

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

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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 1964⁴ (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 1967⁵ (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 1963⁶ (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.

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. Traveler 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 conservatism 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' compensation²⁷ 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 non-residents 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.

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 non-discriminatory 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.