The Legal Assault on Competence and Honesty

The Freeman, a publication of The Foundation for Economic Education, Inc., October, 1997

In October 1993, when Northwest Airlines announced that it had agreed to rehire pilot Norman Prouse as a ground trainer, a company spokesman acknowledged that "some Northwest employees might be bitter." The reason: three years earlier, Mr. Prouse, after an all-night drinking binge with the two members of his flying crew, had flown a plane from Fargo to Minneapolis early the next morning. Whereas FAA rules prohibited Right crew members from operating planes if they had a blood-alcohol level higher than .04 percent and Minnesota law defined drunk driving at .10 percent, Prouse's level, measured three hours after the plane had taken off, measured a whopping .13 percent. The three drinking buddies were thrown in prison, and, after emerging, Prouse entered a rehabilitation program. But the Americans with Disabilities Act (ADA), which President Bush had signed in 1990, protected alcoholics who entered rehab, and Northwest, which could have tried to cover itself under an exception, instead claimed virtue for rehiring an employee who had broken its rules and lied about it. By July 1995, Northwest confirmed that Mr. Prouse was again flying.

In the early 1990s, a UCLA heart surgeon spread hepatitis B to 18 patients: apparently the virus passed through the holes in his gloves. - "The hospital's decision to allow the surgeon to keep on operating even after he was found to be infected," said a hospital spokesperson, was "in compliance with federal regulations." The particular federal law the spokesperson was referring to was, once again, the ADA. Laurence Gostin, a prominent advocate of the ADA, wrote, "Seen through the lens of the ADA, public health regulation may be regarded as discrimination against people with disabilities." The ADA also protected a manic-depressive against an employer who did not want to hire him as a crane operator. Under Michigan's "discrimination law," a jury, citing narcolepsy as a protected category, awarded $610,000 to - a surgeon!

These are a few of the many stories that Walter Olson tells in his new book, The Excuse Factory: How Employment Law Is Paralyzing the American Workplace. If it were just a series of well-documented horror stories about how employment

law makes it hard for employers to fire incompetent and dangerous employees, Olson's book would be well worth the price. In that respect alone, The Excuse Factory is better than Philip Howard's excellent book, The Death of Common Sense. Indeed, with his exquisite mixture of anger and humor, Olson, a fellow at the Manhattan Institute, writes like a modern Voltaire.

But The Excuse Factory is more than just a collection of stories. Olson explains why they happened. He writes of the key articles in various law reviews, the key court decisions, the important legislation, and the important players. He then connects the dots, showing how all those factors came together to create a nightmare of contradictory regulations that would humble Kafka. And he does so with the style and drama of a detective novel.

Ever since slavery ended in the United States, the law governing employment in America had been the so-called "at will" doctrine, which treated employers and employees equally. Just as employees were free to quit without cause, employers were free to fire without cause. But in 1967 Lawrence Blades, a professor at the University of Kansas, argued in a law review article that being fired had harsh consequences for employees. The "ever-increasing concentration of economic power in the hands of fewer employers," wrote Blades, meant that employees would "become even more easily oppressed." Blades's prediction of fewer employers, Olson notes, was "a singularly bad bit of market forecasting." To right the alleged wrongs, Blades advocated letting employees sue employers who fired without "good cause." Dozens of other law review authors piled on, and, by the 1980s, few law professors could be found who would defend employment at will. Later, Harvard law professor Alan Dershowitz asserted, "Suing is good for America."

By Dershowitz's criterion, America prospered. In 1980, the Michigan Supreme Court concluded that a statement in a Michigan Blue Cross employee handbook that employees would be released "for just cause only," was a binding contract. Previous courts had never read such statements that way. "Wielding novel legal arguments like a miracle Ginsu knife," writes Olson, "the court in short order reduced the half--dozen old contract doctrines to coleslaw." The court went further. Jurors didn't have to worry, the judges said, about whether an employer had acted in good faith, but instead could substitute their own judgment. In

another ruling handed down the same day, the Michigan court said that verbal statements of praise, even those made by a long-departed supervisor, could be treated as an oral contract. By 1990, writes Olson, courts in at least 38 states and federal appeals courts in at least 19 cases cited the Michigan Blue Cross decision approvingly. Employment at will was gone.

Also gone was the legal recognition of employers' right to refuse to hire, even if their grounds for refusal were reasonable. Courts ruled against a company that refused to hire a crane operator who had been convicted of first-degree murder, because the offense had not been recent and was not closely related to the job. Admitting that a convicted forger's offense was relevant to a job at a photographic studio, a court said the six-years--old offense was not recent enough. Another court found against a company that was reluctant to hire a convicted shoplifter as a dock worker. Its reason: the items he stole weren't very valuable! Courts even have decided that if an employer asks an "improper" question at a job interview - -about, for example, such irrelevant details as whether the applicant has a criminal record, a history of mental illness, or a problem with alcohol - -the employee has a "right to lie."

But one law the courts couldn't control was the law of unintended consequences. There are many. One is the virtual elimination of job references. Standard policy at most companies today is to admit that, yes, the former employee who asked for a reference did work here, in this position, between these dates, period. The reason: an employer who says that the employee was fired or was incompetent or assaulted his fellow workers could be sued for defamation, malice, or "conscious indifference." Some courts even order employers to provide favorable references to workers who have sued them. This is far more intrusive than simple censorship: it is an outright invasion of the employers' minds.

Another consequence of the laws is that employers end up with less competent employees. Because tests of physical strength have "adverse impact" on women, for example, virtually every large U.S. city government has been sued over the physical tests they use to hire police and firefighters. The San Francisco fire department, which had formerly asked recruits to lift a 150-pound sack up a flight of stairs, now lets them drag a 40-pound sack-across a smooth floor. Although easing standards has not substantially increased the number of women

hired - Olson estimates that only about one percent of firefighters nationwide are women-an unintended consequence is increased hiring of weak men.

Ever wonder why companies often announce generally available severance packages to large numbers of employees rather than pruning out the ones they want to get rid of? Olson shows how this now-common practice is a way around the age--discrimination law and other employment laws. Employers cannot be legally safe by firing just employees beyond a certain age, nor can they be legally safe by firing just the incompetent or less competent employees. A further unintended consequence of the laws is to make career and retirement planning difficult for employees. Now, if employees quit without being offered a severance package, they might miss out on one offered the next month.

One of the most ominous consequences of the changes in employment law is the stifling of free speech. In 1992 a federal court ordered that workers in a government office be prevented from making remarks contrary to the religious beliefs of their fellow employees. But making remarks contrary to other people's religious beliefs is precisely one of the kinds of speech that the founding fathers meant to protect with the First Amendment. The First Amendment says there shall be "no law ... abridging the freedom of speech"? What part of "no law" don't those judges get?

When you read Olson's book, you see how superficial is the current conservative push for ending quotas in hiring. "If official encouragement for preferences were withdrawn tomorrow," he writes, "the great bulk of litigation would continue, and so would most of the managerial headaches." You also see how callous, hypocritical, and possibly outright evil some of the advocates of the new employment

law are. Take, for example, the many congressmen who voted to eliminate mandatory retirement for almost all employers, but to keep automatic retirement at age 55 for firefighters and police who guard federal installations. The congressmen presumably understood that alertness and strength decline with age, but cared only when it affected the places they worked. Or take Warren Rudman's claim, when he was a U.S. Senator from New Hampshire, that the Senate's rights in dealing with their employees should be "absolute" because

otherwise the Senate would be subject "to the whims of a U.S. district-court judge" who "would have the power to overrule the considered judgment of 100 members of this body." Why didn't Rudman use the same arguments to defend the rights of other employers? Finally, take Ira Glasser, then executive director of the American Civil Liberties Union, which has been in the forefront of the battle to prevent employers from firing employees. When he had a disagreement with an employee, he ordered, "Please leave the building and take only personal possessions with you."

Olson notes that when association is compelled, as the law now does, what suffers most, ironically, is diversity. "A nation that truly cared about diversity would allow the flourishing of both bawdy calendars at some workplaces and Bible readings at others," he writes. Fortunately, Olson offers a solution: freedom of association. With employers and employees free to deal with each other-or not- employees can choose employers whose desires and characteristics fit their own, and so can employers. Olson writes: "[L]ibertythe simple policy of refusing to force others to deal with us against their will and without their consent - -turns out to be the best method to elicit the greatest willingness and enthusiasm to cooperate from those who might do us good."