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## Employment as a Protected Property Right

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# COMMENTS

## EMPLOYMENT AS A PROTECTED PROPERTY RIGHT

The right to follow a lawful occupation has long been recognized as a property right protected under the Fifth Amendment to the Federal Constitution. In 1915, the United States Supreme Court, speaking through Justice Charles Evans Hughes, in an action to enjoin a state's attempt to restrict employment of aliens, said:

It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employé has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will.<sup>1</sup>

The great advances in the trade union movement since this decision have resulted in a renewed interest in the right to employment. On the one hand, it has been recognized that unions, in order to effectively bargain for the group as a whole, must control the individual and may sometimes take action which is detrimental to the individual. On the other hand, unions exercise a power over the individual's job which is peculiarly subject to abuse. In addition, a body of federal law has grown up which purports to protect employees, regulate union powers, and which to a great extent makes the contract of employment far less a contract at will and far more a contract which can be terminated only under specified conditions.<sup>2</sup>

### THE EXTENT TO WHICH THE RIGHT IS PROTECTED

The outside interference from which the individual employee's job is protected is illegal and malicious interference, only. If, in the pursuit of lawful purposes through peaceful and lawful means and methods, injury incidentally results, it is considered *dammum absque injuria*.<sup>3</sup> An examination of the cases which have arisen in the three areas of union-management relations in which the individual's rights are most likely to be impinged upon—picketing, compulsory union membership, and contract

<sup>1</sup> *Truax v. Raich*, 239 U.S. 33, 38 (1915).

<sup>2</sup> Labor-Management Relations Act, 29 U.S.C.A. §§ 151-166 (1956).

<sup>3</sup> *Cameron v. International Alliance of Theater & Stage Employees*, 118 N.J. Eq. 11, 176 Atl. 692 (1935).

administration—will serve to illustrate the character of the protection and the problems of determining when a state remedy in tort is available.

*Picketing.*—A union may, to protect its established wage standards, withdraw all employees from an employer who is undercutting the union scale and those persons thus deprived of work have no cause of action.<sup>4</sup> This is part of the union's right to strike to protect the group as a whole. On the other hand, an employee who is prevented from going to his job by a mass picket line can sue the union involved for interference with his lawful occupation.<sup>5</sup> In this situation the union is engaging in conduct which may be considered violative of the Taft-Hartley Act and which is also, generally speaking, enjoined under the state police power. The United States Supreme Court has held that federal action against mass picketing does not so pre-empt the field as to bar the states from acting.<sup>6</sup> Similarly, it has been held that, where a state statute makes it unlawful for a union to use threats to force an employer to discharge an employee for non-membership in the union, a threat to picket resulting in the non-union employee's discharge will render the union liable.<sup>7</sup>

In all of these cases, the plaintiff's right of action was premised on the violation by defendant of state law or policy. The Taft-Hartley Act makes strikes and picketing for certain objectives an unfair labor practice.<sup>8</sup> Can an action for damages be brought in either a state or a federal court based on a violation of this federal policy?

*Control of union membership.*—Heretofore, in cases arising out of expulsion from a union and consequent discharge pursuant to union-security agreements, state courts have taken the position (1) that unions have the authority to establish rules governing their members and punish violation by fine, suspension and expulsion<sup>9</sup> and (2) that unions have the right to assess members for purposes legitimately necessary for the protection of the group as a whole and the organization.<sup>10</sup> As late as 1957, the Okla-

<sup>4</sup> O'Keefe v. Local 463 of United Assn. of Plumbers & Gasfitters of U.S. & Canada, 277 N.Y. 300, 14 N.E.2d 77 (1938).

<sup>5</sup> United Automobile Workers v. Russell, 264 Ala. 456, 88 So.2d 175 (1956).

<sup>6</sup> United Automobile Workers v. Wisconsin E.R.B., 351 U.S. 266 (1956).

<sup>7</sup> Edwards v. Grisham, 339 Mich. 531, 64 N.W.2d 715 (1954).

<sup>8</sup> 29 U.S.C.A. § 158(b) (4) (1956).

<sup>9</sup> Taxicab Drivers' Local Union No. 889 v. Pittman, 322 P.2d 159 (Okla., 1957) where the court stated the general rule at 165: "Plaintiff's right to dispose of his labor was limited by his contract with the Union and by its contract with the employer but only to the extent that the Union lawfully proceeded under its constitution and its contract. The Union must be justified in causing a member's suspension from work."

<sup>10</sup> DeMille v. American Federation of Radio Artists, 31 Cal.2d 139, 187 P.2d 769 (1947). This case was decided shortly before the amendment of § 8(a) (3) of the Taft-Hartley Act to forbid the discharge of an employee for any reason other than failure to pay dues and initiation fees.

homa Supreme Court held that it could step in only after remedies within the union had been exhausted and then only where the procedure taken to punish the member "is so lacking in fairness as to render the decision void."<sup>11</sup> This case, however, did not involve employment in interstate commerce.

The Taft-Hartley Act forbids a union to demand the discharge of an employee for any reason except failure to tender dues and initiation fees.<sup>12</sup> Here again a question arises as to whether the individual would have a right of action for interference with his employment based solely on rights arising out of the federal act.

*Contract administration.*—Particularly, where seniority issues are involved, those who negotiate and administer collective bargaining agreements have virtually no choice but to benefit one group of employees at the expense of another. If seniority is by craft, one group may be laid off first; if by department or plant, another is the first to go. By the very nature of the relationship, somebody has to lose. Where the losing group can prove that it has been discriminated against because of race<sup>13</sup> or disagreement with union officials,<sup>14</sup> it has a right of action.

In several cases, the United States Supreme Court has indicated that since the union has a duty to represent all within the bargaining unit fairly and this duty arises out of a status conferred upon it by federal legislation, actions for loss resulting from a violation of this duty may be brought against the union in the federal court.<sup>15</sup>

#### THE EFFECT OF THE RUSSELL CASE

The question of whether a violation of federal legislation may give rise to a state action for interference with employment takes on new significance in the light of *United Automobile Workers v. Russell*,<sup>16</sup> decided at

<sup>11</sup> Authority cited note 9, *supra*, at 164.

<sup>12</sup> 29 U.S.C.A. § 158(a) (3), (b) (2) (1956).

<sup>13</sup> *Conley v. Gibson*, 355 U.S. 41 (1957).

<sup>14</sup> *O'Brien v. Dade Bros., Inc. & Marine Warehousemen's Local No. 1478*, 18 N.J. 457, 114 A.2d 266 (1955). In this case the employer as well as the union was held liable in damages for a collusive denial of seniority rights arising from the collective bargaining agreement.

<sup>15</sup> *Conley v. Gibson*, 355 U.S. 41 (1957); *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944). Both of these cases involved actions commenced in the federal courts by Negro employees against unions certified as bargaining agents under the Railway Labor Act to enjoin discriminatory application of seniority provisions. The Supreme Court held that an exclusive bargaining agent under the Railway Labor Act is obligated to represent all employees in the bargaining unit fairly and without discrimination because of race and that the courts have power to protect employees against such invidious discrimination. The Court has indicated in another case that the same reasoning applies to a union certified under the Taft-Hartley Act. *Syres v. Oil Workers International Union*, cert. denied 350 U.S. 892 (1955).

<sup>16</sup> 356 U.S. 634 (1958).

the last term of Court. In 1951, Russell drove his car up to the gate of the plant where he was employed. A picketing member of United Automobile Workers leaped on the running board, pulled the brake and ordered Russell to go home and stay there if he valued his life. Russell stayed home for five weeks. Soon after, he instituted suit against the United Automobile Workers for malicious interference with his lawful occupation, claiming compensatory damages for his loss of earnings and for his mental anguish, plus punitive damages, in the total sum of \$50,000. The Supreme Court of Alabama upheld a jury verdict of \$10,000.<sup>17</sup>

The High Court agreed to review one aspect only of the case: The union's contention that the National Labor Relations Board had jurisdiction to the exclusion of the state court because the conduct complained of—mass picketing and threats—violates Section 8 (b) (1) of the Taft-Hartley Act<sup>18</sup> and the Board has discretion to award back pay.

The Supreme Court ruled that the Board did not occupy the field so as to preclude an action in tort for damages in a state court. In this case, it must be noted, the union's conduct fell within the area that both state and federal government may regulate. The majority opinion thus was not required to touch on the question of conduct which violated the federal statute only. Nevertheless, the two dissenting justices (Warren and Douglas) recognized the possibility that this question may arise. They said:

By approving a state-court damage award for conduct regulated by the Taft-Hartley Act, the majority assures that the consequences of violating the Federal Act will vary from State to State with the availability and constituent elements of a given right of action and the procedures and rules of evidence essential to its vindication.<sup>19</sup>

#### THE MEASURE OF DAMAGES

In the *Russell* case, it was clear that both the majority and dissenting opinions were preoccupied with the measure of damages rather than with the gravamen of the complaint.

The majority compared the facts here to a situation in which strikers overturned a car with resultant injury to car and plaintiff. "Under state law," the majority pointed out, ". . . presumably he could have recovered for medical expenses, pain and suffering, and property damages. Such items of recovery are beyond the scope of present Board remedial orders."<sup>20</sup>

The dissenters felt that the analogy between an assault and interference

<sup>17</sup> Authority cited note 5, *supra*.

<sup>18</sup> 29 U.S.C.A. § 158(b) (1) (1956).

<sup>19</sup> 356 U.S. 634, 650 (1958).

<sup>20</sup> *Ibid.*, at 645.

with a lawful occupation was not as direct and simple as appeared at first blush. They argued:

The unprovoked infliction of personal injuries during a period of labor unrest is neither to be expected nor to be justified, but economic loss inevitably attends work stoppages. Furthermore, damages for personal injuries may be assessed without regard to the merits of the labor controversy, but in order to . . . fix the responsibility for economic loss, a court must consider the whole background and status of the dispute. As a consequence, precedents or examples involving personal injuries are inapposite when the problem is whether a state court may award damages for economic loss sustained from conduct regulated by the Federal Act.<sup>21</sup>

The bone in the throat of the dissenters, however, was not the fact that a state court might find itself adjudicating a purely federal question in determining whether a state cause of action existed but rather that state courts by awarding damages for "mental anguish" and, in some states, punitive damages would be giving a recovery, the measure of which is "vague or nonexistent" and far in excess of any recovery possible under the Taft-Hartley Act.

As another objectionable feature of punitive damages, the dissenters pointed out that in strike situations, there may be dozens of actions for the same conduct, each with its own demand for punitive damages. "Whatever the law in other states," they argued, "Alabama seems to hold to the view that evidence of a previous punitive recovery is inadmissible as a defense in a subsequent action claiming punitive damages for the same conduct. Thus, the defendant union may be held for a whole series of punitive as well as compensatory recoveries."<sup>22</sup>

#### OTHERS AGAINST WHOM ACTION MAY BE BROUGHT

While the Court minority was concerned solely with the effect of damages on union treasuries, employers too may find themselves faced with this problem. As noted above, a court held an employer liable in damages where the right interfered with (seniority) arose out of the labor agreement rather than purely out of the employer-employee relationship.<sup>23</sup>

By analogy, it is possible that an employer might be liable for a discharge for non-membership in the union on the theory that the right to employment arises out of the Taft-Hartley Act or out of a state act or policy which forbids the conditioning of employment on union membership. The employer might also be liable for a discharge based on race in contravention of a state anti-discrimination policy.

<sup>21</sup> *Ibid.*, at 648.

<sup>22</sup> *Ibid.*, at 657.

<sup>23</sup> Authority cited note 14, *supra*.

CONCLUSION

The issue of tort liability for interference with the right to employment has not been fully litigated. Despite the fact that jobs have been easier to obtain during most of the last two decades than in any earlier period, holding a job has become more important to the employee because of the seniority, pension and insurance rights that now accompany employment with many companies. State and federal labor legislation and anti-discrimination legislation as well as collective bargaining agreements place limitations on the right of the employer to terminate the employment relationship at will. The same forces that have led to these limitations have served to make individual employees more cognizant of their rights.<sup>24</sup>

Future litigation will have to clarify further the relationship between *federal* administrative law which affords rights and remedies to the employee and the tort right of action in state courts. The courts will also have to determine the relationship between the tort right of action and *state* labor and anti-discrimination legislation, much of which is enforced by administrative agencies empowered to give remedies.

<sup>24</sup> The National Labor Relations Board in its Annual Report for 1957 reports that 947 cases (51% of the cases filed against labor unions) were filed by individuals charging discrimination or coercion. In 1956, Professor Milton R. Konvitz of the New York State School of Industrial and Labor Relations, Cornell University, made a study of damage actions brought against unions. He found that the largest number—119—were brought in the area of “interference with employment rights.” *Business Week*, p. 72 (Jan. 19, 1957).

THE WELFARE AND PENSION PLANS DISCLOSURE ACT

INTRODUCTION

Though private employee welfare and retirement plans have been on the American industrial scene for many years, it was not until the middle 1940’s that they began a tremendous mushroom-like growth. Today, they affect over 84 million persons.<sup>1</sup>

While it is estimated that employers pay approximately 47 percent of the cost of financing welfare plans and 87 percent of the cost of retirement plans,<sup>2</sup> millions of dollars are contributed directly by employees

<sup>1</sup> At the end of 1954, the number of persons and their dependents covered under these plans, for the various types of benefits, were as follows:

<i>Type of Benefit</i>	<i>Employees Covered as Percentage of Labor Force</i>
Welfare plans:	
Death .....	55.0
Temporary disability .....	43.6
Hospitalization .....	59.0
Surgical .....	53.0
Medical .....	32.0
Pension plans: Retirement .....	23.0

S.Rep. No. 1734, 84th Cong., 2d Sess. 11 (1956).

<sup>2</sup> S.Rep.No.1440, 85th Cong., 2d Sess. 7 (1958).