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Equity - Injunction Will Issue to Enjoin Negro Organization from Interfering with Relation between a Racially Discriminating Company and Its Customers

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EQUITY—INJUNCTION WILL ISSUE TO ENJOIN NEGRO ORGANIZATION FROM INTERFERING WITH RELATION BETWEEN A RACIALLY DISCRIMINATING COMPANY AND ITS CUSTOMERS.

Potomac Electric Power Co. v. Washington Chapter of the Congress of Racial Equality (D.D.C. 1962)

Plaintiff sought to enjoin defendant, an organization engaged in a campaign to secure employment for Negroes, from distributing to plaintiff's customers several hundred thousand stamps bearing the words, "We believe in merit hiring." The recipients of these stamps were to be requested to affix them to the stubs of the plaintiff's bills when the latter were returned in connection with payments. It was found that such action would make it impossible to process the stubs in the calculating machines and would result in confusion and havoc in plaintiff's billing and accounting operations. The District Court, on motion by defendant to dismiss the amended complaint, *held* that the complaint stated a valid cause of action and an injunction was a proper remedy. The court further held that the controversy was not a labor dispute within the scope of the Norris-LaGuardia Act,[1] but that, even if it were, plaintiff was entitled to a preliminary injunction restraining the distribution of such stamps. *Potomac Electric Power Co. v. Washington Chapter of the Congress of Racial Equality,* 210 F. Supp. 418 (D.D.C. 1962).

Although the court also concerned itself with whether the controversy involved a labor dispute within the meaning of that term as found in the Norris-LaGuardia Act,[2] and whether that Act precluded the issuance of an injunction, this note will focus solely upon what seems to be the most perplexing problem, that is, the precise nature of the cause of action upon which the litigation was grounded.

Combating racial discrimination in employment is presently a most significant domestic problem. It should be noted that the court in the present case, concerning the theory upon which its decision was based, merely stated that:

> It is well established that equity may enjoin continuing trespasses, repeated or irreparable injuries to property, or a course of illegitimate interference with business activities, if a remedy by an action for damages is not adequate. This is one of the traditional functions of equity.[3]

However, an analysis of these theories in relation to the facts of the instant case shows that the court really went much further than it said it did.

A common law right to conduct one's business without the wrongful interference of others has been recognized since as early as the fourteenth

1. 29 U.S.C. §§ 101-113 (1958).
2. *Ibid.*
3. 210 F. Supp. 418, 419 (D.D.C. 1962).

century.[4] In the earliest cases, recovery was had where the interference involved violence, fraud, or defamation.[5] The familiar torts of disparagement, unfair competition, malicious prosecution, and deceit developed from this common basis. The general scope of this area of tort law was broadened by the decision in *Lumley v. Gye*,[6] which recognized as tortious an intentional, though nonviolent, interference with contractual relations. Such a rule was extended in *Temperton v. Russell*[7] to cover interference with prospective, as well as with fixed contractual relations. Moreover, within a separate line of development, *Quinn v. Leathem*[8] introduced the principle that an action could be brought against a defendant for interfering with one's trade or calling where the defendant's purpose was to injure the plaintiff in his trade as opposed to legitimately advancing his own interest. Today, the outgrowth of such principles has brought about another generic label, "wrongful interference with the conduct of a business," and such has been applied to a conglomerate of transactions often including or overlapping the more crystallized torts. With flexible bounds, this cause of action may offer assistance to any businessman with a grievance which does not fit within the more familiar molds. It also prevents one from avoiding liability for a wrongful act which does not fit within the requirements for a traditional cause of action.[9] Although some courts seem clearly to hold that a general claim of unjustified injury to the business, credit, and reputation of the plaintiff is enough to bring the case within the range of interests protected in the name of "conduct of a business,"[10] the facts of the instant case are quite unlike those in any previously reported decision. Here is present the additional element that the customers of the plaintiff are a necessary agent in bringing about the injury. Thus, it could be contended that the sending of the stamps is nonactionable, since this act, in itself, does not cause any harm to the plaintiff's business. Defendants are in no way pressuring the customers to affix the stamps to the stubs. Defendants' only act was a suggestion to plaintiff's customers that if they were displeased with the plaintiff's policy

4. RESTATEMENT, TORTS § 766, Comment b (1939).
5. *Ibid.*
6. 2 El1. & Bl. 216, 1 ENG. RUL. CAS. 707 (1853).
7. 1 Q.B. 715 (1893).
8. [1901] A.C. 495.
9. See Original Ballet Russe, Ltd. v. Ballet Theatre, Inc., 133 F.2d 187 (2d Cir. 1943) (inducement of employees to leave jobs); Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909) (competing for sole purpose of destroying plaintiff's business); American Guild of Musical Artists, Inc. v. Petrillo, 286 N.Y. 226, 36 N.E.2d 123 (1941) (threatening boycott of association members); Opera On Tour, Inc. v. Weber, 285 N.Y. 348, 34 N.E.2d 349 (1941) (ordering stagehands to refuse to serve plaintiff).
10. American Bank & Trust Co. v. Federal Reserve Bank of Atlanta, 256 U.S. 350, 49 S. Ct. 499 (1921); Carter v. Knapp Motor Co., 243 Ala. 600, 11 So. 2d 383 (1943); Stein v. Schmitz, 21 N.J. Misc. 218, 32 A.2d 844 (1943); Ledwith v. International Paper Co., 64 N.Y.S.2d 810. (Sup. Ct. 1946); Koral v. Savory, Inc., 168 Misc. 615, 5 N.Y.S.2d 270 (Sup. Ct. 1938), *aff'd*, 255 App. Div. 856, 7 N.Y.S.2d 995 (1938); Saxon Motor Sales, Inc. v. Torino, 166 Misc. 863, 2 N.Y.S.2d 885 (Sup. Ct. 1938); Stebbins v. Edwards, 101 Okla. 188, 224 Pac. 714 (1924); Riding v. Smith, 1 Ex. D. 91 (1875).

of discrimination, they should take the prescribed steps. In all the previous cases there has been some direct act on the part of defendants to interfere immediately with the conduct of plaintiffs' business.[11] Thus, the present court has gone one step further in finding this course of conduct actionable as an illegitimate interference with business activities.

It is suggested that in expanding the scope of tort liability in the business area, the Court has either intentionally or inadvertently relied upon the somewhat mysterious prima facie tort doctrine. As classically set out in *Mogul Steamship Co. v. McGregor, Gow & Co.*, the doctrine is that "intentionally to do that which is calculated in the ordinary course of events to damage another in that person's property or trade, is actionable if done without just cause or excuse."[12] Its initial appearance in the United States was in *Aikens v. Wisconsin*,[13] where the court said: "It has been considered that prima facie, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape."[14] This doctrine has been used as a practical tool enabling courts to impose punishment for wrongful actions which did not lend themselves to traditional classification.[15] Prosser suggests that the important factor is motive, and the real problem is in balancing the conflicting interests of the parties, and determining whether the defendant's objective should prevail at the expense of the damage to the plaintiff; it is ultimately a question of deciding whether the social value of that objective is sufficient to outweigh the gravity of the interference.[16] It has also been proposed that the prima facie tort doctrine is a useful instrument since litigants need not be denied relief merely because the common law has not been extended by analogy to fit newly emerging problems. It has been said that the doctrine has had the effect of motivating the development of the concept of "no fault without liability" in the tort area.[17] The same theory applies to the other causes of action alluded to by the court, including continuing trespass and irreparable injury to property. Fol-

11. In addition to cases cited *supra* note 9, see also Dunshee v. Standard Oil Co., 152 Iowa 618, 132 N.W. 371 (1911) (competition for sole purpose of destroying plaintiff's business); Green v. Samuelson, 168 Md. 421, 178 Atl. 109 (1935) (picketing to secure employment of Negroes); Willner v. Silverman, 109 Md. 341, 71 Atl. 962 (1909) (blacklist of labor agitator); Wesley v. Native Lumber Co., 97 Miss. 814, 53 So. 346 (1910) (threatening customers); Van Horn v. Van Horn, 56 N.J.L. 318, 28 Atl. 669 (1894) (inducing suppliers to boycott plaintiff); Crafter Hand Woven Harris Tweed Co., Ltd. v. Veitch, [1942] A.C. 435 (convincing suppliers not to deal with plaintiff).

12. 23 Q.B.D. 598, 613 (1889).

13. 195 U.S. 194, 25 S. Ct. 3 (1904).

14. 195 U.S. 194, 204, 25 S. Ct. 3, 5 (1904).

15. See Aikens v. Wis., 195 U.S. 194, 255 S. Ct. 3 (1904); Imperial Ice Co. v. Rorsier, 18 Cal. 2d 33, 112 P.2d 631 (1941); Walker v. Cronin, 107 Mass. 555 (1871); Wilkinson v. Powe, 300 Mich. 275, 1 N.W.2d 539 (1942); Louis Kamn, Inc. v. Flink, 113 N.J.L. 582, 175 Atl. 62 (1934); Al Raschid v. News Syndicate Co., 265 N.Y. 1, 191 N.E. 713 (1934).

16. PROSSER, TORTS § 5 at p. 23 (2d ed. 1955).

17. Note, 52 COL. L. REV. 503, 513 (1952).

lowing the Restatement of Torts,[18] the defendant would be liable if the customers followed its request and pasted the stamps to the stubs, for the latter act would constitute a trespass and/or a conversion and would be causally linked to the wrongful act through the intent to have the stamps placed on the stubs. This does not resemble any traditional tort theory and appears to be, in effect, an outgrowth of the prima facie tort doctrine.

One of the key issues arising wherever such a theory is applied is the matter of justification. Liability usually will depend on the ultimate purpose which defendant is seeking to advance. The earliest cases[19] dealing with interference with contractural relations, with their emphasis upon malice, regarded proof of an improper motive as an essential part of the plaintiff's cause of action.[20] As the tort became more firmly established, there was a gradual shift of emphasis; today it is generally agreed that the intentional interference is prima facie sufficient for liability, and that the burden of proving that it is "justified" rests upon defendant.[21] According to one view of what factors are necessary in determining privilege,[22] attempts to prevent racial discrimination come within the privilege:[23]

> The question whether such pressure is proper is answered in the light of the circumstances in which it is exerted, the object sought to be accomplished by the actor, the degree of coercion involved, the extent of the harm which it threatens, the effect upon neutral parties drawn into the situation, the effects upon competition, and the general reasonableness and appropriateness of their pressure as a means of accomplishing the actor's objective.[24]

As to how far a group may proceed to combat discrimination in employment, the courts have not been helpful in establishing standards. Occasionally, they have labeled problems as labor disputes, thereby giving the group the benefits of certain labor legislation.[25] But such a matter is beyond the scope of the present discussion.

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18. RESTATEMENT, TORTS § 280 and comment; § 279, comment c (1934): "The actor will be held to be causally connected if he is a substantial factor in bringing about harm of the type which he intended to inflict upon the other; the actor is a substantial factor even if after the event it appears highly extraordinary that it should have brought about the harm or that the actor's conduct has created a situation harmless unless acted upon by other forces for which the actor is not responsible."

19. Lumley v. Gye, 118 Eng. Rep. 749, 1 ENG. RUL. CAS. 707 (1853); Bowen v. Hall, 6 Q.B.D. 333, 50 L.J.Q.B. 305 (1881); Temperton v. Russell, 1 Q.B. 715, 62 L.J.Q.B. 412 (1893).

20. PROSSER, TORTS § 106 (2d ed. 1955).

21. *Ibid.*

22. RESTATEMENT, TORTS § 767 (1939): "In determining whether there is a privilege to act in the manner stated in § 766, the following are important factors:
(a) the nature of the actor's conduct,
(b) the nature of the expectancy with which his conduct interferes,
(c) the relations between the parties,
(d) the interest sought to be advanced by the actor and
(e) the social interests in protecting the expectancy on the one hand, and the actor's freedom of action on the other hand.

23. *Id.*, comment on clause (d) at p. 69.

24. *Id.*, comment on clause (a) at pp. 67-68.

25. *E.g.*, Norris-LaGuardia Act, 29 U.S.C. §§ 101-113 (1958), which places certain restrictions on the issuance of injunctions in any case involving or growing out of

Some insight into the attitude of the courts is found in the cases involving non-labor boycotting and picketing to secure employment for Negroes. In *Green v. Samuelson,*[26] a Negro group picketed and advocated boycotting of a white merchant in a Harlem area who refused to hire Negro clerks exclusively. While the court recognized the right of Negroes, by organization, public meetings, propaganda, and personal solicitation, to persuade white employers to engage colored employees and to induce their people to confine their trade to those who accede to their wishes, the court enjoined such action on the theory that the question was a racial or social one, thus making inapplicable the rule applying to labor disputes. Implicit in the decision was the warning that to allow such conduct might easily lead to physical violence and that such means would not be lawful in order to accomplish the particular end. In *A. S. Beck Shoe Corp. v. Johnson,*[27] the facts were essentially similar. The court there also stressed that the problem was a racial one, not a labor dispute. Supposedly, if defendants had been allowed to continue their acts, it would have been equally proper for some white organization to employ the same tactics. This would have created a substantial danger that race riots and reprisals would have resulted. The court felt that "a balancing of the advantages to the defendants, as against the disadvantages to the plaintiff and the social order as a whole, clearly points to disapproval of the acts complained of."[28] Both of these cases were considered in *Hughes v. Superior Court.*[29] There, defendant, a group organized to improve the status of the Negro, demanded that Negro clerks be hired at plaintiff's grocery store until the proportion of Negro clerks to the white clerks approximated the proportion of Negro to white customers. Upon refusal of this demand and in order to compel compliance, plaintiff's store was systematically patrolled by pickets carrying placards. In a suit by the store owner for an injunction, the state court held for defendants.[30] On appeal, the United States Supreme Court reversed, stating:

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a labor dispute. See New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 58 S. Ct. 703 (1938) where, in a situation involving picketing by an organization attempting to secure employment for Negroes, the Court held that the matter was a labor dispute and was governed by the Norris-LaGuardia Act. In the instant case, the court considered whether the matter was a labor dispute and decided that, even if it were, the requirements for issuing an injunction under the Act were nevertheless satisfied. 210 F. Supp. 418, 420-421. (D.D.C. 1962).

26. 168 Md. 421, 178 Atl. 109 (1935).

27. 153 Misc. 363, 274 N.Y. Supp. 946 (1934).

28. *Id.* at 370, 274 N.Y. Supp. at 954.

29. 186 P.2d 756 (Cal. App. 1948).

30. The court stated:

". . . it is in accord with sound public policy to permit Negroes, a discriminated and subjugated group in our society, to picket to attempt to secure equality in employment practices from those employers who cater to Negro patronage. The right is granted not because the pickets are members of a minority group, but because that minority group is economically discriminated against, and is attempting to rectify that condition." *Id.* at 766.

The court brought out that it depended on the nature of the acts of the Negroes whether the right to gain employment by such methods would be lost.

> To deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities . . . . The differences in cultural traditions instead of adding flavor and variety to our common citizenry might well be hardened into hostilities by leave of law. The constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use in these situations.[31]

Moreover, the Court expressed the view that "industrial picketing is more than free speech, since it involves patrol of a particular locality, and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."[32] Thus, it is evident that there has been little success in attempting to combat racial discrimination through picketing and boycotting. Consequently, one has no difficulty in justifying the court's attitude toward defendant's action in the instant case. However, where the court stated that the defendant's activity served no useful object, but was merely intended to vex and harass the plaintiff,[33] it seemed to have lost sight of defendant's purpose in pursuing such a course of action. For it appears that a very useful object would have been accomplished, namely, the reduction of racial discrimination in employment. The court might simply have meant that the means did not justify the end.

As the law stands at present, the few precedents existing in the area of attempts to combat racial discrimination in employment are not very encouraging for the Negro. Courts have vaguely asserted that groups may combine to combat such discrimination, while, at the same time, they have consistently forbidden effective action aimed at achieving such a result. In fact, it seems that the concept of racial equality in employment has been relegated to such a secondary position by the courts that, in a case like the present one, an injunction is granted without specifically stating the underlying cause of action even though the court is going further than any court has previously gone in this respect.

It is evident that steps must be taken in this area. Perhaps, if a court were willing to consider such controversies as labor disputes and protect them from injunctive relief, an immediate solution might be had. Although it is unlikely that such an interpretation would alter the result

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31. 339 U.S. 460, 464, 70 S. Ct. 718, 721 (1950).

32. *Ibid.*; see also concurring opinion of Justice Douglas in Bakery & Pastry Local v. Wohl, 315 U.S. 769, 62 S. Ct. 816 (1942).

33. 210 F. Supp. 418, 419 (D.D.C. 1962).