EMPLOYMENT DISCRIMINATION CLAIMS IN STATE COURT: A LABORATORY FOR EXPERIMENTATION

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INTRODUCTION

> It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[1]

As the Burger Court repeatedly curtails expansionist approaches to interpretation and application of federal employment discrimination statutes, the utilization of state courts as substantive alternatives for vindicating employees' unjustified discharges represents the new, and perhaps the only, opportunity for creative expansion of discrimination claims. Therefore, expanding state law to address employment discrimination claims is clearly a product of our time, and consistent with the urging of both presidents and justices for a governmental and jurisprudential return to the states for answers to unfulfilled expectations at the federal level.

Accordingly, farsighted or feisty lawyers, previously well-conditioned to thinking of federal law and a federal forum when seeking redress for employment discrimination, have turned to state courts. The handful of remarkable state jurists who have responded by adapting basic common law contract and tort precepts to workplace realities have produced the yeast for a rising mass of state court decisions on employee rights. Whether the result will ultimately be a more edible loaf than is served in federal court remains to be seen. Meanwhile, the developments provide meaningful insights into litigation strategy. This article is intended to provide a focus for such consideration.[2]

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1. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

2. This article is not intended to be an exhaustive discussion of all substantive and procedural issues which could arise in the context of litigating employment discrimination claims in the state courts, nor does it have any pretensions of being a scholarly discussion of the proper allocation of employment discrimination law shaping responsibilities between the federal and

I

BACKGROUND: FROM LAISSEZ FAIRE TO FEDERAL PROTECTION TO 'STATE PROTECTION'

The traditional American rule that an employee hired for an indefinite period may be terminated at the unrestrained will of the employer arose out of the *laissez faire* attitude of the late nineteenth century.[3] With the stirring sense of racial injustice and increased governmental activism of the sixties, Congress enacted Title VII of the Civil Rights Act of 1964[4] (Title VII), which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. Subsequently, Congress enacted the Age Discrimination in Employment Act of 1967[5] (ADEA), to prohibit discrimination against employees between 40 and 65 years (70 years by the Amendments of 1978) on the basis of age. These two statutes, along with the Equal Pay Act of 1963[6] (Equal Pay Act), form the trio of federal statutes through which protected employees have sought redress for wrongful employer conduct.[7]

Although the substance of these laws has not been significantly altered in the intervening years, the federal courts have, in reflection of societal attitudes, taken a less sympathetic view towards these plaintiffs. The "smoking gun" case has virtually disappeared as employers have increased their awareness of discrimination laws and the protective measures available to defeat claims.

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state court systems. Instead, this expresses the views and observations of a practitioner who has litigated employment discrimination cases for the last six years, primarily on behalf of plaintiffs.

3. See Note, Guidelines for a Public Policy Exception to the Employment at Will Rule: The Wrongful Discharge Tort, 13 Conn. L. Rev. 617 (1981); Note, Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816 (1980).

4. 42 U.S.C. § 2000e-2005f (Title VII).

5. 29 U.S.C. § 621 (ADEA).

6. 29 U.S.C. § 206 (Equal Pay Act).

7. Other constitutional and statutory provisions are available in certain situations, including Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, Title IX of the Education Act of 1972, 20 U.S.C. § 1681(a); Model Cities Act, 42 U.S.C. § 3303(a)(6) and § 510 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140 (ERISA). The Vocational Rehabilitation Act of 1973, 29 U.S.C. § 794 (1975) prohibits federal contractors or any program or activity receiving federal financial assistance from discriminating against handicapped persons. It is not within the scope of this article to detail the limitations for litigation purposes of these provisions. Suffice it to note that the limitations are extreme, rendering the handicap discrimination areas most amenable to the development of a wrongful discharge tort and to breach of contract claims by handicapped individuals. See, e.g., Anderson v. Wyatt, No.83-0217347, (Superior Court, New Haven, Conn., Feb. 14, 1984) (denial of defendant's motion to strike tort and contract claims premised upon discharge of plaintiff for diabetic condition). See also Folz v. Marriott Corp., 5 EBC 2245 (W.D. Mo. 1984) (brought under ERISA § 510 for discharge of employee shortly after his diagnosis of multiple sclerosis, to avoid having to pay benefits from employer health disability plan).

In addition, disgruntled minority employees have, when possible, relied upon constitutional prohibitions through 42 U.S.C. § 1981 (same rights to contract as "white citizens") and § 1983 ("under color of state law"). Advantages include the availability of compensatory damages for emotional suffering, punitive damages, and attorney's fees, pursuant to 42 U.S.C. § 1988 as amended, and the opportunity for filing an action without preliminary administrative exhaustion as is required under Title VII and the ADEA.

Furthermore, the demands of proof have become greater: compare *Texas Department of Community Affairs v. Burdine*[8] with *Vulcan v. Civil Service Commission*.[9] The evaluations of statistical proof are more stringent: compare *Hazelwood School District v. U.S.*[10] with *Ste. Marie v. Eastern Railroad Ass'n*[11] Broad certification of a class is more difficult: compare *Payne v. Travenol Laboratories, Inc.*[12] with *General Telephone Company of the Southwest v. Falcon*.[13] As federal courts and causes of action provide less fertile bases for relief, discharged plaintiffs may increasingly look to state courts and state constitutional and common law causes of action to secure relief in harsh economic times.[14]

II
THE RISE IN STATE TORT AND CONTRACT CAUSES

Since the mid-1970s, numerous states have come to recognize a form of common law cause of action for wrongful discharge, some fashioning a tort and others a contract claim with correspondingly appropriate relief.[15]

The leading case is *Monge v. Beebe Rubber Co.*,[16] in which the plaintiff alleged that she was terminated after thwarting the sexual advances of her foreman. Recognizing a cause of action for breach of contract, the *Monge* court stated: "A termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract."[17]

The plaintiff in *Monge* did not rely upon any state or federal legislation prohibiting sexual harassment. Subsequently, however, the New Hampshire Supreme Court in *Cloutier v. Great Atlantic & Pacific Tea Co.*[18] relied on federal policy expressed in OSHA regulations and state legislation mandating a day of rest to find the plaintiff to have been wrongfully discharged.[19] The Court announced a two-pronged test: the plaintiff must show that (a) the employer was motivated by bad faith, malice, or retaliation,[20] and b) the discharge was due to performance of an act encouraged by public policy or the

8. 45 U.S. 248 (1981).
9. 6 FEP Cases 1045, 1049 (2d Cir. 1973).
10. 433 U.S. 299, 311 n.17 (1977).
11. 26 FEP Cases 167 (2d Cir. 1981).
12. 565 F.2d 895 (5th Cir.), cert. denied, 439 U.S. 835 (1978).
13. 457 U.S. 147 (1982).
14. Employment discrimination lawyers looking to state constitutions and courts are joined by the broader group of civil rights attorneys, disillusioned by the conservativism of the Burger Court. See Special Section: The Connecticut Constitution, 15 Conn. L. Rev. 7 (Fall 1982).
15. For elaboration on such cases, see Notes cited in note 3 infra.
16. 114 N.H. 130, 316 A.2d 549 (N.H. 1974).
17. Id. at 133, 316 A.2d at 551.
18. 121 N.H. 884, 436 A.2d 1140 (N.H. 1981).
19. Id. at 890, 436 A.2d at 1145.
20. Id. at 887, 436 A.2d at 1143.

refusal to do an act condemned by public policy.[21]

The use of legislation to clarify the public policy concern surfaced in *McKinney v. National Dairy Council*,[22] in which the court concluded that a sixty year old employee with nineteen years of service to the defendant was entitled to raise the claim that his discharge, which violated the state's age discrimination statute, breached an implied obligation of good faith and fair dealing in the employment contract.[23]

Extending this approach, the plaintiffs in *Cancellier v. Federated Department Stores*[24] claimed that they were terminated in violation of the ADEA *and* in breach of the implied covenant of good faith and fair dealing in the employment contract.[25] The court allowed such a contract cause of action when the employee alleged long years of service and the existence of personnel policies or oral representations "showing an implied promise by the employer not to act arbitrarily in dealing with its employees."[26]

While courts applying a contract theory premised upon a statute read into the contract the terms of the statute, courts applying a tort theory emphasize the public policy expressed through legislation. Thus, numerous cases have held that an employee may not be fired for claiming workers' compensation[27] or for reporting a violation by the employer of certain laws.[28]

A problem which arises when a statute forms the basis for a tort or contract wrongful discharge claim is the defense that statutory remedies may be exclusive. This argument prevailed in *Bruffett v. Warner Communications Inc.*,[29] in which the plaintiff alleged wrongful termination based upon Pennsylvania's disability laws. The court determined that because the plaintiff could have availed himself of the statutory remedies provided for discrimination on the basis of handicap, no common law remedy was available.[30] The statutory age discrimination scheme of Massachusetts did not, however, preclude the plaintiff in *McKinney v. National Dairy Council*[31] from pursuing a breach of contract claim premised upon a discharge resulting from his age.[32] It should be noted that other traditional tort claims have successfully been

21. Id. at 888, 436 A.2d at 1144. See also Magnan v. Anaconda Industries, Inc., 193 Conn. 55, 475 A.2d 28 (1984); Cook v. Alexander & Alexander of Conn. Inc., 40 Conn. Supp. 246 (1985).

22. 491 F. Supp. 1108 (D. Mass. 1980).

23. Id. at 1122.

24. 672 F.2d 1312 (9th Cir. 1982).

25. Id. at 1317.

26. Id. at 1318. See also Weiner v. McGraw Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

27. See, e.g., Lally v. Copygraphics, 85 N.J. 668, 428 A.2d 1317 (1981).

28. See, e.g., Harliss v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978).

29. 692 F.2d 910 (3d Cir. 1982).

30. Id. at 918.

31. 491 F. Supp. 1108 (D. Mass. 1980).

32. See also *Lally*, 85 N.J. 668, 428 A.2d 1317 (workers' compensation scheme prohibiting discharge due to compensation claim would not prevent recognition of alternative or supplemental judicial right to secure relief).

raised in conjunction with federal statutory discrimination claims with varying results.[33]

The advantages of bringing these state law claims are obvious: 1) they may provide for broader damages, particularly when the state claim sounds in tort, than the statutory claim derived from Title VII, which does not permit general and punitive damages; 2) they are available even if state and/or federal administrative schemes have not been followed (unless, of course, a court finds those schemes to be exclusive, as in *Bruffett v. Warner Communciations, Inc.*;[34] and 3) they may provide a longer statute of limitations period.

III
WEIGHING THE ADVANTAGES: FEDERAL VS. STATE COURT

A. Pendent Jurisdiction

In the area of employment discrimination, the question arises as to whether a plaintiff wishing to pursue both federal statutory and state common law claims should file an action in state or federal court. State claims may be joined to federal statutory claims in federal court by pendent jurisdiction. Whether a district court will accept such jurisdiction is, however, a matter of discretion, governed largely by *United Mine Workers v. Gibbs*,[35] which sets forth the following requirements for pendent jurisdiction: a) there must be a substantial federal claim;[36] b) the state and federal claims must derive from a common nucleus of operative fact;[37] and c) the claims must be such that the plaintiff would ordinarily be expected to try them all in one judicial proceeding. A judge's discretion to hear pendent state claims lies, finally, in "considerations of judicial economy, convenience and fairness to litigants."[38]

Applying these guidelines, some courts have accepted jurisdiction over state common law claims.[39] Those courts which have declined to do so have been persuaded by a variety of arguments. In those cases in which the plaintiff's state claims were not intricately woven into the discrimination claims, some courts have declined jurisdiction on grounds that different factual bases

33. See, e.g., NOW v. Sperry Rand Corp., 457 F. Supp. 1338, 1349 (D. Conn. 1978) (Title VII, § 1981, intentional infliction of emotional distress, libel, and slander); Van Hoomissen v. Xerox Corp., 368 F. Supp. 829, 840 (N.D. Cal. 1973) (Title VII and intentional infliction of emotional distress).

34. 692 F.2d 910 (3d Cir. 1982).

35. 383 U.S. 715, 725 (1966).

36. Id. at 725-26.

37. Id. at 725.

38. Id. at 726.

39. See, e.g., Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir. 1982), cert. denied, 459 U.S. 859 (1982); Hovey v. Lutheran Medical Center, 516 F. Supp. 554 (E.D.N.Y. 1981); Placos v. Cosmair, 517 F. Supp. 1287 (S.D.N.Y. 1981); Savodnik v. Corvettes, 488 F. Supp. 822 (E.D.N.Y. 1980); Cemer v. Marathon Oil Co., 20 FEP Cases 523 (6th Cir. 1978); see also, Zamore v. Dyer, — F. Supp. — (D. Conn. Oct. 1, 1984), 11 Conn. Law Trib. No. 5 (Feb. 4, 1985) (retaining pendent jurisdiction over state statutory claims).

were involved.[40] Other courts have held that allowing tort claims which permit damages in excess of those permitted under the federal statutory scheme would circumvent the policy underlying limited recovery.[41] Ironically, in *Kennedy v. Mountain States Telephone & Telegraph Co.*,[42] the court declined jurisdiction because the remedies available under the state tort claim for mental distress were available in punitive damages under the ADEA. Finally, some courts have expressed reluctance to address state claims which involve areas of the law not yet settled by the highest state court.[43]

B. Federal Claims in State Court

Under the ADEA, state courts have jurisdiction concurrent with federal courts.[44] Similarly, state courts exercise concurrent jurisdiction with federal district courts over cases arising under the Civil Rights Act, 42 U.S.C. §§ 1981-1985.[45] Courts have split, however, on the question of whether the federal courts have exclusive jurisdiction over Title VII claims.[46]

C. State Court Limitations: Management, Class Actions, Attorneys' Fees

There are certain inherent disadvantages to litigating employment discrimination claims in state courts. The most obvious and time-honored reason, and the impetus for the passage of the federal employment discrimination statutes, was congressional concern over the adequacy of state courts as protectors of the federal rights of individuals.[47] Thus federal causes of action were created where the state courts were believed not to be adequately protecting an individual's rights.

With the increasingly conservative trend in the federal judiciary, however, some state courts may be more receptive to discrimination claims.[48] Nonetheless, most state courts are inexperienced in handling large employment discrimination cases. In jurisdictions where different judges are assigned

40. See, e.g., Douglas v. American Cyanamid Co., 19 FEP Cases 1671 (D. Conn. 1979) (ADEA, defamation); contra, Rechsteiner v. Madison Fund, Inc., 75 F.R.D. 499, 505-06, 15 FEP Cases 216 (D. Del. 1977) (ADEA, breach of contract).

41. See, e.g., *Douglas*, 19 FEP Cases 1671 (ADEA, defamation); Hannon v. Continental Nat'l Bank, 427 F. Supp. 215, 218 (D. Colo. 1977) (ADEA, intentional infliction of emotional distress).

42. 449 F. Supp. 1008, 17 FEP Cases 616 (D. Colo. 1978). But see Johnson v. Al Tech Specialties Steel Corp., 731 F.2d 143 (2d Cir. 1984) (court held the ADEA does not permit recovery for emotional distress or punitive damages).

43. See, e.g., Sherman v. St. Barnabas Hospital, 535 F. Supp. 564, 574 (S.D.N.Y 1982).

44. 29 U.S.C. § 626c; Jacobi v. High Point Label, Inc., 422 F. Supp. 518 (D.N.C. 1977).

45. See, Bennun v. Board of Governors of Rutgers, 413 F. Supp. 1274 (D.N.J. 1976) (citing Long v. District of Columbia, 469 F.2d 927 (D.C. Cir. 1972)).

46. Greene v. County School Bd. of Henrico County, Virginia, 524 F. Supp. 43 (E.D. Va. 1981) (concurrent jurisdiction); Dickinson v. Chrysler Corp., 456 F. Supp. 43 (E.D. Mich. 1978) (exclusive jurisdiction); Long v. Department of Admin., Dir. of Retirement, 428 So. 2d 688 (Fla. Dist. Ct. App., 1983) (exclusive jurisdiction).

47. See, e.g., Mitchum v. Foster, 407 U.S. 225, 241-42 (1972).

48. See, e.g., Horton v. Meskill, 172 Conn. 615 (1977) compared with Rodriguez v. San Antonio Indep. School District, 411 U.S. 1 (1972).

to each separate pretrial proceeding, as in Connecticut, case management is encumbered by the necessity of introducing a succession of judges to the complex factual setting with its intricate proof requirements, application of which may be crucial for proper pretrial rulings.[49] Further, the extensive discovery needs of discrimination plaintiffs are more likely to be met adequately by a federal district judge applying federal rules than by more restrictive state courts. In addition, if the state court's reporting system does not timely and adequately report trial court decisions, the growth of a state's jurisprudence in this area is severely impaired.

Another factor in considering whether to bring large discrimination cases in federal or state court is the viability of class certification. Federal courts may be willing to certify a large, even interstate class, while state courts may well be disinclined to do so.[50]

A final consideration is the liberality with which a state court may grant or deny an award of attorney's fees. Under 42 U.S.C. § 1988, a prevailing plaintiff in a civil rights action may be almost assured of recovering at least some attorney's fees from a federal court.[51] There appear to be no reported cases applying 42 U.S.C. § 1988 to federal claims litigated in state courts, although the United States Supreme Court has found Title VII fee provisions applicable to state administrative proceedings utilized to process such claims.[52]

In any event, state law and legislation dictate whether a plaintiff in state court on state claims could secure an award of counsel fees, although a state court could look to 42 U.S.C. § 1988 to provide guidance in the award.[53]

IV

DUAL FORUMS AND A HOST OF PROCEDURAL HURDLES: RES ADJUDICATA, COLLATERAL ESTOPPEL, AND THE ELEVENTH AMENDMENT

In *Allen v. McCurry*,[54] the Court determined that under the implement-

49. This is especially true in disparate impact cases involving statistical proof, which has become quite sophisticated and refined. Comment, Judicial Refinement of Statistical Evidence in Title VII Cases, 13 Conn. L. Rev. 515 (Spring 1981).

50. Sussman & Sussman, Class Action Decisions Follow Divergent Paths, Legal Times of N.Y. (Mar. 1984). See, Stellma v. Vantage Press, Inc., N.Y.L.J., Nov. 14, 1983, at 6, col. 2 (Sup. Ct. N.Y. Co.) in which the court, applying a minimum contacts approach, decertified nonresidents from a class of allegedly defrauded plaintiffs, because they would "not be subject to, or bound by the judgment that may be rendered in this case."

51. Hensley v. Eckerhart, 103 S. Ct. 1933 (1983); Kerr v. Quinn, 692 F.2d 875 (2d Cir. 1982); Garrison, Attorney's Fees Under Fee-Shifting Statutes, 56 Conn. B.J. 66 (Feb. 1982); Attorney's Fees Under Fee-Shifting Statutes—A 1982 Update, 57 Conn. B.J. 171 (June 1983).

52. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1979), but see Blow v. Lascaris, 523 F. Supp. 913 (N.D.N.Y. 1981).

53. See, e.g., Gagne v. Town of Enfield, No. H-77-617 (D. Conn. Aug. 3, 1983) (Cabranes, J.) (on state law counts, jury awarded punitive damages which, under Connecticut law, amount to attorney's fees, so federal district judge applied 42 U.S.C. § 1988 procedure).

54. 449 U.S. 90 (1980).

ing statute of the Constitution's full faith and credit clause,[55] issues actually litigated in a state court are entitled to the same preclusive effect, by virtue of res adjudicata or collateral estoppel in a subsequent § 1983 action, as they would be accorded in the courts of the state in which the judgment was rendered.[56] Adhering to this principle, the Court in *Kremer v. Chemical Construction Corporation*[57] held that a state judicial decision upholding a state administrative ruling on an employment discrimination claim was res adjudicata as to the federal Title VII claim.

In *Migra v. Warren City School District Board of Education*,[58] the Court extended its holding in *Allen*,[59] deciding that where a § 1983 claim *could have been* litigated in a state court action involving breach of contract and wrongful interference with an employment contract, the plaintiff would be precluded from bringing the § 1983 action in federal court if the state court judgment would be given such preclusive effect by the state courts.[60]

The ramification of these decisions for plaintiffs in employment discrimination cases is clear: all claims should be brought together when possible, or the plaintiff risks dismissal of related claims (whether common law, constitutional, or statutory) subsequently filed in another forum.

For plaintiffs filing suit against a state or state official, the recent astonishing decision in *Pennhurst State School & Hospital v. Halderman*[61] is of critical import. In a decision notable for its vituperative colloquy between majority and dissent,[62] the Court determined that "a federal suit against state officials *on the basis of state law* contravenes the eleventh amendment when . . . the relief sought or ordered has an impact directly on the state itself."[63] The Court did not elaborate on when such an "impact" occurs, but, as the decision reveals, injunctive relief is not immune from such categorization.[64] The Court further applied this principle to state law claims brought into federal court under pendent jurisdiction.[65]

The unexpected reasoning of *Pennhurst*,[66] is a strong indication that discrimination claims against a state defendant which raise issues of violation of state law must be litigated in state court, absent express consent to suit in federal court by the state.

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55. 28 U.S.C. § 1738 (1966).
56. *Allen*, 449 U.S. at 96.
57. 456 U.S. 461 (1982).
58. 104 S. Ct. 892 (1984).
59. 449 U.S. 90 (1980).
60. *Migra*, 104 S. Ct. at 900 (1984).
61. 451 U.S. 1 (1984).
62. Id. at 911.
63. Id. at 917 (emphasis added).
64. Id. at 909.
65. Id. at 919.
66. 451 U.S. 1 (1984).

CONCLUSION

In sum, plaintiffs litigating employment discrimination claims should consider combining applicable state law causes of action sounding in tort and contract with the more familiar federal statutory claims. Whether the action, with this multiplicity of counts, should be filed in a state or federal forum depends on the evaluation of a variety of factors, such as: a) the receptivity of the state courts to such actions, including the courts' ability to manage such cases; b) the relative availability of attorney's fees; c) in a large case, the need and potential for a class certification; d) the likelihood of the appropriate federal district court accepting pendent jurisdiction; and e) the res adjudicata, collateral estoppel and eleventh amendment ramifications.

While use of state courts for litigating employment discrimination claims is relatively unexplored in the majority of state jurisdictions, it offers, in light of the United States Supreme Court's increasingly restrictive view, a real alternative. While it is at this point hardly a panacea to the developing disadvantages of federal court as a forum, it has the potential for developing an alternative means of enforcing a basic societal commitment to a fair and nondiscriminatory workplace. These standards will be determined by jurors to whom the trauma resulting from a wrongful discharge will have real meaning, and, if the jury verdicts returned thus far are any indication, may provide more adequate compensation than otherwise available.[67]

67. See 1983 Report of the Employment-At-Will Subcommittees, Employment and Labor Law Committee Litigation Section, American Bar Association, Aug. 2, 1983.

RESPONSE

GUY SAPERSTEIN*: I have litigated over thirty federal class actions, and I grew up in the federal courts, but there's been a complete revolution in my practice in the last few years which has brought me into state court more than I ever expected, and I want to tell you about that.

I practice in California, and my firm does more employment discrimination and wrongful discharge cases on behalf of plaintiffs than any other firm in California. I realize that none of you practice in California and that few of you will ever get out there to practice in this area of law, but I think the lessons we've learned in California may apply to wherever you do practice.

In this area, the California state courts have progressed farther and faster than any other state court system, and I think there's much to be learned from their experience.

I'd like to begin by talking about the at-will doctrine and its demise, the doctrine that allows an employer to fire an employee for no reason or for any reason that he or she wants. It is my thesis that, at least in California, the at-will doctrine has not merely been eroded, it is completely dead. The revolution is not coming, it has already occurred. Now, maybe there are some holes in the common law that allow employers to discharge at will, but there are none left with juries.

To give you an idea of what juries are doing with these cases, I refer to a survey that was done by Orrick, Herrington & Sutcliffe, a very large management firm in San Francisco, which surveyed all wrongful discharge cases in California up to the end of 1983. They found that plaintiffs' counsel were winning an astounding 90% of these cases that went to a jury verdict and that the average verdict was $450,000, most of which was punitive damages. Juries are saying that they are not going to put up with abusive and unfair behavior of employers. When did this revolution start, and how did we get to where we are?

I think the change began during the New Deal, when the notion of security, and job security in particular, became an American concept. It was furthered in the sixties and seventies with a proliferation of legislation, in both the state and federal systems, limiting the employer's right to discharge. The idea that you could discharge a person for any reason at all has been wiped out of the American consciousness by media articles such as the one on 60 Minutes that described the case of Philip Cancelier, who walked off with $800,000

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when he was wrongfully discharged. I think nobody believes that an employer can discharge somebody at will today and walk away from it without an explanation.

The legislative exceptions to the at-will doctrine have been enormous: Title VII, the Age Discrimination in Employment Act, the Rehabilitation Act of 1973, Executive Orders 11246 and 11141, the Viet Nam Era Veteran's Readjustment Assistance Act, the Consumer Credit Protection Act, the Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974, and a post-Watergate proliferation of acts that protect employees who whistle blow.

California has done the same. I have a list of no fewer than thirty-seven pieces of legislation protecting discharged workers in one way or another. In addition to these statutory incursions on the at-will doctrine, the judicial incursions have been even more substantial and, I believe, exceed in their breadth and general applicability even the broad legislation.

Before 1980, the California courts recognized only two non-statutory exceptions to the at-will doctrine. The first exception was the public policy exception. The second exception was the express contract exception. The first public policy exception case was *Peterman v. Teamsters.*[1] The plaintiff was a business agent of the Teamsters Union who was fired after he disobeyed the Teamsters order to testify falsely before a legislative committee. The employee sued for wrongful discharge, and the Court of Appeals held that as a matter of public policy and sound morality an employer could not discharge an employee for refusing to commit a felony. So bad unions make good law. But the court in this case did not allow tort remedies. The man received contract remedies and a reinstatement order.

The express contract cases are those in which the employee has a contract "for life" for "satisfactory service," for "so long as the employee's work is adequate," or something similar. We have had no trouble enforcing those contracts, but again, through contract remedies only.

The big breakthrough in Califronia occurred in 1980 in a triad of cases: *Tameny v. Atlantic Richfield Company,*[2] *Cleary v. American Airlines,*[3] and *Pugh v. See's Candies.*[4] In *Tameny,* the plaintiff employee had been a retail sales representative for the oil company. The oil company demanded his participation in an illegal price fixing scheme. He refused, was fired, and brought a wrongful discharge case which went up to the California Supreme Court. They said yes, that certainly fits the public policy exception. You can't discharge for that reason. In addition, they said, we are going to provide tort remedies and compensatory and punitive damages. That was the first time that had happened in California.

The court in *Cleary v. American Airlines* answered a central question left

1. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).
2. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).
3. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).
4. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

open by *Tameny*: Can a wrongfully discharged employee recover in tort for breach of the implied covenant of fair dealing in good faith? The court answered yes, making tort remedies available for what they characterized as a tortious breach of contract.

In *Pugh v. See's Candies*, the California Court of Appeals did the same thing on a slightly different theory, holding that an implied agreement that the employer would not discharge the plaintiff arbitrarily was created by the employer's overall conduct—including its retention of the employee for thirty-two years in this case; the employee's many promotions; the employer's failure to criticize the employee; all assurances of continued work; and personnel policies that say the kinds of things that every large company's personnel policies say, for example, that they are going to treat people fairly.

In addition to these three common law cases—again, these are non-statutory cases providing punitive damages—the California Supreme Court in the 1982 case of *Commodore Homes v. Superior Court*[5] for the first time interpreted the California Fair Employment and Housing Act. That act is a companion to Title VII, but it had been on the books for no fewer than sixteen years before the first case got to the California Supreme Court. Nobody had litigated the FEHA. In that case, the California Supreme Court said that in addition to traditional Title VII remedies, compensatory damages and punitive damages were available.

The total effect of these four cases, all post 1980, is that: (1) in California state court, victims of employment discrimination — including discrimination based on sex, race, national origin, and so forth—can now recover compensatory and punitive damages in addition to traditional Title VII remedies; and (2) persons of every sex, every age, race, and so forth, can also recover punitive damages for wrongful discharge.

The effect of this development on employment litigation in California has been revolutionary. The state courts which prior to 1980 had no litigation whatsoever are now becoming the workhorses of employment litigation in California.

There are sound reasons for this development which go beyond the ready availability of a broader range of damages. Indeed, I believe in most circumstances plaintiffs are better off in state court than in federal court, even if the state cause of action can be brought into federal court on pendent jurisdiction. The first reason is that in federal court you need a unanimous jury verdict to win. There's always a chance you're going to get a management person on that jury. The state court in California requires only nine votes out of twelve, a much easier burden. In the state court you get a much more narrowly-drawn jury, which in many cases can be a tremendous advantage. In San Francisco, a very liberal community, I prefer a liberal San Francisco jury to a Northern District of California jury that could include farmers from upstate.

5. 32 Cal. 3d 211, 649 P.2d 912, 185 Cal. Rptr. 270 (1982).

The next reason is more subjective. I think many federal judges are tired of Title VII litigation because a lot of bad Title VII litigation, and a lot of bad cases, have been poorly litigated by plaintiffs' counsel. The federal courts know the law better, but I think they are tired of it. In state courts, the subject of wrongful discharge, even of employment discrimination, is a fresher topic. It is viewed as a substantial personal injury, and I don't see the kind of bias yet that we see in federal courts.

As a result of these advantages, which I think favor state courts in almost every case, we are now filing all our individual cases in state courts. We never go to federal court except in the rare instance in which the plaintiff has exhausted federal remedies but failed to exhaust state remedies; then we have no choice.

Defendants will attempt removal whenever possible on the grounds of diversity or federal question jurisdiction, and in fighting removal I think it's important to do three things. First, join an in-state defendant. Diversity jurisdiction requires complete diversity of parties. Second, plead the discrimination cause of action in terms of the state anti-discrimination statute, not in terms of Title VII. Third, file your jury demand within ten days. There are many defense firms that will automatically attempt removal just to allow the plaintiff's attorney to make a mistake and not demand a jury in the proper way. The law is very tough on jury demands. These are jury cases, tremendously sympathetic cases, and you don't want to give up the right to a jury.

Choosing between state and federal court in a major class action is a much closer question. The federal courts, as Janet Arterton has said very clearly, have had much more experience in Title VII class litigation. They know discrimination theory, they know class action theory, they know what constitutes appropriate class action discovery. You would be amazed at how many state court judges don't have the slightest idea of what a class action is.

Federal courts are well staffed with law clerks to run a big case, and it is a single judge system which I favor, but in state courts, as I said before, the judges are not yet burned-out on Title VII, and you have the potential availability of punitive damages. Consequently, I find myself litigating more in state court—even class actions. However, I also find myself litigating discovery issues in state court that were settled long ago in federal court, such as right to privacy issues.

In the end, choosing between federal and state court, even in a large case, requires knowing which way the political winds are blowing. My personal assessment is that if Ronald Reagan is reelected and appoints one or more Supreme Court justices, all bets are off in federal court.

By comparison, in California we have a liberal Supreme Court, which is very protective of employee rights. That Court is going to stay on for a long time if we reelect them. The only situation in which I would file a class action in federal court is one in which a very favorable federal court judge had a

related case and I thought I could get my case in front of him or her through local related case rules.

I would like to close with four practical suggestions for litigating these cases. First, consider all possible causes of action such as traditional tort remedies, intentional or negligent infliction of emotional distress, fraud, negligent misrepresentation, defamation, interference with contract, loss of consortium, unfair trade practices, etc., in addition to your statutory cause of action. Bring all causes of action in one forum. These cases are too time consuming to be spread out between two courts. Also, the effect on juries of having multiple causes of action can be cumulative. You are better off with five causes of action, if they are viable causes of action, in front of one jury, not two. If you are pleading a wrongful discharge public policy cause of action, do not plead discrimination. Don't make the violation of public policy the violation of the anti-discrimination statute, because you are likely to find the court holding that the rights and remedies set forth by statute pertaining to fair employment are limited by the statute and must be exhausted through the administrative process. All the courts have not ruled on that, but that's where they are going.

Finally, compare the availability of attorneys' fees in your state court to federal court. As Janet Arterton mentioned, the federal courts have been somewhat favorable in recent years to good attorneys' fees under Title VII, although I do not yet know what happened this last Tuesday. The Supreme Court decided *Blum v. Stenson*. It eliminated the 50% multiplier, which has me worried. In California by comparison we have had multipliers since 1973 through the California Supreme Court, so on attorneys' fees we're okay. Look at your case law and at your statute, and I emphasize this; if you cannot get paid, you are just not going to be able to stay in business for the three, five, seven years it takes to bring these cases to conclusion, and you are not going to be there the next time a viable case comes along for litigation. Thank you.

MR. GILLERS: That's the end of this panel.

QUESTION: I'm not an attorney, but I'm a plaintiff, and I want to express some frustration with the fact that the Civil Rights Act of 1964 allows only two or three years back pay. I work for a very large corporation which is in the top five according to size. If one considers the present value of the amount of money the corporation has saved by discriminating against women and what it would cost them to finance that money in debts, they have been saving by not paying women. I had actually gotten one of our Congressmen to propose legislation, but he said that the present Congress will not be able to make pay retroactive more than three years. Is anything being done on a state level or will anything ever be done on a federal level to have more equity? Is anything being done to give a plaintiff more than bank interest, say the present value of the dollar, or what the company must pay to finance their debts, or inflation?

MR. SAPERSTEIN: I'll be happy to take that one. First, I agree with the sentiment that the remedies under Title VII are not sufficient. I would add a few things, though. Title VII back pay is not limited to two to three years. It's two to three years prior to the allegation, perhaps, but when you get into trial often many years have followed that, and often there were five, six, eight years of back pay. Also, a number of cases have provided for both prejudgment interest and interest at market rates.

I refer you to two cases out of my jurisdiction: *EEOC v. Pacific Printing Press* from the Northern District of California and *Fadhl v. City and County of San Francisco*. Both those cases gave prejudgment interest at 90% of the operative prime rate. Also, there's a new Federal Court Improvement Act of 1982 which now sets forth interest rates for general purposes. It has applied an interest rate to awards of back pay based on the quarterly treasury bill rate, so that act is prospective. It does not say what you are supposed to do for the period before that act was passed, I think in 1982, but some courts have applied it retroactively.

Also, there is a developing body of law providing for front pay, which goes beyond the date of the judgment. Under Title VII courts have awarded front pay up to two years. Under the Age Discrimination and Employment Act, some cases have awarded front pay up to date of retirement or prospective date of retirement, at sixty-five years of age.

This is one area that does illustrate the differences, at least in California, between federal law and state law, particularly in this developing area of tort litigation, but even in the statutory discrimination cases. The California Supreme Court has clearly said that a discriminatee or dischargee is entitled to all types of personal injury remedies. Those damages are being treated not as Title VII federal courts treat damages. Instead, the courts are beginning to look at a dischargee or a person denied promotion or hire as a person injured physically. If you had your arm cut off and could not work, courts and juries would have no trouble in accepting expert testimony as to how long that injury would last and affect your value in the work place. They would put a value on it and pay you up to the end of your expected work life. There is no reason the rules should not be the same if somebody is discharged and either cannot be reemployed because they're fifty-eight years old and an engineer, or because they've been psychically damaged by a severe sex harassment case and will be out of the job market for a long time or return to the job market at a reduced level. In that area, perhaps because of the lack of development of federal law, you're going to be better off in state court.

RESPONSE

NADINE TAUB*: I do not think it's accidental that you will find an attorney from California and an attorney from New Jersey being fairly optimistic about the use of state courts for litigating state constitutional provisions. Let me underscore what has been said so far about the desirability of exploring state remedies. State constitutional provisions are now being interpreted more broadly than comparable-sounding federal ones. For example, a state constitutional provision which corresponds to Title VII goes even farther than federal constitutional provisions, because it does not require state action. You may also find that state laws against discrimination give broader relief than federal provisions. For example, in New Jersey we have a clause for discrimination on the basis of marital status, which you don't find in comparable federal legislation. It makes sense, especially in cases raising novel issues, to explore the full range of state claims in addition to those outlined by previous speakers. For example, in a sexual harassment case that we brought in federal court, with pendent jurisdiction, we raised claims of assault and battery and false imprisonment where a supervisor held onto a woman employee and kissed her against her will. It makes sense to explore those options.

However, I caution you to be careful and to be knowledgeable about the case law that has developed under the state provisions. On the one hand, there are times when you really have more options in state court. As you probably know, there was a period during which federal law did not recognize pregnancy discrimination as sex discrimination, while comparable state provisions in a number of jurisdictions did recognize pregnancy discrimination as sex discrimination. On the other hand, in New Jersey for a while we had a very bad situation when attorneys were seeking injunctive relief to get what might seem like quotas. We sought that relief in federal courts because it wasn't available in state courts. You have to have a fairly refined sense of your state's jurisprudence.

There is one additional advantage to combining tort claims and straight discrimination claims under various statutes: the tax consequences of winning under something that looks like pain and suffering are easier to live with. You are not going to have to pay as you would on a back pay award. When both pain and suffering are involved there may be leeway in allocating damages in settling cases. People have already spoken about investigating the state provisions on attorneys' fees. In our state court litigation on the issue of Medicaid abortion, it was clear that, even though we won on state grounds, had there been any remaining viable federal claims, we would have gotten fees under

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section 1988. I am suprised to hear that there is concern about being able to use section 1988 successfully in state courts.

As to the single judge problem — whether it is possible to have one judge before whom you can bring your case and whom you can educate and persuade by the equities and compelling facts that you will develop in your case— again it is important to explore your state options. New Jersey has a law division with a rotation problem, but we also have some not-so-dumb judges who sit in chancery. If you can structure your case so that you are asking for some injunctive relief, your legal claims can stay in chancery too, and you can continue before the single judge. Again, investigate the refinements of particular jurisdictions.

As we all are, I am quite distressed by the *Pennhurst*[6] case and the difficulties it will cause in bringing state claims against state officials in federal court. That brings me to an overall issue: the need to educate state judges and give them the concern and motivation that may compensate for that ethereal appeal that you can make to federal judges about federal issues. You should aim to overcome the provincial prejudices that might allow judges to find in favor of people they play golf with.

There are three things you can do in your capacity as advocate to educate the state bench about the issues and the equities involved in employment related problems. First, as Janet has already mentioned, is to explain every case as fully as possible. Take advantage of every preliminary proceeding. Even if you have a rotation of judges, you will begin to educate them. She mentioned, I think, discovery. Second, when the situation is especially difficult, there may be times when you should make motions to recuse and possibly even to file ethical charges. It depends on how outrageous and how prejudicial the behavior of the particular judge is. It is a gutsy thing to do, but it has a prophylactic effect on the behavior of other judges. The third approach, slightly more acceptable, is to explore state avenues of getting decisions published. Maintain an informal network of a bar that litigates these cases, and exchange the opinions, but also get the decisions published. Find out how to do that in your state.

There are other things that the employment bar should be doing. Write articles for state or local bar journals. Find out whether law reviews of state schools will be amenable to articles. Get acquainted with people running the continuing education program, and get them to run some programs on employment discrimination. That way you'll make it less likely that people starting out in the area will blow cases. Similarly, you make the issues respectable. In states like Connecticut, where the state constitution can be interpreted more broadly than the federal constitution, it makes sense to have conferences to give credibility and disperse knowledge of the developing law.

Something else in New Jersey that has attracted a fair amount of atten-

6. Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1984).

tion and that other states could build on is our task force on gender bias in the courts. The task force looked not only at how lawyers and litigants were treated—whether they were called Ms. or by their first name—but also it went into issues of substantive law. Since we had tremendous support from the chief justice of the state supreme court, it also served to raise the consciousness of the bench.