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Constitutional Law--Fair Employment Practices Legislation--Religion as a Bona Fide Qualification for Employment (American Jewish Congress v. Carter, 190 N.Y.S.2d 218 (Sup. Ct. 1959))

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RECENT DECISIONS

CONSTITUTIONAL LAW—FAIR EMPLOYMENT PRACTICES LEGISLATION—RELIGION AS A BONA FIDE QUALIFICATION FOR EMPLOYMENT.—The State Commission Against Discrimination permitted the Arabian-American Oil Company to require that an applicant for employment fill out a visa for travel in Saudi Arabia when it appeared reasonable that such applicant would be required to work there.[1] Saudi Arabian policy excludes all Jews irrespective of citizenship and anyone requesting a visa must state his religion as a prerequisite. On application for an order annulling the Commission's determination under Article 78 of the New York Civil Practice Act, the Court *held* any inquiry into religion by a non-religious organization was violative of both the "spirit and letter of the State's anti-discrimination law," [2] and under no circumstances could constitute a bona fide occupational qualification.[3] *American Jewish Congress v. Carter,* 190 N.Y.S.2d 218 (Sup. Ct. 1959).

The term "civil rights" ordinarily includes all those rights of an individual which depend upon the laws of the community of which he is a member.[4] It embraces rights due one citizen from another with a civil cause of action available if they are denied.[5] Civil rights depend on the constitution or statutes for their enjoyment and have been distinguished from natural rights which exist per se regardless of law, until their exercise is prevented by legal fiat.[6] Civil rights

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[1] The following is a statement made by Commissioner Carter: "The ruling of the commission in this case is an application of the consistent view of this agency first made in connection with Saudi Arabia in 1950. This ruling held that in matter affecting the national security S.C.A.D. [State Commission Against Discrimination] will be guided by statements of the Federal Government as to the best interests of the United States. It further held that when a job applicant must travel to a foreign country to perform a job, S.C.A.D. will permit the employer to determine whether the applicant can satisfy the entrance requirements as a prerequisite to employment." N.Y. Times, July 17, 1959, p. 23, col. 4.

[2] N.Y. EXECUTIVE LAW §§ 290-301 (Supp. 1959).

[3] N.Y. EXECUTIVE LAW § 296(1)(c) (Supp. 1959). "It shall be an unlawful employment practice: For any employer . . . to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color or national origin . . . unless based upon a bona fide occupational qualification." *Ibid.*

[4] Bowles v. Habermann, 95 N.Y. 246, 247 (1884).

[5] Commonwealth v. Shimpeno, 160 Pa. Super. 104, 50 A.2d 39, 43 n.2 (1946).

[6] Sult v. Gilbert, 148 Fla. 31, 3 So. 2d 729, 731 (1941).

include the right of every citizen to seek redress of wrongs and the enforcement of his rights in the courts.[7]

The right of each citizen to all the privileges and immunities of every other citizen was incorporated in the United States Constitution.[8] The fourteenth amendment specifically prohibits state legislation and action of every kind which denies a person life, liberty or property without due process of law, or which prevents his equal protection under the laws. Until appropriate government action shall declare that the right to employment without unfair discrimination is a civil right, it has been strongly contended that Congress cannot effect the elimination of unfair practices without seriously impinging upon states' rights.[9]

Inroads were made in this area, however, during the Second World War when it was obvious to the federal government that the available manpower for defense work was being seriously limited by unfair discrimination. To break down this national defense threat and to eliminate the contradiction between democratic principles and unfair discrimination in fact, the Committee on Fair Employment Practice was created by executive order.[10] Equal employment opportunities were afforded all *qualified* persons working on government contracts paid for from public funds. Such persons were entitled to a fair and equitable treatment in all aspects of employment.[11] The method of executive order served also to assure fair employment practices within the federal establishment.[12]

The New York State Constitution, in addition to the above federal action, extends a guarantee against discrimination in civil rights to *all persons* within the state.[13] It also affords equal protection and remedies to all.[14] As a fulfillment of the provisions on civil rights in the state constitution, the opportunity to obtain employment without discrimination because of race, creed, color or national origin

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[7] State v. Powers, 51 N.J.L. 432, 17 Atl. 969, 970 (Sup. Ct. 1889).

[8] U.S. CONST. art. IV, § 2.

[9] For discussion of aspects of this problem, see *Hearings on S. 984 Before a Subcommittee of the Senate Committee on Labor and Public Welfare,* 80th Cong., 1st Sess. 645-749 (1947). The proposed bill declared the right to employment without discrimination because of race, religion, color, national origin or ancestry to be a civil right of all the people of the United States. *Id.* at 805. This bill was never enacted.

[10] Carter, *Practical Considerations of Anti-Discrimination Legislation—Experience under the New York Law Against Discrimination,* 40 CORNELL L.Q. 40-41 (1954).

[11] Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941).

[12] Exec. Order No. 9980, 13 Fed. Reg. 4311 (1948). This applies to the Post Office, Veterans Administration and executive agencies in general.

[13] N.Y. CONST. art. I, § 11. "No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person, . . . firm, corporation, or institution, or by the state or any agency or subdivision of the state." *Ibid.*

[14] *Ibid.*

has been declared a civil right.[15] State policy considers discrimination repugnant to its constitution, a threat to the rights and proper privileges of its inhabitants and a menace to the foundations of a free democratic state.[16]

It has been said that since every man has a natural right to choose for whom he will work and conversely every man has a right to determine whom he will hire, state action should be discouraged when it interferes with private employment.[17] The United States Supreme Court has ruled that state action denying the right to work for a living goes to the essence of personal freedom and opportunity secured by the equal protection guarantee of the fourteenth amendment.[18] Conversely, state fair employment practices legislation which guarantees non-discrimination in private employment has been upheld as not violative of the due process and equal protection clauses.[19]

However, early state and municipal attempts to eliminate unfair discrimination in areas including employment proved ineffective because enforcement depended on prosecution by local officials or civil action by the one claiming such discrimination.[20] This problem was overcome by establishing an administrative agency to evaluate complaints by peaceful settlement so that recourse to the courts and contempt proceedings would be required only in extreme cases.[21] New York set in operation its State Commission Against Discrimination to provide equal employment opportunities by creating a community attitude favoring anti-discrimination measures.[22] In this way expert treatment of the complaint could be afforded without the expenses of a civil suit.

The instant case is significant although the Court's reversal of the Commission's decision still does not afford Jews an opportunity to work in Saudi Arabia. The Court admits an exemption when any other decision would interfere with the functioning of a *religious* organization, but it denies that any such exemption can extend to

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[15] N.Y. EXECUTIVE LAW § 291.

[16] N.Y. EXECUTIVE LAW § 290 (Supp. 1959).

[17] See, *e.g.*, People v. Chicago, M. & St. P. Ry., 306 Ill. 486, 138 N.E. 155 (1923).

[18] Truax v. Raich, 239 U.S. 33, 41 (1915).

[19] Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945). New York has such legislation.

[20] KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS 30, 115-21 (1950).

[21] N.Y. EXECUTIVE LAW §§ 295, 298 (Supp. 1959).

[22] N.Y. EXECUTIVE LAW §§ 290, 293-95 (Supp. 1959). Similar agencies have been established and fair employment practices legislation enacted in: COLO. REV. STAT. ANN. § 81-19-3 (1953); CONN. GEN. STAT. § 31-123 (1958); KAN. GEN. STAT. ANN. § 44-1003 (Supp. 1957); MASS. ANN. LAWS ch. 6, § 56 (1952); MICH. STAT. ANN. § 17.458(5) (1957); MINN. STAT. ANN. § 363.05 (1957); N.J. REV. STAT. § 18:25-1 (Supp. 1957); N.M. STAT. ANN. § 59-4-6 (1953); ORE. REV. STAT. § 659.040 (1957); PA. STAT. ANN. tit. 43, § 956 (1952); R.I. GEN. LAWS ANN. § 28-5-8 (1956); WIS. STAT. ANN. § 111.31 (1957).

cover situations such as this.[23] As a consequence of the decision, if the Aramco Oil Company hires engineers in New York, it must employ them without knowing whether it can use them in its oil fields in Saudi Arabia. It may thus be argued that the Court is forcing the company to hire men it may not be able to use or to discontinue its contract with Saudi Arabia.[24] Perhaps of more significance is the fact that the holding still does not open employment opportunities to Jews, particularly if performance can only take place in Saudi Arabia.

The Court is setting up an absolute rule: *there can be no bona fide qualification of religion for employment in a non-religious organization.*[25] It has interpreted the state anti-discrimination statute as severely limiting the area of the bona fide qualification exemption. Even in the senate resolution for the elimination of discrimination cited by the Court, such attempts at elimination are modified by "reasonable effort" in dealing with foreign nations.[26] In the past, state fair employment practices commissions, including that of New York, have interpreted "bona fide occupational qualification" to include those attributes necessary for the proper performance of the work itself although they have excluded such grounds as possible employee friction, loss of customer good will or a traditional national or religious atmosphere in a business.[27]

The rule as established in the instant case is based on the strong public policy of New York, although at the time the case was being argued a State Department official was reported in the newspapers to have said:

> [A]ny finding . . . which would compel Aramco to employ persons of the Jewish faith in Saudi Arabia . . . would most certainly prejudice the company's operations in that country and would probably adversely affect the United States' interests there as well.[28]

Traditionally, power over external affairs is not shared by the states but is vested exclusively in the national government.[29] State policy cannot be permitted to alter or defeat national foreign policy since it would "imperil the amicable relations between governments and vex the peace of nations." [30] It would seem, however, that the failure of the State Department to take any direct action with respect to the Aramco situation runs contra to the position as originally announced.

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[23] American Jewish Congress v. Carter, 190 N.Y.S.2d 218, 221 (Sup. Ct. 1959).

[24] The principal asset of Aramco is an exclusive agreement with King Saud to exploit Saudi Arabian oil. N.Y. Times, July 19, 1959, § 4, p. 2, col. 6.

[25] American Jewish Congress v. Carter, *supra* note 23, at 221.

[26] American Jewish Congress v. Carter, *supra* note 23, at 222.

[27] See, *e.g.*, N.Y. REPORT OF PROGRESS OF STATE COMMISSION AGAINST DISCRIMINATION 47 (1950).

[28] N.Y. Times, July 19, 1959, § 4, p. 2, col. 7.

[29] United States v. Pink, 315 U.S. 203, 233 (1942).

[30] Oetjen v. Central Leather Co., 246 U.S. 297, 304 (1918).

By this decision the Commission must now adopt the absolute rule set up by the Court which restricts the flexibility existing under earlier Commission decisions. The Commission's original determination in the Aramco matter was to prevent unfair discrimination in Aramco's New York offices but to permit this discrimination where a visa is necessary for an applicant to go to Saudi Arabia. It will be interesting to observe whether the State Department will take any affirmative action, if and when an appeal is taken in this case.

CONSTITUTIONAL LAW—GRAND JURY—ASSERTION OF PRIVILEGE AGAINST SELF-INCRIMINATION NOT REQUIRED OF PROSPECTIVE DEFENDANT.—Defendant was subpoenaed to appear before a grand jury, and after being examined, was indicted for conspiracy and for giving bribes to public officers. Pursuant to Section 149 of the Judiciary Law,[1] he moved directly to the Appellate Division, Third Department, which dismissed the indictment on the ground that he had acquired immunity from prosecution for the crime to which he had been compelled to testify, even though Section 2447 of the New York Penal Law [2] provides for a grant of immunity to a witness *only* when he has claimed his privilege against self-incrimination. Defendant had at no time claimed his privilege. The Court of Appeals affirmed, *holding* that since defendant was before the grand jury as a prospective defendant, and not merely as a witness, he could not be compelled to testify at all. Since the defendant had been compelled to testify, his privilege against self-incrimination had been violated, and, consequently, the indictment predicated on his testimony was void. The Court of Appeals specifically left open the question whether the violation of defendant's constitutional privilege also afforded him an immunity from subsequent prosecution. *People v. Steuding*, 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959).

Section 2447 of the Penal Law was enacted to correct some of the deficiencies found in statutes which preceded it.[3] These deficiencies were, for the most part, products of two conflicting philosophies; on the one hand there prevailed the idea that "no person . . . shall be compelled in any criminal case to be a witness against him-

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[1] N.Y. JUDICIARY LAW § 149(2) (Supp. 1959) provides: "A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, or, at the option of the moving party, at a term of the appellate division of the supreme court in the department in which such . . . term is being held."

[2] N.Y. PENAL LAW § 2447 (Supp. 1959).

[3] See 1953 LEG. DOC. No. 68, THIRD REPORT, N.Y. STATE CRIME COMMISSION 14-15 (1953).