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CASES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

JESSE C. ADKINS, *et al.*, *Appellants*, *vs.* CHILDREN'S HOSPITAL, *Appellee.*	No.
JESSE C. ADKINS, *et al.*, *Appellants*, *vs.* WILLIE A. LYONS, *Appellee.*	No..

BRIEF FOR INDUSTRIAL WELFARE COMMISSION OF THE STATE OF OREGON

ARGUMENT.

Statement of Case.

The Reason for Oregon's Appearance.

The Industrial Welfare Commission of the State of Oregon has been given permission to appear in the above cases because it has the greatest possible interest in their outcome.

If the minimum wage law enacted by Congress for the District of Columbia is unconstitutional un-

der the 5th Amendment, then the like statutes in Oregon and other states are unconstitutional under the 14th Amendment.

The Industrial Welfare Law of Oregon contains minimum wage provisions almost identical with those in the Act of Congress and the Oregon Commission relying upon its validity has for almost ten years issued and enforced its orders fixing minimum wages for women in many occupations, including elevator operators.

The Statute and Orders.

In 1913, without a dissenting vote, the Legislature passed the Industrial Welfare Law after an investigation as to women in industry. The act provided among other things, as follows:

> "Whereas, the welfare of the State of Oregon requires that women and minors should be protected from conditions of labor which have a pernicious effect on their health and morals, and inadequate wages and unduly long hours and unsanitary conditions of labor have such a pernicious effect, therefore
>
> Sec. 1. It shall be unlawful to employ women in any occupation within the State of Oregon . . . for wages which are inadequate to supply the necessary cost of living and to maintain them in health. . . .
>
> Sec. 10. For any occupation in which only a minimum time wage rate has been established, said commission (the Industrial Welfare Commission) may issue to a woman physically defective or crippled by age or otherwise,

> a special license authorizing her employment at such wage less than said minimum time rate as shall be fixed by said commission and stated in said license." (Chap. 62, Laws of Oregon, 1913, pp. 92, 97.)

The act also provides that when the Commission by an investigation is convinced that the wages paid to women in any occupation are inadequate it shall call a Conference of an equal number of representatives of employers, employees and the general public. To this Conference is submitted by the Commission the results of the latter's investigation and the Conference then undertakes an examination of the facts on its own behalf and makes its recommendations to the Commission. The Commission calls a public hearing upon due notice and after such hearing either adopts or disapproves the recommendations of the Conference and makes an order based on such recommendations to become effective in sixty days.

For example, Order No. 45 was made by the Commission so as to become effective October 14, 1919, and so far as relates to the question in hand is as follows:

> "2. No person shall employ any experienced woman in the State of Oregon, in any public housekeeping establishment, at a weekly wage rate of less than $13.20.
>
> 3. The maximum length of the apprenticeship term for women workers in public housekeeping establishments shall be one year, and such apprenticeship term shall be divided into

three equal periods of four months each. No person shall employ any woman in any public housekeeping establishment during the first period at a weekly wage of less than $9.00; nor for the second period at a weekly wage of less than $10.50; nor for the third period at a weekly wage of less than $12.00.

5. When lodging and board, or either of them, is furnished by any employer to any woman or minor girl employed in any occupation as part payment of the wages of such woman or minor girl, not more than $2.00 per week for lodging and not more than $4.50 per week for board shall be deducted by such employer from the weekly wage of such woman or minor girl. Board shall be considered to be twenty-one meals in each week. A fraction of a week's lodging or board shall be computed upon the above basis.

"Public Housekeeping Occupation" includes the work of . . . elevator operators."

Practice and Procedure Under the Act.

The Industrial Welfare Law of Oregon includes the right of the Commission to determine hours and conditions of labor as well as wages. In this respect it differs from the District of Columbia Minimum Wage Law. Investigations have been made by the Commission from the very beginning both by its Secretary and by outside persons employed to cover particular occupations or subjects. An example of the latter is the Burpee investigation made on the night employment of women which is included in the appendix for the purpose of show-

ing the attitude of employers toward the operations of the Act. Members of the Commission have also, through their own inspections and investigations, kept themselves informed of women's work in industry. Whenever the Commission has been satisfied by any sources of information that an occupation is due for a Conference, such Conference is called and each member of the Commission nominates three members of the Conference to represent the element which the commissioner himself represents namely, employers, employees or public. When the Conference is assembled the Commission presents to it the question for consideration and such facts as the Commission itself may have discovered. The Conference then hears such witnesses as will volunteer or can be found who are familiar with the occupation under consideration. The employer and employee members of the Conference are themselves engaged in the occupation and give their own experiences. The discussion of proposed recommendations is usually had in the presence of at least one member of the Commission and the net result is a recommendation on the several points involved which in almost every case has received the unanimous vote of the members of the Conference. In only one case has the Commission declined to adopt the recommendations proposed or to issue an order based thereon.

The enforcement of the Commission's orders is by prosecution only as a last resort and in a small percentage of the cases arising. The Commission

learns of violations of the Act through complaints of employees, members of the public and principally by inspection. The practice has been to determine whether the violation has been through ignorance of the law or if it is a willful evasion. Although the act has been in force almost ten years, there are still employers who are ignorant of its provisions, very often because they have become employers subject to the act only a short time before the inspector discovered the violation. Through education in such cases and warnings to the employers the violation is stopped without prosecution.

The State Government's Interest.

The Commission obtains its legal advice as to the construction of the act from the Attorney General. Prosecutions are carried on by the district attorneys. Biennially the Commission reports to the Governor and the Legislature its work during the preceding two years and biennially likewise the Legislature makes an appropriation to carry on the work of the Commission.

Popular Support and Interest.

The appendix contains the judgment of the Commission, of its first chairman, of United States investigators, of an independent investigator and of two employers on the workings and value of the act. The law has become an established part of the industrial life of Oregon. In addition to preventing

the employment of women at a wage below living expenses it largely has removed from the field of controversy the settlement of wages. That section of women workers which without the law would be the greatest sufferers from underpayment, is withdrawn from controversy. The Conferences, by bringing together employers and employees of a given occupation at a time when there is no friction, can and do discuss the question of a minimum wage in a fair give-and-take state of mind. While it may be granted that the purpose of the act is not mainly or perhaps at all a means to settle wage controversies, yet experience has shown that the Conferences have been one of the best means of preventing such controversies.

Judicial History of the Oregon Law.

Immediately after the law went into effect, two cases were commenced to test its validity. One was brought by Stettler and the other by his employee, Simpson. Both cases were directed at the minimum wage feature of the law. The trial court held the act valid. On appeal the Supreme Court of the State of Oregon by unanimous decisions affirmed the judgments in *Stettler vs. O'Hara,* 69 Oregon, 519, and *Simpson vs. O'Hara,* 70 Oregon, 261. An appeal in both cases was taken to the Supreme Court of the United States and in January, 1917, the decision of the State Court was affirmed by an equally divided court of eight members.

From 1913 to the present, the Commission has proceeded with its work without interruption. No other attempt than the two cases above mentioned has been made to question its validity.

Plaintiffs' Cases.

The plaintiffs (appellees) assert that they are divested of their liberty and property under the 14th Amendment without due process. The same point was the basis of the *Stettler* and *Simpson* cases.

Reference to Appellant's Brief.

We refer the Court to appellant's brief for the law and reasoning on points not included in our argument and to the wealth of information it contains on the relation of women's wages to their health and well being.

Outline of Argument.

I. The Industrial Welfare Law of Oregon is a valid exercise of the State's police power; the statute is adapted to remedy conditions actually existent affecting the public health and general welfare.

II. A strong presumption exists in favor of validity; the statute having been upheld by the State courts of Oregon and similar statutes having been upheld in other states, they are entitled to

favorable consideration; a practical construction of the Constitution in this respect should not be disturbed.

POINT I.

Conditions were actually existent when the Act was passed detrimentally affecting the health and general welfare of women by allowing them to be paid a wage below the cost of living.

This is a question of fact of which the Court may take judicial notice and on which the Court is entitled to receive aid from counsel. The brief filed by Mr. Frankfurter in the *Stettler* and *Simpson* cases contains the information available in 1917. (Pages 95, 104, 142, 364, 420.) Since then more has come to hand. From the common stock of knowledge it has become apparent that unless and until regulation by the State intervenes there are many women who are paid less than they can live on with the strictest economy. Due to the public interest in the subject, the earnings and cost of living of women in the various communities of the United States and of foreign countries have become well known. Likewise the effect of low wages on women's health and general welfare is known and appreciated. It is not too much to say that the relation between earnings and health and welfare is almost universally recognized.

The Legislature of Oregon held hearings and otherwise informed itself on the subject and found a menacing condition due to under-payment. Its findings have been confirmed by experience elsewhere as appears from Mr. Frankfurter's brief.

POINT II.

The Act is "due process"; it is a reasonable exercise of the police power; it is adapted to remedy the menacing condition existent.

The purpose of the act is to prohibit the employment of "women in any occupation within the State of Oregon for wages which are inadequate to supply the necessary cost of living and maintain them in health," and it contains a procedure consisting of investigations and public hearings for the ascertainment of adequate wages; finally it provides an authority to determine the minimum wage and enforce its payment.

While a minimum wage based on the necessary cost of living is fixed for experienced women by the Commission, a lower wage is set for the inexperienced. Moreover, "For any occupation in which only a minimum time rate wage has been established, said Commission may issue to a woman physically defective or crippled by age or otherwise, a special license authorizing her employment at such wage less than said minimum time rate

wage as shall be fixed by said Commission and stated in said license." (Laws of Oregon,. 1913, Chapter 62, Section 10.)

The complaint of the appellees in the present cases, as in the *Stettler* and *Simpson* cases, is that the act interferes with their freedom of contract. Assuming that the employee is an experienced and normal woman there is interference to the extent that the employer cannot have her services unless he pays the required wage; he has the choice of paying her or replacing her with a man. So, if she loses her job with him, she has the choice of other positions, but always at not less than the minimum wage. Even if occasional hardship occurs, it is incidental and as unavoidable as elsewhere when regulations are made. "It is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use." (*Noble State Bank vs. Haskell,* 219 U. S. 104, 110.)

"This court has had frequent occasion to declare there is no absolute freedom of contract. . . . Such limitations are constantly imposed upon the right to contract freely, because of restrictions upon that right deemed necessary in the interest of general welfare. So long as such action has a reasonable relation to the exercise of the power belonging to the local legislative body, and is not so arbitrary or capricious as to be deprivation of due process of law, freedom of contract is not interfered with in a constitutional sense." (*Schmidinger vs. Chicago,* 226 U. S. 578, 589.)

A statute is not valid under the "due process" clause, because of its regulations, "unless it clearly appears that those regulations are so beyond all relation to the subject to which they are applied as to amount to mere arbitrary usurpation of power." (*Lemieux vs. Young,* 211 U. S. 489, 496.)

"Upon what sound principle as to the regulations existing between the different departments of government can the Court review this action of the legislature? If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution." (*Jacobson vs. Massachusetts,* 197 U. S. 11, 31.)

The burden is on those who attack the validity of minimum wage laws to show that underpayment of wages is not an evil condition and that the laws enacted to remedy the abuse are "arbitrary," "spoliative," "unreasonable," "capricious," with "no real or substantial relation to" public health or public welfare, or that they are, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." For the ten years that this question has been under consideration by the gen-

eral public, by legislative bodies and by the courts, the actuality of the evil of inadequate wages and the effectiveness of the remedy adopted have not been seriously disputed.

POINT III.

A strong presumption exists in favor of the validity of the Minimum Wage Law.

Minimum wage laws have been sustained by the following decisions in state courts:

Stettler vs. O'Hara, 69 Ore. 519.
Simpson vs. O'Hara, 70 Ore. 261.
Williams vs. Evans, 139 Minn. 32.
Miller Telephone Co. vs. Minimum Wage Commission, 145 Minn. 262.
State vs. Crow, 130 Ark. 272.
Larsen vs. Rice, 100 Wash. 642.
Spokane Hotel Co. vs. Younger, 113 Wash. 359.
Holcombe vs. Creamer, 231 Mass. 99.
Poye vs. State, 89 Tex. Crim. 182.

The approval of the state courts alone is a factor in favor of validity.

Halter vs. Nebraska, 205 U. S. 34, 40.

Legislative action is always entitled to serious consideration by the courts. "It is but a decent respect to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its

violation of the constitution is approved beyond all reasonable doubt." (*Ogden vs. Saunders,* 12 Wheaton, 270.)

POINT IV.

A practical construction of the "due process" clause in respect to minimum wages for women has been given by legislatures, executive officers and courts and should not be disturbed.

As early as *Stuart vs. Laird* (1 Cranch, 299, 309), and certainly as late as *United States vs. Midwest Oil Co.* (236 U. S. 459, 473), this Court has recognized that a practical construction given by other courts, and by other branches of the government has value.

See also:

Briscoe vs. Bank of Commonwealth of Kentucky, 11 Peters 257, 318.
Cooley vs. Port Wardens, 12 Howard 299, 315.
Griser vs. McDowell, 6 Wall. 363, 381.
McPherson vs. Blacker, 146 U. S. 1, 36.
Fairbank vs. United States, 181 U. S. 283, 308.

For ten years all branches of government in the State of Oregon have found the Industrial Welfare Act with its minimum wage provisions a just and wise law. The industries have found it fair and useful. Prophecies that a minimum wage would

become the maximum wage, that women would be thrown out of employment and displaced by men, that employers would be bankrupted, have all proved false. Unexpected advantages to industries through a smaller turnover of women laborers and a reduction in wage disputes have accrued to employers and employees alike.

Respectfully submitted,

ISAAC H. VAN WINKLE,
Attorney General of Oregon.
JOSEPH N. TEAL,
WILLIAM L. BREWSTER,
for the Industrial Welfare Commission of Oregon, as Amici Curiae.

APPENDIX.

Oregon's Experience Under Its Minimum Wage Law.

The wage determinations have not put men in positions vacated by women. The causes operating to decrease the number of women also operated to decrease the number of men, though to a less degree, as the non-selling male force is not as adjustable as the non-selling female force.

The rates of pay for women as a whole have increased. Whenever the wage rates of old employees have been changed since the minimum-wage rulings, the employees were benefited. Some women, upon reinstatement after an absence, were compelled to accept the rate to which they were legally entitled, although it was below that received during their earlier service. The average rates of pay of girls under 18 and of experienced adults have increased; that of inexperienced adults decreased very slightly. While formerly 26 per cent of the girls under 18 received a rate of less than $6 a week, after the determinations less than 1 per cent were paid below this rate. More girls under 18 years received over $6 a week after than before the minimum-wage determinations. Among the experienced women not only the portion getting $9.25 (the legal minimum) but also the proportion getting over $9.25 has increased. The proportion of the force receiving over $12 has also increased, although the actual number has decreased. Some experienced women were re-

ceiving rates below the minimum to which the determinations entitled them.

A comparison of sales made by women raised to, receiving, or who should have received the minimum with those of women receiving above the minimum does not reveal differences that would indicate a decrease in the efficiency of those affected by the wage determinations. The numbers for whom comparable data on this subject could be secured were too limited, however, to warrant conclusions.

All the changes arising from decreased business, reorganization of departments, and increased rates of pay resulted in an increase in the female labor cost and also in the total labor cost of 3 mills per dollar of sales. This increased cost was not distributed equally among stores or among departments in the same store. The changes in female-labor cost varied from an 8-mill increase per dollar of sales in Portland neighborhood stores to 1.2-cent decrease in Salem stores.

Bulletin of the U. S. Bureau of Labor Statistics No. 176, July, 1915, page 9.

While the argument for minimum wage legislation is generally stated from the standpoint of the employees, it must not be supposed that such legislation is opposed by representative employers. Even apart from the human appeal to which most employers readily respond, a policy of enlightened selfishness on their part would lead them to support

this legislation. A legal minimum wage destroys the advantage which unscrupulous employers who are willing to cut wages below the subsistence level have always enjoyed over their more decent competitors. Respectable employers have not been slow to appreciate this fact, as was evident during the public hearings held in the spring of 1916, by the conference appointed to revise the orders of the Oregon Industrial Welfare Commission. During those hearings, while many employers manifested opposition to further reduction of the working day, opinion was practically unanimous in favor of minimum wage legislation; and an increase in the weekly minimum wage in many occupations in Portland from $8.25 to $8.64 was awarded without a single voice being raised in protest at the public hearings held by the Commission. It may be recorded as a matter of interest that the first real encouragement which the movement for wage legislation received in Oregon was a unanimous resolution of endorsement by the Board of Governors of the Portland Commercial Club.

A Living Wage by Legislation, by EDWIN V. O'HARA, *Chairman of Industrial Welfare Commission of the State of Oregon, 1916, p. XVIII.*

The success of the operation of the minimum wage law has been very gratifying. The Industrial Welfare Commission, being a non-paid body, has not been able to devote the entire time of its mem-

bers to the work of the Commission. Nevertheless the Commission has been able because of the uniform support which it has received from public sentiment, to put into effect a code of rulings governing maximum hours, minimum wages and sanitary conditions of employment in nearly all occupations employing women in the State. Though it had been confidently predicted that the wage rulings would supplant female labor by male labor; that higher paid employees would be reduced in wages and that the average wage would not be increased, all the payrolls submitted to the Commission bear out the conclusions of the report published by the United States Bureau of Labor Statistics, July, 1915 (Bulletin 176), to the following effect:

1. Men have not taken women's places.

2. The minimum rate of pay for the experienced adult workers was raised in all occupations. The per cent of the force receiving $12.00 a week and over increased after the wage determinations.

3. Average weekly earnings increased 10 per cent for the total number of women employed. And this was, it will be remembered, at a time of financial depression, when the wages of all women affected by the wage rulings were cut.

Reference has been made to the uniform support given to the wage rulings by public opinion. All of the daily press of Portland, without exception and without reference to party affiliation, has given editorial endorsement to the wage regula-

tions. The first real encouragement given to the movement was a letter of unanimous endorsement by the Board of Governors of the Commercial Club of Portland. And during the spring of 1916, when many public meetings were held to consider the proposed revision of the rulings of the Commission, and much opposition was voiced by employers to the reduction of hours of labor, there was general approval of the wage rulings. The Conference consisting of equal numbers of representatives of the public, the employers, and the employees, unanimously recommended an increase in the wage award in several important occupations in Portland from $8.25 a week to $8.64 a week. At the public hearing, held by the Commission on these proposed awards of increased wages, no one appeared in opposition. This indicated a very general acceptance of the principles of the law and of the rulings of the Commission.

While there have been individual cases of violation of the rulings, the Commission is able to report that such infractions have been exceptional and the violations, where evidence could be secured, have been successfully prosecuted.

Second Biennial Report of the Industrial Welfare Commission of the State of Oregon to the Governor and Legislature, January 1, 1917, page IV.

Much speculation has been indulged in as to the value of the minimum wage law passed in 1913, and

amended at both 1915 and 1917 sessions of the legislature.

The question as to the employer's point of view is answered in the report of H. N. Burpee, given below. This investigation was made at the request of the Commission and grew out of the pressure for release from the ruling which prohibits the employment of women in factories after 8:30 P. M. The complaint was freely made that the scarcity of labor incident to the drafting of men into service, must be met through the employment of women, and that the 6 P. M. closing order for the mercantile occupations, and the 8:30 P. M. closing order for the manufacturing occupations were interfering with the maintenance of the required standard of production in war industries. Mr. Burpee's report follows:

To the Industrial Welfare Commission of the State of Oregon:

Gentlemen: Your instructions to me were to visit a sufficient number of representative firms and corporations engaged in manufacturing and kindred occupations in Portland and vicinity and to obtain and report to you their views with regard to the employment of women, having particular reference to overtime and night work.

(List of establishments visited.)

It will be noted that out of a total of forty-seven industries visited, employing 17,478 men and

2,473 women, only six firms employing 174 men and 381 women report that the present law is working a hardship on their business, while forty-one firms employing ninety-eight per cent of the total employees report that the present law is not working a hardship on their business.

Certainly when forty-one industries out of forty-seven employing ninety-eight per cent of the workers reporting, state without any qualification that the present law with regard to the employment of women is not working a hardship on their business, there seems little justification for a change in the law, particularly since there is a certain flexibility in some occupations under the present law.

Living conditions in Oregon among women workers are generally better than in many of the Middle Western and Eastern states. If the present law should be changed to permit the unrestrained employment of women there is no certainty that it would afford the relief that the few manufacturers desire. Should that time arrive the women themselves would have to be consulted, and they are already on record in several occupations as having refused to work overtime or on night shift.

It would therefore appear from the information obtained that the necessity does not justify a change in that part of the law, in manufacturing occupations, which pertains to the employment of women on overtime or on a night shift.

Respectfully submitted,

(Signed) H. N. BURPEE.

Portland, Oregon, October 24, 1918.

The Commission has met with the cordial co-operation of the employers in adjusting complaints as to overtime, wages and sanitary working conditions. It is the policy of the department to secure both sides of a complaint before any definite action is taken, as we believe that the law should protect the employers, as well as the employee, and whenever it is possible the two are brought together for discussion of the trouble, and nine times out of ten the matter is amicably adjusted. In this way we are able to avoid prosecutions with all the consequent expense and ill feeling.

Third Biennial Report of the Industrial Welfare Commission of the State of Oregon to the Governor and Legislature, January 1, 1919, page 4.

The actual operation of the measure is found to react favorably upon the employees. It lends strength to the bargaining power of the individuals tending to draw them together into organizations according to trades. The law has actually raised wages. It has not tended to level down the wage of better paid workers, except in department stores where peculiar conditions exist owing to the methods of the management. It stimulates the efficiency of the wage-earners, shifting the plane of competition to the quality of the work done.

The employer, on the other hand, has not been injured. His cost of production is scarcely affected at all and what slight change may come can readily

be provided for in the price, which will probably not be affected appreciably.

Finally, the employer's plane of competition has been raised, and the factor of interstate competition taken care of by similar laws in neighboring states and joint action resulting from interstate conferences.

The Oregon Minimum Wage, by VICTOR P. MORRIS, *in The Commonwealth Review of the University of Oregon, Vol. 2, page 27, July, 1920.*

Minimum wage law in Oregon is proving of great benefit to the community. Employing upwards of two hundred clerks our experience, observing its provisions has been very satisfactory. We heartily approve of it.

Roberts Bros. Department Store, March, 1921.

Oregon's minimum wage plan has a stabilizing influence on industry. The wage commission here gives due consideration to apprenticeship periods and slow workers, thus administering the law efficiently and beneficial to all parties.

Portland Woolen Mills, March, 1921.