

Legal Rights and Interests in the Workplace

*Carolina Academic Press
Law Casebook Series
Advisory Board*



Gary J. Simson, Chairman
Dean, Case Western Reserve University School of Law

Raj Bhala
University of Kansas School of Law

John C. Coffee, Jr.
Columbia University Law School

Randall Coyne
University of Oklahoma College of Law

John S. Dzienkowski
University of Texas School of Law

Paul Finkelman
Albany Law School

Robert M. Jarvis
*Shepard Broad Law Center
Nova Southeastern University*

Vincent R. Johnson
St. Mary's University School of Law

Michael A. Olivas
University of Houston Law Center

Kenneth Port
William Mitchell College of Law

Michael P. Scharf
Case Western Reserve University School of Law

Peter M. Shane
*Michael E. Moritz College of Law
The Ohio State University*

Emily L. Sherwin
Cornell Law School

John F. Sutton, Jr.
Emeritus, University of Texas School of Law

David B. Wexler
*John E. Rogers College of Law
University of Arizona*

Legal Rights and Interests in the Workplace

Clyde W. Summers

JEFFERSON B. FORDHAM
PROFESSOR OF LAW, EMERITUS
UNIVERSITY OF PENNSYLVANIA

Kenneth G. Dau-Schmidt

WILLARD AND MARGARET CARR
PROFESSOR OF LABOR AND EMPLOYMENT LAW
INDIANA UNIVERSITY-BLOOMINGTON

Alan Hyde

PROFESSOR OF LAW
AND SIDNEY REITMAN SCHOLAR
RUTGERS UNIVERSITY-NEWARK

CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2007
Clyde W. Summers
Kenneth G. Dau-Schmidt
Alan Hyde
All Rights Reserved

ISBN-10: 1-59460-095-3, ISBN-13: 978-1-59460-095-1
LCCN: 2007922555

CAROLINA ACADEMIC PRESS
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Dedication

For Evelyn, who shares in my triumphs by right and my travails by grace.

C.W.S.

I dedicate this book to my parents, Barbara Bloom and Glenn Dau-Schmidt. Mom once borrowed \$100 so we could have Christmas, even though she didn't know how she'd pay it back. In the course of raising three kids, she managed to get her PhD and became a Professor at the University of Saskatchewan. Watching her struggle, I learned that education was the key to success and that becoming a professor was the greatest accomplishment in the world. My Dad taught me that hard work was its own reward; your food tastes better, your bed feels better and you enjoy a deep sense of accomplishment as you fall asleep at night. Dad has retired three times and I'm not sure it's taken yet. Nevertheless Dad found the time to build a treehouse with me and my kids when I turned forty. Even though Mom and Dad were divorced when I was eight, my siblings and I have always felt well cared for and loved, and every sacrifice was made for our success.

K.D.S

For Ellen, Toby, and Laura, making the world more just and life more sweet.

A.H.

Contents

Table of Cases	xvii
Foreword	xxiii
Preface	xxv
Chapter I Law and the Labor Market	3
A. Law and the Employment Relationship	3
1. An Historical Sketch	3
<i>Farwell v. Boston & Worcester Railroad Company</i>	4
Notes and Questions	8
The Life and Death of Farwell	8
<i>Payne v. The Western & Atlantic Railroad Co.</i>	10
Notes and Questions	13
J.R. Commons & J.B. Andrews, Principles of Labor Legislation	14
2. Regulation of the Employment Contract: Courts v. Legislatures	15
Summary Note	20
B. Law and the Collective Labor Market	20
1. Judges, the Common Law and Collective Action	20
<i>Vegeahn v. Guntner</i>	23
Notes	28
Prima Facie Tort and Labor Laws	29
<i>Adair v. United States</i>	29
Notes	32
The Labor Injunction: Procedure and Substance in Judicial Law Making	32
The Origins of the Labor Injunction	33
The Growth of the Labor Injunction	34
The Procedural Evils of the Labor Injunction	35
The Substantive Law of the Labor Injunction	36
<i>Hitchman Coal & Coke Company v. Mitchell</i>	37
Notes and Questions	41
Statutory Limitations on Labor Injunction	41
2. Statutory Protection of Collective Action	42
Final Report of the Industrial Commission Created by Act of Congress 1898	43
Statement of Louis D. Brandeis Before the United States Commission on Industrial Relations	44
Final Report of the United States Commission on Industrial Relations	44
Dissenting Report of John L. Commons and Florence J. Harriman	45

Questions	46
The Statutory Development of National Labor Policy	46
3. Epilogue and Prologue	51
Clyde W. Summers, Labor Law as the Century Turns: A Changing of the Guard	51
Kenneth G. Dau-Schmidt, Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law	52
Chapter II Freedom of Contract and Its Limits	59
A. Individual Contracts of Employment	59
1. Limitations on Remedies for Breach	59
(a.) Involuntary Servitude	59
(b.) Liquidated Damages	63
<i>Schrimpf v. Tennessee Manufacturing Company</i>	63
Notes	65
2. Substantive Terms and Judicial Imposition	66
Clyde W. Summers, The Contract of Employment and the Rights of Employees: Fair Representation and Employment at Will	66
Notes	67
(a.) The Traditional Employment-at-Will Doctrine	68
<i>Skagerberg v. Blandin Paper Co.</i>	68
Notes	72
(b.) The Traditional Defense of Employment-at-Will	73
Richard A. Epstein, In Defense of the Contract at Will	73
Allan Axelrod, Simple Rules for a Simple Island	78
(c.) Exceptions to the Employment at Will Doctrine	78
1.) The Implied Covenant of Good Faith and Fair Dealing	78
<i>Tymshare, Inc. v. Covell</i>	78
Notes	85
2.) Discharges in Violation of Public Policy	87
<i>Sheets v. Teddy's Frosted Foods</i>	87
Notes	92
3.) Employee Handbooks	97
<i>Woolley v. Hoffmann-La Roche, Inc.</i>	97
Notes	102
4.) Implied-in-Fact Contracts	103
<i>Gilbert v. Durand Glass Mfg. Co., Inc.</i>	103
Notes	107
Note on Effective Remedies—Employee Recoveries, Employer Payments and Litigation Costs	109
(d.) Economic Arguments against a Simple At-Will Rule	111
Paul C. Weiler, Governing the Workplace: The Future of Labor and Employment Law	112
3. Employee Duties to Employers: Implied and Written	119
(a.) Employee Duties Implied by Law for the Benefit of Employers	119
1.) The Duty of Loyalty	119

	<i>Maryland Metals, Inc. v. Metzner</i>	119
	Notes	126
2.)	Trade Secrets	128
	<i>Bayer Corporation v. Roche Molecular Systems, Inc.</i>	128
	Notes	134
	Alan Hyde, Working in Silicon Valley: Economic and Legal Analysis of a High-Velocity Labor Market	135
	Notes	140
(b.)	Judicial Construction of Negotiated Obligations of Employees: Of Covenants Not to Compete and Invention Assignment Agreements	140
	<i>Hopper v. All Pet Animal Clinic</i>	141
	Notes	149
	Paul H. Rubin and Peter Shedd, Human Capital and Covenants Not to Compete	151
	Notes	156
	<i>Ingersoll-Rand Company v. Ciavatta</i>	157
	Notes and Questions	163
B.	Collective Contracts	165
1.	The Employees' Representative	165
	<i>J.I. Case Co. v. National Labor Relations Board</i>	165
	Notes	169
2.	The Bargaining Process	171
	<i>National Labor Relations Board v. Reed & Prince Manufacturing Co.</i>	173
	Notes	178
3.	Limitations on Terms to Which the Parties May Agree Upon	180
4.	Economics of Collective Bargaining	181
	Michael H. Gottesman, Wither Goest Labor Law: Law and Economics in the Workplace	181
	Notes	183
	Richard B. Freeman & James L. Medoff, What Do Unions Do?	184
Chapter III	The Right of Dignity: Privacy, Liberty, Reputation	189
A.	Right of Privacy: Searches and Gathering Information	190
1.	Searches and Surveillance	191
	<i>O'Connor v. Ortega</i>	191
	Notes and Questions	203
	<i>K-Mart Corporation Store No. 7441 v. Trotti</i>	204
	Notes and Questions	207
	<i>Johnson v. Kmart Corporation</i>	209
	Notes	212
2.	Interception of Communications	213
	<i>Deal v. Spears</i>	213
	Notes	218
3.	Interrogation	221
4.	Polygraphs	222
	Notes and Questions	223
5.	Drug Testing	224
	(a.) Public Employees	224

<i>National Treasury Employees Union, et al v. Von Raab,</i> <i>Commissioner United States Customs Service</i>	224
Notes and Questions	233
(b.) Private Employees	235
<i>Luedtke v. Nabors Alaska Drilling, Inc.</i>	235
Notes	243
6. Psychological Testing and Screening	244
<i>Soroka v. Dayton Hudson Corporation</i>	244
Notes and Questions	250
7. Disclosure of Private Information	252
<i>Doe v. Southeastern Pennsylvania Transportation Authority (SEPTA)</i>	252
Notes and Questions	262
B. Right of Personal Autonomy—Non-Work Activities	263
1. Personal Relationships	263
<i>McCavitt v. Swiss Reinsurance America Corporation</i>	263
Notes and Questions	266
C. Protection against Humiliation	268
1. Intentional Infliction of Emotional Distress	268
<i>Wilson v. Monarch Paper Company</i>	269
Notes	275
2. Defamation	276
<i>Sigal Construction Corporation v. Stanbury</i>	276
Notes	281
Chapter IV Freedom of Speech and Assembly	285
A. Individual Freedom of Speech and Assembly	286
1. Public Employee Speech and Political Patronage	286
<i>Rankin v. McPherson</i>	286
Notes and Questions	293
2. Private Employment: Common Law Protection	296
<i>Novosel v. Nationwide Insurance Company</i>	296
Notes and Questions	301
<i>Intel Corporation v. Hamidi</i>	303
Notes	316
3. Private Employment: State Statutory Protection	317
<i>Mehlman v. Mobil Oil Corporation</i>	317
Notes	331
4. Private Employment: Under Collective Agreements	332
<i>In re Zellerbach Paper Company, Los Angeles Plant and United</i> <i>Paperworkers International Union, Local 1400</i>	332
Notes and Questions	338
B. Collective Speech and Assembly	340
1. The Right to Organize and Engage in Concerted Activity	341
Labor Reform Act, Part 2, Hearings before the Subcommittee on Labor Management Relations of the Committee on Education & Labor, House of Representatives	342
Statement of the Amalgamated Clothing and Textile Workers Union, AFL-CIO before the House Subcommittee on Labor-Management Relations on the Need for Labor Law Reform	343

Statement of B.R. Skelton	346
Pressures in Today's Workplace, Oversight Hearings before the Subcommittee on Labor-Management Relations of the Committee on Labor Management Relations of the Committee on Education and Labor	348
Notes	357
<i>Edward G. Budd Manufacturing Co. v. National Labor Relations Board</i>	357
Notes	358
The Darlington Saga—Limited Rights, Eternal Procedures and Remote Remedies	361
Note on “Concerted” Action: The Need for Group Interest	365
2. Employee Speech and Persuasion	367
<i>Republic Aviation Corp. v. National Labor Relations Board</i>	367
Notes	372
<i>National Labor Relations Board v. Babcock & Wilcox</i>	375
Notes	379
<i>Eastex, Inc. v. National Labor Relations Board</i>	381
Notes	386
<i>National Labor Relations Board v. Local 1229, I.B.E.W.</i>	387
Notes and Questions	390
3. Employer Speech and Persuasion	391
(a.) Free Speech and Coercive Threats	392
<i>National Labor Relations Board v. Virginia Electric & Power Co.</i>	393
Notes	396
<i>National Labor Relations Board v. Gissel Packing Co.</i>	397
Notes and Questions	400
(b.) Employer Speech and the Union's Right to Reply	403
(c.) Free Speech and Fair Elections	405
<i>Sewell Mfg. Co.</i>	405
Notes	409
Note on Election Misrepresentations and Board Waffles	411
4. Picketing, Free Speech and Freedom of Assembly	412
(a.) The Mysterious Constitutional Dimension	413
(b.) The Organizational Picketing Problem	414
(c.) The NLRA and Section 8(b)(7)	415
Case I	417
Case II	417
Case III	418
5. Compulsory Unionism, Freedom of Association and Free Riders	418
Chapter V The Right to Voice: Democracy in the Workplace	423
A. The Historic Promise and Premises of Industrial Democracy	424
1. The Promise	424
Clyde W. Summers, Industrial Democracy: America's Unfulfilled Promise	424
2. The Basic Premises of Industrial Democracy in America	428
Francis Biddle, Chairman, National Labor Relations Board (Old), Should the Collective Bargaining Proposal Be Adopted?	428

B.	The Instrument of Voice	430
1.	The Majority Union	430
2.	Non-Majority Unions	433
3.	“Company Unions”—Employer Influence and Employee Free Choice	436
	<i>Hertzka & Knowles v. National Labor Relations Board</i>	438
	Notes and Questions	441
	<i>National Labor Relations Board v. Webcor Packaging, Inc.</i>	442
	Notes and Questions	448
4.	Considering Alternatives	449
	Richard B. Freeman & Joel Rogers, What Workers Want	449
	Thomas A. Kochan, Labor Policy For The Twenty-First Century	452
	Note	455
	Clyde W. Summers, Employee Voice and Employer Choice	455
	Note	459
5.	A Court-Created Participation Dilemma: Can There Be Too Much Employee Participation?	459
	<i>National Labor Relations Board v. Yeshiva University</i>	459
	Notes and Questions	465
C.	Voice in What Matters? Subjects of Bargaining	467
	<i>National Labor Relations Board v. American National Insurance Co.</i>	467
	Notes	471
	<i>National Labor Relations Board v. Wooster Division of Borg-Warner Corp.</i>	472
	Notes	475
	<i>Fibreboard Paper Products Corporation v. National Labor Relations Board</i>	476
	Notes and Questions	481
	<i>First National Maintenance Corporation v. NLRB</i>	482
	Notes and Questions	489
	<i>National Labor Relations Board v. Truitt Manufacturing Co.</i>	492
	Notes and Questions	494
	A Comparative Note on Worker Participation	495
D.	Voice in the Voice: The Right to a Democratic Union	498
	Democracy in Labor Unions	499
	Clyde W. Summers, Legislating Union Democracy	501
	Report of the Committee on Labor and Public Welfare on Senate Bill 1555	502
	Senator McClellan Introducing His Bill of Rights As an Amendment to S.1555	503
1.	The Meaning of “Equal Rights” (LMRDA Sec. 101(a)(1))	504
	Clyde W. Summers, Democracy in a One Party State: Perspectives from Landrum-Griffin	504
	<i>Bunz v. Moving Picture Machine Operators’ Protective Union Local 224</i>	507
	Notes and Questions	510
2.	The Meaning of “Freedom of Speech and Assembly” (LMRDA Sec. 101(a)(2))	512
	<i>Salzhandler v. Caputo</i>	512
	Notes	517

3.	Election of Union Officers	519
	Clyde W. Summers, Democracy in a One Party State: Perspectives from Landrum Griffin	519
	<i>Wirtz v. Hotel, Motel and Club Employees Union, Local 6</i>	520
	Notes	526
	Enforcement of LMRDA	530
4.	Rights of Union Officers: Protection of Dissent, or Entrenchment?	533
	<i>Sheet Metal Workers' International Association v. Lynn</i>	533
	Notes	536
5.	Government Trusteeships and Union Democracy	537
Chapter VI	Self Government in the Collective Market	539
A.	Regulation of Market Forces in the Collective Market	540
1.	The Timing of Economic Action	541
2.	Strikes and Countermeasures	543
	<i>National Labor Relations Board v. Mackay Radio & Telegraph Co.</i>	545
	Notes and Questions	547
	<i>Pattern Makers' League of North America v. NLRB</i>	549
	Notes	554
3.	Replacements and Repercussions	554
	<i>NLRB v. Curtin Matheson Scientific, Inc.</i>	556
	Notes	562
	<i>Belknap, Inc. v. Hale</i>	563
	Notes	568
B.	Employer Economic Action—The Lockout	571
	<i>American Ship Building Co. v. NLRB</i>	571
	Notes	578
C.	Union Secondary Pressures—The Secondary Boycott	580
1.	The Functions of Secondary Pressures	580
	Trucking and Boycotts—A Cautionary Tale	581
2.	The Search for a Rationale	582
3.	Secondary Pressures under the Common Law	584
	<i>Goldfinger v. Feintuch</i>	584
	Notes	587
4.	Secondary Pressures under the Statute—Appeals to Other Employers	588
	<i>NLRB v. Business Machine & Office Appliance Mechanics Conference Board, Local 459, International Union Electrical, Radio & Machine Workers, CIO</i>	589
	Notes	592
5.	Secondary Pressure under the Statute—Pleas to Consumers	593
	<i>Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council</i>	596
	Notes and Questions	602
6.	Federal Preemption in the Collective Labor Market	603
D.	The Instrument of Self Government: The Collective Agreement	606
1.	Introduction	606
2.	Enforcement of Collective Agreements	608
3.	Courts and Arbitrators—Judicial Reliance on Private Process	613

	<i>United Steel Workers of America v. American Manufacturing Co.</i>	614
	Notes	617
	<i>United Steel Workers of America v. Warrior & Gulf Navigation Co.</i>	618
	Notes	621
	<i>United Steel Workers of America v. Enterprise Wheel & Car Corporation</i>	623
	Notes	625
	<i>Eastern Associated Coal Corporation v. United Mine Workers of America District 17</i>	628
	Notes and Questions	633
4.	Creation and Enforcement of the No-Strike Obligation	635
	<i>Local 174, Teamsters v. Lucas Flour Company</i>	635
	Notes	639
5.	Suits for Injunctions	640
	<i>Boys Market Inc., v. Retail Clerks Union, Local 770</i>	640
	Notes and Questions	648
	Preemption by Collective Agreement	651
Chapter VII	The Right to Fair and Equal Treatment	653
A.	Fair Representation in Contract Negotiation and Administration	653
1.	Fairness in Contract Negotiations	654
	<i>Steele v. Louisville & N.R. Co.</i>	654
	Notes	659
	<i>Ford Motor Co. v. Huffman</i>	660
	Notes	663
2.	Fairness in Contract Administration	668
	Notes	670
	<i>Vaca v. Sipes</i>	671
	Notes	681
	Union and Employer Liability in Fair Representation Cases	687
B.	Fairness under Title VII, Civil Rights Act of 1964	688
1.	Intentional Discrimination or Disparate Treatment	690
(a.)	Proof through Indirect Evidence	690
	<i>Desert Palace, Inc. v. Costa</i>	690
	Notes	693
(b.)	Statistical Proof	696
	<i>Hazelwood School District v. United States</i>	696
	Notes	703
2.	Disparate Impact	705
3.	Remedies for Discrimination	707
4.	Affirmative Action	708
	<i>Johnson v. Transportation Agency</i>	708
	Notes	716
5.	Sex Discrimination	718
(a.)	The Bona Fide Occupational Qualification Defense (§703(e)(1))	719
	<i>Dothard v. Rawlinson</i>	719
	Notes	723

<i>International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Johnson Controls, Inc.</i>	725
Notes	729
(b.) Pregnancy Discrimination	730
(c.) Harassment—Sexual and Otherwise	730
Notes	732
<i>Harris v. Forklift Systems, Inc.</i>	733
Notes	737
<i>Faragher v. City of Boca Raton</i>	739
Notes	748
(d.) From Sex to Gender Discrimination?	750
<i>Rene v. MGM Grand Hotel, Inc.</i>	750
Notes	756
6. Religious Discrimination	757
<i>Ansonia Board of Education v. Philbrook</i>	757
Notes	762
C. Fairness for Older Workers: The Age Discrimination in Employment Act (ADEA)	763
<i>Western Air Lines, Inc. v. Criswell</i>	764
Notes	768
<i>Smith v. City of Jackson</i>	769
Notes and Questions	776
D. Fairness to the Disabled: The Americans with Disabilities Act of 1990 (ADA)	777
1. Who Is Disabled?	779
<i>Sutton v. United Air Lines, Inc.</i>	779
Notes	787
2. What Is Reasonable Accommodation?	789
<i>US Airways, Inc. v. Barnett</i>	789
Notes	800
E. Equal Treatment in Arbitration	802
<i>In re Owens-Corning Fiberglass Corporation and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 86</i>	802
Notes	804
Chapter VIII Protection of Physical Integrity—Occupational Health and Safety	805
A. Introduction	805
1. The World of Work	805
David Halle, American’s Working Man: Work, Home, and Politics among Blue Collar Property Owners	805
2. The World of Law	810
B. Overview of the Occupational Safety and Health Act	814
1. Substantive Duties	814
2. Enforcement Procedure	815
3. Role of State Legislation	816
4. National Institute for Occupational Safety and Health	817

C.	Federal Mine Safety and Health Act	817
D.	Duties and Standards	818
	<i>Caterpillar Inc., v. Occupational Safety and Health Review Commission</i>	818
	Notes and Questions	823
E.	Adoption of Standards	825
	<i>American Iron and Steel Institute v. Occupational Safety and Health Administration</i>	825
	Notes and Questions	833
	<i>American Textile Manufacturers Institute Inc. v. Donovan</i>	836
	Notes and Questions	848
F.	Emergency Temporary Standards	852
G.	Employer Defenses	854
	<i>P. Gioioso & Sons, Inc. v. Occupational Safety and Health Review Commission</i>	854
	Notes and Questions	861
	<i>New York State Electric & Gas Corp. v. Secretary of Labor</i>	862
	Notes and Questions	871
	<i>Atlantic & Gulf Stevedores, Inc., v. Occupational Safety & Health Review Commission</i>	872
	Notes and Questions	880
H.	Enforcement of Employer Obligations	880
1.	Inspection	880
	(a.) Requirement of a Warrant	881
	(b.) OSHA Efforts to Reduce Inspections	882
2.	Post Inspection Procedures	883
	(a.) Authority of the Secretary	884
	(b.) Penalties	885
3.	Effectiveness of Enforcement Procedures and Remedies	886
	Questions on the Enforcement Process	890
4.	Employee Rights and Participation in Enforcement	890
	<i>Oil, Chemical and Atomic Workers v. Occupational Safety & Health Review Commission</i>	891
	Notes and Questions	897
	<i>Donovan v. R.D. Andersen Co., Inc.</i>	899
	Notes and Questions	901
	<i>Whirlpool Corporation v. Marshall</i>	902
	Notes and Questions	909
5.	Notice to Employees of Risks	912
	<i>United Steelworkers of America v. Auchter</i>	912
	Notes and Questions	922
	<i>ASARCO, Inc. v. National Labor Relations Board</i>	923
	Notes and Questions	927
I.	Federal Reliance on the States	929
	<i>AFL-CIO Industrial Union Department v. Marshall</i>	929
J.	State Plans	934
	<i>Gade v. National Solid Wastes Management Association</i>	935
	Notes and Questions	944
	Index	947

Table of Cases

- Adair v. United States, 29–30, 47
Adler v. American Standard Corp., 93
Aeronautical Industrial District Lodge v. Campbell, 662–663
AFL-CIO Industrial Union Department v. Marshall, 929
AFL-CIO v. OSHA, 827, 829
AFSCME v. State of Wash., 532
Agis v. Howard Johnson Co., 275
Airline Pilots Assoc. v. Miller, 420
A.L.A. Schechter Poultry Corp. v. United States, 49
Albemarle Paper Co. v. Moody, 719–720, 746
Albertson's Inc. v. Kirkingburg, 381, 787
Alexander v. Gardner-Denver Co., 668
Allen v. City of Chicago, 24, 27, 420
Allentown Mack Sales and Service, Inc. v. NLRB, 563
Allied Chemical Corp. v. Wells, 491
American Iron and Steel Institute v. Occupational Safety and Health Administration, 825, 851
American National Insurance Co., NLRB v., 467, 471, 475, 879
American Ship Building Co. v. NLRB, 554, 571
American Textile Mfrs. Inst. v. Donovan, 827, 836
Amp, Inc. v. Fleishacker, 72
Arcadian Corp., Reich v., 886–887
Asarco, Inc. v. National Labor Relations Board, 851, 923
Asbestos Information Assoc. v. Reich, 852
Asmus v. Pacific Bell, 102
Asonia Board of Education v. Philbrook, 757
Associated Builders & Contractors, Inc., 922
Atlantic & Gulf Stevedores, Inc. v. Occupational Safety and Health Review Commission, 872
Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 877, 894, 906
Babcock & Wilcox Co., NLRB v., 375–376, 378–381, 384, 925, 927–928
Backus v. Baptist Med. Ctr., 724
Bailey v. Alabama, 60–61
Balla v. Gambro, Inc., 95
Barbee v. Household Auto. Fin. Corp., 267
Bayer Corporation v. Roche Molecular Systems, Inc., 128–129
Beaumont v. Brown, 272
Beckman v. Cox Broad. Corp., 145
Belknap, Inc. v. Hale, 563–568, 605
Bender v. A.G. Edwards & Sons, Inc., 740
Bishop v. Lakeland Animal Hospital, 151
Bishop v. Wood, 72
Bishop, 72, 151, 394–395, 461, 598–599
Blankenship v. Parke Care Ctrs., Inc., 270–272
Borkowski v. Valley Cent. Sch. Dist, 793
Boyle v. Vista Eyewear, Inc., 93–94
Boys Markets v. Retail Clerks Union, 640, 873, 879–880
Bragdon v. Abbott, 780, 788
Branti v. Finkel, 295
Brewer v. Tracy, 146
Brock v. Emerson Electric Co., 882
Brock v. Getna Machine & Ironworks, Inc., 881
Brock v. LE Meyers Co., 866
Brock v. Local 553, Plumbers and Pipefitters, 528
Brock v. Morello Brothers Construction, Inc., 824
Buckley v. Valeo, 300
Bunting v. Oregon, 19
Bunz v. Moving Picture Machine Operators' Protective Union Local 224, 507–508, 510–511
Burk v. K-Mart Corp., 310–311
Business Machine & Office Appliance Mechanics, Local 459, NLRB v., 589
Butz v. Glover Livestock Comm'n Co., 823

- Cabinet Industries v. Brock, 852
 Cabot Carbon, NLRB v., 445–447
 Calang Corp., Secretary of Labor v., 820
 Carnig v. Carr, 69
 Carroll v. United States, 227
 Castillo v. Givens, 882
 Caterpillar, Inc., Secretary of Labor v., 821
 Caterpillar, Inc. v. Occupational Safety & Health Review Comm'n, 818 CHECK
 Catholic Bishop of Chicago, NLRB v., 461, 598
 Chambers v. Omaha Girls Club, 730
 Chandler v. Miller, 233
 Chavez v. Manville Prods. Corp., 301
 Chemical Workers v. Pittsburgh Glass, 484, 486, 806, 809, 923
 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 279, 359, 366, 380–381, 444, 481, 598, 773, 857, 869
 Christopher v. Safeway Stores, Inc., 511
 CID v. Wal-mart Stores, Inc., 262
 City Disposal, NLRB v., 365–366
 Claiborne Hardware, 314, 603
 Cleary v. American Airlines, Inc., 85
 Cole v. Burns Int'l Security Services, 295, 299, 507, 530, 537, 738, 807
 Commercial Bankers Life Insurance Co. v. Smith, 143
 Connecticut v. Teal, 706, 768
 Connick v. Myers, 195, 288–289, 291–292, 294, 301
 Connie Construction Inc. v. Reich, 859
 Continental Car-Na-Var Corp. v. Moseley, 133
 Coppage v. Kansas, 32
 Cotran v. Rollins Hudig Hall Int'l Inc., 85
 CSC v. Letter Carriers, 299
 Curtin Matheson Scientific, Inc, NLRB v., 556
 Dalton v. Camp, 127
 Daniel Int'l Corp. v. Donovan, 823
 Darby, United States v., 218
 Darlington Mfg. Co., Textile Workers of Union of Am. v., 361–397, 399, 402, 484, 486, 575
 Deal v. Spears, 213
 Dean v. Ford Motor Credit Co., 272–273
 Demasse v. ITT Corp., 102
 Desert Palace, Inc. v. Costa, 690–691, 774
 D.M. Sabina Co., Reich v., 885
 Doe v. Southeastern Pennsylvania Transit Authority (SEPTA), 252
 Donovan v. Adams Steel Erection, Inc., 823
 Donovan v. Blasters, Drill Runners and Miners Local 29, 529
 Donovan v. CSEA Local Union 1000, 532
 Donovan v. Hackney, Inc., 881
 Donovan v. Federal Clearing Die Casting Co., 882
 Donovan v. Local Union Number 20, Laborers, 527
 Donovan v. OCAW, 897
 Donovan v. OSHRAC, 897
 Donovan v. R.D. Anderson Co. Inc., 899
 Dothard v. Rawlinson, 705, 719, 724, 726
 Doyle v. Brock, 527, 532
 Doyle, Board of Education v., 288
 Duffner v. Alberty, 143
 Dukes v. Wal-mart Stores, Inc., 703
 Earls, Board of Education v., 233
 Eastern Associated Coal Corp. v. United Mine Workers, District 17, 628
 Eastex, Inc. v. NLRB, 381, 386, 390
 Edward G. Budd Manufacturing Co. v. NLRB, 357
 Edward J. DeBartolo Corp. v. Florida Gulf Coast Bld. and Constr. Trades Council, 596, 602–603
 E.I. Du Pont de Nemours & Co., 445, 707, 898
 Elbeshbeshy v. Franklin Inst., 256, 282
 Electromation Inc., v. NLRB, 444, 447–448
 Ellis v. Brotherhood of Railway Clerks, 420
 Ellis v. Chao, 526
 Ellis v. United Airways, Inc., 777
 Ellison v. Brady, 738, 751–752
 Elrod v. Burns, 295, 299, 537
 Employment Division v. Smith, 763
 Emporium Capwell Co. v. Western Addition Cmty. Org., 170, 434, 553
 Ensign-Bickford Co. v. O.S.H.R.C., 820
 Faragher v. Boca Raton, 739–742, 745, 747–749
 Farwell v. Boston & Worchester R.R. Corp., 4, 8–9, 812
 Fibreboard Paper Prods. Corp. v. NLRB, 476, 481–482, 484–485, 487, 490
 Firestone Tire & Rubber Co. v. Bruch, 298
 First Nat'l Bank of Boston v. Bellotti, 292, 300
 First Nat'l Maint. Corp. v. NLRB, 482, 489–492
 Fischer v. Mt. Olive Lutheran Church, 219
 Flores v. Amigon, 763
 Foley v. Interactive Data Corp., 85, 95, 109
 Ford Motor Co. v. Huffman, 660, 665, 673, 678, 680

- Ford Motor Co. v. NLRB, 465, 491, 551–552
 Fortune v. National Cash Register Co., 84–85
 Frampton v. Central Ind. Gas Co., 88, 90, 92
 Fraternal Order of Police v. Philadelphia, 251, 257
 French v. Foods, Inc., 23, 330
 Freund Baking Co. v. NLRB, 411
 Fuller v. Phipps, 16, 505
 Gade v. National Solid Wastes Management Assoc., 935
 Garibaldi v. Lucky Food Stores, Inc., 157, 329
 Garmon, San Diego Bldg. Trades Council v., 604, 636, 605–606, 673–677
 Garrison v. Louisiana, 72, 292
 Gateway Coal Co. v. Mine Workers, 649, 908, 911
 Geary v. United States Steel Corp., 89, 298, 300
 General Motors Corp., 386
 General Motors Corp. v. Piskor, 222
 General Motors Corp., NLRB v., 419
 Gilbert v. Durand Glass Mfg. Co., Inc., 103
 Gissel Packing Co., NLRB v., 397, 400, 402, 409, 439
 Goldfinger v. Feintuch, 584, 587, 594–595
 Gocowski v. Penn Central Transportation Co., 667
 Griggs v. Duke Power Co., 705, 719–721, 769–771, 773, 776
 Grouse v. Group Health Plan, Inc., 72
 Harless v. First Nat'l Bank in Fairmont, 89
 Harless v. Forklift Sys., Inc., 751
 Harris Forklift Systems, Inc., 733
 Hayes v. Eateries, Inc., 95
 Hazelwood School Dist. v. United States, 696, 701, 712, 723
 Healey v. Southwood Psychiatric Hosp., 724
 Hertzka & Knowles v. NLRB, 438–439, 441
 Hitchman Coal & Coke Company v. Mitchell, 37–39, 46
 H.K. Porter Co. v. NLRB, 179–180, 491
 Hoffman Plastic Compounds v. NLRB, 329
 Holden v. Hardy, 16–18
 Holly Farms v. NLRB, 444
 Hooters of Am. v. Phillips, 725
 Hopper v. All Pet Animal Clinic, Inc., 141–142, 144–149
 HopperHudgens v. NLRB, 385
 Hughes Tool Co., 666
 Humphrey v. Moore, 671, 673, 677–678, 680
 Hunt, Commonwealth v., 23, 26–28, 310
 Hunter v. Sparling, 298–299, 313, 551
 IBEW Local 1129 (Jefferson Standard Broad. Co.), NLRB v., 387–388
 Ingersoll-Rand Co. v. Ciavatta, 157–159, 298
 Intel Corp. v. Hamidi, 303–307, 309–312, 314–316, 405
 International Bhd. of Teamsters v. United States, 532
 International Union, UAW v. General Dynamics Land Sys. Div., 570, 835, 850
 Jacobsen, United States v., 192
 J.I. Case, J.I. Case Co. v. NLRB, 165, 169, 171, 418, 431, 433, 656–657, 675
 Jones & Laughlin Steel Corp., NLRB v., 167, 171, 478, 547, 911
 J. Weingarten, Inc., NLRB v., 222
 Kastalon, Inc., Secretary of Labor v., 820
 Kelly-Springfield Tire Co., Reich v., 882
 Kentucky River Cmty. Care, Inc., NLRB v., 748
 Kinsey v. Macur, 238
 K-Mart Corp. Store No. 7441 v. Trotti, 204, 207–208
 Knoxville Iron Co. v. Harbison, 18
 Korb v. Raytheon Corp., 301
 Lechmere, Inc. v. NLRB, 380–381
 Liu v. Donna Karan Int'l, Inc., 705
 Livadas v. Bradshaw, 652
 Livingston Shirt Co., 403
 Local 174, Teamsters v. Lucas Flour Company, 635, 640, 642–643, 645, 649
 Local 1229, I.B.E.W., NLRB v., 387
 Lochner v. New York, 17
 Loder v. City of Glendale, 233, 247
 Los Angeles Dep't of Water & Power v. Manhattan, 730
 Luedtke v. Nabors Alaska Drilling, Inc., 235, 243
 Lyng v. Payne, 857
 Mack v. Great Dane Trailers, 579
 Mackay Radio & Telegraph Co, NLRB v., 545, 548–549, 554–555, 559, 563, 568, 571, 574–576
 Main v. Skaggs Cmty. Hosp., 72
 Major League Baseball Players Ass'n v. Garvey, 107
 Makovi v. Sherwin-Williams Co., 276
 Marshall v. Barlow's, Inc., 194–195, 881
 Maryland Metals, Inc. v. Metzner, 119
 McCavitt v. Swiss Reinsurance Am. Corp., 263, 265
 McDonnell Douglas Corp v. Green, 386, 695, 710, 720, 774
 McGann v. H & H Music Co., 85, 204

- Medo Photo Supply Corp. v. NLRB, 474, 656
Meehan v. Shaughnessy, 292
Mehlman v. Mobil Oil Corporation,
317–323, 325–326, 328–331
Meritor Savings Bank, FSB v. Vinson,
734–736
Meritor Savings Bank, FSB, 734–736
Metcalf v. Intermountain Gas Co., 899
Midland, City of v. O’Bryant, 412
Miller v. Dept. of Corrections, 737
Miller v. Equitable Life Insurance Society,
212
Miller v. Motorola, 211–212
Mills v. Alabama, 409
Minter v. Tootle, Campbell Dry Goods Co.,
70
Miranda Fuel Co., 666, 673–674, 680
Mount Healthy City Board of Education v.
Doyle, 359
Mountain Timber Co. v. Washington, 19
Muller v. Oregon, 598, 727
Murphy v. American Home Prods. Corp., 95,
264
Murphy v. United Parcel Service, 787
NAACP v. Claiborne Hardware Co., 314
National Association of Government Em-
ployees v. Campbell, 84
National Solid Wastes Mgmt. Ass’n v. Killian,
729, 937, 944
National Treasure Employees Union v. Von
Raab, 224
Navarro v. Gannon, 509
Nees v. Hock, 88, 90, 92
Nemeth v. Clark Equip. Co., 85
Nestle Ice Cream Co. v. NLRB, 411
New Jersey v. T.L.O., 194–196, 199, 202, 230
New York State Electric & Gas Corp. v. Secre-
tary of Labor, 835, 862
Nichols v. Azteca Rest. Enters., Inc., 753, 755
Novosel v. Nationwide Ins. Co., 239, 296–300
O’Connor v. Ortega, 191, 225–227
Oil, Chemical and Atomic Workers v.
O.S.H.R.C., 891
Oliver v. United States, 192, 198
Oncale v. Sundowner Offshore Servs., Inc.,
752
Owens-Corning Fiberglass Corp., et al, In re,
802
Pacific Gas & Elec. Co. v. Bear Stearns & Co.,
940
Palmateer v. International Harvester Co., 239
Paperworkers v. Misco, Inc., 629–630, 632
Parnar v. Americana Hotels, Inc., 93
Parrish v. West Coast Hotel Co., 18–19
Pattern Makers’ League of North America v.
NLRB, 549
Payne v. Western & Atl. R.R. Co., 10, 15, 63,
73–74
Peerless Plywood Co., 409,
Penny Power Shopping News, 435
Pennsylvania State Police v. Suders, 749
Pepsico, Inc. v. Redmond, 131–132, 135
Perez v. Campbell, 941
Perry v. Sindermann, 288, 292
Perry v. Wheeler, 67
Perry v. Woodward, 72
P. Gioioso & Sons, Inc., v. Occupational
Safety and Health, 854
Philadelphia Cordwainers’ Case, 21
Phillips v. Interior Bd. of Mine Operations
Appeals, 909
Pickering v. Board of Education, 288–289,
291–292, 294, 301
Pierce v. Ortho Pharm. Corp., 329
Pierce, 70, 88–89, 93, 98–99, 252–254,
256–261, 329, 444
Pilot Life Ins. Co. v. Dedeaux, 938
Pine River State Bank v. Mettille, 72
Pollard v. E.I. Dupont de Nemours & Co.,
707
Pollack v. Williams, 61
Postal Serv. Bd. of Governors v. Aikens, 692
Price Waterhouse v. Hopkins, 692–694,
753–755
Prill v. NLRB, 336, 910
Puffer’s Hardware Inc. v. Donovan, 945
Pugh v. See’s Candies, Inc., 109, 721–722
Pullis, Commonwealth v., 21
Randi W. v. Monroe Joint Unified Sch. Dist.,
282
Rankin v. McPherson, 286–291, 293, 295
Reddy v. Community Health Found. of
Man., 145
Reed & Prince Manufacturing Co., NLRB v.,
173, 471, 487
Reeves v. Sanderson Plumbing Prods., Inc.,
692, 695
Reich v. Arcadian Corp., 886–887
Reich v. D.M. Sabina Co., 885
Reich v. Sea Sprite Boat Co., Inc., 885
Reich v. Kelly-Springfield Tire Co., 882
Rene v. MGM Grand Hotel, 750–756
Republic Aviation Corp. v. NLRB, 367,
370–372, 376–378, 383–384
Reuther v. Fowler & Williams, Inc., 90, 298
Ridley v. Krout, 143–145, 147

- Rockhill v. Pollard, 269
Rogers v. Missouri Pac. R. Co., 692
Roth v. United States, 588
Rowan v. U.S. Post Office Dept., 315
Rubin v. Tourneau, Inc., 223
Rutan v. Republican Party, 295
Salzhandler v. Caputo, 512–517
San Diego Bldg. Trades Council v. Garmon, 604, 636, 605–606, 673–677
San Diego v. Roe, 293
San Diego Gas & Electric Co., 329
San Diego Gas & Electric Co. v. Superior Court, 312
Schrimpf v. Tennessee Manufacturing Co., 63, 65
Schultz v. Industrial Coils, Inc., 704, 731–733, 739, 754, 756
Scott v. Local Union 337, Teamsters, 688
Scott v. Pacific Gas & Elec. Co., 109
Scott & Fetzer, 446
Scott Lumber Co., 544
Scott Paper Box Co., 574
Scott Paper Co., NLRB v., 463
Scrogan v. Kraftco Corp., 89
Sea Sprite Boat Co., Reich v., Inc., 885
Sears, Roebuck & Co. v. San Diego District Council of Carpenters, 605
Sears, Roebuck & Co., EEOC v., 72, 605, 704, 800, 910
S.E. Nichols Inc., NLRB v., 405
Sewell Mfg. Co., 405
Sheet Metal Workers Intn'l Assoc. v. Lynn, 533, 536
Sheets v. Teddy's Frosted Foods, Inc., 87, 109
Shell Oil Co., EEOC v., 474
Shinman v. Miller, 517
Shoemaker v. Myers, 22
Shovelin v. Central N.M. Elec. Coop., Inc., 302
Sigal Construction Corporation v. Stanbury, 276
Skagerberg v. Blandin Paper Co., 68, 72
Skinner v. Railway Labor Exec. Ass'n, 354
Smith v. City of Jackson, 705–706, 769, 776
Smith v. Evening News Assoc., 668, 670, 674–675, 681
Smith v. Maryland, 203
Smyth v. Pillsbury Co., 220
Soroka v. Dayton Hudson Co., 244, 250
Southeastern Pennsylvania Transit Authority (SEPTA), Doe v., 252
Sowards v. Norbar, Inc., 207
Steele v. Louisville & Nashville R.R. Co., 170, 654, 659–661, 664–666, 673–675, 681
Steelworkers v. Warrior & Gulf Co., 478, 618, 622, 624, 626, 637, 649–650
Sutton v. United Air Lines, Inc., 779, 787
Sventko v. Kroger Co., 88, 298
System Concepts, Inc. v. Dixon, 146
Taxman v. Board of Education of Township of Piscataway, 717
Tench v. Weaver, 143, 147
Terry v. Ohio, 196
Textile Workers v. Lincoln Mills, 611–614, 616, 636–637, 640, 642–645
Textile Workers of Union of Am. v. Darlington Mfg. Co. 361–397, 399, 402, 484, 486, 575
The Singer Co., 386
Torrence v. Hewitt Assocs., 146
Toussaint v. Blue Cross & Blue Shield of Mich., 106
Town & Country, NLRB v., 379
Toyota Motor Mfg. v. Williams, 787
Trans World Airlines, Inc. v. Hardison, 758, 794
Trans World Airlines, Inc. v. Thurston, 726, 764
Treasury Employees v. Von Raab, 224, 233, 235, 294, 296
Trombetta v. Detroit, Toledo & Ironston R. Co., 89
Truitt Manufacturing Co., NLRB v., 492, 494
Tunstall v. Brotherhood of Locomotive Firemen, 661, 673
Tymshare, Inc. v. Covell, 78–65
United Auto Workers v. Johnson Controls, 725–730
United Steel Workers of Am. v. American Mfg. Co., 614, 617, 676
United Steelworkers of America v. Auchter, 912, 922
United Steel Workers of Am. v. Enterprise Wheel & Car Co., 623, 625, 629–630, 650
United Steel Workers of Am. v. Warrior & Gulf Navigation Co., 478, 618, 621, 622, 624, 626, 637, 649–650
United Steel Workers of Am., AFL-CIO v. Weber, 711–716, 718
Universal Camera Corp. v. NLRB, 173–174, 374, 843, 858
US Airways, Inc. v. Barnett, 789
Usery v. Whirlpool Corp., 904
V.I.P. Structures, Inc., Secretary of Labor v., 822
Vaca v. Sipes, 666, 671, 681–682, 686–687
Vande Zande v. State of Wisc., 801

- Vega-Rodriguez v. Puerto Rico Tel. Co., 213, 218
- Vegelahn v. Guntner, 23, 29, 41, 43, 412
- Virginia Electric and Power Co., NLRB v., 393, 400
- Wal-Mart Stores, Inc., State v., 264–266
- Washington Aluminum, NLRB v., 908, 910
- Waters v. Churchill, 294–296
- Watson v. Fort Worth Bank & Trust, 705
- Watts v. Indiana, 266
- Webcor Packaging, Inc., NLRB v., 442–447
- West Coast Hotel v. Parrish, 18–19
- Western Airlines, Inc. v. Criswell, 764
- Whalen v. Roe, 255, 257
- Whirlpool Corp., Marshall v., 909
- Whirlpool Corp. v. Marshall, 893, 902
- White v. Davis, 238, 247
- Whyte v. Schlage Lock Co., 135
- Wieder v. Skala, 96
- Williams v. Poulos, 219
- Wilson v. Monarch Paper Co., 269
- Wirtz v. Hotel and Club Employees Union, Local 6, 520–521, 525–526, 770–772, 774, 776
- Woolley v. Hoffmann-La Roche, Inc., 97, 103, 105–107, 329
- Wooster Division of Borg-Warner Corp., NLRB v., 472, 481, 485
- W.R. Grace & Co. v. Rubber Workers, 630, 632–633
- Wygant v. Jackson Board of Education, 708, 710, 715–716
- Yaindl v. Ingersoll-Rand Co., 298
- Yellow Cab Co. v. Industrial Comm’n, 339
- Yeshiva Univ., NLRB v., 459–466
- Zellerbach Paper Co. et al, In Re, 332–333, 339, 387, 390
- Zheng v. Liberty Apparel Co., 593
- Zimmerman v. Valdak Corp., 608
- Zinda v. Louisiana Pac. Corp., 283

Foreword

It was Clyde Summers' idea to organize a course on labor and employment law around the core values of that law. This has not been the only visionary idea in Clyde's extraordinary career. The values around which these materials are organized are so simple that they tend to disappear in less skillful treatments of the subject: contract, dignity, freedom of speech and association, participation, fairness, equality, and bodily integrity. In these materials, by contrast, they are always in the foreground. Their various meanings are each examined in the contexts of different statutes, lines of case law, and arbitrators' decisions, normally kept apart in separate law school courses. And of course, given such detailed examination, these simple concepts are not so simple at all. We will be left wondering why the dignity of the public employee is analyzed so differently from that of the employee in the private sector, why the arbitrator's concept of loyalty is so different from the judge's, when equality dissolves into a search for someone else's bad motive, how the body floats in and out of our legal consciousness.

Clyde laid out this vision over twenty years ago in *What We Should Teach in Labor Law: The Need for Change and a Suggested Direction*, in THE PARK CITY PAPERS: PAPERS PRESENTED AT THE LABOR LAW GROUP CONFERENCE ON LABOR AND EMPLOYMENT LAW IN PARK CITY, UTAH, JUNE 29–JULY 1, 1984. He correctly predicted the declining role of collective bargaining, and the rise of courses on the disparate law regulating nonunion employment, lacking any “central core or integrating principle” and running “the risk of being a grab bag of miscellaneous problems which gain no coherence or illumination from each other.” He continued: “For me, there is a broad theme of great appeal—the role of the law in aiding the weaker party.” This value potentially lies in every case in this book (or any other casebook in labor or employment law). Sometimes it dominates. More often, perhaps, it yields to other values. Understanding these patterns provides coherence to what students often experience as trees without a forest. Only a year or so before these remarks, Clyde had (with one of us) published a new edition of his traditional casebook on Labor Law. Yet he had already grown restless with that approach, and set out to do something different.

Characteristically, Clyde spent two decades pursuing this goal, never distracted by academic fads. New casebooks have appeared for a course either in labor or employment law, or an à la carte sampling of the two. At least one is organized around the theme of law's search for economic efficiency. None adopts Clyde's organization, examining the fundamental values that cut across all these areas. A generation of law students has graduated with ever-increasing facility in sophisticated discussion of legal process or economic analysis—themes, by the way, that get a great deal of attention in these materials, too. Yet we have noticed no simultaneous improvement in their ability to discuss values. Law students today instead are often tongue-tied when asked to discuss values. So we think these materials are more timely than ever.

Clyde refined his materials in his combined course in labor and employment law at the University of Pennsylvania Law School, which he taught long after his nominal retirement from that institution. As he did, he examined and reexamined entire bodies of law to which he could claim parentage. Only due to Clyde's research in the 1940s and 1950s did we know about the role of the law in guaranteeing union members the right to participate in their institutions. Only due to Clyde's advocacy in the 1950s do we have a federal statute incorporating those principles. As this book shows, Clyde's goal was never to celebrate these achievements, but constantly to probe their successes—and failures—to help us realize that same value of participation, in new venues, such as employee participation in management. Clyde's path-breaking *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA.L.REV. 481 (1976), helped spark one of the most extraordinary revolutions in the history of the common law, reviewed in Chapter II, in which court after court found ways in which discharged employees might challenge their dismissals. The courts responded to no organized movement for legal change, no coordinated litigation, no pressure groups. They bowed to the power of an idea, and that idea, in large measure, was Clyde's.

Around 2002, Clyde asked the two of us to help him ready his materials for publication. We anticipated working with Clyde to add newer readings from our own areas of research, and also anticipated the intellectual treat of working with Clyde. We did not anticipate that Clyde's health would not permit him to participate in the project. The values around which the book is organized are Clyde's, and so are the legal topics used to illustrate them, but he is not responsible for the final form of some of the cases selected and edited, or the notes and questions.

We acknowledge with gratitude the research assistance of Julie Jones of the Cornell Law Library, Timothy A. Haley of Indiana University-Bloomington and Ryan H. Vann of Indiana University-Bloomington. We also are thankful for the skilled secretarial assistance of Silvana Burgese of the University of Pennsylvania and Teresa Barnett of Indiana University-Bloomington.

K.D.S.

A.H.

February, 2006

Preface

The purpose of this book is to provide teaching materials for a course merging two areas of law governing the labor market—collective labor law and individual employment law—which have historically been taught as separate courses. Indeed, “Labor Law,” particularly as taught in law schools for the last fifty years, has dealt entirely with collective labor law, the law governing union-employer relations and collective bargaining. Only in the last fifteen years has any substantial attention been given to individual employment law. This has been prompted by the fact that the proportion of the private workforce covered by collective agreements dropped from 40% in 1955 to 9% in 2004. Individual employment law has now become as important, if not more important, than collective labor law.

These two bodies of law are two different methods of regulating and structuring the labor market. They may operate separately or in tandem in performing this function, but they both play important roles. These materials represent an effort to interrelate or tie together these two bodies of law into a common framework.

The broad premise of this course is that historically and functionally the predominant purpose of labor law has been to protect workers from market forces in the individual labor market. The articulate assumption is that individual bargaining in the labor market will lead to socially undesirable results and that the law here, as in many other areas, should come to the aid of the weaker party. It may do this in two ways: first, employees may be protected by direct regulation of terms and conditions of employment with laws such as minimum wage laws, health and safety laws and prohibitions against discrimination; second, employees may obtain a measure of protection by restructuring the labor market so as to replace individual bargaining with collective bargaining in the belief that the collective labor market will produce more acceptable social results.

If the function of labor law is to protect the interests of workers, then a central question must be “What interests of workers should the law seek to protect?” Government intervention in the market has political, social and economic costs, so the law should intervene to protect only those interests which have significant social values. This then leads to the question which is the focus of this course—“What are the social and economic values which the law seeks to protect and to what extent are those values protected?” Along with this inquiry as to what interests the law *does* protect, must be consideration of what interests the law *should* protect.

The structure of the materials is to consider the various social and economic values in separate chapters, examining those values in both individual employment law and collective labor law. Thus, Chapter II examines the role of freedom of contract, in both areas of the law; Chapter IV examines the role of freedom of speech and association; Chapter V focuses on the social value of worker participation in decisions affecting their

working life. Other chapters deal with the social values of privatization of industrial government; the right to fair and equal treatment; the right to safety and health in the workplace; and the right to dignity.

In all of these, the inquiry is the role of the law and collective bargaining in protecting and promoting these values in the workplace; what the law and collective bargaining does and what it should do. The study focuses largely on the protection law and collective bargaining provides the various interests of workers, but we will at the same time consider the interests of employers, and the impact of regulation on the productivity and profitability of the enterprise. The study must constantly be measuring, implicitly or explicitly, the political and social values of the free market, how well it functions, and the costs, in political as well as economic terms of legal intervention. This is the central focus of Chapter II, *Freedom of Contract and Its Limits*, for freedom of contract is the lawyer's formulation of freedom of market forces. In collective bargaining relations freedom of contract carries the flag of "management prerogatives." In the individual labor market, it carries the assertion of the employers' property rights.

The materials are designed to examine the substantive law in both individual and collective labor law, and to open for criticism and evaluation important cases and writings in the field. It provides an overview of the major legal rules and doctrines as developed by the courts and legislatures and examines the practical effectiveness of the legal remedies. The purpose, however, is to examine the substantive legal rules and remedies in the broader context of the values involved. The purpose is to go beyond Justice Holmes' pedestrian definition of the law:

"The prophecies of what the courts will do in fact, and nothing more pretentious are what I mean by law." *Path of the Law* (1887)

We may aspire to reach toward Holmes' more noble vision:

"The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master of your calling but connect your subject to the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of universal law." *Path of the Law* (1887)

C.W.S.