Supreme Court of the United States

BENJAMIN GITLOW,
Petitioner-in-Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant-in-Error.

ADDENDUM TO BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF ERROR.

Since writing the brief herein dated November 13, 1922, I have read the opinion of this Court in *Prudential Insurance Co.* v. *Cheek,* decided June 5, 1922, U. S. Adv. Ops. 1921-1922, p. 626. In that case this court (the Chief Justice, Mr. Justice Van Devanter, and Mr. Justice McReynolds dissenting) sustained a Missouri statute requiring corporations doing business in the state to issue to an ex-employee, on request, a service letter, setting forth the nature and duration of his employment and the cause, if any, of its termination. It was argued that this abridged without due process of law a "liberty of silence" enjoyed by the employer as a corollary to its liberty of speech. Mr. Justice Pitney, writing for the court, said (p. 633):

> "Neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about 'freedom of speech' or the 'liberty of silence.'"

Upon a superficial construction only can this case be deemed authority against the propositions advanced in support of this application for a writ of error. The following distinctions are obvious:

1. The Missouri service letter statute applied only to corporations, creatures of the state, to whose right to do business the state may attach conditions reasonably deemed expedient.

2. The service letter requirement was a reasonable exercise of the police power. The substantive evil which the state had a right to prevent was presently flagrant—a condition in which competent ex-employees without service letters were deprived of opportunity to obtain employment upon their merits, with resulting vagrancy and poverty.

3. The service letter statute compelled an exercise, not an abdication, of the employer's right of free expression. It did not require him to furnish a recommendation. It laid no restriction upon his promulgation of fact and opinion according to his information and conscience. It called for no straining of either mind or powers, as did the proposed Massachusetts statute contemplating an opportunity for a discharged employee to confront his accuser or complainant (*Opinion of Justices,* 220 Mass. 627).

4. Moreover, the liberty of expression claimed in the service letter case was a matter, not of public necessity, but of private privilege. It was remote from that freedom of opinion and utterance upon matters of public concern which is essential to the operation of free government.

The case of a requirement that an employer, regardless of conviction and conscience, should express approval of the quality of an ex-employee, would approach analogy to the case at bar. A better analogue, however (compare *Adair* v. *United States,* 208 U. S. 161; *Coppage* v. *Kansas,* 236 U. S. 1) would be a requirement that employers should, or should not, discharge persons expressing, or declining to express, certain views upon a matter of public concern.

November 20, 1922.

Respectfully submitted,

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