University of Richmond Law Review

Volume 28 | Issue 3 Article 6

1994

Partially Disabled and Religious: Virginia Workers' Compensation and the Free Exercise Clause

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NOTE

PARTIALLY DISABLED AND RELIGIOUS: VIRGINIA WORKERS' COMPENSATION AND THE FREE EXERCISE CLAUSE

I. INTRODUCTION

The Virginia Workers' Compensation Act denies wage loss benefits to partially disabled employees who unjustifiably reject employment procured by their employer which is within their remaining work capacity.[1] Section 65.2-510 of the Virginia Code provides that "[i]f an injured employee refuses employment procured for him suitable to his capacity, he shall only be entitled to the benefits provided for in section 65.2-603 during the continuance of such refusal, unless in the opinion of the Commission such refusal was justified."[2] Essentially, unjustified refusal of selective employment within the employee's work capacity results in a suspension in wage loss benefits until the employee cures the refusal by either accepting the offered job or finding employment on his or her own.[3]

An employee, however, may defend his or her refusal of selective employment by showing that the denial was justified. The initial burden rests with the employer to show that the offered

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1. VA. CODE ANN. § 65.2-510 (1991); *see also* Washington Metro. Area Auth. v. Harrison, 228 Va. 598, 324 S.E.2d 654 (1985). Employers are under no statutory duty to procure selective employment for injured employees. However, benefits will be suspended when an employee refuses selective employment only if the employer provided the refused job. Big D Quality Homebuilders v. Hamilton, 228 Va. 378, 322 S.E.2d 839 (1984).

2. *Id.* Benefits under Virginia Code § 65.2-603 include medical care, rehabilitation, and vocational training. *Id.* § 65.2-603.

3. Thompson v. Hampton Inst., 3 Va. App. 668, 353 S.E.2d 316 (1987); K & L Trucking Co. v. Thurber, 1 Va. App. 213, 337 S.E.2d 299 (1985).

employment is within the employee's residual work capacity. Once this requirement is met, the burden shifts to the employee to show that his or her refusal to work is justified.[4] If the employee establishes justification cognizable under the Virginia Workers' Compensation Act for the refusal of employment, then he or she retains wage loss benefits.[5] The Virginia Workers' Compensation Commission has stated that factors such as living and travel expenses will be considered in determining whether a refusal of selective employment is justified.[6] The Commission, however, has not regarded certain factors, such as the inability to arrange for child care,[7] the potential loss of union pension benefits,[8] or an aversion to certain working hours,[9] to be adequate justification for refusing selective employment.

On January 29, 1992, the Commission again refused to widen the range of factors accepted for justification. Holding that not accepting employer procured selective employment because the job requirements would force the employee to abandon his or her religious practices does not constitute a justified refusal under the Act, the Commission suspended an employee's wage loss benefits.[10] The Virginia Court of Appeals affirmed the Commission's decision,[11] in *Ballweg v. Crowder Contracting*, agreeing that the termination of Workers' Compensation benefits because an employee refuses to abandon his or her religious

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4. American Furn. v. Doan, 230 Va. 39, 41, 334 S.E.2d 548, 550 (1985) (citing Klate Holt Co. v. Holt, 229 Va. 544, 547, 331 S.E.2d 446, 448 (1985)); Talley v. Goodwin Brothers, 224 Va. 48, 52, 294 S.E.2d 818, 820 (1982). To show justification, the grounds for refusing selective employment must be "such that a reasonable person desirous of employment would have refused the offered work." Additionally, "the determination of justification to refuse employment involves 'a much broader inquiry than merely considering whether the intrinsic aspects of the job are acceptable to the prospective employee.'" Instead, "[j]ustification to refuse an offer of selective employment 'may arise from factors totally independent of those criteria used to determine whether a job is suitable to a particular employee.'" Food Lion, Inc. v. Lee, 16 Va. App. 616, 619, 431 S.E.2d 342, 344 (1993) (quoting Johnson v. Virginia Employment Comm'n, 8 Va. App. 441, 452, 382 S.E.2d 476, 481 (1989)).

5. *See Doan*, 230 Va. at 42-43, 334 S.E.2d at 550-51.

6. Guthrie v. Ken Hurst Firearms Engraving Co., 65 O.I.C. 221 (1986).

7. Mason v. Phillip Morris, U.S.A., 60 O.I.C. 296 (1981).

8. Reynolds v. Gust K. Newburg Const. Co., 70 O.I.C. 236 (1991).

9. Emmerson v. Marshall Lodge Memorial Hosp., 51 O.I.C. 87 (1969).

10. Ballweg v. Crowder Contracting Co., 16 Va. App. 31, 427 S.E.2d 731, 731-32 (1993).

11. *Id.*

doctrines is not a violation of the Free Exercise Clause of the First Amendment.[12] The Virginia Supreme Court, however, reversed the decision rendered by the Court of Appeals and held that requiring Ballweg to violate his religious beliefs to receive Workers' Compensation benefits violates the Free Exercise Clause.[13] This paper will consider whether courts should find that requiring injured workers to accept employment under conditions that conflict with their religious convictions in order to retain wage loss benefits under the Workers' Compensation Act violates the First Amendment's Free Exercise Clause. Part II will present the requisite constitutional history of the Free Exercise Clause. Part III will critique the *Ballweg* decision itself, examining the opinions of the Workers' Compensation Commission and the Court of Appeals. Part IV will analyze the decision of the Virginia Supreme Court and consider whether the court applied the appropriate constitutional standards. Finally, part V concludes that if, under a statutory scheme that provides for individualized exemptions, the Commonwealth determines the recipients of those exemptions, and in doing so burdens an individual's ability to practice his or her religion, the application of the statute will be subjected to the highest judicial scrutiny.

II. THE FREE EXERCISE CLAUSE

The First Amendment to the United States Constitution reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[14] The Supreme Court's interpretation of what "free exercise" encompasses has shifted and swayed over the past 115 years and has come nearly full circle.

A. *Conduct v. Belief*

In *Reynolds v. United States*,[15] perhaps the earliest notable interpretation of the Free Exercise Clause, the Supreme Court

12. *Id.* at 35, 427 S.E.2d at 733.
13. Ballweg v. Crowder Contracting Co., 247 Va. 205, 440 S.E.2d 613 (1994).
14. U.S. CONST. amend. I.
15. 98 U.S. 145 (1878).

upheld a federal law outlawing polygamy. The Court noted that the petitioner, a member of the Mormon church, was duty bound to practice polygamy by his religion.[16] The Court looked to the founders, namely the writings of Jefferson and Madison, to construe the meaning of the free exercise protection. Specifically, the Court quoted Jefferson: "[T]he legislative powers of the government reach actions only."[17] The Court accepted this statement as an "authoritative declaration of the scope and effect of the amendment,"[18] and held that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[19]

The Court explained that if exemptions from general laws were required for each individual whose religious beliefs conflicted with the regulation, society as a whole would suffer. As the Court stated, to hold that Congress could not control actions "would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect to make every citizen to become a law unto himself."[20]

Thus, in *Reynolds* the Court dramatically limited the scope of Free Exercise Clause protections. Congress could pass laws significantly limiting an individual's ability to practice his or her religion so long as the regulation was aimed only at conduct and not at belief.

B. *The Move Away From* Reynolds *Toward the Protection of Conduct*

During most of the twentieth century, the Court broadened the scope of Free Exercise Clause protections to include conduct. In *West Virginia State Board of Education v. Barnette*,[21] the Court overruled its decision in *Minersville School District v. Gobitis*[22] and held that a state statute requiring children in

16. *Id.* at 161.
17. *Id.* at 164.
18. *Id.*
19. *Id.*
20. *Id.* at 166-67.
21. 319 U.S. 624 (1943).
22. 310 U.S. 586 (1940). In *Gobitis*, two Jehovah's Witness children were expelled

public schools to salute and pledge allegiance to the national flag violated the First Amendment when such conduct was prohibited by the children's religious beliefs.[23] The *Barnette* court declared that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[24] Justice Jackson, writing for the Court, asserted "[o]ne's right to life, liberty, and property, to free speech, a free press, *freedom of worship* and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[25] Accordingly, First Amendment rights can be restricted only "to prevent grave and immediate danger to interests which the State may lawfully protect."[26] Jackson concluded, stating "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, [or] religion . . . ."[27]

The precise implication of *Barnette* on the Free Exercise Clause is ambiguous because it represented a meshing of free exercise and free speech issues. It is unclear whether the Court would have applied the same scrutiny if only free exercise issues had been involved. However, Justice's Jackson's sweeping language does indicate a departure from the rigid conduct/belief distinction of *Reynolds*.

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from school for not complying with the Board of Education's requirement that they salute and pledge allegiance to the national flag. *Id.* at 591. Writing for the majority in *Gobitis*, Justice Frankfurter explained that "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." *Id.* at 594.

23. 319 U.S. at 624.

24. *Id.* at 638.

25. *Id.* (emphasis added).

26. *Id.* at 639.

27. *Id.* at 642.

C. *The Unemployment Compensation Cases and Strict Scrutiny*

If *Barnette* was an incremental step toward the protection of religious conduct, the 1963 case of *Sherbert v. Verner*[28] represents a giant leap in Free Exercise Clause jurisprudence. In *Sherbert*, a Seventh-day Adventist lost her job because she would not work on Saturday, the Sabbath for her religion.[29] After failing to find other employment meeting the requirements of her faith, the employee sought unemployment compensation benefits under the South Carolina Unemployment Compensation Act.[30] The law stated that to receive compensation benefits an employee must be "able to work . . . available for work . . . [and not] failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer."[31] Determining that the refusal to work on Saturday, albeit due to religious convictions, did not constitute a good faith denial of employment offered by the employer, the South Carolina Employment Security Commission denied the employee benefits.[32] This decision was ultimately affirmed by the South Carolina Supreme Court.[33]

In its analysis, the Court first considered whether stripping unemployment benefits places any burden on Free Exercise rights. The Court noted that denying benefits is not as great a burden on religion as the imposition of criminal sanctions for religious activity.[34] However, the Court recognized that in denying benefits, the State forced the employee to choose between practicing her religion and accepting benefits.[35] According to the Court, "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[36]

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28. 374 U.S. 398 (1963).
29. *Id.* at 399.
30. *Id.* at 399-400.
31. *Id.* at 400-01 (quoting S.C. CODE ANN., §§ 68-113(3), 68-114 (Law. Co-op. 1962)).
32. *Id.* at 401.
33. *Id.*
34. *Id.* at 403.
35. *Id.* at 404.
36. *Id.*

The majority asserted it was inconsequential that unemployment benefits are not a "right" but merely a "privilege."[37] As Justice Brennan explained, "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions on a benefit or privilege."[38] Placing such a condition on the procurement of benefits "upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[39]

After determining that a burden on the Free Exercise Clause existed, the Court applied the strictest level of scrutiny to the free exercise claim. Any infringement upon the employee's free exercise rights could be "justified [only] by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'"[40]

Noting that "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation"[41] of constitutional guarantees, the Court determined that the denial of compensation benefits had violated the employee's constitutional rights.[42] Although the State asserted it had an interest in preventing the dilution of its unemployment compensation fund by claimants "feigning" religious objections, Justice Brennan was not convinced that this interest was sufficiently compelling.[43] Brennan suggests that only if requiring the exception presented "an administrative problem of such magni-

37. *Id.*

38. *Id.* (citing Wieman v. Updegraff, 344 U.S. 183, 191-92 (1952); American Communications Ass'n v. Douds, 339 U.S. 382, 390 (1950); Hannegan v. Esquire, Inc., 327 U.S. 146, 155-56 (1946)) (footnote omitted).

39. *Id.* at 406.

40. *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

41. *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1944)).

42. According to Justice Brennan, granting Sherbert benefits did not raise Establishment Clause concerns because doing so favored no particular religion and did not entangle the government with religious institutions. Brennan further explained that the holding did not create a blanket rule that all persons whose religious convictions result in their unemployment are entitled to benefits, and that the decision did not mandate a specific unemployment compensation scheme for the states to adopt. *Id.* at 409-10. As Justice Brennan stated: "Our holding . . . is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest." *Id.* at 410.

43. *Id.*

tude, or . . . afford[ed] the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable" would the State be justified in denying benefits.[44]

After *Sherbert*, once it was determined that a burden on the free exercise of religion existed, the state had to establish that a compelling interest justified the burden and that the regulation was the least restrictive alternative.[45] No longer was the Court bound by the conduct/belief distinction of *Reynolds*.

Sherbert's strict scrutiny protection was applied nearly ten years later in *Wisconsin v. Yoder*.[46] Amish parents sought exemptions from Wisconsin's mandatory school attendance policy claiming infringement of their free exercise rights. The parents believed that if their children attended high school, they would risk ostracization from their community and imperil their children's salvation.[47] According to the Amish religion, higher education creates attitudes that separate one from God.[48] The Court noted that Dr. John Hostetler, an expert on Amish society, testified that compulsory high school attendance could cause psychological harm to the Amish children and possibly lead to the destruction of the Old Order Amish Church.[49] The State stipulated that the parents generally held their religious beliefs.[50]

Chief Justice Burger, writing for the Court, explained that although the State must have the power to regulate certain types of religious conduct, "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and are thus beyond the power of the State to control, even under regulations of general applicability."[51] Burger observed that the Court has "rejected" the notion that conduct is beyond the protection of the Free Exercise Clause.[52] The Court also noted

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44. *Id.* at 408-09.
45. *Id.* at 403-05.
46. 406 U.S. 205 (1972).
47. *Id.* at 209.
48. *Id.* at 212.
49. *Id.*
50. *Id.* at 209.
51. *Id.* at 220.
52. *Id.*

that it was irrelevant that the Wisconsin statute did not discriminate against religion on its face. "A regulation neutral on its face may, in its application," the Court explained, "nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[53]

The Court acknowledged that the State had a strong interest in promoting a system of compulsory education.[54] Because the State did not establish how its "admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish" for religious reasons, however, the Court affirmed the Wisconsin Supreme Court's holding that imposing the State's compulsory education requirement on Amish children violated the Free Exercise Clause.[55]

The *Yoder* holding underscored *Sherbert* by emphasizing that the Free Exercise Clause protects religion-based conduct from facially-neutral, generally applicable laws if granting a religious exemption would not substantially interfere with the State's statutory scheme.

An example of where a religion-based exemption intolerably interfered with the state's legitimate interests arose in *United States v. Lee*.[56] In *Lee*, an Old Order Amish farmer objected to paying social security taxes for his hired help, who were also Amish, for sincere religious reasons.[57] The Court explained that the application of the generally applicable statute to Lee passed strict scrutiny because the State established that the tax was necessary to achieve an overriding interest and that "man-

53. *Id.*

54. *Id.* at 221.

55. *Id.* at 236. The Court explained that "we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education . . . and the impediment to those objectives that would flow from recognizing the claimed Amish exemption." *Id.* at 221. The State asserted that the compulsory education requirement promoted the interest of developing citizens who are able to competently participate in the political process and who are self-reliant. Although it agreed with the State's contention, the Court stated that forcing the Amish children to attend high school would not advance the State's asserted interests because Amish children needed only to be prepared to function in the Amish community, not modern society. *Id.* at 221-22.

56. 455 U.S. 252 (1982).

57. *Id.* at 254-55. The Amish opposed paying social security taxes because they believed that it was sinful for individuals not to care for their own poor and elderly. *Id.* at 255.

datory participation [in the program was] indispensable" to accomplish the state's interests.[58]

In the 1980's, three unemployment compensation cases, *Thomas v. Review Board,*[59] *Hobbie v. Unemployment Appeals Commission*;[60] and *Frazee v. Illinois Employment Security Department*,[61] further clarified and underscored the *Sherbert* holding.

In *Thomas v. Review Board*, Thomas worked in his employer's roll foundry manufacturing sheet steel for various uses.[62] When the foundry closed, the employer transferred the employee to a department which fabricated turrets for military tanks. Thomas claimed that his religious beliefs prohibited him from taking part in the production of armaments. When he was unable to find alternate work within the employer's factory, Thomas requested to be laid off.[63] The employer denied this request and Thomas resigned.[64]

Thomas then sought unemployment compensation benefits under the Indiana Employment Security Act. At the administrative hearing, Thomas testified that it was against his religion to participate in the production of armaments.[65] Although the hearing officer acknowledged that the "claimant did quit due to his religious convictions," the officer determined that this reason did not constitute "good cause" as required by the Indiana statute.[66] Consequently, the Review Board denied Thomas benefits.[67] The Supreme Court of Indiana ruled that, because Thomas "quit voluntarily for personal reasons," he did not qualify for benefits.[68]

Relying on *Sherbert v. Verner*, the United States Supreme Court reversed the Indiana court. The Court rejected the Indi-

58. *Id.* at 257-59.
59. 450 U.S. 707 (1981).
60. 480 U.S. 136 (1987).
61. 489 U.S. 829 (1989).
62. 450 U.S. at 709.
63. *Id.*
64. *Id.* at 710.
65. *Id.* at 711.
66. *Id.* at 712.
67. *Id.*
68. *Id.* at 713.

ana Review Board's contention that because Thomas' religious liberty had been burdened indirectly by a neutral law, no free exercise violation existed. Chief Justice Burger, writing for the Court, explained:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[69]

Finding a burden upon Thomas' free exercise rights, the court applied the *Sherbert* strict scrutiny test. The Court recognized Indiana's legitimate interests in preventing widespread unemployment by allowing individuals to leave jobs for personal reasons and in avoiding investigations by employers into job applicants' religious convictions.[70] These interests, however, were not found compelling to justify the inroad on religious freedom. The Court determined the record did not establish that the number of persons leaving employment for religious reasons or employer investigations would be substantial enough to endanger the State's legitimate interests.[71] Therefore, over thirty years after *Sherbert*, the Court re-affirmed its conviction that conditioning benefits upon the neglect of religious convictions by a facially-neutral statute constitutes a violation of the Free Exercise Clause.

Six years later in *Hobbie v. Unemployment Appeals Commission*, the Court again applied the *Sherbert* test and held that the denial of unemployment compensation benefits to a Seventh-day Adventist who would not work on Saturdays violated the Free Exercise Clause.[72]

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69. *Id.* at 717-18.

70. *Id.* at 718-19.

71. *Id.*

72. 480 U.S. 136 (1987). In *Hobbie*, the appellant converted to the Seventh-day Adventist Church after working over two years for the employer. Only after this conversion did the employee's religious beliefs conflict with her employment duties. The employer fired Hobbie, and the Florida Bureau of Unemployment Compensation denied the employee unemployment compensation benefits. *Id.* at 138-39. The Court

Finally, in *Frazee v. Illinois Department of Employment Security*, decided in March of 1989, the Court once again considered whether refusing to work on one's Sabbath was protected by the Free Exercise Clause.[73] *Frazee* was distinguishable from *Sherbert, Thomas,* and *Hobbie* in that Frazee did not belong to a recognized religious sect.[74] The state court found that an exemption from Illinois' generally applicable law was warranted only when it conflicted with the practices of an "established religious sect."[75]

The Supreme Court rejected the State's distinction, holding that all that is required for a free exercise claim is a sincere religious conviction.[76] Applying *Sherbert*'s strict scrutiny test, the Court acknowledged the State's interest in preventing a halt in the economy on the Sabbath. Reiterating the logic of *Thomas*, however, the Court explained that the number of those finding a conflict between their religion and working on Sunday was not proven to be substantial enough to warrant an infringement of Frazee's constitutional rights.[77]

Therefore, after *Frazee*, the *Reynolds* analysis appeared to be abandoned. Regardless of whether a statute was facially neutral and generally applicable, whether the penalty for religious conduct was direct or indirect, or whether the burden on religion was the stripping of a right or privilege, the *Sherbert* strict scrutiny test applied once a burden on the free exercise of religion was shown.

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found the fact that Hobbie converted to her religion after commencing her employment to be "immaterial," explaining "[t]he First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired." *Id.* at 144.

73. 489 U.S. 829 (1989).

74. When seeking review of his denial of benefits by the Illinois Division of Unemployment Insurance, Frazee explained that he "refused the job which required [him] to work on Sunday based on Biblical principles, scripture Exodus 20:8, 9, 10. Remember the Sabbath day by keeping it holy." *Id.* at 833 n.1.

75. *Id.* at 831.

76. *Id.* at 834.

77. *Id.* at 835.

D. *The Revitalization of* Reynolds *and Congress' Reaction*

In *Employment Division, Department of Human Resources v. Smith*,[78] the respondents were fired from their jobs at a drug rehabilitation facility because it was discovered that they ingested "peyote" during a religious ceremony of the Native American Church. Under Oregon law, peyote is defined as a controlled substance, possession of which constitutes a Class B felony. Although respondents were members of the church and peyote ingestion was a part of their religious practice, the Oregon Employment Division found that the respondents were fired for misconduct, rendering them ineligible for unemployment benefits.[79] The Supreme Court refused to apply the *Sherbert* strict scrutiny test and held that the State could burden the respondents' religious conduct. Justice Scalia, writing for the Court, explained that the *Sherbert* test is properly applied in unemployment compensation cases where the state "conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion."[80] Scalia noted that in unemployment compensation cases, the *Sherbert* test "was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct."[81] According to Scalia, the *Sherbert* test is appropriate where "the State has in place a system of individual exemptions, [and] it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[82]

Essentially, the rule announced by the Court in *Smith* was that the government cannot outlaw "acts or abstentions only when they are engaged in for religious reasons."[83] The government cannot *directly* burden religious practices.[84] Scalia also

78. 494 U.S. 872 (1990).
79. *Id.* at 874.
80. *Id.* at 883.
81. *Id.* at 884.
82. *Id.* (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)). Justice Scalia explained that "a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment." *Id.*
83. *Id.* at 877.
84. *Id.* at 877-78.

stated that exemptions from neutral, generally applicable laws are required only when other fundamental rights such as free speech are involved.[85] Moreoever, the *Sherbert* test only applies to cases where "the State has in place a system of individual exemptions."[86] Therefore, unless the above mentioned conditions exist, facially neutral, generally applicable laws pass constitutional muster, and exemptions for religious reasons are not required under *Smith*.[87]

Thus, *Smith* significantly limited the applicability of the *Sherbert* strict scrutiny analysis. Religious conduct, if only indirectly affected by a facially neutral statute, could be burdened by the government.

In a concurring opinion in *Smith*, Justice O'Connor stated that the majority's holding "dramatically departs from well-settled First Amendment jurisprudence . . . and is incompatible with our Nation's fundamental commitment to individual religious liberty."[88] This sentiment was echoed by Congress in 1993. On October 27, 1993, Congress passed the Religious Freedom Restoration Act.[89] The stated purpose of the Act is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened."[90] The Act provides that the government cannot "substantially burden" the free exercise of religion unless the government establishes that the application of the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[91]

Therefore, four years after *Smith*, Congress reversed the decision by legislation and restored the application of the *Sherbert* test to situations where religious conduct is threatened by governmental action.[92]

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85. *Id.* at 881.
86. *Id.* at 884.
87. *Id.* at 872.
88. *Id.* at 891.
89. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.
90. *Id.*
91. *Id.*
92. Apparently, Congress has the authority to take such action, and has done so

III. *BALLWEG V. CROWDER CONTRACTING CO.*[93]

When the Virginia Workers' Compensation Commission denied an employee benefits because he refused to accept employer procured selective employment due to a conflict with his religious practices, an interesting opportunity to analyze the vitality of *Sherbert* principles in the wake of *Smith* presented itself.

A. *The State Agency Decisions*

In *Ballweg v. Crowder Contracting Co.*, Thomas F. Ballweg sustained an injury at work on June 8, 1989. The Virginia Industrial Commission (now the Virginia Workers' Compensation Commission) found this injury compensable under the Virginia Workers' Compensation Act and awarded the claimant compensation benefits for intermittent periods of incapacity through March 14, 1991.[94]

Ballweg re-injured his knee at work in December, 1990, and his treating physician determined that the employee was partially disabled.[95] One month later, his employer obtained the services of a vocational rehabilitation specialist to find employment for Ballweg meeting his physical restrictions. Considering these restrictions as well as Ballweg's vocational aptitude and interests, the employer's vocational rehabilitation specialist found a position for Ballweg in electronic security.[96] Ballweg interviewed for the position and discovered that it required him to work on Saturdays. Consequently, Ballweg refused the position because working on Saturday was prohibited by his religious convictions as a member of the Seventh-day Adventist Church.[97]

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in the past. The Voting Rights Act of 1965, for example, essentially reversed a Supreme Court decision upholding a North Carolina statute requiring literacy tests for voter registration. *See* Philip Spare, Comment, *Free Exercise of Religion: A New Translation*, 96 DICK. L. REV. 705, 731 (1992).

93. 247 Va. 205, 440 S.E.2d 613 (1994).

94. Ballweg v. Crowder Contracting Co., 16 Va. App. 31, 33, 427 S.E.2d 731, 732 (1993).

95. Ballweg v. Crowder Contracting Co., VWC File No. 140-74-04 (Opinion of Deputy Commissioner Phillips, Oct. 9, 1991) at 97.

96. *Id.* at 97.

97. *Id.*

The employer discontinued Ballweg's compensation because of his refusal to accept the selective employment. In a September 10, 1991 hearing before the Virginia Workers' Compensation Commission, Ballweg sought temporary total disability benefits.[98] The employer defended Ballweg's claim under Virginia Code section 65.2-510, asserting that it had procured employment within the employee's capacity and that Ballweg had unjustifiably refused this employment.[99]

Thus, the issue before the Virginia Workers' Compensation Commission was whether Ballweg's refusal of selective employment procured by the employer because of his religious convictions constituted a justified refusal under the Workers' Compensation Act. Looking to *Sherbert* and *Thomas*, the Deputy Commissioner presiding at the Workers' Compensation hearing stated that "[l]ike Sherbert and Thomas before him, Ballweg is precluded by his religious beliefs from working under certain conditions."[100] Consequently, the Deputy Commissioner opined that "Ballweg's refusal of the position . . . was justified and to find otherwise would result in a violation of the claimant's constitutional rights as protected by the First Amendment."[101]

The employer appealed the decision of the Deputy Commissioner to the full Workers' Compensation Commission.[102] The Commission noted that Ballweg did not lack the physical ability to perform the position found by the employer. Instead, Ballweg's religious convictions were the sole cause of his refusal to work.[103] Thus according to the Commission, because the employee was offered employment within his physical capacity, he had the burden to show that his refusal was justified before he could receive compensation for work incapacity.[104]

Citing *Mason v. Phillip Morris*[105] and *Emmerson v. Marshall Lodge Memorial Hospital*,[106] the Commission observed

98. *Id.* at 96-97.
99. *See id.* at 98.
100. *Id.* at 100.
101. *Id.*
102. Ballweg v. Crowder Contracting Co., 71 O.W.C. 279 (1992).
103. *Id.* at 280.
104. *Id.*
105. 60 O.I.C. 296 (1981).
106. 51 O.I.C. 87 (1969).

that reasons such as the inability to find child care or undesirable working hours traditionally do not constitute justified rationales for refusing employer-secured selective employment. Instead, "[t]hese decisions are based on findings that the wage loss being suffered by the claimant is no longer attributable to any physical disability flowing from the injury."[107] The Commission continued by stating that the employer "is not responsible for conditions that are not causally related to the claimant's injury which prevent him from accepting selective employment."[108] Consequently, because Ballweg's reason for refusing the selective employment did not constitute a justified refusal under Virginia Workers' Compensation law, he could receive compensation benefits only if his refusal was protected by the Free Exercise Clause.

Drawing a dubious distinction between the *Sherbert* line of cases and Ballweg's dilemma, the Commission rejected the Deputy Commissioner's findings. The Commission explained that *Sherbert* and *Thomas*, which dealt with unemployment compensation benefits, were not analogous to Ballweg's case because "workers' compensation benefits . . . are directed by the State through funds provided exclusively by the employer or its [insurance] carrier."[109] Because the employer or its insurance carrier directly paid for the benefits instead of the State, the Commission declared "we are not willing to make a finding that the Workers' Compensation Act is depriving him of his freedom to worship as he pleases."[110] The Commission did, however, recognize that "[i]t may be that the claimant must make a difficult decision because of his religious fidelity and his need for compensation benefits . . . ."[111]

B. *The Virginia Court of Appeals*

In affirming the Workers' Compensation Commission's holding, the Virginia Court of Appeals first observed that workers' compensation law is not a development of and is often contrary

107. 71 O.W.C. at 281.
108. *Id.*
109. *Id.* at 280.
110. *Id.* at 281.
111. *Id.* at 280-81.

to common law.[112] Apparently because of this and in light of the fact that "[n]o statutory provision permits the commission to hold that an employee's religion exempts him from accepting selective employment," the court of appeals determined that it would not "interfere with the statutory scheme and provide an exclusion not contained within the statutory language."[113]

Turning to Ballweg's assertion that *Sherbert* and *Thomas* demonstrate that his refusal was constitutionally protected, the court of appeals looked to *Smith*. Without delving into the case's underlying rationale, the court applied a literal interpretation of *Smith*. The court asserted that "the doctrine embodied in these cases [*Sherbert* and *Thomas*] has not been extended by the Supreme Court to invalidate any governmental action except the denial of unemployment compensation."[114] Judge Baker, writing for the court, adopted the Commission's questionable distinction between unemployment compensation and workers' compensation. Like the Commission, Baker focused on the source of workers' compensation benefits, explaining that "unemployment compensation payments are funded by taxes imposed on its citizens; workers' compensation benefits, however, are paid by the employer or its insurance carrier from premiums received from the employer."[115] Thus, ignoring the fact that the state determines who is eligible to receive benefits, the court of appeals affirmed the decision of the Workers' Compensation Commission.[116]

IV. THE VIRGINIA SUPREME COURT

Ballweg appealed his case to the Virginia Supreme Court.[117] The court, citing *Sherbert, Thomas, Hobbie,* and *Frazee* noted that the state may not refuse to grant unemployment compen-

112. Ballweg v. Crowder Contracting Co., 16 Va. App. 31, 34, 427 S.E.2d 731, 732 (1993).

113. *Id.* at 733.

114. *Id.* at 733 (citing Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 883 (1990)).

115. *Id.*

116. *Id.*

117. Ballweg v. Crowder Contracting Co., 247 Va. 205, 440 S.E.2d 613 (1994).

sation benefits because a claimant's religion prohibits him or her from accepting a particular job.[118]

Finding Ballweg's situation more analogous to the unemployment compensation cases than to *Smith*, the court explained that the Virginia Workers' Compensation Act could not be "equated" with the type of statute involved in *Smith*.[119] According to the court, *Smith* involved a neutral criminal statute of general applicability, while the Virginia Workers' Compensation Act is like the statutes in *Sherbert, Thomas, Hobbie,* and *Frazee* in that it provides a system with individualized exceptions.[120]

Turning to the contention that because workers' compensation funds derive from private sources, the system is beyond the realm of First Amendment scrutiny, the court explained that the source of funds was not determinative.[121] As the court stated:

> [I]t is the Commonwealth's action in administering the Act, not the method utilized to fund benefits, that forces the claimant "'to choose between fidelity to religious belief and employment,'" and thereby "'brings unlawful coercion to bear on the [claimant's] choice.'"[122]

After deciding that the Virginia Workers' Compensation scheme was analogous to the unemployment compensation stat-

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118. *Id.* at 209, 440 S.E.2d at 615.

119. *Id.* at 212, 440 S.E.2d at 618.

120. *Id.* at 212-13, 440 S.E.2d at 617-18. The court stated that it agreed with Chief Justice Burger's statement in Bowen v. Roy, 476 U.S. 693 (1986):

> The statutory conditions at issue in those cases [*Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, "without good cause," he had quit work or refused available work. The "good cause" standard created a mechanism for individualized exemptions. If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus, as was urged in *Thomas*, to consider a religiously motivated resignation to be "without good cause" tends to exhibit hostility, not neutrality toward religion . . . . In [*Sherbert* and *Thomas*], therefore, it was appropriate to require the State to demonstrate a compelling reason for denying the requested exemption.

247 Va. at 213, 440 S.E.2d at 618 (quoting 476 U.S. at 708).

121. *Id.* at 213, 440 S.E.2d at 618.

122. *Id.* at 213-14, 440 S.E.2d at 618 (quoting *Frazee*, 489 U.S. at 832).

utes in *Sherbert* and its progeny and that the private nature of workers' compensation benefits was not determinative, the court applied the *Sherbert* compelling interest test. Noting that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion,"[123] the court found that "[n]othing in the record suggests that the Commonwealth's legitimate interest in administering the Act equitably and efficiently would be thwarted by protecting Ballweg's sincerely held religious beliefs."[124] Finding "no real distinction" between Ballweg's dilemma and the *Sherbert* line of cases, the court reversed the court of appeals.[125]

This holding is correct. The Workers' Compensation Commission and the court of appeals essentially circumvented the proper constitutional analysis of Ballweg's case. First, the Commission avoided the constitutional analysis by claiming that because the State did not provide the funding for Ballweg's benefits, the State was not responsible for forcing Ballweg to choose between his religion and benefits.[126] The court of appeals then adopted this logic and also used it to distinguish *Ballweg* from *Sherbert* and *Thomas*.[127]

This logic, as the Virginia Supreme Court found, is flawed. By the Commission's admission, workers' compensation benefits are "directed by the State."[128] Because of this fact, it is irrelevant who directly pays for the benefits.

For example, in *Wengler v. Druggists Mutual Insurance Co.*,[129] Wengler filed a claim to receive privately funded workers' compensation benefits after his wife died in an industrial accident.[130] Under the Missouri statute,[131] widows automatically qualified for benefits. A widower, however, could not receive death benefits unless he was mentally or physically

123. *Id.* at 214, 440 S.E.2d at 618 (quoting *Yoder*, 406 U.S. at 215).
124. *Id.* at 214, 440 S.E.2d at 618.
125. *Id.* at 214, 440 S.E.2d at 619.
126. *Ballweg*, 71 O.W.C. at 280-81 (1992).
127. *Ballweg*, 427 S.E.2d at 733.
128. 71 O.W.C. at 280.
129. 446 U.S. 142 (1980).
130. *Id.* at 143.
131. Mo. REV. STAT. § 287.240 (Supp. 1979).

disabled or proved that he was dependent upon his wife's income.[132]

Wengler claimed that this administration of workers' compensation benefits violated the Equal Protection Clause of the Fourteenth Amendment.[133] The Supreme Court agreed, stating that "[i]t may be that there are levels of administrative convenience that will justify discriminations that are subject to heightened scrutiny under the Equal Protection Clause, but the requisite showing has not been made here . . . ."[134]

Thus, although dealing with workers' compensation, the Supreme Court applied the same constitutional analysis as if the state provided the funds. The key, therefore, is that the state decides who will receive the funds. Workers' compensation funds are administered by state agencies under state law. Therefore, the Virginia Supreme Court appropriately disregarded the source of workers' compensation funding. In rejecting Ballweg's argument under *Sherbert* and *Thomas* on the grounds that *Smith* limited application of the *Sherbert* test to unemployment compensation cases, the court of appeals misinterpreted the meaning of *Smith*.

The court of appeals failed to recognize the similarities between the case before it and *Sherbert*. In *Smith*, Scalia explained that application of the *Sherbert* test had been limited to unemployment compensation cases because those cases "developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct."[135] According to Scalia, and as the Virginia Supreme Court recognized, "where the State has in place a system of individual exemptions" the *Sherbert* compelling interest test applies.[136]

As the Virginia Supreme Court found, the Virginia Workers' Compensation Act meets the requirement of providing a system of individualized exemptions. The Commission adjudicates disputes that arise under workers' compensation law and adminis-

132. 446 U.S. at 143-46.
133. *Id.* at 146.
134. *Id.* at 152.
135. 494 U.S. 872, 884 (1990).
136. *Id.*

ters the rights guaranteed by the Act.[137] With regard to the refusal of selective employment, the Commission, under certain circumstances, exempts individuals from accepting selective employment procured by the employer.[138] Therefore, because the state provides a system for individualized exemptions, the Virginia Supreme Court appropriately held that the *Sherbert* test applies in *Ballweg* despite *Smith*.

However, even if there were no distinction between *Ballweg* and *Smith*, with the passage of the Religious Freedom Restoration Act the *Sherbert* strict scrutiny test would apply in *Ballweg* regardless of whether a system of exemptions exists. Therefore, the Virginia Supreme Court correctly applied the standards of *Sherbert* and its progeny in *Ballweg*.

V. CONCLUSION

Ballweg's dilemma under the Virginia workers' compensation law is strikingly similar to the situations in *Sherbert*, *Thomas*, *Hobbie*, and *Frazee*. In all five cases, an individual was asked to give up his or her religious convictions in order to receive a benefit administered by the state. Each case involved a law, neutral on its face and generally applicable, which when applied to the individual in question, burdened that individual's free exercise rights. As the Court explained in *Yoder*, even if a law is neutral on its face, its application can violate the Free Exercise Clause.[139] In addition, all five cases involved is a government agency that recognized the individual's religious beliefs as sincere, but determined that religious convictions do not represent "good cause" or, as in *Ballweg*, a "justifiable" reason for refusing to work.[140] Certainly, granting an exemption in Ballweg's situation would not lead to the administrative catastrophe contemplated in *Lee* any more than would the exemption granted in employment cases.

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137. VA. CODE ANN. §§ 65.2-200, 201 (1991).

138. *See, e.g.*, Marrow v. Addington Beaman Lumber Co., Inc., 69 O.I.C. 195 (1990); Mullins v. Misener Marine Constr. Co., 69 O.I.C. 167 (1990); Seaborn v. Georgia Pacific Corp., 68 O.I.C. 164 (1989); Wright v. Dan River Mills, Inc., 46 O.I.C. 265 (1964).

139. Wisconsin v. Yoder, 406 U.S. 205 (1972).

140. 71 O.W.C. at 281.

Because of the foregoing similarities between *Ballweg* and unemployment compensation cases, the Virginia Supreme Court correctly found that the Workers' Compensation Commission's application of Virginia Code Section 65.2-510 to Ballweg did not pass strict scrutiny. Hence, there existed a burden on Ballweg's religious conduct because he was forced to choose between his religion and receiving benefits. Therefore, to deny Ballweg benefits, it would have been necessary to have shown that there was a compelling state interest and that there was not a less restrictive means to achieve that goal. Because of the similarities between *Ballweg* and the *Sherbert* line of cases and the fact that the employer provided no evidence that any legitimate interest of the Commonwealth would be threatened by granting the exemption, the Virginia Supreme Court reached the inescapable conclusion that the refusal of workers' compensation benefits to Ballweg violated his constitutional rights.

Virginia, therefore, recognized that religious conduct, under certain circumstances, is entitled to First Amendment protection. A court should apply the *Sherbert* strict scrutiny test when any statutory scheme allowing individualized exemptions is applied in a way burdening an individual's free exercise rights. Additionally, if the program provides benefits, a court can find a government intrusion on First Amendment rights if the state determines the recipients.

Because Virginia's workers' compensation system provides for individualized exemptions and places the state in the position of deciding who is entitled to them, the Virginia Supreme Court etched a new justification for refusing employer procured selective employment into Virginia workers' compensation law.

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