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BISHOP LEONARD V. UNEMPLOYMENT COMPENSATION BOARD OF REVIEW: SPECIAL TREATMENT FOR RELIGIOUS EMPLOYERS IN PENNSYLVANIA

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ABSTRACT

Employees are entitled to the benefits of unemployment compensation when unemployed through no fault of their own. The government has the right to statutorily define what conduct does not qualify for these benefits. The government also has the obligation to enforce these statutory provisions uniformly, regardless of whether the employer is a secular or religious employer. The difficulties of weighing the rights of the employer against those of the employee, in compliance with the statutory unemployment scheme, and in recognition of the constitutional concerns presented, are discussed in the context of *Bishop Leonard Regional Catholic School v. Unemployment Compensation Board of Review.*

INTRODUCTION

The appropriate application of unemployment compensation statutes to the employee who is unemployed because of her/his religious beliefs or practices is not foreign to the United States Supreme Court [1]. The similar issues that are present when the employer is a religious organization have not been reviewed by the Court. The Pennsylvania Commonwealth Court has been presented with this situation twice in recent years [2]. In both cases, the Pennsylvania Supreme Court denied the petitions for appeal [3]. In one, *Bishop Leonard Regional Catholic School v. Unemployment Compensation Board of Review*, the petitioner filed a petition for certiorari to the United States Supreme Court, which was denied [4].

The same basic constitutional questions involved in *Bishop Leonard* were also involved in *Bishop Carroll High School v. Unemployment Compensation Board*

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of Review [5]. After setting the framework for both cases, this article analyzes the issues, mainly in the context of *Bishop Leonard.* This article examines the relationship of the religion clauses of the First Amendment [6] to the eligibility determination process from both the employee's and the employer's view, and compares that process to other statutory schemes. Similar cases in other jurisdictions (only two according to the author's research) are analyzed for comparison to the Pennsylvania Commonwealth Court's treatment of this issue.

BISHOP LEONARD REGIONAL CATHOLIC SCHOOL V. UNEMPLOYMENT COMPENSATION BOARD OF REVIEW

Background

On December 23, 1989, Maria Wesley married a divorced man whose prior marriage to a Catholic had not yet been annulled by the Catholic Church [7, at 432, 30]. As a result of that marriage, Maria Wesley was discharged from her position as a math and science teacher at Bishop Leonard Regional Catholic School (Bishop Leonard) [7, at 431, 29]. Ms. Wesley was a Catholic lay teacher who taught at Bishop Leonard from August 1987 through December 22, 1989, the day before her marriage [7, at 435, 31]. Even though Ms. Wesley's duties were primarily to teach math and science to fifth and sixth graders, she, and in fact all Catholic teachers, was expected to be a role model for her students, both in and outside of the classroom [7, at 435, 31].

The school policy in effect at the time of Ms. Wesley's discharge provided for the termination of any teacher for the "serious public immorality, public scandal, or public rejection of official teachings, doctrine, or laws of the Catholic Church" [7, at 434, 31].

Ms. Wesley filed a claim for unemployment compensation that was initially denied by the local office [8] under section 402(e) [9] of the Pennsylvania Unemployment Compensation Law [10], which provides for a denial of benefits when an employee is discharged for willful misconduct in connection with the work. That denial of benefits was reversed by an unemployment compensation appeals referee after an evidentiary hearing at which both the claimant, Maria Wesley, and the employer, Bishop Leonard, appeared [8, at 4]. The employer appealed to the Unemployment Compensation Board of Review, which affirmed the referee's decision holding that the claimant's actions did not constitute willful misconduct [8, at 4]. The employer appealed to the commonwealth court.

Commonwealth Court Decision

The majority used a traditional willful misconduct analysis and found the claimant had violated an employer rule, the rule was reasonable, and the claimant was aware of the rule. Therefore, the claimant's action, i.e., her marriage, amounted to willful misconduct in connection with the work [7].

Willful misconduct is not defined in the unemployment compensation statute but has been defined by the courts as:

> conduct that represents a wanton and willful disregard of an employer's interest, deliberate violation of rules, disregard of standards of behavior which an employer can rightfully expect from his employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interests or employee's duties and obligations [7 (citing Frick v. Unemployment Compensation Bd. of Review, 31 Pa. Commw. 198, 375 A.2d 879 (1977))].

The determination of what actions rise to the level of willful misconduct is a question of law [11].

The court's finding that the claimant had violated a rule of the school was based on the school's policy providing for termination of a teacher for public rejection of official teachings, doctrine, or laws of the Catholic Church. According to the testimony of Father Donardo at the referee's hearing, the claimant's marriage was invalid in the eyes of the church and therefore violated a law of the church [7, at 434, 31]. Furthermore, because marriage is in the public forum, it is a public repudiation of that law [7, at 434, 31].

The majority accepted the school's determination that the claimant's marriage had violated the laws of the church and that she was aware that her marriage would violate the school's policy. The claimant had informed the principal on December 13, 1989, that she intended to marry outside the church [7, at 435, 31]. The principal, after consulting with the diocesan office, informed the claimant that her marriage would result in her termination and explained to her "exactly what rule [she] was breaking . . . in the handbook" [7, at 435, 31]. Relying on *Sauer v. Unemployment Compensation Board of Review* [12], the majority found Bishop Leonard had established the existence of the rule and the claimant was aware of it.

Under *Williams v. Unemployment Compensation Board of Review* [13], a claimant who violates a known and reasonable rule is guilty of willful misconduct in connection with the work. The majority in *Bishop Leonard* agreed with Father Donardo's testimony that the claimant was expected to be a role model for her students both in and out of the classroom and, therefore, the rule was reasonable. The majority relied on *Lemon v. Kurtzman* [14] to find that the "[c]laimant's conduct directly reflected on her ability to perform her assigned duties and adversely affected the interest of Bishop Leonard" [7, at 435-36, 32]. In *Lemon,* the Supreme Court stated, "The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith" [14, at 618].

The court rejected the claimant's argument that a denial of benefits would result in the state advancement of the Catholic religion in violation of the Establishment Clause of the First Amendment. The majority relied on *Hobbie v. Unemployment*

Appeals Commission [15] and *Corporation of Presiding Bishop v. Amos* [16] in holding that "a denial of benefits pursuant to the Act, secular in nature, is not an excessive entanglement of government and religion" [7, at 439, 33]. According to the majority, the Commonwealth did not violate the Establishment Clause by withholding unemployment compensation benefits to the claimant who violated the school's policy, but merely "accommodate[d] Bishop Leonard by allowing it to advance its religion and as a result to discharge any employee in violation of its policy and the teachings and laws of the Church" [7, at 439, 34].

Judge Smith's Dissent [17]

Judge Smith strongly dissented, finding error in every aspect of the majority's opinion [17, at 440, 34]. Judge Smith opined that the majority's holding violated not only the Establishment Clause of the First and Fourteenth Amendments of the United States Constitution [18], but also Article I, Section 3 of the Pennsylvania Constitution [19]. Furthermore, according to the dissent, the Establishment Clause and Article I, Section 3, of the Pennsylvania Constitution prohibited the majority from utilizing a traditional willful misconduct analysis [17, at 443, 35].

Under the traditional analysis a claimant may be eligible for benefits even when a rule violation occurs, if the claimant can show good cause for the violation [20]. According to Judge Smith, the majority never addressed whether the claimant had good cause to violate the rule [17, at 443, 36]. First, the claimant was unaware that her impending marriage was contrary to the school's policy [17, at 443, 35]. Apparently the principal, a nun, was also unaware until she contacted the diocesan office [7, at 435, 31]. Second, she had no plans to inform her students of the marriage [7, at 435, 31]. The claimant was faced with a choice between forgoing her marriage, which was legally recognized by the Commonwealth but not the church, or going through with her marriage and losing her job.

A traditional analysis of willful misconduct also requires a finding by the court that the employer's rule was reasonable [21]. According to the dissent, the majority could not make a determination on whether the employer's rule was reasonable without violating the Establishment Clause [17, at 444, 36]. Even an inquiry into whether the claimant's decision to marry a divorced person violated the church's policy would require excessive government intervention into religious matters. Any query by the court into the religious tenets of a church to determine their reasonableness would result in an excessive entanglement of government and religion [17, at 444, 36].

As Judge Smith aptly pointed out, the board could have been placed in the controversial position of choosing between two theories of religious doctrine, if the claimant had presented her own expert witness to counter Father Donardo's testimony [17, at 446, 37]. Such a decision is beyond the courts or the administrative agency and clearly violates the Establishment Clause.

According to Judge Smith, the majority had no authority to tread in the area of religious doctrine. Judge Smith opined that particularly since the claimant testified that the rule was ambiguous and she did not think that her marriage would violate it, the majority's decision was insupportable even under the traditional willful misconduct analysis [17, at 443-44, 35-36].

Bishop Leonard, according to the dissent, was, in essence, using the Pennsylvania unemployment statute to compel an employee to adhere to the employer's religious beliefs or forfeit State benefits. This presents a burden on the claimant's free exercise rights under the First Amendment.

Relying on a line of United States Supreme Court decisions, *Sherbert v. Verner* [22], *Thomas v. Review Board* [23], *Hobbie v. Unemployment Appeals Commission* [15], and *Frazee v. Illinois Department of Employment Security* [24], Judge Smith argued that the claimant "can not be stripped of state-created benefits for expressing and acting upon religious or spiritual views different from that of one's employer" [17, at 450, 39].

In the *Sherbert, Thomas, Hobbie,* and *Frazee* line of cases, the employees were granted unemployment compensation benefits because their separations from work, from nonreligious employers, were based on their religious beliefs. According to Judge Smith, the claimant's decision to marry outside the church in *Bishop Leonard* was entitled to the same First Amendment protections as the claimants in this line of cases [17, at 450, 39].

The dissent rejected Bishop Leonard's free exercise argument. Bishop Leonard argued that granting benefits would violate its free exercise of religion because it would result in its being charged for the benefits the claimant received [17, at 452, 40]. Judge Smith acknowledged that either position the court chose, granting or denying benefits, would involve some entanglement with religion [17, at 452, 40]. In this instance, however, the employer voluntarily elected to participate in the State unemployment compensation scheme. By electing to participate, Bishop Leonard, in essence, waived its right to different treatment. As a participating employer, "it . . . place[d] itself within the jurisdiction of the [Law] in the same manner as any other employer and religious holdings must give way to secular laws" [17, at 452, 40 (quoting *Bishop Carroll* at 312, 1146. (Colins, J., dissenting) (alteration in original))].

The dissent analogized this argument to the Amish employer's protest in *United States v. Lee* [25], that he should not be required to participate in the federal social security system. In *Lee*, the employer, an Amish farmer, argued that his religion required members of the faith to provide each other with same type of financial support contemplated by the social security system. Therefore, a requirement to participate in the federal system violated his free exercise rights under the First Amendment. In *Lee,* the Court stated:

> [E]very person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When the followers of a

> particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity [25, at 261].

Judge Smith concluded that a grant of benefits would involve less entanglement than a denial. Only by granting benefits could the government remain neutral in accordance with the dictates of the Establishment Clause [17, at 453-54, 41]. Bishop Leonard was not forestalled from discharging the claimant. The Commonwealth, according to Judge Smith, was forestalled from defining the claimant's marriage as willful misconduct in connection with the work [17, at 451, 39-40].

Judge Byer's Dissent [26]

Judge Byer raised an equal protection argument that was not addressed by the majority. Denying benefits to the claimant, according to Judge Byer, would require the State to treat the claimant differently from the way it treats employees of nonreligious employers [26]. According to Judge Byer, the State should use objective legal principles to determine eligibility, not religious principles [26, at 454, 41]. Only by using objective measures could the state administer the unemployment system in an even-handed manner.

Judge Byer was also troubled by the possibility of similar issues arising in the future in the same context. He articulated the hypothetical possibility of a religious employer requesting a denial of benefits to an employee if s/he chose to marry a person of another faith or race [26, at 454, 41].

Judge Byer noted that the same reasoning the Third Circuit used in *Little v. Wuerl,* [27] to deny review of a religious employee's termination under Title VII of the Civil Rights Act of 1964 [28], should apply in this case [26, at 455 n.1, 41 n.1]. The difference in the two cases is that *Bishop Leonard* involves state-paid benefits while *Little v. Wuerl* does not. Therefore, according to Judge Byer, the best way for the Commonwealth to address the issue presented in *Bishop Leonard* is to treat all employers the same [26, at 454-55, 41]. Because the claimant would not have been denied benefits if she had been terminated by a public school, she should not be denied benefits because she was terminated by a religious school [26, at 454-55, 41].

Judge Kelley dissented without opinion.

BISHOP CARROLL HIGH SCHOOL V. UNEMPLOYMENT COMPENSATION BOARD OF REVIEW

Two years before the court decided *Bishop Leonard,* the court had a notable similar case. In *Bishop Carroll,* [29] the claimant was discharged for living with a woman without the benefit of marriage. Her prior marriage had not been annulled [29, at 304, 1142]. The claimant offered to marry her in a civil ceremony to avoid

discharge from work [29, at 304, 1142]. That was unacceptable to Bishop Carroll since the marriage would not be valid in the eyes of the Catholic Church [29, at 304, 1142]. The claimant had actually signed an employment contract when hired that provided he could be discharged for "serious or public immorality, public scandal, or rejection of official teaching, doctrine, or laws of the Roman Catholic Church" [29, at 304, 1142].

The local unemployment office denied benefits and the referee affirmed the denial [29, at 304, 1142]. The board of review reversed and granted benefits on the basis that the employer failed to prove misconduct [29, at 305, 1142].

The commonwealth court reversed the board and denied benefits [29]. The court used the same traditional willful misconduct analysis it later used in *Bishop Leonard.*

The claimant argued that his right to privacy was unconstitutionally burdened by a denial of benefits [29, at 307, 1143-44]. The court reasoned that because he signed an employment contract that obligated him to follow the rules and doctrine of the Catholic Church, he "waived any such right" [29, at 308-09, 1144]. The court also expressed that in the past it had recognized that constitutional rights may be waived. The cases cited by the court, however, dealt with procedural due process, not substantive, rights [30].

The court did not address the employer's argument that a grant of benefits violated the employer's right to free exercise of religion "by imposing a burdensome tax on religion" [29, at 305, 1143-43]. Because the court found the employer had met its burden of proving willful misconduct the court did not address this issue.

Judge Colins dissented [31], because he believed the majority decision to deny benefits violated the Establishment Clause of the First Amendment and Article I, Section 3 of the Pennsylvania Constitution [31, at 310-11, 1145]. Judge Colins made two important points:

> By denying unemployment compensation under these circumstances, we are making two religious declarations: (1) we will be allowing a religion to use the Act to further its tenets on a *de facto* basis; and (2) we will be using the Act to recognize a hierarchical system of marriage within the Commonwealth [31, at 313, 1146].

Judge Colins continued his analysis by going through the *Lemon* test: "(1) [d]oes the state action have a secular purpose; (2) would its effect neither advance nor inhibit religion; and (3) would such action avoid excessive entanglement of government and religion?" [31, at 313-14, 1146-47 (citing *Lemon v. Kurtzman,* 403 U.S. 602 (1971))]. Judge Colins found that on its face the Pennsylvania statute had a secular purpose, but not as applied in this case [31, at 314, 1147]. The conduct that resulted in the termination was not job related and therefore, the Commonwealth impermissibly advanced the Catholic faith by denying

benefits [31, at 314, 1147]. The majority decision, according to Judge Colins, did not avoid excessive government entanglement [31, at 314, 1147].

Judge Barry also dissented [32], stating very briefly that the misconduct was not in connection with the work. Therefore, he would have affirmed the board.

Judge Smith joined both dissents.

ST. PIUS X PARISH CORP. V. MURRAY [33]

In Rhode Island, a Catholic lay teacher was hired to teach English in a parochial school under a one-year contract that ran from September 1, 1984 to August 31, 1985 [33, at 1215]. In April 1985, she informed the school that she planned to marry outside the Church [33, at 1216]. The school informed her that such action would violate regulation 302-G of the diocese [33, at 1216]. The regulation stated "[a] Catholic lay teacher, married outside of the Church, shall not be hired to teach, or allowed to continue to teach, in a Catholic school of the Diocese" [33, at 1216]. Nevertheless, the employee was not immediately terminated. Her contract, however, for the following school year was not renewed [33, at 1216].

The Department of Employment Security approved her application for unemployment compensation benefits, which was appealed by the employer [33, at 1216]. The appeals referee sustained the determination of the Department of Employment Security [33, at 1216]. An appeal to the board of review produced the same result [33, at 1216]. The employer then appealed to the Sixteenth Division District Court, which sustained the decision of the board of review [33, at 1216]. The employer subsequently appealed to the Rhode Island Supreme Court [33, at 1216].

The court found the claimant eligible for unemployment compensation based on the "reasonable assurance" statute [34]. According to section 28-44-68, an employee of an educational institution who works during the academic year and has reasonable assurance of being reemployed during the next academic year, is ineligible for benefits during the period between terms [33, at 1216 (citing [34)]. In this case the court held that the claimant did not have reasonable assurance because her contract was not renewed [33, at 1216]. Therefore, she was eligible for benefits.

The court rejected the employer's argument that the claimant was discharged for proved misconduct under section 28-44-18 [35]. Rhode Island's definition of misconduct is essentially the same as that used in Pennsylvania [36]. Since the claimant was not terminated immediately upon discovery of her impending marriage, the court reasoned that she was not discharged [33 at 1217].

Even though no discharge was found, the court reasoned that a determination of misconduct was up to the court [33, at 1218 (citing *Hickenbottom v. District of Columbia Board,* 273 A.2d 475, 478 (D.C. Ct. App. 1971))]. An employer

may terminate an employee, but a denial of benefits may only be predicated on a legal determination of proved misconduct [37]. The court did not believe that the claimant's marriage was conduct that constituted proved misconduct [33, at 1218].

The court also examined the employer's argument that requiring the employer to pay for the claimant's unemployment compensation benefits imposed "an unconstitutional burden on [the] employer's right to the free exercise of religion" [33, at 1218]. St. Pius X Parish Corporation voluntarily elected to participate in the state's unemployment compensation system even though it was exempt under the statute [33, at 1218]. Therefore, the school's free exercise argument was found to be without merit [33, at 1218]. Justice Shea wrote, "Given employer's voluntary participation in this program, with full knowledge of its inherent potential for imposing such a tax, we find no basis for employer's free exercise complaint in either the statute or our interpretation thereof" [33, at 1218].

HOLY NAME SCHOOL V. DEPARTMENT OF INDUSTRY [38]

For five years the claimant had been a kindergarten teacher at Holy Name School operated by the Roman Catholic Church in Wisconsin [38, at 123]. At the time of hire, she signed a contract of employment which provided that she was subject to all the rules and regulations of the diocese and the school [38, at 123]. By reference, the contract incorporated a "Declaration of Catholic Educational Philosophy" [38, at 123]. This document contained a provision that stated "[all] teachers should set an example for their students and 'lead by their lives in bearing witness to Christ'" [38, at 123].

The school became aware that the claimant planned to marry outside the Church. The claimant's fiance had been previously married and was in the process of having the marriage annulled [38, at 123]. The annulment was not obtained before the claimant's marriage on February 25, 1978 [38, at 124]. As a result of that marriage, the school decided not to renew her employment contract for the next academic year, but allowed her to complete the current school term [38, at 124-25].

At the end of the year, the claimant applied for unemployment compensation benefits. The Department of Industry, Labor and Human Relations approved the claimant's application for benefits under section 108.04(5) of the Wisconsin unemployment statute, which provides for a denial of benefits when an employee is discharged for misconduct connected with her employment [39]. The employer appealed to the appeal tribunal, which found the claimant's separation from work to be neither a discharge for misconduct nor a voluntary termination [38, at 124]. The employer then appealed to the Labor and Industry Review Commission, which affirmed the tribunal's decision [38, at 124]. Thereafter, the employer appealed to the circuit court, which also upheld the award of benefits [38, at 124].

On appeal to the Court of Appeals of Wisconsin, the employer argued that the claimant was ineligible for benefits because she voluntarily terminated her employment, and alternatively, that she was discharged for misconduct connected with the work [38, at 123].

Under Wisconsin law, a determination of voluntary termination is based on findings of fact concerning the employee's "conduct and intent" [40]. According to *Dentici v. Industrial Commission* [40], the test is that an employee voluntarily terminates employment when "[the] employee shows that he intends to leave his employment and indicates such intention by word or manner of action, or by conduct inconsistent with the continuation of the employee–employer relationship . . . ." [40, at 720]. According to the employer, the claimant's intent to leave was established because she failed to take all necessary steps to have her marriage blessed by the church before she married [38, at 125].

The court held that the claimant lacked the intent requirement and, therefore, did not voluntarily terminate her employment [38, at 125]. The claimant attempted to preserve her employment, according to the majority, by requesting permission to attend the board meeting at which her future employment status was to be discussed [38, at 125]. Further, the claimant's fiance took steps to annul his marriage before setting a definite wedding date. The couple only married before the annulment process was completed because of a personal emergency concerning her fiance's two small children [38, at 125].

The school argued that the claimant's conduct constituted misconduct because she was aware her marriage outside the church was a "deliberate interference" with her employer's known interest in having a teacher serve as an example of the school's and diocese's religious doctrines [38, at 126]. The court also rejected this argument.

Relying on *Boynton Cab Company v. Neubeck* [41] for a definition of misconduct, which is essentially the same as the Pennsylvania standard of willful misconduct, the court found the claimant eligible for benefits [38, at 127]. According to the court, in determining misconduct the controlling factors are the employee's intent and conduct [38, at 126]. The court was satisfied with the record developed before the tribunal that substantial evidence existed for the commission to determine there was no misconduct. Therefore the court did not disturb the tribunal's decision [38, at 126].

In Wisconsin, the court is not as concerned with the reasonableness of the employer's rule as it is with the claimant's "intent" in violating the rule. This is of special significance in the case of Bishop Leonard, where the rule in question is one of religious dogma. The Wisconsin court recognized it would be inappropriate to pass review on a religious tenet. By focusing on the claimant's intent and conduct, the court "avoid[ed] a secular intrusion into religious doctrine" [38, at 126].

Finally, the court avoided judgment on the constitutional question of whether the unemployment statute was unconstitutional as applied because the employer

failed to raise the issue in the circuit court [38, at 127]. Therefore, the court was not required to address this question on appeal.

One judge concurred in the judgment of the majority by simply finding that marriage is neither a voluntary termination nor misconduct under the Wisconsin statute [42]. Therefore, the only conclusion possible was that the claimant was entitled to benefits [42].

EVALUATION

The Establishment Clause

In 1980, the Pennsylvania Commonwealth Court was asked to decide whether private religious schools were subject to the State's unemployment compensation laws [43]. Prior to 1977, private religious and public schools were exempt from coverage [43, at 559, 1343]. That exemption was eliminated in 1977 [44] and the statute was revised to exempt only organizations "operated primarily for religious purposes and . . . operated, supervised, controlled or principally supported by a church or convention or association of churches" [43, at 559, 1343 (quoting section 4(l)(4)(8)(a) of the Pennsylvania Unemployment Compensation Law)].

The court, in *Christian School Association v. Commonwealth, Department of Labor and Industry* [43], discussed in detail the First Amendment implications of requiring religious schools to participate in the unemployment compensation system. The court held that the schools challenging the application of the statute were exempt. Of particular importance to the issues present in *Bishop Leonard* is the court's discussion of the possible implications of coverage in regard to unemployment compensation eligibility determinations. The court stated that the "most significant burden resulting from unemployment compensation coverage is that the schools would be required to participate in compensation eligibility hearings for their former employees" [43, at 563, 1344]. The court acknowledged that employees of religious schools were hired, at least in part, on the basis of religious convictions [43, at 563, 1344]. Therefore, the court was concerned with the First Amendment implications of using the state's definition of "good cause" to determine the eligibility of employees discharged from religious schools [43, at 563, 1345]. The court stated:

> [D]isputes unquestionably will arise in situations where employees are dismissed for cause and the reason given by the church school is failure to adhere to religious tenets of the church.
>
> The type of inquiry necessary to the resolution of controversies such as these is almost identical to that which the Court found to involve dangers of excessive entanglement in *Catholic Bishop* [43, at 563-64, 1345 (quoting *Grace Brethren Church v. California,* CV 79-93 MRP, CV 79-162 MRP, slip op. at 12 (C.D. Cal. Sept. 21, 1979))].

The court in *Christian School Association* concluded that an exemption for religious schools from the state's unemployment tax system would be consistent with the constitutional requirement of avoiding excessive governmental entanglement with religion [45].

The Pennsylvania Commonwealth Court had no problem with "excessive entanglement" in *Bishop Leonard* because it did not apply the court's definition of willful misconduct to the claimant's actions. Instead, it implicitly deferred to the school's interpretation of misconduct. This is significant because it is contrary to the requirements of the state statute. Under the Pennsylvania law, the administrative agency, or the court on appeal, determines whether an employee's actions rise to the level of willful misconduct in connection with the work. By allowing *Bishop Leonard* to make that determination, the court failed to adhere to the statutory requirements of the Pennsylvania law.

In *Lemon v. Kurtzman* [14], the United States Supreme Court announced a three-pronged test for reviewing cases under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion'" [14, at 612-13 (quoting *Walz v. Tax Commission,* 397 U.S. 664, 668, 674 (1970) (citation omitted))].

The problems in *Bishop Leonard* are with the last two prongs of the test. By denying benefits to the claimant because she did not follow the Church's view of marriage, the Commonwealth advances the Catholic view of marriage. The *Lemon* Court articulated a test for excessive entanglement: "[W]e must examine the character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority" [14, at 615].

In *Bishop Leonard* the same concerns are present. The religious school denotes a benefit by not being charged for the claimant's unemployment. The purpose of the unemployment statutes is remedial in nature and is to be liberally construed [21]. To determine whether a discharge for violating a religious tenet meets the statutory definition of willful misconduct, the state must "dig in" and strictly scrutinize the church doctrine, determine whether the discharged employee was aware of it, whether it was reasonable, and whether the employee had good reason to violate it. The state must then decide whether the discharge meets the state-imposed requirements to deny benefits. After examining the church's rules, the *Bishop Leonard* majority simply deferred to the Church and ignored its duty under the law.

In *Lee v. United States* [25], the Court stated: "It is not within 'the judicial function and judicial competence,' however, to determine whether appellee or the Government has the proper interpretation of the Amish faith; '[c]ourts are not arbiters of scriptural interpretation.'" [25, at 257 (quoting *Thomas v. Review Board,* 450 U.S. 707, 716 (1981))]. In *Lee,* the Court held that the social security

system could not function if religious denominations were permitted to challenge its application [25]. There was an overriding governmental interest in maintaining a uniform social security system [25, at 258-59]. The same cannot be said for the unemployment compensation system [46].

Bishop Leonard's participation was strictly voluntary. Had it elected not to participate there would have been no possibility of it being charged for any benefits the claimant may have received. In fact, the claimant in *Bishop Leonard* would not have qualified financially for unemployment compensation benefits because her wages would not have been covered for tax purposes. As the *Waltz* Court stated, "[T]he exemption under examination . . . gives rise to a lesser degree of intrusion than would be required were the exemption not granted" [46, at 671-72, 815].

Property Cases

The property tax case of *Walz v. Tax Commission* [47], is also insightful. In *Walz,* the United States Supreme Court upheld the constitutionality of New York City's property tax exemption for a religious organization's property strictly used for religious purposes. In examining the tension between the Free Exercise Clause and the Establishment Clause of the First Amendment, the Court stated: "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, *none commanded,* and none prohibited" [47, at 669]. In *Bishop Leonard,* however, the court essentially required the claimant to adhere to religious tenets or forego state-sponsored benefits. In *Walz* the Court found an elimination of the tax exemption would increase government involvement, by requiring government inquiry into tax evaluations of land and exposing the religious organizations to tax liens and foreclosures [47, at 674]. Bishop Leonard chose to give up its tax-exempt status. Once it did, it should be subject to the same application of the law as secular employers.

Serbian Eastern Orthodox Diocese v. Milivojevich [48], involved an internal church dispute concerning control of the Serbian Eastern Orthodox Diocese for the United States and Canada. The Illinois Supreme Court held that the procedures of the Mother Church were arbitrary and invalid [48, at 708]. The United States Supreme Court reversed and held that the Illinois Supreme Court decision impermissibly intruded into an area reserved for church resolution [48]. Justice Brennan, writing for the majority stated: "[R]eligious controversies are not the proper subject of civil court inquiry, and . . . a civil court must accept the ecclesiastical decisions of church tribunals as it finds them" [48, at 713]. At first glance this argument would appear to support the majority's deference in *Bishop Leonard* to the church's position. By allowing Bishop Leonard to determine that a violation of its tenets by marriage outside the church constituted willful misconduct, the court properly "accepted" the findings of the church tribunal as construed

in *Serbian Orthodox.* The controversy in *Serbian Orthodox,* however, had no implications of state consequence. The issue did not involve state benefits; therefore it is significantly distinguishable from *Bishop Leonard.*

Title VII Cases

The same rationale can be extracted from the Title VII civil rights' cases. In *Corporation of Presiding Bishop v. Amos* [49], Mayson, an employee of a nonprofit facility operated by the Church of Jesus Christ of Latter-day Saints, was discharged because he failed to maintain the prerequisites for church membership [49, at 330]. Mayson brought an action under Title VII of the Civil Rights Act of 1964 [28] alleging religious discrimination.

The employer argued that it was exempt under section 702 of the Act [49, at 331]. Mayson argued such an exemption violated the Establishment Clause, because his job was nonreligious [49, at 331]. The United States Supreme Court upheld the employer's exemption under section 702. Justice White, writing for the majority, opined, "[a] law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon,* it must be fair to say that the *government itself* has advanced religion through its own activities and influence" [49, at 337]. Again, there was no issue involving state-paid benefits. The issue was the Civil Rights Act of 1964 applied to a religious employer.

Footnote fifteen of the majority opinion is extremely interesting in the context of *Bishop Leonard.* Justice White wrote: "Undoubtedly, Mayson's freedom of choice in religious matters was impinged upon, *but it was the Church* . . ., and *not the Government,* who put him to the choice of changing his religious practices or losing his job" [49, at 337 n.15 (emphasis added)]. In *Bishop Leonard,* the claimant deviated from the religious practices mandated by the church when she chose to proceed with her marriage. She was denied government benefits, and her freedom of choice was impinged by the *government* when the court held that her "choice" rose to the level of willful misconduct in connection with the work. The only manner by which that infringement could be viewed as emanating strictly from the church would have been for the court to apply the statute in the same manner as it would to a secular employer. That would have required a finding of no willful misconduct and a grant of benefits. In unemployment compensation cases the courts have long recognized the distinction between an employer's right to discharge an employee and a finding that, as a matter of law, the discharge is disqualifying under the statute. This distinction was not made in *Bishop Leonard.*

The factual scenario in *Little v. Wuerl* [27] is strikingly similar to that of *Bishop Leonard.* Susan Little was a Protestant lay teacher whose employment contract at a Catholic school was not renewed when she announced her plans to remarry [27, at 945-46]. Ms. Little's fiance was a nonpracticing Catholic [27, at 946].

The school failed to renew her contract because she remarried without taking the proper steps to have her second marriage recognized by the Catholic Church [27, at 946].

Ms. Little filed an action under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of religion. The Court of Appeals for the Third Circuit declined to review the school's decision not to renew her contract. The court stated: "Little makes no claim to be a Catholic. Nevertheless, if this court were to review the Parish's decision, it would be forced to determine what constitutes 'the official teachings, doctrine or laws of the Roman Catholic Church' and whether plaintiff has 'rejected' them" [27, at 948]. The court, in *Little,* recognized the error of intruding into the area of religious dogma while the *Bishop Leonard* court did not.

The *Little* court continued to examine the "entanglement" dangers by stating:

> In this case, the inquiry into the employer's religious mission is not only likely, but inevitable, because the specific claim is that the employer's beliefs or practices make her unfit to advance that mission. It is difficult to imagine an area of the employment relationship *less* fit for scrutiny by secular courts. Even if the employer ultimately prevails, the process of review itself might be excessive entanglement [27, at 949].

The court held that the school was exempt under Title VII and dismissed Ms. Little's claim.

National Labor Relations Act Cases

In *NLRB v. Catholic Bishop* [50], the United States Supreme Court examined the question of whether the National Labor Relations Board (NLRB) may assert jurisdiction over religious schools and require them to bargain with a union. Prior to 1975, the NLRB had refused jurisdiction over organizations that were completely religious [50, at 497-99]. In 1975, lay teachers at various parochial schools in the Chicago area, where both secular and religious courses were taught, sought union representation. The NLRB ordered elections and certified two unions to represent the two groups of lay teachers [50, at 493]. The schools refused to recognize the unions and unfair labor practices were filed with the NLRB [50, at 494]. The NLRB held that the schools violated the National Labor Relations Act and ordered them to bargain with the unions [50, at 494-95]. The schools appealed the order of the NLRB to the Court of Appeals for the Seventh Circuit [50, at 495]. The court of appeals held that the NLRB had no jurisdiction because it violated the religion clauses of the First Amendment [50, at 496]. The court reasoned that to order bargaining would "impinge upon the freedom of church authorities to shape and direct teaching in accord with the requirements of their religion [50, at 497].

The United States Supreme Court, per Chief Justice Burger, observed that jurisdiction would necessarily involve sensitive issues of church doctrine [50, at

503]. Therefore, before deciding whether jurisdiction would violate the religion clauses of the First Amendment, the Court examined the legislative history of the National Labor Relations Act to determine whether Congress intended the NLRB to have jurisdiction over church-operated schools. The Court held that it did not. Chief Justice Burger wrote, "[W]e decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses" [50, at 507].

The cases construing the Civil Rights Act of 1964 and the National Labor Relations Act have a consistent theme. The court may not entangle itself in issues of employment that require inquiry into questions of religious doctrine. This pattern of removing the government from deciding religious questions is consistent with the Pennsylvania Commonwealth Court's decision in *Christian School Association* [43], that religious schools are exempt from coverage under the state unemployment compensation system. Once religious school's elect to participate, however, they waive their rights to special treatment. They should be required to submit to application of the statute in the same manner it is applied to nonreligious employers.

Free Exercise Argument

The Free Exercise Clause of the First Amendment [6] is at the core of the line of unemployment cases to reach the United States Supreme Court. *Sherbert v. Verner* [22], concerned an employee discharged by a nonreligious employer because she refused to work on Saturday, her sabbath. When she later applied for unemployment compensation benefits and indicated she was unavailable for work on Saturdays, she was denied benefits [22, at 401]. *Thomas v. Review Board* [23], involved a Jehovah Witness who quit employment when transferred to a department that produced weapons. His religious beliefs forbade him to work in the production of weapons [23, at 711]. In *Hobbie v. Unemployment Appeals Commission* [15], the claimant was terminated after she joined the Seventh-Day Adventist Church and would no longer work on her sabbath, Saturday. *Frazee v. Illinois Department of Employment Security* [24], concerned a claimant who refused a job because it required him to work on Sunday, "the Lord's day" [24, at 830].

In *Sherbert,* a two-part test was announced for determining eligibility: 1) does a denial of benefits impose a burden on the claimant's free exercise of religion, and 2) is there some compelling state interest that justifies the incidental burden a denial of benefits would place on the claimant's free exercise rights [22, at 403]. The Supreme Court rejected South Carolina's argument that "unscrupulous" claimants would advance false claims of religious beliefs to collect unemployment, creating the possibility of financial strain on the unemployment fund [22, at 407].

In each of these cases the Court held that the claimants were entitled to unemployment compensation benefits under the protection of the Free Exercise Clause of the First Amendment. In *Bishop Leonard* we are presented with a different set of facts. Bishop Leonard is a religious employer and the claimant is, arguably, a religious employee [51]. The court is not weighing an employee's religious beliefs against a secular employer, as in the *Sherbert* line of cases.

Bishop Leonard, as a religious employer, is also entitled to protection under the Free Exercise Clause. If the challenge to the claimant's discharge in *Bishop Leonard* had presented itself as a claim under Title VII, or an unfair labor practice under the National Labor Relations Act, the employer would logically prevail because the court would refrain from interfering with the employer's right to exercise its freedom of religion. A court would refuse jurisdiction or find an exemption. The *Bishop Leonard* court's reasoning, however, is flawed because of Bishop Leonard's submission to the unemployment tax system. By participating, it accepts that it will be subject to a government determination of eligibility for discharged employees. That submission should weigh the scales in favor of Maria Wesley.

The application of the unemployment statutes should not vary because the religious employer is reimbursable as opposed to contributory [52]. That election only determines how the unemployment compensation contributions shall be made. It has no effect on how the statute is applied to the separation from work of the employee. A finding of willful misconduct in connection with the work must be made before a denial of benefits may occur. This process is entirely separate from the statutory requirements for financial contributions.

To deny benefits to Maria Wesley because she chooses to practice her religion in a way that deviates from the tenets of the Catholic Church, but is legally recognized by the Commonwealth of Pennsylvania, deprives her of benefits to which she is entitled. "A state may not 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, or lack of it, from receiving the benefits of public welfare legislation'" [23, at 716] (quoting Everson v. Board of Education, 330 U.S. 1, 16 (1947) (alteration in original))].

A recent United States Supreme Court decision, *Employment Decision v. Smith,* [53] suggests a new application of the Free Exercise Clause. In *Smith,* the claimant was discharged from his job as a drug rehabilitation counselor when the employer became aware that he used peyote [53, at 874]. Smith was a member of the Native American Church and ingested peyote during religious ceremonies, not unlike the manner in which Christians consume wine during communion [53, at 874]. Smith was discharged for what the employer alleged to be willful misconduct because as a drug counselor, he was to abstain from all drugs or alcohol in order to be a role model for his patients [54]. The Oregon Supreme Court granted benefits relying on *Sherbert* and *Thomas* [53, at 875]. In reversing, the Supreme Court, per Justice Scalia said, "[i]f prohibiting the exercise of religion . . . is not the object of the

[Law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended" [53, at 878].

The denial of benefits in *Smith* hinged on an Oregon statute that made peyote use a criminal act. Unlike other state statutes, at the time, the Oregon statute made no exception for the sacramental use of peyote [53, at 876]. Therefore, the *Smith* Court could easily distinguish this case from the *Sherbert* type cases [53, at 884-85]. Because criminal conduct was involved, the majority found the "compelling state interest" requirement inapplicable [53, at 885-86]. Justice Scalia acknowledged that the judiciary was not the forum for analyzing religious beliefs.

Justice Scalia wrote:

> [I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.' Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim [53, at 887 (quoting Hernandez v. Commissioner, 490 U.S. 680, 699 (1989))].

There was no criminal statute involved in *Bishop Leonard.* The claimant's marriage was valid in the eyes of the Commonwealth. The court's function was not to judge how Maria Wesley choose to follow her faith. No one questioned Bishop Leonard's right to discharge her. Therefore, the Commonwealth had no duty to deny her benefits.

Fundamental Right to Marry

The fundamental right to marry has been recognized by the United States Supreme Court since at least 1923. In *Meyer v. Nebraska* [55], the Court discussed the personal liberties protected by the Due Process Clause of the Fourteenth Amendment. The Court stated:

> [I]t denotes . . . the right of the individual to contract, to engage in any of the common occupations of life, . . . to marry, . . . to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men [55, at 399].

In *Meyer,* the Court also stated that "[t]he established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect" [55, at 399-400].

There is no clear governmental interest that would justify burdening the claimant's decision in *Bishop Leonard* to marry outside the church. This would hold true even if, for the sake of argument, one would assume that her decision to marry was a strictly secular one. The unemployment statute at issue in *Bishop Leonard* as applied to Marie Wesley, places an undue burden on her that would

not apply if she had been terminated from a public school. Her right to marry any man of any faith, or no faith, in or outside the Catholic church, is legally recognized under the laws of Pennsylvania. The commonwealth court has, in essence, forced her to forgo that right or forego her entitlement to unemployment compensation.

In *Bishop Carroll,* the claimant's fundamental right of privacy was the main force of his argument. In order to maintain his employment, the claimant offered to marry the woman, with whom he was living, in a civil ceremony. This is the factual distinction from *Bishop Leonard.* In *Bishop Carroll* the claimant had signed an employment contract agreeing to abide by the rules of the Church. Even so, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival" [56].

Griswold v. Connecticut [57] held that the state could not prohibit the use of contraceptives by married people. In holding, the Court said: "We deal with a right of privacy older than the Bill of Rights's—older than our political parties, older than our school system" [57, at 486]. Yet in both *Bishop Carroll* and *Bishop Leonard,* the application of the unemployment statute, as applied by the court, penalized the claimants for exercising this basic fundamental right.

The statute at issue does not attempt to explicitly regulate marriage as the one at issue in *Loving v. Virginia* [58]. The application of the statute, however, has the same invidious effect. In *Loving,* an interracial married couple was subject to criminal sanctions. In *Bishop Carroll* and *Bishop Leonard,* the claimants were deprived the benefits of public welfare legislation because of the legal act of marriage. The application of the statute in these two cases discriminates on religious grounds in the same manner that the Court found racial classifications discriminatory in *Loving.*

CONCLUSION

Of the three jurisdictions that have been presented with the issues present in *Bishop Leonard,* interestingly, only Pennsylvania has found it necessary to deny benefits. Both the courts in Rhode Island and Wisconsin recognized the error of making judgments based on religious doctrine. Rhode Island rejected the employer's free exercise argument because of its voluntary participation in the unemployment compensation program. This same argument was advanced by Judge Smith in her dissent in *Bishop Leonard.*

Even more disturbing than the majority decision in *Bishop Leonard,* is the refusals of the Pennsylvania Supreme Court and the United States Supreme Court to review this important issue. The constitutional concerns in *Bishop Leonard* are deserving of the same judicial scrutiny the United States Supreme Court was willing to address in the Title VII and National Labor Relations Act cases. The

facts of *Bishop Carroll* and *Bishop Leonard* are sufficiently distinguishable from the *Sherbert* line of unemployment cases that it is unfortunate our highest courts are unwilling to lend their expert guidance in this important area of First Amendment jurisprudence.

* * *

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END NOTES

1. *See Employment Division v. Smith,* 494 U.S. 872 (1990); *Frazee v. Illinois Dep't of Employment Security,* 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Commission,* 480 U.S. 136 (1987); *Thomas v. Review Board,* 450 U.S. 707 (1981); *Sherbert v. Verner,* 374 U.S. 398 (1963).
2. *Bishop Leonard v. Unemployment Compensation Bd. of Review,* 140 Pa. Commw. 428, 593 A.2d 28 (1991); *Bishop Carroll v. Unemployment Compensation Bd. of Review,* 125 Pa. Commw. 302, 557 A.2d 1141 (1989).
3. *Bishop Leonard v. Unemployment Compensation Bd. of Review,* 140 Pa. Commw. 428, 593 A.2d 28 (1991) *alloc. denied,* 529 Pa. 624, 600 A.2d 540 (1991); *Bishop Carroll v. Unemployment Compensation Bd. of Review,* 125 Pa. Commw. 302, 557 A.2d 1141 (1989), *alloc. denied,* 525 Pa. 604, 575 A.2d 569 (1990).
4. *Bishop Leonard,* 140 Pa. Commw. 428, 593 A.2d 28 (1991), *cert. denied,* 112 S. Ct. 1671 (1992).
5. *Bishop Carroll v. Unemployment Compensation Bd. of Review,* 125 Pa. Commw. 302, 557 A.2d 1141 (1989).
6. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ." U.S. Const. amend.1. The first clause is referred to as the Establishment Clause and the second, the Free Exercise Clause.
7. *Bishop Leonard v. Unemployment Compensation Bd. of Review,* 140 Pa. Commw. 428, 593 A. 2d 28 (1991).
8. Petition for Allowance of Appeal for Appellant at 3, 140 Pa. Commw. 428, 593 A.2d 28 (1991).
9. Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897 *as amended,* Pa. Stat. Ann. tit. 43, sec. 802 (1991).
10. Pa. Stat. Ann. tit. 43, secs. 751-914 (1991).
11. *Fritz v. Unemployment Compensation Bd. of Review,* 66 Pa. Commw. 492, 446 A.2d 330 (1982).
12. 110 Pa. Commw. 103, 531 A.2d 1174 (1987).
13. 109 Pa. Commw. 329, 531 A.2d 88 (1987).
14. 403 U.S. 602 (1971).
15. 480 U.S. 136 (1987).
16. 483 U.S. 327 (1987).

17. *Bishop Leonard v. Unemployment Compensation Bd. of Review,* 140 Pa. Commw. 428, 440, 593 A.2d 28, 34 (1991) (Smith, J., dissenting).
18. The First Amendment is held applicable to the states through the Fourteenth Amendment. *Cantwell v. Connecticut,* 310 U.S. 296 (1940). The Fourteenth Amendment provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . ." U.S. Const. Amend. sec. 1. The concept of liberty referred to in the Fourteenth Amendment includes religious liberty. *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940).
19. Rights of conscience; freedom of religious worship

    > All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

    Pa. Const. of 1874, art. I, sec. 3.
20. *E.g. Spirnak v. Unemployment Compensation Bd. of Review,* 125 Pa. Commw. 354, 557 A.2d 451 (1989); *Frumento v. Unemployment Compensation Bd. of Review,* 466 Pa. 81, 351 A.2d 631 (1976).
21. *Frumento v. Unemployment Compensation Bd. of Review,* 466 Pa. 81, 87, 351 A.2d 631, 634 (1976).
22. 374 U.S. 398 (1963).
23. 450 U.S. 707 (1981).
24. 489 U.S. 829 (1989).
25. 455 U.S. 252 (1982).
26. *Bishop Leonard v. Unemployment Compensation Bd. of Review,* 140 Pa. Commw. 428, 454-55, 593 A.2d 28, 41 (1991) (Byer, J., dissenting).
27. 929 F.2d 944 (3d Cir. 1991).
28. 42 U.S.C. sec. 2000e-2(a) (1988).
29. *Bishop Carroll v. Unemployment Compensation Bd. of Review,* 125 Pa. Commw. 302, 557 A.2d 1141 (1989).
30. *Pa. Social Services Union v. Commonwealth, Bd. of Probation and Parole,* 96 Pa. Commw. 461, 508 A.2d 360 (1986) (procedures bargained through the union satisfy due process requirements); *Federman v. Pozsanyi,* 365 Pa. Super. 324, 529 A.2d 530 (1987) (tenant waived due process rights concerning confession of judgment when a lease was drafted by his attorney and the waiver was done knowingly, intelligently, and voluntarily).
31. *Bishop Carroll v. Unemployment Compensation Bd. of Review,* 125 Pa. Commw. 302, 310, 557 A.2d 1141, 1145 (1989) (Colins, J., dissenting).
32. *Bishop Carroll v. Unemployment Compensation Bd. of Review,* 125 Pa. Commw. 302, 315, 557 A.2d 1141, 1145 (1989) (Barry, J., dissenting).
33. 557 A.2d 1214 (R.I. 1989).
34. R.I. Gen. Laws, sec. 28-44-68 (1986). The statute in effect at the time of the claimant's separation from work was actually the version under the 1979 Reenactment. [33, at 1216 n.1]. The substance is identical so the court referred to the version in the 1986 Reenactment.

35. R.I. Gen. Laws, sec. 28-44-18 (1986). The court referred to the 1986 version of the statute even though it was not in effect at the time the claimant filed her claim [33, at 1216-17 n.2].
36. The Rhode Island Supreme Court, in *Turner v. Dep't of Employment Security,* 479 A.2d 740 (R.I. 1984), adopted the definition of misconduct articulated by the Wisconsin Supreme Court in *Boynton Cab Co. v. Neubeck,* 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1961) [33, at 1217].
37. *See also Breininger v. Unemployment Compensation Bd. of Review,* 103 Pa. Commw. 502, 520 A.2d 949 (1987) (circumstances for termination under company policy may not always be circumstances sufficient to deny benefits).
38. 326 N.W.2d 121 (Wis. Ct. App. 1982).
39. Wis. Stat. Ann. sec. 108.04(5) (West 1988) (amended 1991).
40. *Dentici v. Industrial Commission,* 58 N.W.2d 717, 720 (1953).
41. 237 Wis. 249, 296 N.W. 636, (1941).
42. *Holy Name School v. Dep't of Industry,* 326 N.W.2d 121, 127 (Wis. Ct. App. 1982) (Foley, J., concurring).
43. *Christian School Ass'n v. Commonwealth, Dep't of Labor,* 55 Pa. Commw. 555, 423 A.2d 1340 (1980).
44. The Pennsylvania Unemployment Compensation Law mirrors the Federal Unemployment Tax Act. 26 U.S.C. secs. 3301-3311 (1988). When the federal act changed its exemptions, the states followed.
45. *Christian School Ass'n v. Commonwealth, Dep't of Labor,* 55 Pa. Commw. 555, 564, 423 A.2d 1340, 1345 (1980); *see also St. Martin Lutheran Church v. South Dakota,* 451 U.S. 722 (1981) (holding religious school operated and controlled by Lutheran Synod not subject to Federal Unemployment Tax Act).
46. *In re* Klein, 78 N.Y.2d 662, 672, 585 N.E.2d 809, 815 (1991) (religious employer's exemption from coverage under New York's unemployment scheme was upheld).
47. 397 U.S. 664 (1970).
48. 426 U.S. 696 (1976).
49. 483 U.S. 327 (1987).
50. 440 U.S. 490 (1979).
51. According to the employer, a non-Catholic lay teacher would be held to the same standards as a Catholic, concerning marriage to a Catholic [7, at 434 n.4, 31 n.4].
52. *See* Pa. Stat. Ann. tit. 43, secs. 903-906 (1991).
53. 494 U.S. 872 (1990).
54. Craig J. Dorsay and Lea A. Easton, *Employment Division v. Smith: Just Say "No" to the Free Exercise Clause,* 59 UMKC L. Rev. 555, 557 (1991).
55. 262 U.S. 390 (1923).
56. *Loving v. Virginia,* 388 U.S. 1,12 (1967) (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).
57. 381 U.S. 479 (1965).
58. 388 U.S. 1 (1967).

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