# 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.