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CHAPTER 5

Labor Law

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§ 5.1. Eligibility for Unemployment Benefits Due to Pregnancy and Domestic Responsibilities.* The increasing participation of women in the labor force has led to a greater recognition of the difficulties facing working women in balancing their traditional responsibilities as child-bearer and rearer with their responsibilities as workers. The changing perceptions of the proper role of women in society and the gradual removal of legal impediments to full and equal participation in the labor force by women1 is reflected in unemployment compensation legislation and court decisions expanding the ability of women unemployed because of pregnancy or family responsibility to receive benefits.2

Unemployment compensation legislation was enacted, inter alia, to provide the unemployed with the means to support themselves while searching for alternative employment.3 To avoid providing incentives to forego employment, benefits are provided only to those persons with a demonstrable attachment to the workforce. Thus, only those workers who do not voluntarily leave the workforce and who remain ready and able for alternative employment are eligible for benefits.4

Consistent with traditional notions that a woman’s primary responsibilities were childbearing and housekeeping, many unemployment compensation statutes, including that of Massachusetts,5 provided that women

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§ 5.1. 1 Congress has acted to provide equality of employment opportunities through the enactment of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976), and the Equal Pay Act, 29 U.S.C. § 206(d) (1976 & Supp. III 1979), which prohibit discrimination on the basis of sex in employment and compensation practices.


5 G.L. c. 151A § 27, provided in part that “no waiting period may be served and no benefits
leaving employment because of pregnancy were ineligible to receive unemployment compensation. This automatic exclusion may, in some states, have reflected the belief that women who became pregnant and left their jobs did so voluntarily to fulfill their traditional roles, thereby denying their attachment to the workforce. The exclusion of pregnant women from unemployment benefits also reflected the presumption that pregnant women were unable to work. This per se exclusion is inconsistent, however, not only with a realistic appraisal of women's attachment to the workforce, but also with the United States Constitution.

The United States Supreme Court, in *Turner v. Dept. of Employment Security,* invalidated such per se exclusions of pregnant women from unemployment benefits. In *Turner,* the Court struck down a Utah law disqualifying pregnant women from unemployment benefits as violative of the fourteenth amendment. Subsequently, Congress amended the Federal Unemployment Tax Act, which governs federal assistance for state unemployment compensation programs, to prohibit the denial of unemployment compensation "solely on the basis of pregnancy or termination of pregnancy."
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Both the Turner decision and the amendment to the Federal Unemployment Tax Act, leave important questions unresolved. For example, it is a usual, if not inevitable, consequence of pregnancy that a woman must take time off from work to give birth and, thereafter, to care for the child. Some employers accommodate these needs by providing maternity leave. It is unclear, after the Turner decision and the Congressional amendment, whether a woman on maternity leave is eligible for unemployment benefits if she cannot find work after recovery from childbirth. Also unanswered was the question whether a pregnant woman who leaves work for her own health and for that of her unborn child has left the work force involuntarily, and is consequently eligible for benefits. Finally, it remains unclear whether a women who must quit her job to care for her child becomes ineligible for benefits. Thus, although Turner invalidates irrebuttable presumptions that pregnant women are ineligible for unemployment, the decision provides little guidance as to the availability of benefits in the above described situations.

During the Survey year, the Supreme Judicial Court in two decisions addressed some of these issues, leaving others for future resolution. In the first decision, Director of the Division of Employment Security v. Fitzgerald, the Supreme Judicial Court reversed a municipal court ruling that had denied benefits to claimant Fitzgerald. Fitzgerald had sought benefits for the time prior to childbirth while she was on maternity leave from her job as a welder. She had been advised by her doctor that, for health reasons connected with her pregnancy, she must cease work as a welder, but that she could continue to perform lighter work. Fitzgerald had sought unsuccessfully to transfer to a clerical job with her employer for which she was qualified. The employer, having no clerical vacancies, placed her on maternity leave. Fitzgerald continued to seek clerical or related employ-

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16 At least one federal district court has ruled that the amendment to the Federal Unemployment Tax Act is more than a simple codification of the decision in Turner and has held that the amendment prohibits, inter alia, the denial of benefits to otherwise eligible women who left their most recent work for pregnancy-related medical reasons. Brown v. Porcher, 502 F. Supp. 946, 957-58 (D.S.C. 1980).
18 Id. at 2544, 414 N.E.2d at 610.
19 Id. at 2543-44, 414 N.E.2d at 609-10.
20 Id. at 2543, 414 N.E.2d at 609.
21 Id. at 2544, 414 N.E.2d at 609. The employer, apparently relying on the company physician's judgment that Fitzgerald could continue working as a welder, initially denied Fitzgerald her requested maternity leave. Id. at 2544, 414 N.E.2d at 609. Fitzgerald challenged the denial under the grievance and arbitration provisions of the applicable union contract and was granted maternity leave in apparent settlement of her grievance. Id. at 2544, 414 N.E.2d at 610. The Court treated the award as conclusive proof of Fitzgerald's inability to continue working as a welder, stating: "There was no finding, nor, in our view, could there rightly have been a finding, that the employee was unjustified in refusing work as a welder. . . ." Id. at 2546, 414
ment without success. Under the circumstances presented, the Court found the claimant to be eligible to receive unemployment benefits. The Court took pains, however, to limit its holding to only the facts presented. Consequently, the Fitzgerald decision is of limited usefulness in answering the more general question of whether women while on or when returning from maternity leave will be presumed eligible for unemployment benefits.

The Court based its holding in Fitzgerald on the general rule that an unemployed worker is eligible for benefits unless he either left work voluntarily or was terminated by the employer for good cause. The Court also relied on its prior decisions holding that a person who is forced to leave work because of compelling personal circumstances has not left work voluntarily and that pregnancy or an pregnancy-related disability may be such a compelling personal circumstance. Because the Court found no evidence indicating that Fitzgerald was unjustified in refusing to work as a welder, the Court found that she had not left work voluntarily. Thus, Fitzgerald was not, as her employer had claimed, disqualified from seeking unemployment benefits.

To be eligible for unemployment benefits, however, a claimant also must be unable to find alternative work to which he is suited. The Court noted that Fitzgerald had sought alternative employment both before and after

N.E.2d at 610. The Court, therefore, did not consider the legal consequences of a pregnant employee taking a maternity leave when she should in reason recognize that she is able to continue at her regular work without predictable damage to herself or the child. Id. at 2546, 414 N.E.2d at 611. Presumably, an employer may challenge a benefits award to a pregnant woman on the basis that the woman left her employment voluntarily, the question being one of fact. The extent to which a review examiner should make an independent evaluation of whether a pregnant woman may safely continue working, possibly placing the woman in the position of deciding for herself or her physician whether she can continue working, remains an unanswered question. The court in Brown v. Porcher, 502 F. Supp. 946 (D.S.C. 1980) implied that no scrutiny by a review board should be permitted, stating: "The decision to stop working must be left to the woman and her physician. . . ." 502 F. Supp. at 957. Conversely, a woman placed on maternity leave by the employer notwithstanding her belief that she could safely continue to work should be presumptively eligible for benefits, unless, under the circumstances, it was unreasonable for her to fail to seek alternative employment.

23 Id.  
24 See text and note at note 38, infra.  
26 Id.  
30 Id. at 2546-47, 414 N.E.2d at 611.  

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going on maternity leave. Thus, the Court found that she was available for work and, consequently, eligible for benefits.

The Court also rejected the employer's final argument that Fitzgerald was ineligible for unemployment because she had not severed the employment relationship. The employer reasoned that, because Fitzgerald anticipated returning to work, she was still employed and should not be eligible for benefits. The Court found, however, that Fitzgerald was not "employed," as she had ceased working and was earning nothing. The Court analogized Fitzgerald's situation to that of a worker who has been laid off but who has a contractual right to recall his previous job. A worker in this situation previously had been held eligible for benefits.

The Fitzgerald case reaffirms that a woman who can demonstrate that she left her job for health reasons related to her pregnancy is involuntarily unemployed and, if otherwise eligible, is entitled to benefits for the time she is on maternity leave prior to childbirth. Because Fitzgerald was limited strictly to its facts, however, it cannot be said that women who leave work for pregnancy-related reasons, are automatically entitled to benefits. For instance, women who leave before medically required to do so will likely be found to have left voluntarily and not for compelling personal circumstances. On the other hand, women returning from maternity leave who, although capable of working, are unable to find employment, are presumably eligible for benefits. Furthermore, the Court's analysis suggests that a woman who quits her job because she cannot safely continue to work will be found to have left work involuntarily and will be eligible for benefits if she meets the other prerequisites. In short, under Fitzgerald, pregnancy is a legitimate reason for temporary unemployment which is not reflective of a prohibited diminution in one's attachment to the workforce. The decision provides no basis for exempting pregnant women from the availability requirement and, indeed, there seems little basis for judicial elimination of this requirement.

31 Id. at 2547, 414 N.E.2d at 611.
32 Id.
33 Id.
34 Id.
35 Id.
37 See Dohoney v. Director of the Div. of Employment Security, 377 Mass. 333, 386 N.E.2d 10 (1979). In Dohoney, the Court rejected the argument that repeal of the pregnancy exclusion from the unemployment compensation statute implied that a woman on maternity leave has left work involuntarily, stating that the repeal was not intended "to make female employees who leave their jobs to give birth automatically eligible for unemployment compensation." 377 Mass. at 337, 386 N.E.2d at 13.
38 Because the Court found Fitzgerald entitled to benefits, it had no occasion to consider whether a denial of unemployment benefits to a pregnant woman would violate the Federal
In the second case pertaining to women in the workforce, Conlon v. Director of the Division of Employment Security, the Court was faced for the first time with the question whether a person who refuses work at certain hours because of domestic responsibilities is entitled to unemployment compensation. Conlon previously worked the 7 a.m. to 3 p.m. shift as a nurse’s aide in a nursing home. Her husband was a fireman who was required to work nights. The nursing home went out of business, and Conlon sought other employment as a nurse’s aide. She restricted her availability, however, to the day shift because she was unwilling to leave her six children, ages 7 to 17, without parental supervision at night. Unable to find work as a nurse’s aide on the day shift, she applied for but was denied unemployment benefits. A district court reversed the board of review’s denial. The Supreme Judicial Court upheld the lower court’s decision in part and remanded the case to the board for further findings.

The Court noted that, for an unemployed worker to be eligible for benefits, the worker must be available for work. It is not necessary, however, for the worker to be available for any job that is offered. Rather, the worker must be available only for suitable work that he has no “good cause” to refuse. The Conlon Court also noted that “good cause” to

Unemployment Tax Act. Cf. Brown v. Porcher, 502 F. Supp. 946 (D.S.C. 1980) (finding Federal Unemployment Tax Act did more than codify Turner). Denial of benefits to a pregnant woman unavailable for work is not a denial solely on the basis of pregnancy, and facially the denial is not in violation of the Federal Unemployment Tax Act. Nor does there appear to be grounds on which to attack such an exclusion as discriminatory under the Constitution. Thus, the Court previously ruled in Keough v. Director of the Div. of Employment Security, 370 Mass. at 6, 344 N.E.2d at 897, that “unemployment benefits are not for those who are incapable of working”, (quoting Rivers v. Director of the Div. of Employment Security, 323 Mass. 339, 342 (1948)). Since the unemployment compensation program is for the benefit of a class of unemployed persons who have been and who continue to be attached to the labor force, availability for work is a valid condition for eligibility for benefits. The per se exclusion of pregnant women from the eligible class is unconstitutional, but the fact that the classification may exclude from eligibility a disproportionate number of working women as compared to men is insufficient to make out a constitutional violation. Washington v. Davis, 426 U.S. 229 (1976); cf. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) (veteran’s preference, where men comprise 98% of veterans, does not constitute sex discrimination).
decline employment may include personal reasons. Consequently, the Court remanded the case to the board of review to determine whether, as a matter of fact, Conlon's domestic responsibilities constituted "good cause" for limiting her availability for suitable employment.

In so ruling, the Court stated that the board had erred in concluding that the person claiming benefits must be willing and able to work full time on any shift normally operated in the occupation for which she is suited by training and experience. The board's focus on claimant's reduction in availability and the implicit assumption that women so limiting their availability because of domestic responsibilities do not have the requisite attachment to the workforce was, according to the Court's analysis, incorrect. Rather, the board was to determine on remand whether there remained a substantial enough number of employment possibilities which Conlon would consider so that she was still available for work within the meaning of section 24 or whether Conlon had so limited her availability that she had effectively removed herself from the labor force. Under Conlon then, the proper focus in determining eligibility is whether, consistent with her domestic responsibilities, a claimant exhibits a substantial remaining attachment to the workforce. If so, she should be found entitled to benefits.

49 Id. at 2390, 413 N.E.2d at 729. For a similar analysis, see Sanchez v. Unemployment Ins. Appeals Board, 20 Cal.3d 55, 569 P.2d 740, 141 Cal. Rptr. 146 (1977), and Note, THE CONCEPT OF AVAILABILITY, supra note 3. As the Court in Conlon noted, the trend has been away from a narrow definition of "good cause" which excluded domestic responsibilities, to a more expansive definition. 1980 Mass. Adv. Sh. at 2389, 413 N.E.2d at 729. The Court in Fitzgerald and in Conlon appears to contemplate using the same "good cause" standard for determining whether a woman left her job involuntarily for compelling personal reasons and for determining whether she has permissibly restricted her availability for personal reasons. This suggests that women may substantially restrict their availability for health and safety reasons related to their pregnancy and remain eligible for benefits. Decisions from other states are collected in Annot., 35 A.L.R.3d 1129, 1137 (1971 & 1981 Supp.). Determination of eligibility often turns on whether the state statute in question recognizes only "good cause" attributable to the employee or not. Section 25 contains no such qualifying phrase and the Court found "good cause" for personal reasons to be recognized by the statute. 1980 Mass. Adv. Sh. at 2390-91, 413 N.E.2d at 730.

50 1980 Mass. Adv. Sh. at 2392-93, 413 N.E.2d at 730-31. The district court had based its reversal of the board's denial of benefits on the rationale that employment on anything other than the day shift was not "suitable employment" within the meaning of § 25, citing that provision in § 25(c) requiring "consideration whether the employment (declined) is detrimental to the health, safety or morals of an employee." Agreeing that § 25(c) was relevant, the Supreme Judicial Court, however, stated that it bore upon whether claimant had "good cause" to limit her availability rather than on the definition of "suitable employment." Id. at 2392-93, 413 N.E.2d at 730-31. The Court, in fact, expressly declined to address the question of whether employment in the same type of work as previously held by a claimant but at a different time or shift constituted "suitable employment." Id. at 2392-93, 413 N.E. 2d at 731.

51 Id., 413 N.E.2d at 730.

52 Id. at 2392, 413 N.E.2d at 730.

53 Id. at 2392-93, 413 N.E.2d at 731.

54 Id. at 2393, 413 N.E.2d at 731. The board on remand presumably will survey the
Both Fitzgerald and Conlon represent an increasing appreciation by the Supreme Judicial Court of the problems facing working women. Specifically, the Court has recognized that pregnancy and domestic responsibilities may constitute valid reasons to limit a woman's availability for work without necessarily disqualifying her for unemployment benefits. The decisions leave several questions unanswered, however. For example, the necessary level of residual availability (that is, the extent of permissible limitations on the location, timing, and physical requirements of a suitable job) to remain eligible for benefits will have to be ascertained. The level of proof to which claimants will be held in establishing the reasonableness of their self-imposed limitations on availability also must be addressed.

§ 5.2. Tenure and the Elimination of Positions due to Declining Enrollment. During the Survey year, the Supreme Judicial Court again considered the legal effect of declining pupil enrollments and declining community tax revenues upon the job security of public school teachers. Under section 41 of chapter 71 of the General Laws, teachers who have served for three consecutive years acquire tenure upon election to their fourth year of service. Pursuant to section 42, a tenured teacher may be dismissed only for good cause upon a two-thirds vote of the entire school committee and only after a notice of the charges and an opportunity for a hearing.

availability of employment opportunities meeting Conlon's self-imposed restrictions and will attempt to strike a balance between the reasonableness of such restrictions and the perceived seriousness of the domestic responsibilities. Factors likely to be considered by the board, in determining eligibility, include the claimant's effort to find alternative solutions to her domestic responsibilities (e.g., attempting to find babysitters) and the length of time the claimant has had to adjust her domestic responsibilities to accommodate better the needs of her employment (e.g., a claimant who quits work after the sudden death of a relative who had watched her children may be eligible for benefits.) The same claimant who a month later has failed to make alternative arrangements for the care of her children may not be eligible.

§ 5.2. For analyses of the relation between tenure rights and the authority to dismiss tenured teachers for reasons of financial exigency, see Brown, Tenure Rights in Contractual and Constitutional Context, 6 J. LAW & ED. 280 (1977); Grunebaum et al., Labor Law, 1977 ANN. SURV. MASS. LAW, § 16.4, at 357-64; Peterson, The Dismissal of Tenured Faculty for Reasons of Financial Exigency, 51 IND. L.J. 417 (1976).

G.L. c. 71, § 41.
G.L. c. 71, § 42 provides:
The school committee may dismiss any teacher, but no teacher and no superintendent, other than a union superintendent and the superintendent of schools in the city of Boston, shall be dismissed unless by a two-thirds vote of a whole committee. In every such town a teacher or superintendent employed at discretion under the preceding section shall not be dismissed, except for inefficiency, incapacity, conduct unbecoming a teacher or superintendent, insubordination or other cause, nor unless at least thirty days, exclusive of customary vacation periods, prior to the meeting at which the vote is to be taken, he shall have been notified of such intended vote; nor unless, if he so request, he shall have been furnished by the committee with a written charge or charges of
Prior to the Survey year, the Massachusetts Appeals Court had held that the elimination of a teaching position constituted "good cause" for dismissal of a tenured teacher within the meaning of section 42.4 The Appeals Court also had ruled, however, that a tenured teacher who was dismissed because of the elimination of his position remained entitled to his procedural rights under section 42, including the right to hearing.5 During the Survey year, in Milne v. School Committee of Manchester,6 the Supreme Judicial Court held that, in the face of declining enrollments, a school board may dismiss a tenured teacher without providing an opportunity for a hearing.7

In Milne, the Manchester school board dismissed the plaintiff, a tenured physical education teacher, after deciding that a reduction in the number of physical education teachers was advisable because of a decrease in the number of pupils in the Manchester schools.8 The plaintiff was provided no hearing before his dismissal.9 In denying Milne a hearing, the school board relied on that portion of section 42 which states that nothing in the tenure law shall affect a school committee's right to dismiss a teacher "whenever an actual decrease in the number of pupils in the schools of the town renders such action advisable."10

Milne challenged his dismissal in superior court arguing that he was entitled to notice and a hearing as a matter of statutory and constitutional right.11 The trial court granted the defendant school committee's motion for

the cause or causes for which his dismissal is proposed; nor unless, if he so requests, he has been given a hearing before the school committee which may be either public or private at the discretion of the school committee and at which he may be represented by counsel, present evidence and call witnesses to testify in his behalf and examine them; nor unless the charge or charges shall have been substantiated; nor unless, in the case of a teacher, the superintendent shall have given the committee his recommendations thereon. The change of marital status of a female teacher or superintendent shall not be considered cause for dismissal under this section. Neither this nor the preceding sections shall affect the right of a committee to dismiss a teacher whenever an actual decrease in the number of pupils in the schools of the town renders such action advisable. In case a decrease in the number of pupils in the schools of a town renders advisable the dismissal of one or more teachers, a teacher who is serving at the discretion of a school committee under section forty-one shall not be dismissed if there is a teacher not serving at discretion whose position the teacher serving at the discretion is qualified to fill. No teacher or superintendent who has been lawfully dismissed shall receive compensation for services rendered thereafter.


Id. at 81-82 & n.8, 359 N.E.2d at 965 & n.8.


Id. at 2153, 410 N.E.2d at 1218.

Id. at 2151, 410 N.E.2d at 1217.

Id. at 2151-52, 410 N.E.2d at 1217.

Id. at 2152, 410 N.E.2d at 1217. See note 3 supra.


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summary judgment. The Supreme Judicial Court affirmed on direct appellate review.

In denying the plaintiff's statutory claim, the Court relied on the same language of section 42 as that relied on by the school committee. The Court held that this language exempted any dismissal based solely on decreased enrollment from the notice and hearing requirements of section 42. Accordingly, the Court decided that the plaintiff had no statutory right to a hearing.

The plaintiff also argued that, by denying him a hearing, the school committee had violated his right to due process of law under the fourteenth amendment to the United States Constitution. The Court summarily rejected this argument, relying on the holding of the United States Supreme Court in Bishop v. Wood. In Bishop, the Supreme Court held that the existence of a constitutionally protected property interest depends on the nature of the plaintiff's rights under state law. Accordingly, the Supreme Judicial Court focused its inquiry on whether Milne had a property interest under the laws of the commonwealth. The Court reasoned that although the United States Supreme Court had ruled that tenure may create legitimate expectations of continued employment that are entitled to due process protections, under Massachusetts law, a tenured teacher has no legitimate expectation of continued employment where: (a) good cause for termination is established in a statutorily mandated hearing or (b) a decrease in enrollment makes dismissal advisable. Because Milne had been dismissed due to declining enrollment, the Court found that he had no legitimate expectation of continued employment. Thus, the Court ruled that the school committee's action had not infringed any property interest of Milne which was protected by state law and entitled to constitutional protection.

In Milne, the Court adopted a narrow definition of the interest created by the tenure statute. The Court's opinion did not consider the language in section 42 that provides that, even where teachers are to be dismissed because of decreased enrollments, no tenured teacher can be dismissed if there is a

12 Id. at 2152, 410 N.E.2d at 1217.
13 Id.
14 Id. See text and note at note 10 supra.
16 Id.
17 Id., 410 N.E.2d at 1218.
18 Id.
20 Id. at 344.
21 Perry v. Sinderman, 408 U.S. 593 (1972); see also, Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).
23 Id.
24 Id.
non-tenured teacher holding a position the tenured teacher is qualified to fill. It is at least arguable that this provision creates an additional dimension to the statutorily created property interest of a tenured teacher. A hearing may be necessary to determine whether this additional dimension of the property right has been abridged, in violation of due process. The Court's opinion fails to consider whether tenure creates a sufficiently strong interest in continued employment such that due process requires providing a tenured teacher the opportunity to challenge whether declining enrollments was actually a pretextual reason for his dismissal.

The Supreme Court of Colorado, by contrast, adopted in Howell v. Woodlin School Dist. R-104 a broad definition of tenure rights as property interests entitled to constitutional protection. In essence, the Howell court required a hearing at which a teacher dismissed because of declining enrollments could raise claims that the dismissal was arbitrary, that the purported reason for dismissal was not the actual one, or that another teacher should have been dismissed first. The Massachusetts Court in Milne attempted to distinguish Howell, noting that in Milne the plaintiff had failed to raise any of these claims. The Court expressly declined to decide whether it would follow Howell if these claims were raised. The Court's failure to address this issue, although unnecessary for resolution of the case before it, leaves unresolved the precise delineation of the job security interests of tenured teachers created by state statute and entitled to constitutional due process protection.

The Milne Court's decision not to grant a hearing also may be criticized as somewhat unmindful of the practicalities of a dismissed teacher's situation. A dismissed teacher may be unable to learn of any irregularities in his dismissal, prior to and without the opportunity for a hearing at which he may cross-examine witnesses. Thus he may not be in a position to challenge effectively his dismissal without a hearing. On the other hand, if all a teacher must do to preserve his right to a hearing is to raise claims of pretext or failure to consider him for another job for which he is qualified, hearings in these circumstances will be routine and may become frivolous. Resolution of these issues must await a future decision by the Court.

The Milne Court also was silent as to whether the rights of a teacher under a collective bargaining agreement might create a sufficient interest in

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25 See note 3 supra. The record showed that Milne was the junior physical education teacher and that there was no untenured teacher in the Manchester school system whose job Milne was qualified to fill. 1980 Mass. Adv. Sh. at 2151, 410 N.E.2d at 1217.
27 Id. at 45, 596 P.2d at 60.
29 For reasons unstated in the opinion, the plaintiff raised no claims based on an asserted violation of his rights under the applicable collective bargaining agreement. 1980 Mass. Adv. Sh. at 2152 n.2, 410 N.E.2d at 1217 n.2.
continued employment to be entitled to due process protection and a statutory hearing.\textsuperscript{39} If the answer to this question is no, one effect of the \textit{Milne} decision may be that efforts to reach an accommodation between the interests of teachers and school boards in the face of retrenchment will be concentrated to a greater extent in the collective bargaining process and in grievance arbitration. Attempted judicial enforcement of the statute would be less common.

\textsuperscript{39} See Grunebaum \textit{et al.}, Labor Law, 1977 \textit{Ann. Surv. Mass. Law} § 16.4, at 362. G.L. c. 150E § 8 provides that where a public school teacher elects arbitration of his contractual rights in a dismissal case, the arbitration is final and binding without resort to adjudication of his rights under the tenure law. \textit{Id.}