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Recent Decision
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CONSTITUTIONAL LAW—FIRST AMENDMENT—FREE EXERCISE CLAUSE—EXPRESSION OF CULTURAL AND RELIGIOUS HERITAGE IS NOT GROUNDS FOR DENIAL OF UNEMPLOYMENT COMPENSATION

Petitioners [1] appealed from a decision of the Circuit Court of Hinds County, reinstating respondent's [2] eligibility to receive unemployment benefits. [3] Petitioner dismissed respondent from employment [4] within the school district for refusing to comply [5] with dress code regulations. [6] In contravention of the dress code, respondent wore a religious [7] and cultural headdress. [8] A Mississippi Employment Security Commission referee denied [9] respondent unemployment benefits for her ***224** alleged misconduct. [10] The Employment Security Commission Board of Review affirmed the referee's ruling. [11] The circuit court reversed the decision of the board. [12] On appeal, the Mississippi Supreme Court, *held*, affirmed. [13] State unemployment benefits under the Mississippi Employment Security Law may not be denied where an employee is dismissed for an expression of cultural and religious heritage. *Mississippi Employment Security Commission v. McGlothin*, 556 So. 2d 324, 329 (Miss. 1990).

The United States Constitution guarantees the explicit protection of an individual's free exercise of religion, which extends to both religious beliefs and religiously motivated expression. [14] The United States Supreme Court's early view of free exercise focused on the "belief"-"action" distinction, which originated in the first major free exercise case, *Reynolds v. United States*. [15] The Mormon petitioner in *Reynolds* claimed polygamy was his affirmative religious duty, even though federal law prohibited such conduct. [16] Chief Justice Waite of the Supreme Court interpreted the first amendment as depriving the government of ***225** legislative power over mere opinion, [17] while allowing the power to reach actions violative of social duties and good order. [18] After noting the traditional condemnation of polygamy, the Court sustained the application of federal law. [19] The Court analogized that the allowing of polygamy in the face of a law banning bigamy would raise religious doctrines above the law, effectively permitting every citizen to decide what laws will apply to himself. [20] The Court later adopted a more modern view [21] requiring the government to satisfy the burden of strict scrutiny analysis and first applied the new view to a free exercise case in *Sherbert v. Verner*. [22] In *Sherbert*, the appellant was a member of the Seventh-Day Adventist Church, whose teachings forbade working on Saturday, the Sabbath day of its faith. [23] After refusing to work on ***226** Saturdays, which resulted in her dismissal, [24] appellant subsequently filed a claim for unemployment compensation benefits. [25] The South Carolina Supreme Court held [26] that appellant was not placed in a category exempt from disqualification because the statute neither directly infringed upon the appellant's freedom of religion nor prevented her in the exercise of her freedom to observe religious beliefs. [27] On appeal, the United States Supreme Court reversed and held that the disqualification for benefits imposed a burden on the free exercise of religion. [28] The Court stated that the agency's ruling forced appellant to choose between following her religion and forfeiting benefits and directly penalized her Saturday worship. [29] Additionally, the Court determined ***227** that while the state was under no obligation to afford such an exemption, [30] conditioning availability of benefits upon the willingness of

an appellant to violate a religious principle effectively penalized the free exercise of her constitutional liberties.[31] The Court then stated that "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" of free expression.[32] Upon finding no such compelling interest, the Court held that the state could not constitutionally constrain a worker to abandon religious convictions when applying eligibility provisions.[33]

The Supreme Court adopted the standard of *Sherbert*, and did not seriously re-examine the doctrine announced until *Thomas v. Review Board of Indiana Employment Security Division*.[34] In *Thomas*, the focus was also on the free exercise clause in conjunction with a belief, but the issue centered around the type of belief.[35] Claimant asserted ***228** a conscientious objection to the nature of his employment loosely supported by religious beliefs.[36] Moreover, as the Indiana Supreme Court found in its denial of benefits, claimant's objection to his employment was based on neither a cardinal religious tenet nor even a uniform belief among Jehovah's Witnesses.[37] The Supreme Court of the United States considered the validity of Thomas's beliefs unnecessary and focused instead on the constitutional parameters of the case.[38] The Court concluded inquiry into his beliefs by stating that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit first amendment protection."[39] The majority determined the narrow function of the reviewing court to be whether ***229** an appropriate finding existed that petitioner "honestly believed that such work was forbidden by his religion."[40] Since the Court found that the appropriate findings were established at the hearing level, then the state must give the claimant unemployment benefits to avoid first amendment violation, unless a compelling state interest existed.[41] After examining two interests averred by the state, the Court concluded that even the combined interests did not outweigh the adverse effect of denial on the free exercise of religion.[42] Therefore, the Court determined that unemployment benefits must be awarded in light of the *Sherbert* doctrine.[43]

Five years later, the Court limited the scope of the preceeding cases in *Bowen v. Roy*.[44] Upon the appellees' refusal to recognize the social security number assignment in accordance with their Native American beliefs,[45] the Pennsylvania Department of Public Welfare terminated health and medical benefits and filed suit to diminish appellees' food stamp allowance.[46] On appeal,[47] the United States Supreme ***230** Court held constitutional the state requirement that individuals possess social security numbers for obtaining benefits, despite the claimants' religious belief that the number would impair the child's spirit.[48] The Court applied minimal scrutiny in ruling that the government had met its burden by demonstrating that the requirement was neutral and uniform in its application, and that the requirement was reasonable in promoting a legitimate public interest.[49] By reasoning that the statute failed to provide a "mechanism for individual exemptions," the Court held that the requirement exhibited no "hostility towards religion."[50] In conclusion, the majority noted that while the free exercise clause protected an individual from certain governmental impositions, ***231** the clause did not give an individual the authorization to impose on internal governmental procedure.[51] *Hobbie v. Unemployment Appeals Commission*[52] resolved the conflict surrounding circumstances where employers made no changes in working conditions, but the employee's newly changed religious beliefs prohibited compliance with formerly acceptable conditions.[53] In *Hobbie*, the employee notified her employer that her change in faith to Seventh Day Adventist would forbid her working on Saturday.[54] Upon her refusal to work and her subsequent termination,[55] Hobbie unsuccessfully applied for unemployment compensation.[56] On appeal, the Supreme Court abandoned the minimal scrutiny applied in *Roy* in favor of the earlier test of strict scrutiny.[57] The Court, in effectively destroying the distinction of *Roy*, ***232** broadened prior holdings by extending first amendment protection to employees whose changed religious convictions made their work incompatible.[58] The *Hobbie* decision, however, left open the question of what state interests would be compelling enough to override a legitimate claim to the free exercise of religion.[59]

The Supreme Court narrowed what is sufficient to constitute a compelling interest in *Frazee v. Illinois Department of Employment Security*.[60] The appellant in *Frazee* refused to accept a job position offered to him by a temporary job service, and this refusal gave rise to a denial of unemployment benefits.[61] The state court determined that the Sabbatarian reason for refusal did not constitute good cause for exemption from disqualification[62] because appellant did not belong to an established religious

sect, nor were his beliefs that of an established religious body. [63] On appeal, the Supreme Court reversed and remanded, rejecting the idea that one must respond to the dictates of a religious organization in order to claim first amendment protection. [64] ***233** The Court noted that although membership in a sect would simplify the identification of sincerely held religious beliefs, there was no doubt at the trial court level that the appellant was sincere in his belief. [65] The Court further stated that the requirement of a compelling state interest was not satisfied by the fact that Sunday work has become commonplace in today's society and was not sufficient to override a legitimate free exercise claim. [66]

In the instant case, the Mississippi Supreme Court first reasoned that since unemployment benefits were generally available to the involuntarily [67] unemployed, [68] then the state could not deny the benefit where the individual refused to forsake sincerely held religious beliefs. [69] In such a case, the state does not have an interest compelling [70] ***234** enough to overcome religious rights. [71] also, the court determined since first amendment protections do not require that the conduct be mandatory, by doctrine or teaching, [72] then the only requirement of the conduct is to be expressive of sincerely held religious beliefs. [73] The court added that since affiliation with a particular denomination is not a prerequisite to first amendment protection, then it was of little consequence that appellee did not meet with a religious group regularly. [74] Likewise, the court concluded since the first amendment does not require consistency in the conduct, [75] then appellee's selectivity in her conduct did not remove her from its protection. [76] Since the court found that appellee's conduct was constitutionally protected religious and cultural expression, then the Mississippi Employment Security Commission had no authority to deny her claim for benefits. [77]

***235** In a dissent, [78] Justice Dan Lee stated that since the decision being reviewed was that of the Employment Security Commission, then the proper standard of review was that the findings of the board "shall be conclusive, and the jurisdiction of said court shall be confined to questions of law." [79] He further noted that since the sincerity of the religious belief was at issue, [80] then the fact finder should answer this question. [81] Justice Lee asserted since the "truth" of a belief is unquestionable, then the significant question that remained was whether the belief was truly held. [82] Lee concluded that since the majority opinion rested on the assumption that appellee's belief was sincere, then the court ignored the scope of review and substituted its own opinion for that of the fact finder. [83]

The Mississippi Supreme Court in *McGlothin* consistently applied the constitutional doctrines set forth in United States Supreme Court precedent. [84] The Mississippi Supreme Court gave proper recognition to the strict scrutiny involved in the first amendment exercise of religion [85] and the compelling state interest necessary to override an infringement ***236** of that exercise. [86] The court also corroborated the Supreme Court's finding in *Frazee* that the sincerity of the religious belief is the paramount requirement for first amendment protection. [87] The policy reflected by *McGlothin* acknowledges the diversity of American culture and religion, which has been a resounding theme in American jurisprudence since the birth of the nation. [88] *McGlothin* reaffirmed the sanctity of free expression of religion, with minimal constraints only where proper proof of a compelling state interest is offered. [89] The court clearly announced that unemployment compensation is not excluded from first amendment protection even though there is no constitutional right to such benefits. [90] The Mississippi Supreme Court noted that the protection should extend to such benefits in light of their use as a tool to discourage, directly or indirectly, the free exercise of religious expression. [91] To hold otherwise in this case would contradict the express principles of the United States Constitution. [92]

Footnotes

1 Appellants were the Mississippi Employment Security Commission and Jackson Municipal Separate School District. Mississippi Employment Sec. Comm'n v. McGlothin, 556 So. 2d 324, 324 (Miss. 1990).

2 *Id.* Appellee Deborah McGlothin was a member of the original African Hebrew Israelites out of Ethiopia and served as an assistant teacher in the Jackson Municipal Separate School District. *Id.* at 325.

3 *Id.* at 327. The circuit court reinstated the appellee's eligibility to receive unemployment benefits after the appellant school district fired her and appellant commission denied unemployment benefits to appellee. *Id.*

4 *Id.* Appellee was initially assigned to McLeod Elementary, where she worked for two years prior to requesting transfer to Whitfield Elementary. *Id.* at 325. Appellee was terminated from employment while performing her duties at Whitfield Elementary. *Id.*

5 *Id.* Whitfield's principal, Kisiah Nolan, expressed displeasure with appellee's head wrap within the first year at Whitfield. *Id.* Appellee had previously worn the headdress at McLeod for two years without incident or reprimand. *Id.* The Whitfield school governance committee then convened and adopted a rule prohibiting the wearing of a headdress or blue jeans. *Id.* at 325-26. Appellee initially complied for fear of losing her job. *Id.* at 326. After attending a school sponsored multicultural workshop, appellee wore the headdress again. *Id.* McGlothin stated that multicultural diversity was acceptable and supported by the school system in the workshop, and she thereafter wore the garment, believing the district's position was to be more receptive to these items. *Id.*

6 *McGlothin*, 556 So. 2d at 325. The local school governance committee, which was composed of employees and others in the school environment, promulgated the dress code. *Id.* at 326 n.1. District Personnel Director George Terry could not say whether the action of the committee was directed at the appellee. *Id.*

7 *Id.* at 325. McGlothin wore berets and headdresses expressive of her religious and cultural heritage in the faith of the African Hebrew Israelites out of Ethiopia. *Id.*

8 *Id.* McGlothin wore the items "especially during times of spiritual growth" as a personal preference which gave her strength in accordance with her teachings of religion. *Id.*

9 *Id.* at 327. The referee denied the benefits because appellee wore headdresses as an expression of her religious and cultural heritage where it was not dictated by the Ethiopian religious culture. *Id.* Additionally, the referee based his decision on the fact that she was selective in wearing the head wrap and continued to do so even after being warned. *Id.*

10 *Id.* MISS. CODE ANN. §§ 71-5-513(A) (1972) defined "misconduct" and the Mississippi Employment Security Commission's referee paraphrased the word to mean: "[A]n act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, as disregard of the standard of behavior which an employer has the right to expect of an employee, or negligence indicating an intentional disregard of the employer's interest . . . ." *McGlothin*, 556 So. 2d at 332-33 (Lee, P.J., dissenting).

11 *McGlothin*, 556 So. 2d at 327. The board adopted the facts as found by the referee and affirmed his decision. *Id.*

12 *Id.* The circuit court reversed the board's affirmation on the grounds that appellee's conduct was protected under the first amendment free exercise clause. *Id.* The circuit court also found that both the fact appellee did not wear the headdress all the time and that the wearing of such was not mandated by her religion did not detract from the protection of the

first amendment. *Id.* Therefore, the trial court concluded that such conduct could not be construed as misconduct within the meaning of the statute. *Id.*

13 *Id.* at 331. The majority acknowledged the validity of first amendment free exercise of religion and stated that the clause protected the appellee's conduct. *Id.*

14 *See* Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (any punishment for religious belief prohibited); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (state may not regulate individual's conscience, religious belief, or membership in religious organization).

15 98 U.S. 145 (1878).

16 *Reynolds*, 98 U.S. at 161. The Court noted that at the trial level, petitioner proved that he was a member in the Church of Jesus Christ of Latter-Day Saints and a believer in its religious teaching. *Id.* Polygamy is a well documented part of Mormon teachings and scripture as an affirmative duty of the male Mormon to escape damnation in the hereafter. *Id.*

17 *Id.* at 162. The Supreme Court duly noted the initial point of inquiry: What exactly was the religious freedom guaranteed in the Constitution? *Id.* The majority also pointed out that a dangerous fallacy existed when the civil government was allowed to interfere in the religious opinions of men, as evidenced in colonial times. *Id.* at 162, 764; *see* Harris v. Harris, 343 So. 2d 762, 764 (Miss. 1977) (removal of child custody rights based on mother's religious belief in snake handling was violation of free exercise of religion); *see, e.g.*, Pepper, *Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309, 312 (constitutional inclusion of free exercise clause was due to recurring religious persecution).

18 *Reynolds*, 98 U.S. at 162. The Court approved governmental imposition on religion when principles became overt acts breaching peace and good order. *Id.* at 163; *see* Minersville School Dist. v. Gobitis, 310 U.S. 586, 588-89 (1940) (court rejected free exercise claim in conflict between flag salute requirement and religion).

19 *Reynolds*, 98 U.S. at 164. The Supreme Court pointed to the non-existance of polygamy in the Western world and condemned it as an offense against society over which the civil courts have cognizance to punish. *Id.* at 165. The evidence clearly led the Court to conclude that interpreting the constitutional provision protecting freedom of religion to include polygamy was impossible. *Id.*

20 *Id.* at 167. The Court stated that allowing religion to be superior to the law would result in the government existing only in name with no power to control its citizens. *Id.*; *see* King v. City of Clarksdale, 186 So. 2d 228, 230 (Miss. 1966) (ordinance that conferred unbridled discretion to official over public exercise of free expression was unconstitutional).

21 *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 628 (1943) (changed focus of conflict between flag salute requirement and religion from freedom of religion to freedom of expression). For years after *Reynolds*, the court gradually shifted parameters of what was protected under the religious free exercise clause to a broader reading, protecting more forms of religion than *Reynolds* would. *See id.* at 625-27; *see also* Gillette v. United States, 401 U.S. 437, 439 (1971) (religious objection to certain wars, but not to all wars, afforded no grounds for exemption from participation).

22 374 U.S. 398 (1963).

23 *Sherbert*, 374 U.S. at 399. The South Carolina textile mill changed the work week to include Saturday two years after the appellant's religious conversion. *Id.* at 399 n.1. At no time was the sincerity of appellant's religious beliefs challenged. *Id.*

24 *Id.* at 399. Subsequent to her discharge appellant sought similar work at area mills but found none which would afford her the opportunity to observe her Saturday religious convictions. *Id.* at 399 n.1.

25 *Id.* at 399-400. The South Carolina court summarized the relevant unemployment compensation laws to read: "[T]o be eligible for benefits, a claimant must be able to work . . . available for work; and, further, that a claimant is ineligible for benefits if . . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer . . . ." *Id.* at 400 & n.3 (paraphrasing 68 S.C. CODE § 68-1 to 68-404).

26 *Sherbert*, 374 U.S. at 401. The appellee Employment Security Commission denied the claim for benefits finding that appellant's restriction on employment brought her within the provision disqualifying her for benefits. *Id.* The trial court sustained the denial of benefits and the South Carolina Supreme Court affirmed that decision. *Id.*

27 *Id*. The United States Supreme Court noted that unavailability for work for some "personal reasons" was held to be a basis of disqualification for benefits. *Id.* at 401 n.4. Furthermore, the Court stated that where the consequences of the disqualification directly affect first amendment rights, every "personal reason" could not be a basis for legitimate disqualification. *Id*.; *see* Employment Div. v. Smith, 485 U.S. 660, 669-674 (1988) (discussion of what constitutes legitimacy in claims of religious free exercise); Messina v. Iowa Dep't of Job Serv., 341 N.W.2d 52, 57-58 (Iowa 1983) ("fighting words" were misconduct under unemployment compensation statute); Melody Manor, Inc. v. McLeod, 511 So. 2d 1383, 1385 (Miss. 1987) (employee's resignation because of economically unfeasible continuance excluded employee's receipt of benefits). *See generally* Note, *Constitution - Freedom of Religion - Religious Belief Protected Under Free Exercise Clause Though Not Shown to Be Derived from Cardinal Tenets of Common Faith*, 22 SANTA CLARA L. REV. 235, 235-45 (1982) (authored by Jeffrey H. Wong) (personal religious convictions not common to majority of faith).

28 *Sherbert*, 374 U.S. at 403-04. The Court noted that there was no difference between an indirect imposition on free expression of religion and that which is direct. *Id.* at 404. "[I]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as only being indirect." *Id.* (quoting Braunfield v. Brown, 366 U.S. 599, 607 (1961)).

29 *Sherbert*, 374 U.S. at 404. The Court found it readily apparent that appellant's declared ineligibility for benefits centered around the practice of her religion and was unmistakable pressure on her to forgo that practice. *Id.*

30 *Id.* The majority indicated that the state court's construction of the statute interpreting the benefit as a privilege and not a right would not save the statute from constitutional deficiency. *Id.*; *see* Flemming v. Nestor, 363 U.S. 603, 611 (1960) (interest of social security covered employee sufficient for due process protection); Speiser v. Randall, 357 U.S. 513, 529 (1958) (condition limiting availability of tax exemption unconstitutional); American Communications Ass'n v. Douds, 339 U.S. 382, 390 (1950) (employer's requirements of "non-communist" affidavits were constitutional).

31 *Sherbert*, 374 U.S. at 406. The Court pointed out that even a gratuitous benefit conditioned on such a qualification discouraged the exercise of first amendment rights. *Id.* at 405-06 (citing Speiser v. Randall, 357 U.S. 513, 526 (1958)).

32 *Sherbert*, 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)); *see* E.E.O.C. v. Fremont Christian School, 781 F.2d 1362, 1368-69 (9th Cir. 1986) (minimal interference with religious belief under compelling state interest is constitutional); Parks v. Employment Sec. Comm'n, 427 Mich. 224, 398 N.W.2d 275, 283 (1986) (requirement

that school district employee pay union dues did not affect former employee's first amendment interest; therefore, denial of benefits was constitutional); *see also* Note, *Free Exercise and Dress Codes: Toward More Consistent Protection of a Fundamental Right*, 63 IND. L.J. 601, 609-20 (1987-88) (authored by Dale E. Carpenter) (citing application and misapplication of strict scrutiny to free exercise dress code cases); Note, *Constitutional Law - Unemployment Compensation Benefits and the First Amendment - Perpetuating the Tension?*, 6 W. NEW ENG. L. REV. 1131, 1141-46 (1984) (authored by Mark D. Vasington) (focusing on need for alternative analysis in establishing constitutional protection to free exercise of religion).

33 *Sherbert*, 374 U.S. at 409. The Court explained that its holding did not foster the "establishment" of this particular religion; the holding merely applied a neutral hand "in the face of religious differences." *Id.*; *cf.* Lemon v. Kurtzman, 403 U.S. 602, 620-22 (1971) (restrictions were necessary to ensure that teachers play strictly non-ideological role).

34 450 U.S. 707 (1981).

35 *Thomas*, 450 U.S. at 709. The nature of the claimant's belief was that, as a Jehovah's Witness, he could not participate in the production of armaments. *Id.*; *see* Comment, Thomas v. Review Board of Indiana Employment Security Division: *Denying Freedom of Religion in Unemployment Compensation Cases*, 9 N.Y.U. REV. L. & SOC. CHANGE 371, 377-91 (1979-80) (authored by Wayne H. Thompson) (differentiating between religious beliefs and personally professed beliefs); Note, *Constitutional Law: The Religion Clauses - A Free Rein to Free Exercise?*, 11 STETSON L. REV. 386, 388-93 (1982) (authored by G. Robertson Dilg) (examining religious clauses as applied to *Thomas*).

36 *Thomas*, 450 U.S. at 710-11. Claimant was hired to work in the roll foundry area of the company at which time he informed his employer of his particular faith. *Id.* at 710. After one year, that department was closed and claimant was transferred to the turret department where he worked directly on tanks. *Id.* After realizing that the work was weapons related, claimant unsuccessfully looked for an in-house transfer. *Id.* Claimant asked for a layoff, at which time he sought unemployment compensation. *Id.*

37 *Id.* at 715. Before asking for the layoff, Thomas consulted a fellow Jehovah's Witness who advised him that working on weapons was not "unscriptural." *Id.* at 711. After advisement, Thomas determined that his friend's interpretation was less strict than his own, and thus personally unacceptable. *Id.* Based on the foregoing information, the state court concluded that claimant had quit voluntarily for personal reasons which disqualified him for benefits. *Id.* at 713.

38 *Id.* at 716. The Supreme Court resolved the entanglement of the establishment clause and the free exercise clause by stating that the denial of benefits violated Thomas's free exercise of religion, and payment of those benefits would not violate the establishment clause. *Id.* at 717-18; *cf.* Cooper v. Eugene School Dist., 301 Or. 358, 723 P.2d 298, 308-11 (1986), *appeal dismissed*, 480 U.S. 942 (1987) (implementing neutral policy concerning religion in public schools facilitates protection of free exercise).

39 *Thomas*, 450 U.S. at 714. Justice Burger denied inquiry into Thomas's beliefs, stating, "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Id.* at 715. The line separated Thomas's refusal to work directly on weapons and his willingness to work in a non-armament area of the same factory. *Id.*; *see* Keith v. Chrysler Corp., 41 Mich. App. 708, 200 N.W.2d 764, 766-67 (1972) (refusal of offer of suitable employment proper grounds for denial of unemployment benefits). *See generally* Note, *Constitutional Law - Freedom of Religion - State's Denial of Unemployment Benefits to Jehovah's Witness Who Quit Armaments Production Job for Religious Reasons Violates First Amendment's Free Exercise Clause*, 59 U. DET. J. URB. L. 217, 219-25 (1982) (authored by Robert R. Florka) (in-depth analysis of *Thomas*); Note, *Unemployment Benefits and the Religion Clauses: A Recurring Conflict*, 36 U. MIAMI L. REV. 585, 591-97 (1982) (authored by Diane Deighton Ferraro) (examining *Thomas* on conflicting establishment clause and free exercise of religion clause).

40 *Thomas*, 450 U.S. at 716. The majority agreed that however difficult the trial court's findings of fact were, the Supreme Court must confine their conclusions to the facts as found below. *Id.*; *see* Mississippi Unemployment Compensation Comm'n v. Avent, 192 Miss. 85, 87, 4 So. 2d 296, 297 (1941) (findings of fact by board of review were conclusive on appeal if amply supported).

41 *Thomas*, 450 U.S. at 716. The Court pointed out that if the benefits were denied, Indiana would be compelling Thomas to trade the exercise of one of his first amendment rights with unemployment benefits. *Id.* at 718. *See* Goldman v. Weinberger, 475 U.S. 503, 506-10 (1986) (first amendment does not require military to accommodate religious practices that detract from uniformity); Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc., 269 Ind. 361, 380 N.E.2d 1225, 1227-30 (1978) (state's photograph requirement for driver's license not compelling enough to override religious freedom).

42 *Thomas*, 450 U.S. at 718-19. The state's unsuccessful objections were (1) compensation awards for unrestricted personal beliefs would place a severe burden on the state, and (2) the denial of benefits in such cases would forgo the employer's burden of conducting a detailed inquiry into job applicant's religious beliefs. *Id.*

43 *Id.* at 720. Justice Berger reasoned that "[u]nless we are prepared to overrule *Sherbert* . . . Thomas cannot be denied the benefits due him on the basis of the findings of the referee . . . that he terminated his employment because of his religious convictions." *Id.*

44 476 U.S. 693 (1986).

45 *Roy*, 476 U.S. at 695. Appellees contended that obtaining a social security number for their two year old daughter would violate their religious beliefs. *Id.* Roy testified that, after his first child, he developed a religious objection to obtaining a social security number, and he testified at trial concerning the "evil" that would flow simply from obtaining a number. *Id.* at 696-97, 697 n.3. Roy testified, after learning that a number had already been assigned, that the use of such a number would rob his daughter, Little Bird of the Snow, of her spirit. *Id.* at 697.

46 *Id.* at 695. Participants in these programs are required "to furnish their state welfare agencies with the social security numbers of members of their households as a condition of receiving benefits." *Id.*; *see* 42 U.S.C. § 602(a)(25) (1990) (required exchange of certain information for verification of eligibility).

47 *Roy*, 476 U.S. at 696. The appellees filed a claim in district court claiming that denial of the food stamp allowance abridged their free exercise of religion, and the first amendment entitled them to an exemption from the disqualification of these benefits. *Id.* The trial judge made a suggestion that the child be awarded a social security number which phonetically coincided with her name, but Roy refused on religious grounds and stated his dissatisfaction in even appending her full tribal name to her social security number. *Id.* The trial court denied Roy's request for damages and awarding injunctive relief, so that use of a social security number for Little Bird of the Snow was not required. *Id.* at 697-98.

48 *Id.* at 706-07. The court stated that the first amendment had never required the state to behave in such a manner as to further the spiritual growth of an individual or his family. *Id.* at 699. The court reasoned that the government cannot be required to conduct its own internal affairs in compliance with an individual's religious beliefs, "just as the government may not insist that appellees" observe any set form of religion. *Id.* at 699-700. *But see In re* Brown, 478 So. 2d 1033, 1038-39 (Miss. 1985) (free exercise clause prohibits state interference in certain religiously motivated conduct); *cf.*

Munford, *Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond*, 56 MISS. L.J. 73, 96-97 (1986) (application of article I section 18 to religious free exercise cases in Mississippi).

49 *Roy*, 476 U.S. at 707-08. The *Roy* Court acknowledged that the statute may confront some applicants for benefits with choices, but the court held that it did not affirmatively compel appellees to refrain from religiously motivated conduct. *Id.*; *cf.* Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (constitutional protection extends to public advocation of religion); Cox v. New Hampshire, 312 U.S. 569, 574 (1941) (regulation imposed to insure public safety and convenience did not violate constitutional rights); Pierce v. Society of Sisters, 268 U.S. 510, 517-18 (1925) (parents compelled to send children to school); Sheink v. Maine Dep't of Manpower Affairs, 423 A.2d 519, 522 (Me. 1980) (violation of employer's rule is not per se misconduct under employment security law); Vander Laan v. Mulder, 178 Mich. App. 172, 443 N.W.2d 491, 493-95 (1989) (denial of unemployment compensation to employee who "shared her faith" with patients was not violation of first amendment free exercise).

50 *Roy*, 476 U.S. at 708. The Court noted the "good cause" standard in *Thomas* and *Sherbert* created a mechanism for individualized exemptions, and found that such a mechanism did not exist in *Roy*. *Id.*

51 *Id.* at 700. The Court recognized the government's need to have certain space within which to operate, even where incidental neutral restrictions must be used. *Id.* at 712; *see* Menora v. Illinois High School Ass'n, 683 F.2d 1030, 1035-36 (7th Cir. 1982) (Orthodox Jewish basketball players had no constitutional right to wear insecurely fastened yarmulkes during game); *see also* Note, *A New Standard of Review in Free Exercise Cases*: Thomas v. Review Bd. of the Indiana Employment and Sec. Civ., 10 PEPPERDINE L. REV. 791, 793-807 (1983) (authored by Lynn M. Gardner) (examining strict scrutiny and its application in religious free exercise cases).

52 480 U.S. 136 (1987).

53 *Hobbie*, 480 U.S. at 143; *see* Engraff v. Industrial Comm'n, 678 P.2d 564, 568 (Colo. Ct. App. 1983) (timing of employee's conversion is not primary consideration). *Compare* Hildebrand v. Unemployment Ins. App. Bd., 19 Cal.3d 765, 566 P.2d 1297, 1299-1301 (1977) (denying full unemployment compensation upon refusal to work on Sabbath), *cert. denied*, 434 U.S. 1068 (1978), *and* Martinez v. Industrial Comm'n, 618 P.2d 738, 741 (Colo. App. 1980) (denying compensation to America Indian after adoption of religious beliefs in conflict with work), *with* Key State Bank v. Adams, 138 Mich. App. 607, 360 N.W.2d 909, 913 (1984) (upholding benefits to employee after discharge for refusal to work on Saturday). *See generally* Note, *The Free Exercise Clause and Unemployment Compensation for Religious Converts*, 33 WAYNE L. REV. 159, 159-70 (1986) (authored by Patrick A. Karbowski) (conflict among states concerning benefits where employer made no condition changes).

54 *Hobbie*, 480 U.S. at 138. The employee's supervisors devised a suitable arrangement in which claimant did not have to work on Saturday; this arrangement continued until the general manager terminated the arrangement. *Id.*

55 *Id.* Before termination, Hobbie met with her minister to determine the true religious nature of the Saturday restriction imposed by her faith. *Id.* This time she confirmed her belief and discontinued Saturday work. *Id.*

56 *Id.* at 139. The claims examiner for the Bureau of Unemployment Compensation denied compensation according to the premise that under Florida law, the benefits were available to persons "who become unemployed through no fault of their own." *Id.* at 138-39.

57 *Id.* at 141. The Court stated that there was no meaningful distinction between *Sherbert* and *Hobbie*, and the Court held that the strict scrutiny of *Sherbert* must apply. *Id. See generally* Comment, *Constitutional Law - Denial of Unemployment*

Compensation to Religious Converts Violates the First Amendment 22 SUFFOLK U.L. REV. 153, 153-58 (1988) (authored by Patricia Connors) (analyzing *Hobbie* and free exercise of religion).

58 *Hobbie*, 480 U.S. at 141. The commission urged the Court to apply the "reasonable means" scrutiny of *Roy*, but the Court flatly rejected both that theory and the holding in *Roy*. *Id.* at 141, 142 n.7. *But cf.* Flynn v. Maine Employment Sec. Comm'n, 448 A.2d 905, 908-09 (Me. 1982) (no violation of free exercise clause when employee knowingly accepted religiously conflicting job), *cert. denied*, 459 U.S. 1114 (1983); Levold v. Employment Sec. Dep't, 24 Wash. App. 472, 604 P.2d 175, 177 (1979) (infringement of religious freedom was self-imposed where employee "voluntarily accepted employment conflicting with religious beliefs").

59 *Hobbie*, 480 U.S. at 142. "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

60 489 U.S. 829 (1989).

61 *Frazee*, 489 U.S. at 830. Frazee told his employer after refusing the job that his religion would not allow him to work on Sunday. *Id.* Frazee asserted his Christianity, but never claimed membership to a particular sect. *Id.* at 834.

62 *Id.* at 831. The Board of Review decided that a suitable offer of work was refused without good cause. *Id.* The Board also stated that actions based on religious convictions must be based on accepted religious tenets, and Frazee's personal beliefs were immaterial. *Id.* at 830.

63 *Id.* at 831. The Appellate Court of Illinois, in affirming the lower court's denial, made it clear that the sincerity of the claimant's belief was unquestionable, and the belief in this case was simply not in the proper religious context. *Id.* The court distinguished *Sherbert, Thomas*, and *Hobbie* because Frazee was not a member of a religious sect or church, as the claimants in the preceding cases were. *Id.*

64 *Id.* at 831-32. The Supreme Court recognized the distinction set out by the lower court, but held that none of the preceding cases was decided on that point. *Id.* at 833. The Court stated the standard in those cases was that the "claimants had a sincere belief that religion required him or her to refrain from the work in question." *Id.* The Court also pointed out that purely secular views would not merit protection under the free exercise clause. *Id.*; *see* Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) (compulsory school attendance inapplicable to those attending religious secondary education); United States v. Seeger, 380 U.S. 163, 166 (1965) (whether given belief that is sincere occupies place in life of possessor is test for belief in God).

65 *Frazee*, 489 U.S. at 834. The Court iterated the sincerely held religious belief of Frazee, and held that the belief merited first amendment protection. The Court also found his sincerity conclusive under their scope of review, for the state conceded this point in its brief. *Id.*; *see* Shannon Eng'g & Constr. v. Mississippi Employment Sec. Comm'n, 549 So. 2d 446, 449 (Miss. 1989) (appellate courts without authority to disturb agency's conclusions where substantial evidence supportive); Mississippi Employment Sec. Comm'n v. Sellers, 505 So. 2d 281, 283 (Miss. 1987) (appellate court had limited scope of review in unemployment benefit cases).

66 *Frazee*, 489 U.S. at 835. The Court rejected the lower court's justification for the denial of benefits. *Id.* The mere fact that a majority of people chose to work and recreate on Sunday failed to gain merit with the Court. *Id.*; *see* Detroit Gravure Corp. v. Michigan Employment Sec. Comm'n, 366 Mich. 530, 115 N.W.2d 368, 369 (1962) (claimant's refusal to work Sunday shift for religious reasons was not misconduct).

67 Mississippi Emp. Sec. Comm'n v. McGlothin, 556 So. 2d 324, 329. The court noted that those appointed to administer public schools had broad authority which the law would "brook but little interference." *Id.* at 327-28. Public schools had authority to promulgate reasonable dress codes where it did not infringe rights otherwise protected. *Id.* at 328. The majority expressed that public school employees were entitled to exercise rights protected by the First Amendment of the United States Constitution and article 3, section 18 of the Mississippi Constitution, without fear that their employment would be affected. *Id.* "[N]o preference shall be given by law to any religious sect or mode of worship; but the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred." MISS CONST. art. 3, § 18.

68 *McGlothin*, 556 So. 2d at 329. The court recognized that the gratuitous benefit entitlement was available to all under objective criteria. *Id.*

69 *Id.* In a footnote, Justice Robertson pointed out that the court assumed, without deciding, that some situations involve conduct that may give rise to loss of employment while unemployment benefits must be given because of the state's lack of compelling interest in withholding compensation. *Id.* at 329 n.5.

70 *Id.* at 329. The court noted that compelling governmental restrictions were those so closely related to the educational mission that a violation of those restrictions would result in the impairment of the overall mission. *Id.* The court had no doubt that a school could proscribe a native American Indian teacher from coming to school in the scantily clad attire of an Indian warrior, or a Christian teacher disrobed, emulating Adam before the fall, although both would be religious expression. *Id.*

71 *Id.* at 329. In grappling with the question of what constituted a religious belief, the court stated that the question did not hinge upon judicial perception of the particular belief, or its acceptability, logic, or consistency in order to exist under the protection of the first amendment. *Id.* The purpose of the amendment was to protect the individual from a state imposed burden created from a general opinion that the belief was unacceptable. *Id.*

72 *Id.* at 330. The court held that first amendment protection did not require that the exercise be expressly or tacitly stated as a religious facet of that sect. *Id.* And equally, the fact that members of that sect disagreed with the appellee's interpretation of church dictate was of no concern. *Id.*

73 *McGlothin*, 556 So. 2d at 330. The court stated that sincerity was the key to what constitutes religious belief in a constitutional setting, and that the belief should be well grounded in religion. *Id.* Hence the court took judicial notice that it was common practice in many religions to cover the head as a matter of religious and customary practice of culture. *Id.*

74 *Id.* The court acknowledged that the existence of this particular sect's denominational congregation in the Jackson area to which appellee did not belong. *Id.*

75 *Id.* The court also indicated that if consistency in conduct was required by the first amendment, those who are "backsliders" would not be afforded its protections. *Id.*

76 *Id.* The court held that the standard required sincerity, and the Justices noted assumption of the risk of discharge as demonstrative of sincerity. *Id.*

77 *Id.* at 331. The majority stated that among the fundamental values schools were supposed to teach, tolerance of divergent political and religious views was important, to avoid choking the free mind at its source. *Id.* After finding no adverse

impact on students, appellee's job performance, or the school mission, the court held that no compelling overriding interest existed to take the conduct out of the realm of the first amendment protection. *Id.*

78 *McGlothin*, 556 So. 2d at 331 (Dan Lee, P.J., dissenting). Justice Roy Noble Lee joined in the dissent. *Id.*

79 *Id.* at 333 (citing MISS. CODE ANN. § 71-5-31). Justice Dan Lee pointed out that it was the referee's duty to ascertain that ample predicate for invoking the free exercise clause existed, and the burden of proving such constitutional protection rested with McGlothin. *Id.* at 331. Also, Lee added that the scope of review, limited to questions of law, applied to both the circuit courts and the supreme court. *Id.* at 333.

80 *Id.* at 331. Justice Dan Lee also stated that to meet the burden of constitutional protection, it was incumbent upon McGlothin to show that her actions were grounded in a sincere religious belief which motivated her conduct. *Id.*

81 *Id.* at 333. Justice Lee recounted that the referee's finding of fact demonstrated no clear evidence of sincerity. This did not justify an assumption of sincerity by the circuit or supreme court. *Id.* at 333.

82 *Id.* Justice Lee regarded the question of whether the belief was truly held as the threshold question of sincerity which was eminent in every such case. *Id.* Justice Dan Lee again emphasized that this was a question of fact and a prime consideration in the validity of the exemption claim. *Id.* In a separate dissent, joined by Justices Dan Lee, Roy Noble Lee, and Sullivan, Justice Blass concluded that McGlothin was not required to choose between her religious beliefs and employment. *Id.* at 334 (Blass, J., dissenting).

83 *McGlothin*, 556 So. 2d at 334. Justice Dan Lee argued that in those cases where there was a failure to make a necessary finding, the court may make assumptions in favor of the appellee. *Id.* But he stated that this was not a failure to make a necessary finding, but instead it was an ambiguous finding which did not call for any assumptions. *Id.*

84 *See supra* notes 33, 34, 40, 41, 58, 65 and accompanying text.

85 *See supra* notes 33, 42-43, 58, 71 and accompanying text.

86 *See supra* notes 33-34, 72 and accompanying text.

87 *See supra* notes 61-67, 74 and accompanying text.

88 *See supra* notes 14, 15 and accompanying text.

89 *See supra* text accompanying notes 58, 71-72.

90 *See supra* notes 29, 68-70, 78 and accompanying text.

91 *See supra* notes 43, 67, 78 and accompanying text.

92 *See supra* note 14.

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