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01-06-1977 Justice Rehnquist, Per Curiam

William H. Rehnquist
US Supreme Court Justice

HAB

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–812

Michael J. Codd, Police Commissioner, City of New York, et al., Petitioners, *v.* Elliott H. Velger.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January —, 1977]

PER CURIAM.

Respondent Velger's action shifted its focus, in a way not uncommon to lawsuits, from the time of the filing of his complaint in the United States District Court for the Southern District of New York to the decision by the Court of Appeals for the Second Circuit which we review here. His original complaint alleged that he had been wrongly dismissed without a hearing or a statement of reasons from his position as a patrolman with the New York City Police Department, and under 42 U. S. C. § 1983, sought reinstatement and damages for the resulting injury to his reputation and future employment prospects. After proceedings in which Judge Gurfein (then of the District Court) ruled that respondent had held a probationary position and therefore had no hearing right based on a property interest in his job, respondent filed an amended complaint. That complaint alleged more specifically than had the previous one that respondent was entitled to a hearing due to the stigmatizing effect of certain material placed by the City Police Department in his personnel file. He alleged that the derogatory material had brought about his subsequent dismissal

from a position with the Penn-Central Railroad Police Department, and that it had also prevented him from finding other employment of a similar nature for which his scores on numerous examinations otherwise qualified him.

The case came on for a bench trial before Judge Werker, who, in the words of his opinion on the merits, found "against plaintiff on all issues." He determined that the only issue which survived Judge Gurfein's ruling on the earlier motions was whether petitioners, in discharging respondent had "imposed a stigma on Mr. Velger that foreclosed his freedom to take advantage of other employment opportunities." After discussing the evidence bearing upon this issue, Judge Werker concluded that "[i]t is clear from the foregoing facts that plaintiff has not proved that he has been stigmatized by defendants."

Among the specific findings of fact made by the District Court was that an officer of the Penn-Central Railroad Police Department was shown the City Police Department file relating to respondent's employment, upon presentation of a form signed by respondent authorizing the release of personnel information. From an examination of the file, this officer "gleaned that plaintiff had been dismissed because while still a trainee he had put a revolver to his head in an apparent suicide attempt." The Penn-Central officer tried to verify this story, but petitioner's office refused to cooperate with him, advising him to proceed by letter. In rendering judgment against the respondent, the court also found that he had failed to establish "that information about his Police Department service was publicized or circulated by defendants in any way that might reach his prospective employers."

Respondent successfully appealed this decision to the Court of Appeals for the Second Circuit. That court held that the finding of no stigma was clearly erroneous. It reasoned that the information about the apparent suicide attempt was of a kind which would necessarily impair employment.

prospects for one seeking work as a police officer. It also decided that the mere act of making available personnel files with the employee's consent was enought to place responsibility for the stigma on the employer, since former employees had no practical alternative but to consent to the release of such information if they wished to be seriously considered for other employment.

We granted certiorari, 44 U. S. L. W. 3745 (June 28, 1976), and the parties have urged us to consider whether the report in question was of a stigmatizing nature, and whether the circumstances of its apparent dissemination were such as to fall within the language of *Board of Regents* v. *Roth*, 408 U. S. 564, 573 (1972) and *Bishop* v. *Wood*, 426 U. S. 341 (1976). We find it unnecessary to reach these issues, however, because of respondent's failure to allege or prove one essential element of his case.

Assuming that all of the other elements necessary to make out a claim of stigmatization under *Roth* and *Bishop*, the remedy mandated by the Due Process Clause of the Fourteenth Amendment is "an opportunity to refute the charge." 408 U. S., at 573. "The purpose of such notice and hearing is to provide the person an opportunity to clear his name," *id.*, n. 12. But if the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation. Nowhere in his pleadings or elsewhere has respondent affirmatively asserted that the report of the apparent suicide attempt was substantially false. Neither the District Court nor the Court of Appeals made any such finding. When we consider the nature of the interest sought to be protected, we believe the absence of any such allegation or finding is fatal to respondent's claim to a hearing under the Due Process Clause.

Where the liberty interest involved is that of conditional

freedom following parole, we have said that the hearing required by the Due Process Clause in order to revoke parole must address two separate considerations. The first is whether the parolee in fact committed the violation with which he is charged, and the second is whether if he did commit the act his parole should, under all the circumstances, therefore be revoked. *Morrisey* v. *Brewer*, 408 U. S. 471, 479–480 (1973); *Gagnon* v. *Scarpelli*, 411 U. S. 778, 784 (1973). The fact that there was no dispute with respect to the commission of the act would not necessarily obviate the need for a hearing on the issue of whether the commission of the act warranted the revocation of parole.

But the hearing required where an employee has been stigmatized in the course of a refusal to re-employ him is solely "to provide the person an opportunity to clear his name." If he does not challenge the substantial truth of the material in question, no hearing would afford a promise of achieving that result for him. For the contemplated hearing does not embrace any determination analogous to the "second step" of the parole revocation proceeding, which would in effect be a determination of whether or not, conceding that the report were true, the employee was properly refused re-employment. Since the District Court found that respondent had no Fourteenth Amendment property interest in continued employment, the adequacy or even the existence of reasons for failing to rehire him presents no federal constitutional question. Only if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination is such a hearing required. *Roth, supra; Bishop, supra.*

Our decision here rests upon no overly technical application of the rules of pleading. Even conceding that the respondent's termination occurred solely because of the report of an apparent suicide attempt, a proposition which is certainly not crystal clear on this record, respondent has at no stage

of this litigation affirmatively stated that the "attempt" did not take place as reported. The furthest he has gone is a suggestion by his counsel that "i[t] might have been all a mistake, [i]t could also have been a little horseplay." This is not enough to raise an issue about the substantial accuracy of the report. Respondent has therefore made out no claim under the Fourteenth Amendment to a hearing, even were we to accept in its entirety the determination by the Court of Appeals that the creation and disclosure of the file report otherwise amounted to stigmatization within the meaning of *Board of Regents* v. *Roth*, *supra*.

The judgment of the Court of Appeals is reversed with instructions to reinstate the judgment of the District Court.