Labor and the Supreme Court: significant issues of 1991–92

Veterans' rights to reemployment, union organizing practices, pension entitlements, and the taxability of backpay recovered in damage suits are among the labor-related issues the Supreme Court will hear in the coming term

Craig Hukill

For the second consecutive year, the Supreme Court opened its fall term with only eight justices. The most recent vacancy resulted from Justice Thurgood Marshall's announcement on June 27, 1991, that he was stepping down after having served on the High Court for 24 years. Within days of this announcement, President Bush nominated Judge Clarence Thomas, of the Court of Appeals for the District of Columbia Circuit, to succeed Justice Marshall. Although Judge Thomas' confirmation hearing proved to be one of the most contentious in history, 52 of the Senate's 100 members voted to confirm him. Judge Thomas was soon sworn into office and joined the Court nearly 1 month into its new term.

The Court's caseload in recent years has declined steadily. For example, litigants argued and submitted 184 cases to the Court as recently as the 1983–84 term.[1] By contrast, only 125 cases were argued and submitted last term.[2] With this reduced caseload, it is not surprising that the Court's current calendar contains fewer labor cases than in years past. Even so, these cases raise many important issues, including whether nonemployee union members should be allowed to organize workers on company property, whether a city violates its workers' Federal civil rights when it neglects to provide adequate safety training for them, whether a veteran's reemployment rights include the right to take a 3-year leave of absence to serve in the Reserves, and whether a union member can sue his or her union to enforce a provision of the union's constitution.[3]

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Veterans' reemployment rights

The Veterans' Reemployment Rights Act[4] allows reservists to take leaves of absence from their regular jobs in order to engage in various types of training.[5] In *King* v. *St. Vincent's Hospital*,[6] the Supreme Court will consider whether this Federal law requires an employer to grant all leave requests or just those it considers to be reasonable.

The leave request at issue in *St. Vincent's Hospital* was made by a hospital security department manager, known as "Sky" King, who also was a sergeant major in the Alabama National Guard. King sought a 3-year leave of absence so that he could serve in the Reserves as an advisor to his adjutant general. Although the hospital considered King to be an exemplary employee, it denied his request because the length of the leave requested was deemed too long.

The Court of Appeals for the Eleventh Circuit agreed with the hospital's decision, holding that only reasonable leave requests must be granted. Even though section 2024(d) nowhere mentions the word "reasonable," the court wrote, "Were we to read Section 2024(d) as creating an absolute right of reinstatement, reservists would be allowed to play fast and loose with the system in a way that Congress could not have intended."[7] The court then found that King's request was for

leave of an "exceptional duration," which it held was an indication of his bad faith. Thus, it concluded that the request was unreasonable *per se*.

Union organizing

In *Lechmere, Inc.* v. *NLRB*,[8] the Court has been asked to decide whether an operator of a chain of New England retail stores committed an unfair labor practice when it prevented nonemployee union organizers from distributing union literature on company property. The United Food and Commercial Workers union had tried to organize 200 nonunion employees at a Lechmere store, and the company had responded by enforcing its no-solicitation policy, which limited organizers to distributing their materials to cars as they entered the store's parking lot from a busy highway. The union objected to this arrangement and complained to the National Labor Relations Board.

Thirty-five years ago, in *NLRB* v. *Babcock & Wilcox*,[9] the Supreme Court allowed companies to ban nonemployee union organizers from company premises when circumstances are such that organizers can contact employees through the "usual channels" of communication.[10] In that case, the Court held that access to company property was not needed because organizers easily could contact employees in the nearby community, where most of them lived.[11] Several years later, the National Labor Relations Board interpreted *Babcock & Wilcox* in such a way that it concluded that the usual channels of communicating with workers ordinarily do not include newspapers, radio, or television and that union organizers must have some other means by which to contact workers directly.[12] The propriety of the approach taken by the National Labor Relations Board will be at issue in *Lechmere*, in which the appellate court held that organizers had been denied any meaningful opportunity to reach employees because no other alternative, including using the mass media, was cost effective.[13]

Union constitutions

May a union member enforce a provision of his or her union's constitution by filing suit under the Labor Management Relations Act,[14] which authorizes suits for violation of contracts between labor organizations?[15] That question was debated on October 16, 1991, when the Supreme Court heard arguments in *Wooddell* v. *International Brotherhood of Electrical Workers*.[16]

The dispute in this case began soon after a union member criticized a proposed amendment to his local union's bylaws and objected to the appointment of the brother-in-law of the local's president to become its business manager.[17] The president, in turn, lodged an internal union complaint against the member for making false accusations about him and about the business manager. This prompted the member to bring suit under section 301 of the Labor Management Relations Act, claiming that the internal union charges were intended as retaliation for his exercising his rights to free speech that were guaranteed under the union constitution.[18]

The district court and the court of appeals agreed with the union, holding that suits under section 301 "between labor organizations" do not include suits between an individual and his or her union in which the member seeks to enforce the union's constitution. Although the Supreme Court has not ruled on the question of whether an individual union member may file such a suit,[19] it has held that section 301 authorizes individuals to sue to enforce provisions of collective bargaining agreements.[20] The lower appellate courts are split over whether this holding should be extended to the case of an individual seeking to enforce a union constitution.[21] In *Woodell*, the Supreme Court should resolve the issue.

Pensions

One requirement of the Employee Retirement Income Security Act[22] is that an employee's vested interest in his or her company's pension plan retirement benefits must be nonforfeitable.[23] The issue confronting the Supreme Court in *Nationwide Mutual Insurance Co.* v. *Darden*[24] is whether a life insurance agent should be considered an employee of the insurance company so that he or she may invoke this nonforfeitability provision.

In this case, Robert Darden, a life insurance agent, entered into an agency contract with Nationwide Mutual Insurance Company that allowed him to participate in that company's retirement and deferred compensation plan. Darden and the company agreed that if the contract were canceled for any reason, Darden could not sell other companies' insurance for 1 year. They also agreed that if Darden were to breach this agreement, he would forfeit his vested rights in the retirement and deferred compensation plan. Twenty years later, Darden's agency contract was terminated, and he began selling insurance in competition with Nationwide. When the company notified him that it would not pay him under the plan, Darden sued to recover the benefits to which he considered himself entitled.

The Court of Appeals for the Fourth Circuit agreed with Darden that his interest in the company's retirement plan was not forfeitable.[25] In reaching this conclusion, the appellate court

held that Darden met its three-part test for determining whether an agent is an employee under the Employee Retirement Income Security Act: (1) he had a reasonable expectation of receiving retirement benefits; (2) he relied on this expectation; and (3) he lacked sufficient bargaining power to insist that the forfeiture provision be removed from the contract.[26]

The appellate court's approach to determining whether Darden was an employee under the Employee Retirement Income Security Act has not been the approach taken by other courts of appeal.[27] Those courts have held that a person's status as an employee should be determined under principles of agency common law, which require, in general, a close look at the degree of independence with which an agent operates.

City liability for worker training

In October of 1988, a sanitation worker for the City of Harker Heights, Texas, entered a manhole to clear a sewer line and was asphyxiated. Later, his widow sued the city under 42 U.S.C. § 1983, a Federal civil rights law, claiming that the city had violated his constitutional rights by failing to provide safe working conditions or safety training. When the Supreme Court considers the widow's case, *Collins* v. *City of Harker Heights*,[28] it must decide whether the district court and the court of appeals were correct in holding that a city can be liable under section 1983 only if it abused a power that is uniquely governmental, as opposed to abusing a power that any employer wields over its employees.

Section 1983 provides that "every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured."[29] In 1989, in *City of Canton* v. *Harris*,[30] the Supreme Court ruled that a city may be held liable under this law if its deliberate indifference results in a failure to train police officers adequately.

In *Collins*, the appellate court acknowledged that the "deliberate indifference" test applies to litigation under section 1983, but held that liability under that law can be imposed only in cases in which "a governmental official, because of his unique position as such, was able to impose a loss on an individual."[31] In *Harris*, the *Collins* court noted, the city had been found liable properly, because it had inflicted injuries through the exercise of police powers, which are governmental by nature. By way of contrast, the court held, the injuries in *Collins* came about when the city was acting only in its capacity as an employer. That being the case, the deceased worker's injuries were not of a type that the court considered itself empowered to remedy under the terms of section 1983.[32]

Taxation of discrimination recoveries

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[33] In general, a victim of any of these types of discrimination may sue under Title VII to enjoin further violations and to obtain appropriate "affirmative action," which may include reinstatement or hiring, backpay, or any other equitable relief.[34] A court may not, however, award monetary compensatory damages for nonmonetary losses, such as emotional distress, or for punitive damages.[35]

In *United States* v. *Burke*,[36] the Supreme Court will decide whether backwages recovered under a Title VII settlement agreement are subject to Federal income taxation. At the center of the dispute is section 104(a)(2) of the Internal Revenue Code,[37] which excludes from gross income—and hence from Federal income taxation—any damages that are received on account of "personal injuries."

The Government has argued that Title VII backpay awards should be taxed because the purpose of Title VII is to make victims of discrimination economically whole, not to place them in a more favorable position than if discrimination had not occurred. In the Government's view, "damages on account of personal injuries" include only tort-type damages, such as for pain and suffering. The Court of Appeals for the Sixth Circuit did not agree with this interpretation, focusing instead on the nature of the discriminatory action. Viewed from this perspective, it held, Title VII victims suffer "personal injuries," and settlements to redress those injuries should be excluded from gross income.[38]

Workers injured at sea

The Longshore and Harbor Workers' Compensation Act[39] and the Jones Act[40] are Federal laws that permit longshore and sea workers to recover for certain losses they have suffered as a result of work-related injuries. The Longshore Act operates much like State workers' compensation laws, in that the money a worker receives is tied to his or her wages.[41] Longshore Act remedies, like those under State workers' compensation laws, are the sole means by which a covered worker can hold his or her employer liable for an on-the-job injury.[42]

By contrast, the Jones Act operates more like State tort laws, under which an injured person's recovery is limited only by his or her damages, not wages.[43] This means that a recovery under the Jones Act has the potential to be significantly higher than one under the Longshore Act, because it can be tied to lost and future earnings, pain and suffering, and the employer's bad faith, if any, in causing or remedying the injury.[44]

Injured workers usually cannot choose between recovering benefits under the Longshore Act or recovering damages under the Jones Act, because the two laws comprise "a pair of mutually exclusive remedial statutes."[45] Even so, when the Court considers *Southwest Marine, Inc.* v. *Gizoni*,[46] it will decide whether an injured ship repairman may recover under the Jones Act, even though his occupation is one that is listed in the Longshore Act as being covered by that law's exclusive provisions.[47] The worker in *Gizoni* successfully argued to the court of appeals that the Longshore Act's exclusion of any "master or member of a crew of any vessel"[48] from recovering under its remedies overrides that law's provision covering ship repairmen. Thus, the court held that the injured ship repairman could pursue his claim for recovering damages under the Jones Act.

State workers' compensation

In 1985, the Supreme Court of Michigan construed an amendment to that State's workers' compensation law[49] in such a way that the amendment applied to all compensation and benefits payable after the law's effective date, not just to compensation and benefits payable on account of injuries that occurred after that date.[50] Because the amendment allowed employers to reduce, or coordinate, their workers' compensation payments by the amount of certain other employer-financed benefits, such as those received through pension plans, Social Security contributions, and disability insurance, the court's decision was a significant victory for employers.

The Michigan legislature quickly responded to this court ruling by enacting legislation that allowed employers to coordinate benefits only in claims in which injuries occurred after the earlier law's effective date.[51] The legislation also required employers to reimburse claimants who suffered injuries before the old law's effective date and whose compensation had been reduced while the repealed law was in effect.[52] In *General Motors Corp.* v. *Romein*,[53] the U.S. Supreme Court will decide whether Michigan violated the Federal constitutional rights of employers in that State when it changed its workers' compensation law retroactively and imposed these additional workers' compensation liabilities on the employers. The Michigan Supreme Court concluded that the legislature had not violated the employers' rights, and it upheld the legislature's action.[54] □

Footnotes

[1] *Statistical Recap of Supreme Court's Workload During Last Three Terms*, 54 U.S.L.W. 3038 (July 30, 1985). Members of the Court and Congress seemed particularly troubled in the early 1980's by the size of the Court's caseload. See Note, *Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court*, 97 Harv. L. Rev. 307 & n.5 (1983). During a single year, for example, 8 of the Court's 9 justices decried that body's workload, while Congress considered legislation to control it. *Id.*

[2] *Statistical Recap of Supreme Court's Workload During Last Three Terms*, 60 U.S.L.W. 3056 (July 23, 1991).

[3] Because the Court's 1991–92 calendar is not full, more cases will be added as the term progresses. Some of these, no doubt, will raise labor issues.

[4] 38 U.S.C. § 2021 (1988).

[5] 38 U.S.C. § 2024(d) (1988).

[6] 901 F.2d 1068 (11th Cir. 1990), *cert. granted*, 111 S. Ct. 950 (1991) (No. 90–889). On December 16, 1991, the Supreme Court reversed the decision of the court of appeals and held that the Veterans' Reemployment Rights Act does not limit the length of leave a reservist may take while retaining reemployment rights. 60 U.S.L.W. 4061 (U.S. Dec. 16, 1991) (No. 90–889).

[7] 901 F.2d at 1071, quoting *Eidukonis* v. *Southeastern Pa. Transp. Auth.*, 873 F.2d 688, 699 (3d Cir. 1989) (Judge Edward R. Becker, dissenting). The Third Circuit in *Eidukonis*, the Fifth Circuit in *Lee* v. *City of Pensacola*, 634 F.2d 886 (5th Cir. 1981), and the Eleventh Circuit in *Gulf States Paper Corp.* v. *Ingram*, 811 F.2d 1464 (11th Cir. 1987), have each read a test of reasonableness into section 2024(d). The Fourth Circuit, agreeing with the Government, has refused to apply this test. See *Kolkhorst* v. *Tilghman*, 897 F.2d 1282 (4th Cir. 1990), *petition for cert. filed*, 60 U.S.L.W. 3013 (U.S. June 12, 1990) (No. 89–1949). Yet another circuit court has held that the standard for granting or denying leave requests under section 2024(d) is so unsettled that municipal officials should not be held personally liable for administering a city policy that reasonably accommodates reservists' requests. See *Boyle* v. *Burke*, 925 F.2d 497 (1st Cir. 1991).

[8] 914 F.2d 313 (1st Cir. 1990), *cert. granted*, 111 S.Ct. 1305 (1991) (No. 90–970). Oral arguments were held before the Court on November 12, 1991.

[9] 351 U.S. 105 (1956).

[10] *Id.* at 112.

[11] The company plant in *Babcock & Wilcox* was located 1 mile from a small town where 40 percent of the workers

lived, and most other workers lived within 30 miles of their jobs. *Id.* at 106. The Supreme Court noted that the union had been able to reach many employees in their homes, either in person or on the telephone, or on local streets. *Id.* at 107 n.1.

[12] See *Jean Country*, 291 N.L.R.B. 4, 1988–89 NLRB Dec. (CCH) ¶15,118 (N.L.R.B. Sept. 27, 1988).

[13] 914 F.2d at 323–24. The *Lechmere* court distinguished *Babcock & Wilcox* from the case at hand, noting that the local community in *Babcock & Wilcox* had been small, and employees were easily identifiable. *Id.* at 322. The Lechmere store, however, was located in the Hartford, Connecticut, metropolitan area, which had a population of almost 900,000, and workers leaving work were indistinguishable from customers. *Id.* Thus, the court in *Lechmere* concluded that employees could not be reached by organizers as easily as they could be reached in *Babcock & Wilcox*.

[14] 29 U.S.C. § 141 (1988).

[15] 29 U.S.C. § 301 (1988).

[16] 135 L.R.R.M (BNA) 2944 (6th Cir. June 27, 1990), *affirming and remanding*, 135 L.R.R.M. (BNA) 2926 (S.D.Ohio Oct. 18, 1988), *cert. granted*, 111 S.Ct. 951 (1991) (No. 90–967). The Court also had agreed to consider the issue of whether the union member should have been granted a jury trial on his claim that the union had violated his rights to free speech under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(2) (1988). At oral argument, though, the union conceded that the lower courts improperly had denied the union member his right to a jury trial under the Supreme Court's recent decision in *Chauffeurs and Teamsters, Local 391* v. *Terry*, 110 S.Ct. 1339 (1990), and suggested that the Court should remand that part of the case to the appellate court for further consideration. See 1991 Daily Lab. Rpt. No. 202, A-3 (Oct. 18, 1991).

Shortly before this article was published, the Court decided *Wooddell*. 60 U.S.L.W. 4024 (U.S. Dec. 4, 1991) (No. 90–967). It held that a union member may sue to enforce a union constitution under U.S.C.§301 (1988) and that the union member in the case had a right to a jury trial on his claim that his rights to free speech had been infringed. Justic Byron White wrote the opinion for a unanimous court.

[17] To complicate matters further, the union president was the brother of the complaining union member. 135 L.R.R.M. (BNA) at 2926.

[18] *Id.* at 2927. The member also claimed that the union retaliated against him by manipulating its job referral system. *Id.*

[19] See *Plumbers & Pipefitters* v. *Local 334, Plumbers & Pipefitters*, 452 U.S. 615, 627 n.16 (1981). In this case, the Supreme Court held that a union constitution also can be considered a contract under section 301.

[20] See *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 200 (1962).

[21] Several courts of appeal have held that individuals may sue their unions to enforce provisions of union constitutions. See *DeSantiago* v. *Laborers Int'l Union, Local 1140*, 914 F.2d 125 (8th Cir. 1990); *Pruitt* v. *Carpenters' Local 225*, 893 F.2d 1216 (11th Cir. 1990); *Lewis* v. *International Bhd. of Teamsters, Local 771*, 826 F.2d 1310 (3d Cir. 1987); *Kinney* v. *International Bhd. of Elec. Workers*, 669 F.2d 1222 (9th Cir. 1982); and *Abrams* v. *Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1970), *cert. denied sub nom.*, *Steelworkers* v. *Abrams*, 401 U.S. 1009 (1971). Other appellate courts have reached the opposite result. See *Tucker* v. *Bieber*, 900 F.2d 973 (6th Cir. 1990); and *Adams* v. *International Bhd. of Boilermakers*, 262 F.2d 835 (10th Cir. 1959).

[22] 29 U.S.C. § 1001 (1988 & Supp. I 1989).

[23] 29 U.S.C. § 1053(a) (1988 & Supp. I 1989).

[24] 922 F.2d 203 (4th Cir.), *cert. granted*, 60 U.S.L.W. 3292 (U.S. Oct. 15, 1991) (No. 90–1802).

[25] *Id.* at 207. The court concluded, however, that Darden's interest in the company's "Extended Earnings Plan" was not subject to the nonforfeitability provision, because it could not be considered a pension plan. 922 F.2d at 208. Darden appealed this part of the decision to the Supreme Court, but the Court declined to consider it. 922 F.2d 203 (4th Cir.), *cert. denied*, 60 U.S.L.W. 3292 (U.S. Oct. 15, 1991) (No. 90–1953).

[26] *Id.* at 206.

[27] See *Penn* v. *Howe-Baker Eng'r, Inc.*, 898 F.2d 1096, 1102 & n.6 (5th Cir. 1990); *Wolcott* v. *Nationwide Mut. Ins. Co.*, 884 F.2d 245, 250–51 (6th Cir. 1989); and *Holt* v. *Winpisinger*, 811 F.2d 1532, 1538–41 (D.C.Cir. 1987).

[28] 916 F.2d 284 (5th Cir. 1990), *cert. granted*, 111 S.Ct. 1579 (1991) (No. 90–1279). The Supreme Court heard oral arguments in this case on November 5, 1991.

[29] 42 U.S.C. § 1983 (1988).

[30] 489 U.S. 378 (1989).

[31] 916 F.2d at 291 (quoting *McClary* v. *O'Hare*, 786 F.2d 83, 89 (2d Cir. 1986)).

[32] The Fifth Circuit's decision in *Collins*, that the government must abuse a uniquely governmental power before it can be held liable under section 1983, is in conflict with the decision of the Eighth Circuit in *Ruge* v. *City of Bellevue*, 892 F.2d 738 (8th Cir. 1989), which held that a municipality may be held liable under section 1983 whenever it actively has pursued a policy of deliberate indifference to the constitutional rights of its employees.

[33] 42 U.S.C. § 2000e–2(a)(1) (1988).

[34] See 42 U.S.C. § 2000e–5(g) (1988). In fashioning any remedy under Title VII, a court must attempt to make the victim "whole." See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418–19 (1975) ("injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed," quoting *Wicker* v. *Hoppock*, 73 U.S. (6 Wall.) 94, 96 (1867)).

[35] See *Shah* v. *Mt. Zion Hosp. & Medical Center*, 642 F.2d 268 (9th Cir. 1981).

[36] 929 F.2d 1119 (6th Cir.), *cert. granted*, 60 U.S.L.W. 3257 (U.S. Oct. 7, 1991) (No. 91–42).

[37] 26 U.S.C. § 104(a)(2) (1988).

[38] The Sixth Circuit's decision in *Burke* conflicts with the Fourth Circuit's decision in *Thompson* v. *Commissioner*, 866 F.2d 709 (4th Cir. 1989), which held that suits to recover backwages are more like contractual suits, in which recoveries must be included in gross income, than they are like personal injury suits.

[39] 33 U.S.C. § 901 (1988).

[40] 46 U.S.C. App. § 688 (1988).

[41] 33 U.S.C. §§ 908–910 (1988).

[42] 33 U.S.C. § 905(a) (1988).

[43] See 46 U.S.C. App. § 688(a) (1988).

[44] See *Morales* v. *Garijak, Inc.*, 829 F.2d 1355 (5th Cir. 1987).

[45] *McDermott Int'l, Inc.* v. *Wilander*, 111 S.Ct. 807, 817 (1991).

[46] 909 F.2d 385 (9th Cir. 1990), *cert. granted*, 111 S.Ct. 1071 (1991) (No. 90–584). Before this article was pub-

lished, the Court decided Gizoni, holding that the injured worker was entitled to pursue his claim under the Jones Act. 60 U.S.L.W. 4020 (U.S. Dec. 4, 1991) (No. 90–584).

[47] 33 U.S.C. § 902(3) (1988) (definition of employee includes ship repairman); 33 U.S.C. § 903(a) (1988) (employers are liable for injuries to employees); 33 U.S.C. § 904(a) (1988) (Longshore Act remedies are exclusive).

[48] 33 U.S.C. § 902(3)(G) (1988).

[49] 1980 Mich. Pub. Acts 203.

[50] *Franks* v. *White Pine Copper Div.*, 422 Mich. 636, 375 N.W.2d 715 (1985).

[51] Mich. Comp. Laws Ann. § 418.354(17) (1991 Supp.).

[52] *Id.* at §§ 418.354(19)–.354(20) (1991 Supp.).

[53] 436 Mich. 515, 462 N.W.2d 555 (1990), *cert. granted*, 111 S.Ct. 2008 (1991) (No. 90–1390). Oral arguments were scheduled in this case for December 10, 1991.

[54] *Id.*

The hours factor

In the early days of industry, manufacturing firms worked their employees 12 to 14 hours a day, 6 days a week, and sometimes longer, to extract a maximum work contribution for the wages paid. Banding together into unions, the workers brought pressure to bear against such practices. In time, employers were made to accept the 10-hour day as a standard day's work. The 9- and 8-hour days came later. In the 20th century, the 6-day week has given way to the 5-day week. A 5-day, 40-hour week is now the cornerstone of our work system. Statistically, the average hours worked in the U.S. economy declined from 68 hours in 1860 to 39 hours in 1986.

Some would take from those facts a complacent attitude regarding efforts to reduce the workweek further. They would say to America's workers: Be patient. Shorter work hours are inevitable. The unions are pushing for it. The work force is increasingly composed of persons, notably married women and young people, who are leisure-oriented and will make their preferences felt in the labor market. However, these things take time. You cannot force economic change prematurely or the economy might be hurt.

Such an approach is unrealistic. It were as if the shorter workweek could be gained without human intervention. Of course, someone must actively be supporting proposals for change or change will not happen. The unions may be officially on record as supporting a shorter workweek, but to say they are 'pushing' for it would be an exaggeration. Married women and the young may want and need shorter hours to meet their family obligations or personal requirements, but there is a gap between their individual wishes and the institutional arrangements to accommodate them. 'Flex-time' notwithstanding, the average worker has only a limited ability to influence his or her schedule of working hours.

—EUGENE MCCARTHY AND WILLIAM MCGAUGHEY
Nonfinancial Economics: The Case for Shorter Hours of Work
(New York, Praeger Publishers, 1989), pp. 35–36.