

Toussaint v Blue Cross

Employee Rights and Wrongful Discharge

408 Mich 579 (1980)

For most of American history, the theoretical framework of the law was that employers and workers had an “at-will” relationship. Workers were free to work or quit, and employers to hire or fire, whenever they wanted, for whatever reasons they wanted. In the late twentieth century, legislatures and courts began to make exceptions to this rule, and to give employees rights against “wrongful discharge.” In 1980, the Michigan Supreme Court became the first state to adopt the “implied contract” principle, holding that certain employer policies automatically gave employees a right to be fired only for “good cause.”

American employment law grew out of the medieval English common law of “master and servant.” Unless otherwise stipulated, employment contracts were assumed to extend for one year, probably so that landowners could be sure that agricultural workers would work through harvest-time and to assure that the workers would enjoy a year of what would later be called “job security.”¹ The law could be quite harsh in compelling employees to serve out the terms of their contracts. They were not free, for example, to accept an offer of higher wages from another employer during the term of their contract. And if employers had a good cause to fire them (which might include, for example, failing to show proper respect and deference to the employer), he could do so 11 months into the term of the contract and pay nothing. Many American courts began to relax these rules after independence, allowing employees to be paid for that part of the time which they had worked if they quit during the year.²

The industrial revolution widened the labor market, created new kinds of non-agricultural jobs, and made most employment relations distant and impersonal. No longer was the landlord-tenant or master-apprentice system an intimate, local, face-to-face relationship. Employment law thus became more abstract and formal, taking on the characteristics of contract law in general (see *Sherwood*). The law came to view all employment relations as completely individualistic and voluntary. Indentured servitude and slavery, most notably, were abolished in the nineteenth century. Employer and employee were said to be equally free to bargain for whatever wages and terms they found satisfactory. Employers were free to hire or fire any worker, and employees to

Fired worker may have reason to sue

By The Associated Press

Workers fired without just cause can sue their bosses if they were told they would have employment security as long as they did their jobs, according to the Michigan Supreme Court.

The court ruled Tuesday that an employee hired under such an agreement cannot be discharged without good cause.

The court ruled on behalf of Charles Toussaint and Walter Ebling, who filed suit charging their

discharges violated their employment agreements.

TOUSSAINT WAS fired by Blue Cross and Blue Shield of Michigan, and Ebling by Masco Corp.

Toussaint was awarded \$72,835.52 and Ebling, \$300,000 in Wayne County Circuit Court. Different panels in the state Court of Appeals upheld Ebling's award, but reversed Toussaint's.

The Supreme Court, in a 4-3 decision, reversed the Court of Appeals decision in Toussaint's

case and reinstated his award. The high court also upheld Ebling's award.

THE COURT said companies can set policies making it clear that employees serve at the pleasure of the firm, in which case the company can fire them for any reason at all.

But if companies do not set such policies, they risk having the courts overturn their decision to fire a worker, if there was no good cause for the action, it said.

Headline from the June 11, 1980, issue of the *Lansing State Journal*.

accept or quit any job they liked. The principle came to be called “employment-at-will.”

State and federal courts struck down many laws that attempted to abridge this “liberty of contract” in employment. States could not, for example, prohibit employers from paying workers in scrip redeemable at the company store. If workers were happy to accept such scrip, that was their business. States could, on the other hand, prohibit children or women from working, since they were not, like adult males, equal before the law. And they could prohibit miners from working more than 10 hours in one day, mining being an obviously hazardous occupation. But when New York enacted a law prohibiting bakers from working more than 10 hours in a day, the United States Supreme Court struck it down, since there was nothing inherently dangerous about baking.³

The general rule was liberty; restrictions had to be justified. Thus, in 1908, the United States Supreme Court struck down a federal act that outlawed “yellow-dog contracts” in interstate railroad employment. In “yellow-dog contracts,” an employee agreed, as a condition of employment, never to join a labor union. “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,” Justice John Marshall Harlan wrote. “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 services of such employee.... In all such particulars the employer and the 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.”⁴

“Employment-at-will” is sometimes referred to as “Wood’s rule,” after it was mentioned in Horace Wood’s 1877 treatise, *Master and Servant*. “Men must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or no cause, or even for bad cause without thereby being guilty of an unlawful act per se,” Woods wrote. “It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.”¹ Wood added that, unless an employment contract explicitly said otherwise, the contract was terminable by either party at any time.

1. Quoted in Skoppek, *Employment-at-Will in Michigan: A Case for Retaining the Doctrine*, Mackinac Center for Public Policy (1991), available at <<http://www.mackinac.org/article.aspx?ID=266>> (accessed March 1, 2009).

In the late nineteenth and early twentieth centuries, many observers began to criticize the employment-at-will principle. The formal equality of the employer and employee, they argued, was a legal fiction that masked the obviously greater power of the employer. How could a penniless immigrant bargain on equal terms with a billion-dollar corporation like U.S. Steel? Far from guaranteeing employee liberty, employment-at-will forced workers to accept employer dictation or starve, producing “wage slavery.”⁵ Legislatures and courts began to respond to the “unequal bargaining power” argument to bolster employee rights, making exceptions to the employment-at-will principle. The most important of these exceptions empowered labor unions. The National Labor Relations (Wagner) Act of 1935 compelled employers to bargain with unions chosen by a majority of their workers. The Act also prohibited employers from firing workers for union activity, and most collective bargaining agreements provided some procedure whereby employers had to show “good cause” to fire workers. By 1955, almost one in three American non-farm workers was a union member.

After World War II, the state and federal governments added protections for the remaining two-thirds of workers who could be terminated for no reason or bad reasons. Many states in the northeast, upper Midwest, and West adopted “fair employment practice” laws, which made it illegal to fire someone because of race, creed, color, or national origin. Michigan adopted such an act in 1955. Congress adopted this non-discrimination rule, and added sex as a protected class, in the Civil Rights Act of 1964. The California Supreme Court held in 1959 that it was unlawful to fire someone for reasons that were contrary to “public policy.”⁶ In this case, the Teamsters Union made a trucking company fire a worker who had agreed to testify about union corruption to the state legislature. Similarly, a worker could not be fired for agreeing to serve on jury duty or for filing a workers’ compensation claim. Few states followed California’s example right away, but by the end of the century all but a handful of states had adopted a public-policy exception to the employment-at-will rule.⁷

The Michigan Supreme Court led the way in the judicial creation of further protections against wrongful discharge. In 1967, Charles Toussaint interviewed for a job as a financial officer with Blue Cross/Blue Shield of Michigan. During the interview process, he was told that he would be employed until retirement, “as long as

I did my job,” and that “if I came to Blue Cross, I wouldn’t have to look for another job because [the interviewer] knew of no one ever being discharged.” While there was no written contract of employment, he was given a 260-page employee manual, in which the company declared that its policy was to fire for “just cause” only. Toussaint later had problems managing Blue Cross’ company-car accounts and was fired. He sued, claiming that he had been fired without just cause, and a Wayne County jury awarded him \$73,000. Blue Cross appealed, and the Michigan Court of Appeals reversed the decision. Toussaint then appealed to the Supreme Court.⁸

Toussaint v Blue Cross was consolidated for argument with a factually similar case, *Ebling v Masco Corporation*. The Supreme Court unanimously agreed that a jury could consider testimony in the record on whether the employee and employer made an oral contract that included distinguishing features or provisions that made Mr. Ebling’s employment terminable at will but only for cause. The Court upheld a judgment that he was entitled to recover the value of stock options that he forfeited when fired without just cause. As to Mr. Toussaint’s contract, however, the Court split 4-3 as to whether Mr. Toussaint’s evidence that such a contract existed was sufficient to make a prima facie case.

In a 4-3 decision, the Court restored the trial court verdict for Toussaint. Justice Charles Levin wrote the majority opinion; the three Republicans dissented. Levin held that the interview statements and employee manual amounted to an “implied contract” that included just-cause termination. Employment-at-will could not be assumed in the face of such expressions of just-cause tenure. Employers were entitled to maintain an at-will policy, he noted, but Blue Cross and other employers had created misunderstandings by not stating such a policy clearly. Levin denied the company’s contention that they received no consideration from the employee in exchange for greater job security—and without such consideration there could be no contract. “The employer secures an orderly, cooperative and loyal work force” in exchange for job security, he claimed. “Having announced the policy, presumably with a view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the work force, the employer may not treat its promise as illusory.”⁹ In addition to the “implied contract” that Toussaint made when he was hired, subsequent company policies created, without contract requirements, a “legitimate expectation” of tenure. “We hold that employer statements of policy, such as the [guidelines], can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights.”¹⁰ Thus the two pillars of wrongful-discharge law in Michigan were “implied contract” and “legitimate expectations.”

Justice James Ryan wrote the dissenting opinion. He noted that the guidelines did not constitute a contract between Toussaint and Blue Cross. There was no evidence of any offer, acceptance, consideration, or meeting of the minds—the classical elements necessary to make a binding contract—in its promulgation by the company and reception by the employee. Toussaint may have “felt” that these documents were part of his employment contract, but “we are unable to conclude that there was produced any evidence

whatever from which a jury was free to conclude that the parties agreed, either expressly or by implication, that the defendant's manual or guidelines, or any part of either, would constitute [Toussaint's] contract of employment."¹¹

Toussaint opened the door to a flood of wrongful-discharge litigation. It "caused a certain amount of chaos in the Michigan judicial system," one commentator noted, and for many years employers were uncertain as to the limits of the implied-contract and especially the legitimate-expectations doctrines.¹² Noting that wrongful-discharge was "very much in the mainstream of the contemporary litigation explosion," another critic observed, "Michigan courts are clogged with employment litigation, employers have turned defensive hiring and firing measures into a fine art, and the cost[s] of doing business in Michigan, which was already high, has become prohibitive."¹³

Two economists who studied wrongful-discharge laws have concluded that the Michigan doctrines increase unemployment between 0.8 and 1.6 percent. While they might benefit workers with seniority and skills, they reduce employment for young, female, and low-skilled workers. When Charles Toussaint was hired, the United States was in the middle of a booming economic decade with almost full employment. When his case was decided, the country was in the midst of a depression in which the unemployment rate would reach nearly 10 percent. In Michigan, the unemployment rate approached 17 percent in 1982. These economists conclude: "legal protections do not come costlessly."¹⁴

The legal and economic fallout of the *Toussaint* case led many courts within the state to try to contain its effects, and the federal courts (particularly the Sixth Circuit Court of Appeals, which Justice Ryan joined in 1985) "engaged in a guerilla war" against it.¹⁵ In the more conservative atmosphere of the 1980s and 1990s, the movement to expand employee tenure abated. Only two states (Arizona and Montana) adopted comprehensive wrongful-discharge laws by statute. Public-policy exceptions to at-will employment remained widespread, and extended in federal civil rights acts, but most states did not go as far as Michigan in the implied-contract and legitimate-expectations doctrines, the latter of which the Michigan Supreme Court tightened up in 1993.¹⁶ And Michigan did not follow the few state courts that adopted an even more pro-employee "covenant of good faith" rule, which essentially read a just-cause provision into every employment contract. But it remained true that "nowadays employers must be wary when they seek to end an employment relationship for good cause, bad cause, or, most importantly, no cause at all."¹⁷

FOOTNOTES

1. Blackstone, *Commentaries on the Law of England*, Book I, ch 14.
2. Karsten, *Heart versus Head: Judge-Made Law in the Nineteenth Century* (Chapel Hill: Univ of NC Press, 1997), p 184. See, e.g., *Allen v McKibbin*, 5 Mich 449 (1858).
3. *Lochner v New York*, 198 US 45; 25 S Ct 539; 49 L Ed 937 (1905).
4. *Adair v United States*, 208 US 161, 174-175; 28 S Ct 277; 52 L Ed 436 (1908). Of course, even without a yellow-dog contract, an employer was free to fire a worker who joined a union. Such contracts were useful to stop unions from trying to

organize workers, for trying to persuade yellow-dog workers to join was inducing them to breach their contracts, and such activity could be enjoined by courts.

5. Forbath, *The ambiguities of free labor: Labor and the law in the gilded age*, Wis L R 767 (1985); Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870* (Chapel Hill: Univ of NC Press, 1991); Pound, *Liberty of contract*, 18 Yale LJ 454 (1909). For a contrary view, see Reynolds, *The myth of labor's inequality of bargaining power*, 12 J Lab Res 167 (1991).
6. *Petermann v International Brotherhood of Teamsters*, 344 P2d 25 (Cal App, 1959).
7. Muhl, *The employment-at-will doctrine: Three major exceptions*, Monthly Lab Rev 5 (January 2001).
8. *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980).
9. *Id.* at 613, 619.
10. *Id.* at 614-615.
11. *Id.* at 646.
12. Przybylo, *Call off the funeral: Toussaint...Is alive under Rood v General Dynamics*, 11TM Cooley L R 966 (1994).
13. Skoppek, *Employment-at-will*, *supra*.
14. Autor & Donohue III, *The Costs of Wrongful-Discharge Laws*, National Bureau of Economic Research Working Paper, May 2005.
15. Skoppek, *Employment-at-will*, *supra*.
16. Przybylo, *Call off the funeral*, *supra*.
17. Muhl, *The employment-at-will doctrine*, *supra* at 11.

THE VERDICT OF HISTORY

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