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Some Kind of Hearing for Persons Discharged from Private Employment

CORNELIUS J. PECK*

I perhaps took the title of this conference too seriously, and I therefore request you remember its title when I discuss the possibility of establishing a requirement of some kind of hearing for all persons discharged from employment, including private employment. Obviously the law is far from imposing such a requirement now. Nevertheless I feel confident in making the suggestion that a development of that sort will occur before the twenty-first century. The problem is: "How will it occur?" Those who have a particular interest in administrative law have much to contribute to the solution.

Presently the law is that unless there is an express understanding to the contrary a contract of employment with no fixed term is terminable at will and without cause by either party. Perhaps some of you would prefer not to characterize this as a doctrine of contract law but only as a preferred construction for contracts of employment. In any event most persons who are employed by private employers and not represented by a labor union work under a contract of employment which can be terminated without cause or even for a bad cause.

Thus a cashier-checker at a supermarket can be told that her services are no longer wanted. When she asks for an explanation,

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management can tell her it does not have to give a reason. When that cashier-checker seeks employment at another supermarket, she will be asked where she worked before and why her employment was terminated. When she says her former employer would not state why her employment was terminated, you know what the prospective employer is going to conclude. The prospective employer will conclude that she had her hand in the till, and it will not want to expose its own till to such a risk.

Or, to take the facts of a case to which I will refer later, suppose a salesman for a manufacturer of steel pipe has an engineering background and realizes that he is supposed to sell pipe for industrial purposes for which he believes the pipe is not sufficiently strong. He tells his sales manager that he does not believe they should be marketing this steel pipe for those purposes because it cannot stand the pressures of such use. The sales manager tells him that his job is to sell the pipe and not to raise such questions. The salesman is a friend of a vice president in the manufacturing division of the company. In conversation with the vice president the salesman brings the attention of the vice president to the fact that they are selling this pipe for purposes which make its use dangerous. An order is issued by the manufacturing division to stop selling the pipe for those purposes. Another order also comes out of the sales division and it is that the salesman's employment is terminated. Now, as the law stands, neither the cashier-checker nor the salesman has any remedy.

A familiar aspect of the judicial process is that change in one area produces such tensions in other areas that change in the latter areas becomes inevitable. I believe such a situation has developed today. It is fairly obvious that decisions of the Supreme Court in the 1970s confer due process protection for interests of less importance than the interests of an employee in the continuation of his private employment and in the protection of his reputation from an unjust dismissal.¹ Please remember that in the employment area about which I am talking there is no requirement of a hearing of any kind. In contrast, recent decisions of the Supreme Court have required pretermination hearings for these lesser interests even though there would be a subsequent hearing on the merits.²

Not all employees work under employment contracts which can be terminated without cause. More than one out of seven persons

1. *See, e.g.,* Bell v. Burson, 402 U.S. 535 (1971) (suspension of driver's license and vehicle registration); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits).

2. *See* cases cited note 1 *supra*.

in the American work force is employed by a government. More than half of the persons employed by a government have the protection of a civil service law. Those who do not have the protection of a civil service law have found that decisions from the 1970s provide that the Constitution can also be called upon for protection. For example, *Elrod v. Burns*³ shows that the Constitution gives job protection against discharges under the spoils system even though no civil service law provides protection. The decisions in *Board of Regents of State Colleges v. Roth*⁴ and *Bishop v. Wood*⁵ deny constitutional protection to government employees, but the earlier decisions recognizing due process claims with respect to public employment have not been overruled.

The sharp contrast between the protection available to public employees and that available to private employees should cause us to ask whether there is justification for that difference. The justification for law that permits termination of employment without cause grows even more difficult when consideration is given the fact that twenty-five percent of the private non-agricultural work force is now represented by labor unions.⁶ About ninety-five percent of the collective bargaining agreements contain grievance and arbitration provisions which lead to final and binding arbitration before a neutral independent arbitrator in cases involving discipline or discharge.⁷ In those arbitration proceedings the burden is on the employer to prove just cause for the discharge.⁸ It is true that the individual employee does not have a right to have a grievance taken to arbitration. Basically, he must rely upon his union and convince its officers that his case is good enough to merit being brought to the higher level of the grievance procedure. But if he has exhausted the attempts to get the union to do that, then under *Vaca v. Sipes*⁹ he is able to sue both his employer and his union. His suit against the union would be based upon a claim that it was guilty of a breach of duty of fair repre-

3. 427 U.S. 347 (1976).

4. 408 U.S. 564 (1972).

5. 426 U.S. 341 (1976).

6. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, DIRECTORY OF NATIONAL UNIONS AND EMPLOYEE ASSOCIATIONS 72 (1973).

7. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1425-1, MAJOR COLLECTIVE BARGAINING AGREEMENTS: GRIEVANCE PROCEDURES 1, 8 (1965).

8. E. ELKOURI & F. ELKOURI, HOW ARBITRATION WORKS 621 (3d ed. 1973).

9. 386 U.S. 171, 186 (1967).

sentation.¹⁰ The claim against the employer is for discharge without cause.¹¹ The recent 1976 decision of *Hines v. Anchor Motor Freight, Inc.*,¹² held that liability could be imposed upon an employer even where an award sustaining the discharge had been rendered if the union failed to perform its duty of fair representation in presenting the case to the arbitrator. The case has radiations indicating the duty of fair representation requires minimum levels of performance and that liability may be established with proof of less than arbitrary, discriminatory, or bad faith treatment of the employee by the union.

We can see in this country a general movement favoring protecting people from discharge based upon reasons which are thought not to justify the discharge. The Civil Rights Act of 1964¹³ reflects that kind of judgment and protects employees from many kinds of discrimination, including discharge because of race, sex, national origin, or religion. Another federal statute prohibits discharge based upon age.¹⁴ A number of states and the federal government now give some protection against discrimination based upon physical handicap.¹⁵ Indeed the gay liberation movement has succeeded in obtaining protection at a local level from termination of employment based upon consideration of an employee's sexual preferences. I may be stodgy but I do not see a great societal interest in a program to protect the people who are involved in the gay liberation front as such. However, their protection can be viewed as an aspect of general protection of human dignity. The right of a person to choose the way he wishes to live, and the right not to suffer consequences on the job because of personal preferences unless there is a job relationship, fit easily into traditional concepts of human dignity and liberty. I think we have moved in protecting against specific violation of human dignity so far that we will give protection to the dignity of the individual who finds himself discharged without explanation or hearing.

From where will the force for this change come? We know the origins of the Civil Rights Act are found in very large part in the disturbances that occurred to protest racial discrimination. Even Senator Dirksen knew something had to be done! Are we going to get anything of this sort for persons working under contracts of employment terminable at will? I doubt there will be a political

10. *Id.* at 177.

11. *Id.* at 186.

12. 424 U.S. 554 (1976).

13. Pub. L. No. 352, 78 Stat. 255 (codified in scattered sections of 28, 42 U.S.C.).

14. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (1976).

15. See *Gurmankin v. Costanzo*, 556 F.2d 184 (3d Cir. 1977); Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976).

movement which will accomplish the adoption of legislation changing that law. Legislation occurs because there are interested and effective lobbying groups that bring about the adoption of proposed legislation. Employers will not propose such a change. Understandably they would seek to preserve their presently unrestrained control of employment. I do not think we can expect unions to press for this change in the law. One of the most persuasive organizational arguments a union now has is that it will give job protection to employees if they make it their collective bargaining agent.

Therefore, I think we have an area appropriate for judicial activism. The judiciary may not be able to act in a comprehensive way, producing the total solution, but it is able to act as a catalyst and produce changes that direct a legislature's attention to the need for a comprehensive reform. There are constitutional arguments which can be made to persuade the judiciary to extend protection against improper termination of employment to persons in private employment.

Rejection of the employment at will doctrine would be a complete reversal of the 1908 position of the Supreme Court in *Adair v. United States*,¹⁶ which found a constitutional right of an employer to contract to discharge at will. In today's world, contrary constitutional argument can be based on deprivation of equal protection of laws. The description given of the protections available to public employees under civil service laws, and even more so the protection enjoyed by persons employed under collective bargaining agreements, strongly suggests that people working in private employment without collective bargaining suffer from a very obvious unequal protection of laws. Of course if a court uses the "rational basis" test¹⁷ for equal protection scrutiny, I suppose a rational basis can be found for distinguishing between private employment and civil service. Maybe a rational basis can be found for distinguishing between private employees who have unions and those who do not have unions because the distinction does encourage the important national policy of collective bargaining. But if (as seems likely) we depart from the two levels of scrutiny in equal protection cases, is it not possible that we could

16. 208 U.S. 161 (1908).

17. See, e.g., *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 40 (1972).

recognize the interest in employment to be so great that a challenge on the basis of denial of equal protection of laws will be accepted?

There is of course one more complication which I should mention. The lack of equal protection of the laws in this area does not come solely from state law. Indeed most of the inequality of protection has come from federal law which encourages collective bargaining and has established arbitration as a king-pin of the national labor policy. While this is not the traditional equal protection situation, it is not outrageous to suggest that equal protection requires examination of the entire context in which a law operates.

There remains the question of whether a discharge from private employment now has taken on characteristics of state action. Certainly the Supreme Court's recent decisions in *Jackson v. Metropolitan Edison Co.*,¹⁸ which involved termination of electrical services, and in the earlier *Moose Lodge* case,¹⁹ indicate that the Court is not likely to find state action on the basis of government involvement with incorporation, or government involvement with regard to the regulation of the activity of employers even though there is a very close supervision of the discharge decisions made by employers.

Perhaps a little stronger argument is that judicial process involves state action. Here I refer to *Shelley v. Kraemer*,²⁰ involving the enforcement of restrictive covenants, *Sniadach v. Family Finance Corp.*,²¹ involving prejudgment garnishment, *Fuentes v. Shevin*,²² involving repossession of property, and *New York Times Co. v. Sullivan*,²³ involving defamation laws. In each of these cases it was made easier to find state action because a sheriff or deputies acted and thus an identifiable public officer did something somewhere in the process. But maybe we should recognize that this test of state action serves us no better than the right-privilege dichotomy, controlling when one is entitled to a hearing, which we rejected because it did not serve the needs of our society. Our society has become so complex that we should also recognize that the difference between misfeasance and nonfeasance is not an adequate basis for deciding what government must do. The failure of the courts to provide protection against unjust discharge may now be found to constitute a state policy permitting

18. 419 U.S. 345 (1974).

19. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

20. 334 U.S. 1 (1948).

21. 395 U.S. 337 (1969).

22. 407 U.S. 67 (1972).

23. 376 U.S. 254 (1964).

(and thus condoning if not approving) arbitrary, discriminatory, and unjust treatment of employees in private employment. Should such a policy be held to satisfy the requirement of due process developed in the decisions of the 1970s? Is it what has been called "the sovereign prerogative of choice" to permit private parties to act on an illegitimate basis? If so, *Burton v. Wilmington Parking Authority*²⁴ provides some support for the proposition that nonfeasance is state action. Or to pick up what Professor Rabin has said concerning the rationale of providing the means for a person to ask the basis for what the state has done to him,²⁵ the anguish of a person would be just as great in asking why the state has permitted people to do harm to him. That is not much of a change in the question, and it may be that similar questions should get similar answers.

It seems to me that the most likely basis for finding state action is to be found in the lawmaking function of the judiciary. Judicial realism provides a basis for finding state action. When we thought judges only "found" law it was not so obvious that there was state action involved in the formulation of the common law. But California's repeal of the anti-discrimination laws by amendment of its constitution was held to be state action in *Reitman v. Mulkey*.²⁶ It seems not much of a step to say that state law which continues the employment at will doctrine is state action and subject to constitutional challenge.

*Wisconsin v. Constantineau*²⁷ involved a woman who was in effect publicly declared a drunkard, one to whom liquor was not to be sold. The injury to reputation was found to be unconstitutional.²⁸ Is a law which permits injury to reputation by an unjustified discharge also unconstitutional? *Paul v. Davis*,²⁹ involving circulation by police of leaflets carrying pictures of suspected shoplifters, is a case which points in the other direction by refusing to give constitutional protection to the interest in reputation. *Ingraham v. Wright*³⁰ found constitutional protection unneces-

24. 365 U.S. 715 (1961).

25. See Rabin, *Some Thoughts on the Relationship Between Fundamental Values and Procedural Safeguards in Constitutional Right to Hearing Cases*, 16 SAN DIEGO L. REV. 301, 303 (1979).

26. 387 U.S. 369 (1967).

27. 400 U.S. 433, 435 (1971).

28. *Id.* at 436.

29. 424 U.S. 693 (1976).

30. 430 U.S. 651 (1977).

sary for injury by corporal punishment administered by school officials. Those cases leave the protection to state tort law. But in their denial of constitutional protection we may find the basis for requiring constitutional protection in employment. In those cases state tort law could be pointed to as providing a remedy. But when we look at the situation of the employee in private employment, we must conclude there is no protection.

The recent decision in *Board of Curators of the University of Missouri v. Horowitz*³¹ suggested a lesser due process requirement for an academic dismissal than what would be required for a disciplinary dismissal, and cuts against the suggestion that the employment interest deserves constitutional protection. It suggests the Court will be unwilling to undertake consideration of questions of job competence.

Perhaps the Supreme Court, reconstituted by new appointments, will return to the precedents which are more supportive of protecting the interest in job security. It is my personal belief that the manner in which recent changes in constitutional law have been made has been so unprincipled that much of the prior law has been left standing. It would therefore be possible for future members of the Court to note that the older cases were not overruled, that the more recent developments were obvious wanderings from the true law, and to declare a return to the true law.

I think, however, the development in the protection against unjustified termination of employment is likely to occur in the development by a state court of principles of tort law or contract law. This obviously could occur without involving the approval of the United States Supreme Court as it is presently constituted, and without requiring the overruling of recent decisions of that Court. Powerful arguments for providing such protection through tort law were made more than ten years ago in an article by Professor Blades.³² His work, and the work of others, established that the rule which we take so much for granted is not the rule followed in Europe; indeed it is not the rule followed in most of the world.³³ The peculiar American rule is based upon an erroneous statement in a nineteenth century treatise.³⁴ This erroneous statement of the law became accepted as the law of employment in the United States.

As long ago as 1959 a court of appeal in California recognized a

31. 435 U.S. 78 (1978).

32. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

33. Blumrosen, *Employer Discipline: U.S. Report*, 18 RUTGERS L. REV. 428, 432-33 (1964).

34. J. WOOD, MASTER AND SERVANT § 134 (1877).

limitation on the employment at will doctrine where the discharge of an employee was based on his failure to commit perjury before a legislative committee.³⁵ The Supreme Court of Indiana in 1973 held actionable a discharge for filing a workmen's compensation claim, saying the discharge constituted a statutorily prohibited device for avoiding the workmen's compensation law.³⁶ A Michigan appellate court reached the same conclusion concerning the filing of a workmen's compensation claim even though there was no statutory provision on which it could rely.³⁷

The Supreme Court of New Hampshire in 1974, in the case of *Monge v. Beebe Rubber Co.*,³⁸ created an exception to the terminable at will doctrine of employment for a termination motivated by bad faith or malice. The facts are worth noting. A foreman working on a swing shift apparently was attracted to one of the women who worked the shift, and proposed that they should go out together after the shift. She, very morally and righteously, reminded him that she was a married woman and refused. The allegations of the complaint and the proof at trial were that with the connivance of the personnel manager the foreman had her discharged. The New Hampshire court said that this was such a bad faith and malicious discharge that damages could be obtained even though the woman's employment was at will.³⁹

I might mention in this respect one of the developments in the Civil Rights Act with regard to sex discrimination. I think three courts have reached the conclusion that there is a violation of the prohibition against discrimination on the basis of sex when an employer permits the situation to exist in which a male supervisor makes job improvements for the woman under his supervision conditioned upon compliance with his sexual demands.⁴⁰ I feel

35. *Petermann v. Local 396, Int'l Bhd. of Teamsters*, 174 Cal. App. 2d 184, 188-89, 344 P.2d 25, 27 (1959) (right to discharge at will may be limited by statute or by public policy; in this case, public policy proscribed dismissal for refusal to commit perjury).

36. *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973).

37. *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976).

38. 114 N.H. 130, 316 A.2d 549 (1974).

39. *Id.* at 133, 134, 316 A.2d at 551, 552.

40. *Barnes v. Costle*, 561 F.2d 983, 993 (D.C. Cir. 1977) (court reversed summary judgment for the defendant employer and held that civil rights violations need not affect all employees of a similar class and that employers are liable for the title VII violations of their supervisory personnel); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977); *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976). *But see* *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976);

rather sure that Representative Hayes did not have this in mind when he voted for this legislation, and I do not really think that was the purpose of the legislation. But these results indicate how desperate judges are to provide protection to persons discharged from employment without valid justification.

The Pennsylvania Supreme Court in 1974 refused to make an exception to the employment at will doctrine.⁴¹ The case involved the salesman who believed that pipe was not safe for the uses for which he was told that it should be sold. It was a four to three decision. There is a very, very strong dissent, which I think shows the vitality of the argument against preserving or continuing the employment at will doctrine.⁴² The Oregon Supreme Court in 1975 found a prima facie tort, and concluded damages should be awarded, for the termination of the employment of a woman who had responded to a call to do jury service.⁴³ Of course there is a community or public interest in such a case that might differentiate it from some other types of discharge. The Supreme Court of Washington recently refused to make an exception to the employment at will doctrine for bad faith discharges.⁴⁴ However, in the course of its decision the court indicated its receptiveness to the argument that the exception should be made by stating: "While the future of this doctrine is a compelling issue, it is one that must be left for another day and different facts."⁴⁵

The case for recognizing exceptions to the employment at will doctrine is compelling. I think we can also recognize that such a change may produce a caseload that would overwhelm the courts.

Here, I suppose, those of us interested in administrative law might provide some assistance. One possibility is that courts could do something like what the Court of Appeals for the District of Columbia did with cases arising under the United Mine Workers pension trust. In *Kosty v. Lewis*,⁴⁶ the court held that when a change in the eligibility rules for retirement is to be made, the trustees must give sufficient notice to persons who are otherwise qualified for retirement, permitting them to take action before they become disqualified.⁴⁷ It seems to me that what the court of

Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975) (no employer liability for isolated acts of employee where employer has no discriminatory policy or practice). See Comment, *Title VII: Legal Protection Against Sexual Harassment*, 53 WASH. L. REV. 123 (1977).

41. *Geary v. United States Steel Corp.*, 456 Pa. 171, 175, 319 A.2d 174, 176 (1974).

42. *Id.* at 186-92, 319 A.2d at 181-84 (Roberts, J., dissenting).

43. *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975).

44. *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 568 P.2d 764 (1977).

45. *Id.* at 898, 568 P.2d at 770.

46. 319 F.2d 744 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964).

47. *Id.* at 749.

appeals did in *Kosty v. Lewis* provides an analogy applicable to the employment area, in that the court looked to see whether or not the trustees had handled the case in a reasonable manner. In doing so, the court drew support from the background of equity jurisdiction, which traditionally has supervised administration of trusts. In these days, when equity and law are merged, do we need to limit the function of the equity courts to supervising trusts rather than to "doing equity" generally?

I suppose *Goss v. Lopez*⁴⁸ provides another possibility. Courts could insist that an employer who is going to terminate an employee at least give that employee a statement of reasons for the discharge; otherwise that discharge would be considered to be in bad faith.

Professor Clyde Summers has proposed the establishment of a statutory scheme utilizing the existing corps of labor law arbitrators to resolve disputes concerning unjustified terminations of employment.⁴⁹ It is a very provocative suggestion. It has the appeal that there is an established corps of labor arbitrators who frequently and regularly handle cases of claimed unjust discharge. I have my doubts that arbitrators have sufficient free time to take on all of the additional cases that would come to them if the rule requiring just cause for discharge were applied to the unorganized portion of the private sector of employment.

Another solution could be to enlarge the jurisdiction of the various state and federal agencies now hearing claims of particular types of improper discharge. Perhaps we can combine all the agencies concerned with unjust discharge in one agency, and that agency could be a labor court that would pass upon all questions of whether or not a termination of employment was for just and proper reasons.

With regard to the question of what kind of hearing would be required, experience with labor arbitration suggests that a full judicial-type hearing is necessary and practical. The "new law" should require what is very close to a judicial evidentiary proceeding in which the employer has the burden of proving just cause for discharge. Let me remind you that the large number of labor arbitration decisions concerning what constitutes just cause

48. 419 U.S. 565 (1975).

49. Summers, *Individual Protection Against Unjust Dismissal*, 62 VA. L. REV. 481, 519-32 (1976).

for discharge could provide the basis for the development of judicial rule.

We might find as we get into this area that we are going to have problems deciding what kinds of discipline less than discharge will be subject to a hearing requirement. This is obviously something for which a legislative solution would be better. The legislature can draw the arbitrary limits which the judiciary might find difficult to enunciate or justify. The problem is not insurmountable.

We will also have problems about the right to representation by attorney, provision of attorneys' fees, etc. Those problems will of course keep us much busier once the right of employees to a hearing is recognized. We should not undertake the venture as a make-work program for lawyers. It should be undertaken only if we believe it to be a refinement of justice we can afford. I think it is almost certain that it will be recognized sometime before the twenty-first century that an employee in private employment is entitled to a hearing before a discharge becomes final. It is up to us to give thought to what kind of a workable system we can establish to protect that very important interest in continued employment and employability.