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NOTES

A Misguided Reversal: Why the Oklahoma Supreme Court Should Not Have Interpreted *Saint v. Data Exchange, Inc.* to Provide a *Burk* Tort Cause of Action to Plaintiffs Alleging Age Discrimination in Employment

I. Introduction

Terminable at-will employment theoretically benefits both the employer and employee for a number of reasons, but principally because each party has an equal right to end the employment relationship whenever he or she desires without facing any legal consequences.¹ Society also benefits from such an employment arrangement by avoiding the litigation that would otherwise result from the parties' facing legal liability.² This characterization of employment at-will, however, unrealistically assumes that both the employer and employee have equal power.³ Employee power decreases as corporations grow larger and job shortages abound.⁴ Yet at-will employment promotes economic growth, benefitting not only employers but society at large.⁵

In recognition of these competing needs, the Oklahoma Supreme Court, in *Burk v. K-Mart Corp.*, adopted the public policy exception to employment at-will.⁶ This exception protects employees who are discharged from their jobs in violation of Oklahoma's public policy, "as articulated by constitutional, statutory or decisional law," by affording them a tort cause of action for wrongful discharge.⁷ At the same time, the court recognized the importance of employers' engaging in efficient business practices by emphasizing the narrow application of this newly created common law action.⁸

1. See generally Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 962-77 (1984).

2. See *id.* at 966-67, 970.

3. See Frank J. Cavico, *Employment at Will and Public Policy*, 25 AKRON L. REV. 497, 501-02 (1992).

4. See *id.*

5. Lorraine K. Phillips, *The Legal Chokehold: Professional Employment in Ohio Under the Employment-At-Will Doctrine*, 24 AKRON L. REV. 581, 585 (1991).

6. 1989 OK 22, ¶ 17, 770 P.2d 24, 28.

7. See *id.* This common law cause of action has since been referred to as a "Burk tort" cause of action. See, e.g., *Tate v. Browning-Ferris, Inc.*, 1992 OK 72, ¶ 19, 833 P.2d 1218, 1230.

8. See *Burk*, ¶¶ 16-17, 770 P.2d at 28.

Oklahoma courts have looked to the Oklahoma Anti-Discrimination Act (OADA)⁹ as a basis for the public policy exception in employment discrimination cases.¹⁰ Cases have lacked clarity, however, regarding the availability of a *Burk* tort action when employment discrimination victims have an adequate federal remedy.¹¹ The Oklahoma Supreme Court attempted to settle this issue in *Clinton v. State ex rel. Logan County Election Board* by holding that an adequate state or federal statutory remedy precluded the common law action.¹² In a case decided before *Clinton*, *List v. Anchor Paint Manufacturing Co.*, the Oklahoma Supreme Court had already determined that age discrimination victims had an adequate federal statutory remedy available to them under the Age Discrimination in Employment Act of 1967 (ADEA).¹³

After *List* and *Clinton*, it seemed settled that age discrimination victims could not bring a *Burk* tort action because the ADEA provided an adequate remedy that precluded the common law action.¹⁴ Then, in 2006, *Saint v. Data Exchange, Inc.*¹⁵ unnecessarily confused the availability of the *Burk* tort remedy in age discrimination cases.¹⁶ The *Saint* court was presented with a narrowly worded certified question from the United States District Court for the Northern District of Oklahoma that specifically asked the court to consider the availability of a *Burk* tort action for age discrimination victims under the Oklahoma Constitution and the *state* antidiscrimination statute.¹⁷ The question

9. 25 OKLA. STAT. §§ 1101-1901 (2001).

10. *See, e.g.*, *Collier v. Insignia Fin. Group*, 1999 OK 49, 981 P.2d 321; *Tate*, 1992 OK 72, 833 P.2d 1218.

11. *See Clinton v. State ex rel. Logan County Election Bd.*, 2001 OK 52, ¶ 7, 29 P.3d 543, 546, *overruled by Kruchowski v. Weyerhaeuser Co.*, 2008 OK 105, ¶ 25, 202 P.3d 144, 152.

12. *Id.* ¶ 9, 29 P.3d at 546.

13. *See* 1996 OK 1, ¶ 12, 910 P.2d 1011, 1014, *overruled by Kruchowski*, ¶ 23, 202 P.3d at 151; *see also* 29 U.S.C. §§ 621-634 (2006). Under the ADEA, a claimant in a civil case (as opposed to an enforcement action by the Equal Employment Opportunity Commission (EEOC)) may recover unpaid minimum wages or unpaid overtime compensation, as well as liquidated damages in cases of willful violations of the Act. *Id.* § 626(b). A court may also grant other appropriate legal or equitable relief, including orders requiring employment, reinstatement, or promotion as required to effectuate the purposes of the Act. *Id.* Additionally, absent an EEOC action, a person bringing a claim under the ADEA is entitled to a jury trial. *Id.* § 626(c).

14. Michael W. Bowling, *Saint v. Data Exchange: A Sea Change or Business as Usual for the Public Policy Tort Exception to Employment At-Will?*, 78 OKLA. B.J. 137, 138 (2007).

15. 2006 OK 59, 145 P.3d 1037.

16. *See* Bowling, *supra* note 14, at 138 (observing that “the *Saint* court fail[ed] to mention either *Clinton* or *List*, leaving practitioners to wonder if *Saint* [was] intended to mark a fundamental shift by the court away from these prior rulings or to be read alongside and together with them”).

17. *See Saint*, ¶ 1, 145 P.3d at 1037. The certified question read as follows: “Is there either an implied statutory remedy or a common-law *Burk* tort remedy for state age discrimination claims arising under the operation of the Oklahoma Constitution, Art. 5 § 46 and the provisions

did not ask if the ADEA offered an adequate federal remedy that would subsequently preclude the *Burk* tort cause of action.¹⁸ After providing analysis that addressed only the narrow certified question, however, the court concluded that a *Burk* tort remedy is available for alleged employment age discrimination victims as members of the more general class of employment discrimination victims protected by the OADA.¹⁹ This overly broad language and the opinion's complete lack of discussion about *List* and the ADEA as an adequate, preclusive remedy resulted in confusion about when the *Burk* tort remedy was available to age discrimination victims.²⁰

The Oklahoma Supreme Court later clarified the meaning of the *Saint* decision in *Kruchowski v. Weyerhaeuser*²¹ and *Shirazi v. Childtime Learning Center, Inc.*²² *Kruchowski* expressly overruled *List*, after explaining that *Saint* had implicitly done so,²³ and held that a *Burk* tort cause of action is available to an alleged employment discrimination victim when the remedy available to him or her is "not uniform and evenhanded" with the remedies available to other members of the OADA's employment discrimination class.²⁴ *Shirazi* subsequently clarified that the *same* remedies must be available to all members of the OADA employment discrimination class.²⁵

Although *Kruchowski* and *Shirazi* brought certainty to the law by explaining that the *adequacy* of a federal remedy is no longer relevant to the question whether a *Burk* tort cause of action is available after *Saint*, the court's broad interpretation of *Saint* in those cases cannot be squared with the narrow wording of the certified question presented in *Saint*, applicable Oklahoma Supreme Court precedent in place at the time *Saint* was decided, and the rationale behind the creation of the *Burk* tort remedy. This note argues that relevant precedent and policy considerations lead to the conclusion that a narrower interpretation of *Saint* would have been more appropriate. Part II provides a description of the public policy exception to employment at-will and discusses the Oklahoma Supreme Court's application of the exception in employment discrimination cases. Part III outlines the facts of the *Saint* case

of the Oklahoma Anti-discrimination Act, 25 O.S. §§ 1101, et seq. and § 1901?" *Id.*

18. *See id.*

19. *Id.* ¶ 6, 145 P.3d at 1039.

20. *See, e.g.,* Bennett v. Head Country Food Prods., Inc., No. CIV-07-1100-D, 2008 WL 3095847, at *2 (W.D. Okla. Aug. 4, 2008); Miller v. Love's Travel Stops & Country Stores, Inc., No. CIV. 06-1008-D, 2008 WL 1841021, at *1 (W.D. Okla. Apr. 21, 2008); *see also* Bowling, *supra* note 14, at 138.

21. 2008 OK 105, 202 P.3d 144.

22. 2009 OK 13, 204 P.3d 75.

23. *Kruchowski*, ¶ 23, 202 P.3d at 151.

24. *Id.* ¶ 31, 202 P.3d at 153.

25. *Shirazi*, ¶ 12, 204 P.3d at 79.

and explains the court's rationale for the decision. Part IV discusses *Saint*'s application in the Tenth Circuit before the Oklahoma Supreme Court rendered *Kruchowski* and *Shirazi* and provides a brief description of the effect of those cases. Part V argues that the court should not have interpreted the *Saint* case as overruling *List* and providing a *Burk* tort remedy in all age discrimination cases because a narrow interpretation of *Saint* would have been more consistent with the wording of the certified question, precedent, and the policy behind the *Burk* tort remedy. Part V also explains the circumstances in which *Saint* would provide a remedy under a narrow interpretation. This note concludes in Part VI.

II. *The Law Before Saint v. Data Exchange, Inc.*

Oklahoma has historically adhered to the employment at-will doctrine, which holds that an employment contract without a definite duration is terminable at the desire of either the employer or employee.²⁶ As a practical matter, the doctrine allows an employer to discharge an employee for any reason, good or bad, without incurring liability.²⁷ The traditional justification for the doctrine is that it serves the twin interests of economic growth and freedom of contract.²⁸

A. *Burk v. K-Mart Corp.: The Creation of the Public Policy Exception to the At-Will Employment Doctrine*

Despite adherence to the employment at-will doctrine, the Oklahoma Supreme Court has recognized that freedom of contract is not limitless.²⁹ The court has stated that the interests of the state's citizens are not best promoted by "a marketplace of cut-throat business dealings where the law of the jungle is thinly clad in contractual lace."³⁰ In *Burk v. K-Mart Corp.*, the plaintiff sued her employer under both contract and tort theories, alleging that her employer had broken the covenant of good faith and fair dealing implicit in their employment contract.³¹ In response to a question certified from the U.S. District Court for the Northern District of Oklahoma,³² the Oklahoma Supreme Court sought to strike an appropriate balance between competing societal

26. *Burk v. K-Mart Corp.*, 1989 OK 22, ¶ 5, 770 P.2d 24, 26.

27. *Id.*

28. *See id.*

29. *See Hall v. Farmers Ins. Exch.*, 1985 OK 40, ¶ 13, 713 P.2d 1027, 1029.

30. *Id.*

31. *Burk*, ¶ 1, 770 P.2d at 25.

32. *See id.* ¶¶ 3-4, 770 P.2d at 25-26. The Revised Uniform Certification of Questions of Law Act authorizes such intercourt inquiries under certain circumstances. *See* 20 OKLA. STAT. §§ 1601-1611 (2001); *see also infra* text accompanying notes 193-95.

interests: the employer's need for efficient business practices and the employee's need to earn a living.³³ The *Burk* court thus examined two judicially created exceptions to the at-will doctrine: an implied covenant of good faith and fair dealing and the public policy exception.³⁴ The court declined to imply a covenant of good faith and fair dealing in Oklahoma's employment contracts, explaining that it would have been "overly broad" to imply such covenants in terminable at-will employment arrangements.³⁵ Instead, the court recognized a public policy exception to the employment at-will doctrine.³⁶ The exception provides a tort cause of action for an employee discharged from employment in violation of a clearly mandated public policy.³⁷ In recognition of employers' needs, the court stated that the nature of the exception must be "tightly circumscribed."³⁸ Therefore, the public policy that serves as a basis for the exception must be clearly conveyed by statutory or constitutional law.³⁹ Although the court explained that judicial decisions may establish such a policy, it cautioned against declaring a public policy without any previous legislative or judicial input.⁴⁰

B. Tate v. Browning-Ferris, Inc.: The Extension of the Public Policy Exception to Race Discrimination Victims

In *Tate v. Browning-Ferris, Inc.*, the Oklahoma Supreme Court considered for the first time the availability of a *Burk* tort remedy in the context of employment discrimination and the OADA,⁴¹ which prohibits employers from discharging or otherwise discriminating against employees based on race, color, religion, sex, national origin, age, or handicap.⁴² Tate, a black male, filed two discrimination claims with the Equal Employment Opportunity Commission (EEOC)—one for racial discrimination and another for wrongful termination following a previous complaint to the EEOC.⁴³ Tate subsequently sued in federal court, bringing a claim under Title VII of the Civil Rights Act⁴⁴ as well as a state-law *Burk* tort claim for compensatory and punitive

33. See *Burk*, ¶ 16, 770 P.2d at 28.

34. See *id.* ¶¶ 7, 14, 770 P.2d at 26, 28.

35. *Id.* ¶¶ 12, 13, 770 P.2d at 27.

36. *Id.* ¶ 17, 770 P.2d at 28.

37. *Id.*

38. See *id.* ¶ 18, 770 P.2d at 29.

39. See *id.* (quoting *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 631 (Haw. 1982)).

40. See *id.*

41. See 1992 OK 72, 833 P.2d 1218.

42. 25 OKLA. STAT. § 1302 (2001).

43. *Tate*, ¶ 3, 833 P.2d at 1220-21.

44. See 42 U.S.C. § 2000e-5(f)(1) (2006) (authorizing private discrimination claims by individual employees against their employers under specified conditions).

damages.⁴⁵ The federal court certified to the Oklahoma Supreme Court the question whether a *Burk* tort remedy was available in these circumstances.⁴⁶

In its response, the Oklahoma Supreme Court first noted that the applicable federal law, Title VII, does not preempt the relevant state law provisions in the OADA.⁴⁷ Next, the court considered whether an employee's racial discrimination and retaliatory discharge are actionable under the *Burk* exception.⁴⁸ The court answered in the affirmative because an employer's participation in racial discrimination undoubtedly violates Oklahoma's public policy against employment discrimination, as clearly articulated by the OADA.⁴⁹

After establishing the existence of the common law claim, the court next considered the intersection between the tort action and the state statutory remedy provided by the OADA.⁵⁰ First, the court determined that the state legislature did not intend the OADA to be the sole remedy for racial discrimination victims.⁵¹ In making this determination, the court examined OADA language indicating that an alleged discrimination victim *may* file a complaint with the state Human Rights Commission.⁵² The word "may," the court observed, denotes a permissive or discretionary use rather than a mandatory action.⁵³ The court inferred from this language that the legislature did not intend to enter, "much less completely occupy, the entire arena of legally regulated employer/employee relationship."⁵⁴

Second, the *Tate* court explained that, because the types of discrimination victims named in the OADA "comprise a single class,"⁵⁵ disallowing a *Burk* tort claim in racial discrimination cases would violate the Oklahoma

45. *Tate*, ¶ 4, 833 P.2d at 1221.

46. *Id.* ¶ 1, 833 P.2d at 1220. The certified question asked, "Where an at-will employee terminated by a private employer files suit alleging facts that, if true, violate state and federal statutes providing remedies for employment discrimination, can the employee-plaintiff state a tort cause of action based on the same facts, pursuant to the public policy exception to the at-will termination rule, recently recognized by the Oklahoma Supreme Court in *Burk v. K-Mart*, 770 P.2d 24 (Okla. 1989)?"

Id.

47. *Id.* ¶ 6, 833 P.2d at 1222.

48. *Id.* ¶ 9, 833 P.2d at 1225.

49. *Id.* ¶ 10, 833 P.2d at 1225.

50. *See id.*

51. *Id.* ¶ 17, 833 P.2d at 1229.

52. *Id.* ¶ 16, 833 P.2d at 1228; *see also* 25 OKLA. STAT. § 1502(a) (2001).

53. *Tate*, ¶ 16, 833 P.2d at 1229.

54. *Id.* ¶ 17, 833 P.2d at 1229.

55. *Id.* ¶ 18, 833 P.2d at 1229-30.

Constitution's prohibition on "special laws"⁵⁶—that is, laws that "apply to less than the whole of a class of persons, entities or things standing upon the same footing or in substantially the same situation or circumstances and hence do not have a uniform operation."⁵⁷ This is because the OADA authorizes a private right of action for handicap discrimination claimants but not for racial discrimination claimants.⁵⁸ This disparity, the court reasoned, would result in a constitutionally impermissible "dichotomous division of discrimination remedies," if the OADA were the only remedy for racial discrimination victims.⁵⁹ To avoid such a problem, the *Tate* court ultimately held that racial discrimination victims have a common law remedy—the *Burk* tort cause of action—available to them under the public policy exception to the employment at-will doctrine.⁶⁰

C. *List v. Anchor Paint Manufacturing Co.: The Oklahoma Supreme Court's Refusal to Extend the Public Policy Exception to Age Discrimination Victims*

In *List v. Anchor Paint Manufacturing Co.*, the plaintiff alleged that he was demoted from his supervisory position because of his age.⁶¹ He claimed that the resulting working conditions were intolerable and forced him to resign from his employment.⁶² List brought a *Burk* tort cause of action in federal court, arguing that he was constructively discharged from his employment.⁶³ The federal court certified to the Oklahoma Supreme Court the question whether Oklahoma recognized a *Burk* tort claim when a plaintiff alleged that his employer's conduct resulted in his constructive discharge.⁶⁴ The Oklahoma Supreme Court did not address the question whether the facts of the case met the requirements for a constructive discharge.⁶⁵ Instead, the *List* court focused

56. See OKLA. CONST. art. 5, § 46.

57. Okla. City v. Griffin, 1965 OK 76, ¶ 8, 403 P.2d 463, 465 (internal quotation marks omitted) (quoting Fenimore v. State ex rel. Comm'rs of the Land Office, 1948 OK 93, ¶ 6, 194 P.2d 852, 854).

58. *Tate*, ¶ 18, 833 P.2d at 1229. Compare 25 OKLA. STAT. §§ 1302, 1502 (2001) (authorizing an administrative remedy for all claimants in the employment discrimination class), with *id.* § 1901 (authorizing a private right of action for handicap discrimination claimants only).

59. *Tate*, ¶ 18, 833 P.2d at 1229-30.

60. *Id.* ¶ 19, 833 P.2d at 1230.

61. 1996 OK 1, ¶ 1 n.1, 910 P.2d 1011, 1012 n.1, *overruled by* Kruchowski v. Weyerhaeuser Co., 2008 OK 105, ¶ 23, 202 P.3d 144, 151.

62. *Id.*

63. See *id.*

64. *Id.* ¶ 1, 910 P.2d at 1012.

65. *Id.* ¶ 5, 910 P.2d at 1013.

on the issue of whether the *Burk* exception to at-will employment extended to age discrimination cases.⁶⁶ After emphasizing the narrow scope of the public policy exception,⁶⁷ the court distinguished between the plaintiff in the instant case and the plaintiff in *Tate* by comparing the remedies provided by the ADEA,⁶⁸ the applicable federal statute in *List*,⁶⁹ with those set forth in the Civil Rights Act of 1964,⁷⁰ the applicable federal statute in *Tate*.⁷¹

The *List* court observed that the Civil Rights Act did not provide a plaintiff with the right to a jury trial, and it limited damages available to recovering victims to back pay.⁷² A plaintiff could not recover any additional compensatory or punitive damages under the federal law.⁷³ Thus, the *Tate* court found that a *Burk* tort action was necessary to secure the plaintiff's right to a jury trial and to allow for the recovery of damages above back pay.⁷⁴ By contrast, the ADEA provides a plaintiff with the right to trial by jury, and the statute allows a plaintiff to recover "liquidated damages" (i.e., punitive damages) in an amount equal to actual damages if the employer is found to be in willful violation of the ADEA.⁷⁵ Accordingly, the court determined that *List* had an adequate federal statutory remedy for his age discrimination claim; therefore, the *Burk* exception did not extend to him or any other age discrimination victims.⁷⁶

After announcing its holding, the Oklahoma Supreme Court proceeded to note the questionability of relying on discrimination laws as the basis for the public policy exception to the at-will employment doctrine.⁷⁷ Allowing common law wrongful discharge actions based on employee *status* rather than *active conduct* would, the court suggested, open the exception to a much wider field of potential plaintiffs, thereby defeating the effort to keep the exception narrow.⁷⁸ Moreover, because age discrimination claimants could seek a

66. *See id.* ¶ 12, 910 P.2d at 1014.

67. *See id.* ¶ 6, 910 P.2d at 1013.

68. *See* 29 U.S.C. § 626(b) (2006); *see also supra* note 13.

69. *List*, ¶ 11, 910 P.2d 1013-14.

70. *See* 42 U.S.C. § 2000e-5(g) (2006) (setting forth the remedies available in a Title VII action).

71. *See Tate v. Browning-Ferris, Inc.*, 1992 OK 72, ¶ 4 & nn.6-7, 833 P.2d 1218, 1221 & nn.6-7.

72. *List*, ¶ 11, 910 P.2d at 1014 (citing, *inter alia*, 42 U.S.C. §§ 2000a to 2000h-6 (1994)); *see also* 42 U.S.C. § 2000e-5(g).

73. *See List*, ¶ 11, 910 P.2d at 1014.

74. *See id.*

75. *See id.* ¶ 11 & n.3, 910 P.2d at 1014 & n.3 (citing 29 U.S.C. § 626(b)-(c) (1994)).

76. *Id.* ¶ 12, 910 P.2d at 1014.

77. *See id.* ¶ 16, 910 P.2d at 1015.

78. *See id.* (quoting 1 LEX K. LARSON, UNJUST DISMISSAL § 6.10[6][e] (1989)). The court presented this widening effect as the reason why most jurisdictions do not recognize status-

greater remedy under the common law, a tort action would discourage such plaintiffs from utilizing the very statutory remedy (filing a claim with the state Human Rights Commission or the EEOC) on which the exception was based.⁷⁹

D. Marshall v. OK Rental & Leasing, Inc.: The Oklahoma Supreme Court's Initial Refusal to Extend the Public Policy Exception to Constructively Discharged Sexual Harassment Victims

In *Marshall v. OK Rental & Leasing, Inc.*, the plaintiff claimed that sexual harassment at her place of employment caused her to be constructively discharged from her job because her work environment was so intentionally hostile that she had no choice but to quit.⁸⁰ The plaintiff brought a *Burk* tort cause of action, claiming that the OADA and Title VII of the Civil Rights Act of 1964 articulate a public policy against constructive discharge.⁸¹ The Oklahoma Supreme Court relied heavily on the *List* decision in holding that a *Burk* tort cause of action was not available to the plaintiff, characterizing *List* as holding that when an employment discrimination victim had a statutory remedy that sufficiently protected his or her rights, the common law remedy was no longer available because the statutory remedy was exclusive.⁸² The plaintiff in *Marshall* had adequate remedy under the OADA and Title VII because after *Tate* was decided Congress amended Title VII to provide the right to a jury trial and compensatory and punitive damages.⁸³ The court also echoed the criticism in *List* about using discrimination statutes as a basis for the public policy exception.⁸⁴ Finally, the *Marshall* court reiterated not only the distinction between an employee's discharge based on "status" and discharge based on "conduct,"⁸⁵ but also the concern that providing a tort cause of action to discrimination victims would encourage them to ignore the very statutory remedy that served as the basis for the public policy exception in the first place.⁸⁶

based wrongful discharge claims. *See id.* ¶¶ 15-16, 910 P.2d at 1014.

79. *See id.* ¶ 16, 910 P.2d at 1015.

80. 1997 OK 34, ¶ 11, 939 P.2d 1116, 1119, *overruled by* *Kruchowski v. Weyerhaeuser Co.*, 2008 OK 105, ¶ 25, 202 P.3d 144, 152.

81. *Id.* ¶ 10, 939 P.2d at 1119 (citing 25 OKLA. STAT. §§ 1101-1901 (1991) (OADA); 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. 1992) (Title VII)).

82. *Id.* ¶ 16, 939 P.2d at 1120.

83. *Id.* ¶ 23, 939 P.2d at 1122 (citing 42 U.S.C. § 1981a (1994)).

84. *Id.* ¶ 20, 939 P.2d at 1121.

85. *Id.* ¶ 19, 939 P.2d at 1121.

86. *Id.* ¶ 20, 939 P.2d at 1121.

E. Collier v. Insignia Financial Group: The Oklahoma Supreme Court Reconsiders the Extension of the Public Policy Exception to Constructively Discharged Sexual Harassment Victims

In *Collier v. Insignia Financial Group*, the Oklahoma Supreme Court answered another certified question asking whether a *Burk* tort remedy is available to constructively discharged sexual harassment victims.⁸⁷ The court restated that an alleged victim has a *Burk* tort cause of action only after identifying a clearly articulated public policy goal⁸⁸ and found that constructively discharged employees can bring a *Burk* tort claim provided they meet the test for constructive discharge as outlined by the court.⁸⁹ The court explained, however, that the common law remedy would be available only in the absence of an adequate statutory remedy.⁹⁰ Therefore, the next step of the analysis was to determine whether the OADA provided sexual harassment victims with an adequate remedy.⁹¹

First, the court analyzed the statute's opening language.⁹² The OADA's stated purpose, the court explained, is to provide for the state's execution of "the policies embodied in the federal Civil Rights Act of 1964 [and] the federal Age Discrimination in Employment Act of 1967 . . . and to provide rights and remedies substantially equivalent to those granted under the federal Fair Housing Law."⁹³ According to the court, this language "amply evidences" the legislature's intent for the OADA's main remedial measures to be those provided by the Fair Housing Law.⁹⁴ Furthermore, the court observed that the legislature distinguished between "policies" and "remedies," demonstrating that the drafters understood the difference between the two.⁹⁵ The court inferred from this distinction that the legislature did not intend for the federal

87. 1999 OK 49, ¶ 1, 981 P.2d 321, 322.

88. *Id.* ¶ 5, 981 P.2d at 323.

89. *Id.* ¶ 10, 981 P.2d at 324.

90. *Id.* ¶ 12, 981 P.2d at 325.

91. *See id.*

92. *Id.* ¶ 13, 981 P.2d at 325.

93. *Id.* (emphasis omitted) (quoting 25 OKLA. STAT. § 1101 (1991)). The language of the statute remains the same in the most recent version of Oklahoma's official statutory code. *See* 25 OKLA. STAT. § 1101 (2001).

94. *Collier*, ¶ 13, 981 P.2d at 325. Under the federal Fair Housing Law, a prevailing plaintiff may be awarded actual and punitive damages, a temporary or permanent injunction or temporary restraining order, and such other relief as the court deems appropriate. 42 U.S.C. § 3613(c)(1) (2006). The prevailing party may be awarded reasonable attorneys' fees and costs in the court's discretion. *Id.* § 3613(c)(2).

95. *Collier*, ¶ 13, 981 P.2d at 325.

acts cited in the OADA to provide the only remedies for violations of the state's antidiscrimination policy.⁹⁶

Second, the *Collier* court emphasized the same state constitutional concerns raised in *Tate*.⁹⁷ Despite the fact that the types of discrimination victims named in the OADA constitute a single class,⁹⁸ the OADA affords sexual harassment victims only an administrative remedy, but allows handicap discrimination victims a private cause of action.⁹⁹ In light of this disparity, the court reasoned that the legislature did not intend the OADA to be the sole remedy for sexual harassment victims because such a remedial scheme would give members of the same class of victims different remedies—a result forbidden by the Oklahoma Constitution.¹⁰⁰ In sum, the court held that a *Burk* tort action is available to sexual harassment victims because their constructive discharge violates the state's public policy goal as clearly articulated by the OADA and because the statute does not provide victims with an adequate remedy.¹⁰¹

F. Clinton v. Logan County Election Board: The Oklahoma Supreme Court Clarifies the Availability of the Burk Tort Cause of Action to Discrimination Victims

In *Clinton v. Logan County Election Board*, the Oklahoma Supreme Court set out to clarify the boundaries of the *Burk* tort cause of action.¹⁰² The plaintiff, an alleged victim of gender discrimination, argued that the existence of an adequate federal statutory remedy did not affect the availability of the common law action.¹⁰³ The *Collier* court's silence on the issue, together with the *List* and *Marshall* decisions, had resulted in uncertainty about the availability of the tort action.¹⁰⁴ The *Clinton* opinion—occasioned by yet another question certified from one of the federal district courts within Oklahoma¹⁰⁵—answered the question “head-on.”¹⁰⁶ The court explained that the purpose behind the creation of the *Burk* tort action was to discourage employers from terminating an at-will employee for a reason that violates the

96. *See id.*

97. *See id.* ¶ 14, 981 P.2d at 325-26.

98. *Id.*

99. *Id.* ¶ 14, 981 P.2d at 326.

100. *Id.*; *see also supra* text accompanying notes 55-59.

101. *See Collier*, ¶¶ 14-15, 981 P.2d at 326-27.

102. 2001 OK 52, ¶ 10, 29 P.3d 543, 546, *overruled by* *Kruchowski v. Weyerhaeuser Co.*, 2008 OK 105, ¶ 25, 202 P.3d 144, 152.

103. *Id.* ¶ 7, 29 P.3d at 546.

104. *Id.*

105. *See id.* ¶ 1, 29 P.3d at 541.

106. *Id.* ¶ 8, 29 P.3d at 546.

state's clearly articulated public policy.¹⁰⁷ Accordingly, the court stated, the state common law action was unnecessary when a statute adequately protected Oklahoma's public policy.¹⁰⁸ The court reasoned that although a federal statute does not serve as a statement of the state's public policy goals, a federal statutory remedy may effectively discourage at-will employers from terminating their employees for reasons that violate the state's public policy.¹⁰⁹ Therefore, the court held that the existence of a federal statutory remedy that adequately protected the state's public policy precluded an independent *Burk* tort action.¹¹⁰ Although the *List* and *Marshall* cases differentiated between status-based and conduct-based wrongful terminations,¹¹¹ the court explained that those cases were primarily decided on the basis that both plaintiffs had adequate statutory remedies for their alleged wrongful terminations.¹¹²

Thus, the *Clinton* and *List* cases seemed to establish that a *Burk* tort cause of action was not available to age discrimination victims because the federal ADEA supplied an adequate, preclusive remedy. Nevertheless, the *Clinton* court's goal of clarifying the law on this issue was thwarted five years later by the *Saint* decision.

III. *Saint v. Data Exchange, Inc.: Statement of the Case*

A. *Facts and Procedure*

Fifty-eight-year-old Carol Saint, the plaintiff in the case, maintained that her employer, Data Exchange, Inc., had terminated her employment because of her age.¹¹³ The Oklahoma Supreme Court's opinion provides no other details regarding the circumstances of her employment or of the termination. Saint brought her case in federal court, asserting claims under the federal ADEA and the state's public policy against age discrimination, as articulated by the OADA.¹¹⁴ The plaintiff claimed that the OADA creates a unified class of discrimination victims—made up of handicap, race, gender, and age discrimination victims—and that article 5, section 46 of the Oklahoma Constitution requires equal remedies for the unified class.¹¹⁵ Saint asserted that the state and federal statutory remedies for age discrimination victims

107. *Id.*

108. *Id.* ¶ 9, 29 P.3d at 546.

109. *Id.*

110. *Id.*

111. *See supra* text accompanying notes 78, 85.

112. *Collier*, ¶ 7 n.1, 29 P.3d at 546 n.1.

113. *Saint v. Data Exch., Inc.*, 2006 OK 59, ¶ 2, 145 P.3d 1037, 1037.

114. *Id.*; *see also* 29 U.S.C. §§ 621, 623 (2006); 25 OKLA. STAT. §§ 1101, 1302 (2001).

115. *Saint*, ¶ 2, 145 P.3d at 1037-38; *see also supra* text accompanying notes 55-59.

were inferior to the Oklahoma statutory remedy for handicap discrimination victims.¹¹⁶ Therefore, Saint argued, the statutory remedies for age discrimination victims were constitutionally inadequate, and she could recover under the *Burk* tort cause of action.¹¹⁷

The defendant moved to dismiss the state common law claim, maintaining that the ADEA provided the plaintiff with an adequate federal remedy and thereby precluded the state common law action.¹¹⁸ The United States District Court for the Northern District of Oklahoma certified the following question to the Oklahoma Supreme Court: “Is there either an implied statutory remedy or a common-law *Burk* tort remedy for state age discrimination claims arising under the operation of the Oklahoma Constitution, Art. 5 § 46 and the provisions of the Oklahoma Anti-discrimination Act, 25 O.S. §§ 1101, et seq. and § 1901?”¹¹⁹ The court answered yes.¹²⁰

B. The Court’s Rationale

The Oklahoma Supreme Court answered the federal court’s certified question in a short, six-paragraph opinion written by Justice Hargrave.¹²¹ Without delivering separate opinions, seven justices concurred and one justice concurred in the result.¹²² The *Saint* opinion characterized the certified question as the “self-same question” already addressed in the *Tate* and *Collier*

116. *Saint*, ¶ 2, 145 P.3d at 1038. Under the OADA, an alleged age discrimination victim’s remedy is to file a complaint with the state Human Rights Commission, which conducts an investigation into the allegations. 25 OKLA. STAT. § 1502(a). If the Commission finds the employer’s practices discriminatory, the Commission works to eliminate such practices by conferencing with the parties, working out a conciliation agreement between them, or by otherwise using persuasion to end the discriminatory practices. *Id.* § 1505(A). If methods of conference, conciliation, or persuasion fail to end the discriminatory practice, the Commission issues a cease and desist order to the employer and takes such affirmative action as the Commission deems necessary to end the discrimination. *Id.* § 1505(B). Under the ADEA, an age discrimination victim may receive unpaid minimum wages, unpaid overtime compensation, liquidated damages, or other legal or equitable relief. 29 U.S.C. § 626(b) (2006); *see also supra* note 13. Under the OADA, a handicap discrimination plaintiff is entitled to “actual damages,” which “include, but are not limited to, reinstatement or hiring, with or without back pay, or any other legal or equitable relief as the court deems appropriate.” 25 OKLA. STAT. § 1901(C); *see also* Mark Edgar Hammons, *Saint v. Data Exchange Inc.: Discrimination Claims Return to State Court*, 78 OKLA. B.J. 140, 143-49 (2007) (discussing differences between key points of federal and Oklahoma discrimination law, including individual liability, exhaustion requirements, burden of proof, damage caps, and the role of the jury).

117. *See Saint*, ¶ 2, 145 P.3d at 1037-38.

118. *Id.*

119. *Id.* ¶ 1, 145 P.3d at 1037.

120. *Id.*

121. *See id.*, 2006 OK 59, 145 P.3d 1037.

122. *See id.* ¶¶ 7-8, 145 P.3d at 1039.

cases regarding racial discrimination and sexual harassment victims, respectively.¹²³ The *Saint* court repeated *Tate*'s and *Collier*'s observation that the discrimination victims named in the OADA constitute a single class¹²⁴ and that failing to provide equal remedies to all members of the class would create a "dichotomous division of members of the same class."¹²⁵ Such a division, the court reiterated, would offend article 5, section 46 of the Oklahoma Constitution, which mandates "norms of uniformity, symmetry and evenhanded treatment."¹²⁶

The court then quoted the *Collier* case's comparison of the OADA's remedies for handicap discrimination victims with the statute's remedies for sexual harassment victims.¹²⁷ Recalling that a *Burk* tort action provides terminated sexual harassment victims with a private cause of action "comparable to that statutorily accorded to victims of handicap discrimination,"¹²⁸ the court recognized *Collier* as having avoided the "pitfalls of according asymmetrical remedies to members of a single class of employment discrimination victims" by holding that the OADA is not the exclusive remedy available to sexual harassment victims.¹²⁹ The court emphasized, however, that if the OADA had given sexual harassment and handicap discrimination victims the same remedy, the common law action would have been disallowed.¹³⁰

The *Saint* court also revisited the *Tate* case's discussion comparing the OADA's remedies for handicap discrimination victims with the remedies for race discrimination victims,¹³¹ underscoring once again that under the OADA, handicap discrimination victims have a private cause of action, but a similar cause of action is not available to race discrimination victims.¹³² As a result, the court explained, if the OADA were the sole remedy for race discrimination victims, "[t]here would be a more generous remedy for victims of handicap discrimination than for those who suffered from racial discrimination."¹³³ But, as the court pointed out, the Oklahoma Constitution "absolutely interdicts"

123. *Id.* ¶¶ 3-5, 145 P.3d at 1038-39.

124. *Id.* ¶¶ 4-5, 145 P.3d at 1038-39; *see also supra* text accompanying notes 55, 98.

125. *See Saint*, ¶ 3, 145 P.3d at 1038; *see also supra* text accompanying notes 59, 100.

126. *Saint*; *see also supra* text accompanying notes 55-59.

127. *See Saint*, ¶ 4, 145 P.3d at 1038; *see also supra* text accompanying note 99.

128. *Saint*, ¶ 4, 145 P.3d at 1038 (quoting *Collier v. Insignia Fin. Group*, 1999 OK 49, ¶ 14, 981 P.2d 321, 326).

129. *Id.* (quoting *Collier*, ¶ 14, 981 P.2d at 326).

130. *Id.*

131. *See id.* ¶ 5, 145 P.3d at 1038-39.

132. *Id.* ¶ 5, 145 P.3d at 1039 (quoting *Tate v. Browning-Ferris, Inc.*, 1992 OK 72, ¶ 18, 833 P.2d 1218, 1229-30).

133. *Id.* (quoting *Tate*, ¶ 18, 833 P.2d at 1229).

passing laws that provide unequal remedies for those who allege employment discrimination.¹³⁴

Only in the last paragraph of the *Saint* case, after quoting the *Tate* and *Collier* decisions at length, did the court specifically address age discrimination victims.¹³⁵ Without discussion, the *Saint* court summarily concluded that “[a]ge-discrimination victims are part of the employment discrimination class, and as such must be afforded the same rights as the other members of the class. Therefore we find that there is a *Burk* tort remedy for those who allege employment age discrimination.”¹³⁶ The *Saint* opinion did not expressly address the defendant’s claim that the federal ADEA was an adequate statutory remedy that precluded the *Burk* tort claim.¹³⁷ The opinion also failed to acknowledge the apparent conflict with the Oklahoma Supreme Court’s prior holdings in the *List* and *Clinton* cases.¹³⁸

IV. Saint’s Impact and the Oklahoma Supreme Court’s Later Clarification of the Case

Before the Oklahoma Supreme Court decided *Saint*, courts typically dismissed employees’ state common law age discrimination claims when employees also filed analogous federal claims.¹³⁹ These dismissals were based on *List*’s holding that age discrimination victims did not have a *Burk* tort remedy available to them because the federal ADEA provided an adequate remedy.¹⁴⁰ Moreover, *Clinton* had affirmed that the existence of an adequate federal remedy would preclude *Burk* tort claims generally.¹⁴¹ Not surprisingly, then, following the *Saint* decision, interested entities filed a “flurry of amicus briefs” calling for the court to reconsider and reverse the case.¹⁴² Yet on September 18, 2006, all of the justices on the Oklahoma Supreme Court concurred in denying a rehearing.¹⁴³

134. *Id.* (quoting *Tate*, ¶ 18, 833 P.2d at 1230).

135. *See id.* ¶ 6, 145 P.3d at 1039.

136. *Id.*

137. *See id.*, 2006 OK 59, 145 P.3d 1037; *see also* Bowling, *supra* note 14, at 138.

138. *See Saint*, 2006 OK 59, 145 P.3d 1037; *see also* Bowling, *supra* note 14, at 138.

139. Bowling, *supra* note 14, at 138.

140. *See id.*; *see also* List v. Anchor Paint Mfg. Co., 1996 OK 1, ¶ 12, 910 P.2d 1011, 1014, *overruled by* Kruchowski v. Weyerhaeuser Co., 2008 OK 105, ¶ 23, 202 P.3d 144, 151.

141. Clinton v. State *ex rel.* Logan County Election Bd., 2001 OK 52, ¶ 9, 29 P.3d 543, 546, *overruled by* Kruchowski, ¶ 25, 202 P.3d at 152.

142. Hammons, *supra* note 116, at 140.

143. *Id.* at 149 n.2.

A. Uncertainty Following the Saint Decision

The *Saint* opinion broadly announced that “there is a *Burk* tort remedy for those who allege employment age discrimination,”¹⁴⁴ but the court’s failure to discuss either the ADEA’s adequacy as a federal remedy or the *List* case created uncertainty about whether the Oklahoma Supreme Court’s previous precedents, which had unquestionably been viewed and applied by other courts to preclude state common law claims in federal employment age discrimination cases, remained valid.¹⁴⁵ One federal judge characterized the post-*Saint* judicial task as an “attempt[] in various ways either to reconcile the Oklahoma Supreme Court’s employment law decisions or to manage federal cases involving *Burk* claims until the uncertainty [was] resolved.”¹⁴⁶

In view of this uncertainty among the courts, plaintiffs argued that the *Saint* case was meant to overrule the Oklahoma Supreme Court’s previous decisions in *Clinton* and *List* and that plaintiffs alleging employment discrimination under the ADEA were no longer precluded from bringing an additional state common law action.¹⁴⁷ Such an interpretation of *Saint* benefits plaintiffs because a *Burk* tort claim allows them to seek compensatory and punitive damages that would be unavailable if the ADEA provided their sole remedy.¹⁴⁸ Defendants countered that the *Saint* court’s lack of discussion about the ADEA and the *List* case demonstrated that the court did not intend to change this area of employment litigation and that the federal ADEA continued to preclude plaintiffs’ state common law claims.¹⁴⁹

The Tenth Circuit Court of Appeals adopted the plaintiffs’ view of the *Saint* ruling in two unpublished decisions, *Ruleford v. Tulsa World Publishing Co.*¹⁵⁰ and *Enderwood v. Sinclair Broadcast Group, Inc.*¹⁵¹ In *Ruleford*, the court, without elaboration, interpreted *Saint* as holding that the ADEA is an inadequate federal remedy for age discrimination victims; therefore, the court concluded that plaintiffs could bring both ADEA and OADA claims together after *Saint*.¹⁵² The *Enderwood* opinion interpreted *Saint* as abrogating the

144. *Saint v. Data Exch., Inc.*, 2006 OK 59, ¶ 6, 145 P.3d 1037, 1039.

145. *See Bennett v. Head Country Food Prods., Inc.*, No. CIV-07-1100-D, 2008 WL 3095847, at *2 (W.D. Okla. Aug. 4, 2008).

146. *Id.* (DeGiusti, J.).

147. *Bowling*, *supra* note 14, at 138.

148. *Id.*; *see also supra* note 116.

149. *See Bowling*, *supra* note 14, at 138.

150. 266 F. App’x 778 (10th Cir. 2008).

151. 233 F. App’x 793 (10th Cir. 2007).

152. *Ruleford*, 266 F. App’x at 784. The court treated the term “OADA claim” as synonymous with the term “*Burk* tort claim.” *See id.*

Oklahoma Supreme Court's decision in *List* without explaining the reason for this interpretation.¹⁵³

In *Miller v. Love's Travel Stops & Country Stores, Inc.*, Judge DeGiusti of the U.S. District Court for the Western District of Oklahoma followed the Tenth Circuit's view of the *Saint* opinion, agreeing with this "common-sense reading of *Saint*, at least as it impacts age discrimination claims."¹⁵⁴ Judge DeGiusti explained that "[b]ecause a 'federal court must defer to the most recent decisions of the state's highest court,' this Court will follow *Saint* and the Oklahoma Supreme Court's decision to provide a *Burk* remedy in an ADEA case."¹⁵⁵ Similarly, in *Boyles v. AG Equipment Co.*, Judge Kern of the U.S. District Court for the Northern District of Oklahoma decided to follow suit and allow a plaintiff to bring a state common law claim with an ADEA claim.¹⁵⁶ Judge Kern noted, however, that there was some question about whether the *Saint* case overruled the *List* decision or instead reached only the question of the OADA's adequacy as a state remedy for age discrimination victims.¹⁵⁷

Not all judges adopted the plaintiffs' interpretation of *Saint*. In an order granting the defendant's motion to dismiss for failure to state a claim in the case of *Peery v. Veolia Water North America-West, LLC*, Judge Heaton of the U.S. District Court for the Western District of Oklahoma discussed the Oklahoma Supreme Court's decisions in *List*, *Marshall*, *Collier*, *Clinton*, and *Tate*.¹⁵⁸ Because of these precedents, Judge Heaton avoided the conclusion that the *Saint* case's silence regarding the adequacy of the ADEA as a federal remedy was intended to overrule *List*, *Marshall*, and *Clinton* in "what [was] otherwise a summary opinion answering a relatively narrow certified question."¹⁵⁹ Judge Heaton reasoned that in previous cases discussing the availability of a *Burk* tort claim, such as *Collier*, the Oklahoma Supreme Court had sometimes not discussed the adequacy of federal remedies in its opinions, but in later cases, such as *Clinton*, the court had clarified that the adequacy issue remained a component of the analysis.¹⁶⁰

153. See *Enderwood*, 233 F. App'x at 797, 801 n.1.

154. No. CIV. 06-1008-D, 2008 WL 1841021, at *1 (W.D. Okla. Apr. 21, 2008).

155. *Id.* (citation omitted) (quoting *Henrie v. Northrop Grummon Corp.*, 502 F.3d 1228, 1231 (10th Cir. 2007)).

156. 506 F. Supp. 2d 809, 822 (N.D. Okla. 2007).

157. *Id.* at 822 n.14.

158. See No. CIV-06-0721-HE, 2007 U.S. Dist. LEXIS 57993, at *3-6 (W.D. Okla. Apr. 10, 2007).

159. *Id.* at *7.

160. *Id.* at *7-8.

Before concluding the order, Judge Heaton explained that the availability of the *Burk* tort remedy had become a murky area of employment litigation and that he was “unable to identify a unifying principle or coordinated series of principles in the existing authorities which would provide a definitive guide to the questions presented in this case.”¹⁶¹ In light of this lack of clarity in the law, Judge Heaton took the position that the implications of *Saint* were “more limited” than the plaintiff maintained.¹⁶² The judge “st[ood] alone” in his decision not to allow plaintiffs to bring both a *Burk* tort claim and a federal claim under the ADEA after *Saint*.¹⁶³

Thus, in the wake of the *Saint* decision, the district court in which a case was filed and the judge assigned to the case were the decisive factors with regard to whether a plaintiff could file both a *Burk* tort claim and a claim under the ADEA. This variation in law throughout Oklahoma’s federal courts showed that the *Saint* case had confused this once-settled area of employment litigation.

B. The Oklahoma Supreme Court’s Clarification of the Saint Decision in Kruchowski and Shirazi

The Oklahoma Supreme Court took the opportunity to clarify the confusion created by *Saint* in *Kruchowski v. Weyerhaeuser Co.*¹⁶⁴ In response to a question certified from the U.S. District Court for the Eastern District of Oklahoma, the *Kruchowski* court explained that the *Saint* court meant to include age discrimination victims in the class of employment discrimination victims to which the *Burk* tort remedy is available and that *Saint* had thereby implicitly overruled *List*.¹⁶⁵ Thus, *Kruchowski* held that an alleged employment discrimination victim may bring a *Burk* tort claim when the remedies available to him are “not uniform and evenhanded” with the remedies available to the other members of the class of employment discrimination victims set out in the OADA.¹⁶⁶ This rule applies, the court continued, “regardless of whether the remedies originate under Federal or State law.”¹⁶⁷ Therefore, the court explained, in order to bring a *Burk* tort claim, a plaintiff must show that an employer violated Oklahoma’s public policy against employment discrimination and either that no statutory remedy is available or

161. *Id.* at *8-9.

162. *Id.* at *9.

163. *Miller v. Love’s Travel Stops & Country Stores, Inc.*, No. CIV. 06-1008-D, 2008 WL 1841021, at *1 (W.D. Okla. Apr. 21, 2008).

164. 2008 OK 105, ¶ 6, 202 P.3d 144, 147.

165. *Id.* ¶ 23, 202 P.3d at 151.

166. *Id.* ¶ 31, 202 P.3d at 153.

167. *Id.*

that the existing statutory remedy is “not commensurate” with the remedies available for similar employment-related discrimination.¹⁶⁸ The *Kruchowski* court also expressly overruled *List*, as well as *Marshall* and *Clinton* to the extent that they conflict with *Kruchowski* and *Saint*.¹⁶⁹ This ruling garnered the votes of eight of nine justices.¹⁷⁰

Despite the justices’ near-unanimous opinion in *Kruchowski*, judges and attorneys remained uncertain about the application of the *Kruchowski* and *Saint* holdings.¹⁷¹ Once again, the Oklahoma Supreme Court was presented with the opportunity to dispel any lingering uncertainty when it responded to a certified question from the U.S. District Court for the Western District of Oklahoma in *Shirazi v. Childtime Learning Center, Inc.*¹⁷² The plaintiff in *Shirazi* argued that identical remedies must be available to all members of the OADA discrimination class.¹⁷³ The defendant contended that the plaintiff must still show the inadequacy of the available federal remedy to bring a *Burk* tort claim.¹⁷⁴ The court agreed with the plaintiff, explaining that the adequacy of a federal employment discrimination remedy is no longer the focus of the *Burk* tort analysis.¹⁷⁵ The court stated that a *Burk* tort remedy is available when the applicable statutory remedy is not the *same* as the remedy provided to other members of the employment discrimination class identified in the OADA.¹⁷⁶

V. Analysis

The confusion over the availability of the *Burk* tort remedy that the federal courts and Oklahoma practitioners experienced in the wake of *Saint v. Data Exchange, Inc.* was justified. On its face, the *Saint* case’s broad holding appeared to affirmatively grant a *Burk* tort remedy to victims of age

168. *Id.* ¶ 32, 202 P.3d at 153.

169. *Id.* ¶ 35, 202 P.3d at 154.

170. *See id.* ¶ 37, 202 P.3d at 154. Justice Watt lodged a partial dissent, arguing that it was unnecessary for the *Kruchowski* case to overrule *List* and *Marshall* because those cases did not reach the state constitutional issue that was presented by the plaintiff in *Saint*. *Id.* ¶ 7, 202 P.3d at 156 (Watt, J., concurring in part and dissenting in part).

171. *See Shirazi v. Childtime Learning Ctr.*, 2009 OK 13, ¶ 4, 204 P.3d 75, 77.

172. *See id.* ¶ 0, 204 P.3d at 76.

173. *Id.* ¶ 6, 204 P.3d at 77.

174. *Id.*

175. *Id.* ¶ 12, 204 P.3d at 79.

176. *Id.* The court also reiterated a caveat it had introduced as early as *Tate*, *see* 1992 OK 72, ¶ 19, 833 P.2d 1218, 1230-31, and subsequently revived in *Kruchowski*, *see* 2008 OK 105, ¶ 33, 202 P.3d 144, 153, when it stated that “double recovery” would not be allowed. *See Shirazi*, ¶¶ 10, 12, 204 P.3d at 79. This statement will likely lead to litigation to determine the meaning of “double recovery” under the ADEA and *Burk* tort remedial schemes.

discrimination in employment.¹⁷⁷ The seemingly straightforward opinion was complicated, however, by its failure to mention the *List* and *Clinton* cases even though *Saint* appeared to directly conflict with those prior decisions.¹⁷⁸ *Saint* needed explanation, and a careful reading of the precedent in place at the time the case was rendered would have allowed *Saint*, *List*, and *Clinton* to stand together.¹⁷⁹ This reconciliation would have made sense because the *Saint* and *Clinton* cases were signed by four of the same justices and decided just five years apart.¹⁸⁰ The Oklahoma Supreme Court in *Kruchowski* and *Shirazi*, however, broadly interpreted *Saint* as overruling *List* and providing plaintiffs alleging employment age discrimination with a *Burk* tort cause of action.¹⁸¹ As argued below, the court should have narrowly interpreted *Saint* as preserving *List* and not addressing the issue of whether the ADEA supplies an adequate federal remedy. Such an interpretation would have been more consistent with the narrowness of the certified question that the *Saint* court purported to answer, precedent, and the policy behind the creation of the *Burk* tort remedy. Furthermore, even interpreted narrowly, *Saint* would have been a significant case because of its application in situations where the ADEA does not provide victims of age discrimination in employment with a remedy.

A. The Oklahoma Supreme Court's Broad Interpretation of Saint Was Unjustified in Light of the Narrow Question Certified to the Court and Prior Case Law

The certified question in *Saint* asked whether there is a *Burk* tort remedy for age discrimination victims “arising under the operation of the Oklahoma Constitution, Art. 5 § 46 and the provisions of the Oklahoma Anti-discrimination Act.”¹⁸² On its face, the question appeared to inquire only about the availability of a *Burk* tort cause of action under the Oklahoma Constitution and the OADA. Moreover, the *Saint* opinion characterized the federal court’s certified question as the “self-same question” answered in the *Tate* case regarding racial discrimination victims and in the *Collier* decision

177. See *Saint v. Data Exch., Inc.* 2006 OK 59, ¶ 6, 145 P.3d 1037, 1039.

178. See *Bowling*, *supra* note 14, at 138.

179. See *id.*

180. Compare *Saint*, 2006 OK 59, 145 P.3d 1037, with *Clinton v. State ex rel. Logan County Election Bd.*, 2001 OK 52, 29 P.3d 543, overruled by *Kruchowski*, ¶ 25, 202 P.3d at 152; see also *Bowling*, *supra* note 14, at 138.

181. *Shirazi*, ¶¶ 11, 12, 204 P.3d at 79; *Kruchowski*, ¶ 35, 202 P.3d at 154.

182. See *Saint*, ¶ 1, 145 P.3d at 1037.

regarding victims of sexual harassment.¹⁸³ This characterization shows that the *Saint* court intended to address only the issues found in *Tate* and *Collier*.¹⁸⁴

In both *Tate* and *Collier*, after finding an explicit public policy goal on which to base the *Burk* tort claim, the court considered whether there was an adequate statutory remedy available to the alleged victims that would preclude the state common law claim.¹⁸⁵ The *Tate* and *Collier* opinions, however, analyzed only whether the discrimination victims were afforded adequate remedies under *state* statutory law, specifically, the OADA.¹⁸⁶ Neither opinion discussed the adequacy or potential preclusive effect of *federal* statutory remedies.¹⁸⁷

Considering the narrow language of the certified question and the *Saint* court's explicit statement that it was answering the same question presented in *Tate* and *Collier*, it seems clear that the court meant to address only the availability of a *Burk* tort remedy as a function of the Oklahoma Constitution and the OADA. This is particularly true in light of the fact that the *Saint* court did not even respond to the defendant's argument that the federal ADEA precluded the state common law tort action.¹⁸⁸ The Oklahoma Supreme Court had already considered the issue of whether the ADEA precludes a *Burk* tort claim in the *List* case.¹⁸⁹ There, the court held that a *Burk* tort action was not necessary for age discrimination victims because the ADEA provided an adequate remedy.¹⁹⁰ Moreover, in *Clinton*, the Oklahoma Supreme Court made explicit that the existence of an adequate federal remedy would preclude a *Burk* tort claim.¹⁹¹

Given the seemingly settled state of the law, the fact that the *Saint* court did not address the existence or implications of an adequate federal remedy should not have been interpreted to mean that the remedy provided by the ADEA was inadequate. Rather, this shows that the issue simply was not raised by the narrow certified question presented to the court. Therefore, the *Saint* case should not have been broadly interpreted as abrogating the *List* decision because the two cases did not address the same issues. This conclusion is

183. *Id.* ¶¶ 3-5, 145 P.3d at 1038.

184. *See* Bowling, *supra* note 14, at 138.

185. *See* Collier v. Insignia Fin. Group, 1999 OK 49, ¶ 12, 981 P.2d 321, 325; Tate v. Browning-Ferris, Inc., 1992 OK 72, ¶ 10, 833 P.2d 1218, 1225.

186. *See* Collier, ¶ 12, 981 P.2d at 325; Tate, ¶ 10, 833 P.2d at 1225.

187. *See* Bowling, *supra* note 14, at 138.

188. *Id.*

189. *See* List v. Anchor Paint Mfg. Co., 1996 OK 1, 910 P.2d 1011, *overruled by* Kruchowski v. Weyerhaeuser Co., 2008 OK 105, ¶ 23, 202 P.3d 144, 151.

190. *Id.* ¶ 18, 910 P.2d at 1015.

191. Clinton v. State *ex rel.* Logan County Election Bd., 2001 OK 52, ¶ 9, 29 P.3d 543, 546, *overruled by* Kruchowski, ¶ 25, 202 P.3d at 152.

buttressed by the fact that the author of the *List* decision, Justice Watt, concurred in *Saint*.¹⁹²

That the *Saint* opinion was rendered to answer a certified question of law also points to the conclusion that the Oklahoma Supreme Court did not intend to reach the issue of whether the federal ADEA precludes a *Burk* tort action. The Revised Uniform Certification of Questions of Law Act (Certified Question Act)¹⁹³ gives the Oklahoma Supreme Court the authority to answer a question asked by a U.S. district court if the certified question is determinative of an issue pending in litigation.¹⁹⁴ The Certified Question Act also specifies, however, that there must be no controlling Oklahoma Supreme Court decision (or statutory or constitutional provision) on the issue.¹⁹⁵

Because the *Clinton* and *List* decisions directly controlled the issue of whether an adequate federal statutory remedy precludes a *Burk* tort claim,¹⁹⁶ the *Saint* court could not have intended to address that particular issue. Otherwise, the court would have lacked the authority to answer the federal court's question under the Certified Question Act. Accordingly, the *Saint* decision should have been interpreted as reaching only the same issue addressed in the *Collier* and *Tate* cases regarding the OADA's intersection with the Oklahoma Constitution.¹⁹⁷ There was no controlling Oklahoma Supreme Court decision on this issue because the intersection between the OADA and the state constitution had never been explicitly considered in the context of age discrimination cases.

B. Increasing the Availability of the Burk Tort Remedy Is Inconsistent with Its Rationale

The view that the *Saint* case did not abrogate the *List* decision is more consistent with the reasoning behind the creation of the *Burk* tort remedy than is the view adopted by the court in *Kruchowski* and *Shirazi*. The Oklahoma Supreme Court adopted the public policy exception to the terminable at-will doctrine in *Burk v. K-Mart Corp.*¹⁹⁸ Despite the fact that the plaintiff initially brought a breach of contract claim alleging that her employer had broken the covenant of good faith and fair dealing implicit in their employment

192. See *Saint v. Data Exch., Inc.*, 2006 OK 59, 145 P.3d 1037; *List*, 1996 OK 1, 910 P.2d 1011.

193. 20 OKLA. STAT. §§ 1601-1611 (2001); see also *supra* note 32.

194. 20 OKLA. STAT. § 1602.

195. *Id.*

196. See *Clinton*, 2001 OK 52, 29 P.3d 543; *List*, 1996 OK 1, 910 P.2d 1011.

197. See *Collier v. Insignia Fin. Group*, 1999 OK 49, ¶ 12, 981 P.2d 321, 325; *Tate v. Browning-Ferris, Inc.*, 1992 OK 72, ¶ 10, 833 P.2d 1218, 1225.

198. 1989 OK 22, ¶ 17, 770 P.2d 24, 28.

contract,¹⁹⁹ the court declined to impose a duty of good faith and fair dealing in Oklahoma's employment at-will contracts because it would have been "overly broad" to impose such duties in employment at-will arrangements.²⁰⁰ Rather than implementing the sweeping requirements of good faith and fair dealing, the *Burk* court created a common law action that would apply in a "narrow class of cases."²⁰¹

The court's decision to eschew a broad implied covenant in favor of a common law tort action highlights the fact that the court intended the *Burk* tort remedy to be available only in limited circumstances. The court explained that this new tort action was created in recognition of the necessary balance between the employer's needs of efficiency and profitability, the employee's need to earn a salary, and society's goals.²⁰² The *Burk* tort exception to employment at-will was meant to protect at-will employees against "unchecked employer power"²⁰³ and to dissuade employers from discharging employees for reasons that violate Oklahoma's clearly articulated public policy.²⁰⁴ Out of deference to employers' needs, however, the *Burk* opinion emphasized that the tort cause of action was supposed to be a narrow exception to the employment at-will doctrine that would be kept "tightly circumscribed."²⁰⁵ The Oklahoma Supreme Court has repeated this language multiple times in later decisions.²⁰⁶

The above rationale for extending a common law remedy to victims of employment discrimination generally is not as compelling in the context of plaintiffs who allege age discrimination because the ADEA already protects them and provides them with a meaningful remedy.²⁰⁷ The availability of this federal remedy curtails employer power by ensuring that such power is not "unchecked" and protects Oklahoma's public policy against age discrimination

199. *Id.* ¶ 1, 770 P.2d at 25.

200. *Id.* ¶ 13, 770 P.2d at 27. The court had previously refused to impose a duty not to terminate employees in bad faith on at-will employers. *Hinson v. Cameron*, 1987 OK 49, ¶ 13, 742 P.2d 549, 554.

201. *Burk*, ¶ 17, 770 P.2d at 28.

202. *See Burk*, ¶ 16, 770 P.2d at 28 (quoting *Palamateer v. Int'l Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981)).

203. *Id.* (quoting *Palamateer*, 421 N.E.2d at 878).

204. *Clinton v. State ex rel. Logan County Election Bd.*, 2001 OK 52, ¶ 8, 29 P.3d 543, 546, *overruled by Kruchowski v. Weyerhaeuser Co.*, 2008 OK 105, ¶ 25, 202 P.3d 144, 152.

205. *See Burk*, ¶ 18, 770 P.2d at 29.

206. *See Clinton*, ¶ 6, 29 P.3d at 545; *Collier v. Insignia Fin. Group*, 1999 OK 49, ¶ 5, 981 P.2d 321, 323.

207. *See* 29 U.S.C. § 626(b)-(c) (2006) (allowing recovery of unpaid minimum wages or unpaid overtime compensation; authorizing liquidated damages for willful violations; granting courts authority to award legal and equitable relief as necessary; and providing claimants with the right to a jury trial); *see also supra* note 13.

by discouraging employers from engaging in discriminatory conduct.²⁰⁸ Consequently, the *Burk* tort remedy that was intended to have a narrow application is unnecessary in situations where the ADEA applies. Furthermore, allowing a federal statutory remedy under the ADEA and a *Burk* tort remedy for the same alleged offensive conduct could disturb the balance between employer and employee that the Oklahoma Supreme Court has strived to achieve.²⁰⁹ Providing these multiple remedies dissuades employers from executing lawful and economically necessary terminations because such terminations might be construed as age discrimination and could subject employers to more time-intensive and expensive litigation if employees bring two different claims, each with potentially complicated remedial schemes.²¹⁰

C. Even Interpreted Narrowly, Saint Would Provide a Remedy in Several Cases

Even though the federal ADEA would preclude a state common law action under the *List* decision in many age discrimination cases if the Oklahoma Supreme Court had interpreted *Saint* narrowly and left *List* intact,²¹¹ such an interpretation would not have rendered the *Saint* holding meaningless. In the event that an age discrimination victim or her employer did not fall under the ADEA's provisions, the *Saint* case would provide the victim with a *Burk* tort cause of action as a function of article 5, section 46 of the Oklahoma Constitution and the OADA. For example, the ADEA defines the term "employer" as a person who has twenty or more daily employees for at least twenty weeks of a given calendar year (or the previous year).²¹² Therefore, the federal remedy would not be available to an age discrimination victim working for someone with nineteen or fewer employees, or with twenty or more employees but for less than twenty weeks of the year, because such a person would not be an "employer" under the ADEA's definition. With the federal remedy unavailable, the *Saint* decision would come into play, protecting the alleged age discrimination victim by providing a state common law action.

It is important to note that under the OADA, an "employer" is defined as a person with fifteen or more employees for twenty or more weeks of the year.²¹³ At the time *Saint* was decided, *Brown v. Ford* held that a plaintiff could not

208. See Oklahoma Anti-Discrimination Act, 25 OKLA. STAT. §§ 1101, 1302, 1505 (2001).

209. See *supra* text accompanying notes 1-6.

210. See Michael D. Moberly, *Proceeding Geometrically: Rethinking Parallel State and Federal Employment Discrimination Litigation*, 18 WHITTIER L. REV. 499, 501-04 (1997).

211. See *List v. Anchor Paint Mfg. Co.*, 1996 OK 1, ¶ 12, 910 P.2d 1011, 1014, *overruled by Kruchowski*, ¶ 23, 202 P.3d at 151; see also *supra* text accompanying note 76.

212. 29 U.S.C. § 630(b) (2006); see also Hammons, *supra* note 116, at 143.

213. 25 OKLA. STAT. § 1301(1) (2001); see also Hammons, *supra* note 11, at 143.

bring a *Burk* tort action against a person with fewer than fifteen employees because such a person is not an “employer” under the OADA.²¹⁴ Thus, interpreted narrowly, *Saint* would have provided a *Burk* tort cause of action only in cases where an employer fell in the “gap” between the OADA and ADEA, that is, when an employer had fifteen or more but fewer than twenty employees.²¹⁵

On November 10, 2009, however, the Oklahoma Supreme Court decided *Smith v. Pioneer Masonry, Inc.*²¹⁶ The *Smith* court overruled *Brown*, holding that a common law *Burk* tort cause of action is available to members of the OADA’s class of discrimination victims irrespective of the number of employees under their employers’ hire.²¹⁷ Thus, after *Smith*, a narrow interpretation of *Saint* would provide a *Burk* tort cause of action against any employer with fewer than twenty employees, and the ADEA would continue to provide a cause of action against those with twenty or more employees.²¹⁸ For the first quarter of 2008, 87.3% of private employment establishments in Oklahoma had fewer than twenty employees.²¹⁹ Therefore, interpreted narrowly, *Saint* would provide a *Burk* tort cause of action to any alleged discrimination victims working for the overwhelming percentage of Oklahoma’s employers who are not governed by the ADEA.

The *Kruchowski* and *Shirazi* decisions were beneficial in the sense that they clarified the *Saint* case to ensure that plaintiffs’ potential recovery and

214. See 1995 OK 101, ¶¶ 1, 10, 905 P.2d 223, 225, 229. The court also stated that the OADA did not violate equal protection for failure to cover alleged discrimination victims working for employers with fewer than fifteen employees. See *id.* ¶ 6, 905 P.2d at 227.

215. According to the federal Bureau of Labor Statistics State and County Employment and Wages calculator, the number of private Oklahoma employers with ten to twenty employees was 10,882 in 2006—nearly 12% of the 91,207 private employers operating in the state in that year. See Bureau of Labor Statistics, Quarterly Census of Employment and Wages, <http://data.bls.gov:8080/PDQ/outside.jsp?survey=en> (last visited Jan. 15, 2010). This statistic suggests that the number of employers in the state employing between fifteen and nineteen employees, while somewhat smaller than the figure stated, was nonetheless significant.

216. No. 105285, 2009 WL 3748510 (Okla. Nov. 10, 2009). As of the publication date of this note, *Smith* has not yet been released for publication in the permanent law reports. The opinion is subject to revision or withdrawal until released. The publication status of the case is publicly accessible through the Oklahoma State Courts Network website by using the public domain citation assigned to the case, 2009 OK 82. See Oklahoma State Courts Network, <http://www.oscn.net> (last visited Jan. 15, 2009).

217. *Pioneer Masonry*, 2009 WL 3748510, at *3.

218. See 29 U.S.C. § 630(b) (2006).

219. This figure was determined using the federal Bureau of Labor Statistics State and County Employment and Wages calculator. See Bureau of Labor Statistics, *supra* note 215. The author divided the total number of private employers in the state by the number of employers with fewer than twenty employees to arrive at the stated figure.

defendants' potential liability no longer vary according to the federal district in which a case is brought or the judge assigned to the case.²²⁰ The method that the court used to reach this result, however, was flawed. The court could have achieved the certainty created by *Kruchowski* and *Shirazi* while maintaining consistency with its previous jurisprudence by interpreting the *Saint* opinion as preserving *List* and recognizing that *Saint* did not reach the issue of whether the federal ADEA provides Oklahoma's age discrimination victims with an adequate remedy.²²¹ This interpretation would have been more consistent with the wording of the certified question that *Saint* purported to answer, Oklahoma's prior case law, and the rationale behind the creation of the *Burk* tort remedy.²²² Furthermore, even under a narrow interpretation, *Saint* would serve an important purpose because it would provide a *Burk* tort cause of action to alleged age discrimination victims who cannot bring claims under the ADEA.²²³

VI. Conclusion

The *Burk* tort exception to terminable at-will employment provides a cause of action for employees who have been discharged from their jobs for reasons that violate Oklahoma's clearly articulated public policy.²²⁴ The OADA articulates the state's public policy against discrimination in employment, recognizing a unified class of victims—including age, handicap, sex, and racial discrimination victims—who must be provided with equal remedies.²²⁵ The *Burk* tort cause of action used to be available only in the absence of an adequate statutory remedy, and the Oklahoma Supreme Court had determined that the OADA itself does not provide an adequate remedial scheme for race and sex discrimination victims.²²⁶ In the *List* case, however, the Oklahoma Supreme Court determined that the federal ADEA supplied an adequate remedy for age discrimination victims,²²⁷ and the *Clinton* case reaffirmed that an adequate federal remedy for discrimination victims would preclude a *Burk* tort action.²²⁸ Thus, the law seemed clear that an alleged age discrimination

220. See discussion *supra* Part IV.B.

221. See *supra* text accompanying notes 137-38.

222. See discussion *supra* Part V.A-B.

223. See discussion *supra* Part V.C.

224. *Burk v. K-Mart Corp.*, 1989 OK 22, ¶ 17, 770 P.2d 24, 28.

225. See *Collier v. Insignia Fin. Group*, 1999 OK 49, ¶ 14, 981 P.2d 321, 326; *Tate v. Browning-Ferris, Inc.*, 1992 OK 72, ¶ 18, 833 P.2d 1218, 1229-30.

226. *Collier*, ¶¶ 12, 14, 981 P.2d at 325-26; *Tate*, ¶ 18, 833 P.2d at 1229.

227. *List v. Anchor Paint Mfg. Co.*, 1996 OK 1, ¶ 12, 910 P.2d 1011, 1014, *overruled by Kruchowski v. Weyerhaeuser Co.*, 2008 OK 105, ¶ 23, 202 P.3d 144, 151.

228. *Clinton v. State ex rel. Logan County Election Bd.*, 2001 OK 52, ¶ 9, 29 P.3d 543, 546,

victim could not simultaneously bring a *Burk* tort claim and a claim under the ADEA.²²⁹

In *Saint v. Data Exchange, Inc.*, however, the Oklahoma Supreme Court answered a certified question asking whether there is a *Burk* tort cause of action for age discrimination victims as a function of the Oklahoma Constitution and the OADA.²³⁰ The *Saint* court discussed and cited cases relevant only to that specific issue,²³¹ but ultimately concluded by stating, without qualification, that a *Burk* tort remedy is available to victims of age discrimination in employment.²³² As a result of this broad statement, the *Saint* opinion obscured the law on this issue.²³³ Federal courts in Oklahoma struggled to determine whether the *Saint* case was meant to overrule the Oklahoma Supreme Court's decision in *List* or instead did not even reach the issue of the adequacy of the federal ADEA's remedy for Oklahoma's age discrimination victims.²³⁴

The Oklahoma Supreme Court's *Kruchowski* and *Shirazi* opinions attempted to bring certainty to this murky area of law.²³⁵ The court stated in *Kruchowski* that *Saint* had implicitly overruled *List*.²³⁶ In *Shirazi*, the court held that in order for an employment discrimination victim to bring a *Burk* tort claim, she must show that the statutory remedy available to her is not the same as the remedy available to other members of the OADA employment discrimination class.²³⁷ Alleged victims of employment discrimination, therefore, no longer need to show that the statutory remedy available to them is inadequate. They need to show merely that it is not the same remedy available to others in the class.²³⁸ The *Kruchowski* and *Shirazi* decisions were helpful because they clarified this area of law; however, the court's broad interpretation of *Saint* was mistaken, and this clarity could have been achieved by interpreting *Saint* more narrowly. Interpreting *Saint* to avoid a conflict with *List*—in other words, finding that *Saint* did not even reach the issue of the ADEA's adequacy or preclusive effect²³⁹—would have been more consistent

overruled by *Kruchowski*, ¶ 25, 202 P.3d at 152.

229. Bowling, *supra* note 14, at 138.

230. 2006 OK 59, ¶ 1, 145 P.3d 1037, 1037.

231. *See id.* ¶¶ 3-5, 145 P.3d at 1038-39.

232. *Id.* ¶ 6, 145 P.3d at 1039.

233. *See* Bowling, *supra* note 14, at 138.

234. *See* discussion *supra* Part IV.A.

235. *Shirazi v. Childtime Learning Ctr.*, 2009 OK 13, 204 P.3d 75; *Kruchowski v. Weyerhaeuser Co.*, 2008 OK 105, 202 P.3d 144.

236. *Kruchowski*, ¶ 23, 202 P.3d at 151.

237. *See Shirazi*, ¶ 12, 204 P.3d at 79.

238. *See id.*

239. *See supra* text accompanying note 137.

with the narrow question that the *Saint* court was supposed to answer, precedent, and the rationale behind the creation of the *Burk* tort remedy.²⁴⁰ Moreover, the *Saint* case would not have been rendered meaningless by this interpretation because the decision would still provide a *Burk* tort remedy to the significant number of age discrimination victims who cannot bring actions under the ADEA.²⁴¹

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240. See discussion *supra* Part V.A-B.

241. See discussion *supra* Part V.C.