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01-18-1977 Correspondence from Rehnquist to Marshall

William H. Rehnquist
US Supreme Court Justice

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 18, 1977

Re: No. 75-812 - Codd v. Velger

Dear Thurgood:

The problem which you raise with respect to the subject of the draft opinion in this case is a real one, but I am unsure of whether we should deal with it here. As you point out, respondent here sought only damages and reinstatement, and therefore we are not directly presented with the question which would be raised if he had in addition sought a delayed Roth hearing by the employer. The precise disposition of his case, had he sought only that sort of a hearing and neither damages nor reinstatement, is to my mind a cloudy and difficult question; it may be the disposition you propose is right, but while I would be happy to reserve the question I would rather not decide it now.

The notion that allegations can be divorced from proof in a litigated matter is one which itself raises some questions -- most obviously of how the elements of proof of the Roth claim would be apportioned between the federal District Court and the delayed administrative hearing. Suppose, for example, that the discharged employee makes all of the allegations which you hypothesize in your memo of January 14th; non-tenured status, stigmatizing information disseminated in course of termination, and falsity. At

the initial hearing in the federal court, counsel for the respondent files a verified response or answer, in the best tradition of Chitty, denying that the plaintiff was ever an employee, that he was fired, that any information was disseminated, that any information which was disseminated was stigmatizing, and, finally, that the information was false. Surely the federal district judge does not immediately say to the plaintiff: "You have alleged enough for me to require the employer to conduct a delayed Roth hearing, and I am now issuing a mandatory injunction requiring him to do so. If he fails to do so, he will be cited for contempt."

I think the best way to handle the problem which you suggest is to note that it exists, but not suggest any resolution of the difficult issues which it brings with it. I would therefore propose to add the following footnote to the present draft opinion, to be referenced at the end of the second sentence of the present draft:

> "Respondent did not seek a delayed Roth hearing to be conducted by his former employer at which he would have the opportunity to refute the charge in question. Board of Regents v. Roth, 408 U.S. 564, 573. The relief he sought was premised on the assumption that the failure to accord such a hearing when it should have been accorded entitled him to obtain reinstatement and damages resulting from the denial of such hearing. We therefore have no occasion to consider the allocation of the burden of pleading and proof of the necessary issues as between the federal forum and the administrative hearing where such relief is sought."

If I can tailor my suggestion to better satisfy you, let me know. In the course of revising the draft, I also propose to change the first sentence in the first full paragraph on page 4 to read as follows:

> "But the hearing required where a non-tenured employee has been stigmatized in the course of a decision to terminate his employment is solely 'to provide the person an opportunity to clear his name.'"

Sincerely,

WEB

Mr. Justice Marshall

Copies to the Conference