The Labor Lawyer's Guide to the Rights and Responsibilities of Employee Whistleblowers

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Quorum Books
NEW YORK • WESTPORT, CONNECTICUT • LONDON

Library of Congress Cataloging-in-Publication Data

Kohn, Stephen M. (Stephen Martin)
The labor lawyer's guide to the rights and responsibilities of employee whistleblowers.

Bibliography: p.
Includes index.
1. Employees, Dismissal of—Law and legislation—United States. 2. Discrimination in employment—Law and legislation—United States. 3. Whistle blowing—Law and legislature—United States. I. Kohn, Michael D. II. Title.
KF3471.K64 1988 344.73'012596 88-6017
347.30412596

ISBN 0-89930-207-6 (lib. bdg. : alk. paper)

British Library Cataloguing in Publication Data is available.

Library of Congress Catalog Card Number: 88-6017
ISBN: 0-89930-207-6

First published in 1988 by Quorum Books

Greenwood Press, Inc.
88 Post Road West, Westport, Connecticut 06881

Printed in the United States of America

The paper used in this book complies with the Permanent Paper Standard issued by the National Information Standards Organization (Z39.48-1984).

10 9 8 7 6 5 4 3 2 1

In memory of our Father, Arthur,
who served his country gallantly,
and to our Mother, Corinne,
an inspiration to all who know her.

ACKNOWLEDGMENTS

We would like to express our appreciation to everyone who helped make this book possible, especially for the support given us by our Nanny, our loving sister, our Uncle Harold Dressler, and to Leslie Rose, David Colapinto, and our many friends and colleagues who assisted us with this project. We also wish to express our special thanks to the students of the Antioch School of Law and to Thomas Gannon for his interest in the topic and push to get it into print; to Sharon Coose for her assistance in producing the manuscript; to Diana Teran for assistance with Chapter 7; to Michael Rose for proofreading; and Amy Brazill for her tireless effort that insured the manuscript's completion.

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INTRODUCTION

An important source of information vital to honest government, the enforcement of laws, and the protection of the public health and safety are whistleblowers: employees who disclose violations of law to their management,[1] labor unions, news reporters,[2] or directly to governmental authorities.[3] Whistleblowers have significantly contributed to the enforcement of environmental and nuclear safety laws,[4] have saved American taxpayers billion of dollars,[5] and have exposed and corrected countless problems within the federal bureaucracy.[6]

Reaction against whistleblowers has been harsh. They are often subject to retaliation from their employers. They have been called "malcontents," "informants," "bag ladies," and "mental health patients."[7] A government official with the responsibility of protecting whistleblowers recently warned them to "keep quiet" or face getting "their heads blown off."[8]

Litigation in this area is often acrimonious and aggressive. It is not uncommon for employees' attorneys to raise serious ethical charges against corporate law firms.[9] Litigation can run on for years, and the costs to both sides have skyrocketed well into the hundreds of thousands of dollars. The desire of either government or corporate wrongdoers to cover up the whistleblower allegations can result in ugly and protracted legal battles.[10] In recent testimony, attorneys for a major utilities law firm that often defends employers in suits against whistleblowers, plainly admitted that the "collateral consequences" of a court ruling in support of a whistleblower can "dwarf" the actual liability the employer may face in losing a wrongful termination dispute.[11] Whistleblower cases are hard fought not just because of animosity which may arise in the course of an employment discrimination case, but also because of the economic or political impact of the actual disclosures. Unexpectedly strong backlash from their employers

and the high cost of litigation have prompted many whistleblowers to advise their peers: "Forget it!"[12]

This book will focus on the legal remedies available to employee whistleblowers. Twenty years ago a landmark article in the *Columbia Law Journal* articulated the need for a new tort; a tort action based upon the wrongful discharge of an employee who testified, or who exposed corporate corruption, regarding health and safety hazards and other clear violations of public policy.[13] Prior to this article one state—California—had recognized a wrongful discharge tort for such discharges.[14] Likewise, the U.S. Supreme Court was on the verge of recognizing whistleblowing among government employees as a protected First Amendment activity.[15] In the twenty years since these developments, whistleblower law has begun to come into its own. Approximately twenty-seven federal statutes were passed explicitly protecting whistleblowers. The U.S. Constitution and the Federal Civil Service Reform Act protect whistleblowers employed by federal, state, and local government, and a majority of state jurisdictions have altered the common law to provide for a *public policy* exception designed to protect whistleblowers.[16]

Slowly, society has recognized the value of protecting employees who disclose public safety and corruption issues. The new tort of wrongful whistleblower discharge is evolving—and its parameters are maturing. Presently, there is no agreement among the various states as to what is protected activity, what type of disclosures constitute legitimate whistleblowing, what type of damages are recoverable under this new cause of action, and how overlapping statutes and laws should be interpreted. Through the maze of wrongful discharge cases and statutes, however, clear patterns and principles have emerged. The nature and scope of whistleblower protection are beginning to take on a clear and well-defined shape.

In this book we will first go backward and review the jurisprudential and constitutional roots of whistleblower protection. Second, we will outline the numerous legal remedies, under both state and federal law, which prohibit the discharge of employee whistleblowers. Third, we will present an overview of the practical issues which generally arise in all whistleblower litigation. The book will conclude with an analysis of the major controverted issues in this area of the law—specifically the scope of protected activity, the definition of public policy, and the federal preemption doctrine.

This is not a book dedicated either to advocating the virtue of whistleblowing or to explicating the significant social contributions these employees have had on society. We focus instead on basic legal principles and laws necessary to adequately understand and litigate a whistleblower case.

NOTES

1. See Stephen M. Kohn and Thomas Carpenter, "Nuclear Whistleblower Protection and the Scope of Protected Activity Under Section 210 of the Energy Reorganization Act," 4 *Antioch Law Review* 73 (Summer 1986); *Phillips v. Interior Board of Mine Op. App.*, 500 F.2d 772 (D.C. Cir. 1974); *Kansas Gas and Electric v. Brock*, 780 F.2d 1505 (10th Cir. 1985), cert. denied, 106 S.Ct. 3311 (1986).

2. *Donovan v. Peter Zimmer America, Inc.*, 557 F. Supp. 642 (D.S.C. 1982) (news media disclosure); *Wedderspoon v. Milligan*, 80—Water Pollution Control Act Case No. 1., Decision of U.S. Department of Labor Administrative Law Judge (July 11, 1980), adopted by U.S. Secretary of Labor (July 28, 1980) (contacting "environmental activist" and news media); *Consolidated Edison Co. of N.Y. v. Donovan*, 673 F.2d 61 (2nd Cir. 1982) (working with union safety committee); *Nunn v. Duke Power*, Decision and Order of the U.S. Deputy Secretary of Labor, at pp. 12–13 (July 30, 1987) (employee contacts with citizen intervenor groups with intent to provide safety information to NRC); Kohn and Carpenter, *supra*, pp. 86–89.

3. *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984); *Hanna v. School District of Allentown*, 79–Toxic Substances Control Act. (TSCA)–1, slip op. of Secretary of Labor at 11 (July 28, 1980), rev'd on other grounds, *School Dist. of Allentown v. Marshall*, 657 F.2d 16 (3rd Cir. 1981); *Haney v. North American Car Corp.*, 81–Solid Waste Disposal Act (SWDA)–1, slip op. of Administrative Law Judge (ALJ) at 12 (Dec. 15, 1981), adopted by Secretary of Labor (June 30, 1982).

4. See Ralph Nader, ed., *Whistleblowing* (1972); C. Peters and T. Branch, *Blowing the Whistle* (1972); A. Westin, *Whistleblowing: Loyalty and Dissent in the Corporation* (1981); Senate Comm. on Governmental Affairs, 95th Cong., 2d sess., *The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Waste, Abuse, and Corruption* (Comm. Print, 1978); Stephen Kohn, *Protecting Environmental and Nuclear Whistleblowers: A Litigation Manual* (Nuclear Information and Resource Service, 1985); *McAllen v. U.S. Environmental Protection Agency*, et al., 86—Water Pollution Control Act—Case No. 1, Decision of U.S. Department of Labor Administrative Law Judge (Nov. 28, 1986); Speech by C. Kennedy, "Whistleblowing: Contribution or Catastrophe?" to the American Association for the Advancement of Science (Feb. 15, 1978); Thomas M. Devine, Donald G. Aplin," Abuse of Authority: The Office of the Special Counsel and Whistleblower Protection," 4 *Antioch Law Journal* 5, 10 (Summer 1986); U.S. Department of Agriculture, Office of Inspector General, Report of Investigation: Food Safety and Inspection Service Special Review of the Inspection Program in Southern California, File No. SF–2499–7 (Nov. 13, 1985) and reports referenced therein [hereinafter referred to as USDA OIG Report], Devine and Aplin, *supra* at 42–44; see *United States v. Garde*, 673 F. Supp. 604 (D. D.C., Oct. 27, 1987). Also see, *Rose v. Secretary of Dept. of Labor*, 800 F.2d 563, 565 (6th Cir. 1986) (concurring op. of J. Edwards).

5. Government Accounting Office, *5-Year Summary of Results of GAO Fraud Hot-Line*, GAO/AFMD–84–70 (Washington, D.C., Sept. 25, 1984); Nader, ed., *Whistleblowing* (1972); S. Kohn and T. Carpenter, "Nuclear Whistleblower Protection and the Scope of Protected Activity Under Section 210 of the Energy Reorganization Act," 4 *Antioch Law Journal* 73, 74 (Summer 1986).

6. See Thomas Devine and Donald Aplin, "Abuse of Authority: The Office of the Special Counsel and Whistleblower Protection," 4 *Antioch Law Review* 5 (Summer 1986).

7. U.S. House of Representatives, Report of the Civil Service Subcommittee of the House Post Office and Civil Service Commission, House Report 99–859, 99th Cong., 2d Sess., p. 17 (Washington, D.C.: Government Printing Office, 1986).

8. Ibid.

9. *Hasan v. N.P.S.*, 86–Energy Reorganization Act—24, U.S. Dept. of Labor Administrative Law Judge Decision on "Motion to Disqualify Respondent's Counsel, for Default Judgment and for Sanctions" (appealed 10/21/86, settlement agreement reached without concession as to legality of the ALJ's decision, joint motion to vacate pursuant to terms of settlement agreement granted 2/4/87); U.S. Department of Labor, Wage and Hour Division, Investigation Report by Herman R. Northcott, Jr. (Feb. 10, 1986) (See *Wensil v. Shaw*, 86–Energy Reorganization Act (ERA)–15, file of the U.S. Department of Labor); M. Galen, "An Ethical Furor over a Witness," *National Law Journal*, December 22, 1986; Eugene R. Fidell, *Federal Protection of Private Sector Health and Safety Whistleblowers: A Report to the Administrative Conference of the United States* (Washington, D.C., March 1987).

10. Ibid.

11. N. Reynolds, R. Walker, P. Dykema (law firm of Bishop, Cook, Purcell & Reynolds), "Comments on Preliminary Recommendations of the Administrative Conference of the United States Regarding Private Sector Health and Safety Whistleblower Statutes" (Washington, D.C., April 10, 1987).

12. Myron Glazer and Penina Glazer, "Whistleblowing," *Psychology Today*, August 1986, p. 42.

13. Blades, "*Employment at Will v. Individual Freedom:* On Limiting the Abusive Exercise of Employer Power," 67 *Columbia Law Review* 1404 (1967).

14. *Peterman vs. International Brotherhood of Teamsters*, 174 Cal. App. 184, 344 P.2d 25 (1959).

15. *Pickering v. Board of Education*, 391 U.S. 563 (1968).

16. Philip Borowsky and Lex Larson, *Unjust Dismissal* (New York: Matthew Bender, 1987).

2

CONSTITUTIONAL DEVELOPMENT OF WHISTLEBLOWER PROTECTION LAW

The constitutional roots of modern whistleblower law derive from a synthesis of two completely independent judicial developments—one in the law of contempt, and the other in the law of contract. In the late nineteenth century the employment *at-will* doctrine was well settled in American law. Essentially, the employment relationship was contractual in nature and both the employee and employer had the right to terminate the relationship for any reason or no reason. Attempts by government to interfere with this freedom to contract—by passing laws to protect employees, such as eight-hour-day laws or minimum-wage laws—were regularly found unconstitutional. The concept of employment discrimination was not recognized in law. At the same time, it was well settled in law that people could not intimidate witnesses or parties appearing in court. Such intimidation was illegal and the perpetrator was subject to contempt of court—a summary process that can result in both fines and imprisonment.

Over the years the ironclad at-will doctrine was eroded, and Congress' power to prohibit certain forms of employment discrimination was constitutionally recognized by the U.S. Supreme Court. Simultaneously, state courts slowly changed the common law at-will rule. During the 1980s a majority of state jurisdictions modified the strict at-will doctrine, and carved out a *public policy exception*. This exception protects employees from termination if the discharge is in violation of a state *public policy*. The public policy exception to the employment at-will doctrine is summarized by most courts as follows: An employer may fire an employee for any reason or no reason, but not for a reason which violates a clear mandate of public policy. Today, whistleblowers are regularly protected under both federal statutory and state statutory, or common law.

As whistleblowers began to receive protection under common law and statutory remedies, the law of contempt was altered. The historic power of a court to find persons in contempt for actions which occurred

outside the geographical location of the court fell into disuse—and in 1941 the U.S. Supreme Court, interpreting the federal contempt laws, reversed a contempt citation for a person who improperly induced a litigant to drop his case.[1] The alleged impropriety occurred beyond the geographical domain of the courthouse. The Supreme Court reasoned that this type of misconduct was better adjudicated, not through summary contempt proceedings, but in formal criminal proceedings, under existing federal law.[2] The historic contempt power of the federal courts was restricted in cases concerning interference with the administration of justice. Courts stopped utilizing the contempt remedy to protect witnesses and parties to court proceedings from intimidation which occurred outside the courthouses. The prohibition on witness intimidation remained—only the remedy moved from contempt to more established litigation under federal statute, state statute, and common law. Essentially, the historic contempt power of courts to protect witnesses has now been merged with state and federal laws, which have been used effectively to protect both whistleblowers and witnesses.

WITNESS PROTECTION AND THE LAW OF CONTEMPT

The origins of whistleblower law stretch back to antiquity. Although the rights of employee whistleblowers have only recently received constitutional sanction, the contempt power of courts was used throughout history to prohibit the harassment of witnesses or parties engaged in judicial proceedings.[3] A whistleblower is a witness—an employee who obtains information of corporate or government wrongdoing. In most cases whistleblowers are fired or harassed after they either initiate a suit to vindicate their rights or after they disclose information to a government investigation, a grand jury, or at a hearing. For example, the first state to prohibit the wrongful discharge of a whistleblower was California. The facts of the case concerned an employee's discharge for refusing to commit perjury.[4] Likewise, the federal whistleblower statutes all prohibit discharge for employees who either "testify" or "commence" litigation or enforcement proceedings under federal law.[5] Even if a whistleblower is not a formal witness at the time he or she suffers from retaliation, in most cases it is clear that the employee may shortly become a witness in either a civil, administrative, or criminal proceeding.

It parties or witnesses in judicial proceedings are intimidated from testifying, the ability of a citizen to obtain justice is undermined, and eventually the very existence of a republican form of government is threatened. If people are afraid to assert their rights or testify in court, what avenues remain open for societal action against civil or criminal wrongdoers? What good is a law passed by Congress or a legislature if people are intimidated from insisting upon its enforcement?

Government has the undisputed power to protect witnesses and parties. In *Marbury v. Madison* the U.S. Supreme Court Chief Justice Marshall wrote:

> [t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of the government is to afford him that protection."[6]

The power of government to protect witnesses and parties from retaliation was historically enforced directly by courts through summary contempt proceedings.[7] In his distinguished 1884 *Treatise on Contempt*, Stewart Rapalje noted that under common law a contempt of court would lie for "any attempt to threaten or intimidate a person from instituting or defending any action." Contempt could also be found if a person acted to "threaten," "intimidate," or coerce a witness to "suppress or withhold the truth."[8]

In 1916 the Supreme Court of Arkansas in *Turk v. State*[9] summarized this rule: "It is universally held that intimidating a witness and preventing his appearance at court . . . is a contempt of court."[10] Courts in both England and the United States followed this precedent.[11] Although the early contempt cases did not arise in the context of the employer-employee relationship, the conduct courts found contemptuous was extremely similar to the problems that contemporary whistleblowers face.

The contempt power is no longer invoked to prohibit intimidation of witnesses or parties when that intimidation occurs outside of the physical domain of a court. Prior to the twentieth century, contempts of court were issued for conduct committed far from a courthouse—and sometimes even for conduct which occurred outside the jurisdiction of a court. For example, in *Turk v. State* the Supreme Court of Arkansas reasoned that contempt could be found for actions occurring far away from a courthouse. The court reasoned that the "arm" of the court was "long enough and strong enough to keep open and unobstructed the way to its door.[12]

In 1941 the U.S. Supreme Court, in *Nye v. U.S.*, struck down a federal court's use of the contempt power to punish a person who interfered with a litigant's ability to pursue his case in a federal court.[13] The Supreme Court found the conduct of the lower court "reprehensible" but was not willing to authorize federal courts to punish such obstruction by contempt. Justice Douglas, who wrote the majority opinion, held that summary contempt proceedings should be used for "misbehavior" which "obstructed the administration of justice," only when such misconduct is within the geographic location of the court itself:

> The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the

court in any normal meaning of the term. It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business.[14]

The holding in *Nye* was narrow. The power of courts to find persons who intimidate witnesses or parties in contempt was not found unconsitutional.[15] The U.S. Judicial Code was narrowly construed to limit the contempt power of federal judges. A defendant in a summary contempt proceeding risks imprisonment without the benefit of a jury trial. Because of the conflict between the right of a defendant and the necessity to protect the orderly administration of justice, Justice Douglas held that "instances where there is no right to a jury" must be "narrowly restricted."[16] Obstruction of justice (including witness intimidation) was sanctionable under other federal statutes where the defendant would have the right to a jury trial.[17] The Supreme Court reasoned that people accused of witness intimidation or interference with a person's right to file a suit should be afforded a jury trial—not imprisoned and fired in a summary proceeding.

THE RISE OF EMPLOYMENT LAW AND WHISTLEBLOWER PROTECTION

Establishing the legal rights of whistleblowers under statutory and common law has been a slow process stretching over the last forty years. During this process Congress and the U.S. Supreme Court were initially in the forefront of protecting employees who gave negative testimony or information against an employer from job-related retaliation. Since the early 1970s, however, state courts have taken the lead and have established, in most state jurisdictions, effective remedies for wrongfully discharged whistleblowers.

In the late nineteenth and early twentieth century there was no recognized principle in employment law concerning whistleblower protection. Employers had the right to fire employees for any reason or no reason—or even an "immoral" reason. In *Payne v. Western and Atlantic Railroad Co.*, [18] the Tennessee Supreme Court summarized the at-will doctrine:

> All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong. . . . Trade is free; so is employment. The law leaves employer and employee to make their own contracts. . . . This secures to all civil and industrial liberty. A contrary rule would lead to a judicial tyranny as arbitrary, irresponsible and intolerable as that exercised by Scroggs and Jeffreys.[19]

In *Payne* the Court upheld the right of an employer to terminate an employee if that employee shopped at a store disapproved of by the

employer. In doing so, the Court justified corporate use of their size and wealth to dominate their employees and society. The Court stated: "Great corporations, strong associations, and wealthy individuals may thus do great mischief and wrong" and "greatly injure individuals and the public." This conduct was allowable, however, because "power is inherent in size and strength and wealth; and the law cannot set bound for it, unless it is exercised illegally."[20]

Employees could be hired and fired at will—employers were "free" not to hire women, blacks, Jews, union members, Irish, or any class of people they did not like. Those who were hired could be discharged for any reason and compelled to work at no minimum wage, no maximum hours, and in dangerous and hazardous occupations. Employees had no basic legal rights—except those which could be obtained through private contract.

Although there has been tremendous change in the employee–employer relationship since the Tennessee Supreme Court decided *Payne*, the roots of modern labor law are grounded in the majority opinion of *Payne*. Modern labor law is still based on policies rooted in laissez-faire principles of employee and employer rights.

The majority in *Payne* did recognize that even extreme laissez-faire policies could be tempered. Although the court recognized that capital could "injure" the public and cause "great mischief and wrong," it also recognized that capital was required to act within the bounds of law and its power could not be "exercised illegally."[21] Thus the state maintained some form of legislative power to statutorily limit the freedom of capital over labor. At the time the *Payne* case was decided there were no laws limiting the monopolistic rights of corporations to require that their employees not frequent certain stores.

The dissent in *Payne* articulated a public policy exception to the unlimited power of capital to determine the working conditions of their employees. The roots of the modern public policy exception to the at-will doctrine were articulated in the hundred-year-old dissent authored by Justice Freeman:

> Perfect freedom in all legitimate uses is due to capital, and should be zealously enforced; but public policy and all the best interests of society demands it shall be restrained within legitimate boundaries, and any channel by which it may escape or overleap these boundaries, should be carefully but judiciously guarded. For its legitimate uses I have perfect respect, against its illegitimate use I feel bound, for the best interests both of capital and labor, to protest.[22]

This tension between the at-will doctrine and the power of the legislature to equalize the employee-employer relationship in light of public policy issues was similarly unfolding in the U.S. Supreme Court.

In 1898 Congress passed a law which made it illegal for carriers engaged in interstate commerce to terminate an employee on the basis of union membership.[23] If an agent or an employer of an interstate carrier did terminate an employee on the basis of union membership, he was liable for a fine of "not less than one hundred dollars and not more than one thousand dollars."[24] In *Adair v. U.S.* the constitutionality of this provision was challenged.[25]

The U.S. Supreme Court used *Adair* to canonize the at-will doctrine to constitutional proportions. The Court struck down the legality of the union protection provision of the 1898 act on the basis of the Fourteenth Amendment right to contract. Relying upon its decision in *Lochner v. New York*,[26] the Court reasoned:

> While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, 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 personal services for another. 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 it. So the right of the employe 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 services of such employe.[27]

The Court explicitly struck down the statute on the basis of the "equality of right" existing between labor and capital. The Court ignored the gross discrepancies between the respective strengths of an individual and a major corporation and gave constitutional status to the fiction of equality between employers and employees:

> In all such particulars the employer and the employee have equality of rights, 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.[28]

The *Adair* court adopted the same principle as did the *Payne* court. *Adair* did not hold that Congress could not pass any law restricting the employee-employer relationship—but it narrowly restricted the potential scope of such intervention by reading into the Constitution laissez-faire notions of capital and labor.[29]

The majority in *Adair* did, however, at least in theory, recognize that certain areas of the public interest could justify a limitation of the right of labor and capital to "freely" contract. The Court recognized the potential right of the state to condition the "right to purchase or sell

labor" through the reliance upon certain inherent police powers which the state always maintains:

> There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.[30]

Justice Holmes, dissenting in *Adair*, picked up on the majority recognition that issues related to "safety, health, morals and general welfare of the public" could lawfully justify abridging the at-will doctrine. Like the dissent in *Payne*, Holmes utilized the concept of public policy and reasoned that Congress was well within its right to reasonably define sound public policy exceptions to the at-will doctrine:

> I confess that I think that the right to make contracts at will that has been derived from the word liberty in the amendments has been stretched to its extreme by the decisions; but they agree that sometimes the right may be restrained. Where there is, or generally is believed to be, an important ground of public policy for restraint the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued. It cannot be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, might be deemed by Congress an important point of policy.[31]

As Justice Holmes pointed out, the supremacy of the at-will doctrine during the pre–New Deal era was not totally based upon a reading of constitutional or common law principles. In fact those principles recognized potential legal and public policy exceptions to the at-will doctrine. Politically, the U.S. Supreme Court was not willing to apply those exceptions to most of the cases that came before it.[32]

In the New Deal and post–New Deal era, however, Congress, legislatures, and the courts began to enforce the right of employees to be free from employer discriminations. The turning point in this constitutional history was the massive union organizing movement which occurred during the Great Depression (1929–1940). The economic hardship and social dislocation caused by the Depression set the social-economic stage for a bloody and violent confrontation between labor and capital. Strikes, including illegal occupations of factories, occurred throughout the United States. Between 1929 and 1932 over two-hundred workers were killed in strike-related violence. The Congress of Industrial Organizations (CIO) union was formed. Many in its leadership were radicals—including socialists and communists—who effectively organized millions of employees into powerful industrial unions.[33]