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Accommodating Employees' Sabbaths: Is it the Government's Job?

by Neal Devins

Estate of Donald Thornton

v.

Caldor, Inc.

(Docket No. 83-1158)

Argued November 7, 1984

ISSUE

There has been great confusion and division among judges and constitutional scholars concerning whether the two Religion Clauses of the First Amendment speak either to different—possibly competing—ideals, or to a unified vision of religious liberty. *Thornton v. Caldor, Inc.*, will provide important insights into this issue. In *Thornton*, the Supreme Court will determine whether the state of Connecticut can constitutionally compel private employers to give religious employees whatever day off each designates as a Sabbath.

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..." These provisions were made applicable to the states through a 1940 Supreme Court decision, *Cantwell v. Connecticut*, (310 U.S. 296 (1940)). For the most part, these constitutional provisions raise distinct issues. Yet, when government seeks to accommodate religious practice, both Establishment Clause and Free Exercise Clause values are implicated. Unlike previous accommodation cases, *Thornton* raises both the knotty issues of the scope of permissible government intervention into the affairs of private sector employers and the ability of the state to limit a religious accommodation to Sabbath observers.

The wall separating church and state has been heatedly discussed recently. Clearly, the state has a legitimate interest in enacting antidiscrimination laws which protect religious liberty. On the other hand, the state is guilty of a grave constitutional offense when it singles out and places its imprimatur on particular types of religious practice. The *Thornton* case stands in the middle of these two conflicting principles: the Connecticut law protects Sabbath worship (a permissible end) at the expense of nonobservers (an impermissible end) who

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may bear the brunt of the Connecticut law through greater weekend work obligations.

FACTS

Connecticut law provides: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day No employer may, as a prerequisite to employment, inquire whether the applicant observes any Sabbath." Donald Thornton, a manager at a Caldor retail store, invoked this statutory provision in an effort to attend Sunday Presbyterian services. Caldor refused to honor this request. Instead, they offered to transfer him to a distant store that was closed on Sundays or to demote him to a nonsupervisory position—which would not involve Sunday work but would have substantially reduced Thornton's pay—at the same store. Thornton found these alternatives unacceptable, ceased work, and filed a grievance with the State Board of Mediation and Arbitration.

The board, finding Thornton's claim of Sunday observance sincere, ordered Caldor to reinstate him with backpay. (The board, however, refused to consider Caldor's challenge to the constitutionality of the statute, claiming that it had no authority to pass on the constitutionality of state law.) Caldor sought to vacate the board's award before a state trial court.

The trial court upheld the statute, ruling that: "The statute enables the state to protect its citizens from the dangers of uninterrupted labor without infringing upon any individual's right to practice the religion of his or her choice." The Connecticut Supreme Court reversed this decision, invalidating the statute.

The Connecticut Supreme Court ruled that the statute violated all three prongs of the tripartite test advanced by the Supreme Court to adjudicate Establishment Clause cases. This test requires the following: "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.'" (*Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971)) The Connecticut court held that the legislature's "unmistakable purpose" was religious and sectarian since only employees with a Sabbath day "specifically mandated by the tenets of a particular religion" can invoke the statute. The court next ruled that the Sabbath law "possesses the primary effect

of advancing religion," since "[w]orkers who do not 'observe a Sabbath' may not avail themselves of the benefits provided by the subsection." Finally, the court held that the Connecticut law impermissibly entangled government with religion since claims arising under the statute involve "an analysis of the particular religious practices and will require a decision concerning the scope of religious activity which may fairly be labelled 'observance of Sabbath.'"

(In response to this ruling, the Connecticut legislature enacted a less stringent provision which requires that employers "reasonably accommodate" the religious observances of their employees only where doing so will not cause "undue hardship." This enactment parallels the religious accommodation provision of federal civil rights legislation. Connecticut, however, did not repeal the Sabbath law.)

In its appeal to the Supreme Court, Thornton (and the state of Connecticut which intervened in the case) urges the Supreme Court to consider the Sabbath law an antidiscrimination provision against private discrimination. Thornton, in support of this claim, emphasized the Supreme Court's 1963 *Sherbert v. Verner* decision (374 U.S. 398), a case which held that a Sabbatarian who refused to work on Saturdays was entitled to state unemployment benefits under the Free Exercise Clause. In so ruling, the *Sherbert* Court noted that "there is ... enough flexibility in the Constitution to permit a legislative judgment accommodating an unemployment compensation law to the exercise of religious beliefs." Thornton reads this, and other Court language, to support Connecticut authority "to protect religious observers against being compelled to work on the day of the week they observe as their Sabbath."

Thornton next suggests that even if the Establishment Clause is implicated, the Court should scrutinize this law under a deferential rationality test. Arguing that the Sabbath law "simply relieves observant individuals of a special burden that is not imposed upon those who observe no Sabbath ...," Thornton suggests that the Court should merely see whether the Sabbath law "rationally" further(s) the "legitimate, articulated state purpose of accommodating individual religious belief and practice."

Caldor vehemently disagrees both with Thornton's characterization of Connecticut's law and his suggestion that the Court apply a rationality test. For Caldor: "Connecticut compels private employers to yield to the Sabbath observances of their employees under all circumstances, without regard to the hardship or cost that this imposes on the employer or other employees." Caldor thus argues that the Supreme Court should follow the Connecticut Supreme Court's application of the tripartite test and find the Sabbath Law unconstitutional.

Thornton, however, contends that, even under the

tripartite test, the Sabbath law would pass constitutional muster. For Thornton: 1) "There is a significant secular purpose in securing equal employment opportunities for Sabbath observers ...;" 2) "The effect of the Connecticut law is not to 'benefit' Sabbath observers, but to remove a discriminatory hurdle to their equal employment;" 3) Excessive enhancement is not implicated since "[w]hile the law may require the state to determine the sincerity of an individual employee's claimed Sabbath observance, this involves no more government entanglement with religion than similar inquiries necessary for implementing numerous other religious accommodations which are plainly constitutional."

BACKGROUND AND SIGNIFICANCE

Thornton, depending on how the Court chooses to resolve the issues before it, may prove to be a significant Establishment Clause case. The Supreme Court is yet to provide clear guidance on the religious accommodation issue; particularly whether the Establishment and Free Exercise Clauses speak either to a disjoint or common theme. From a legal theory standpoint, *Thornton* could prove to change the direction of the law.

On a more practical level, the *Thornton* decision will help clarify inconsistent court rulings concerning the constitutionality of all government laws which have the effect of accommodating religious practice. For example, Title VII of the Civil Rights Act of 1964 prohibits employers from taking adverse employment actions against applicants or employees on the basis of their religious observations and practices, including their observance of a Sabbath, "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Title VII's religious accommodation provision would necessarily be found constitutional if the Sabbath law is upheld since the Sabbath law does not consider undue hardship as a mitigating factor. (For this same reason, the Connecticut Supreme Court decision could be upheld without necessarily implicating the constitutionality of Title VII.) In addition to Title VII, various other federal provisions which accommodate religious practice are implicated by *Thornton*—including allowing religious holidays to federal employees and exempting conscientious objectors from military service in times of conscription.

Thornton also speaks to an issue of potentially great significance in Establishment Clause litigation—namely, whether one challenging the constitutionality of legislation must demonstrate that implementing the statute actually advances religious practice. Caldor did not demonstrate that the Sabbath law did not cause it or its employees undue hardship. Conceivably, the Court could insist that Caldor proffer such proof before it resolves the Establishment Clause issue. If the Court

were to do this, several early-1970s Supreme Court decisions which struck down state programs before their effects were known would be called into question. The Court, however, will probably wait to address this matter in *Grand Rapids v. Ball* (another 1984-85 term Establishment Clause case to be argued December 5, 1984).

ARGUMENTS

For Thornton (Counsel of Record, Nathan Lewin, 2555 M Street, NW, Suite 500, Washington, DC 20037; telephone (202) 293-6400)

1. Government efforts to protect the exercise of religion against private discrimination do not raise Establishment Clause issues.
2. If the Establishment Clause is implicated, the Court should use a rationality standard.
3. The Sabbath law satisfies the requirements of the tripartite test.

For the State of Connecticut (Counsel of Record, Joseph I. Lieberman, P. O. Box 120, Hartford, CT 06101; telephone (203) 566-2026)

1. Supreme Court decisions defining the scope of appropriate governmental accommodation of religion contradict the Connecticut Supreme Court decision.
2. The Sabbath law satisfies the requirements of the tripartite test.

For Caldor, Inc. (Counsel of Record, Elliott B. Gersten, 234 Pearl Street, Hartford, CT 06108; telephone (203) 522-0173)

1. The Connecticut Supreme Court correctly held that the Sabbath law violates all three prongs of the tripartite test.
2. Title VII of the 1964 Civil Rights Act's religious accommodation provision preempts the Connecticut's overly expansive Sabbath law.
3. Connecticut's recent passage of a religious accommodation law undercuts the need for the Court to review *Thornton*.

AMICUS BRIEFS

In Support of Thornton

Briefs were filed by the United States, the Anti-Defamation League of B'nai B'rith, The Seventh Day Adventist Church, The National Association of Counties, The Council of State Governments, The National Conference of State Legislatures, the National Right to Work Legal Defense Fund and Americans United for Separation of Church and State.

In Support of Caldor

Briefs were filed by the Connecticut Retail Merchants Association, the Connecticut Small Business Federation the AFL-CIO, and the Equal Employment Advisory Council [to Employers].

Other

The ACLU filed a brief recommending that the case be remanded to the trial court to determine whether Caldor or its employees suffered an "undue hardship."



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