

2001

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

Utah Supreme Court

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BRIEF

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OF THE STATE OF UTAH
BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

MARY ANN TURNER,

Plaintiff,

vs.

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

Defendants.

Case No.
13395

PLAINTIFF'S BRIEF

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TABLE OF CONTENTS

	<i>Page</i>
NATURE OF THE CASE	1
DISPOSITION MADE OF THE CASE IN THE LOWER CASE	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF THE FACTS	2
ARGUMENT	3
POINT I. SECTION 35-4-5(h), <i>UTAH CODE ANN.</i> , 1953, IS VOID UNDER ARTICLE I, SECTION 2 AND ARTICLE IV, SECTION 1 OF THE CONSTITU- TION OF UTAH	4
POINT II. SECTION 35-4-5(h), <i>UTAH CODE ANN.</i> , 1953 IS VOID BECAUSE IT IS A VIOLATION OF AMENDMENT 14 OF THE UNITED STATES CONSTI- TUTION	10
CONCLUSION	16
APPENDIX A	18

CASES CITED

Frontiero v. Richardson, 411 U.S. 677,
36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973) 11, 12, 14

	<i>Page</i>
Justice v. Standard Gilsonite Company, 12 Utah 2d 357, 363 P.2d 974 (1961)	8, 9, 10, 15
Kahn v. Shevin, U.S.40 L. Ed. 2d 189, 94 S. Ct. (1974)	15, 16
F. M. Lyman v. Enoch F. Martin, 2 Utah Reports, 136 (1877-1880)	4, 5
Reed v. Reed, 404 U.S. 71, 30 L. Ed. 2d, 225, 92 S. Ct. 251 (1971)	13, 14
S. S. Royster Guano Company v. Virginia, 253, U.S. 412, 415 64 L. Ed. 989, 990, 40 S. Ct. 560 (1920)	14
Stanley v. Illinois, 405 U.S. 645, 656, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972)	13

AUTHORITIES CITED

I. Official Report of the Proceedings and Debates of the Convention Assembled at Salt Lake City on the Fourth Day of March, 1895 to Adopt a Constitution for the State of Utah, 437-601	5
--	---

STATUTES AND REGULATIONS CITED

FEDERAL

Constitution of the United States, Amendment 5	13
Constitution of the United States, Amendment 14	13, 14, 15, 16
10 U.S.C., Sections 1072, 1076	11, 12
Equal Pay Act of 1973, 29 U.S.C., Section 206	11
37 U.S.C., Sections 401, 403	11, 12

	<i>Page</i>
Civil Rights Act of 1964, 42 U.S.C., Section 2000e-2	11

STATE

Utah Constitution, Article I, Section 2	4
Utah Constitution, Article IV, Section 1	4, 10
Employment Security Act, Utah Code Ann., Section 35-4-7	7
Employment Security Act, Utah Code Ann., Section 35-4-2	6
Employment Security Act, Utah Code Ann., Section 35-4-3	7
Employment Security Act, Utah Code Ann., Section 35-4-5	1, 3, 6, 7, 10
Utah Rules of Civil Procedure, Rule 75(O)	2

IN THE SUPREME COURT OF THE STATE OF UTAH

MARY ANN TURNER,

Plaintiff,

vs.

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

Defendants.

Case No.
13395

PLAINTIFF'S BRIEF

NATURE OF THE CASE

Plaintiff is claiming that Section 35-4-5(h) of the Utah Employment Security Act, which limits eligibility for employment compensation during pregnancy, is in violation of both the Utah and United States Constitutions.

DISPOSITION MADE OF THE CASE IN THE LOWER COURT

This is the first court hearing in this matter. The Department of Employment Security and Board of Industrial Review of the Utah Industrial Commission of Utah denied plaintiff employment compensation for twelve weeks preceding and six weeks following the birth of her child.

RELIEF SOUGHT ON APPEAL

Plaintiff requests that the statute, Section 35-4-5(h), be declared unconstitutional and void both under the Utah and United States Constitutions. Plaintiff further requests that the Department of Employment Security be ordered to pay unemployment compensation for which Mrs. Turner would otherwise have been eligible during the period twelve weeks preceding and six weeks following the birth of her child.

STATEMENT OF FACTS

The agreed statement of facts stipulated to by plaintiff and defendants in this case pursuant to Rule 75(O) of the *Utah Rules of Civil Procedure* are as follows:

The plaintiff duly filed a proper claim for unemployment benefits, had sufficient base period wage

credits and was otherwise eligible, except for the pregnancy disqualification at issue in the case.

The plaintiff 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 Ann.*, 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.

After filing her claim for unemployment benefits the appellant worked intermittently on call as a clerical worker for a manpower service.

ARGUMENT

I. SECTION 35-4-5(h), *UTAH CODE ANN.*, 1953, IS VOID UNDER ARTICLE I, SECTION 2 AND ARTICLE IV, SECTION 1 OF THE CONSTITUTION OF UTAH.

I. SECTION 35-4-5(h), *UTAH CODE ANN.*, 1953, IS VOID BECAUSE IT IS A VIOLATION

OF AMENDMENT 14 OF THE UNITED STATES CONSTITUTION.

I. SECTION 35-4-5(h), *UTAH CODE ANN.*, 1953 IS VOID UNDER ARTICLE I, SECTION 2 AND ARTICLE IV SECTION 1 OF THE CONSTITUTION OF UTAH.

Article I, Section 2 of the Constitution of Utah states:

All political power is inherent in the people; and all free governments are founded on their authority *for their equal protection and benefit*, and they have the right to alter or reform their government as public welfare may require. (Emphasis supplied.)

Article IV, Section 1 of the Constitution of Utah 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 female citizens of the state shall enjoy equally all civil, political and religious rights.* (Emphasis supplied.)

The question of fair and equal treatment of all persons whether male or female is one of deep controversy today. The issue of sex equality being one raised in the press and in public affairs generally. Utah faced and resolved the question of equal treatment for men and women at or before the time of statehood. As early as 1880 the Supreme Court of Utah in the case of *F. M. Lyman v. Enoch F. Martin*, 2 Utah Reports 136

(1877-1880) held that a provision requiring that men must be taxpayers to vote but women need not be was "obnoxious" to the equal protection requirements of the United States Constitution and struck the requirement that men must be taxpayers in order to vote. 2 Utah 146.

At the time of the Utah Constitutional Convention resulting in the Constitution of 1896 the issue of sexual equality was one of fierce and intense debate. The question arose again and again during the constitutional debates. See, e.g. *I Official Report of the Proceedings and Debates of the Convention Assembled at Salt Lake City on the Fourth Day of March, 1895 to Adopt a Constitution for the State of Utah*, 437-601. Considering the great debate and thought given the issue it can be safely assumed that the two sections of the Utah Constitution referring to equal protection and equal political rights contemplated full political and civil equality for women as well stated in Article IV, Section 1. Perhaps because of the express constitutional direction by which the government of the State of Utah has been governed for the last seventy-eight years Utah has not been visited by the bulk of litigation seeking to secure sexual equality under the law that has been seen in other states and at the federal level.

Now the issue has arisen because of the statutory anomaly in the Unemployment Compensation Act which limits unemployment compensation available to women who are pregnant.

Section 35-4-5(h) of the Utah Employment Security Act is explicit. Regardless of her competence and immediate ability to work no woman may be eligible for unemployment compensation for twelve weeks preceding or six weeks following childbirth. This statute was applied as the sole basis for denying Mrs. Turner unemployment compensation for that eighteen week period in 1973. Mrs. Turner was able to work and did work on a part-time basis as a Kelly Girl temporary employee. (R. 17-18) There is no question in the minds of plaintiff or defendants that the only obstacle to paying Mrs. Turner the unemployment compensation was Section 35-4-5(h) of the Utah Employment Security Act.

Plaintiff believes that the equal protection and equal civil rights section of the Utah Constitution make void this section of the Utah Code. Certainly plaintiff falls within the general scope of the unemployment compensation provisions of the Utah Employment Act. Section 35-4-2 of the act states its purposes.

Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Unemployment is therefore a subject of interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. . . . The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state re-

quire the enactment of this measure, under the police power of the state, for the establishment and maintenance of free public employment offices and for the compulsory setting aside of unemployment reserves to be used for the benefit of the unemployed person.

Appendix A presents economic data showing the large interest women have in maintaining stable incomes of their own and the importance of those incomes to the State.

Benefits are payable only to individuals who have become eligible for such by contribution of his employer to the fund. Utah Employment Security Act, Section 35-4-7. Benefits are paid in part in proportion to the amount contributed — that is, the amount of work performed by the potential recipient before unemployment. Utah Employment Security Act, Section 35-4-3. Other than the exemption for pregnancy and childbirth the conditions for eligibility for benefits all rest upon the applicant's refusal to work or, in the provision for discharge for misconduct, negligence and incompetent work. The causes for ineligibility, other than pregnancy and childbirth, are:

1. Voluntarily leaving work.
2. Discharge for misconduct.
3. Failure to apply for or accept work.
4. Strikes if the applicant is a member of a grade, class, or group of workers who were found to

be party to a plan or agreement to foment a strike.

5. Willful false statements concerning material facts relative to eligibility.
6. Seeking or receiving benefits in another state.
7. Registering at or attending an established school.
8. Voluntarily leaving work for marriage unless the person so leaving has demonstrated the desire to work and availability for work.
9. When applicant is receiving wages in lieu of notice, dismissal or separation, vacation or terminal leave payment.

The situation created by the statute is such that even if a woman is the financial support of the family and her income is requisite for the stability of the family as referred to in the policy statement of the Act, even if she is completely capable or working, willing to work and actively seeking employment, the mere fact of the proximity of childbirth automatically renders her ineligible for unemployment compensation.

The Utah Supreme Court has established a test for equal protection. In *Justice v. Standard Gilsonite Company*, 12 Utah 2d 357, 363 P.2d 974 (1961) this Court said that there must be a reasonable justification in fact for a law which provides penalties for some employers for failure to pay wages due and excludes banks

and mercantile houses from the penalty provision. In that opinion, written by Chief Justice Wade and concurred in by Justices Henroid and Callister with a concurring opinion by Justice Crockett the Court applied the reasonable basis test in a precise, factual way. Considering first banks and then mercantile houses the Court concluded that while there might be some factual dissimilarities between such employers and other employers they were not sufficient to render the purposes of the act inapplicable to banks and mercantile houses and thus the distinction was unconstitutional. In Justice Crockett's concurring opinion the rule is summarized in a more general way. First, the classification must be uniform so that all who fall within the same class are effected alike. Pregnant women who are in the class of people ready, able and actively seeking work who have worked for a sufficient period to accrue benefits under the Unemployment Compensation System are not treated in the same way that other persons are. Second, Justice Crockett states the rules of classification must bear some reasonable relationship to the objectives sought to be accomplished by the statute. The objectives sought to be accomplished by the statute are to alleviate the economic burdens of unemployment and maintain the stability of the family and of the community. Certainly a family or a woman who is a head of a household is not given greater stability and ability to function in the community by being deprived of unemployment compensation at the critical and expensive period surrounding the birth of a child. By the tests

set out by the Court in *Justice v. Standard Gilsonite Company*, Section 35-4-5(h) of *Utah Code Ann.*, 1953 is unconstitutional and should be declared void.

In the case of possible denial of equal protection on the basis of sex, which this must be since only women can be declared ineligible under Subsection h, the Constitution of Utah gives even more express instructions. Section 1 of Article IV of the Constitution provides both male and female citizens of Utah equal enjoyment of all civil rights and privileges. Whether a right or a privilege, unemployment compensation is a civil benefit conferred by the state upon its citizens. Civil is defined by Black's Law Dictionary as pertaining or appropriate to a member of a free political community or relating to the community or to the policy in government of the citizens and subjects of the state. Civil right is more precisely defined as a right accorded to members of a district, community or nation. Again, the element necessary for a civil right or privilege is that it be conferred on the basis of membership in the community. The statutory protections and benefits granted by the Employment Security Act are conditioned upon the potential recipient's being a member of the community. It is in the community's interest that those benefits be conferred. Section 1, Article IV of the Constitution is explicit. Those rights and privileges may not be extended unequally on the basis of sex.

II. SECTION 35-4-5(h), UTAH CODE ANN., 1953 IS VOID BECAUSE IT IS A VIOLATION

OF AMENDMENT 14 OF THE UNITED STATES CONSTITUTION.

After many years the federal courts have come to recognize the essential element of equal protection which was explicitly contained in the Utah Constitution in 1896 and in decisions of the Utah Supreme Court for as much as 16 years prior to that. Discrimination in the application of state laws on the basis of sex is a basic violation of the elements of due process. Even excluding cases decided under the *Civil Rights Act of 1964*, 42 U.S.C., Section 2000e-2, and the *Equal Pay Act of 1963*, 29 U.S.C., Section 206, the United States Supreme Court has come to accept the wisdom perceived so many years ago by the Constitutional draftsmen and Supreme Court Justices of Utah.

In the case most directly useful for the considerations of Mrs. Turner's situation the Supreme Court struck down provisions which established different proof requirements for servicemen and servicewomen seeking dependents pay for their spouses. In *Frontiero v. Richardson*, 411 U.S. 677, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973) Justice Brennan wrote an opinion which is a useful explication of the applicability of the 14th Amendment to laws having an unequal effect upon men and women. The statutes in question in *Frontiero* were statutes providing that uniform service members could obtain increased quarters allowances and medical and dental benefits for spouses claimed as dependent. 37 U.S.C., Sections 401, 403 and 10 U.S.C. Sections

1072, 1076. Under these statutes a serviceman may claim his wife as a dependent without regard to whether she is in fact dependent upon him for any part of her support. On the other hand, a servicewoman, in order to claim her husband as a dependent, must demonstrate that he is in fact dependent upon her for over one-half of his support. The Court struck down the statutory qualifications on treating husbands as dependents. Several elements of Justice Brennan's opinion have a familiar ring to one who has read the Utah Constitutional provisions discussed in Point I of this Argument. The government argued that "As an empirical matter, wives in our society are frequently dependent upon their husbands, while husbands rarely are dependent upon their wives." Thus, the matter of administrative convenience, relieving all husbands from the burden of showing that their wives are financially dependent upon them for more than half of their income, saves administrative work and, presumably, pays dependents benefits to a hopefully small number of wives who are, in fact, not financially dependent upon their husbands for over half their support. The same argument could apply to the unemployment compensation statute presently under consideration. Just as some wives may provide half or more of their own support, some women may be unable to work within twelve weeks before and six weeks following childbirth. But the administrative convenience of automatically excluding all women from access to these benefits cannot outweigh the constitutional right to equal protection whether provided in the

14th Amendment or the Due Process Clause of the 5th Amendment. As the Supreme Court said in *Stanley v. Illinois*, 405 U. S. 645, 656, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972) :

The Constitution recognizes higher values than speed and efficiency.

If the argument supporting Subsection h of Section 34-4-5 is that it is in the public benefit to support women's ineligibility for unemployment compensation the Equal Protection Clause bears even more heavily against the statute. The only effect Subsection h has is to deny a woman unemployment compensation during this period, She may still be, and to qualify under the Act must still be, ready, able and actively seeking employment. She is thus not encouraged to stay in the home, but penalized financially for her pregnancy at a time when economic stress upon the family must be greater than normal. No man would be denied unemployment compensation on the basis that he was to become a father within twelve weeks or had become a father within the last six. The concept is absurd. Certainly there is no justification sufficient to satisfy the equal protection clause in penalizing a woman for her pregnancy.

Chief Justice Burger's opinion in *Reed v. Reed*, 404 U.S. 71, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971) provides another explication of the applicability of the Equal Protection Clause of the 14th Amendment to differences based upon sex. In the *Reed* case the stat-

ute in question was an Idaho statute giving preference in appointment as Administrator of an estate to any male candidate otherwise equally entitled to the position with any female candidate. The Court held that, since women may be issued letters of administration for purposes of probate under circumstances where there is no male "otherwise equally entitled" that treating men and women, equally entitled to letters of administration, differently solely on the basis of sex is a criteria wholly unrelated to the objective of that statute. By analogy to the Turner situation if women were always denied unemployment compensation then denying a woman such compensation when she was close to term would not by itself be a violation of the Equal Protection Clause of the United States Constitution. However, the statute recognizes the need to pay unemployment compensation to women who are qualified just as to men who are qualified. Singling out pregnancy as a basis for denying unemployment benefits is a process not reasonably related to the objective of the statute and thus is constitutionally defective. The holdings of the *Reed* and *Frontiero* cases can best be summarized in the language of Justice Pitney in *S. S. Royster Guano Company v. Virginia*, 233 U.S. 412, 415, 64 L. Ed. 989, 990, 40 S. Ct. 560 (1920).

[A classification] must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

In other words, the Supreme Court of the United

States has adopted precisely the test adopted by the State of Utah in *Justice v. Standard Gilsonite Company*, 12 Utah 2d 357.

One recent United States Supreme Court opinion appears, on its face, to weaken the long standing rule that the Equal Protection Clause applies to differing treatment by the state based upon sex alone. A Florida statute grants widows but no widowers, an annual \$500.00 property tax exemption. A widower applied for the exemption but was denied because the statute provides the benefit only for widows. He sought declaratory judgment that the exemption was violative of the Equal Protection Clause because the classification widow was based upon gender. The Florida Supreme Court found the classification valid because it had a fair and substantial relation to the object of the legislation, that is, the reduction of the disparity between the economic capabilities of a man and a woman. The Supreme Court, in the opinion *Kahn v. Shevin*, U.S., 40 L. Ed. 2d 189, 94 S. Ct. (1974) upheld the Florida Supreme Court. The basis of the split decision upholding the Florida Supreme Court was the women's earnings are, on the average, so much less than men's earnings that a statute designed to partially relieve this disparity by discriminating in favor of a class of people otherwise disadvantaged was not in conflict with the Federal Constitution. 40 L. Ed. 2d 193. The differences between the *Kahn* case and the case before this Court are clear. Denying unemployment compensation to a woman dur-

ing a portion of her pregnancy and shortly after term does not serve to alleviate an already existing inequity but, assuming all the statistics given in the *Kahn* case, exacerbates that inequity. See Appendix A. It may be that under the Utah Supreme Court interpretations of equal protection such favorable legislation would be invalid under the Utah Supreme Court. That issue is not before the Court today. Where a statutory discrimination serves to magnify a defect in the social system, if any exists, it cannot possibly be justified on the basis of the Equal Protection Clause under *Kahn* or under any other interpretation of the Equal Protection Clause whether that interpretation be state or federal.

CONCLUSION

For the reasons above stated, plaintiff Mary Ann Turner urges this court to declare Section 35-4-5(h) of the *Utah Code Ann.*, 1953 to be void as a violation of the Utah Constitution and the 14th Amendment of the United States Constitution and to order the Department of Employment Security to pay Mrs. Turner those additional amounts of unemployment compen-

sation to which she would otherwise have been entitled.

Respectfully submitted this ~~22~~²³ day of August,
1974.

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APPENDIX A

(UTAH - 1970)

Employment status
and occupation

	Total	Women	Men	Women as percent of total
Civilian population	676,854	351,008	325,846	51.9
In civilian labor force	399,162	145,638	253,524	36.5
Employed	378,562	136,988	241,574	36.2
Unemployed	20,600	8,650	11,950	42.0
Not in labor force	277,692	205,370	72,322	74.0

Source: U. S. Department of Commerce, Bureau of the Census;
"Census Population: 1970. General Social and Economic Char-
acteristics, PC(1)-C46."

Refers to persons 16 years of age and over.

WOMEN WORKERS IN UTAH, 1970:

Nearly 8,700 women workers were unemployed in 1970, creating a 5.9 percent unemployment rate. The rate for men was 4.7 percent.

Two-fifths of all mothers of own children under 18 years of age were in the labor force in 1970, and these mothers represented 44 percent of the female work force. Almost 39,000 mothers with children 6 to 17 years of age only, or 53 percent of all such mothers in the population, were in the labor force. Nearly 25,000 mothers with children under 6, or 29 percent of those in the population, were workers.

About 20,000 families (8 percent of all families) were headed by women. More than half (52 percent) of the 5,804 women family heads with related children under 6 were workers. About 3,500 women with children under 6 headed families where incomes were below the poverty level; 35 percent of these women were workers.

(From the March 1974 Bulletin of the U.S. Department of Labor, Employment Standards Administration, Women's Bureau, Washington, D.C. 20210.)

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