

2001

# Mary Ann Turner v. Department of Employment Security and Board of Review of the Industrial Commission of Utah : Brief of Petitioner

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH  
DEC 5 1975  
BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

MARY ANN TURNER,

*Plaintiff,*

vs.

DEPARTMENT OF EMPLOY-  
MENT SECURITY AND BOARD  
OF REVIEW OF THE INDUS-  
TRIAL COMMISSION OF UTAH,

*Defendants.*

Case No.  
13395

DEFENDANT'S BRIEF

FILED

DEC 5 - 1974

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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MARY ANN TURNER,

*Plaintiff,*

vs.

DEPARTMENT OF EMPLOY-  
MENT SECURITY AND BOARD  
OF REVIEW OF THE INDUS-  
TRIAL COMMISSION OF UTAH,

*Defendants.*

Case No.  
13395

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## DEFENDANT'S BRIEF

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### NATURE OF THE CASE

This is a review by the Utah Supreme Court of the decision of the Utah Board of Review of June 25, 1973 which affirmed the decision of the Appeals Referee of April 19, 1974 denying unemployment benefits to the plaintiff from March 11, 1973, twelve weeks before expected date of childbirth, and continuing for six weeks after the date of childbirth. The decision of the referee had affirmed a determination of March 22,

1973 by the Department of Employment Security, Industrial Commission of Utah, establishing the foregoing disqualification. The basis for the denial of unemployment benefits was the legislative requirement in Section 35-4-5(h)(1), *Utah Code Annotated*, 1953, for such denial in the period shortly before and after delivery of the plaintiff's child.<sup>1</sup> Plaintiff challenges such legislative requirement under the Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States and under Article I Section 2 and Article IV Section 1 of the Utah Constitution.

### RELIEF SOUGHT ON APPEAL

Plaintiff seeks a declaration that Section 35-4-5(h)(1), *Utah Code Annotated*, 1953, is contrary to requirements of the United States Constitution and/or the Constitution of Utah, and an order for the payment of unemployment benefits in the amount of \$54.00 per week for the weeks of the disqualification period. Defendants seek an affirmation of the validity of the section.

### STATEMENT OF FACTS

The Agreed Statement of Facts submitted by the parties pursuant to Rule 75(o), *Utah Rules of Civil Procedure* is as follows:

<sup>1</sup> 35-4-5 "An individual shall be ineligible for benefits or for the purpose of establishing a waiting period:

(h) For any week (1) within the twelve calendar weeks prior to the expected date of such individual's childbirth and within the six calendar weeks after the date of such childbirth..."



1. The appellant duly filed a proper claim for unemployment benefits, had sufficient base period wage credits and was otherwise eligible, except for pregnancy disqualification at issue in the case.
2. The appellant was separated involuntarily from her work on November 3, 1972 for reasons unrelated to pregnancy. She was pregnant at the time, however, and the expected date of the birth of her child was established by her doctor as June 6, 1973. In application of Section 35-4-5 (h), *Utah Code Annotated*, 1953, she was disqualified by the Department of Employment Security on March 22, 1973, from receiving unemployment benefits for a period beginning March 11, 1973, twelve weeks preceding the expected date of childbirth, and continuing for six calendar weeks after the date of childbirth. The disqualification was affirmed by the Appeals Referee on April 19, 1973, and by the Utah Board of Review on June 25, 1973.
3. After filing her claim for unemployment benefits the appellant worked intermittently on call as a clerical worker for a manpower service.

## ARGUMENT

### Point I

SECTION 35-4-5 (h) (1), UTAH CODE ANNOTATED, 1953, DOES NOT VIOLATE THE

EQUAL PROTECTION CLAUSE OF THE  
FOURTEENTH AMENDMENT OF THE CON-  
STITUTION OF THE UNITED STATES.

- a. THE SUBJECT OF THE SECTION IS  
NOT AN "INHERENTLY SUSPECT  
CLASSIFICATION" AND, THERE-  
FORE, IS NOT ONE REQUIRING RE-  
VIEW UNDER AN EXCEPTIONAL  
STANDARD OF CLOSE JUDICIAL  
SCRUTINY.

A threshold question in this case on the Federal constitutional issue is as to the standard of judicial scrutiny to be applied to the challenged section of the Utah statute.

In certain limited subject fields the United States Supreme Court has held statutory classifications to be "inherently suspect" and thus subject, according to the Court, to a standard of strict judicial scrutiny. Such has been the treatment by the Court of classifications based upon (1) race, *Loving v. Virginia*, 388 U.S. 1, 11, 8 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 13 L. Ed. 2d 222, 85 S. Ct. 283 (1964); (2) national origin, *Oyama v. California*, 332 U.S. 633, 644-646, 92 L. Ed. 249, 68 S. Ct. 269 (1948); *Korematsu v. United States*, 323 U.S. 214, 216, 89 L. Ed. 194, 65 S. Ct. 193 (1944); and (3) alienage, *Graham v. Richardson*, 403 U.S. 365, 372, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971).

It is well established that, except for the very

limited “inherently suspect” categories, a legislative classification will be sustained upon court review unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest. *Jefferson v. Hackney*, 406 U.S. 535, 546, 32 L. Ed. 2d 285, 92 S. Ct. 1724 (1972); *Richardson v. Belcher*, 404 U.S. 78, 81, 30 L. Ed. 2d 231, 92 S. Ct. 254 (1971); *Flemming v. Nestor*, 363 U.S. 603, 611, 4 L. Ed. 2d 1435, 80 S. Ct. 1367 (1960); *McGowan v. Maryland*, 366 U.S. 420, 426, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961); *Dandridge v. Williams*, 397 U.S. 471, 485, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970).

In dealing with sex-related statutory classifications, the United States Supreme Court has shown a marked disinclination to treat these as “inherently suspect” and has not been prone to invoke strict judicial scrutiny. See *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 Harvard Law Review 1499 (1971); *Project Report: Toward an Activist Role For State Bill of Rights*, 8 Harvard Civil Rights — Civil Liberties Law Review 271, 305-307 (1973).

In *Reed v. Reed*, 404 U.S. 71, 76, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971), the Court unanimously applied the traditional “rational relationship” standard, stated above, to review and invalidate a clearly arbitrary preference for men over women in the Idaho probate law. However, the Court showed no inclination to use the case for broadening the standard of judicial review. In so holding, the *Reed* case cited *Royster*

*Guano Co. v. Virginia*, 253 U.S. 412, 64 L. Ed. 989, 40 S. Ct. 560 (1920).

In *Frontiero v. Richardson*, 411 U.S. 677, 36 L. Ed. 583, 93 S. Ct. 1764 (May 1973) the Court, much divided, invalidated a Federal statutory distinction in treatment accorded to military servicemen and service-women as to eligibility for dependent's allowances. The distinction was defended solely on the basis of administrative convenience. A plurality of four Justices (Brennan, Douglas, White, Marshall) held the statute not only to be an invidious discrimination (under the Fifth Amendment Due Process Clause) but also held the subject thereof to be "inherently suspect." Justice Stewart concurred only that the discrimination was invidious but not "inherently suspect." Justice Rehnquist dissented, and three Justices (Chief Justice, Powell, and Blackman) concurred only in the result, declining to hold sex classifications "inherently suspect" pending an expression of the will of the people on the Equal Rights Amendment now being considered by the states.

Following *Frontiero*, a case arose in the Supreme Court of Washington (state) similar to the present Utah case, *Hanson et al v. Hutt*, 83 Wash. 2d 195, 517 P. 2d 599 (January 1974). Claimants challenged the Washington State provisions denying unemployment benefits for seventeen weeks before and six weeks after the expected date of birth. The Court carefully followed the *Frontiero* case in holding, as that opinion had (though actually not by a majority), the sex classification to be "inherently suspect." Under the stan-

dard of strict judicial scrutiny thus invoked, the Court found insufficient "compelling state interest" to justify the classification and held it to be invalid under the Equal Protection clause of the Federal constitution and under the equivalent Privileges and Immunities clause of the State constitution.

Since *Hanson v. Hutt*, however, the United States Supreme Court has decided two additional sex discrimination cases under the Equal Protection clause of the Fourteenth Amendment, each in a manner clearly contrary to the departure made by the four prevailing justices in the *Frontiero* case.

In *Kahn v. Shevin*, ..... U.S. ...., 40 L. Ed. 2d 189, 94 S. Ct. 1734 (April 1974), the Court affirmed the Florida Supreme Court in upholding a tax exemption system discriminating in favor of widows and against widowers. Six members concurring (Brennan, Marshall, and White dissenting), the Court found the difference in treatment to be consistent with equal protection requirements since it rested upon a ground having a "fair and substantial relation to the object of the legislation" (helping to improve the relative economic status of widows). Upon this point the Court again cited *Reed v. Reed*, and *Royster Guano Co. v. Virginia*, and distinguished the *Frontiero* case as one in which the governmental interest was "solely for administrative convenience." (emphasis in original, Id., 411 U.S. 677 at 690).

Of more importance to the present case and of more distinct contrast to *Frontiero* is the latest U.S.

Supreme Court case, *Geduldig v. Aiello*, ..... U.S. ...., 41 L.Ed. 256, 94 S. Ct. 2485 (June 1974). The classification under review in that case as to compliance with equal protection requirements was a provision of the California unemployment compensation disability insurance statute, a supplement to the California unemployment insurance and workmen's compensation programs. The statute denies benefits to women for disability incident to normal pregnancy and childbirth, whereas it allows benefits for certain male sex linked disabilities including prostatectomy, vasectomy, circumcision, etc.<sup>2</sup>

In a seeming complete repudiation of the *Frontiero* position (so characterized by the dissent of Brennan, Douglas and Marshall) the Court (six members concurring) reversed a three-judge Federal district court and reemphasized the traditional standard of review. Declaring that a State "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" the Court observed that "*Particularly with respect to social welfare programs*, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point." *Id.* 94 S. Ct. 2485, 2491 (emphasis added). At this

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<sup>2</sup> §2626 California Unemployment Insurance Code provides: " 'Disability' or 'disabled' includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of mental or physical condition, he is unable to perform his regular or customary work. In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter." (emphasis added).

point the court quoted the *Dandridge* case: "The Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." 397 U.S. 471, 486-487.

Thus, it appears clear that if the *Hanson* (Washington) case were being decided at this time a different treatment would be proper, at least as to the standard of judicial scrutiny to be applied. The traditional "rational relationship" standard is still the applicable one, perhaps more firmly than ever in light of the very recent cases, and such is the standard which should be applied to the classification at issue in this case.

**b. UNDER THE OBJECTIVES AND PURPOSES OF THE UTAH EMPLOYMENT SECURITY ACT, THE STATUTORY DENIAL OF UNEMPLOYMENT BENEFITS SHORTLY BEFORE AND AFTER CHILDBIRTH IS SUSTAINABLE AS A RATIONAL EXPRESSION OF STATE POLICY.**

Assuming the proper standard of review for the unemployment insurance pregnancy disqualification is that set forth in the *Geduldig* case, i.e., whether the disqualification is rationally supportable, the Utah disqualification may be examined by analogy to the California provisions upheld in *Geduldig*. There are several points of similarity in the legislative rationale of the California provisions as observed by the Supreme Court and the rationale of the Utah pregnancy disqualification.

1. *Basis in insurance principles.* The Utah unemployment insurance program, as the name implies, is founded upon insurance principles — upon a legislative balancing of the employer contributions revenues to the fund and the selection of insured risk costs. Like the California program, Utah's unemployment insurance is self-supporting and does not draw upon general revenues of the state. Historically the program has had a close relationship between the scope of contributions coverage and benefits coverage and between the amount of employer contributions collected and the amount of unemployment benefits paid to workers.
2. *Benefits determination features.* The California and Utah acts both use for benefit determinations such features as weekly benefit amount, waiting week, maximum benefit duration, high quarter earnings, unemployment as a prerequisite, etc.
3. *Objectively definable basis of ineligibility.* In each act the basis of ineligibility (pregnancy) is objectively definable. As the Court observed in the *Geduldig* case, "Normal pregnancy is an objectively definable physical condition . . . lawmakers are constitutionally free to include or exclude pregnancy from coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." 94 S. Ct. 2485, 2492.



4. *Risk selection or exclusion.* Like California, Utah insures many unemployment risks, but not all such risks. Excluded in the Utah program (in addition to near-term pregnancies) are students, the disabled, pensioners (partially), the voluntarily unemployed, those unemployed for domestic reasons, fraud feasons, those unemployed by their own misconduct, strikers, etc.
5. *Similar basis as to coverage limitation.* The Court recognized that the California issue of coverage was *not* that pregnancy is either disabling or non-disabling, but rather that it is an endemic type of health condition excluded from the program. Similarly, the Utah unemployment insurance provisions do not require a finding that all pregnant persons are unemployable, but that near-term pregnancy is an endemic condition relating to employability and hence is not covered by the program.<sup>3</sup> On this point, the main thrust of plaintiff's brief appears to be that pregnancy *ought* to be covered, which determination is, of course, a legislative one. Pregnant persons are obviously neither all employable nor all unemployable.

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<sup>3</sup> That pregnancy impacts heavily upon employability and hence upon the length of benefit claimant status is evidenced by the fact that all female claimants having a benefit year ending the twelve months of July 1, 1973 to June 30, 1974, including those **not** disqualified for pregnancy drew unemployment benefits for an average of 15.3 weeks. Among these, the claimants disqualified for pregnancy, even **after** deduction of the period of pregnancy disqualification drew benefits for an average of 18.3 weeks.

The same may be said about students, pensioners, domestically unemployed, etc.

Perhaps the analogy could be extended further, but the foregoing examples may be sufficient to demonstrate the application of the *Geduldig* decision to the present case and to evidence the abundance of rational support for the legislative determinations as to the coverage of the Utah unemployment insurance program. As the Court concluded in the *Geduldig* case, "The State has a legitimate interest in maintaining the self supporting nature of its insurance program. Similarly, it has an interest in distributing available resources in such a way as to keep benefit payments at an adequate level . . . These policies provide an objective and wholly non-invidious basis for the State's decision not to create a more comprehensive insurance program than it has." 94 S. Ct. 2485, 2491-2492.

## Point II

THE STATUTORY SECTION DOES NOT VIOLATE EITHER ARTICLE I SECTION 2 OR ARTICLE IV SECTION 1 OF THE UTAH CONSTITUTION.

- a. THE STATUTORY SECTION IS VALID UNDER ESTABLISHED REQUIREMENTS OF THE EQUAL PROTECTION PROVISION OF ARTICLE I SECTION 2.

Since the pregnancy disqualification provisions are valid under the Federal equal protection requirements, there does not appear to be any reason they would be less so under the equal protection declaration found in Article I Section 2 of the Utah Constitution. If anything, the Federal provision might be construed as having a greater reach, since it is a specific proscription upon state government conduct whereas the Utah provision is part of a general declaration as to the source of governmental power and the continuity thereof.

Constitutional review of statutory provisions by this Court has been said to begin with the presumption of constitutionality, and the party asserting the unconstitutionality of a statute has the burden of proving his assertion, *Trade Commission v. Skaggs Drug Centers, Inc.*, 21 U. 2d 431, 446 P. 2d 958 (1968); *Norton v. Department of Employment Security*, 22 U. 2d 24, 447 P. 2d 907 (1968); *Justice v. Standard Gilsonite*, 12 U. 2d 357, 366 P. 2d 974 (1961).

In passing upon the constitutionality of statutes, the Utah Court has enunciated substantially the same standard of judicial review as that discussed with the Federal cases above, saying: "If from an analysis of the entire situation there appears to be any reasonable basis for the requirements imposed by the statute which is related to its purpose . . . the statute must be upheld" *Allen v. Merrill*, 6 U. 2d 32, 35, 305 P. 2d 490 (1956). More recently, in an equal protection case the Court declared, "There is no doubt that the questioned statute treats men and women differently. But there

is likewise no question but it may treat people differently, based on classification, so long as there is a reasonable basis for the classification, which is related to the purposes of the act, and it applies equally and uniformly to all persons within the class.” *Stanton v. Stanton*, 30 U. 2d 315, 318, 517 P. 2d 1010 (1974), citing *State v. Mason*, 94 U. 501, 78 P. 2d 920, 117 A.L.R. 330 (1938); and *Slater v. Salt Lake City*, 115 U. 476, 206 P. 2d 153, 9 A.L.R. 2d 712 (1949). The foregoing rationale, applied by this court in the *Stanton* case closely resembles a summarization of the rationale applied subsequently by the United States Supreme Court in the *Geduldig* case, its most recent case examining a sex-related statutory classification.

**b. ARTICLE IV SECTION 1 PERTAINS ONLY TO EQUAL TREATMENT OF MEN AND WOMEN IN RIGHTS OF SUFFRAGE AND DOES NOT PERTAIN TO OTHER RIGHTS.**

The plaintiff contends, finally, that Article IV Section 1 of the Utah Constitution extends, perhaps more broadly than the Equal Protection clause of Article I Section 2, equal civil rights to men and women and that this Section invalidates the unemployment insurance pregnancy disqualification provisions.

Article IV Section 1 states:

The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and fe-

male citizens of this State shall enjoy equally all civil, political and religious rights and privileges.

If it be assumed, *arguendo*, that Article IV Section 1 was intended to extend to *all* civil rights matters (which it undoubtedly was not) there is no reason to conclude that any greater right, pertinent to this case, could be extended than the guarantees of equal protection of the laws contained elsewhere in the State and Federal Constitutions.

More importantly, whether the foregoing assertion be correct or not, it appears clear from the history of the Section, the background of its adoption, and an interpretation of its language by rules of construction well established in Utah, that Article IV Section 1 refers only to rights of suffrage, i.e., "The rights of citizens of the State of Utah to vote and hold office . . ."

Article IV Section 1 is located in the portion of the Utah Constitution dealing with rights of suffrage and elections. The inclusion of this Section occasioned a monumental debate in the Utah Constitutional Convention of 1895 (*Proceedings, Constitutional Convention of Utah 1895*, Volume 1), a debate occupying nearly two weeks in the time of the convention and extending over more than 200 pages in the proceedings, *Id.* pp. 407-621. Nowhere in the debate, as reported in the proceedings, is reference made to the second sentence of Article IV Section 1 regarding equal "political, civil, and religious rights." The entirety of the discussion of the convention was focused upon the first sentence assuring to both sexes the equal right to vote and to

hold office. In presenting the Article to the convention, the Committee on Elections and Suffrage reported: "The Committee by this article have conferred upon women the right to vote and exercise *political privileges* equal with men." *Proceedings*, Id., p. 265. (emphasis added). The Article was adopted on April 8, 1895. *Proceedings*, Id., p. 804.

Thus, the intent of the framers of the Utah Constitution is clearly evident, to understand the entirety of Article IV Section 1 as pertaining only to elections and rights of suffrage.

In matters of statutory and constitutional construction the Utah Court has long followed and often applied the rule of *ejusdem generis*, or Lord Tenterden's Rule, as have most other courts. Among numerous Utah cases applying this rule have been *Townsend v. Board of Review*, 27 U. 2d 94, 493 P. 2d 614 (1972); *Frehner v. Morton*, 18 U. 2d 422, 424 P. 2d 446 (1967); *Heathman v. Giles*, 13 U. 2d 368, 374 P. 2d 839 (1962); *Hatch Co. v. Public Service Commission*, 3 U. 2d 7, 277 P. 2d 309 (1954); and *Dona-hue et al v. Warner Brothers Pictures Distributing Corp.*, 2 U. 2d 256, 277 P. 2d 177 (1954) (citing 28 *Corpus Juris Secundum* 1049). Used as aid in arriving at the true meaning of a writing, the rule is generally said by the Court to be that "when general words or terms follow specific ones, the general must be understood as applying to things of the same kind as the specific." *Townsend*, Id., at p. 96.

If the remarkable record of the Constitutional Convention should leave any doubt as to the intended narrow scope of the meaning of the second sentence of Article IV Seition 1, it appears clear that under the rule of *ejusdem generis*, the general terms "civil, political, and religious rights" therein are limited by the specific terms of the first sentence to matters pertaining to the right "to vote and hold office." It might be noted as to inclusion of the general term "religious" rights, that the issue of suffrage was very much of a religious issue during the Convention, the matter being characterized as dealing with a God-given right.

## CONCLUSION

Defendants respectfully submit that for the reasons stated above the provisions of Section 35-4-5(h)(1) are sustainable and valid under the applicable standards for judicial review as to constitutionality and are wholly consistent with the requirements of the United States Constitution and the Constitution of Utah.

Respectfully submitted,

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