IN THE COURT OF APPEALS OF THE STATE OF GEORGIA

SHIRLEY D. LESTER,

Appellant,

v.

MARK BUTLER, Commissioner of Georgia Department of Labor,

and

GOODWILL OF NORTH GEORGIA, INC., Employer,

Appellees.

COURT OF APPEALS OF GEORGIA CASE NO. A14A2008

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BRIEF ON APPEAL

Appellant SHIRLEY D. LESTER appeals from the Superior Court of Athens-Clarke County's February 27, 2014 Order Affirming Board of Review's Denial of Unemployment Benefits [R.120-122] and files this Brief on Appeal.

INTRODUCTION

The issue that this appeal presents appears to be one of first impression in this State, but the Supreme Court of the United States long ago resolved this same question under the United States Constitution's Free Exercise Clause. The evidence is undisputed: Ms. Lester's employer forced her to choose between adherence to her sincerely held religious convictions or continued employment, then terminated her employment for choosing the conduct that her religion mandates. The Georgia Department of Labor disqualified her from receipt of unemployment compensation benefits because of conduct mandated by religious belief. This denial put substantial pressure on Ms. Lester to modify her behavior to violate her belief, which unconstitutionally burdened her First Amendment right to free exercise of her religion. The lower tribunals, including the Georgia Department of Labor Board of Review and the superior court, erred in upholding

this violation of the United States Constitution's First Amendment Free Exercise Clause.

The Supreme Court of the United States in *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (107 SC 1046, 94 LE2d 190) (1987), held that a state's denial of unemployment compensation benefits to an employee discharged for refusal to work certain hours because of sincerely held religious convictions, even if the employee adopted the religious convictions after beginning employment, violates the United States Constitution's Free Exercise Clause.

Ms. Lester became a Seventh-day Adventist during her employment, and she refused to work certain hours -- Saturdays -- because her sincerely held religious convictions mandate that she observe the Sabbath on that day. She was terminated for that refusal and sought unemployment compensation benefits.

The Georgia Department of Labor Administrative Hearing Officer found, and the Board of Review adopted, as fact that the last four absences for which Ms. Lester was terminated were absences "due to her religious beliefs." The lower tribunals thus erred in applying the law to the facts by determining that her decision to adhere to her religious convictions and incur absences due to her

religious beliefs bars her claim for unemployment compensation. Accordingly, the Georgia Department of Labor's and the superior court's decisions should be reversed.

PART ONE - FACTUAL AND PROCEDURAL BACKGROUND

Shirley D. Lester was employed by Goodwill of North Georgia, Inc. ("Goodwill") in Athens-Clarke County, Georgia as a Floor Associate, from April 12, 2011, until August 22, 2011. [R.18 (T.8:3-6)][1] Goodwill has a system in which it assigns an employee points for unexcused absences or for tardiness. [R.18 (T.8:14-20)] An employee receives two points if the employee has an unexcused absence and one point if the employee is tardy. [R.18 (T.8:22-25)] Goodwill's policy provides that, if an employee reaches twelve points, the employee is subject to termination. [R.19 (T.9:1-3)]

On May 22, 2011, Ms. Lester received a warning for reaching four points. She had been absent one day because her child was ill and, on another occasion,

[1] Documents included in the certified record are R.5-103 in this Court's record on appeal. R.11-46 is the transcript of the hearing before the Administrative Hearing Officer which was included in the certified record before the Board of Review.

had been absent because she attended a court appearance that her husband was required to attend. [R.24-25 (T.14:20-25 – 15:1-14)]

In July 2011, Ms. Lester became a Seventh-day Adventist. She thus requested that Goodwill accommodate her religious practices by permitting her Saturdays off to observe, as her religious convictions mandate, the Sabbath. [R.22, 23, 28 (T.12:1-9; 13:5-10; 18:1-14)] The store manager told her, however, that, because Goodwill did not allow employees to take Saturdays off, Goodwill could not accommodate her religious practice. [R.32 (T.22:7-12)] Ms. Lester tried to resolve Goodwill's refusal by using her personal and earned vacation time to take Saturdays off, but Goodwill refused to allow that accommodation as well. [R.32, 33 (T.22:17-21; 23:13-23)] Goodwill then advised her that she could switch shifts with other employees -- only so long as it did not cause an employee to incur overtime -- or alternatively, she could transfer to a different store. But this alternative also turned out not to be a possibility for accommodation, as Goodwill confirmed it could not guarantee Saturdays off at that store either. [R.22-23 (T.12:14-25 – 13:1-7)]

Subsequently, because of her religious mandate to keep Saturday as the Sabbath, Ms. Lester was absent on three occasions between July 17, 2011, and

August 13, 2011. [R.25-28; 29-31 (T.15:25 – 18:1-6; 19:3-25 – 21:1-11)] She tried to find employees to cover these shifts, but because the employees were already scheduled or otherwise unavailable, her attempts were unsuccessful. [R.31 (T.21:12-22)]

On Saturday, August 20, 2011, Ms. Lester was again absent from work. [R.21 (T.11:11-12)] On August 22, 2011, Goodwill terminated her on the ground that she "accumulated . . . 12 points, resulting in termination." [R.32 (T.11:12-14)]

After Goodwill terminated Ms. Lester, she filed a claim for unemployment benefits. The Claims Examiner determined that she was disqualified from receipt of unemployment benefits: "You were fired because you did not work your schedule as instructed by your employer. Your reasons were personal. When you did not work as scheduled you failed to follow your employer's rules. Therefore, you cannot be paid unemployment benefits." [R.82]

Ms. Lester appealed the Claims Examiner's decision. [R.81] At the hearing before the Administrative Hearing Officer (Hearing Officer), Goodwill's representative admitted that the reason for Ms. Lester's final three absences leading to her termination was that she "was going to church, . . . observing the

Sabbath." [R.22 (T.12:1-2)] The Hearing Officer found as fact that, because her religious convictions mandate that she observe the Sabbath, Ms. Lester's last four absences, for which she accrued eight points and was terminated immediately, were "due to her religious beliefs." [R.8] Notwithstanding Goodwill's representative's testimony, and the Hearing Officer's finding, the Hearing Officer affirmed the decision to deny Ms. Lester unemployment benefits. [R.8-10] The Hearing Officer concluded: "When the claimant was hired there were no restrictions on her employment. In July of 2011, the claimant changed her hiring agreement when she informed the employer she could not work on Saturdays due to her religious beliefs. The hearing officer finds that the claimant's reasons for being absent were personal in nature and within her control." [R.9]

Ms. Lester timely appealed to the Georgia Department of Labor Board of Review (Board of Review). [R.47-48] The Board of Review adopted the Hearing Officer's findings of fact without modification. [R.6-7] The Board of Review affirmed the Hearing Officer's decision and disqualified Ms. Lester from receiving unemployment benefits. [R.6-7]

Pursuant to OCGA § 34-8-223, Ms. Lester petitioned the superior court for judicial review. [R.1-3] She again asserted that the denial of unemployment

benefits violated her First Amendment right to free exercise of religion. [See R.104-119] The superior court nonetheless affirmed the Board of Review. [R.120-122] The superior court did so, however, based on numerous factual findings that do not find any support in the certified record.[2]

The superior court found that Goodwill had informed Ms. Lester from the outset that she would be required to work on Saturdays [R.121], but evidence of this assertion is absent from the record. The court noted that "Petitioner received a warning in May 2011. . . She missed work due to her son's illness and her husband's court appearance." [Id.] The court then noted that "[n]either time did she find coverage for her shift." [Id.] To the extent that the superior court purported to find that Ms. Lester did not heed Goodwill's directions that she seek coverage for Saturdays she could not work because of her religious convictions, the record

[2] Regardless whether the superior court's factual findings found any support in the record, Supreme Court of the United States case law and the United States Constitution's Fourteenth Amendment require that the State provide Ms. Lester unemployment benefits. But because the superior court based its decision to affirm on these unsupported, erroneous factual findings, Appellant discusses them here.

reflects that Goodwill discussed the shift coverage with Ms. Lester only after she raised the issue of her Saturday absences, which was after these two absences. [See R.25 (T.15:12-21)]

The court then found that, in July 2011, Ms. Lester informed Goodwill that she could no longer work on Saturdays, because she had become a Seventh-day Adventist and observed the Saturday Sabbath. The superior court determined that Goodwill "attempted to accommodate the Petitioner's request to be off every Saturday by trying to arrange a transfer to another store; however, that was not feasible for the *Petitioner*." [R.121, emphasis added] The transfer option, however, was abandoned by Goodwill because it was not feasible for *Goodwill*, not because it was not feasible for Ms. Lester. [R.22, 23 (T.12:21-25 – 13:1-7)] The superior court then found:

> As an alternative, the Employer gave Petitioner the option of finding other employees to cover her Saturday shifts. From July 17, 2011 until August 20, 2011, the Petitioner was absent on four more Saturdays. . . . Petitioner informed the store manager on the Friday, July 16th just prior to closing time that she would be absent the next day on July 17th. . . . Petitioner made scant efforts to get her shifts covered. . . . Despite the alternatives presented

> by her employer, the Petitioner did little to assist including failing to seek coverage for her shift and providing less than 24 hours notice of a planned absence.

[R.121-122] These factual findings do not find any support in the record. The record establishes: (i) Ms. Lester informed the store at the beginning of July that she would need to begin taking Saturdays off. [R.22 (T.12:8-13)] (ii) Ms. Lester reminded her manager on the evening of July 16 that she would be off the following day in observance of the Sabbath. [R.27 (T.17:13-19)] (iii) She previously informed her employer that she could not work on July 17. [R.27 (T.17:20-25)]

With regard to Ms. Lester's "scant efforts to get her shifts covered," while the evidence may be "scant," all the record evidence establishes that she made bona fide efforts to switch shifts with other employees, albeit to no avail. [R.31 (T.21:12-22)] The store manager acknowledged that, because of Goodwill's policy not to pay its employees overtime, Ms. Lester's efforts to have other employees take her Saturday shifts would likely be unavailing. [R.22, 45 (T.12:16-20; 35:3-6)]

The superior court rejected Ms. Lester's free exercise argument, and held that there was evidence to support the Board of Review's findings of fact and legal conclusions, thus affirming its decision. [R.120-122] The superior court concluded that Ms. Lester "materially changed her hiring agreement in July 2011 by making herself completely unavailable to work on Saturday." [R.122] The court found that Ms. Lester was properly disqualified from benefits due to violation of Goodwill's attendance policy, as her "absences were not solely related to religious beliefs but also personal matters and choices." [Id.]

Ms. Lester, pursuant to OCGA §§ 50-13-20 and 5-6-35 (a) (1), and to Court of Appeals of Georgia Rule 31, filed an application for discretionary appeal to this Court for review of the superior court's February 27, 2014 order affirming the Board of Review's decision to deny her unemployment benefits. [R.120-122] This Court granted the application [R.123-124], and this appeal followed. [R.125]

JURISDICTIONAL STATEMENT AND PRESERVATION OF ERROR

This appeal's subject matter is not one exclusively reserved to the Supreme Court under either Ga. Const. of 1983, Art. VI, § VI, Par. II or III. This Court, rather than the Supreme Court of Georgia, has jurisdiction to consider this appeal.

Ms. Lester preserved this Court's review of the allegations of error that this appeal presents by the allegations of error raised in her August 16, 2013 Brief in Support of Petition for Review [R.104-119], which she filed with the record on appeal in support with the superior court, and the superior court's ruling on Ms. Lester's petition in its February 27, 2014 order affirming the Board of Review's decision. [R.120-122]

PART TWO - ENUMERATIONS OF ERROR

1. Because Goodwill terminated Ms. Lester's employment for conduct that her sincerely held religious convictions mandate, the Board of Review and superior court erred in their application of law to the facts of the case when they affirmed the Department of Labor's decision to disqualify Ms. Lester from receiving unemployment benefits.

2. The Board of Review and superior court erred in affirming the Hearing Officer's decision to disqualify Ms. Lester from receiving unemployment benefits, because, under the circumstances of this case, the United States Constitution's Free Exercise Clause precludes the employer, as a matter of law, from meeting its statutory burden of proving fault by the employee.

PART THREE – ARGUMENT AND CITATION TO AUTHORITY

A. Standard of Review.

In its review of administrative decisions, this Court and the superior court are required to examine the soundness of the conclusion of law drawn from the findings of fact supported by any evidence, and are authorized to reverse or modify the agency decision upon a determination that the agency's applications of the law to the facts is erroneous. *Pruitt Corp. v. Ga. Dep't of Cmty. Health*, 284 Ga. 158, 161 (3) (664 SE2d 223) (2008). See OCGA § 50-13-19. Thus, "[a] determination that the findings of fact are supported by evidence does not end judicial review of an administrative decision." Id. The Board of Review's application of the law to the facts is reviewed de novo. *Barnett v. Ga. Dep't of Labor*, 323 Ga. App. 882, 883 (748 SE2d 688) (2013).

B. Argument and Citations to Authority.

As a court reviewing an agency decision, this Court may reverse or modify that decision if substantial rights of the appellant have been prejudiced, because the administrative findings, inferences, conclusions, or decisions are in violation of constitutional or statutory provisions or are affected by other error of law. OCGA § 50-13-19 (h) (1) and (4). Here, the Board of Review's decision prejudiced Ms.

Lester's substantial rights because that decision was in violation of the United States Constitution's Free Exercise Clause, which applies to the states via the Fourteenth Amendment, and because that clause shows that the Board of Review's application of law to the facts was erroneous. Accordingly, the superior court erred in affirming that decision, and this Court must reverse.

1. Because Goodwill terminated Ms. Lester's employment for conduct that her sincerely held religious convictions mandate, the Board of Review and superior court erred in their application of law to the facts of the case when they affirmed the Department of Labor's decision to disqualify Ms. Lester from receiving unemployment benefits.

A state administrative agency's decision to disqualify a person "from receipt of [unemployment] benefits" based on that person's religious tenet not to work on Saturdays "violates the Free Exercise Clause of the First Amendment, applicable to the States through the Fourteenth Amendment." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 140-41 (107 SC 1046, 94 LE2d 190) (1987). Under the Free Exercise Clause, government may not penalize individuals because of the religious views they hold, which occurs when government places an impermissible burden on a person's freedom to practice his or her religion.

Sherbert v. Verner, 374 U.S. 398, 403 (83 SC 1790, 10 LE2d 965) (1963), limited by *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (110 SC 1595, 108 LE2d 876) (1990).

Unlike some other areas of Constitutional rights jurisprudence, the United States Supreme Court articulated a bright line rule for determining whether denial of state unemployment compensation benefits violates the First Amendment's Free Exercise Clause: when an employee is placed in a situation in which the employee must choose between conduct that adherence to sincerely held religious convictions mandates or continue employment, that choice places an impermissible burden on the employee's free exercise rights, and a state's refusal to provide that employee unemployment compensation benefits when the employee chooses the former violates the Free Exercise Clause. See *Hobbie*, supra, 480 U.S. at 146; *Sherbert*, supra, 374 U.S. at 404; *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 717-18 (101 SC 1425, 67 LE2d 624) (1981).

Thus, it is unconstitutional to

> "force [a person] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental

> imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against her for her Saturday worship."

Hobbie, supra, 480 U.S. at 140 (quoting *Sherbert*, supra, 374 U.S. at 404).

The appellant in *Hobbie* adhered to the same religious tenet as Ms. Lester (secular work on the Saturday Sabbath) and presented virtually identical factual circumstances to those that this appeal presents. *Hobbie*, supra, 480 U.S. at 137. Paula Hobbie had been employed for two and a half years when she informed her employer that she was to be baptized into the Seventh-day Adventist Church. Id. at 138. She said that would no longer be able to work from sundown Friday to sundown on Saturday, as that is the Sabbath, according to a basic tenet of her religion. Id. The company accommodated Hobbie's Sabbath for a short period of time, but then gave her the choice of either working her scheduled Saturday shifts or submitting her resignation. Id. Hobbie refused and was terminated. Id. Hobbie applied for unemployment benefits and was denied those benefits because her refusal to work was deemed misconduct sufficient to disqualify her from benefits. Id. at 139.

The Supreme Court looked to its precedent decisions -- particularly to *Sherbert* and to *Thomas* -- and reversed the state's decision to deny benefits:

> Florida's refusal to award unemployment compensation benefits to appellant violated the Free Exercise Clause of the First Amendment. Here, as in *Sherbert* and *Thomas*, the State may not force an employee "to choose between following the precepts of her religion and forfeiting benefits, . . . and abandoning one of the precepts of her religion in order to accept work."

Hobbie, supra, 480 U.S. at 146 (quoting *Sherbert*, supra, 374 U.S. at 404).

Ms. Lester's circumstances are virtually identical. After Goodwill hired Ms. Lester, she converted to the Seventh-day Adventist Church and immediately informed Goodwill of the conversion and that her religious convictions mandate that she not work on her Sabbath (Saturday). Ms. Lester requested accommodation of this religious conviction, which Goodwill did not provide. Goodwill instead disciplined Ms. Lester for each of her Saturday absences and terminated her because of those absences a few weeks later.

The Board of Review adopted the Hearing Officer's factual finding that these absences for which she was disciplined and terminated were "due to her religious beliefs." [R.8] But then, in its application of law to this finding of fact,

the Board of Review erroneously concluded, like the Florida Bureau of Unemployment Compensation in *Hobbie* and the South Carolina Employment Security Commission in *Sherbert*, that Ms. Lester was disqualified from benefits.

In its review of the Board of Review's decision, the superior court noted that Goodwill's attendance policy "provided for termination of an employee who accrued twelve 'points' for unexcused absences." [R.121] It also noted that, before "Petitioner became a Seventh Day [sic] Adventist and observed the Sabbath on Saturdays," she had accrued only "four points." [Id.] And "[i]n July 2011, the Petitioner informed the Employer that she could no longer work on Saturdays *due to her religious beliefs*." [Id., emphasis added] Then, "[f]rom July 17, 2011 until August 20, 2011, the petitioner was absent on four more Saturdays." [Id.] Appellant "was finally terminated on [Saturday] August 20th due to the unexcused absences." [Id.]

Even though the court expressly found Goodwill terminated Ms. Lester because of conduct that her religious convictions mandate, in its application of law to these facts (and to the Board of Review's same facts), the superior court erred when it, like the Florida Fifth District Court of Appeal in *Hobbie* and the Court of

Common Pleas in *Sherbert*, affirmed the Board of Review's decision.[3] This application of law to the facts is error that requires reversal of both the Board of Review's decision and the superior court's affirmance of that decision. *See Pruitt*, supra, 284 Ga. at 161 (3).

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[3] Based on the superior court's statement that "[t]here is evidence to support the Board's factual findings and legal conclusions," [R.122] it is unclear whether the superior court applied the correct standard of review to the Board of Review's decision. The Supreme Court of Georgia made clear in *Pruitt* that, while the superior court reviewing an administrative decision must uphold the factual findings if there is any evidence to support those findings, "[a] determination that the findings of fact are supported by evidence does not end judicial review of an administrative decision," and that the superior court must review the application of the law to those facts de novo. *Pruitt*, supra, 284 Ga. at 161 (3). Regardless whether the superior court applied the correct standard of review to the Board of Review's legal conclusions, however, the Board of Review's factual findings establish that the Board of Review's application of the law to those facts is reversible error.

The superior court's decision also took issue with Ms. Lester's appeal of the Board of Review's decision, noting that she "focuses solely on her constitutional religious rights." [R.122] It instead focused on the fact that "she received a warning and began accumulating points prior to converting to the teachings of Seventh Day [sic] Adventists," and that she "materially changed her hiring agreement in July 2011 by making herself completely unavailable to work on Saturday." [Id.] Based on these conclusions, the superior court held: "Her absences were not solely related to religious beliefs but also personal matters and choices." [Id.] But the Supreme Court in *Hobbie* already disposed of this possible distinction over 25 years ago.

In *Hobbie*, the Supreme Court addressed the argument that, because Hobbie was the "agent of change," she was responsible for the conflict between her job and her religious belief regarding Saturday Sabbath work. *Hobbie*, 480 U.S. at 143. The Supreme Court held:

> The First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired. The timing of Hobbie's conversion is **immaterial** to our determination that her free exercise rights have been burdened; the salient

> inquiry under the Free Exercise Clause is the burden involved. In *Sherbert*, *Thomas* and the present case, the employee was forced to choose between fidelity to religious belief and continued employment; the forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice.

Id. at 144 (emphasis supplied). Here, as in *Hobbie*, the superior court's reliance on Ms. Lester's conversion to the Seventh-day Adventist Church after her hire and after she incurred points for personal absences is "immaterial," as she afterward was forced to choose between fidelity to religious belief or forfeiture of unemployment benefits. Id.

And with regard to the superior court's proximate cause-type analysis that she is disqualified from benefits because her termination was not "solely related to religious beliefs but also personal matters and choices," [R.122] (which presumably refers to the accumulation of points before she became a Seventh-day Adventist), the Supreme Court established that "the salient inquiry under the Free Exercise Clause is the burden involved," which renders unconstitutional denial of benefits where "the employee was forced to choose between fidelity to religious belief and continued employment." *Hobbie*, supra, 480 U.S. at 144. The superior

court gave great weight to the fact that Ms. Lester's first two absences -- for which she accumulated four points under Goodwill's policy -- were unrelated to her religious tenets. But the burden on her continued employment came not from those two absences, nor from any additional personal absences. As in *Hobbie*, the burden came from the choice between fidelity to her religious beliefs or continued employment: the record evidence is undisputed that Ms. Lester's choice to adhere to her sincerely held religious convictions and abstain from work on the Sabbath caused her to incur the eight additional points for which Goodwill terminated her. [See R.8] So, as in *Hobbie*, the State's decision to deny her unemployment compensation benefits after she was forced to make that choice is an unconstitutional burden on her free exercise right.

Indeed, the Minnesota Court of Appeals, faced with an unemployment compensation claim that presented a petitioner with a much worse record of attendance, which record included more absences and incidences of tardiness unrelated to the petitioner's religious practices than Ms. Lester's record, held that, because "the conduct that triggered her discharge was an absence for religious reasons," the denial of benefits violated the Free Exercise Clause. *Nyaboga v.*

Evangelical Lutheran Good Samaritan Soc'y, A11-2067, slip op. at 6, 2012 Minn. App. Unpub. LEXIS 833 (Minn. Ct. App. Aug. 27, 2012) (unpublished).

Finally, the superior court apparently also based its decision to affirm on its finding that Goodwill made attempts to accommodate Ms. Lester's religious practice to no avail, and so Ms. Lester was not entitled to benefits. Whether Goodwill attempted accommodation may be germane to a Title VII claim, but it is immaterial to Ms. Lester's free exercise objection to denial of unemployment benefits. See *Hobbie*, supra, 480 U.S. at 137 n.1.

The Supreme Court passed on the issue of the employer's accommodation attempts in the free exercise context in *Thomas*. There, a Jehovah's Witnesses was employed in a foundry producing sheet steel for a variety of industrial uses, including military applications. *Thomas*, supra, 450 U.S. at 710. The foundry eventually closed, and the employee was transferred to another department which produced turrets for military tanks. Id. Armaments production was contrary to the employee's religious beliefs, and all the departments to which he might have been transferred were engaged in the armaments production. Id.

The employee then quit his job and sought unemployment compensation, which was denied on the ground that, although the employee terminated his

employment because of religious convictions, his voluntary termination was not for "good cause arising in connection with his work," pursuant to the Indiana statute. Id. at 711. Compare *Blair v. Poythress*, 211 Ga. App. 674, 676 (440 SE2d 261) (1994); OCGA §§ 34-8-194 and 34-8-158. The Indiana Supreme Court determined that the employee's resignation, which was motivated by his religious convictions, was for a personal reason, and thus he did not qualify for unemployment benefits. *Thomas*, supra, 450 U.S. at 713. The United States Supreme Court rejected this argument and held that he was entitled to receive unemployment benefits. Id. at 717-18.

The Board of Review's and the superior court's legal conclusion that Ms. Lester's religiously mandated absences were "personal in nature" must likewise be rejected. Here, as in *Thomas*, Goodwill was unable to find a position for Ms. Lester that would allow her to continue employment and to adhere to her religious convictions' mandate that she abstain from work on the Sabbath. [See R.22, 31, 45 (T.12:16-20; 21:12-22; 35:3-6)] Thus, according to the Supreme Court in *Thomas*, denial of benefits to Ms. Lester is unconstitutional.

At bottom, contrary to the lower tribunals' reasoning and decisions, whether Ms. Lester's conversion to the Seventh-day Adventist Church was the "agent of

change" that precipitated her termination is immaterial to her unemployment compensation claim. *Hobbie*, 480 U.S. at 144. Whether her choice not to work the Saturday hours Goodwill required of her was a "personal . . . choice[]" [R.122] is immaterial to her claim. *Hobbie*, 480 U.S. at 144. And whether Ms. Lester had two absences "wholly personal" [Id.] and unrelated to her religious mandates, which may have played a part in her termination, is immaterial to her compensation claim. *Hobbie*, supra, 480 U.S. at 144. See also *Nyaboga*, 2012 Minn. App. Unpub. LEXIS 833, at *6. Because Ms. Lester was terminated based on conduct mandated by her religious convictions, she was faced with the choice to adhere to her religious tenets or to continue her employment. The denial of unemployment compensation benefits to Ms. Lester when faced with such a choice violates her First Amendment right to free exercise of religion. Thus, the Board of Review's and the superior court's decisions misapplied the law to the facts, and this Court should reverse those decisions. *Pruitt*, supra, 284 Ga. at 161 (3).

2. The Board of Review and superior court erred in affirming the Hearing Officer's decision to disqualify Ms. Lester from receiving unemployment benefits, because, under the circumstances of this case, the United States Constitution's Free Exercise Clause precludes the employer, as a matter of law, from meeting its statutory burden of proving fault by the employee.

The Georgia Legislature declared that the express purpose of the Employment Security Act (the "Act") is to give effect to the fact that "economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state"; therefore, Georgia's public policy favors payment of unemployment benefits to "persons unemployed through no fault of their own." OCGA § 34-8-2. *See Williams v. Butler*, 322 Ga. App. 220, 223 (1) (744 SE2d 396) (2013). Given this expressed purpose of the Act, courts should liberally construe the Act's provisions in favor of the employee and should narrowly construe statutory exceptions and exemptions which are contrary to the

Act's expressed intention. See *Scott v. Butler*, Court of Appeals Case No. A14A0105, 2014 Ga. App. LEXIS 357 (June 4, 2014) (physical precedent only).[4]

"Under OCGA § 34-8-158 (2), an individual may be disqualified for unemployment compensation benefits where the individual has been discharged for failure to obey orders, rules, or instructions or for failure to discharge the duties for which she was employed." *Tanner v. Golden*, 189 Ga. App. 894, 895 (377 SE2d 875) (1989). "[T]he employer must show that the discharge was caused by the deliberate, conscious fault of the claimant." Id. (citing *Millen v. Caldwell*, 253 Ga. 112 (317 SE2d 818) (1984)). This Court has recognized that, under its precedent,

[4] This Court's recent decision in *Scott* held that the state cannot disqualify an employee from benefits under OCGA § 34-8-194 (1) when the employee quit her job because of the reasonable probability that, if she continued the employment, she would become the victim of violence committed by a third party who had no employment or business relationship with her employer. This Court premised its holding in part on "Georgia's public policy favoring payment of unemployment benefits to persons who are unemployed through no fault of their own." Id.

> employees who had not voluntarily resigned but, instead had been *discharged* by their employers [are] still entitled to unemployment benefits under the Act when they were discharged based upon their failure or inability to perform their jobs, when such failure or inability was not due to . . . . carelessness or deliberate malfeasance.

Scott, supra, 2014 Ga. App. LEXIS 357, at *14 (emphasis added) (citing, as e.g. cites, *Johnson v. Butler*, 323 Ga. App. 743, 745-746 (748 SE2d 111) (2013); *Davane v. Thurmond*, 300 Ga. App. 474, 475-77 (685 SE2d 446) (2009); *Glover v. Scott*, 210 Ga. App. 25, 25-26 (435 SE2d 250) (1993)).

Similarly, an individual who voluntarily leaves a job cannot be disqualified from benefits after the individual had "good cause" for leaving the job, *Blair*, supra, 211 Ga. App. at 676 (citing OCGA §§ 34-8-194, 34-8-158), and good cause exists where "an employee cannot . . . reasonably be judged as free to stay in the job." Id. at 677 (internal quotation marks and citation omitted).[5]

[5] "Whether or not an employee voluntarily leaves employment is usually a question of fact, but whether there existed good cause for his voluntary termination more often requires a legal conclusion," which falls within this Court's province to

Ms. Lester's termination was "due to her religious beliefs," [R.8, 121] as adherence to her religious convictions mandate that she not work on the Sabbath. The Board of Review and the superior court found this fact; Goodwill does not dispute it. [R.22 (T.12:1-2)]. As a result, she cannot "reasonably be judged as free to stay in the job." *Blair*, supra, 211 Ga. App. at 677. Refusal to award unemployment benefits for Ms. Lester's termination predicated on her adherence to her religious convictions prohibiting Saturday Sabbath work is unconstitutional, as it violates the Free Exercise Clause. Thus, terminating her for refusing to work Saturday hours is conduct of "a gravity that would justify a reasonable person to 'voluntarily leave the ranks of the employed and join the ranks of the unemployed, . . . [which] constitutes the requisite good cause to prevent disqualification,'" from benefits. Id.

Indeed, Supreme Court of the United States precedent foreclosed the possibilities that the termination can be the "fault" of the terminated individual or that the termination can justify the disqualification of the individual from

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"correct[] errors of law." *Blair*, supra, 211 Ga. App. at 676 (internal quotation marks and citations omitted).

unemployment benefits. "[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Sherbert*, supra, 374 U.S. at 405. Following one's religious convictions cannot, as a matter of law, constitute intentional disregard or conscious neglect or "fault" justifying a disqualification from receipt of unemployment benefits.

For this reason as well, both the Board of Review and the superior court erred in applying the law when they concluded that Ms. Lester was properly denied benefits, and their decisions should be reversed. *Pruitt*, supra, 284 Ga. at 161 (3).

CONCLUSION

Appellant was terminated for adhering to her sincerely held religious convictions and tenets. The United States Constitution and the United States Supreme Court proscribe disqualification of unemployment compensation benefits under these circumstances, as it impermissibly burdens appellant's First Amendment free exercise rights. Appellant therefore urges this Court to reverse the decision of the superior court with instructions to reverse the decision of the Board of Review affirming the Department of Labor's determination that she be

denied benefits and to order benefits be awarded to Ms. Lester, retroactive to the date of her termination through the statutory eligibility period.

Respectfully submitted this 11th day of August, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **BRIEF ON APPEAL** has been served upon the following by transmitting a copy of the document via United States Mail, postage prepaid, at the addresses below:

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