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Labor Law - Courts May Not Interfere with Selection of Members of Labor Union

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Island,[25] specifically require the city police to return data.

The acquitted person must look to the courts in the other forty-six states. In reviewing the cases, what can be expected from the courts? With the exception of New York, since 1905 the courts have refused to compel city police to return data. The early Louisiana cases that compelled the return of photographs are probably dated because the public rogues' gallery is a thing of the past. Without the aid of a statute the acquitted citizen must rely on his "right of privacy." Here again he meets judicial reluctance, since only about half of the states have recognized the "right to privacy."[26] And now, with the Illinois case of *Kolb v. O'Connor*,[27] refusing to compel city police to return data, where the statute only requires return by the state bureau of criminal identification, the acquitted citizen has small chance of obtaining his records.

[25] N.Y. Gen. Laws Ann. (1944) Penal Law § 516; R.I. Gen. Laws (1938) c. 620, § 7.

[26] A footnote to Hazlitt v. Fawcett Publications, 116 F.Supp. 538, 542, 543 (D.C. Conn., 1953) lists the decisions up to 1953. Consult Prosser, Torts, 635 (2d ed., 1955) for more recent decisions.

[27] 13 Ill. App. 2d 81, 142 N.E. 2d 818 (1957).

LABOR LAW–COURTS MAY NOT INTERFERE WITH SELECTION OF MEMBERS OF LABOR UNION

The plaintiffs, two Negroes, desiring to join a labor union, were denied membership solely on account of the fact that they were Negroes. Plaintiffs based their rights to relief on three grounds, the first of which is that the Wisconsin Constitution, the circuit court has jurisdiction to order the union to admit the plaintiffs. Section nine, Article I, of the Wisconsin Constitution reads:

> Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character. . . .

Plaintiffs, therefore, contend that since a wrong has been committed, the Wisconsin courts have jurisdiction to order the union to admit them to membership. The court in turn replied that the wrongs contemplated by this language were those resulting from an invasion of a party's legal rights; and that since unions are voluntary associations which may select their own members, there has been no invasion of the plaintiffs' legal rights. *Ross v. Ebert*, 275 Wis. 523, 82 N.W. 2d 315 (1957).

The case of *Mayer v. Journeyman Stone-Cutters' Ass'n*[1] originated the proposition that courts will not interfere with the selection of membership by a union. It was there held that unions "may restrict membership to the

[1] 47 N.J. Eq. 519, 20 Atl. 492 (1890).

original promoters, or limit the number to be thereafter admitted," and that "this power is incident to its character as a voluntary association and can not be inquired into."[2] The basis of the preceding holding is that if unions were compelled to accept everyone for membership, persons whose interests were inimical to the union could force themselves in and destroy the organization.[3] In *Miller v. Ruehl*[4] the court refused to compel the union to accept the plaintiffs despite the fact that it was impossible for plaintiffs to work in their trade unless they were members of the union. The court stated that in the absence of legislation the court can not compel the unions to admit members.[5] Some courts, however, do not allow unions to be arbitrarily restrictive in their membership when a person's right to work depends on his being a member. In *Wilson v. Newspaper and Mail Deliverers' Union of New York*[6] the plaintiffs were denied membership simply because the union closed its books to new members. Therein the court said that a closed shop contract and a union with restricted membership were contrary to public policy and, therefore, "a union may restrict its membership at pleasure; it may, under certain conditions, lawfully contract with employers that all work shall be given to its members. But it cannot do both."[7] This view was adopted by the California Supreme *James v. Marinship Corp.*[8] where a closed shop agreement existed between Court in the union and the plaintiffs' employer, but the union did not admit Negroes. Plaintiffs there contended that an auxiliary, set up by the union for Negro members, and to which they had to belong in order to work, was not a bona fide union local and did not offer equal privileges and benefits of union membership. The court, therefore, extended the concept set down in *Wilson v. Newspaper and Mail Deliverers Union of New York*[9] and held that not only may a union be prevented from main-

[2] Ibid., at 494. See also Murphy v. Higgins, 12 N.Y.S. 2d 913 (1939), aff'd 260 App. Div. 854, 23 N.Y.S. 2d 552 (1940); Muller v. Bricklayers Union, 6 N.J. Misc. 226, 140 Atl. 424 (1928).

[3] Miller v. Ruehl, 166 Misc. 479, 2 N.Y.S. 2d 394 (1938). [4] Ibid.

[5] See also Clark v. Curtis, 71 N.Y.S. 2d 55 (1947), rev'd on other grounds 273 App. Div. 797, 76 N.Y.S. 2d 3 (1947). This case held that courts have no control over membership in unions, and a person may be excluded from a union without reason, or for any reason other than race, color, creed, or national origin. Hence, the common law rule is modified. The Clark case is predicated upon two New York Statutes. N.Y. Civil Rights Law (McKinney, 1951) §§ 41, 43; N.Y. Executive Law (McKinney, 1951), as amended c. 15, §§ 290–301 (1955).

[6] 123 N.J. Eq. 347, 197 Atl. 720 (1938).

[7] Ibid., at 351 and 722. E.g., Seligman v. Toledo Moving Pictures Union, 88 Ohio App. 137, 98 N.E. 2d 54 (1947); Carroll v. Local No. 269, 133 N.J. Eq. 144, 31 A. 2d 223 (1943); Dorrington v. Manning, 135 Pa. Super. 194, 4 A. 2d 886 (1939).

[8] 25 Cal. 2d 721, 155 P. 2d 329 (1944).

[9] 123 N.J. Eq. 347, 197 Atl. 720 (1938).

taining both a closed shop agreement or other form of labor monopoly together with an arbitrarily closed or partially closed membership,[10] but that denying union membership on terms of equality with other members is the equivalent of denying in whole the privilege of membership.[11]

The courts are in disagreement as to whether a person excluded arbitrarily from membership in a union is entitled to relief only if it is shown that the union has obtained a monopoly in the supply of labor in the area, or whether proof of a closed shop agreement with the plaintiff's employer will suffice. *Williams v. International Brotherhood of Boilermakers*[12] held that the failure to allege a monopoly of labor is not fatal and pointed out that although certain cases emphasize the fact that such a monopoly existed,[13] only in the case of *Walter v. McCarvel*[14] was it stated that relief must be denied because of the failure to show a monopoly. In other jurisdictions, the court continued, relief was granted against the maintenance of a closed shop and an arbitrarily closed union without requiring proof of a labor monopoly.[15]

Plaintiffs' second contention in the instant case is that the failure to allow them membership violates the Fair Employment Code of Wisconsin.[16] The Supreme court, by citing Section 111.31 (3)[17] of the statute reached the conclusion that racial discrimination is not illegal; it is simply undesirable and the public policy of the state is to encourage and foster employment without discrimination, not compel it.

[10] Authority cited note 8 supra. The court there said that a closed union could co-exist with a closed shop if the union was not closed arbitrarily, and held that simply rejecting persons, or expelling those who refused to abide by any reasonable regulation or lawful policy adopted by the union was not arbitrary. Cf. Dotson v. International Alliance of Theatrical Employees, 34 Cal. 2d 362, 210 P. 2d 5 (1949).

[11] Authority cited note 8 supra.

[12] 27 Cal. 2d 586, 165 P. 2d 903 (1946).

[13] Carroll v. Local No. 269, 133 N.J. Eq. 144, 31 A. 2d 223 (1943); Wilson v. Newspaper and Mail Deliverers of New York, 123 N.J. Eq. 347, 197 Atl. 720 (1938).

[14] 309 Mass. 260, 34 N.E. 2d 677 (1941).

[15] Dorrington v. Manning, 135 Pa. Super. 194, 4 A. 2d 886 (1939).

[16] Wis. Stat. Ann. (1957) §§ 111.31 to 111.36. Section 111.31(1) provides that "the practice of denying employment and other opportunities to, and discriminating against, properly qualified persons by reason of their race, creed, color . . . is likely to . . . adversely affect the general welfare of a state by depriving it of the fullest utilization of its capacities for production. The denial by some . . . labor unions of employment opportunities to such persons solely because of their race, creed, color . . . tends to deprive the victims of the earnings which are necessary to maintain a just and decent standard of living, thereby committing grave injury to them."

[17] Wis. Stat. Ann. (1957) § 111.31 (3): "In the interpretation and application of this subchapter . . . it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified persons regardless of their race, creed, color. . . ."

Of the fifteen states enjoying fair employment legislation,[18] Wisconsin, Indiana and Kansas are the only three which allow for the removal of discriminatory practices on an almost completely voluntary basis.[19] The remaining twelve provide substantial legal means for the abolition of discriminatory practices. These twelve states make it an unfair employment practice for a labor organization to exclude an individual from membership because of his race or color.[20] They provide for fair employment practices commissions, which, after holding hearings and determining that a respondent has been guilty of an unfair employment practice, issue and cause to be served on such respondent an order requiring him to cease and desist from such practice.[21] The statutes also provide for the issuance of court decrees to enforce the orders of the commissions.[22] Penalties for failure to carry into effect the orders of the commission are provided for in Washington, New Jersey, Minnesota, Pennsylvania, and New York.[23]

[18] Colo. Rev. Stat. (1953) § 81 (19), (1); Conn. Gen. Stat. (1949) c. 61, § 371; Ind. Stat. Ann. (Burns, 1955) § 10-2401; Kan. Gen. Stat. Ann. (1949) c. 44, § 8, as amended, (1955) c. 44, § 8; Mass. Ann. L. (1950) c. 151 (B); Mich. Stat. Ann. (1950), as revised, c. 17, § 154 (Supp., 1955); Minn. L. (1955) c. 516; N.J. Stat. Ann. (1939) c. 18, as amended, (Supp., 1956) § 18 (25), (1); N.M. Stat. Ann. (1953) c. 59; N.Y. Executive L. (McKinney, 1951) c. 15; Ore. Rev. Stat. (1953) c. 659; Penn. Stat. Ann. (Purdons, 1952), as revised, (1955) c. 43, § 951; R.I. Pub. L. (1949) c. 2181; Wash. Rev. Code (1951) § 49.60; Wis. Stat. Ann. (1957) §§ 111.31-111.36.

[19] Kansas and Indiana do not provide a specific list of unlawful practices such as are found in other states, nor are there provisions for court enforcements since the administrative bodies under these laws may not issue cease and desist orders. Ind. Stat. Ann. (Burns, 1955) c. 23, § 40-2303; Kan. Gen. Stat. Ann. (1949) c. 44, § 8, as amended, c. 44, § 8 (Supp., 1955); Wis. Stat. Ann. (1957) §§ 111.35, 111.36.

[20] Colo. Rev. Stat. (1953), as amended, Session Laws of Colo. (1955) § 81(19)(5); Conn. Gen. Stat. (1949) Title 61, c. 371, § 7405; Mass. Laws Ann. (1950) c. 151 (B), § 4; Mich. Stat. Ann. (1950) Title 17, c. 154, § 17.458 (3) (Supp., 1955); Minn. L. (1955) c. 516, § 5; N.J. Stat. Ann. (1939) c. 18, § 18:25-12 (Supp., 1956); N.M. Stat. Ann. (1953) § 59(4) (4); N.Y. Executive Law (McKinney, 1951) c. 15, § 296; Ore. Rev. Stat. (1953) § 659.030; Penn. Stat. Ann. (Purdons, 1952) c. 43, § 955 (Supp., 1956); R.I. Pub. Laws (1949) c. 2181, § 4; Wash. Rev. Code (1951) § 49.60.190.

[21] Colo. Rev. Stat. (1953), as amended, Session Laws of Colo. (1955) § 81(19)(6); Conn. Gen. Stat. (1949) Title 61, c. 371, § 7406; Mass. Laws Ann. (1950) c. 151 (B), § 5; Mich. Stat. Ann. (1950) Title 17, c. 154, § 17.458 (Supp., 1955); Minn. L. (1955) c. 516, § 9; N.J. Stat. Ann. (1939) c. 18, § 18:25-17 (Supp., 1956); N.M. Stat. Ann. (1953) § 59(4)(10); N.Y. Executive Law (McKinney, 1951) c. 15, § 297; Ore. Rev. Stat. (1953) § 659.060 (4); Penn. Stat. Ann. (Purdons, 1952) c. 43, § 95 (Supp., 1956); R.I. Pub. Laws (1949) c. 2181, § 8 (H); Wash. Rev. Code (1951) § 49.60.250.

[22] Colo. Rev. Stat. (1953), as amended, Session Laws of Colo. (1955) § 81(19)(7); Conn. Gen. Stat. (1949) Title 61, c. 371 § 7407; Mass. Laws Ann. (1950) c. 151 (B), § 6; Mich. Stat. Ann. (1950) Title 17, c. 154, § 17.458 (Supp., 1955); Minn. L. (1955) c. 516, § 10; N.J. Stat. Ann. (1939) c. 18, § 18:25-19 (Supp., 1956); N.M. Stat. Ann. (1953) § 59(4) (11); N.Y. Executive Laws (McKinney, 1951) c. 15, § 298; Ore. Rev. Stat. (1953) c. 659, § 659.070; Penn. Stat. Ann. (Purdons, 1952) c. 43, § 960 (Supp., 1956); R.I. Pub. Laws (1949) c. 2181, § 9; Wash. Rev. Code (1951) § 49.60.260.

[23] Wash. Rev. Code (1951) § 49.60.310; N.J. Stat. Ann. (1939) c. 18, § 18:25-26 (Supp., 1956); Minn. Laws (1955) c. 516, § 11; Penn. Stat. Ann. (Purdons, 1952) c. 43,

The fair employment acts of some states are strengthened by making it an unfair labor practice for a union to:

1. elicit information or attempt to elicit any information directly or indirectly pertaining to the race or color of an applicant for membership.[24]
2. make or keep a record of his race or color.[25]
3. use a membership blank containing questions pertaining to race or color.[26]
4. print a notice relating to membership indicating any preference based upon race or color.[27]
5. deny or limit through a quota system, membership because of race or color.[28]

As to the constitutionality of statutes prohibiting discrimination by labor unions, the Supreme Court of the United States in *Railway Mail Ass'n. v. Corsi*[29] held that Section 43 and related Sections 41 and 45 of New York's Civil Rights Law, which provide, under penalty against its officers and members, that no labor organization shall deny a person membership for reasons of race or color, do not violate the Fourteenth Amendment.

Section one of the Fourteenth Amendment to the Constitution of the United States says:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The plaintiffs' third contention, that the discrimination against them was a violation of the Fourteenth Amendment, was dismissed by the court. Citing *Shelley v. Kraemer*,[30] the Wisconsin court, in the instant case, said that the action prohibited by this section of the Fourteenth Amendment

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§ 961 (Supp., 1956); N.Y. Executive Law (McKinney, 1951) c. 15, § 299; Colo. Rev. Stat. (1952) c. 80, § 80(5)(20), contains the Labor Peace Act which provides for a penalty for failure to allow a member into a union because of race, creed or color.

[24] Mich. Stat. Ann. (1950) Title 17, c. 154, § 17.458 (Supp., 1955); Penn. Stat. Ann. (Purdons, 1952) c. 43, § 955 (Supp., 1956); R.I. Pub. Laws (1949) c. 2181, § 4.

[25] Ibid. [26] Ibid. [27] Ibid. [28] Ibid.

[29] 326 U.S. 88 (1945).

[30] 334 U.S. 1 (1948). In this case the Court held that the enforcement by a state court of a covenant between private parties discriminating against Negroes in the occupancy or ownership of land was state action denying equal protection of the laws. However, the Court held, "so long as the provisions of these agreements are effectuated by voluntary adherence to their terms, it would appear that there has been no action by the State and the provisions of the Amendment have not been violated." Ibid., at 13.

is only such action as may fairly be said to be that of the States. The court said:

> The instant complaint does not allege any state action in aid of the discrimination practiced here. On the contrary, the state deplores it and through the good offices of its industrial commission has sought to end it.[31]

The question as to the violation of the Fourteenth Amendment by a union discriminating as to membership has not yet been decided by the Supreme Court. Mr. Homer Hewitt in his article *The Right to Membership in a Labor Union*[32] says that "the theory supporting a constitutional right to membership is that the exclusionary acts of a union operating under powers given by a state are 'state action' within the Fourteenth Amendment."[33] Mr. Hewitt thinks that perhaps the authority that best supports a constitutional right to join a union is the "white primary cases." In *Nixon v. Condon*,[34] an action was brought against Texas election officials who refused to give petitioner a ballot to vote in the Democratic primary. Having repealed an old statute which denied Negroes the right to participate in a Democratic party primary, they enacted a new statute which provided that the political parties in the state through their State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who is qualified to vote. Mr. Justice Cardozo ruled that the State Executive Committee of the Democratic party acted under the authority of the state of Texas and that this, therefore, constituted state action violating the Fourteenth Amendment. In his opinion, Mr. Justice Cardozo said:

> Whatever power of exclusion has been exercised by the members of the committee, has come to them . . . not as the delegates of the party, but as the delegates of the State.[35]

In *Smith v. Allwright*,[36] the Court ruled that Negroes cannot be denied the right to vote in state primaries, since even in the absence of a statute which gives its sanction to private rules by political organizations, these parties were subject to the statutory control of the states.[37]

These white primary cases, according to Mr. Hewitt, show that voluntary associations are not immune from constitutional limitations.[38] The analogy to unions is clear according to Hewitt. "In negotiating a collective bargaining contract, and otherwise representing the worker, the

[31] Ross v. Ebert, 275 Wis. 523, 82 N.W. 2d 315, 319, 320 (1957).

[32] 99 U. of Pa. L. Rev. 919 (1951).

[33] Ibid., at 939.

[34] 286 U.S. 73 (1932).

[35] Ibid., at 85.

[36] 321 U.S. 649 (1944).

[37] 1 Race Relations Law Rept. 613, 635 (1956).

[38] Hewitt, The Right to Membership in a Labor Union, 99 U. of Pa. L. Rev. 919, 941, 942.

recognized union is exercising legislative and governmental powers. This power has been derived from the state or federal government, for without the statute, the union has no right to be exclusive representative."[39] However, though the Supreme Court may not find "state action" by virtue of the authority granted the union by the State, there is the possibility that it would find "state action" by following the line of reasoning given by the dissenting judge in *Ross v. Ebert* who said:

> It has now been made clear by the Supreme Court of the United States that a state court must not enforce a private contract to exclude persons from the ownership or enjoyment of property because of their race. . . . It seems clearly to follow that if a union had a constitution which restricted its membership on the grounds of race, the courts could not enforce that restriction.[40]

We find, therefore, in the absence of legislation to the contrary, that courts generally, because of the voluntary nature of labor unions refuse to interfere in the selection of their members. This has been modified in most of the jurisdictions that have dealt with the problem by holding that if a closed shop exists, making it imposible for a person to find employment, the union may not arbitrarily exclude him from membership.

Fair employment legislation dealing with union discrimination has played an important part in the last twelve years, and has also succeeded in modifying the rule laid down in the *Mayer* case by holding that unions may not exclude a person from membership because of his race or color.

We can see, therefore, that the common law rule, which declares that unions may exclude from membership any applicant for any reason, has been qualified in some jurisdictions in two respects: (1) when a closed shop exists unions may not discriminate;[41] (2) unions may not discriminate because of the color of a person's skin.

The question of discrimination in regard to union membership as violating the Fourteenth Amendment is still unanswered. Perhaps, with the tendency of the Supreme Court to extend the concept of "state action," it will one day hold that since the union derives some of its rights from the state, the discriminatory action by the union will be interpreted as being the action of the state.[42] Or the Court may agree with the dissenting judge above and hold that the enforcement by a state court of a discriminatory restriction of a union is violative of the Fourteenth Amendment.

[39] Ibid., at 942.

[40] This case will not be heard by the Supreme Court as the two plaintiffs have been admitted into the union.

[41] The cases mentioning closed shop were decided prior to the enactment of the Taft-Hartley Act whereby under this Act the closed shop was outlawed, but the union shop was allowed. Labor-Management Relations Act, 1947, at §§ 7 and 8(a)(3), 61 Stat. 140 (1947), 29 U.S.C.A. §§ 157 and 158(a)(3) (1947).

[42] Authority cited note 33 supra.