

RECENT DEVELOPMENTS

CIVIL PROCEDURE: DISCHARGE OF A SOCIAL WORKER FAILS TO SUPPORT 1343(3) JURISDICTION UNDER PERSONAL- PROPERTY RIGHTS TEST

In *Tichon v. Harder*¹ the Court of Appeals for the Second Circuit held that a social worker's claim that her discharge from a state job lacked procedural due process failed to state a cause of action under section 1983 of title 42² and section 1343(3) of title 28,³ since no right of personal liberty was at stake. The plaintiff, who planned to become a psychiatric social worker, began work with the Connecticut Department of Welfare on a probationary status. Her supervisor recommended dismissal at the end of a six-month trial period, rating her performance as mediocre and her judgment as poor. The plaintiff was dismissed, and her efforts to appeal to the program supervisor were fruitless. She sued in federal court under section 1983 on the grounds that failure to give notice of the imminent termination, lack of an impartial evaluation of her work, and absence of a hearing for rebuttal of her supervisor's critique violated procedural due process. On the theory that due process does not require a formal hearing and the right to appeal a probationary employee's dismissal, the district court dismissed the complaint but did not treat the issue of civil rights jurisdiction.⁴ Relying primarily on the personal rights-property rights test of *Hague v. CIO*⁵ and its recent evaluation of that test in *Eisen v. Eastman*,⁶ the Second Circuit concluded that the alleged lack of

1. 438 F.2d 1396 (2d Cir. 1971).

2. 42 U.S.C. § 1983 (1964), provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. 28 U.S.C. § 1343(3) (1964), is the jurisdictional counterpart to the section 1983 cause of action. For the text of section 1343(3) see note 10 *infra*.

4. 438 F.2d at 1398-99.

5. 307 U.S. 496, 531 (1939) (Stone, J., concurring).

6. 421 F.2d 560 (2d Cir. 1969).

procedural due process did not state a cause of action cognizable under section 1983.

The personal rights-property rights distinction has survived a troublesome history since the *Hague* decision. The plaintiffs in *Hague* obtained an injunction under the predecessors of sections 1983 and 1343(3) against municipal officials refusing to allow a union to hold organizational meetings.⁷ The concurring opinion of Justice Stone⁸ focused on the reconciliation of two jurisdictional provisions, sections 1331⁹ and 1343(3)¹⁰ of title 28. Stone concluded that section 1331 was the proper jurisdictional basis whenever a dollar value could be placed on the subject matter and that section 1343(3) provided jurisdiction *only* when the "right asserted is inherently incapable of monetary valuation."¹¹ The now familiar test emerged as:

whenever the right or immunity is one of personal liberty not dependent for its existence upon the infringement of property rights, there is jurisdiction in the district court under [section 1343(3)] to entertain it without proof that the amount in controversy exceeds the requisite amount.¹²

While the personal-property right distinction seems clear enough on its face, serious problems arise in its application.¹³ The primary reason for difficulties is that the loss of property so often affects personal interests. As the cases after *Hague* have shown, state deprivation of rights traditionally considered to be property rights, such as one's home or job, carries with it an inconvenience and loss of dignity often as onerous and hard to value as the state's abridgment of

7. 307 U.S. at 507-08.

8. Mr. Justice Roberts also wrote an opinion in *Hague*, which rested on the privileges and immunities clause of the 14th amendment, and argued that section 1343(3) provided jurisdiction over the loss of rights within that clause. *Id.* at 518.

9. The section provides in pertinent part:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States. 42 U.S.C. § 1331(a) (1964).

10. This section provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any rights, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. *Id.* § 1343(3).

11. 307 U.S. at 530.

12. *Id.* at 531-32.

13. See Note, *Section 1343(3) Jurisdiction and the Property-Personal Right Distinction*, 1970 DUKE L.J. 819, 824.

one's right to free speech or peaceable assembly.¹⁴ In *Douglas v. City of Jeannette*¹⁵ the Supreme Court upheld jurisdiction under section 1343(3) of an appeal from the criminal prosecution of Jehovah's Witnesses for soliciting without a license. Justice Stone noted that the alleged infringement of free speech was sufficient for civil rights jurisdiction, a position that would appear consistent with his *Hague* formula. Yet, according to the facts in *Douglas*, the city objected to the sale of materials by the Jehovah's Witnesses, not their mere distribution. Thus, the complaint was in essence for the loss of a property right—the potential sales of the literature. This right, however, was closely allied with their interests in freedom of expression. The subtleties involved in this sort of analysis explain why recent cases indicate a desire to avoid the Stone approach in *Hague*.¹⁶ In two Fifth Circuit cases¹⁷ involving denial of applications for liquor licenses, plaintiffs, using 1343(3) as a basis for jurisdiction, claimed a denial of due process since no standards existed to measure the merits of their applications. The court found section 1343(3) jurisdiction in both cases without discussing the personal-property rights distinction.¹⁸ In these circumstances, it is difficult to find anything other than the loss of a property right, except perhaps the loss of the right to carry on one's chosen business. Amidst such uncertainty, the distinction between property interests and personal interests begins to rest on verbalization instead of logic. The Second Circuit appeared wary of this dilemma in *Eisen v. Eastman*¹⁹ although it refused to find section 1343(3) jurisdiction on a claim that a municipal rent control law had deprived the complaining landlord of due process rights by limiting the rents he could charge. The frustration is evident in the tone of the holding:

We therefore hold, although with a good deal less than complete assurance, that Justice Stone's *Hague* formulation, generously construed, should continue to be regarded as the law of this circuit. Since the complaint here alleged only a loss of money . . . jurisdiction under the Civil Rights Act [is not present].²⁰

14. Note, *The Proper Scope of the Civil Rights Act*, 66 HARV. L. REV. 1285, 1289 (1953).

15. 319 U.S. 157 (1943).

16. 307 U.S. at 518-32.

17. *Barnes v. Merritt*, 376 F.2d 8 (5th Cir. 1967); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964).

18. 376 F.2d at 11; 326 F.2d at 612. *But see* *Berry v. Allen*, 411 F.2d 1142 (6th Cir. 1969); *Atlanta Bowling Center, Inc. v. Allen*, 389 F.2d 713 (5th Cir. 1968).

19. 421 F.2d at 560.

20. *Id.* at 566.

Very recently the Second Circuit indicated some greater flexibility in the area of section 1343(3) jurisdiction. In *Dale v. Hahn*²¹ plaintiff contended that section 102 of New York's Mental Hygiene Law, under which she had been committed as a mental incompetent, deprived her of procedural due process and resulted in the appropriation of her assets against her will. Disagreeing with the lower court's characterization of this action as one involving only a property right, the court held that all the incidents of competence were at stake—an interest far more fundamental than a property right.²²

The problems in delineating the boundaries of personal and property interests are acutely present in cases challenging the procedures used in discharge from public employment. In *Birnbaum v. Trussell*²³ a physician on a hospital staff was dismissed, without notice, from his post primarily because of pressures from a hospital union which accused the doctor of racial bias. In addition a New York City hospital official wrote to other hospitals advising them not to hire Dr. Birnbaum. In light of the devastating effect of this action on the doctor's reputation and career, the Second Circuit avoided characterization of his plight as the loss of a property interest and instead focused on the threat to his future and the personal rights involved. Similarly, the Sixth Circuit declined to put a price tag on the refusal to reappoint a physician to a hospital staff in *Meredith v. Allen County War Memorial Hospital Commission*,²⁴ where section 1343(3) jurisdiction was upheld even though the basis for the firing was general uncooperativeness, very likely less damaging than the racial aspersions of *Birnbaum*. Such reasoning is not confined to the professional employee. In *Olson v. Regents*²⁵ a district court upheld section 1343(3) jurisdiction where a maintenance worker with little remaining employability²⁶ alleged a denial of procedural due process after he was fired due to purported threats of assault on other employees. In addition, a district court in *Taylor v. New York City Transit Authority*²⁷ held that the discharge of a road car inspector

21. 440 F.2d 633 (2d Cir. 1971).

22. *Id.* at 636.

23. 371 F.2d 672 (2d Cir. 1966).

24. 397 F.2d 33 (6th Cir. 1968).

25. 301 F. Supp. 1356 (D. Minn. 1969).

26. Petitioner was 59 years old, had worked for the university for over 14 years, and thus had little chance for alternative employment.

27. 309 F. Supp. 785 (E.D.N.Y. 1970). On appeal, the case was affirmed on other grounds. 433 F.2d 665 (2d Cir. 1970).

involved an interest in personal liberty for section 1343(3) purposes since the loss of the job and salary restricted the liberty of the discharged inspector and his family. Although acknowledging the *Hague* formula, the court's analysis that a diminution of personal liberty stems from the loss of public employment seems to sublimate the need to fit within the personal-property rights test. The loss to the public servant in every one of these cases can be called a loss of wages—a loss susceptible to valuation. Yet the courts have perceived the rights of the public employee as a “bundle of interests” including those of pursuing a chosen career, retaining the respect of peers, and maintaining a minimal mobility for future jobs.²⁸

The focus of the Second Circuit in *Tichon* was twofold: whether the rights in jeopardy are of “sufficient moment to invoke procedural protections” and whether these rights involve elements of personal liberty.²⁹ In analyzing the first aspect of this test, the court noted that discharge from public employment presents a spectrum of potentially injured interests varying from violations of rights secured by the first eight amendments to rights grounded in broader elements of procedural due process through the fourteenth amendment. Yet the courts have been more inclined to find section 1343(3) jurisdiction to protect a discharge imperiling the Bill of Rights' freedoms³⁰ than a discharge procedurally unfair.³¹ In this case section 1343(3) jurisdiction was sought on the basis of the infringement of rights secured by general notions of due process. Without an added interest that draws on some personal liberty, the court observed, section 1343(3) jurisdiction cannot exist within the *Hague* test because “sufficient moment” is not present in property interests alone. Turning to the second facet of this approach, the infringement of an element of personal liberty, the Second Circuit compared *Tichon*'s interests to those of the physician in *Birnbaum* who was discharged amidst charges of racial bias. The court found that the dismissal of Dr. *Birnbaum* and the circulation of the black-list letter jeopardized both his established professional reputation and his ability to pursue his occupation. At stake, therefore, was not only his interest in a

28. All of the cases referred to above dealt with procedural due process rights. Where an equal protection element exists, the further right to equal treatment arises. See, e.g., *Mansell v. Saunders*, 372 F.2d 573 (5th Cir. 1967); *Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946).

29. 438 F.2d at 1400.

30. See, e.g., *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956).

31. See *Taylor v. New York City Transit Auth.*, 309 F. Supp. 785 (E.D.N.Y. 1970).

specific job but also the likely destruction of his professional career. In this latter factor, the court saw an interest sufficiently separate from a property right in his current salary to provide civil rights jurisdiction. In *Tichon*, however, the court reasoned that the discharge did not deprive the probationary social worker of an established means of earning a living; it did not occur in the context of racist accusations, and there was no wide circulation of the reasons for her dismissal. From this comparison the Second Circuit established a test for section 1343(3) jurisdiction in employment cases:

Although every dismissal for reasons other than reduction in the work force can be said to have some impact on future employability . . . in the absence of a *clear, immediate, and substantial* impact on the employee's reputation which effectively destroys his ability to engage in his occupation, it cannot be said that a right of personal liberty is involved.³²

Responding to plaintiff's claim that her dismissal jeopardized the opportunity for future positions in this field and erased her undergraduate investment in plans for graduate study, the court pointed out that Congress did not intend that every claim of unfair treatment by a government employee have a federal forum. Since the adverse effects of her dismissal did not touch the elements of personal liberty required by the *Hague* rule, the court concluded that section 1343(3) jurisdiction did not exist.

The effort of the court in *Tichon* to frame its rationale within the *Hague* guidelines reveals the recurring problem faced by courts in attempting to fit the personal rights-property rights distinction to every situation. In light of this difficulty, the question arises whether Justice Stone intended for his formula to control all section 1343(3) jurisdiction issues. Since an infringement of speech and assembly was at issue in *Hague*, the difficulty in valuation of the loss to plaintiffs provided a logical explanation for the assertion of civil rights jurisdiction. Yet, elsewhere there is evidence that Mr. Justice Stone did not desire this formula to be applied in all cases. For instance, his approval in *Hague* of the analysis in *Truax v. Raich*,³³ where the court allowed section 1343(3) jurisdiction to contest a ban against aliens securing jobs, indicates his realization that some apparent property rights cannot be easily equated with dollars and cents. The court in *Truax* had characterized the right to work as "the very essence of . . . personal freedom."³⁴ Perhaps Justice Stone's formula only suggested

32. 438 F.2d at 1402.

33. 239 U.S. 33 (1915).

34. *Id.* at 41.

one reason why Congress did not require a jurisdictional amount for civil rights complaints rather than dictating a rule for every application of this jurisdictional provision.³⁵ Furthermore, contrary to Justice Stone's indication in *Hague*, a narrow reading of section 1343(3) jurisdiction is not necessary in order to maintain the usefulness of the section 1331 monetary limit. Little vitality is left after the enactment of numerous provisions for federal jurisdiction which are exempt from the monetary requirement.³⁶ Moreover, a study has shown that the abolition of the \$10,000 limit would not aggravate the problem of overcrowding in the federal system.³⁷ Also, the policy of guarding against federal supervision over functions traditionally managed by the theory that section 1343(3) cannot be used in a setting where only property interests are at stake.³⁸

The state cannot deprive a person of liberty or property without due process of law.³⁹ Section 1331 provides jurisdiction to redress the loss of property,⁴⁰ while section 1343(3) provides jurisdiction to redress the loss of liberty.⁴¹ The difference in these means for redress of rights is that Congress has imposed a jurisdictional amount in controversy requirement of \$10,000 when property rights are lost. Parallel to this dollar minimum in the case of property rights is the quantum requirement from *Hague* and *Tichon* that a *significant* deprivation of liberty must occur to gain section 1343(3) jurisdiction. The problems encountered in quantifying personal liberty underpin the challenges to discharge from government employment. Some liberty is lost whenever one is discharged from any job, yet the *Tichon* court is probably correct in asserting that Congress did not intend for every claim of denial of due process by a discharged public employee to reach the federal courts.

The difficult, recurring question is therefore: when does

35. Although the courts do not state that Justice Stone was only suggesting a dividing line between sections 1331 and 1343 in asserting his formula, the commentaries point to this possibility. See, e.g., Note, *The Property Rights Exception to Civil Rights Jurisdiction—Confusion Compounded*, 43 N.Y.U.L. REV. 1208, 1211-12 (1968).

36. See Friedenthal, *New Limitations on Federal Jurisdiction*, 11 STAN. L. REV. 213, 216-17 (1959).

37. ALI Study of the Division of Jurisdiction Between State and Federal Courts, App. B, at 202-03 (Tent. Draft No. 4, 1966).

38. 43 N.Y.U.L. REV., *supra* note 35, at 1218.

39. See *Rochin v. California*, 342 U.S. 165 (1952); *Lochner v. New York*, 198 U.S. 45 (1905).

40. See note 9 *supra*.

41. See note 10 *supra*.

termination of government employment become a *significant* deprivation of liberty? A comparison of *Tichon* and other public employment cases reveals factors which can be relied on to resolve this issue. In *Birnbaum*⁴² and *Meredith*⁴³ the courts found that section 1343(3) jurisdiction protected the interest in an *established means* by which one has maintained a livelihood. A threat to this interest by an alleged governmental denial of procedural due process properly supports civil rights jurisdiction. Very similar to this factor is the *Tichon* problem of an interest in the capacity *to establish* a chosen means of earning a living, particularly if that career is available only in the public sector. While it is most important to protect the security and esteem built on years of performance in a given occupation, a total lack of due process protection for those who have invested time and dollars in substantial preparation for a career would arguably deter the choice of public service as a profession. This interest in *Tichon* is diluted by the factor of probationary status, which has proved so detrimental to employees seeking due process protection⁴⁴ that *Tichon* itself is consistent with previous holdings. A much harder case would be one where *Tichon* had already gained a permanent position and had demonstrated strong reliance on job referrals throughout the welfare system. If this setting depicts an effective preclusion of her re-entry into the welfare profession, the employee would have reached a zone requiring procedural safeguards. Whether such preclusion of re-entry into a career has occurred is also affected by the specific charges given as grounds for dismissal. As *Birnbaum* and *Meredith* indicate, accusations damaging the reputation place a stigma on a career, especially in a profession where a reservoir of reputation and respect of colleagues is critical to success.⁴⁵ Outside the professions, *Olson*⁴⁶ and *Taylor*⁴⁷ indicate that charges implying untrustworthiness or irresponsibility should sustain section 1343(3) jurisdiction, a position that the Second Circuit itself impliedly adopted in *Dale v. Hahn*.⁴⁸ Another significant factor from *Olson* is

42. See note 23 *supra* and accompanying text.

43. See note 24 *supra* and accompanying text.

44. *Freeman v. Gould Special School Dist.*, 405 F.2d 1153 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969).

45. *Cf. Wisconsin v. Constantineau*, 400 U.S. 433 (1971), where the Supreme Court indicated that injury to reputation alone would be sufficient for section 1343(3) jurisdiction in a proper case.

46. See note 25 *supra* and accompanying text.

47. See note 27 *supra* and accompanying text.

48. See note 21 *supra* and accompanying text.

the particular employability of the claimant. Advanced age and lack of skill in other capacities, especially when coupled with longevity in service, combine to equate the right to remain employed with the basic right to exist in society. These indicia only sketch a direction for consideration in the public employment segment of civil rights jurisdiction. While *Tichon* and other recent cases⁴⁹ illustrate the Second Circuit's reluctance in applying the *Hague* formula, nevertheless the continued application of this test instills an element of uncertainty and confusion by detracting from the actual factors on which the courts do, and should, rely. Whether the personal-property test was intended as a rigid rule or merely an approximate dividing line between section 1331 and section 1343(3) cases,⁵⁰ it is no longer viable. If the demise of this test requires courts to develop standards on a case-by-case basis, the factors evident in the cases discussed above should prove helpful in determining when a discharge from employment without formal due process of law is a substantial deprivation of liberty.

49. See *Dale v. Hahn*, ___ F.2d ___ (2d Cir. 1971); *Johnson v. Harder*, 438 F.2d 7 (2d Cir. 1971).

50. 43 N.Y.U.L. Rev., *supra* note 35, at 1217.