

Civil Rights Law--Proposed Amendment--Employment Discrimination on Account of Race, Creed or Color

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CURRENT LEGISLATION

Editor—WILLIAM J. CAHILL

CIVIL RIGHTS LAW—PROPOSED AMENDMENT—EMPLOYMENT DISCRIMINATION ON ACCOUNT OF RACE, CREED OR COLOR.—In the 5th Amendment to the Constitution of the United States, a guaranty is made to the individual that he shall not be deprived of life, liberty or property without due process of law. The 14th Amendment, expressly forbids a state from so depriving an individual of life, liberty or property. What receives protection within the meaning of "life, liberty or property" was interpreted in the case of *Allgeyer v. Louisiana*,¹ as follows:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

In accord with the latter part of the foregoing quotation, the courts recognize the right of the individual to freely choose any lawful pursuit² and, for the purpose of enabling him to bring to a successful conclusion such profession, the right to freely contract.³ Both are inalienable rights protected by the guaranty of personal liberty and property. Among the inalienable rights of every citizen are found the rights to freely contract for the acquisition of prop-

¹ 165 U. S. 578, 589, 17 Sup. Ct. 427, 429 (1897).

² *People v. Marx*, 99 N. Y. 377, 386, 2 N. E. 29, 52 Am. Rep. 34, wherein the court, per Rapallo, J., said, "Among these, no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit." See *People v. Hawkins*, 157 N. Y. 1, 8, 51 N. E. 257 (1898).

³ *Adkins v. Children's Hospital*, 261 U. S. 525, 545, 791, 43 Sup. Ct. 394 (1923), "That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause is settled by the decisions of this court, and is no longer open to question"; *Chicago, Burlington & Quincy R. Co. et al. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259 (1911); *Lochner v. People*, 198 U. S. 45, 25 Sup. Ct. 539 (1905); *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586 (1895); *Wolff Packing Co. v. Ct. of Ind. Rel.*, 262 U. S. 522, 43 Sup. Ct. 630 (1922).

erty;⁴ to set the terms and the price at which his private property will be disposed of;⁵ to invest his money in any lawful enterprise;⁶ and, finally, to fix the terms at which he will hire or be hired.⁷ Quite obvious is the necessity of the freedom of the individual in the above respects to insure both to himself and the nation, prosperity and success.

Although freedom of contract is the general rule, a limitation is placed upon it by the valid exercise of police power.⁸ It is elementary that the use of one's rights be restricted to a use not in conflict with the rights of others. An enactment under the exercise of police power, abridging the right to contract, to be valid must have a reasonable tendency to promote the public health, safety, morals or welfare,⁹ exceptional circumstances necessitating the act for the benefit of the public health, safety, morals or welfare.¹⁰ However, a purely aesthetic purpose is not sufficient justification, and personal rights and private property may not be so invaded under the guise of police power.¹¹ The Constitution represents the supreme law of the land, and the restraints which it imposes must not be exceeded by any arbitrary interference with personal rights.¹² No conflict exists between the individual's right of freedom of contract and the state's right to enact such legislation as is a valid exercise of police power,¹³ but to be such, that power is required, when exer-

⁴ See *Coppage v. Kansas*, 236 U. S. 1, 14, 446, 35 Sup. Ct. 240 (1915); *People v. Hawkins*, *supra* note 2.

⁵ *People v. Hawkins*, *supra* note 2, 7. O'Brien, J., writing in that case, stated that, "A law which interferes with property by depriving the owner of the profitable and free use of it, or hampers him in the application of it for the purposes of trade or commerce, or imposes conditions upon the right to hold or sell it, may seriously impair its value, against which the Constitution is a protection." *Tyson & Bro. et al. v. Banton*, 273 U. S. 418, 47 Sup. Ct. 426 (1927).

⁶ Concurring opinion of Mr. Justice Brower, *Northern Securities Co. v. United States*, 193 U. S. 197, 361 (1904).

⁷ *Adkins v. Children's Hospital*, *supra* note 3; *Frisbie v. United States*, *supra* note 3; *Coppage v. Kansas*, *supra* note 4; *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 42 Sup. Ct. 516 (1922); *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277 (1908); *Hitchman C. & C. Co. v. Mitchell et al.*, 245 U. S. 229, 38 Sup. Ct. 65 (1917).

⁸ *Ibid.*; *Liberty Warehouse Co. v. Burley Tobacco Growers Co.-Op. Ass'n*, 276 U. S. 71 (1928); *Lochner v. New York*, *supra* note 3.

⁹ *Ibid.*; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 34 Sup. Ct. 612 (1914); BLACK, CONSTITUTIONAL LAW, p. 424; WILLOUGHBY, THE CONSTITUTION, Vol. II, p. 1233.

¹⁰ *Tyson & Bro. et al. v. Banton*, *supra* note 5; *Adkins v. Children's Hospital*, *supra* note 3; *Wolff Packing Co. v. Ct. of Ind. Rel.*, *supra* note 3.

¹¹ *Adkins v. Children's Hospital*, *supra* note 3; *Wolff Packing Co. v. Ct. of Ind. Rel.*, *supra* note 3; *City of Syracuse v. Snow et al.*, 123 Misc. 568 (1924).

¹² *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co. et al.*, *supra* note 8; *In the Matter of Jacobs*, 98 N. Y. 98, 50 A. R. 636 (1885).

¹³ *Allgeyer v. Louisiana*, *supra* note 1; *Frisbie v. United States*, *supra* note 3.

cised, to have a substantial relation to the furtherance of the public health, safety, morals or welfare.

Recently in the New York Legislature a bill, providing

"that it shall be unlawful for any person, firm or corporation, or for any officer, agent or employee thereof, to refuse to employ any person in any capacity in the business of such person, firm or corporation, on account of race, creed or color of such person seeking such employment,"¹⁴

was introduced. For its objective the bill has the procuring of the social equality of all individuals in their quest for employment. Can that objective be justified at the expense of an abridgement of the right to contract, a constitutional right? Freedom of absolute choice of an employee is to be denied the employer thereby, for no consideration can be given by him to the applicant's race, color or creed. The proposed bill as a prospective invader of the constitutional rights of the individual must come within the valid exercise of police power or failing that, it is unconstitutional.

For the promotion of the public welfare and safety, the regulation of junk dealers¹⁵ and banking concerns,¹⁶ the licensing of vendors of cigarettes,¹⁷ and dealers in corporate or quasi corporate securities,¹⁸ the requiring a railroad to remove a bridge and to replace it with a larger bridge so as to permit the widening of a creek for drainage purposes¹⁹ and to maintain suitable crossings across the railroad right of way together with ditches and drains along each side of its roadbed²⁰ and the prohibiting the maintenance of pool rooms²¹ have been justified. The bill does not in any way aid the public welfare or safety nor does it prohibit or regulate a dangerous trade or the making of a contract *malum per se*.

Protection of the public health necessitated the limiting of hours of employment in hazardous occupations,²² the limiting of the hours of employment of women²³ and the passing of state prohibition acts.²⁴ No claim whatever can be made that the public health is here in-

¹⁴ Assembly Pr. A. 373, Introduced January 20th, 1932.

¹⁵ *Rosenthal v. New York*, 226 U. S. 260, 33 Sup. Ct. 27 (1912).

¹⁶ *Noble State Bank v. Haskell et al.*, 219 U. S. 104, 31 Sup. Ct. 186 (1911).

¹⁷ *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633 (1900).

¹⁸ *Hall v. Geiger Jones Co.*, 242 U. S. 539, 37 Sup. Ct. 217 (1870).

¹⁹ *Chicago B. & O. R. Co. v. Illinois ex rel. Grimwood et al.*, 200 U. S. 561, 26 Sup. Ct. 341 (1905).

²⁰ *Chicago & A. R. Co. v. Tranbarger*, 238 U. S. 67, 35 Sup. Ct. 678 (1915).

²¹ *Murphy v. People*, 225 U. S. 623, 32 Sup. Ct. 697 (1912).

²² *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383 (1898).

²³ *Riley v. Massachusetts*, 232 U. S. 671, 34 Sup. Ct. 469 (1914); *Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324 (1908).

²⁴ *Mugler v. Kansas*, 123 U. S. 123, 8 Sup. Ct. 273 (1887).

volved. Neither does it deal with the regulation of interstate commerce²⁵ or the prevention of monopolies.²⁶

A business affected with a public interest because of its quasi public nature, is subject to reasonable regulation. For that reason, the regulation of hours of labor of municipal or state employees,²⁷ of contracts of fire insurance companies,²⁸ and of the rates to be charged the public by public service corporations have been held to be a reasonable exercise of police power.²⁹ Such an enactment is Section 40 of the Civil Rights Law of the State of New York,³⁰ providing for equal rights in places of public accommodation and forbidding owners thereof from refusing admission to any person because of race, creed or color. That all men are equal is the theory behind the foregoing section as well as the bill, but in the former the theory is applied solely to businesses devoted to a public use, whereas, the latter goes much further and would apply to both private and public businesses, a most vital distinction. Seeking the equality of employees, the act would result in inequality between employer and employee, in that the employer would not have the same freedom of contract as the employee, who is not forbidden to discriminate against an employer because of race, creed or color and, as such, it is an arbitrary interference with the right to contract.³¹

The constitutionality of Civil Rights Law Sec. 40 was upheld in *People v. King*.³² In that case the defendant, an owner of a skating rink, was fined for refusing admission to some colored persons. It was pointed out by the court that the quasi public nature of that business permitted the reasonable curtailment of the owner's right to contract and went on to say that

"the statute does not interfere with private entertainments or prevent persons not engaged in the business of keeping a place of public amusement from regulating admission to

²⁵ *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164 (1910).

²⁶ *Central Lumber Co. v. So. Dakota*, 226 U. S. 157, 33 Sup. Ct. 66 (1912).

²⁷ *Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124 (1903).

²⁸ *German Alliance Ins. Co. v. Lewis*, *supra* note 9.

²⁹ *Wilcox et al. v. Consolidated Gas Co.*, 212 U. S. 19 (1909).

³⁰ A new section to the Civil Rights Law was passed on March 16th, 1932, to be known as Section 40a. It provides that no inquiry may be made as to the religion or religious affiliations of persons seeking employment in the public schools. Although it appears to be similar to the bill, there is a vast difference since the section invades no individual rights and applies solely where government is the employer.

³¹ *Adair v. United States*, *supra* note 7. In discussing employment contracts the court there said that, "it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person, in the course of his business and against his will to accept or retain the personal services of another, or to compel any person against his will, to perform services for another."

³² 110 N. Y. 418, 18 N. E. 245, 1 L. R. A. 293 (1888).

social, public or private entertainments given by them as they deem best, nor does it seek to compel social equality."

Had it done so, the decision would have been otherwise. But, social equality in a limited narrow sense is the very end which the proposed section would attain.

Were the bill to deal solely with businesses of a public nature, it still unreasonably interferes with personal rights and should be condemned. That a business is devoted to a public use does not deprive the owner of all control of it,³³ for no distinction can be made between the hiring of employees for a public business and for a private business. The right of one is as personal as the right of the other and possessing the same constitutional protection.

The bill is an unlawful interference with property rights, against which the constitution affords a guard. To permit this bill to become law, would be a serious attack upon a sound business policy. In a contract there must be a meeting of the minds, a mutual assent to the terms.³⁴ Harmony between employer and employee forms the foundation for a prosperous business, public or private, and the lack of it presents a serious barrier to success. But how can there be assent to the contract if the employer has any objection whatever to the applicant, and how can there be harmony in a forced, undesired relationship?

Any discrimination because of race, creed or color would be barred. Is it not overlooking the fact that they often play an important part in the carrying on of a business, and that even at times it becomes a necessity to have an employee of a particular race or color or creed? Imagine the handicap of one of foreign extraction selling articles in a foreign settlement of a nationality different from his own. Nor should it depend solely on necessity. Any preference an employer has, irrespective of whether it be logical, necessary or otherwise, ought not to be denied him. It is a private affair, in which outsiders have no right.³⁵ Suppose a hotel has a preference for bell hops of the colored race, and, wishing to maintain uniformity, refuses to hire one of the white race, by the terms of this bill the hotel, acting so, would subject itself to penalization. Such a situation manifestly shows the unreasonableness of the bill, unjustified by any advantage to public health, safety, morals or welfare.

Employment contracts should be regarded as sacred things, having the attribute of the greatest freedom and requiring the strictest

³³ *Wolff Packing Co. v. Ct. of Ind. Rel.*, *supra* note 3. A regulation giving to a commission to determine the amount of wages to be paid in certain trades and prohibiting the use of any other wage was there held unconstitutional. Chief Justice Taft at p. 539 said, "To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner."

³⁴ *WILLISTON ON CONTRACTS* (1920), Vol. I, Sec. 18, p. 17.

³⁵ *Adair v. United States*, *supra* note 7. See note 31.

caution to be used in placing any limitation upon them, and such limitation to be justified only in the most exceptional cases, such as the hours of labor in hazardous employments and the hours of labor for women, and so the courts have considered them.³⁶ But, even in those cases, the choice of the individual of his employee is unaffected, for the regulation merely goes to a part of the contract. An enactment which gave to a board the determination of the minimum wage to be paid to women employees, and making it unlawful for employers to hire at a smaller wage, was declared unconstitutional in the case of *Adkins v. Children's Hospital*. Speaking of employment contracts, the court in that case said:

"Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining."³⁷

Quoted in the same opinion was the following from *Adair v. United States*:

"The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell. * * * In all such particulars the employer and employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."³⁸

Any law which would invade the right to contract so unreasonably as this bill would and which would be so detrimental to business, without adding anything to the public health, safety, morals or welfare, can not be justified merely because it has an aesthetic aim, which in this instance is an imperfect social equality.

Should the bill be passed, it would have little if any effect. A refusal to admit to a public accommodation on grounds not based on race, creed or color is not prohibited by Civil Rights Law, Sec. 40.³⁹ An intoxicated person may rightfully be excluded. So too, under the proposed bill only discrimination on account of race, color or creed is forbidden. There is, for example, no penalty if the

³⁶ *Coppage v. Kansas*, *supra* note 4; *Adair v. United States*, *supra* note 7; *Adkins v. Children's Hospital*, *supra* note 3.

³⁷ *Supra* note 3, 545. A case similarly holding the determination of wages by a commission to be unconstitutional is *Wolff Packing Co. v. Ct. of Ind. Rel.*, *supra* note 3.

³⁸ *Supra* note 7, 174.

³⁹ *Grannan v. Westchester Racing Ass'n*, 153 N. Y. 449, 47 N. E. 896 (1897).

employer refuses to hire and gives as his reason, lack of ability of the applicant. Yet that very employer might not be hiring because of race, color or creed but there is no reason other than the employer who is the judge of the ability of the applicant. Nor need the employer give any reason if he did hire and immediately thereafter discharged the employee.⁴⁰ As a result, it would seem that unless the employer expressed discrimination because of the applicant's race, color or creed, there would be little efficacy to the act. That the convictions under such a statute would be few indeed is quite evident.

GEORGE J. SCHAEFER.

THE "YELLOW DOG" CONTRACT.—The campaign waged by organized labor on the so-called "yellow dog"¹ contract gained legislative sanction in 1887, when the New York Legislature passed a statute making it a misdemeanor for "any * * * employer * * * (to) coerce or compel any * * * employee to enter into any agreement * * * nor to join or become a member of any labor organization, as a condition of such person securing employment, or continuing in the employment of any such employer."²

Similar statutes were passed in fourteen states, and Congress not only imposed a similar restriction on interstate carriers but in addition forbade discrimination against employees by reason of their membership in labor unions.³

These attempts to make use of criminal sanction to outlaw the anti-union contract fell under constitutional laws as constituting an unconstitutional interference with liberty of contract.⁴

⁴⁰ *Coppage v. Kansas*, *supra* note 4, 10, "So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the service of such employee." See *Prudential Ins. Co. v. Cheek*, *supra* note 7.

¹ Such a contract usually provides that the employer will run his business non-union and that the employee will not become a member of any labor union during the course of his employment nor molest, nor interfere with the employer's business. See Note (1928) 41 HARV. L. REV. 770. A "yellow dog" agreement is set forth in *Hitchman v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65 (1917).

² N. Y. PENAL CODE, §1171a, L. 1887, c. 688. It was held unconstitutional in *People v. Marcus*, 185 N. Y. 257, 77 N. E. at 1073 (1906).

³ Erdman Act, June 1, 1898, c. 370 §10.

⁴ *Adair v. U. S.*, 208 U. S. 161, 28 Sup. Ct. 277 (1908); *Coppage v. Kansas*, 236 U. S. 1, 35 Sup. Ct. 240 (1915). In addition about a dozen state supreme court decisions to the same effect have established that it cannot be made a criminal offense for employers to require their employees to agree that they would not join unions.