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Supreme Court Decisions: Coal Strike Brings no 'Peace of Mine(d)'

Marc Hoffman

who offers neither his support nor his name, claim a right in his illegitimate child. Rights and responsibilities of fatherhood are concomitant; an unwed father cannot accept the right and deny the responsibility.

Coal Strike Brings No 'Peace of Mine(d)'

by Marc Hoffman

On May 31, 1977, the Supreme Court of the United States decided the case of *Ohio Bureau of Employment Services v. Hodory*, 97 S. Ct. 1898, regarding the asserted right of an employee furloughed as a result of a coal strike to receive unemployment benefits. In 1974 Leonard Hodory was employed by United States Steel Corporation to work in a steel mill in Youngstown, Ohio. The United Mine Workers went out on stirke at all coal mines owned by United States Steel Corporation (USS) and by Republic Steel Corporation. These company-owned mines supplied the fuel used in the operation of manufarturing facilities of USS and Republic. As a result of the strike the fuel supply at the Youngstown plant was reduced. The plant eventually was shut down and in November 1974 Hodory was furloughed. Hodory applied to the appellant state agency for unemployment benefits. On January 3, 1975 the appellant disallowed his claim under OHIO REV. Code §4141.29(D)(1)(a) which provides that a worker may not receive unemployment benefits if: "His unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute."

On January 27 Hodory filed a complaint based on 42 U.S.C. §1983 in the United States District Court for the Northern District of Ohio seeking declaratory and injunctive relief on behalf of himself and "all others similarly situated" who had been or in the future would be denied benefits under §4141.29(D)(1)(a). The court held that the statute as applied to Hodory entitled him to unemployment benefits. The State appealed the decision to the Supreme Court of the United States and in an 8-0 decision (Mr. Justice Rehnquist not participating) the Court reversed the District Court.

The Supreme Court held that (1) the abstention doctrine was not applicable in this case; (2) the Ohio statute was neither in conflict with, nor pre-empted by, the Social Security Act or the Federal Unemployment Tax Act; and (3) the statute had a rational relation to a legitimate state interest and did not violate the Equal Protection or Due Process clauses of the fourteenth amendment.

The Supreme Court's decision as to the abstention doctrine was based upon the fact that the state voluntarily chose to submit to a federal forum and principles of comity do not demand that the federal court force the case back into the State's own system. 97 S.Ct. at 1904.

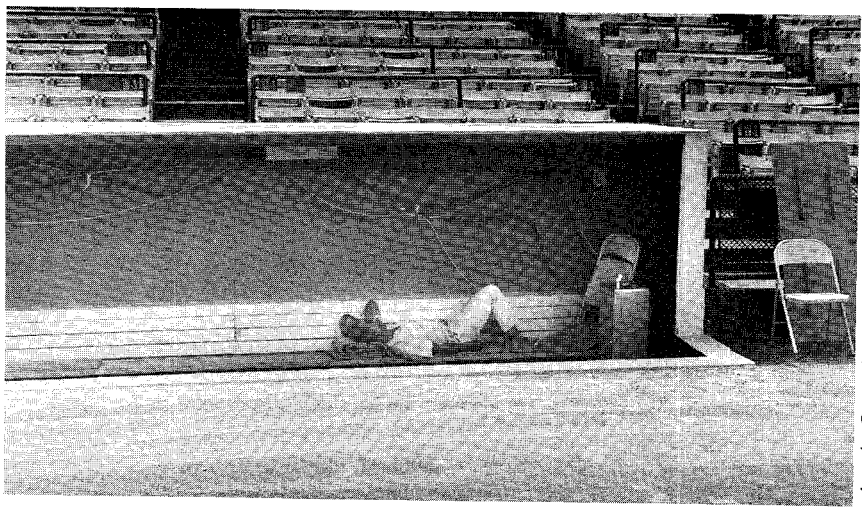

photo by George Martin Kripner

Hodory argued that the Ohio statute was pre-empted by 42 U.S.C. §503(a)(1) and (3), as amended, of the Social Security Act (SSA) of 1935, the Employment Security Amendments of 1970 and the Federal Unemployment Tax Act (FUTA), 26 U.S.C. §§3301-3311, as amended. Hodory advanced the argument that the state may not deny benefits to those who, like him, were unemployed under circumstances where the unemployment is not the fault of the employee. He also contended that the SSA forbid disqualification of persons laid off due to a labor dispute at a related plant. In response, Mr. Justice Blackmun speaking for the court stated that, "a reading of the entire Report of the Committee on Economic Security, which became the cornerstone of the SSA, shows that Congress did not intend to require that the States give coverage to every person involuntarily unemployed." 97 S.Ct. at 1905. He went on to say that, "the history shows Congress did not intend to restrict the ability of the States to legislate with respect to persons in Hodory's position." 97 S.Ct. at 1906. The report reflects through various provisions that unemployment compensation schemes generally do not grant full benefits immediately and indefinitely even to those involuntarily unemployed. The report also does not direct that funds *must* be dispensed but rather cautions against funds being dispensed too freely.

Hodory also claimed that "innocent" persons could not be disqualified from unemployment compensation based on §5(d) of draft bills issued by the Social Security Board shortly after passage of the SSA. The Court pointed out, however, that the cover page of the draft bills booklet explicitly stated, "these drafts are merely suggestive. . . Therefore they can't properly be termed 'model' bills or even recommended bills. This is in keeping with the policy of the Social Security Board of recognizing that it is the final responsibility and the right of each State to determine for itself just what type of legislation it desires and how it shall be drafted." 97 S.Ct. at 1907.

Additionally, Hodory argued that "innocent" persons could not be disqualified from unemployment compensation pursuant to the legislative history of the Employment Security Amendments of 1970. This history, however, recognizes that the States continue to be free to "specify the conditions for disqualification such as for. . .unemployment due to a labor dispute in the worker's plant, etc. . ." 97 S.Ct. at 1908.

Hodory, in contending that the States were pre-empted by the Federal Unemployment Tax Act, did not effectively narrow his argument to include pre-emption as to labor dispute qualifications. The Court felt Congress showed no intent vis-a-vis the FUTA to totally pre-empt the State and restrict its freedom to legislate on the subject of labor disqualifications. 97 S.Ct. at 1908. Hodory could not cite any provision of the Act which would mitigate against this conclusion.

The Court lastly turned to the question of whether the statute as applied was irrational, without valid public purpose, and thus, in violation of the Equal Protection and Due Process clauses of the fourteenth amendment. The statute did not involve any discernible fundamental right, or affect with particularity any protected class which would have required the State to show a compelling interest for the Court to uphold the statute. Hodory conceded that the test of constitutionality was whether the statute had a rational relationship to a legitimate state interest.

In approaching this question the Court pointed out that the unemployment compensation statute touched upon more than just the recipient. It provided for the creation of a fund produced by contributions from private employers. The rate of an employer's contribution to the fund varied according to benefits paid to that employer's eligible employees. Ohio Rev. Code §4141.25. Hodory urged the Court to consider only the needs of the employee seeking compensation. Hodory's position was contrary to the principle enunciated in *Dandridge v. Williams*, 397 U.S. 471, 486 (1970), that "the fourteenth amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy."

In considering the constitutionality of the statute, the Court viewed its consequences, not only to the recipient of benefits but also to the contributors to the fund and the fiscal integrity of the fund. The Court found that the statute on its face was rationally related to a legitimate State interest, specifically, the protection of the employer. The Court elaborated that if a union goes out on strike the employer's contributions to the fund are not increased, but if the employer locks employees out, all his employees thus put out of work are compensated and the employer's contributions to the fund accordingly are increased. "If the classification has some 'reasonable basis' it does not offend the Constitution simply because the classification is not made with mathematical nicety or because it results in some inequality. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78."

Dandridge v. Williams, 397 U.S. 485 (1970).

It was found that the State had two additional interests at stake. First, the granting of benefits would place the employer at an unfair disadvantage in negotiations with the unions. The employer's costs go up with every laid-off worker who is qualified to collect unemployment. The only way for the employer to stop its rising costs is to settle the strike so as to return the employees to work. Qualification for unemployment compensation thus acts as a lever, increasing the pressure on an employer to settle a strike. The State chose to leave this lever in existence for situations in which the employer locked out his employees, but to eliminate it if the union made the strike move. The approach taken by Ohio was found not to be irrational. 97 S.Ct. at 1910. Secondly, the State had an interest in protecting the fiscal integrity of its compensation fund and the statute was rationally related to this interest.

The Court was unable to discern the basis for a claim that Hodory had been denied substantive due process of law and Hodory made no claim of denial of procedural due process.

Affirmative Action Plan Rejected

by John Benjes*

Voluntary affirmative action, called into question in the context of admission to professional schools in *Bakke v. Regents of the University of California*, 18 Cal.3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976), *cert. granted*, 429 U.S. 1090 (1977), suffered a setback in the recent case of *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216 (5th Cir. 1977). In *Weber*, the Fifth Circuit found that a joint program of affirmative action entered into by a union and employer violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2 *et seq.* The affirmative action before the court was a quota which was established for admittance into an on-the-job training program for entry into the craft positions in all Kaiser plants. Its effect was to create an entrance ratio of one minority worker to each white until the percentage of minority craft workers roughly approximated the proportion of minorities in the surrounding local population.

The district court found the training program defective on two grounds: One, only courts may implement quota relief and even then only with great caution; Two, under the facts of this case a quota system would not be warranted even if ordered by the court in light of the fact that those preferred workers were not identifiable victims of discrimination and there had, in fact, been no past discrimination by this employer. The circuit court affirmed on the second ground only, holding that while voluntary compliance with Title VII was laudable and preferable to litigation, the facts of this case did not warrant quota relief. Despite the court's support for voluntary compliance, the decision in *Weber* can be expected to discourage that remedy. Essential to the court's ruling was the finding by the district judge that there had been no proof of past discrimination by Kaiser, this despite an apparent disparity between the proportion of black craftsmen at Kaiser and the percentage of blacks in the local population. The court was unconvinced by the employer's argument that the the effects of past societal discrimination were far-reaching and could be remedied only through a "one-for-one" training program.

Equally unconvincing was the argument that the quota system was instituted at the behest of the Office of Federal Contract Compliance (OFCC) in its attempt to enforce Executive Order 11246, 30 Fed. Reg. 12319, which requires federal contractors to take affirmative action to obtain a fair percentage of minorities in their workforces. On this point, the district court had found that the collective bargaining agreement in question "reflected less of a desire on Kaiser's part to train black craft workers than a self interest in satisfying the OFCC in order to retain lucrative government contracts." 563 F.2d at 226. While the circuit court recognized the legitimacy of affirmative action plans implemented under Executive Order 11246, such as the "Philadelphia Plan", *see Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied* 404 U.S. 854 (1971), it held that in the absence of prior discrimination, the Executive Order may not override the contradictory congressional provision against quota hiring found in Section 703(d) of Title VII.

This decision places an employer in the bind of having to choose between awaiting litigation charging past racial bias against blacks or other minorities or initiating a plan to remedy the underutilization of minorities and inviting a reverse discrimination charge. It is difficult to conceive of employers who would be willing to admit a past pattern or practice of minority discrimination prior to implementing affirmative action plans voluntarily or with the encouragement of OFCC.

Judge Wisdom, in his dissent, pointed out that the majority in *Weber* requires the employer to guess what a district court might find in the event that employer is sued for discrimination. Should the employer guess that the district court would find past discrimination, and thus institute a voluntary affirmative

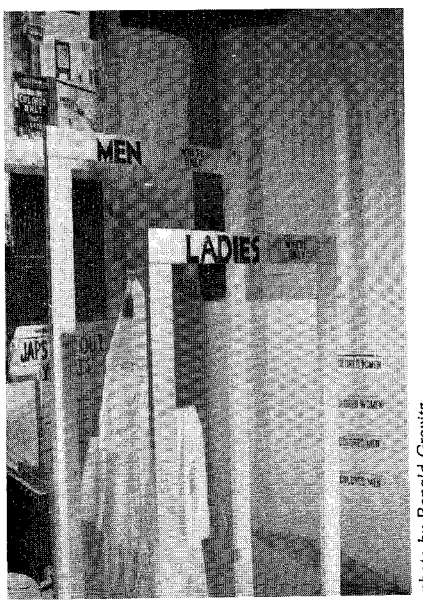

photo by Ronald Gravitz

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