United States Supreme Court refused to consider the constitutional questions in the Kut case solely on the ground that the State court's decision was based on a nonfederal ground adequate to support it, the nonfederal ground being that Kut was denied benefits because he refused to return to his former employment where no violation of his Sabbath was involved. 329 U. S. 669, 91 L. Ed. 590, 67 S. Ct. 86.

In my view, this case would be correctly disposed of by reversing the order of the lower court to the end that the cause might be remanded to the South Carolina Employment Security Commission with direction that an award be made to the claimant in accord with the views hereinabove expressed. If we so disposed of the case, there would be no constitutional questions involved. In view, however, of the decision of the majority, the constitutional questions are,

of course, still present. I shall not here discuss at length or attempt to decide these constitutional questions but do feel that they are serious enough to require very full consideration before deciding to affirm the judgment of the lower court.

[fol. 55]
IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Appeal from Spartanburg County
Honorable J. Woodrow Lewis, Judge

ADELL H. SHERBERT, Appellant,

against

CHARLIE V. VERNER, ED. H. TATUM, ROBERT S. GALLOWAY, SR., as members of South Carolina Employment Security Commission and SPARTAN MILLS, Respondents.

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES—
Filed August 15, 1962

I. Notice is hereby given that Adell H. Sherbert, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of South Carolina, affirming the decree of the Court of Common Pleas for Spartanburg County, dated and entered in this action on May 17, 1962.

This appeal is taken pursuant to 28 U. S. C. Sec. 1257(2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) Transcript of record filed in the Supreme Court of South Carolina.

(b) Opinion of the Supreme Court of South Carolina.

(c) Judgment of the Supreme Court of South Carolina.

(d) This notice of appeal.

(e) Certificate of the Clerk of this Court certifying the portions of the record covered by this designation.

III. The following questions are presented by this appeal:

[fol. 56] 1. Whether the eligibility requirement of the South Carolina Unemployment Compensation Law (Section 68-113, 1952 Code of Laws of South Carolina as amended) that a worker be "available for work" as construed and applied to appellant under the circumstances of this case to hold her not "available for work" and hence ineligible for unemployment benefits because she refused to work on her Saturday Sabbath after her employer changed her to a six-day week and because, after discharge, she was unwilling to apply for, or to accept, employment that would require her to work on her Sabbath, sun-down Friday to sun-down Saturday, in violation of her religious conviction and the tenets of her denomination, that work on such Sabbath is forbidden by God—Whether the statute, as so construed and applied to appellant and the facts of this case:

(a) Violate the guarantee of religious freedom contained in the First Amendment as absorbed into the Fourteenth Amendment to the Constitution of the United States; or

(b) Violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether the South Carolina Unemployment Compensation Law (Section 68-114, 1952 Code of Laws of South Carolina, as amended), providing for disqualification for unemployment benefits upon finding by the state Employment Security Commission that a worker—

(1) "left voluntarily without good cause his most recent work",

(2) "has been discharged for misconduct connected with his most recent work",

(3) "Has failed, without good cause . . . . (b) to accept available suitable work when offered him",

and further providing—

(3)(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,....

as here construed and applied to appellant under the same circumstances partially summarized in Question No. 1 so as to uphold her disqualification by the state Employment Security Commission upon review on appeal to the South Carolina Supreme Court:

(a) Violates the guarantee of religious freedom con-
[fol. 57] tained in the First Amendment as absorbed into the Fourteenth Amendment to the Constitution of the United States;

(b) Violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Dockery, Ruff, Perry, Bond & Cobb, By James O. Cobb, Charlotte, North Carolina.

Lyles & Lyles, By Frank A. Lyles, Spartanburg, South Carolina, William D. Donnelly, 1625 K Street N. W., Washington 6, D. C.

[fol. 58] Proof of service (omitted in printing).

[fol. 59] Clerk's certificate to foregoing transcript (omitted in printing).

[fol. 60]

SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—December 17, 1962

APPEAL from the Supreme Court of the State of South Carolina.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

December 17, 1962