J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 4(2) 87-100, 1995-96

EMPLOYMENT-BASED PROPERTY RIGHTS*

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ABSTRACT

Effective employee job property rights have recently increased consequent on state-courts-imposed liabilities for management employment decisions. The acquisition, application, scope, and enforcement of these new job rights alter the incentive for union activity. After briefly describing employment-based property rights, recent additions to employee rights and their impacts on union-shop employees and union membership are discussed.

Private sector union membership trends, measured as a percentage of the labor force, exhibit thirty years of decline for organized labor. Studies of the decreasing labor market density and economic importance of unions are generally divided into time series analyses of membership trends using macrodeterminants and cross-sectional analyses of individual employee decisions to support a union using microdeterminants [1]. The macro-level explanatory variables most consistently effective in explaining union membership include business cycles [1-3], employer opposition [4], structure of employment [5-6], and election characteristics [7].

Inquiries into the employees' decisions to support unions span the discussions of the Webbs and Marx on collective responses to the rise of capitalism, Perlman's "scarcity consciousness" [8] and cognitive dissonance theory [9]. One of the main approaches appearing in the literature focuses on employees' perceptions of union effectiveness in realizing their objectives. From this perspective, the union functions as an instrumentality [9, 10] or has monopoly and voice-response faces [4]. Putatively, a union is one instrumentality or method for improving compensation and dealing with fairness issues in the workplace.

*An earlier version of this article was presented at the July 1992, Western Economic Association meetings in San Francisco.

doi: 10.2190/GTH4-2N8J-V0WF-C993
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In the literature on alternative instrumentalities, there is support for the existence of a substitution effect between employee job rights in statutes or public policy and those in collective bargaining agreements [11]. Most often differences in employment relations based on public policy goals involve international comparisons [12]. However, in a recent study Krueger found a linkage between the enactment of state unjust-dismissal legislation and state court recognition of employee job property rights in the United States [13]. When employee rights are established in law or public policy, their availability is independent of unions, diminishing the incentive for union membership. Further, these alternative rights-acquisition processes contribute to the erosion of the labor movement's role in establishing and maintaining employee job rights.

Job property rights are the recognized, sanctioned, policed, and enforced behavioral norms of the workplace. These rights constitute a power of action or a capacity to control, with the concurrence and assistance of the state or some other third party. Job property rights rely on attributes peculiar to an employee's position in a firm's internal labor market and include every valuable claim resulting from the sale of labor. Typically, these rights include requiring due process in terminations, influencing compensation, establishing work rules and working conditions, and claiming returns based on work in previous time periods. Employee rights may be expanded to include the ability to withhold labor for short periods with ending the employment relationship and requiring management to negotiate alterations in other employment property rights. Taken in total, employee job property rights, management prerogatives, internal control structures, and adjudicators' opinions in the enforcement process create somewhat unique rights sets for each employing unit. The enforcement policy and procedures for what had been a voluntary agreement determine the employment relationship's effective terms, who has monitoring and policing responsibilities, and the remedies for violations of the agreement.

Employee job property rights often conflict with management's right to direct the business and its labor force. Stereotypical confrontations leading to the development of employee rights have management's decisions affecting employment conditions and precipitating a concerted or group response among employees. The response's purpose is to create an enforceable right under labor law, a negotiated labor agreement, or a public law. The establishment of individual employee rights by statute is an outcome of a political process, while a labor agreement results from a protected, concerted process encouraged by labor law. Employment property rights tend to be cumulative, commencing with basic constitutional rights, then adding those founded in statute, common law, and court opinions. The final components of the rights set are the property rights for covered employees and activities under labor law, and the rights in a collective bargaining agreement. The more traditional route for the diffusion of job property rights in the labor market has union-negotiated rights flowing to others via a competitive market or political process.

Recently the process of establishing job property rights was augmented, as individual employees won state court suits for wrongful termination, an instrumentality that did attain importance until the 1980s. An immediate consequence of these suits is the establishment of individual job property rights independent of unions and a reversal of a historical employment rights acquisition pattern. Rights not negotiated by unions are entering collective bargaining relationships and constitute a newer form of instrumentality for employees. However, because these employee property rights are derived from state court opinions they have geographically limited applications.

This article briefly describes the scope and nature of employee rights in nonunion and union shops in section two. Note is made of how case law affects property rights sets and how job rights obtained in unionized labor markets have been applied in nonunion workplaces. The third section of the article concerns enforcement costs, forums, and available remedies. Section four discusses the transference of individual property rights acquired by state court opinions to unionized employees. Throughout the article, limitations on the exercise of individual job rights are discussed, as well as the sources of these constraints. A review of public and employment law providing employee rights is beyond the scope of the current discussion.

THE NATURE OF EMPLOYEE RIGHTS

General Structure

Basic job property rights are defined by the employment relationship's form, which is either unionized, nonunion with concerted activity, or nonunion with individual activity. In the first two forms the National Labor Relations Act (NLRA) prohibits management from retaliating against members of employee groups who undertake actions directed toward improving employee compensation or certain job property rights. Being a federal statute, the NLRA limits management in the basis for employment decisions only when employing firms are engaged in or vitally affect interstate commerce. To have rights, employees must be undertaking a protected, concerted activity as a part of a labor dispute [14]. The NLRA does not provide employee property rights beyond the attempt to organize when individuals act alone or when employees engage in a prohibited activity such as a secondary boycott. Exempt from coverage are many small businesses whose role in contemporary labor markets is increasing in importance. Several occupations are also exempted; for example, in *Yeshiva University* the Supreme Court opined that faculty at private universities are managerial employee by virtue of their governance system and have no protected rights under the NLRA [15, 16].

In the third form of the employment relationship are found employees having formal employment contracts with a fixed term and those who are employed "at will." Individuals with explicit employment contracts may use contract law to

pursue enforcement of their job rights, if they have sufficient resources. Employees who are at-will face a greater burden in their suits because they must first establish a property right under one of the legal theories recognized by their state courts and then show a violation of that right to be entitled to compensation.

In at-will or nonunion environments, compensation and job-based property rights are unilaterally constructed by the employer. For most ordinary employees the hiring process has management screening applicants and making an employment offer on a take-it-or-leave-it basis; there is very little bargaining over compensation or job property rights, if any. The employee's satisfactory completion of a probationary period results in a "permanent" job and possibly some employment-related property rights. However, in at-will situations job property rights are severely attenuated and precarious as compared to unionized environments.

Individual Employee Rights in Nonunion Shops

In nonunion or open shops, management is empowered to undertake unilateral actions in most aspects of the firm's operations and employment relations. These actions, including termination and the modification of employment conditions or compensation, may be accomplished for a good, bad, or no reason and without notice. A good reason is synonymous with just or sufficient cause, and a bad reason equates to unfair, unjust, or illegal causes. Although either party may terminate an at-will relationship, employment is said to be at the sufferance of the employer because the power to control the workplace and working conditions is management's. The employee's job property rights, if any, are those unilaterally granted by management or in the four state-court-recognized exceptions to the employment at-will doctrine: implied contract, covenant of good faith and fair dealing, tort, and public policy [17].

The legal principles in implied contract suits are illustrated by *Toussaint,* where an oral promise of continued employment as long as he "did the job" was breached by termination [18]. When one contractual party interferes with the other's right to benefit from a contract, the implied covenant of good faith and fair dealing is violated. For example, in *Fortune* an employer attempted to escape paying already earned bonuses when an employee was discharged before the distribution date [19]. Employees who are successful in contract-based suits are awarded compensatory damages for losses incurred. In tort suits, courts have granted both compensatory and punitive damages for the breach of a duty independent of a contract. This exception's principles are presented in *Monge,* where an employee showed she was terminated for refusing to become personally involved with her superior [20]. Tort suits for battery, fraud, intentional infliction of emotional distress, negligence, and impairment of economic opportunity have succeeded in some states.

The legal principle in the public policy exception to employment at will is that employees cannot be required, as part of their job, to take actions injurious to the

public interest or against the public good. For example, employers may find themselves being held liable for monetary damages when they terminate employees for refusing to perform illegal acts or for reporting unlawful acts to the civil authorities. An early recognition of the public policy exception was in *Palmateer,* where an employee was awarded compensation for being terminated in retaliation for reporting a coworker's criminal activity: a "whistle-blower" property right.

In response to employee suits many employers now include a page in the employee handbook stating, or require their employees to sign a statement recognizing, the at-will nature of employment. These constructions are a clear recognition of management's unencumbered right to alter employment conditions or compensation and to terminate employees without cause or notice. The union shop counterpart of these constructions is an extensive management rights clause in the collective bargaining agreement. Typically, these clauses acknowledge management's exclusive and unilateral rights to introduce new methods or equipment, change products, remove bargaining unit work, and direct the work force. When individuals or unions clearly recognize unilateral managerial decision rights, they waive their job property rights. The existence and enforcement of rights waivers often complicate rather than simplify the Gordian knot of employment relations.

Concerted Rights in Nonunion Shops

Historically, employers were free to use terminations, blacklisting, yellow-dog contracts, and the criminal-conspiracy doctrine to inhibit union activity on the part of employees. With the passage of the NLRA, employees acting as a group were granted certain job rights irrespective of whether they are unionized. Under the NLRA terminations or changes in employment conditions must be based on causes other than protected, concerted activity [21]. Currently, employees have the right to seek changes in wages, improvements in employment conditions, or union representation without fear of managerial reprisals. Alterations to these basic property rights have been limited to changes in National Labor Relations Board (NLRB) policies, case law, and minor legislative fine-tuning since 1959.

Formal, enforceable applications of union-like job property rights in nonunion settings occurred when the courts reviewed and approved of the NLRB's interpretations of the NLRA's coverage. In two sets of cases the job property rights typically found only in union shops were extended to the nonunion workplace, and then rescinded. In the first set of cases, the common factual content dealt with truck drivers being disciplined for refusing to operate what they believed to be unsafe vehicles and reporting the safety infractions to state authorities. In *Alleluia Cushion* the courts, in their review of the NLRB's decision, approved of extending the coverage of the NLRA to individual employees acting alone [22]. The courts reasoned that the employee's motivation was a matter of common concern directly

related to employment, a type of mutual aid and protection. Later, in *Myers Industries,* the courts reversed on this issue, stating that individual activity was unprotected in matters of common concern to employees unless the implied or explicit consent of other employees could be demonstrated [23].

The second instance involved the extension of *Weingarten* [24] rights, the right of representation during the investigatory phase of disciplinary procedures, to nonunion work environments in *Materials Research* [25]. The reasoning employed by the courts was that having a coworker present provided a form of mutual aid and protection as provided by the NLRA. The courts subsequently reversed in *Sears, Roebuck,* based on the inability to identify a sole bargaining agent in the absence of a union [26, 27]. To be acting in the interests of others for mutual aid and protection is not sufficient to claim job property rights under the NLRA, and terminations may be in response to these employee actions. The only relief for the employee is obtainable through an individual state court action, assuming that state recognizes an applicable exception and the employee has sufficient resources to proceed.

Employee Property Rights in Union Shops

The main body of rights enjoyed by employees in union shops beyond those granted under the NLRA are specified in the labor agreement [28]. The union leadership, acting as the sole bargaining agent for union and nonunion bargaining unit employees, sets and determines the tradeoffs among bargaining objectives, and negotiates a labor agreement with management. Although one is tempted to consider the union as an instrumentality for obtaining improvements in compensation and employee property rights, the converse may also be true. For example, in *Prudential* a labor agreement clause waiving an employee's right to representation in the discipline process was found to be valid and enforceable [29].

Employee property rights in a union shop are the constraints on management's right to control business operations and comprise an imperfect reflection of the duty to bargain; when and where the duty to bargain exists, employees potentially have property rights. The *Borg-Warner, Fiberboard, First National Maintenance, and Otis Elevator II* decisions delineated the "core of entrepreneurial control" and the duty to bargain [30-33]. The three management decision categories set out by the courts are: 1) decisions related to the business's direction and with an indirect, attenuated impact on employment relations; 2) decisions that are almost exclusively an aspect of employment relations; and 3) decisions that have a direct impact on employment, but focus on economic profitability. Accordingly, decisions in category one are at the core of entrepreneurial control and belong exclusively to management, and those in category two are mandatory bargaining items. For issues falling in category three, a balance of equities and the amenability to resolution through collective bargaining jointly determine whether the issue will be included in the scope of the duty to bargain. For example, the decision to close

part of a business's operations is a mandatory item for negotiations only if union concessions could restore profitability. If a union's concessions would not have made a difference in a business decision based on profitability, management is required to bargain only over the closure's impacts, such as severance pay and preferential rehiring for laid-off employees. Quite a different reasoning appeared in *Darlington Mills,* wherein the right to completely close a business for any reason, including anti-union animus, was recognized [34]. Although employee property rights under the NLRA may be violated in partial and full closures, the employer can reap no future benefit from a complete closure. Thus, this NLRA-based employee job property right depends on whether a business closure is partial or complete and its purpose.

The duty to bargain extends to labor's and management's conduct in the execution of the collective bargaining agreement. An agreement's day-to-day application and interpretation requires an examination of the property rights' allocation and their potential enforcement through the grievance arbitration clause. Arbitrators recognize that labor agreements specify the parties' rights only up to a point. Of considerable import is the clarity, specificity, and prior interpretations of the agreement's language or past practices. Augmenting these factors are the bargaining histories of the firm and the industry.

ENFORCEMENT COSTS AND FORUMS

Individual Actions in Nonunion Shops

Individuals who are employed at will must sue in a state court to enforce their job property rights. The burden of verifying that a right exists in an internal labor market rule, policy, or procedure rests completely with the employee. Any enforcement costs associated with seeking a remedy for rights violations are again born by the employee. All policing, monitoring, and enforcement costs are born by the employee, absent the court-directed provision of attorney fees and costs.

In addition to these costs are prospective unemployment and job-search costs because an employee seeking remediation for a violation of a job property right is almost invariably terminated regardless of the outcome of the suit. Courts rarely go beyond monetary damages and order reinstatement in private sector, nonunion shops; in union shops reinstatement, with back pay, is common. Having sued their employer and lost their jobs, individuals soon discover that any reasonable applicant screening procedure will bring to light the litigation. Many firms are reluctant to hire litigious individuals as a risk-reduction strategy. In spite of these disincentives there was an increase in the number of state court actions seeking enforcement of individual job property rights during a period when union membership declined significantly.

Concerted Activity in Nonunion Shops

The specific rights established for employees under the NLRA provide for structured discussions of compensation, working conditions, organizational activity, and actions whose purpose is mutual aid and protection. When management retaliates against employees by basing an employment decision on these types of activities, employees or individuals acting for the employees may file an unfair labor practice complaint with the regional office of the NLRB. A representative of the general counsel will investigate, attempt to settle, and prosecute the complaint in a hearing before an administrative law judge, if necessary. The NLRB's role is to review the law judge's decision and award to maintain a consistent interpretation of the NLRA. Because the NLRB is enforcing a federal statute, employees do not incur direct policing or enforcement costs. In addition to monitoring costs, employees may incur unemployment costs while the complaint is processed, if the complaint is unsuccessful, or if a complaint is not filed. Given the cumbersome nature of the enforcement process, many employer unfair labor practices are not remedied and employees find themselves terminated.

The NLRA's statutory authority provides a federal forum to process unfair labor practice complaints and eliminates alternative employee forum choices. The *Garmon* preemption doctrine establishes the NLRB as the appropriate hearing body for all complaints on issues actually or arguably covered by the NLRA [35]. Whenever an individual's tort- or contract-based case has significant unfair labor practice elements, the preemption doctrine causes the case to be removed and heard under NLRB procedures. In *Richardson* this doctrine was applied to a state tort suit against both the employer and the law firm advising the employer in labor relations matters [36]. Being responsive to compelling state interests and the intent of national labor policy, the federal courts do not apply the preemption doctrine mechanically. However, state statutes and courts are effectively limited in scope to regulating disputes the NLRA does not cover.

Labor Agreement Enforcement Forums

When an employee attempts to enforce one of the job-related property rights specified in the labor agreement, that individual is engaged in protected, concerted activity [37]. However, the general practice is for the individual employee to bring the issue to the union; the union then proceeds with the grievance, with an arbitrator as the adjudicator of final resort. When there is a broad arbitration clause in the labor contract, an arbitrator has near-absolute authority in the application of the terms of the labor agreement. An arbitrator determines whether the issue is arbitrable, decides the grievance on its merits, and fashions a remedy. In the grievance process an arbitrator may also decide the extent of management's right to make unilateral decisions on noncontractual employment issues and its obverse, employee property rights.

For issues not addressed by the labor agreement or past practices, the question of the assignment and breadth of property rights arises. Typically, arbitrators employ the reserve or residual rights theory to answer questions on all rights conflicts emerging during the contract's term over issues not addressed during negotiations nor added by a midterm modification. Under the reserve rights doctrine employees have only those specific property rights ceded to them in the labor agreement. Management retains all other rights, even those not previously contemplated. When management intends to establish and exercise a new-to-the-relationship property right midterm, the duty to bargain requires management to notify the union and seek agreement, labor's sole property right in this instance. If agreement is reached in these negotiations, the new clause is appended to the labor contract. If not, the parties are at impasse, and management may unilaterally enforce the new rule that modifies job property rights. If the new rule had been bargained over during regular contract negotiations and not agreed to, most arbitrators would be reluctant to grant that right to either party. This reluctance has a greater potential impact on the employees' property rights than management's because the reserve rights doctrine allows management to develop strategies effectively claiming unassigned property rights [38]. In any event, management retains much of its right to modify employee job property rights even when unions are present.

In a union setting employees are unable to proceed with their own grievances due to the sole-bargaining-agent doctrine, which requires the union to represent all employees in the bargaining unit regardless of membership status. This doctrine forces individuals to initially approach the union with their grievances and effectively makes the union the only party that has the right to seek enforcement of employee job rights defined in the labor agreement. When the union declines to proceed, individuals may seek to enforce the provisions of the labor agreement [39]. Taken together, the sole-bargaining-agent doctrine and the *Vaca* decision, which provides unions with the ability to screen grievances, set the bounds on individual enforcement options for union-negotiated property rights.

Union shop employees also face restrictions on their forum choices when the grievance is also an unfair labor practice. The NLRB's deferral policy, fashioned by court opinions over a more than twenty-year history and stated in *United Technologies,* requires an arbitrator's ruling before the NLRB processes a complaint whenever there is dual coverage [40, 41]. This NLRB policy is designed to limit employee choice for the stated purposes of eliminating double jeopardy for management and shopping for a sympathetic forum by the employee. However, at least one federal appeals court has ruled that an employee's statutory rights may not be negotiated away in the interest of the collective good by this deferral policy. In *Taylor* the court disallowed deferral, stating that the NLRB retains the statutory duty to enforce the NLRA [42]. The court went on to say that the law of the shop is not the law of the land because different facts and standards of proof are used.

In contrast to the court's acceptance of arbitration outcomes as satisfying labor law infractions is the rejection of arbitration as satisfying public law violations. In both *Gardner-Denver* [43] and *Barrentine* [44] the courts said that employees have the right to a de nova court review of an arbitrator's decision whenever the grievance involves rights established by a public law, such as civil rights legislation. Individuals seeking to enforce a property right that exists both in the collective bargaining agreement and in federal public law may receive multiple hearings: first in arbitration, then in a court review of the proceeding's record, and lastly a new hearing if the court rejects the arbitrator's findings.

NEW RIGHTS FOR UNION MEMBERS

Historically, unions were charged with negotiating the final components of the job property right bundle for bargaining unit employees. Currently, the property rights and enforcement forums acquired by individuals in state court actions are being pursued by union shop employees. These property rights go beyond the federal statutes' definition of a labor dispute and supplement the job rights of employees covered by labor agreements. Further, the use of state courts expands the bargaining unit employee's choice set for enforcement forums. However, these new property rights appear in the context of and are limited by the NLRA preemption doctrine and deferral policy.

Two of the critical aspects of these new property rights are the right's independence of collective bargaining agreements (new rights) and its parallel existence (choice of forum). The courts, in permitting state court actions by union shop employees, have spoken to the independent existence of a job property right in disallowing preemption to the NLRA forum. For example, in *Romero* a New Mexico federal district court ruled that a tort action for intentional infliction of emotional distress, retaliatory discharge, and interference with contractual relations was not preempted even though a grievance procedure was available in a collective bargaining agreement [45]. Also, a California federal district court, reasoning oral contract rights were not created by nor based in the collective bargaining agreement, disallowed preemption in *Walton* [46].

These cases encompass the legal theories and principles set forth in three of the four exceptions to employment at will, but apply them in the union shop environment. The public policy exception to the at-will doctrine was addressed by the Ninth District Court of Appeals. In *Jackson* the court ruled state jurisdiction was not preempted in public policy cases because of the compelling state interest against discrimination in the workplace [47]. However, the court allowed preemption of tort and contract issues, reasoning these issues were within the labor contract's coverage for this specific case.

The courts have used the identical legal theories emerging in the preemption of state court action in their rulings on deferral to arbitration of unfair labor practice complaints. In *Hammontree,* the deferral to arbitration of individual,

noncontractual claims was deemed inappropriate; the individual did not request arbitration and the claim did not rest on a contractual matter [48]. The court reasoned the matter rested in labor law, and that the union discrimination contract issue was parallel to federal statutory rights. The court concluded the existence of federally granted rights could not be diminished by their parallel inclusion in the labor agreement.

Although the courts have not yet reached the question of whether a de nova review of arbitration outcomes over issues covered in a state statute is appropriate, their reasoning to date strongly suggests this forum will be made available to union shop employees. On one hand, state courts have disallowed preemption when the union member wished to proceed in state courts rather than through the process in the collective bargaining agreement. On the other hand is the court-enunciated policy of a de nova review of arbitration opinions for issues that touch public law. Employees in the bargaining unit may proceed on their own or use arbitration, and when arbitration fails, they may be able to access the courts for a second hearing on their grievance.

A new aspect of the application of the preemption doctrine is emerging as states enact wrongful discharge acts; at issue is when in time is preemption appropriate. In *Deeds* the Montana Supreme Court, citing a provision of state law, ruled that federal preemption was not operative until another state or federal remedy took effect [49]. The case is interesting because union employees, discharged for strike misconduct, pursued a state court action under Montana's Wrongful Discharge and Employment Act, even though unfair labor practice charges under the NLRA had been filed six months earlier and were still pending.

CONCLUDING OBSERVATIONS

Traditional union shop property rights, including items covered, sources in law, enforcement procedures, enforcement costs, hearing forums, and available remedies, have been augmented by individual employee successes in state courts. The incentive for union membership is declining as employee reliance on unions for job property rights declines and individual enforcement opportunities, which augment the union-dominated grievance procedures, expand while other explanatory factors for the decline in unionization remain. Unions, legally required to operate in the confines of the labor agreement's grievance clauses and the NLRA, often appear unresponsive to current labor market problems and options. Taken in total, these factors deny unions a leadership role and diminish the use of concerted activity in developing and enforcing employee property rights.

Key differences in the property rights, enforcement forums, cost magnitudes, and cost allocations continue for union and nonunion environments. The application of individual property rights has a very different meaning in a union shop because of the labor agreement grievance procedures and the possibility for multiple hearings on public policy grievances. A distinct advantage for the union

shop employee is found in the de nova arbitration review policy for matters that touch on public law. Because the courts have allowed second hearings on these matters, this strongly suggests an analogous treatment for matters covered by state public law, including public policy issues.

With unions defined as sole bargaining agents, union shop employees are subject to limitations on the exercise of their individual property rights. On the positive side, grievance costs are borne by both the union and the management, yielding an enforcement cost advantage over the nonunion shop for employees. On the negative side, union shop employees are channeled into the labor contract's enforcement structure, losing their forum choice. Another significant difference between union and nonunion shops is found in the courts' reluctance to order reinstatement in nonunion environments, while arbitrators routinely issue make-whole (reinstatement) remedies. The resultant unemployment and reemployment costs incurred by individuals pursuing rights in nonunion workplaces may be substantial. Although individual property rights enforcement has been limited, being derived from state court opinions and discouraged by relatively high personal cost, union shop employees have enjoyed a gain in property rights at no additional negotiation costs. As the job property rights set for all employees expand and protection for concerted activity remains unaffected or declines, the net advantage to belonging to a union declines. The continuance of the trend in state court decisions on individual job property rights bodes ill for union membership levels.

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12. R. B. Freeman and J. Pelletier, The Impact of Industrial Relations Legislation on British Union Density, *British Journal of Industrial Relations, 28,* pp. 141-164, July 1990.
13. A. B. Krueger, The Evolution of Unjust Dismissal Legislation in the United States, *Industrial and Labor Relations Review, 44,* pp. 644-660, July 1991.
14. A labor dispute is defined in the law as a controversy over compensation, conditions of employment, organization, or representation.
15. Loss of employee status removes individuals from NLRA coverage and has resulted in management's altering the retirement programs of the already retired.
16. *Yeshiva University,* 444 US 672 (1980).
17. Employees have also succeeded in legal actions for aspects consequent to the termination, such as defamation. See *Lewis v. Equitable Life Assurance Society of the United States,* 389 NW 2d 876 (1986).
18. *Toussaint v. Blue Cross and Blue Shield,* 292 NW 2d 880 (1980).
19. *Fortune v. National Cash Register Co.,* 364 NE 2d 1251 (1977).
20. *Monge v. Beebe Rubber Co.,* 316 A. 2d 549 (1974).
21. Generally available private sector employee rights to concerted activity were established by the Norris-LaGuardia Act, 47 Stat. 70, Wagner Act, 49 Stat. 449 and the Taft-Hartley Act, 136 Stat. 136, 73 Stat. 519.
22. *Alleluia Cushion Co., Inc.,* 221 NLRB 999 (1975).
23. *Myers Industries,* 286 NLRB 456 (1986).
24. *Weingarten Inc.,* 420 U.S. 251, 88 LRRM 2689 (1975).
25. *Materials Research Corp.,* 262 NLRB 1010 (1982).
26. *Sears, Roebuck & Co.,* 274 NLRB 55 (1985).
27. On February 6, 1986 then-NLRB General Counsel Rosemary M. Collyer issued a memorandum stating the enforcement policy for concerted activity: other employees must participate in or approve of individual actions before protection is afforded by the NLRA.
28. Title III of the NLRA provides for suits in federal court to enforce the terms of a labor agreement, including the grievance arbitration clause. It is the grievance arbitration clause that enforces the other terms of the labor agreement.
29. *Prudential Ins. Co. v. NLRB,* 661 F2d 398, CA5 (1981).

30. *Borg-Warner,* 356 US 342 (1958).
31. *Fiberboard Paper Products Corporation v. NLRB,* 379 US 203 (1964).
32. *First National Maintenance v. NLRB,* 452 US 666 (1981).
33. *Otis Elevator II,* 269 NLRB 891 (1984).
34. *Textile Workers v. Darlington Mfg. Co.,* .380 U.S. 263, 269 (1965).
35. *San Diego Building Trades Council v. Garmon,* 37 LC 65,367, US (1959).
36. *Richardson v. Kruchko & Fries,* 121 LC ¶ 10,184.
37. The general rule applied when an employee is given a directive that conflicts with management's authority as defined by the labor agreement is to work now and grieve later.
38. A complicating factor in claiming unassigned rights is the existence of a joint bargaining waiver in the labor contract that requires agreement for any midterm modification, a zipper clause.
39. The exception to these limitations, stated in *Clayton v. Automobile Workers* occurs when an employee can demonstrate union hostility, nonfeasance, or malfeasance, 451 U.S. 679 (1981).
40. The rules for accepting the arbitrator's opinion and award in contract enforcement as also satisfying the unfair labor practice complaint require the arbitrator's opinion to directly dispose of the unfair labor practice and a "fair and proper" hearing.
41. *United Technologies Corp.,* 268 NLRB No. 83 (1984).
42. *Taylor v. NLRB,* CA 11, No. 85-3220, 104 CCH Labor Cases ¶ 11,790.
43. *Alexander v. Gardner-Denver Co.,* 415 US 36 (1974).
44. *Barrentine v. Arkansas Best Freight System,* 450 US 728 (1981).
45. *Romero v. Hanger-Silas Mason, Inc.,* DC NM, 118 LC ¶ 56,609.
46. *Walton v. UTV of San Francisco, Inc.,* DC Cal, 121 LC ¶ 56,890.
47. *Jackson v. Southern California Gas Co.,* CA-9, 112 LC ¶ 11,390.
48. *Hammontree v. NLRB,* 114 LC ¶ 11,827.
49. *Deeds v. Decker Coal Co.,* 118 LC ¶ 56,611.

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