Florida Law Review

Volume 29 | Issue 2 Article 11

January 1977

Labor Law: The Refusal of Non-Union Work as a Basis for Disqualification in Florida's Unemployment Compensation Law

Robert Warren Wedan

Follow this and additional works at: https://scholarship.law.ufl.edu/flr

Part of the Law Commons

Recommended Citation

Robert Warren Wedan, *Labor Law: The Refusal of Non-Union Work as a Basis for Disqualification in Florida's Unemployment Compensation Law*, 29 Fla. L. Rev. 387 (1977).
Available at: https://scholarship.law.ufl.edu/flr/vol29/iss2/11

This Case Comment is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

est. Although the individual has lost his right to expect that his private business papers will be inviolate, this cost can be justified by the fact that fourth amendment restrictions on the seizure of documents are retained, while fifth amendment restraints are removed.

The expansion in *Boyd* of the fifth amendment to include document immunity was the product of judicial overreaching to decide an issue not raised by the case. The holding of the instant case overruled the last of that dicta and has completed the process of dismantling *Boyd.* Thus it is appropriate to consider that: "Respect for . . . [constitutional] principles is eroded when they leap their proper bounds to interfere wth the legitimate interest of society in enforcement of its laws and collection of the revenues."[78]

HENRY H. BOLZ, III

LABOR LAW: THE REFUSAL OF NON-UNION WORK AS A BASIS FOR DISQUALIFICATION IN FLORIDA'S UNEMPLOYMENT COMPENSATION LAW

Adams v. Auchter Co., 339 So. 2d 623 (Fla. 1976)

Claimant, an unemployed member of Carpenter's Local Union 627, was offered[1] non-union work at slightly less than the union wage scale.[2] Because his union prohibited the acceptance of any non-union work at less than union wage, he refused the offer. Subsequently, the claims examiner for the Department of Commerce discontinued his unemployment compensation since he had refused suitable work.[3] The Industrial Relations Commission reversed and reinstated the unemployment benefits;[4] but the First District Court of Appeal

78. Couch v. United States, 409 U.S. 322, 336 (1972).

1. Adams v. Auchter Co., 339 So. 2d 623, 624 (Fla. 1976) (Adkins, J., dissenting). Claimant complied with Florida law to the extent that he actively sought work. He did not rely solely on his union's referral service, but sought employment on his own initiative. *See* Florida Indus. Comm'n v. Ciarlante, 84 So. 2d 1, 4 (Fla. 1955); Dawkins v. Florida Indus. Comm'n, 155 So. 2d 153, 154-55 (2d D.C.A. Fla. 1963); Teague v. Florida Indus. Comm'n, 104 So. 2d 612, 614 (2d D.C.A. Fla. 1958).

2. The union wage scale was $7.56 per hour. Since $.91 per hour is kept by the union to fund its program, the union member would take home $6.65 per hour. Claimant was offered non-union employment at $7.00 per hour, although the average wage scale for carpenters in that area (Orange Park) was $3.62 per hour, the low being $1.70 per hour and the high being $6.00 per hour. Auchter Co. v. Florida Indus. Rel. Comm'n, 304 So. 2d 487 (1st D.C.A. Fla. 1975).

3. This determination was based on FLA. STAT. §443.06(2) (1975). On appeal, the referee affirmed for the reason that the claimant-petitioner had materially reduced his chances for securing employment because of self-imposed restrictions and hence could not be considered to have been available for work as required by FLA. STAT. §443.05(1)(c)1 (1975). 304 So. 2d at 487.

quashed that decision.[5] On certiorari the Supreme Court of Florida affirmed[6] and HELD, that unemployment benefits were properly withheld from the claimant because his refusal to accept otherwise suitable work on the ground that it did not conform to union standards was not a refusal with good cause in accordance with Florida law.[7]

The social emphasis of congressional legislation in the 1930's was characterized by enactments protecting labor unions and supporting the unemployed. With the passage of the Norris-LaGuardia Act[8] in 1932 and the National Labor Relations Act[9] in 1935 a federal policy encouraging unionism replaced one of mere tolerance. The new policy represented a belief that through collective bargaining the employee could meet on an equal basis with his employer to negotiate wages, hours, and working conditions.[10] Contemporaneously,[11] the unemployed found relief through the Old Age and Survivor's Insurance Act[12] which provided a tax offset device to encourage[13] the formation of state unemployment insurance programs.[14] Because economic insecurity was viewed as a menace to the welfare of society, the programs were designed to maintain the purchasing power of the unemployed by making available subsistence

---

4. The Commission found that the claimant, as a consequence of accepting the offered employment, would have been subjected to discipline and would have been deprived of union benefits which inure to his advantage in terms of retirement and medical benefits. The Commission then determined that the claimant could not have been expected to make this sacrifice in order to receive unemployment compensation because such a result would not be consonant with the national labor relations policy. *Id.* at 488.

5. *Id.*

6. Adams v. Auchter Co., 339 So. 2d 623 (Fla. 1976).

7. FLA. STAT. §443.06(2) (1975).

8. 47 STAT. 70 (1932), 29 U.S.C. §§101-115 (1952).

9. Originally called the Wagner Act, 49 STAT. 449 (1935), the NLRA was later amended by the Taft-Hartley Act, 61 STAT. 136 (1947), 29 U.S.C. §§141-188 (1952).

10. The Norris-LaGuardia Act attempted to equalize labor's economic weapons with those of employers by removing certain judicial restraints. Going even further, the National Labor Relations Act declared that employees should be given the right to collectively bargain because such bargaining was a desirable means of setting wages, hours, and working conditions. The 1947 amendments to the National Labor Relations Act retained the purpose of encouraging collective bargaining, but subjected that purpose to an overall policy of protecting the interests of employers and individual employees as well as of unions. *See* Jones, *The Conflict Between Collective Bargaining and Unemployment Insurance*, 28 ROCKY MOUNT. L. REV. 185 (1956).

The power of Congress to pass the National Labor Relations Act extends from the commerce clause of the United States Constitution. The broad interpretation of that provision by the Supreme Court of the United States carried federal authority into fields traditionally the sole domain of the states. *See, e.g.*, NLRB v. Fainblatt, 306 U.S. 601 (1939).

11. For a discussion of the parallel development of union policy and unemployment insurance, *see generally* Jones, *supra* note 10.

12. 49 STAT. 620 (1935-36), 26 U.S.C. §§3301-3310 (1970).

13. *See* Jones, *supra* note 10, at 186.

14. The Florida legislature responded by passing the Unemployment Compensation Law. This statute was designed to establish free public employment offices in the state and to accumulate funds to benefit those who were unemployed through no fault of their own. Responsibility for the administration of the program was placed in the Florida Industrial Commission. FLA. STAT. ch. 443 (1975).

checks and job finding agencies.[15] Eligibility requirements specified that the worker be unemployed, that he be able to work, and that he be available for work.[16]

The Florida Unemployment Compensation Law paralleled the federal labor policy protecting unionism in that both were designed to benefit the working people.[17] Because of this similarity of purpose the disqualification provisions[18] of the Unemployment Compensation Law do not conflict with the goals of the National Labor Relations Act. For instance, an unemployed worker is not disqualified from unemployment benefits for refusing work which is available because of a strike, lockout, or other labor dispute.[19] Without such a provision the unemployed worker would be encouraged to accept the work, reducing the effectiveness of the strike.

While the Unemployment Compensation Law was not meant to undercut labor law's objectives, neither was it meant to actively promote them. This tension of restrained cooperation has made it inevitable that the purposes of the two statutory schemes would not coincide in certain situations. For instance, because the Unemployment Compensation Law has limited its benefits to those who are involuntarily[20] unemployed, unemployment funds have not been awarded to workers who are unemployed because of a labor dispute.[21] A labor dispute was considered a voluntary act and unemployment resulting from it was held to be the fault of the laborer.[22] The argument for such a disqualification was that the Unemployment Compensation Law was not designed to finance disputes,[23] but to help those who are unemployed through no fault of their own.

---

15. *See* FLA. STAT. §443.02 (1975).

16. For additional requirements *see* FLA. STAT. §443.05 (1975).

17. *See* Jones, *supra* note 10.

18. FLA. STAT. §443.06(2)(b) (1975) provides: "Notwithstanding any other provisions of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (1) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (2) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (3) If as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any *bona fide* labor organization."

The three-pronged exemptions to disqualification are required in all states for approval of their unemployment compensation law. *See* 26 U.S.C. §3304(a)(5) (1970).

19. FLA. STAT. §443.06(2) (1975).

20. For a discussion of how the term "involuntary" can be misleading, *see* Sanders, *Disqualification for Unemployment Insurance*, 8 VAND. L. REV. 307, 310 (1954).

21. FLA. STAT. §443.06(4) (1975). *See, e.g.*, Post-Times Co. v. Turner, 123 So. 2d 359 (1st D.C.A. Fla. 1960); Olusczak v. Florida Indus. Comm'n, 230 So. 2d 31 (1st D.C.A. Fla. 1970).

22. Sometimes courts are placed in a philosophical dilemma in applying the labor dispute disqualification. While the purpose of the disqualification may be that the state desires to remain neutral in disputes, the courts may also be aware that unemployment compensation is meant to be remedial and liberally construed to achieve its beneficial purposes. *See* Comment, *Labor Controversies and Unemployment Compensation*, 36 ALB. L. REV. 95 (1971); *e.g.*, O'Brian v. Michigan Unemployment Comp. Comm'n, 309 Mich. 18, 14 N.W.2d 560 (1944).

23. Striking laborers stand to gain by the economic pressures they exert. To insure them a guaranteed income during the dispute would unequally increase the power and stamina of the union at the bargaining table. *See* Commentary, *Unemployment Benefits in Labor*

This posture of restrained cooperation is also illustrated by the provision which allows a claimant to refuse offered work when as a condition of employment he is required to resign from any *bona fide* labor organization.[24] Although this provision has been interpreted to include conditions imposed by the employer, courts have not extended it to include conditions imposed by the claimant's union. This distinction arises when unions, in order to maintain the standards of acceptable working conditions, have dictated to their unemployed members not to accept inferior work.[25] But "inferior work" may nonetheless be considered suitable work under the Unemployment Compensation Law, and an unemployed union member may disqualify himself from benefits by complying with his union's requests. Thus, in *Bigger v. Unemployment Compensation Commission*,[26] disqualification resulted when an unemployed worker refused non-union work at slightly less than union wage because his union threatened to expel any member that accepted work below the union scale. In *Bigger*, the claimant contended that this situation was the same as if he had been required to resign from a *bona fide* labor organization as a condition of employment. In rejecting this contention, the court pointed out that the statute was designed to protect a prospective employee against unfair labor conditions imposed by an employer, not to enforce demands of the employee or standards of his union.[27]

The *Bigger* case and others[28] defined the public policy behind the unem-

---

Controversies: The Anachronisms of the Establishment Doctrine, 16 BUFFALO L. REV. 715 (1967).

24. See note 18 *supra*.

25. Unions feel that their bargaining achievements would be undermined if one of their members were to accept work below union standards. *See* Mandelker, *Refusals to Work and Union Objectives in the Administration of Taft-Hartley and Unemployment Compensation*, 44 CORNELL L. Q. 477, 503 (1952).

26. 43 Del. 553, 53 A.2d 761 (1947).

27. *Id.* at 563, 53 A.2d at 766.

28. Under similar facts, the Supreme Court of Mississippi in Mills v. Mississippi Employment Sec. Comm'n, 89 So. 2d 727 (Miss. 1956), held that the claimant was not "available for work" when he refused suitable employment on the sole ground that he might be subject to fine or expulsion from his union for accepting that employment. The court insisted that the legislature did not intend to give effect to union regulations in determining whether a claimant has forfeited his rights to receive benefits. *Id.* at 730. Similarly, the Supreme Court of Pennsylvania in Barclay White Co. v. Unemployment Comp. Bd. of Review, 356 Pa. 43, 50 A.2d 336, *cert. denied*, 332 U.S. 761 (1947), on the same facts, reasoned that to allow compensation in such a case would be the equivalent of permitting a union to adopt its own definition of suitable work and determine by rule and bylaws what constitutes good cause for refusing referred employment. *Id.* at 52, 50 A.2d at 341. Finally, in Chambers v. Owens-Ames-Kimball Co., 146 Ohio St. 559, 67 N.E.2d 439 (1946), the Supreme Court of Ohio noted that the equal protection clauses of the state and federal constitutions would be violated if a union member was allowed to refuse suitable work while a non-union member was not.

Arguably, the discriminatory treatment alluded to in the Ohio case would not violate the equal protection clause of the federal constitution. Unless the discrimination involves a "suspect classification" such as race or religion the Supreme Court of the United States will only subject the discriminatory treatment to a "rational relation" test. If a rational state objective can be found and the discrimination is reasonably designed to achieve its purpose, then there is no violation of the equal protection clause. Dandridge v. Williams, 397 U.S. 471 (1970). The Supreme Court of Ohio, however, effectively insulated its decision from

ployment compensation laws in the context of union rights. Although the right to union membership was recognized as an aspect of national policy, it was not intended to create a special privilege in terms of unemployment benefits. The courts treating the issue have emphasized that the unemployment compensation law was intended to benefit those who are unemployed because of conditions over which they have no control, and who are willing, anxious, and ready to obtain employment.[29]

The lower court[30] in the instant case analyzed Florida's Unemployment Compensation Law[31] against this background of judicial recognition of restrained cooperation between pro-union legislation and unemployment benefits. No other Florida court had ever faced the particular problem of an unemployed union member being denied benefits because of his refusal to accept non-union work.[32] The claimant contended that by accepting non-union employment he would have deprived himself of union retirement and medical benefits and subjected himself to union discipline and a fine. Certainly, he argued, the court's interpretation of the Unemployment Compensation Law should not be so restricted as to force him, as a condition to qualification for benefits, to jeopardize his rights acquired through years of union membership. The lower court responded that under Florida law[33] the conditions which rendered work unsuitable and subject to permissable rejection by the prospective employee were only those imposed by the employer. Here, the union and not the employer or the State of Florida threatened to impose sanctions upon the claimant. Thus, the lower court recognized the union's right to adopt rules for governing its members but concluded that the benefits should be withheld

---

review by the Supreme Court of the United States. If a state decision will rest on independent state grounds (state constitution) the Supreme Court will refuse to hear the case.

29. Although not in the context of union right, a Florida case, Florida Indus. Comm'n v. Ciarlante, 84 So. 2d 1 (Fla. 1955), has interpreted the meaning behind "availability for work" to be largely a subjective term designed to test the individual's continued and current attachment to the labor force. The court stated that the Florida courts up until 1955 had not defined the term "availability," but other courts had. The *Ciarlante* court showed a particular reliance on those other state courts. *Id.* at 3. The term, according to Schettino v. Administrator, Unemployment Compensation Act, 138 Conn. 253, 260, 83 A.2d 217, 220 (Sup. Ct. of Errors, 1951), means that the person must be exposed unequivocally to the labor market. A Minnesota case, Swanson v. Minneapolis-Honeywell Regulator Co., 240 Minn. 449, 456, 61 N.W.2d 526, 531 (1953), said: "In order to give effect to the act a person must be ready and willing to accept suitable work. The act is intended to benefit persons who are unemployed through no fault of their own and who are genuinely attached to the labor market." *Ciarlante* also cited Pizura v. Director of Div. of Employment Security, 331 Mass. 320, 118 N.E.2d 771 (1954), saying, "A factor to be considered is the claimant's mental attitude, i.e., whether he wants to go to work or is content to remain idle." Florida Indus. Comm'n v. Ciarlante, 84 So. 2d at 3. The *Ciarlante* case dealt with a seasonal worker who made a few unsuccessful attempts to find work. *See also* Teague v. Florida Indus. Comm'n, 104 So. 2d 612 (2d D.C.A. Fla. 1958).

30. Auchter Co. v. Florida Indus. Rel. Comm'n, 304 So. 2d 487 (1st D.C.A. Fla. 1974).

31. FLA. STAT. ch. 443 (1975).

32. A possible exception is the unreported case of Cartwright v. Carbone, Inc., *cert. denied*, 247 So. 2d 804 (3d D.C.A. Fla. 1971).

33. See note 18 *supra*.

since by imposing the restrictions the union, and no one else, created the claimant's dilemma.[34]

Although the claimant also asserted an abridgment of his union rights as protected by article I, section 6 of the Florida Constitution, the court saw no constitutional issue at stake because the claimant had not shown an actual infringement of such rights.[35] Even if actual infringement could be shown, however, the court noted that the provision was inapplicable since it was the union and not the employer or the State of Florida which imposed such restrictions on union membership.[36]

In affirming the lower court's decision, the Supreme Court of Florida agreed that the claimant had failed without good cause to accept suitable work.[37] Admitting that there was little that could be added to the appellate court's opinion, the court merely noted that the decision was in accord with virtually every state that has considered the question.[38] Furthermore, the court reasoned that the holding comported with the basic philosophy of the unemployment compensation law that the funds should be used only for the benefit of persons unemployed through no fault of their own.[39] The majority, however, did not address a constitutional issue.

The dissent, on the other hand, focused on the constitutional question ignored by the majority.[40] Since none of the states cited by the majority had a constitutional provision guaranteeing the right of employees to bargain collectively through a labor organization[41] comparable to Florida's,[42] the dissent

---

34. 304 So. 2d at 489.

35. The court felt that the petitioner's fear of losing his union benefits was in fact illusory, quoting Commissioner Coleman, the dissenter in the two to one vote of the Industrial Commission which held that the petitioner was eligible for unemployment benefits. Coleman made reference to the years since 1939 in which he had served as an appeal referee and general counsel for the Commission. "'During such period there were many occasions when the same contention was made by union members as is made in the case *sub judice*, i.e., that if a union member accepted nonunion work he would be subject to disciplinary action. In the course of the history of this Commissioner, in hearing appeals, some of which involved this contention and in representing the Florida Industrial Commission and the Board of Review he has no recollection of any instance when any evidence was ever submitted or incorporated in any case record wherein any such disciplinary action had ever been imposed upon any union members for accepting suitable work solely because it was with a nonunion employer.'" 304 So. 2d at 489.

36. *Id.*

37. Adams v. Auchter Co., 339 So. 2d 623 (Fla. 1976).

38. *See* Thornbrough v. Stewart, 232 Ark. 53, 334 S.W.2d 699 (1960); Lemelin v. Administrator, Unemployment Comp. Act, 27 C.S. 446, 242 A.2d 786 (1968); Bigger v. Unemployment Comp. Comm'n, 43 Del. 553, 53 A.2d 761 (1947); Norman v. Employment Sec. Agency, 83 Idaho 1, 356 P.2d 913 (1960); Miville v. Maine Employment Sec. Comm'n, 219 A.2d 752 (Me. 1966); Mississippi Employment Sec. Comm'n v. Mixon, 248 Miss. 399, 159 So. 2d 181 (1964); Chambers v. Owens-Ames-Kimball Co., 146 Ohio St. 559, 67 N.E.2d 439 (1946); Barclay White Co. v. Unemployment Comp. Bd. of Review, 56 Pa. 43, 50 A.2d 336, *cert. denied*, 332 U.S. 761 (1947).

39. FLA. STAT. §443.02 (1975).

40. 339 So. 2d at 624 (Adkins, J., dissenting).

41. Only two of the states cited in the majority opinion have any constitutional provisions dealing with union rights: Arkansas and Mississippi. These provisions, however, are

deemed the public policy of these states to be irrelevant. Therefore, the dissent argued that Florida's public policy cannot be construed on the basis of the Unemployment Compensation Law alone.[43] A reconstruction of the dissenting argument reveals a presupposition that if collective bargaining is a protected right, so must be the right to union membership; otherwise, the constitutional right would be of no effect.[44] From that premise the dissent concluded that union membership, independent of bargaining activity, was a right beyond infringement of the state.[45] Therefore, the state[46] could not force the claimant

---

in no way comparable to Florida's broadly stated right to bargain collectively. See note 42 *infra.*

ARK. CONST. amend. 34, §1 provides: "No person shall be denied employment because of membership in or affiliation with or resignation from a labor union, or because of refusal to join or affiliate with a labor union; nor shall any corporation or individual or association of any kind enter into any contract, written or oral, to exclude from employment members of a labor union or persons who refuse to join a labor union, or because of resignation from a labor union; nor shall any person against his will be compelled to pay dues to any labor organization as a prerequisite to or condition of employment."

MISS. CONST. art. 7, §198-A provides: "It is hereby declared to be the public policy of Mississippi that the right of a person or persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization."

42. FLA. CONST. art. I, §6 provides in part: "The right of persons to work shall not be denied or abridged on account of union membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged."

43. To support his argument Justice Adkins cited a New York case, *In re* Grandin's Claim, 19 App. Div. 2d 448, 243 N.Y.S.2d 902 (Sup. Ct. 1963), which upheld a union member's right to refuse non-union work with no clear proof that his union rights would be infringed. This decision he attributed to New York's constitution which provides: "Employees shall have the right to organize and to bargain collectively through representatives of their own choosing." N.Y. CONST. art. I, §17. The result in this case, however, was probably dictated by a New York statute reflecting a very strong pro-union public policy: "No refusal to accept unemployment shall be deemed without good cause nor shall it disqualify any claimant otherwise eligible to receive benefits if acceptance of such employment would . . . interfere with his . . . retaining membership in any labor organization . . . ." N.Y. LABOR LAW §593(2)(a) (McKinney 1958). See Mandelker, *supra* note 26, at 516, which explains that the concentration of unionization in the locality may affect standards used to interpret the "suitability" of proffered employment.

44. 339 So. 2d at 625 (Adkins, J., dissenting). "To deny petitioner unemployment compensation is to deny him the right to *bargain collectively* as a *union member*. The decision of the District Court penalizes petitioner for exercising a constitutionally protected right. The State cannot ignore this right by compelling petitioner to choose between unemployment benefits and *union membership.*" *Id.* (emphasis added).

45. This method of constitutional construction resembles that of Justice Douglas in his majority opinion in Griswold v. Connecticut, 381 U.S. 479 (1965). That case upheld the right of married people to use contraceptives in the privacy of their home. Justice Douglas asserted that there are many rights which are not specifically included in the Constitution, but which are peripheral to those expressed rights and "necessary in making the express guarantees fully meaningful." *Id.* at 483. The "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484. Justice Douglas reasoned that the various guarantees created "zones of privacy." *Id.*

Justice Douglas' method of constitutional construction does not necessarily lend any support to Justice Adkins' attempt to create a general right to union membership from the

to trade away a constitutional right in order to remain qualified under the unemployment compensation program. To strengthen the argument the dissent referred to section 447.03 of the Florida statutes as a legislative declaration paralleling the public policy of article I, section 6. That statute guarantees the right to self-organization for the purposes of collective bargaining. The dissent asserted that Florida's policy to protect the rights of union membership was, therefore, declared legislatively as well as constitutionally.[47] This valuable

---

collective bargaining clause. In contrast, the right to privacy is now viewed as a "fundamental" value "implicit in the concept of ordered liberty." Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring). It is only one of many values which compose the body of law referred to as substantive due process. Those rights find protection not just as peripheral aspects of explicit protections, but as aspects of the due process clause of the fourteenth amendment. For a discussion of Justice Black's dissenting opinion in Griswold v. Connecticut, see note 57 *infra*.

46. This issue of state involvement is illustrated by the case of Sherbert v. Verner, 374 U.S. 398 (1963), which is in many ways analogous to the instant case. In that case the petitioner, a Seventh Day Adventist, refused proffered work because it would have required her to work on Saturdays, her day of worship. The Supreme Court of the United States ruled that the state violated petitioner's freedom of religion by forcing her to choose between unemployment benefits and her religious convictions.

The *Sherbert* case, which embodied the federal doctrine of unconstitutional conditions, stands for the notion that a state cannot condition a statutory right upon the waiver of a federal constitutional right. "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner compel a surrender of all. It is inconceivable that guaranties [*sic*] embedded in the Constitution of the United States may thus be manipulated out of existence." Frost v. Railroad Comm'n, 271 U.S. 583, 594 (1926). *See* Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

Arguably, in the *Sherbert* case, the state infringement of the constitutional right was more direct than in the instant case. The employer created an unreasonable condition of employment which the state sanctioned. In the instant case, the union, and not the employer, presented an unreasonable condition. If this distinction is significant, federal case law offers another doctrine which may suggest the necessary connection for the instant case. William Van Alstyne, in his article *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968), described the doctrine of indirect effects as an extension to the doctrine of unconstitutional conditions. Even though a state does not directly infringe a constitutional right by a particular statute, the Supreme Court of the United States has occasionally protected the petitioner "by emphasizing the 'unconstitutional effect' of the regulation . . . ." *Id.* at 1449. But the test is more complex for it involves an attempt to balance competing "public and private concerns to determine whether the regulation as applied has a sufficient connection with important enough state interests to outweigh the incidental effect on the constitutional rights of the affected class." *Id. See* Shelton v. Tucker, 364 U.S. 479 (1960).

This material is offered by way of analogy and is not meant to suggest that the doctrines of federal constitutional law necessarily govern Florida constitutional interpretation.

47. The dissent also cited the National Labor Relations Act, 29 U.S.C.A. §151 (1973), as declaring that union membership is a federal right. If he means to say that union membership, beyond the purpose of collective bargaining, is a federal right protected from any direct or indirect state influence, then the discussion of article I, §6 is superfluous. The federal law, if applicable, would preempt any state constitution or statute. *See* Lodge 76, Int'l Ass'n of Machinists and Aero-Space Workers, A.F.L.-C.I.O. v. Wisconsin Employment Relations Comm'n, 96 S. Ct. 2548 (1976).

If Congress had meant for the National Labor Relations Act to give union membership special protection in terms of unemployment compensation disqualification, that protection

right, according to the dissent, should remain a matter of free choice for the worker, unhindered or unintimidated by any outside force.[48]

This dispute between the district court and the dissent as to the protection the constitution affords to union membership and the extent to which it modifies the scope of Florida's Unemployment Compensation Law can be partially explained by the fact that the district court, in finding no abridgement of article I, section 6, seemed to interpret a different clause than did the dissent. The lower court apparently interpreted the "right to work" clause,[49] while the dissent was concerned with the constitutionally protected right to collectively bargain.

The "right to work" provision guarantees that the right to work shall not be denied or abridged on account of union membership. Although the district court correctly concluded that this constitutional provision was inapplicable to the claimant's cause, its explanation was insufficient.[50] The provision was inapplicable for two reasons. First, the "right to work" must be understood as protecting union membership only to the extent that such membership cannot become the basis of discriminatory treatment so as to reduce the injured party's chances for obtaining work.[51] Clearly, neither the employer nor the state was restricting the claimant's opportunities for work. Second, the "right to work" already has partial protection in the Unemployment Compensation Law. If, hypothetically, a prospective employer did infringe a claimant's right to work because of union affiliation, that employer would have created a condition of employment specifically identified as unsuitable in the disqualification provisions.[52] The claimant would have been eligible for unemployment benefits

---

would have been reflected in 26 U.S.C. §3304(a)(5) (1970), which outlines acceptable reasons for refusing new work. See note 18 *supra*.

48. For a similarly broad statement of public policy toward union membership, see Local Union No. 519 v. Robertson, 44 So. 2d 899, 902 (Fla. 1950), where the court stated that working men "are guaranteed complete freedom of decision in whether to join or refrain from joining any labor organization . . . . They are not to be coerced or intimidated in the enjoyment of their legal rights, including the right of free decision as to whether or not they will join a union . . . ." *Id.*

49. The district court never specified which aspect of article I, §6 it was addressing. But, the court seemed to dismiss Article I, §6 with the same argument it used to dismiss claimant's contention that he was required to resign from a labor organization, i.e., the disqualification provision of FLA. STAT. §443.06(2)(b)3 (1975). See text accompanying note 24 *supra*. The response to both of claimant's arguments is that it is the union and not the employer or the state which imposes the sanctions. This similarity in response can be explained because the "right to work" clause operates in a way similar to the disqualification provision. Both provide protection from discriminatory treatment on the basis of union membership. The parallel manner in which the court dismissed the arguments has led, therefore, to the conclusion that the court was construing the "right to work" clause. 304 So. 2d at 489 (1976).

50. See text accompanying note 36 *supra*.

51. The right to work clause "clearly bestows on the workingman a right to join or not to join a labor union, as he sees fit, without jeopardizing his job." Schermerhorn v. Local 1625 of Retail Clerks Int'l Ass'n, 141 So. 2d 269, 272, *aff'd*, 375 U.S. 96 (1963). "Under these provisions it is the declared public policy of the State that all working men, whether union or non-union, shall be considered on an equal footing with respect to labor opportunities." Local Union No. 519 v. Robertson, 44 So. 2d 899, 902 (Fla. 1950).

52. See note 18 *supra*.

by the force of the Unemployment Compensation Law itself, not because of a constitutional violation. Therefore, the "right to work" clause does nothing to expand the scope of the Unemployment Compensation Law, and the lower court properly dismissed that claim.

The dissent felt that there was merit to the claimant's constitutional argument because of the "right to collectively bargain" clause. To the dissent that clause created an unqualified right to union membership. Though the majority of the supreme court did not address this issue, close analysis of the dissent's argument reveals inherent defects. Union membership, independent of bargaining activity, is not a constitutional right. The protected activity is, by definition,[53] that which is dedicated to improving the conditions of employment. Unless union membership affects the quality of that activity, the claimant cannot invoke constitutional protection.[54] Accordingly, the right to collectively bargain was not even an issue in the claimant's complaint.[55] The claimant

53. "[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . . ." Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. §158(d) (1970).

54. Florida cases as well as foreign decisions support the distinction between activity which is protected by a constitution and that which is not.

The New York constitutional provision, see note 43 *supra*, protects employees against legislative or judicial action which would interfere with their organization and choice of representatives for the purpose of bargaining collectively. Additional rights must be provided by statute. For instance, in Quill v. Eisenhower, 113 N.Y.S.2d 887 (Sup. Ct. 1952), the court reasoned that although the right of employees to bargain cannot be enjoined, the correlative duty of the employer to bargain must be found in the provisions of New York labor law. In Mount Sinai Hospital, Inc. v. Davis, 18 N.Y. Misc. 2d 311, 190 N.Y.S.2d 870 (Sup. Ct. 1959), the court stated that the right to collectively bargain grants to employees immunity from court injunctions only when involved in an actual labor dispute. If they are not involved in the actual activity of collective bargaining as defined by statute (§876-a of Civil Practice Law, Clevenger, current version at N.Y. Labor Law §807 (McKinney 1965)), their activities can be limited. The best interpretation of *In re* Grandin's Claim, 19 App. Div. 2d 448, 243 N.Y.S.2d 902 (Sup. Ct. 1963), would also illustrate that the right to collectively bargain is not broad enough to give unemployed union members the right to refuse non-union work and remain qualified for unemployment benefits. The right to refuse non-union work is granted not by the constitution but by statute. See note 43 *supra*.

In the Florida case, Local Union No. 519 v. Robertson, 44 So. 2d 899 (Fla. 1950), a union, composed of persons not employees of the plaintiff, was properly enjoined from picketing the plaintiff. The court determined that no valid controversy existed between the union and the plaintiff and that, therefore, the union was not picketing for legitimate reasons. The union action was illegitimate for two reasons: first, the closed shop agreement it was attempting to force on the plaintiff was illegal in that it violated the right to work provision; second, there was no dispute in the employer-employee relationship and hence the union was not meeting its purpose of representing the bargaining interests of the employees.

These cases seem to indicate that collective bargaining is an activity engaged in by a union to improve working conditions with an employer. Any rights beyond that may not fall under constitutional protection and must be created by statute.

55. By way of analogy, this method of construing a constitutional provision according to its strict meaning was used by Justice Black dissenting in Griswold v. Connecticut, 381 U.S. 479, 507 (1965). In response to Justice Douglas' expansive approach by which Douglas found

asserted not the unrestrained freedom to bargain with his employer, but an unprotected freedom from having to decide between union membership and unemployment compensation.

Furthermore, the dissenting argument is deficient in that it fails to adequately follow the public policy of the State of Florida. By asserting that a union member may refuse work while a nonmember may not, the dissent was advocating a union-supportive, rather than a neutral state policy.[56] Without a constitutional provision authorizing such a generalized pro-union stance, the court is restricted[57] to the public policy expressed by the legislature.[58] Inasmuch as the Florida legislature has not adopted a strong union preference,[59] except in the area of collective bargaining, the threat of losing union membership or benefits should not be considered serious enough to modify the standards of disqualification in unemployment compensation.[60]

---

a right to privacy in the penumbra of explicit rights, Justice Black said, "I get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision." *Id.* at 509. "There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities . . . . But I think it belittles that Amendment to talk about it as though it protects nothing but 'privacy.'" *Id.* at 508.

56. The Supreme Court of Ohio condemned such preferential treatment in the administration of government programs because it would interfere with the uniform administration of the law. Chambers v. Owens-Ames-Kimball Co., 146 Ohio St. 559, 67 N.E.2d 439 (1946). "Government cannot abdicate and permit any person or group of persons by private action or determination to qualify or disqualify an applicant for governmental benefits such as . . . unemployment compensation. On the contrary, an applicant for such benefits may be obliged to suffer disqualification for participation in such benefits if he attaches as a requisite to his employment some condition which is in conflict with a uniform administration of the law." *Id.* at 571, 67 N.E.2d at 445.

57. This is not to say that judges may not make policy determinations. Their evaluations of what the public policy is, however, should bank heavily on the voice of representational government. With this in mind the court should consider the work refusal requirements which the legislature has designed to maximize the effectiveness of unemployment insurance in conquering economic hardship and distress. "Recognition that protection against the economic consequences of wage loss is a legitimate aim of government has brought with it the imposition of work refusal requirements to define properly the scope of the protection to be afforded." Mandelker, *supra* note 25, at 477. *See also* Barclay White Co. v. Unemployment Comp. Bd. of Review, 356 Pa. 43, 50 A.2d 336, *cert. denied*, 332 U.S. 761 (1947), which said that it is the role of the legislature and not the judiciary to effectuate a change in the standards of suitability for claimants of unemployment benefits. The legislature is in the best position to determine a shift in public policy. *Id.* at 49, 50 A.2d at 341.

58. As discussed in notes 43, 54 *supra*, the New York legislature has adopted a pro-union stance in the administration of unemployment benefits. Such a pro-union policy is an indication of the concentration of unionization in the state. See Mandelker, *supra* note 25, at 507, 516.

59. See note 18 *supra*.

60. One reason for this view was expressed in Mandelker, *supra* note 25, at 514: "Many feel that unemployment compensation, like poor relief, should only provide aid at a subsistence level, without regard to previous employment. Work refusal requirements are also important in the prevention of fraud, and union-oriented refusals that have only a personal basis must be viewed from this perspective . . . . If the program is intended to force the