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Introduction

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INTRODUCTION

Clyde W. Summers*

Ten years ago a symposium on the subject of employment at will would have been unthinkable. There would have been few commentators willing to write on the subject, and few others interested in reading about it. The misbegotten legal doctrine was mechanically, and at times brutally, applied by the courts but was seldom examined or questioned. It was one of our inherited legal curses which we mindlessly accepted.

In 1967 Professor Blades wrote his pioneering article, *Employment at Will vs. Individual Freedom: On Limiting The Abusive Exercise of Employer Power*.¹ His sensitivity to the problem and his creative legal argument raised a powerful challenge, but no one responded to it. Apparently, no one even listened — neither the legal scholars nor the courts. The Pennsylvania Supreme Court, in *Geary v. United States Steel Corp.*,² listened with less than half an ear, rejecting Professor Blades' logic as "beckoning us into uncharted territory."³ The majority denied relief to a salesman who had been discharged for "in-subordination" because he had warned a company vice-president that the steel tubing the company was selling had not been adequately tested and could be dangerous to its users. The court declared that "the law has taken for granted the power of either party to terminate an employment relationship for any or no reason."⁴ The dissenting justice, looking forward rather than backward, declared, "I believe the time has surely come to afford unorganized employees an opportunity to prove in court a claim for arbitrary and retaliatory discharge."⁵

Just ten years ago a newly elected legislator in Connecticut introduced a bill designed to provide broad protection against unjust discharge.⁶ One of his close friends had been discharged without notice or reason, and, like the customary victim of unjust discharge, discovered to his surprise that the courts were unconcerned with such injustice. The proposed statute, with no model to follow, was simple in conception and wording. It advocated that all employees should enjoy the protection against unjust discharge enjoyed by those under collective agreements.

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1. 67 COLUM. L. REV. 1404 (1967).

2. 456 Pa. 171, 319 A.2d 174 (1974).

3. *Id.* at 174, 319 A.2d at 175.

4. *Id.* at 175, 319 A.2d at 176.

5. *Id.* at 188, 319 A.2d at 182.

6. Conn. Gen. Ass., Jan. Sess., Committee Bill No. 8738 (1973).

Employees could be dismissed "only for just cause or because of reduction in force for business reasons."⁷ Enforcement was to be through arbitration under the State Board of Mediation. Although supported by organized labor, the bill was killed by opposition from organized employers.

In 1974 Robert Howlett focused public attention on the problem. He began his inaugural address as president of the Society of Professionals in Dispute Resolution with the words, "The forgotten man needs an advocate — perhaps even a partisan."⁸ As Chairman of the Michigan Employment Relations Commission, Howlett had seen a parade of workers seeking some legal relief from unjust discharges and had had to tell them that the Commission could do nothing. For these forgotten men and women he proposed state legislation establishing a "just cause" for discharge, requiring employers to afford discharged employees a hearing, and providing for ultimate submission to arbitration.

During this same year the New Hampshire court decided the weather-vane case of *Monge v. Beebe Rubber Co.*,⁹ in which damages were awarded to a woman who was first demoted and then discharged because she refused to date her foreman. The court likened the employment-at-will doctrine to the rejected tenancy-at-will doctrine as "based on an ancient feudal system."¹⁰ Simultaneously, the *Stanford Law Review* published a farsighted student comment, *Implied Contract Rights to Job Security*,¹¹ which mapped out the potential paths by which accepted contract principles could protect dismissed employees.

These were the forerunners of changes in the law now witnessed by this symposium. The forgotten men and women are no longer forgotten. Professor Blades' creative tort rationale has not only been embraced by courts but has been extended beyond his modest boldness. The contract paths mapped by the *Stanford Law Review* comment have now become travelled roads. Although many courts still walk in the wet cement of precedent, there seems an inexorable move away from the employment-at-will doctrine. The articles and notes in this issue demonstrate the breadth and the strength of that movement. More importantly, they add vigor and new dimensions to the movement.

Legislation that was dismissed as fanciful is now seriously discussed. Indeed, Canada has adopted legislation on the arbitration model¹² and proposals have been introduced in Michigan and other states. This symposium demonstrates that we are past the point of having to prove

7. *Id.* at § 1.

8. GOV'T EMPL. REL. REP. (BNA) No. 583, at E-1 (Dec. 2, 1974).

9. 114 N.H. 130, 316 A.2d 549 (1974).

10. *Id.* at 132, 316 A.2d at 551.

11. 26 STAN. L. REV. 335 (1974).

12. An Act to Amend the Canada Labour Code, § 61.5 Can. Stat., 1977-78 § 61.5, at 615-18 (1978).

the need for legislation. We can now direct our efforts toward exploring the various forms that legislation might take and work out concrete drafts with explanations, as the articles and notes have done here.

With a short backward look, we might ask why the law has moved so much in so short a time. For a hundred years the employment-at-will doctrine was unbending and seemed to go unchallenged; in ten years it has largely disintegrated and is now under frontal attack. Why? In main part it is because the underlying principle has been long dead and the doctrine was but a shell. The employer's unlimited freedom to discharge an employee was squarely rejected by the National Labor Relations Act, even to the point of ordering an employer to reinstate a discharged employee. It was further rejected by state anti-discrimination laws, Title VII of the Civil Rights Act, the Selective Service Act, and a variety of lesser statutes. More importantly, employers had voluntarily surrendered this right in collective agreements and accepted the principle that employees should not be discharged without just cause. With the supporting principle rejected, the shell could scarcely help cracking and collapsing.

A second reason is that the protestation of employer fairness had lost all credibility. Experience under all of the statutes and under collective agreements gave hourly evidence that many employers had warped or perverse notions of fairness. Most telling, because least excusable, were widespread and flagrant violations of civil rights acts. Only legal protection could give employees any guarantee of fairness, even against the most obvious and abusive employer action.

A third reason, paradoxically, was the use of collective agreements. The near universal acceptance of just cause clauses in collective agreements inevitably raised the question of why other employees should not have the same protection. Union insistence on such clauses measured its first importance to employees, and employer acceptance measured its practicability in operation. At the same time, increasing awareness of the lack of collective agreements — collective agreements covered only a minority of the work force — added to the pressures for protection by law.

Finally, awareness of protection against unjust dismissal in other countries helped call attention to the void in our law. Most countries of Western Europe had long had such laws, and the International Labor Organization had adopted a Recommendation in 1963 supporting such legislation.¹³ In 1971, Great Britain,¹⁴ and in 1974, Sweden,¹⁵ passed

13. 1963 Recommendation concerning Termination of Employment at the Initiative of the Employer, *reprinted in* INTERNATIONAL LABOUR CONFERENCE, 67TH SESSION 1982: REPORT VIII (1) — TERMINATION OF EMPLOYMENT AT THE INITIATIVE OF THE EMPLOYER [EIGHTH ITEM ON THE AGENDA] 102-05 (1980).

14. Industrial Relations Act, 1971, ch. 72, §§ 22-33.

15. Lag om Anställningsskydd, Svensk Forfattningssamling 1974:12.

comprehensive dismissal statutes. The United States then stood practically alone among industrial countries in not protecting against unjust dismissal. The doctrine of employment-at-will could no longer "be taken for granted"; it had become a national embarrassment.

Such a glance backward is only a short diversion from the direction of this symposium. All of the contributors here seek to move forward in dismantling the dead doctrine and providing increased protection to the individual. Each author marks a separate course, but all share a common goal. More importantly, their efforts are not competing. There is no need to choose which path to pursue; all can be pursued at once.

Elaborating and reinforcing protection for an employee who refuses to work under unsafe conditions, as Mr. Schibley proposes, serves to emphasize the inhumanity of employment at will; eliminating that particular manifestation will encourage elimination of other manifestations. Professor Malin's focus on protecting whistleblowers emphasizes that the fundamental value to be served is not productive efficiency or social utility but the right of the individual. The particular right of a whistleblower is to act according to his conscience, but recognition of that right will carry in its train recognition of a range of other individual rights, including the right to security in earning a livelihood. Ms. Tully's strengthening of the contract theory through an increased emphasis on the reliance interest will add to the usefulness of common law remedies in all cases.

None of these courses in any way detract from the arguments in favor of a general statute. Protection in particular types of cases will inevitably leave gaps that need filling by general legislation, and the presence of special protection will make the gaps more glaring and intolerable. The more complete the common law remedies, the less resistance there will be to general statutory protection. Judgments for \$40,000, \$300,000, and \$2,000,000, along with the high costs of litigation, should help persuade employers that statutory proposals with simple procedures and more realistic remedies are not only tolerable but preferable.

Professor Blumrosen urges employers to include arbitration clauses in contracts of employment. Such voluntary action is plainly desirable, but the argument most persuasive to employers is the alternative of the heavy liability of potential litigation. Employers will follow Professor Blumrosen's suggestion only as those advocating legal remedies succeed in breaking down the employment-at-will doctrine. Those who advocate legislation need not fear that Professor Blumrosen will be so persuasive that the demand for legislation will be dulled. Many, if not most, employers will not follow his suggestions, but those who do will demonstrate that recognizing employees' rights does not destroy

efficiency. Similarly, the enactment of legislation need not preclude employers from establishing voluntary arbitration procedures.

The ultimate need, as Professor Stieber and Mr. Murray pointed out, is general legislation, for piecemeal provisions and common law theories will never give more than spotty protection. These authors propose broad guidelines for drafting a federal "just cause" discharge statute. Two different specific legislative proposals are presented here, but they should not be considered competitive. We must consider the widest range of possibilities, and the fifty states provide opportunities to test various alternatives. Professor Bellace has presented an idea that has never been considered; we need to examine even more new possibilities. A detailed statutory proposal has been offered by Ms. Gioia and Mr. Ramfjord; many of the considerations articulated and weighed there will be relevant to other statutory proposals. Finally, Professor Peck's challenging article warns us against blindly following analogies or verbal parallelisms. Proposed solutions must be tested against the realities of the specific problem to be solved.

The symposium speaks to the task ahead — to use every legal device available to sweep away the remnants of the employment-at-will doctrine and bring a measure of freedom, respect, and dignity to every American worker.

