1977

# Anita J. Robinson v. the Board of Review of the Industrial Commission of Utah : Defendant's Brief

Utah Supreme Court


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# IN THE SUPREME COURT OF THE STATE OF UTAH

ANITA J. ROBINSON,

*Plaintiff-Appellant,*

vs.

Case No. 15331

THE BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH,

*Defendant-Respondent*

## Defendant's Brief

**Appeal from a decision of the Appeal Referee of the Department of Employment Security, State of Utah, as upheld by the Board of Review of the Industrial Commission, State of Utah**


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# IN THE SUPREME COURT OF THE STATE OF UTAH

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*Plaintiff-Appellant,*

vs.

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THE BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH,

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## Defendant's Brief

### NATURE OF THE CASE

This is an action before the Supreme Court of the State of Utah pursuant to Section 35-4-10(i), Utah Code Annotated 1953, as amended, seeking judicial review of a decision of the Board of Review of the Industrial Commission of Utah, which denied Plaintiff unemployment compensation for a period of six weeks.

### DISPOSITION BY THE BOARD OF REVIEW

Plaintiff was initially allowed unemployment compensation without disqualification by a Department Representative. After a hearing resulting from an appeal by the employer, University of Utah, the Appeal Referee reversed the Department Representative and denied benefits for six weeks, from February 20, 1977, to April 2, 1977, on the grounds Plaintiff left work voluntarily without good cause. The Board of Review affirmed the decision of the Appeal Referee in Case No. 77-A-954, 77-BR-80, dated June 22, 1977.

## RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the decisions of the Board of Review and the Appeal Referee, and requests the Court to declare Section 35-4-5(a), Utah Code Annotated 1953, as amended, invalid insofar as it chills the exercise of religious and other freedoms guaranteed by the Constitutions of the United States and the State of Utah. Defendant seeks affirmance of the decision of the Board of Review and the Appeal Referee.

## STATEMENT OF FACTS

Plaintiff became employed with the University of Utah on September 21, 1976, as a secretary-stenographer. (R.0019, 0027, 0028, 0047) At the time of her hire the Plaintiff was also employed by the United States Bureau of Reclamation (R.0028), where she worked from 7:00 a.m. to 11:00 a.m., Monday through Friday. (R0024, 0028) The Plaintiff's workday at the University of Utah was to begin at 11:00 a.m. (R.0019) or 11:30 a.m. (R.0025) each day. Whenever Plaintiff worked overtime she was subsequently given overtime pay or compensable time off. (R.0029, 0037) Plaintiff's last day of actual work for the University of Utah was on January 31, 1977. She took leave without pay on February 1 and 3, 1977, and did not report for work on Februay 4, 1977. (R.0020) By letter dated February 3, 1977, Plaintiff was advised she would be terminated as of February 17, 1977, because of the unsatisfactory quality of her work. (R.0022) On February 7, 1977, Plaintiff verbally advised the Dean's Office where she worked that she would submit a letter of resignation. (R.0021, 0032)

Plaintiff had agreed at the time of her hire to work for the Bureau of Reclamation only until she qualified for placement on a permanent roster, a period of time expected to take about four months. (R.0019, 0022, 0029) Despite this agreement and the fact she actually commenced termination procedures with the Bureau of Reclamation, Plaintiff decided some time in December 1976 to retain her part-time employment with the Bureau rather than her full-time job with the University. (R.0040, 0041)

Although unemployment benefits were initially allowed without disqualification based on Plaintiff's statements, (R.0047) it was later found by an Appeal Referee that Plaintiff's

working conditions were not in violation of her working agreement or in any way substandard. (R.0018)

## ARGUMENT

### POINT I

THAT IN REVIEWING A DETERMINATION OF THE INDUSTRIAL COMMISSION UNDER THE EMPLOYMENT SECURITY ACT THE COURT WILL AFFIRM THE COMMISSION FINDINGS IF SUCH ARE SUPPORTED BY THE EVIDENCE.

The standard of review in unemployment insurance cases is well established. Section 35-4-10(i), Utah Code Annotated 1953; *Martinez v. Board of Review,* 25 Ut. 2d 131, 477 P. 2d 587 (1970). This court has consistently held that where the findings of the Commission are supported by evidence, they will not be disturbed. *Members of Iron Workers Union of Provo v. Industrial Commission,* 104 Ut. 242, 139 P. 2d 208. A reversal of an order of the Department denying compensation can only be justified if there is no substantial evidence to sustain the determination and the facts giving rise to a right to compensation are so persuasive that the Department's denial is clearly capricious, arbitrary, and unreasonable. *Kennecott Copper Corporation Employees v. Department of Employment Security,* 13 Ut. 2d 262, 372 P. 2d 987 (1962); *Gocke v. Wiesley,* 18 Ut. 2d 245, 420 P. 2d 44 (1966).

### POINT II

THAT THE EMPLOYMENT SECURITY ACT IS TO BE LIBERALLY CONSTRUED TO ACCOMPLISH ITS OBJECTS BUT SUCH RULE DOES NOT PERMIT AN EXTENSION OF UNEMPLOYMENT COMPENSATION TO ONE WHOSE INITIAL UNEMPLOYMENT MAY BE VOLITIONAL.

Section 35-4-5(a) of the Utah Employment Security Act, Utah Code Annotated 1953, as amended, provides:

> 5. An individual shall be ineligible for benefits or for purposes of establishing a waiting period: (a) For the week in which he has left work voluntarily without good cause, if so found by the commission, and for not less than one or more than the five next following weeks, as determined by the commission according to the circumstances in each case, provided that when such individual has had no bona fide employment between the week in which he voluntarily left such work without good cause and the week in which he filed for benefits he shall be so disqualified for the week in which he filed for benefits and for not less than one or more than the five next following weeks.

It is a generally acknowledged rule that Employment Security statutes are construed liberally to accomplish their purposes and objectives. However, in Utah and elsewhere the courts construe such statutes in a manner which distinguishes those petitioning as beneficiaries of the Act who become unemployed for reasons attributable to themselves. This court has previously pointed out that the purpose of the Employment Security Act is to assist the worker and his family in times when he is out of work *without fault on his part. Kennecott Copper Corporation Employees v. Department of Employment Security,* supra. The court has also noted that the underlying legislative intent of the various disqualifying provisions of the Act is that the Department is to determine a claimant's eligiblity for unemployment compensation by adhering to the volitional test, and declared the policy of the contributions provisions of the statute to be to establish financial reserves for the benefit of persons unemployed through no fault of their own. *Olaf Nelson Construction Company v. Industrial Commission,* 121 Ut. 521, 243 P. 2d 951 (1952).

This court has recently held that:

> The initial determination of "good cause," for voluntarily leaving employment is a mixed question of law and fact for the administrative agency. A claimant has the burden of showing good cause for leaving, when he voluntarily terminates suitable employment. "Good cause" has been defined as "such cause as would similarly affect persons of reasonable and normal sensitivity, and is limited to those instances where the unemployment is caused by external pressures so compelling that a reasonably prudent person, exercising ordinary common sense and prudence, would be justified in quitting under similar circumstances." *Denby v. Board of Review of the Industrial Commission of Utah,* (Utah) 567 P. 2d 630 (1977). (Citations omitted.)

There is no dispute as to the fact Plaintiff left her work with the University of Utah voluntarily. Although the employer sent a letter dated February 3, 1977, to Plaintiff advising she would be terminated as of February 17, 1977, (R.0022) Plaintiff had not appeared for work for the two prior days, (R.0020) and called the employer on February 7, 1977, verbally advising that she would submit a letter of resignation. (R.0021) Furthermore, at no point in her appeal has Plaintiff alleged her termination was a discharge rather than a voluntary quit. The question to be determined by this appeal is whether or not the Plaintiff had good cause in so leaving.

The applicable standards to determine "good cause" are standards of reasonableness, and the question of good cause is to be determined from the circumstances of each

individual case. *Stevenson v. Morgan,* 17 Or. App. 428, 522 P. 2d 1204, 1206 (1974); *Wilton v. Employment Division,* 26 Or. App. 549, 553 P. 2d 1071 (1976). That Plaintiff's reasons for leaving her employment under the particular circumstances of her case do not fall within the standards of "good cause" as set forth in the *Denby* case, supra, is evident from the record, as will be shown in Point III herein.

## POINT III

## THE FINDINGS OF THE BOARD OF REVIEW AND THE APPEAL REFEREE THAT PLAINTIFF LEFT WORK VOLUNTARILY WITHOUT GOOD CAUSE ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND ARE CONCLUSIVE.

a. THE BOARD OF REVIEW AND APPEAL REFEREE DID NOT ERR IN FINDING THAT PLAINTIFF'S OBJECTION TO SUNDAY WORK WAS NOT DUE TO A STRONG RELIGIOUS CONVICTION.

b. THE BOARD OF REVIEW AND APPEAL REFEREE DID NOT ERR IN FINDING THAT PLAINTIFF'S RIGHT TO VOTE WAS NOT INFRINGED BY THE EMPLOYER.

c. THE BOARD OF REVIEW AND APPEAL REFEREE DID NOT ERR IN FINDING THAT PLAINTIFF'S WORKING CONDITIONS DID NOT VIOLATE HER WORK AGREEMENT AND WERE NOT SUBSTANDARD.

d. THE APPEAL REFEREE AND BOARD OF REVIEW DID NOT ERR IN FINDING THAT PLAINTIFF FAILED TO PURSUE AVAILABLE GRIEVANCE PROCEDURES.

Plaintiff contends that she had good cause for leaving work on three grounds: (1) the employer infringed her fundamental right to freedom of religion; (2) the employer infringed Plaintiff's fundamental right to vote; and (3) Plaintiff was subjected by her employer to harrassment and unreasonable working conditions. Defendant concurs that any one of the foregoing conditions could, where existing in appropriate circumstances, constitute "good cause" for voluntarily leaving work, such as would justify a finding of eligibility for unemployment compensation.

### a. THE BOARD OF REVIEW AND APPEAL REFEREE DID NOT ERR IN FINDING THAT PLAINTIFF'S OBJECTION TO SUNDAY WORK WAS NOT DUE TO A STRONG RELIGIOUS CONVICTION.

A Department Representative found at the initial stage of Plaintiff's filing for benefits that she was required to work Sundays "against the conditions of her hire & rel.

conviction." (R.0047. See also Plaintiff's Brief, p. 10) That such a finding is not conclusive as to the Appeal Referee or Board of Review is evident from the fact that proceedings before the Appeal Referee and Board of Review are *de novo.* Section 35-4-10(b) and (d) (2), Utah Code Annotated, 1953, as amended. See also *Continental Oil Company v. Board of Review of the Industrial Commission of Utah,* (Utah) 568 P. 2d 727 (1977).

In contrast to the conclusion of the Department Representative that Plaintiff left work because she was required to work on Sunday in violation of the conditions of her hire and religious convictions, the Appeal Referee found that Plaintiff's objection to Sunday work was not motivated by a strong religious belief. Such a finding has ample support in the record.

There is direct testimonial evidence that at her initial employment interview Plaintiff agreed to work on Sundays. (R.0019) In addition the Plaintiff requested that she be allowed to work on one Sunday:

> Ms. Leininger: ". . . and then there was another Sunday that she wanted to work and said there was no problem, church or otherwise. And I said well now and I'd respected all the way through and anytime she didn't want to and she said no this was the time because she had been gone and she wanted to take a weekend and she'd be back and she'd like to work when it was quiet (sic)."
>
> Referee: "So this, then, this work on Sunday was at her option?"
>
> Ms. Leininger: "This was the agreement." (R.0029, 0030)

Plaintiff's testimony at the hearing is substantially the same, although she contended that the reason for asking to work on Sunday was so she could move to a new apartment that Saturday:

> Ms. Robinson: "Ok. For this reason I adjusted to her needs to have someone come in on the weekend and I came, or requested to come in on Sunday rather than Saturday, although this was still an inconvenience as I would to me because I still did not finish my moving since I had had to work on Sunday . . ." (R.0035)

Plaintiff explained her objection to Sunday work in the following manner:

> Referee: "Now then, uh, what is your objection to Sunday work?"
> Ms. Robinson "Ok, It's for religious purposes. I think that if the Lord had said has said it is a day of rest and I personally believe that no matter what religion we are, whether its, uh, a requirement of the church we go to, whether our church tells us to, I believe personally that it is a day of rest and shouldn't be used for work

Referee: "However, you had worked on Sundays before, had you not?"
Ms. Robinson: "No, I had not. I may have worked one other Sunday, and I, that may have been all. But, uh, I never did work any other Sundays." (R.0025)

In her five months of employment with the University of Utah, Plaintiff was asked to work one Sunday and requested that she be allowed to work another Sunday. (R.0035) Plaintiff was also asked to work Sunday, January 30, 1977, to which she agreed. However, she failed to appear for work. That her employer was not critical of the failure to work on Sunday in and of itself, but rather, because the failure typified an attitude on the part of Plaintiff, is evident from the record. (See letter dated January 31, 1977, by Dean Leininger. R.0024) Despite Plaintiff's protestations to the contrary, the Appeal Referee and Board of Review could have reasonably concluded from the foregoing evidence that Plaintiff's reluctance to work on Sunday was not motivated by strong religious conviction.

Furthermore, Plaintiff was aware of the grievance procedure available to her but failed to pursue the matter after contacting the Employee Relations Representative of the University, as will be more fully detailed at the conclusion of this Point.

In support of her contention of denial of religious freedom, Plaintiff cites *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963). As the applicability of *Sherbert* to the instant case is fully discussed in Point IV herein, further discussion will not be undertaken at this juncture.

b. THE BOARD OF REVIEW AND APPEAL REFEREE DID NOT ERR IN FINDING THAT PLANTIFF'S RIGHT TO VOTE WAS NOT INFRINGED BY THE EMPLOYER.

Plaintiff alleges an infringement of her right to vote. While the Appeal Referee made no specific findings as to this allegation, he could reasonably have concluded it was without merit in view of the facts that Plaintiff did vote on that particular occasion (R.0034) and that Plaintiff made no apparent effort to obtain time off from her morning employment. (R.0034) The Appeal Referee properly rejected Plaintiff's testimony that ". . . it would have been far too distance (sic) to travel and work at the University in the afternoon." (R.0034) in light of the Plaintiff's testimony that she was able to drive from the University to the polling place in less than ten minutes, and the testimony of Dean Leininger

that Plaintiff sometimes did not appear for work at the University until 1:30 or 2:00 p.m. (R.0031)

Had Plaintiff been delayed so as to have been unable to exercise her right of suffarage, she may very well have been justified in leaving the job. And, in fact, Plaintiff stated in a memorandum to the Board of Review:

> The point is that if I had not been able to vote (I made it at the last minute) I would have quit that very next day. (R.0012)

Plaintiff did not quit at that time, however, and did not even attempt to file a grievance, of which more will be said at the conclusion of this Point.

c. THE BOARD OF REVIEW AND APPEAL REFEREE DID NOT ERR IN FINDING THAT PLAINTIFF'S WORKING CONDITIONS DID NOT VIOLATE HER WORK AGREEMENT AND WERE NOT SUBSTANDARD.

Plaintiff's final factual allegation is that she left work because of harrassment and unreasonable working conditions. With respect to the charge of unreasonable working conditions, the record reflects that Plaintiff did indeed work odd hours as compared to the usual 8:00 a.m. to 5:00 p.m. workday which is common in the business community. She was also asked to work some weekends, as previously discussed. However, the unusual hours were, at least to a large extent, due to Plaintiff's request at her initial employment interview that she be allowed to work from 11:00 or 11:30 a.m. to 7:00 p.m. to accommodate a temporary part-time job. (R.0019, 0020, 0025, 0028, 0031) There were indeed occasions when Plaintiff was requested to work beyond 7:00 p.m. (R.0028, 0029, 0035, 0040) However, she did receive overtime pay or compensable time off, (R.0029, 0031, 0037, 0047) and such extra work was with her consent. (R.0031, 0032, 0037)

Relative to Plaintiff's complaint of harrassment, the record shows that Plaintiff did receive a letter establishing a thirty-day evaluation period, (R.0025), a letter concerning working hours and other matters, (R.0023) and a letter giving Plaintiff two weeks' notice (R.0022) There were also verbal discussions with Plaintiff about her work performance and tardiness. (R.0022) The evidence, taken as a whole, overwhelmingly supports the finding of the Referee and Board of Review that the working hours and conditions were not in violation of Plaintiff's working agreement or substandard. Indeed, the reason for the

letters to and discussions with Plaintiff were the result of inadequate performance by Plaintiff. In a letter dated as early as November 30, 1976, Plaintiff was advised:

> During the next 30 days, I will again be reviewing to see if your typing and shorthand improve as there have been several typographical and obvious spelling, grammar, etc., errors in some of the letters. I hope that such errors can be reduced and that the quality of your work will rather noticeably improve as well as the quantity of work . . . I have actually found that when you work on Saturday with me, and you have not worked an extra half day (your other position), that the quality of your work is better, as well as your attitude. I suspect that you are overcommitted and are finding it difficult to maintain two jobs and adjust to two settings. (R.0025)

Plaintiff's supervisor, Dean Leininger, summarized the relationship with Plaintiff in her testimony:

> Ms. Leininger: So that she was inconsistent on this and I think that we are constantly, I must say all our staff were constantly adjusting to her personal needs. Uh, we tried very hard to, uh, and I was hoping that with her skills and that maybe she could advance herself, but, uh, she was inconcistent all the way through. (R.0033)

Thus, there appears to be an abundance of evidence in the record showing that rather than harrassing Plaintiff, the employer made a prolonged, conscientious attempt to work with the Plaintiff by adjusting work schedules and having several discussions with Plaintiff, rather than terminating her earlier in the relationship.

### d. THE APPEAL REFEREE AND BOARD OF REVIEW DID NOT ERR IN FINDING THAT PLAINTIFF FAILED TO PURSUE AVAILABLE GRIEVANCE PROCEDURES.

It is undisputed that a claimant for unemployment compensation has good cause for leaving work when the facts disclose abridgment of religious freedom, denial of the right of suffrage, or undue harrassment. However, even where such conditions exist, it is first incumbent on a claimant to make some effort to resolve the problems before terminating from gainful employment. This court has previously held:

> Furthermore, in order to have good cause for leaving work, an employee with grievances about his employment must indicate an effort to work out the problems, unless he can demonstrate that such effort would be futile. *Denby v. Board of Review,* supra.

Plaintiff was aware of the grievance procedure available to her and even contacted the University Employee Relations Representative about her concern for working on Sunday.

(R.0032, 0039) Plaintiff contends that it would have been futile to continue with the grievance procedure, and quotes Plaintiff's testimony before the Appeal Referee to the effect that Plaintiff was given to believe she would still be required to work on Sundays. (See Plaintiff's Brief, pp. 9, 10.)

Plaintiff's testimony on this point is in direct conflict with that of Mr. Hubbard, the Employee Relations Representative for the University of Utah:

| | |
|---|---|
| Referee: | Fine. I think that pretty well covers the circumstances. Mr. Hubbard, do you have anything further you'd like to add? |
| Mr. Hubbard: | I really don't, in terms of, uh, basic issues involved, except to say that, uh, Anita called me, uhm. sometime before this February 4th date and complained of having to, uh, work on Sunday against her will. |
| Referee: | Uh-huh. |
| Mr. Hubbard: | And I said "well, uh, there is a, uh, law I believe that would, uh, support you, you know, that you don't have to work on Sunday if it is your Sabbath day, uh. I will research to find out, but in the meantime I'd like for you, if you wish to, uh, file a grievance, to put that grievance in writing so we can, you know." |
| Referee: | Did she ever reduce that to writing? |
| Mr. Hubbard: | No, she did not and, uh, in fact she called me at home, uh, on two occasions. One to further discuss the situation and a second time to say to me that she did not want to follow through on the grievance. |
| Referee: | Uh-huh. |
| Mr. Hubbard: | Uh, I could not really continue with claim of, uh, some kind of injustice or unfairness on the job without having something reduced to writing. That's not necessary, but in this situation, uh, because she was a probationary employee and she could be released with little or no cause, uh, I felt that it would be proper to have that in writing so that she will have a commitment on the record. (R.0032) |

Had Plaintiff in fact held the "strong belief" she alleges, it seems only reasonable that she pursue the grievance procedure available to her rather than giving up certain employment.

In support of her contention that such action would have been futile, Plaintiff relies on the case of *Glennen v. Employment Division,* (Or. App.) 549 P. 2d 1288 (1976). The *Glennen* case is directly in point because the Oregon Court of Appeals specifically held that the claimant therein failed to demonstrate an effort to work out problems would be futile, and therefore affirmed the denial of unemployment benefits. In weighing the testimony and relative interests of the two parties, the Appeal Referee in the instant case reasonably concluded that the Plaintiff failed to pursue the grievance by her own choice, and not

because she had been dissuaded from it.

The record is totally devoid of any evidence that Plaintiff attempted to pursue a grievance with respect to the occasion when she felt she was deliberately delayed in trying to vote, or with respect to the alleged harrassment. The record reflects only one occasion when Plaintiff inquired about the hours she was working:

> . . . She (plaintiff) wondered why she had to work until 7:30 or 8:00 and Ms. Lynch said that this was her arrangement to accommodate her other job and that she worked later because she started later and Ms. Robinson agreed (R.0020)

Based on the foregoing evidence the Appeal Referee rightly concluded that the Plaintiff made no effort to work out her alleged grievances and failed to demonstrate that such an effort would have been futile.

## POINT IV

## SECTION 35-4-5(a), UTAH CODE ANNOTATED 1953, AS AMENDED, IS NOT VIOLATIVE OF THIS CONSTITUTIONALLY PROTECTED RIGHTS OF SUFFRAGE AND FREEDOM OF RELIGION.

Plaintiff requests the court to declare invalid Section 35-4-5(a), Utah Code Annotated 1953, as amended, on the grounds said provision has a "chilling" effect on the exercise of religious and other freedoms. In support of this proposition, Plaintiff cites *Sherbert v. Verner,* supra. The *Sherbert* case arose when a member of the Seventh-Day Adventist Church was discharged by her South Carolina employer because she refused to work on Saturday, which is the Sabbath Day of her faith. Upon discharge, she filed for unemployment compensation and was denied benefits on the grounds she restricted her availability for work by refusing to work on Saturdays. The South Carolina Supreme Court found that, as a matter of law, the denial of benefits infringed no constitutional rights because it did not prevent her from observing her religious beliefs. The facts of the case were that appellant became a member of the Seventh-Day Adventist Church in 1957, when her employer did not require her to work on Saturday. In 1959 the employer imposed the requirement of Saturday work. It was specifically noted in the court's opinion that no challenge was made concerning the sincerity of the appellant's religious beliefs. See Footnote 1, 83 S. Ct. 1791.

The U.S. Supreme Court found that the decision of the South Carolina Supreme Court left the appellant no alternative but to either forego unemployment benefits or work on the day of her Sabbath;

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. (At 83 S. Ct. 1794.)

The court also found that the South Carolina statutory scheme exempted Sunday worshippers from being required to work on Sunday. (Although, see Footnote 3, 83 S. Ct. 1803.)

It is a basic rule of construction that legislative enactments and administrative regulations made thereunder are to be construed in such a manner as to preserve their constitutionality or validity. 16 *Corpus Juris Secundum,* Constitutional Law, Section 98. "Good cause" for leaving work has been interpreted to include a good faith leaving on religious grounds. *General Rules of Adjudication,* Voluntary Leaving, Section 90.

Defendant readily concedes that if Plaintiff *in fact* holds a sincere religious conviction which prohibits her by reason of conscience from working on Sunday, that a denial of unemployment benefits resulting from her refusal to work on Sunday would violate the free exercise clause of the First Amendment. Such a denial would also be contrary to the aforementioned interpretive rule. Thus, the issue in this regard is not whether Section 5(a) of the Utah Employment Security Act violates the free exercise clause of the First Amendment, but rather is there substantial evidence to support the finding of the Referee that Plaintiff's objection to Sunday work was not the product of a strong religious belief. The court in *Sherbert,* supra, did not consider the question of the sincerity of Appellant's religious belief because no question was raised concerning it. However, it must be considered that sincerity of religious belief, or lack thereof, can be an appropriate factual issue in such cases because to hold otherwise would permit any unemployment insurance claimant who chooses to voluntarily leave work to avoid the statutory penalty by claiming a religious privilege. For that reason the Department, in carrying out its administrative responsibilities by promulgating Section 90, Voluntary Leaving, of the *General Rules of Adjudication,* included the qualifying phrase "an individual who *in good faith* refuses or leaves employment. . . . " (emphasis added.) That the Department and this court may look beyond the claim of abridgement of religious freedom is clear. Although few cases could be

located on this point which directly involve unemployment insurance, one case in which unemployment benefits were allowed involved undisputed evidence of the claimant's sincerity of belief, as in the *Sherbert* case, supra. *Syrek v. California Unemployment Insurance Appeals Board,* 54 Cal. 2d 519, 354 P. 2d 625, 633 (1960). In the *Syrek* case the California Supreme Court explained the extent of its holding by saying:

> . . . . We do hold that when an applicant declines to take the oath and states his own conscientious objection to the taking, and there is no finding that his stated objection is a sham for the purpose of avoiding work or is otherwise false, the applicant may not be denied such unemployment insurance benefits as would otherwise be payable.

Several cases under the Universal Military Training and Service Act have considered the sincerity of the appellant's religious belief. The First Circuit Court of Appeals succinctly stated the issue in the case of *Weightman v. United States,* 142 F. 2d 188 (1944):

> By granting the favor of exemption from military service to conscientious objectors without requiring membership in a presently organized and well-recognized religious sect or organization whose existing creed forbids its members to participate in war of any form . . . Congress raised a serious practical problem for those entrusted with the administration of the Act because it required investigation of personal, not group beliefs — a matter which can easily be falsified without detection. If conscientious objectors should simply be excused from the burden of military duty cast upon other men . . . no doubt some, maybe many, men would falsely profess conscientious objections only to obtain the privileged status of exemption.

In a more recent Selective Service case the Second Circuit Court of Appeals found that an order for the appellant to perform alternative service by working in a hospital did not infringe the free exercise of religion because appellant had previously worked in a hospital. *United States v. Boardman,* 419 F. 2d 110, 113 (1969). Although these cases arose under a Federal statute involving the question of a compelling governmental interest, which is not alleged in the instant case, the analogy between the *Boardman* case and Plaintiff's case is readily apparent.

Finally, it should be noted that one alleging infringement of the First Amendment free exercise clause has the burden "to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Abington School District v. Schempp,* 374 U. S. 222, 223, 8 S. Ct. 1560 (1962); *Jones v. Butz,* (S. D. New York) 374 F. Supp. 1284 (1974). Thus, in the *Sherbert* case, supra, the court held that the State Supreme Court ruling forced

the claimant to choose between giving up her right to unemployment benefits or abandoning one of the precepts of her religion in order to accept work; in the instant case no such coercive effect exists because the Plaintiff agreed to work on one Sunday, requested to work on another Sunday, and failed to pursue grievance procedures available to her had she in fact wished not to work on Sunday for reasons of religion.

## CONCLUSION

The claim of Plaintiff that a denial of unemployment benefits violates the free exercise of religion clause of the First Amendment was properly rejected by the Appeal Referee and the Board of Review in the face of evidence that the Plaintiff's religious belief did not prevent her from agreeing to work on one occasion and actually requesting to work on another. The findings of the Board of Review and Referee that Plaintiff was not prevented from voting are supported by the evidence of record. The record also contains ample support for the finding the Plaintiff's working conditions were within the terms of the employment agreement, which terms were set in large part at Plaintiff's request because of her desire to maintain a second employment while working full time for the University of Utah, and that Plaintiff was not unduly harrassed by her employer.

Plaintiff by her own admission did not try to resolve any grievances she may have had through available grievance procedures and has failed to show that such an effort would have been futile. Therefore, the decision of the Board of Review should be affirmed and benefits denied accordingly.

RESPECTFULLY SUBMITTED,

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IN THE SUPREME COURT
OF THE STATE OF UTAH

ANITA J. ROBINSON,

Plaintiff-Appellant,

vs.

Case No. 15331

THE BOARD OF REVIEW OF THE
INDUSTRIAL COMMISSION OF UTAH,

Defendant-Respondent.

Addition of case authority to Brief
of Defendant, Board of Review of the
Industrial Commission, State of Utah

Add to Defendant's Brief, Page 14, immediately preceding the conclusion:

A case directly supportive of Point IV of Defendant's Brief (beginning at p. 11 thereof), and only recently decided, is Hildebrand v. Unemployment Insurance Appeals Board, 140 Cal Rptr. 151, 566 P. 2d 1297; Cert. denied U. S. Sp. Ct., 46 L. W. 3522 (2/21/78).

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed two copies of the foregoing Defendant's Brief to Lucy Billings, Utah Legal Services, 216 East Fifth South, Salt Lake City, Utah 84111, this _____ day of _____, 1977.

_____