

Why You Can't Fire Anybody: The Invisible Foot Of Government (Book Review)

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The Excuse Factory: How Employment Law is Paralyzing the American Workplace, Walter Olson, Free Press

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, had flown a plane from Fargo, North Dakota, to Minneapolis early the next morning. Whereas FAA rules prohibited flight crew members from operating planes if they had a blood-alcohol level higher than 0.04%, and Minnesota law defined drunk driving at 0.10%, Prouse's level, measured three hours after the plane had taken off, measured a staggering 0.13%. Prouse was fired and thrown in prison; after he emerged, he entered a rehabilitation program. But the Americans with Disabilities Act (ADA), which President Bush signed in 1990, protects alcoholics who enter rehab--so Northwest rehired him.

In the early 1990s a UCLA heart surgeon spread hepatitis B to 18 patients through 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"--once again, the ADA. The ADA also protected a manic-depressive against an employer who did not want to hire him as a crane operator. And under Michigan's "discrimination law," a jury, citing narcolepsy as a protected category, awarded \$ 610,000 to--a narcoleptic surgeon.

These are a few of the many tales that Walter Olson tells in his new book, *The Excuse Factory: How Employment Law is Paralyzing the American Workplace* (Free Press, \$ 25). If Olson's book were just a series of well-documented employment-law horror stories, it would be worth the price. But *The Excuse Factory* offers much more. Citing key players, law review articles, court decisions, and legislation, Olson shows how the U.S. has created a nightmare of

contradictory regulations that would humble Kafka. And he does it with the drama of a detective novel.

It all started, says Olson, back in 1967, when 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 ever more easily oppressed." Blades' 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 even if they had been fired for "good cause." Dozens of other authors piled on. Harvard law professor Alan Dershowitz summed up the mood of legal thinkers when he said, "Suing is good for America."

The courts followed the trend. One of the first was Michigan's Supreme Court. "Wielding novel legal arguments like a miracle Ginsu knife," writes Olson, the Michigan court "in short order reduced the half-dozen old contract doctrines to cole slaw." By 1990, writes Olson, courts in at least 38 states and federal appeals courts in at least 19 cases cited the Michigan labor decisions approvingly.

Olson tracks another time-honored tradition done away with: an employer's right to refuse to hire, even if the grounds are reasonable. For example, courts ruled against a company that wouldn't hire a machine operator who had been convicted of first-degree murder, because the offense had not been recent and was not closely related to the job. Another court found against a company that was reluctant to hire a convicted shoplifter as a dockworker. Its reason: The items he had stolen weren't valuable. Courts even have decided that if an employer asks an "improper" question in 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; Olson explains that the consequences are many. One is the virtual elimination of job references. Standard policy at most companies today is to admit only 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. As a result, employers end up with less competent employees.

One of the strongest features of Olson's book is that he highlights the superficiality of the current conservative push for ending hiring quotas. "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 hypocritical the employment-law advocates are. Congressmen, for instance, voted to eliminate mandatory retirement--but still require retirement at age 55 for firefighters and police who guard federal installations, no doubt because they understand that strength and alertness decline with age.

Olson argues that when association is forced--the law's intention--what suffers most, ironically, is diversity. Fortunately, Olson offers a solution: letting employers have the same freedom that employees have to work with whomever they choose. Olson writes: "Liberty--the 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." If such winds of freedom ever loosen the government's ever-tightening grip on America's employers, the Excuse Factory will surely deserve some of the credit.