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LABOR LAW

EMPLOYEE'S RIGHT TO SUE FOR WRONGFUL DISCHARGE

Can a labor union member sue his employer for his discharge in violation of the collective bargaining agreement between the union and the employer? This question was considered in the case of *Parker v. Borock*[1] where a labor union member brought an action for wrongful discharge against the receiver of his employer, alleging a breach of the collective bargaining agreement made between the employer and the union and adopted by the receiver. The agreement provided in part, that "no regular employee shall be discharged or disciplined without good and sufficient cause." The union had earlier refused to pursue the right to arbitrate the employee's claim that he had been wrongfully discharged, although it was requested to do so by plaintiff.

The denial of defendant's motion for summary judgment at the trial, was reversed by the Appellate Division on the ground that plaintiff had failed to establish that his hiring was for a definite term rather than a hiring at will.[2]

On plaintiff's appeal, the Court of Appeals affirmed the judgment for defendant, holding that although the "no discharge without cause" provision modified the terms of the contract of hiring between plaintiff and his employer, and although the clause was inserted for the direct benefit of the employee and gave him a contractual right, that right had been entrusted to the union, the employee's exclusive representative, and plaintiff's redress lay against the union if he claimed that it had wrongfully refused to utilize the arbitration procedures.

Judge Fuld, concurring, chose to rest the result on the ground that the union, as exclusive representative of the employee, was in the best position, after investigating the employee's claim and weighing the interests involved, to decide whether to press or abandon the complaint.

In a separate concurring opinion, Judge Van Voorhis indicated that he would have affirmed the judgment for defendant, not on the ground that the employee's right had been entrusted to his union, but on the ground that the clause never gave plaintiff a personal right in the first instance.

The instant case appears to be the first in which a collective bargaining agreement provision against discharge without cause was viewed as conferring a direct and personal right on an employee and yet standing to sue was denied. To be distinguished is *Rotnofsky v. Capitol Distributors Corp.*,[3] where it was held that a similar clause was inserted to insure retention of union members by the company, and therefore never inured to the direct benefit of employees. Also distinguishable are cases in which the collective bargaining

1. 5 N.Y.2d 156, 182 N.Y.S.2d 577 (1959).
2. 1 A.D.2d 969, 150 N.Y.S.2d 396 (2d Dep't 1956).
3. 262 App. Div. 521, 30 N.Y.S.2d 563 (1st Dep't 1941).

agreement contained an express provision that it should be enforcable by individual employees.[4]

In view of the prevailing opinion that the discharge provision inured to the direct benefit of employees, and in view of the fact that New York courts have held that provisions so inuring may be the subject of a cause of action by employees assertable against their employers, the conclusion in the present case appears, at first, to represent a departure from prior holdings.[5] The resolution of this apparent inconsistency, somewhat glossed over in the prevailing opinion, and unacceptable to Judge Van Voorhis, lies in the majority holding that the particular bargaining agreement in question, when read as a whole, indicates that plaintiff had entrusted even his personal right under the contract to his union, and that he was bound thereby. The result in the instant case may thus be confined to its facts and attributed to the peculiar wording of the agreement involved.

APPLICABILITY OF CONTRACT ARBITRATION CLAUSE TO ANOTHER CONTRACT

An employer's right to contract out work is an inherent right of management. It is not subject to arbitration through collective bargaining unless the contract with labor specifically provides otherwise.[6]

The Court of Appeals dealt with a problem in this area in *Otis Elevator Company v. Carney*.[7] The company-union contract contained a general arbitration clause. All disputes not settled by the grievance procedure were to go to arbitration. The company entered into a contract with an allegedly independent contractor for the cleaning of the company's offices. The union felt that the company did not enter a *bona fide* independent contract. It contended that the employees were really working for the company itself and that the contract was merely a subterfuge to get employees away from the coverage of the collective bargaining agreement.

After the trial court denied the company's motion to stay arbitration on this issue, the Appellate Division reversed, granting the stay of arbitration.[8] In reversing the Appellate Division, the Court of Appeals held that the question of whether the contract was bona fide was an arbitrable dispute.

In *In re Teschner* where a company dissolved and reformed without violating any express term of the labor contract, the union showed facts which raised doubt as to whether it was a *bona fide* dissolution or merely a scheme to avoid obligations under the contract with labor. The Court of Appeals

4. Levine v. Meizel, — Misc. —, 34 N.Y. Supp. 561 (City Ct. 1942). Kadish v. New York Evening Journal Inc., — Misc. —, 67 N.Y.S.2d 435 (Sup. Ct. 1946), *aff'd without opinion* 272 App. Div. 872, 72 N.Y.S.2d 402 (1st Dep't 1947).

5. Barth v. Addie Co., 271 N.Y. 31, 2 N.E.2d 34 (1936); Gulla v. Barton, 164 App. Div. 293, 149 N.Y. Supp. 952 (3d Dep't 1914).

6. United Steelworkers of America, A.F.L.-C.I.O. v. Warrior & Gulf Nav. Co., 168 F. Supp. 702 (D.C. Ala. 1958).

7. N.Y.2d 358, 189 N.Y.S.2d 874 (1959).

8. 8 A.D.2d 636, 185 N.Y.S.2d 828 (2d Dep't 1959).