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NOTE

Labor Law: Tate v. Browning-Ferris Industries:
Oklahoma Creates a Common Law Action for
Employment Discrimination

Terminable at-will employment is one of the most entrenched of common law
maxims. In its traditional formulation, the terminable at-will rule holds that an
employer may discharge a worker for "good cause, for no cause, or even for cause
morally wrong, without thereby being guilty of a legal wrong." The wide discretion
granted to employers in the hiring and firing process was deemed justified in the
interests of economic efficiency and preserved by judicial reluctance to inquire into
the employment contract.

Since World War II, however, the clarity of many venerable common law doctrines
has been muddied by courts increasingly inclined to enforce equitable considerations. 2
Gradually, as courts inevitably turned their attention to the employer-employee
relationship, limited exceptions were created to the general rule of at-will employment
as well. 3 Prominent among these modifications is the "public policy exception,"
prohibiting employers from terminating an employee where such a discharge would
violate a recognized state interest. 4

In 1989, the Oklahoma Supreme Court adopted the public policy exception to at-
will employment in Burk v. K-Mart. 5 The Burk decision culminated a stammering
effort by the court to mitigate the harshness of pure at-will employment in Oklahoma.

1. Payne v. Western & A.R.R., 81 Tenn. 507, 519-20 (1884), overruled on other grounds, Hutton
v. Watters, 179 S.W. 134 (Tenn. 1915).
the decline of laissez-faire ideas in property law).
3. For a summary of each state's wrongful discharge law, see HENRY H. PERRITT, JR., EMPLOYEE
4. The public policy exception to the at-will rule has generated a significant amount of academic
literature. See, e.g., Lawrence E. Blades, Employment at Will vs. Individual Freedom: On Limiting the
Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404 (1967); Joseph DeGiuseppe, Jr., The
Effect of the Employment-at-Will Rule on Employee Rights, 10 FORDHAM URB. L.J. 1 (1981); Mary A.
Glendon & Edward R. Levy, Changes in the Bonding of the Employment Relationship: An Essay on the
New Property, 20 B.C. L. REV. 457 (1979); Gary E. Murg & Clifford Scharman, Employment at Will:
Do the Exceptions Overwhelm the Rule?, 23 B.C. L. REV. 329 (1982); Cornelius J. Peck, Unjust
Discharges from Employment: A Necessary Change in the Law, 40 OHIO ST. L.J. 1 (1979); Clyde W.
Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 VA. L. REV. 481
(1976); J. Peter Shapiro & James F. Tune, Note, Implied Contract Rights to Job Security, 26 STAN. L.
REV. 335 (1974); Peter S. Partee, Note, Rebutting the Presumption of Employment at Will, 44 VAND. L.
REV. 689 (1991); Note, Protecting Employees at Will Against Wrongful Discharge: The Public Policy
Exception, 96 HARV. L. REV. 1931 (1983) [hereinafter Note, The Public Policy Exception]; Note,
Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith,
93 HARV. L. REV. 1816 (1980) [hereinafter Note, Duty to Terminate].
However, Burk was not intended to be a wholesale vitiation of the at-will rule. The language of Burk indicated that the exception was tightly circumscribed; it seemed to be limited to cases in which an employee was terminated for acting in compliance with a well-recognized public policy of the state.6

Oklahoma's acceptance of the public policy exception was a belated recognition that a common law remedy should be afforded in certain circumstances to employees who are unjustly dismissed. Indeed, where an employee has no statutory recourse, the exception serves both to redress the aggrieved employee and deter employers from actions detrimental to the public interest.7 In the recent decision of Tate v. Browning-Ferris Industries,8 however, the Oklahoma Supreme Court, greatly expanding the scope of the public policy exception, held that the exception applies to discharges based on status characteristics such as race or sex as well as to discharges predicated on an employee's activities. Significantly, Tate allows an employee now to seek relief under both the common law and federal and state anti-discrimination statutes. This seemingly innocuous change, announced in Tate, alters the potential liability of employers and challenges the historical role of the public policy exception as an interstitial remedy, available only to preserve rights that would otherwise go unprotected.

This note analyzes the impact of Tate on the employment relationship in Oklahoma. In part I of this note, the historical development and gradual erosion of the terminable at-will rule are traced. Part II discusses the inroads into the employment contract that have been made by Oklahoma courts. The facts and holding of Tate are outlined in part III. Part IV develops an analytical framework within which to evaluate the Tate decision. This framework is based on an examination of similar cases from other jurisdictions and an evaluation of the policies justifying recognition of a common law action for employment discrimination. Finally, part V critiques the holding in Tate and argues that, although the holding in Tate is correct, there are alternative grounds that provide more persuasive justifications for the decision.

I. The Historical Development of Employment-at-Will

A. The Genesis of the At-Will Rule

The at-will rule of employment, although enshrined in the law, is, in fact, of recent origin9 and is a uniquely American phenomenon.10 In early English law, for example,

6. Id. at 27.
10. The United States is the only industrialized nation lacking statutory protection of workers that limits the rights of an employer to arbitrarily terminate the employment relationship. Mathews, supra
employment contracts were presumed to be for one year in duration, unless specified otherwise. Moreover, English law required employers to provide reasonable notice to employees before termination. Until the middle of the nineteenth century, these English precedents formed the basis of American law on employment relations as well.

In the United States, the durability of employment contracts became increasingly questioned as industrialization progressed. However, it was not until 1877 that the at-will rule of employment was given precise formulation. In that year, Horace Gray Wood, a New York lawyer, published a treatise on master-servant relations that was to have tremendous impact on the development of American labor jurisprudence. Wood argued that the English approach to employment contracts was inappropriate for an industrialized economy. In place of this perceived anachronism, Wood declared that employers could fire workers at their discretion. Indeed, he set forth a rule that still today is the law in most jurisdictions: "[A] general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof."

Wood's thesis was really a masterpiece in scholarly sleight-of-hand. There was neither case law nor compelling public policy interests justifying the dogmatic

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note 9, at 1447 n.54.
12. Feinman, supra note 9, at 121-22.
13. Id. at 122.
14. Id. at 124-25; Note, Duty to Terminate, supra note 4, at 1824.
15. HORACE GRAY WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877).
16. Id. § 134, at 202.
17. Id. Prior to Wood's formulation, treatises usually stated that a hiring was presumed to be for one year in duration. See, e.g., CHARLES MANLEY SMITH, A TREATISE ON THE LAW OF MASTER AND SERVANT 53-57 (8th ed. 1931).
19. Wood cited four cases in support of the at-will rule: Wilder v. United States, 5 Ct. Cl. 462 (1869), rev'd on other grounds, 80 U.S. 254 (1871); De Briar v. Mintuin, 1 Cal. 450 (1851); Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 (1870); and Franklin Mining Co. v. Harris, 24 Mich. 115 (1871). WOOD, supra note 15, at 272 n.4. In fact, none of these cases supports Wood's arguments for employment-at-will. These cases are discussed and criticized in Shapiro & Tune, supra note 4, at 343-46. First, Wilder dealt with a business contract between the Army and private entrepreneurs. The case had nothing to do with general hirings. Second, in DeBriar, the controversy concerned the right of a discharged bartender to occupy a room in the tavern after he had been asked to leave. Essentially a case about unlawful eviction, the court held that the innkeeper had the right to eject a person living in his house after providing proper notice to the tenant. Third, Tatterson actually contradicts Wood's argument for the at-will rule. In Tatterson, the court found that there was no error in allowing the jury to determine the nature of the employment contract from all circumstances surrounding its execution. There was no presumption of at-will employment. Finally, in Franklin, the jury found that hiring for a year could be inferred from the facts of the case. As a result, the jury held that a mining captain who had been assured employment would be stable could not be terminated before one year.
20. Scholars have offered several explanations for the development of the at-will rule, including the dominance of laissez-faire economics in the late nineteenth century, the importance that courts in this era gave to freedom of contract, and class struggle between middle managers and business owners. For an overview of the historical conditions in which at-will employment took root, see ANITA HILL,
assertion that American employment relations were on an at-will basis. Nevertheless, despite the doctrine’s dubious intellectual origins and debatable economic merits, the at-will rule spread rapidly across the United States. By the early twentieth century, nearly all states had adopted the at-will employment rule. The at-will rule was even temporarily provided with constitutional clothing; in Adair v. United States, the United States Supreme Court struck down a federal statute prohibiting an employer from firing workers who were union members. Relying on the now-discredited economic due process analysis made famous in the Lochner case, the Court in Adair held that laws restricting the right of employers to terminate employees violated the Fifth Amendment of the United States Constitution.

B. The Erosion of the At-Will Employment Rule

While most jurisdictions still adhere to the at-will doctrine, the vitality of the rule has been increasingly sapped by the combination of two forces. First, numerous statutes have been passed that limit the employer’s right to arbitrarily dismiss employees. For example, there are now federal laws prohibiting dismissal for


21. Most academic commentators have criticized the economic bases of at-will employment. See, e.g., Blades, supra note 4, at 1410-13 (arguing that the at-will rule creates economic inefficiencies by granting employers monopoly bargaining power); Partee, supra note 4, at 708-09 (stating that the at-will rule gives employers too much power in the labor market); Note, The Public Policy Exception, supra note 4, at 1937-42 (stating that the at-will rule contributes to labor market stratification); Note, Duty to Terminate, supra note 4, at 1828-36 (deciding that high information costs due to at-will rule create labor market inefficiencies). But see Richard Epstein, In Defense of the Contract at Will, 51 U. Chi. L. Rev. 947, 973-77 (1984) (asserting that the at-will rule is efficient and cannot be explained in terms of putative market failures); Mayer G. Freed & Daniel D. Polsby, Just Cause for Termination Rules and Economic Efficiency, 38 EMORY L.J. 1097, 1127-30 (1989) (replacing the at-will rule is costly).

22. 1 CHARLES LABATT, MASTER AND SERVANT, § 159 (2d ed. 1913); Henry P. Farnham, Annotation, 11 A.L.R. 469, 470-71 (1921).

23. 208 U.S. 161 (1908); see also Coppage v. Kansas, 236 U.S. 1 (1915) (striking down a statute prohibiting employers from forcing employees to agree not to join a labor union).


26. Adair, 208 U.S. at 176. The language of the Court’s decision in Adair emphasizes the laissez-faire tenor of the times:

It is a part of every man’s civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon any reason, or is the result of whim, caprice, prejudice or malice. With his reasons, neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contacts, and if he is wrongfully deprived of this right by others, he is entitled to redress.

Id. at 173 (citation omitted).

age,28 sex,29 race,30 and union activity.31 Moreover, many federal regulatory statutes protect employees from dismissal because they reported violations of the statutes.32 Most states also have laws providing various protections to employees.33 Since the New Deal, the United States Supreme Court has been willing to uphold these types of legislative protection of workers.34

Second, and perhaps most fundamentally, unionization — although now a weakened force — has provided protection for employees, obviating the application of the at-will rule. Collective bargaining agreements today cover approximately 15% of the nonagricultural workforce.35 These agreements usually prohibit dismissal of an employee without "good cause."36 In addition, over eighteen million American workers — about 17% of the total workforce — are employees of federal, state, or local governments and are usually not employed on an at-will basis.37 Consequently,


36. Peck, supra note 4, at 8.
37. STATISTICAL ABSTRACT, supra note 35, at 422, tbl. 672.
the at-will rule today applies at most only to about 60% of the workforce.

While at-will employment has become less prevalent in the labor market, judicial willingness to create exceptions to at-will employment has further taken much of the bite out of the terminable at-will doctrine. One method of attack, used by courts in many states, has been to find an implied contract of job tenure in employment handbooks and personnel manuals. Where an employer communicates a promise through an employment handbook that employment will be terminated only for cause or only after the exhaustion of certain procedures, failure to abide by these promises can support a wrongful dismissal claim based on breach of contract. A few courts have used similar analysis in holding that oral promises of job security can create a binding employment contract.


39. See, e.g., Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1036 (Ariz. 1985) (holding that employment manuals gave rise to implied-in-fact contract action); Pine River State Bank v. Mettille, 333 N.W.2d 622, 631 (Minn. 1983) (holding that disciplinary procedures in employee handbook were a legally enforceable promise not to dismiss employees without following the procedures).

A second judicially crafted exception to at-will employment exists in the few jurisdictions holding that employers have an implied duty of good faith and fair dealing in employment contracts. Some courts have used this exception to imply a promise of job security as a matter of law. In theory, the implied covenant is broad enough to require employers to have good cause for termination. In no state, however, have the courts read the exception in this way; instead, the courts accepting the implied covenant have restricted their holding to requiring that employers not have a bad faith motive in discharging an employee. So, despite the potential use of the implied covenant, its limited acceptance and theoretical uncertainties hamstring its use in wrongful dismissal cases.

The most common caveat to at-will employment, however, is the so-called "public policy" exception, in which a private right of action is allowed where the dismissal violated a recognized public policy of the state. This exception has now been adopted by over forty states. Its pervasiveness notwithstanding, there is no uniformity of

(N.Y. 1982) (stating that employer's assurance in initial employment interview that discharge would only be for just cause rebutted presumption of at-will employment).


43. See generally PERRITT, supra note 3, § 411 (discussing various jurisdictions to the implied covenant of good faith).

44. See Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1040 (Ariz. 1985) (holding that covenant does not require good cause for dismissal); Magnan v. Anaconda Indus., 479 A.2d 781, 782 (Conn. 1984) (stating there is no action for breach of implied covenant for discharge without just cause); see also PERRITT, supra note 3, § 411.

approach to the public policy exception; jurisdictions differ on the subtle points of the exception's application. For example, courts are far from monolithic in viewing the appropriate sources for determining "public policies" of the state. Courts also differ on the available damages for a successful claim under the public policy exception. There is also controversy over whether the public policy exception is preempted by the availability of statutory relief for the wrongful dismissal.

II. The Employment Relationship in Oklahoma

Terminable at-will employment has been the law in Oklahoma at least since 1932. In the past fifteen years, however, the at-will employment rule in Oklahoma has evolved in a way parallel to that of other jurisdictions; courts in this state flirted with several modifications to the at-will doctrine before fully embracing the public policy exception. For example, in Langdon v. Saga Corp., the Oklahoma Court of Appeals held that an employment manual's guarantees were enforceable contractual provisions. The statements in the manual, the court reasoned, were a unilateral


Although the state courts in Mississippi and Rhode Island have not ruled authoritatively on this issue, federal courts have concluded that these states would probably recognize the public policy exception to at-will employment. See Laws v. Actna Fin. Co., 667 F. Supp. 342 (N.D. Miss. 1987); Cummins v. EG & G Sealco, Inc., 690 F. Supp. 134 (D.R.I. 1988).


48. See infra parts IV-V.


52. Id. at 527.
contract that had been accepted by the employee's continued service to the company. 53 Although the holding in Langdon was subsequently limited by the Oklahoma Supreme Court, 54 the decision marked the first time in Oklahoma that at-will employment had been limited in any real manner and was a harbinger of further judicial inquiry into the employment relationship. This part of the note analyzes the efforts of the Oklahoma Supreme Court to circumscribe employment-at-will.

A. The First Steps to Limiting the At-Will Rule: Hall v. Farmers Insurance Exchange and Hinson v. Cameron

In its initial foray into restricting at-will employment, the Oklahoma Supreme Court issued a confusing opinion that seemed to imply that at-will employment had been eliminated in one fell swoop. In Hall v. Farmers Insurance Exchange, 55 the court acknowledged that at-will employment had long been the law in Oklahoma, 56 but nevertheless held that employment contracts had an implicit covenant requiring the parties to act in good faith. 57 This covenant, the court stated, prohibited employers from wrongfully resorting to the terminable at-will rule. 58 As the court felicitously phrased its justification: "[T]he interests of the people of Oklahoma are not best served by a marketplace of cut-throat business dealings where the law of the jungle is thinly clad in contractual lace." 59

Hall could be read as adopting the most significant modification to at-will employment, the implied covenant of good faith and fair dealing. 60 Indeed, the Tenth Circuit, asked to apply Oklahoma law shortly after Hall, did just that. 61 In one

53. Id.
54. Hinson v. Cameron, 742 P.2d 549, 554-57 (Okla. 1987). In Hinson, the Oklahoma Supreme Court emphasized that not all statements in personnel manuals rebut the presumption of at-will employment. For example, where personnel manuals or employment handbooks provide a noninclusive list of grounds for termination, a discharge for a reason unenumerated in the manual will not necessarily give rise to a breach of contract action. Id. at 557.

Other Oklahoma cases dealing with implied-in-fact contracts arising from provisions in an employment manual have carefully examined the record for evidence of the parties' intent to create a binding contract. See, e.g., Vinyard v. King, 728 F.2d 428, 431-32 (10th Cir. 1984) (applying Oklahoma law, the court found that an employment manual's provisions created a property interest in the employment that was protected by the Fourteenth Amendment of the United States Constitution); Williams v. Maremont Corp., 875 F.2d 1476, 1481-88 (10th Cir. 1989) (applying Oklahoma law, court held that express language in employee handbook was not sufficient to create a binding unilateral contract absent a showing of communication, inducement, and reliance); LeMieux v. Kerby, 931 F.2d 1391 (10th Cir. 1991) (applying Oklahoma law, court declined to imply a for-cause requirement for discharge from a nonexclusive list of grounds for termination contained in employment manual); Breshears v. Moore, 792 P.2d 91, 92 (Okla. Ct. App. 1990) (holding that the employment manual's description of termination procedures created a legal duty for employer to follow those procedures).

55. 713 P.2d 1027 (Okla. 1985).
56. Id. at 1029.
57. Id.
58. Id. at 1030.
59. Id. at 1029.
61. Grayson v. American Airlines, 803 F.2d 1097, 1099 (10th Cir. 1986) (holding that Oklahoma
decision, it appeared that Oklahoma had jumped from the back of the pack into the vanguard of labor law. Yet, Hall dealt with an agency relationship in which the employee was wrongfully denied earned commissions and, thus, was not a typical employment contract. Although the court seemed to place no significance upon this point, the unique facts in Hall left an opening through which the court could later retreat from its audacious finding of an implied covenant of good faith. This retreat came two years later in Hinson v. Cameron.64

In Hinson, the Oklahoma Supreme Court rejected a tort claim for wrongful discharge. The court held that an at-will employee could not sue her employer for damages in excess of earned income. Recognizing the ambiguity of the holding in Hall, the court stated that relief was granted in that earlier case only because of the unique agency relationship and the plain injustice of depriving an employee of income already earned. As the plaintiff in Hinson was a traditional at-will employee and was not seeking the payment of previously earned income, the court refused to allow a cause of action. Employers, the court indicated, were under no duty to discharge employees only for good cause.69

B. Burk v. K-Mart: Oklahoma Adopts the Public Policy Exception to At-Will Employment

Whatever confusion still existed about the viability of the at-will employment doctrine was resolved by the Oklahoma Supreme Court in Burk v. K-Mart,69 in which the court recognized the public policy exception to terminable at-will employment. The plaintiff in Burk, an at-will employee, brought an action in contract and tort against her employer for breach of the implied covenant of good faith and fair dealing in her employment contract. The plaintiff claimed that her employer’s agents had sexually harassed her, prevented her from performing her job responsibilities, and by so doing, constructively discharged her from her job.

"recognizes a covenant of good faith [that] is implicit in every contract, even in at will employment contracts").

62. In Hall, the plaintiff was an insurance agent who led a group of other agents in a protest against the dismissal of a fellow agent by the defendant, Farmers Insurance Exchange. Consequently, the insurance company terminated Hall’s agency and refused to pay him the value of future commissions that had already been earned.

63. In reviewing cases from other jurisdictions invoking the implied covenant of good faith, the Hall court noted that these cases dealt with a contract between an employer and an employee, not between an agent and principal. Id. at 1030. But the court found "nothing in the distinction which makes the application of the [implied covenant] any less desirable." Id.

64. 742 P.2d 549 (Okla. 1987).
65. Id. at 552.
66. Id.
67. Id.
68. Id.; see also Blanton v. Housing Auth. of Norman, 794 P.2d 412, 417 (Okla. 1990) (refusing to extend Hall to cases where a plaintiff seeks to recover future unearned income).
69. Hinson, 742 P.2d at 552.
70. 770 P.2d 24 (Okla. 1989).
71. Id. at 28.
The court in Burk initially settled the controversy arising from Hall v. Farmers Insurance Exchange regarding the scope of the implied covenant of good faith. While the court in Hinson v. Cameron had declined to impose a duty of good faith on employees, it had left unresolved the question of whether bad faith discharges were allowable. In Burk, however, the court explicitly repudiated any notion of a covenant of good faith in the employment-at-will context. Such a rigorous standard, the court reasoned, "would subject each discharge to judicial incursions into the amorphous concept of bad faith." Motivated by the practical concerns of enforcement and the fear that the good faith standard was overly broad, the court rejected the application of Hall to at-will employment.

The Burk court was not willing to acquiesce to every termination of an at-will employee, however. Recognizing the trend in other jurisdictions, the court chose instead to fashion a new remedy in tort, available in an ostensibly narrow class of cases in which the discharge is contrary to a clear mandate of public policy. This modification of at-will employment, the court reasoned, is an equitable accommodation of the competing interests of both employers and employees, as well as society. Thus, the court fashioned a common law action for wrongful termination in violation of a public policy of the state.

The court in Burk was aware of the dangers of vexatious litigation under the newly created exception and mindful of the protean nature of the term "public policy." As a result, the court attempted to clearly demarcate the borders of the public policy exception. The court concluded that prior judicial decisions, as well as constitutional, statutory, and regulatory provisions, were the appropriate expressions of Oklahoma's public policies. However, while the sources of public policy were broad, the exception was to be quite limited. As the court stated: "[T]he circumstances which present an actionable tort claim under Oklahoma law is [sic] where an employee is discharged for refusing to act in violation of an established and well-defined public

72. See Harry F. Tepker, Jr., Oklahoma's At-Will Rule: Heeding the Warnings of America's Evolving Employment Law?, 39 OKLA. L. REV. 373, 374 (1987) (arguing "bad faith" discharges were actionable in Oklahoma and expressing need for further judicial clarification of the at-will rule). See supra text accompanying notes 55-63.
73. See supra text accompanying notes 64-69.
74. Burk, 770 P.2d at 27.
75. Id. (quoting Hinson, 742 P.2d at 554).
76. Id.
77. See supra text accompanying notes 45-48.
79. Id.
80. Id. at 27.
81. Id. at 28-29.
82. Id. at 29. The court stated: In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may also establish the relevant public policy. However, courts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject. Id. (citation omitted).
policy or for performing an act consistent with a clear and compelling policy.\textsuperscript{83} In this language, the court indicated that the public policy exception was applicable only to those cases in which an employee was discharged for volitional activity, i.e. acting or refusing to act. Thus, a whistleblower who reported illegal activity or an employee who refused to participate in illegal activity had a cause of action under \textit{Burk}. However, discharges due to status characteristics such as race or sex did not seem to fall under the rubric of the \textit{Burk} public policy exception.\textsuperscript{84}

The recognition of the public policy exception led immediately to considerable litigation, giving courts the early opportunity to clarify the holding in \textit{Burk}.\textsuperscript{85} In these cases, ranging from dismissals for whistleblowing\textsuperscript{86} to dismissals for giving testimony to Congress\textsuperscript{87} or refusing to take a polygraph test,\textsuperscript{88} the volitional standard was consistently applied, although never explicitly stated as the rule. It was clearly implied in these cases that a termination was not actionable unless the employee was dismissed for \textit{acting} in a way required by the public policy of the state. Employment discrimination, it seemed, could not be the basis for a claim under Oklahoma's public policy exception.\textsuperscript{89}

In \textit{Rosenfeld v. Thirteenth Street Corp.},\textsuperscript{90} the Oklahoma Supreme Court had the

\begin{quote}
83. \textit{Id.}

84. This interpretation of \textit{Burk} is consonant with the general parameters of the public policy exception set by other jurisdictions. For example, in Delaney v. Taco Time Int'l, 681 P.2d 114, 117 (Or. 1984), the Oregon Supreme Court divided public policy tort cases into three categories: (1) cases where a plaintiff was discharged for fulfilling a societal obligation, such as serving on a jury; (2) cases where a plaintiff was fired for the pursuing private statutory rights, such as the filing of a workmen's compensation claim; and (3) cases where no other remedy exists to vindicate the public policy of the state. Another instructive classification of public policy exception cases was provided by the Missouri Court of Appeals in Boyle v. Vista Eyewear Inc., 700 S.W.2d 859 (Mo. Ct. App. 1985). In Boyle, the court held that the public policy exception covers: (1) terminations for refusal to perform criminal acts or acts contrary to public policy; (2) terminations for reporting employer violations of the law or public policy; (3) terminations for acts that public policy encourages, such as jury duty; and (4) terminations for seeking government benefits, such as workmen's compensation. \textit{Id.} at 874-75; see also Note, The Public Policy Exception, \textit{supra} note 4, at 1936-37 (outlining three classifications of public policy exception cases).

85. In McGeehee v. Florafax Int'l, 776 P.2d 852 (Okla. 1989), the Oklahoma Supreme Court gave retroactive effect to its holding in \textit{Burk}.


88. Pearson v. Hope Lumber & Supply, 820 P.2d 443 (Okla. 1991). In Pearson, the court articulated a prudential limitation on the public policy exception. The plaintiff in the case was discharged for refusing to submit to a polygraph examination. The plaintiff claimed that his termination violated the Oklahoma Polygraph Examiners Act, 59 OKLA. STAT. §§ 1451-1476 (1981), which provides that the state Polygraph Examiners Board can revoke the license of any polygraph operator who does not inform a subject that participation in the test is voluntary. The Oklahoma court found that the statute was not designed to regulate conditions of employment. \textit{Pearson}, 820 P.2d at 445. As a result, the statute could not serve as the source for a claim under Oklahoma public policy exception. \textit{Id.}

89. See Johnson, \textit{supra} note 60, at 657 (concluding that an employee who was discharged due to race or sex discrimination would not have claim under \textit{Burk}).

90. 117 Lab. Cas. (CCH) \textsection 56,446 (Okla. 1989).
\end{quote}
opportunity to address the application of the public policy exception to employment
discrimination. In Rosenfeld, an employee-at-will claimed that he was terminated
because of his religious affiliation and his decision to report the illegal acts of his
fellow employees. In finding that the plaintiff had stated a claim under Burk, the court
identified the grounds for an actionable public policy claim.\textsuperscript{91} Such grounds included
discharges for:
(a) refusing to participate in illegal activity;
(b) performing an important public obligation;
(c) exercising a legal right or interest;
(d) exposing some wrongdoing by the employer; and
(e) performing an act that public policy would encourage or refusing to do
something that public policy would condemn, when the discharge is coupled with a
showing of bad faith, malice, or retaliation.\textsuperscript{92}

It is difficult to see how a claim for religious discrimination fits into any of these
categories. Indeed, the court in Rosenfeld seemed to recognize this, focusing its
atentions on the plaintiff's claim that he had been discharged for whistleblowing, a
termination clearly falling within the criteria contemplated in the above list.\textsuperscript{93} Rosenfeld, then, appeared to tacitly reaffirm the volitional test, i.e., the public policy
exception does not embrace situations in which an employee is discharged for a trait
such as race, sex, or religious affiliation.

If, in the aftermath of Rosenfeld, the volitional test was a tenable interpretation of
Oklahoma's public policy exception, it was, in fact, far off the mark. Contrary to the
implications of all earlier cases, the Oklahoma Supreme Court in Tate v. Browning-
Ferris Industries\textsuperscript{94} applied the public policy exception to a racially motivated
discharge. In creating a common law action for employment discrimination, Tate
provides an additional remedy for a plaintiff who may also seek relief under federal
and state anti-discrimination laws. This availability of statutory relief has led many
jurisdictions to reject the application of the public policy exception to discrimination
claims.

\textit{III. Tate v. Browning-Ferris Industries: Toward a Common Law
of Employment Discrimination}

\textbf{A. Facts}

Walter Tate, an African-American male, was terminated by Browning-Ferris
Industries (BFI) subsequent to the filing of two racial discrimination grievances with

\textsuperscript{91} Id. at 80,035.
\textsuperscript{92} Id. (quoting Hinson, 742 P.2d at 552-53).
\textsuperscript{93} A termination for whistleblowing or reporting the illegal acts of an employer or fellow
employees presents one of the strongest claims under the public policy exception. See PERRITT, supra
note 3, § 5.33, at 508; Palmateer v. International Harvester Co., 421 N.E.2d 876, 879 (Ill. 1981) (holding
that "there is no public policy more basic, nothing more implicit in the concept of ordered liberty than
the enforcement of a state's criminal code").
\textsuperscript{94} Tate v. Browning-Ferris Indus., 833 P.2d 1218 (Okla. 1992).
the Equal Employment Opportunity Commission (EEOC). When the EEOC failed to resolve the dispute, Tate sued in federal court under Title VII of the Civil Rights Act of 1964 and the Oklahoma Anti-Discrimination Act, alleging a racially motivated discharge. In addition to his pursuit of statutory remedies, Tate also sought relief under a pendant state claim for tortious wrongful discharge. Tate asserted that his termination violated the public policy of the State of Oklahoma and was actionable under the exception to at-will employment recognized in Burk.

BFI moved that the trial court dismiss the public policy tort claim on the grounds that federal and state human rights statutes provide a different and exclusive remedy for racially motivated discharges. The federal district court, uncertain as to the applicable law, certified the question to the Oklahoma Supreme Court for clarification.

B. Holding in Tate

The Oklahoma Supreme Court began its analysis by discussing the federal preemption of state law, although neither party in Tate contended that Title VII proscribed state laws against discrimination. Holding that Title VII was a floor beneath which federally provided protection may not drop rather than a ceiling above which it may not rise, the court restated the well-established principle that the federal civil rights law did not prohibit a plaintiff from seeking relief under analogous state laws. Indeed, the court recognized that Title VII allows for state remedies that are both different and broader than those provided by federal law.

97. Under the doctrine of pendant jurisdiction, state claims may be litigated along with a federal claim in federal court if both claims arise out of the same transaction or set of facts. 28 U.S.C. § 1367(e) (Supp. 1990); see also United Mineworkers v. Gibbs, 383 U.S. 715, 725 (1966) (holding that federal courts may exercise jurisdiction over both federal and state claims where both claims "derive from a common nucleus of operative fact"). Federal jurisdiction over state claims in these instances is a matter of discretion for the federal court. See, e.g., Jong-Yul Lim v. International Inst. of Metro. Detroit, 510 F. Supp. 722, 725 (E.D. Mich. 1981) (refusing to exercise jurisdiction over state claim for breach of contract in a Title VII action). Courts may be especially reluctant to exercise pendant jurisdiction over state claims when the federal claim is based on Title VII. PERRITT, supra note 3, §2.35, at 110. An in-depth examination of the issues involved here is outside the scope of this note. For a full treatment of the problems of litigating state claims alongside Title VII claims, see Andrea Catania, State Employment Discrimination Remedies and Pendant Jurisdiction Under Title VII: Access to Federal Courts, 32 AM. U. L. REV. 777 (1983) (advocating a fuller integration of Title VII and state claims).
98. Pursuant to the Uniform Certification of Questions of Law Act, 20 OKLA. STAT. § 1601 (1991), the United States District Court for the Western District of Oklahoma certified the following question to the Oklahoma Supreme Court:

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 25 (Okla. 1989).

Tate, 833 P.2d at 1220.
99. Tate, 833 P.2d at 1222-23.
100. Id. at 1223.
The court next addressed the more salient as well as vexing question of whether the state statute prohibiting employment discrimination precluded a tortious wrongful discharge claim. The Oklahoma Anti-Discrimination Act was enacted to provide a state equivalent to the Federal Civil Rights Act of 1964.101 The Oklahoma law prohibits employment discrimination based on race, color, religion, sex, national origin, age, or handicap102 and further provides a regulatory remedy through the Oklahoma Human Rights Commission.103 The Commission may, inter alia, order an award of reinstatement, back pay, and attorney's fees and costs.104

BFI argued that a public policy tort claim was, at best, duplicative of the Oklahoma Anti-Discrimination Act and, at worst, a distortion of carefully crafted legislative schemes. Tate, conversely, contended that the administrative remedies provided by the federal and state statutes were insufficient to redress his grievance and deter employers from discriminatory behavior. In holding that Tate could pursue both statutory and common law relief, the court analogized the Oklahoma statute with Title VII.105 As Title VII was not seen by the court as an exclusive remedy, the court reasoned that the Oklahoma Anti-Discrimination Act, based on that federal law, should likewise not be interpreted as precluding other sources of relief.106

The Tate court specifically identified two reasons for allowing a public policy exception claim for a racially motivated discharge. First, the court noted that a common law claim is always viable unless the state legislation textually demonstrates its intent to occupy the entire field of employment discrimination.107 The Oklahoma Anti-Discrimination Act does not show such an intent; it was not designed to be an all-inclusive remedy.108 The court wrote that "[w]here the common law gives a remedy, and another is provided by statute, the latter is merely cumulative, unless the statute declares it to be exclusive." 109 Thus, the court held that a state tort claim under the public policy exception should be seen as supplemental to statutory relief.110

Second, the court, with only a brief discussion, held that failure to recognize a tort action in Tate would create a dichotomous division of discriminatory remedies at state law.111 The Oklahoma Anti-Discrimination Act explicitly provides a private right of action only for cases of handicap discrimination.112 To deny victims of race

102. Id. § 1302(A).
103. Id. § 1501.
104. Id. § 1505(C).
105. Tate, 830 P.2d at 1229.
106. Id. at 1230-31.
107. Id. at 1225.
108. Id. at 1226.
109. Id. (citations omitted).
110. Id. at 1230-31.
111. Id. at 1229.
112. 25 OKLA. STAT. § 1901(A) (1991). The section provides:
  If a charge for discrimination in employment on the basis of handicap is filed under the
  provision of Sections 1101 through 1801 of Title 25 of the Oklahoma Statutes and is not
  resolved to the satisfaction of the charging party, within one hundred and eighty (180)
discrimination a private cause of action, the court held, would create the unacceptable situation where one class of discrimination victims is rewarded more generously than another.\footnote{113}

### IV. Evaluating Tate: A Framework for Analysis

The common law provides plaintiffs with procedural advantages and potentially greater remedies than are available under anti-discrimination statutes.\footnote{114} As a result, most courts that have considered the applicability of the public policy exception to cases of employment discrimination have concluded that a claim under the exception should not be allowed where relief is also available under statutes.\footnote{115} These courts have usually expressed concern that a common law claim would allow a plaintiff to circumvent carefully crafted statutory remedies.\footnote{116} A few courts, however, allow plaintiffs to pursue a common law public policy action in addition to seeking statutory remedies.\footnote{117} At first glance, these two approaches to the viability of a common law

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days from the filing of such charge, the charging party may commence an action for redress against any person who is alleged to have discriminated against the charging party and against any person named as respondent in the charge, such action to be commenced in the district court of this state for the county in which the unlawful employment practice is alleged to have been committed.

\textit{Id.} Under the Oklahoma statute, victims of handicap discrimination may seek nominal or actual damages and receive a jury trial. \textit{Id.}

\footnote{113. Tate, 830 P.2d at 1229.}

\footnote{114. \textit{See infra} text accompanying notes 129-37.}


\footnote{116. \textit{See, e.g.}, Melley v. Gillette, 475 N.E.2d 1227, 1229 (Mass. App. Ct. 1985) (holding that the creation of a new common law action would interfere with the relief of the state anti-discrimination statute).}

\footnote{117. Only Arizona, Michigan, Nevada, New Jersey, Oregon, and Washington unequivocally allow
discrimination claim seem completely irreconcilable. However, a close examination of the cases on this issue reveals a common analytical framework and raises questions about the cogency of the Oklahoma court's reasoning in *Tate v. Browning-Ferris Industries*. This part of the note examines the significance and appropriateness of expanding the public policy exception to embrace employment discrimination. This part focuses particularly on the legislative intent in enacting anti-discrimination statutes and different jurisdictions' approaches to common law discrimination claims.

A. The Legislative Intent in Federal and State Anti-Discrimination Statutes

While federal statutes often provide comprehensive remedial schemes to combat employment discrimination, courts have held that these statutes do not foreclose other available remedies. For example, Title VII, one of the most-invoked federal civil rights measures, was specifically designed to provide only a threshold of protection to employees. The legislative history of Title VII indicates that Congress was aware that other federal as well as state statutes prohibited employment discrimination. Yet Congress did not provide that Title VII preempted these alternative sources of relief. By refusing to make Title VII the exclusive remedy for employment discrimination, Congress condoned the granting of supplemental relief in


In *California Fed. Sav. & Loan v. Guerra*, 479 U.S. 272, 281 (1987), the United States Supreme Court reaffirmed the availability of other remedies under Title VII. The Court held that only in three situations is a state remedy preempted by federal law. *Id.* First, Congress may preempt state law by so stating in express terms. *Id.* Second, state laws are preempted by federal laws where the scheme of federal regulations is "sufficiently comprehensive" to indicate that Congress left no room for supplemental state action. *Id.* at 282. Third, state laws are preempted when they conflict with federal laws. *Id.*

Regarding Title VII, the Court found irrelevant the first and second paths leading to preemption. *Id.* Title VII, the Court held, neither explicitly preempts state anti-discrimination laws nor evinces congressional intent to make civil rights the exclusive domain of the federal government. Moreover, addressing the third avenue of preemption, the Court reasoned that Title VII was enacted with the intention of preserving state fair employment laws. Thus, the court concluded that there is a very narrow scope of preemption under Title VII. *Id.* at 283. Plaintiffs can usually seek relief under both federal and state laws.

See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974) (holding that "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination").

*Id.* at 49.

120. *Id.*
cases of workplace discrimination.122 Like Title VII, other federal civil rights statutes have also been held not to preempt additional state and federal remedies.123

Most state anti-discrimination statutes mirror Title VII.124 Although varying slightly between jurisdictions, these state human rights statutes usually forbid
discrimination at least on the basis of race, sex, and religion.125 In addition, the
statutes usually create an administrative body to hear complaints and provide redress
to the those aggrieved by discrimination.126 As state statutes closely resemble Title
VII, it is reasonable to impute to these statutes an intent not to create exclusive
remedial schemes.127 Absent clear indication from the state legislature that the statute
was intended to preclude all other types of relief, courts should allow other remedies
that are consistent with the statute. This view is consonant with the nearly uniform
understanding that civil rights laws are best served by the availability of multiple
enforcement mechanisms.128

B. Significance of Allowing a Common Law Action to Supplement Statutory Relief

Although federal and state anti-discrimination statutes provide remedies for
discrimination, there are reasons for questioning the effectiveness of these sources of
relief. Federal and state civil rights laws usually provide a short statute of limitations
period in which a complaint can be filed.129 Thus, an understandable reluctance to
file a claim can often result in an absolute bar to relief. In addition, there are usually
limits on the amount of available damages awarded under anti-discrimination

122. Id.
123. See, e.g., Canfiller v. Federated Dept Stores, 672 F.2d 1312, 1318 (9th Cir. 1982) (holding
that Age Discrimination in Employment Act does not preempt state common law causes of action);
Jackson v. Cox, 540 F.2d 209, 210 (5th Cir. 1976) (holding that 42 U.S.C. § 1985, one of the
Reconstruction Civil Rights Acts, does not preempt state law remedies); Neulist v. County of Nassau,
Rights Acts, provides "a remedy in federal courts supplementary to any remedy any state might have").
124. Only two states, Alabama and Arkansas, have not passed a comprehensive anti-discrimination
analysis of state human rights laws, see Sarah E. Wald, Alternatives to Title VII: State Statutory and
125. Compare, e.g., ALASKA STAT. §§ 18.80.010 to 22.10.020 (1992) (prohibiting discrimination
in employment on the basis of race, religion, color, national origin, age, sex, physical or mental
disability, changes in mental status, pregnancy, or parenthood) with IDAHO CODE §§ 67-5901 to 67-5912
(1992) (prohibiting discrimination on the basis of race, color, religion, sex, handicap, or national origin).
126. Wald, supra note 124, at 43 n.4 (citations omitted).
127. This interpretation has received the imprimatur of scholarly support. See Marc D. Greenbaum,
128. See supra text accompanying notes 118-23.
129. Under Title VII, for example, a complaint must be filed with the Equal Employment
Opportunity Commission within 180 days of the discriminatory act, or within 300 days in a state with
statutes. Moreover, in some instances a jury trial is not allowed under a statutory cause of action.

State attempts to deal with discrimination are particularly fraught with problems. For example, state remedial schemes are often hampered by budgetary constraints that limit staff and resources. As a result, filing a complaint under the state statute can be pointless. There is also evidence that state agencies responsible for enforcing anti-discrimination laws are not aggressive in carrying out their duties.

Recognition of a common law action for employment discrimination improves a plaintiff's chances for success in a wrongful dismissal suit. The most significant benefit to a plaintiff of a common law action is the availability of a greater range of damages. Whereas most employment discrimination statutes limit the amount of recoverable damages, a plaintiff suing under common law usually may seek the full panoply of damages allowed under state law, including compensatory and punitive damages. Furthermore, a trial before a jury is automatically available in a state common law action. There is some evidence that a jury trial increases a plaintiff's probability of success in a discrimination suit. Finally, a common law claim allows plaintiffs to avail themselves of the statute of limitations of such an action. While employment discrimination statutes typically provide a 180- to 300-day statute of limitations, the limitations periods on tort and contract actions are usually much longer. Thus, a plaintiff could file a claim under the public policy exception even where the time limit for seeking statutory relief has expired.

C. Common Law Actions for Employment Discrimination: A Typology

In determining whether a common law remedy may be sought in an area where statutory relief already exists, a court must determine whether the statutory remedy was intended to be exclusive. This project is easiest in cases where the legislature has clearly evinced its intentions. Where the legislature is silent as to a statute's exclusivity, the extent to which a statute will be viewed as precluding all other

131. See Perritt, supra note 3, § 2.38.
132. Wald, supra note 124, at 43. The limited capacity of state fair employment agencies was also recognized by Congress in considering the preemptive scope of Title VII. 110 CONG. REC. 7205 (1964) (statement of Sen. Clark), reprinted in U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, 1 THE LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 3344 (William S. Hein Co. photo. reprint n.d.) (stating that, in some states, enforcement of civil rights was hampered by "inadequate legislation, inadequate procedures, or an inadequate budget").
133. Wald, supra note 124, at 43 n.47 (citations omitted).
134. See, e.g., Harless v. First Nat'l Bank, 289 S.E.2d 692, 699 (W. Va. 1982) (awarding compensatory damages in a public policy exception tort case); Kelsay v. Motorola, 384 N.E.2d 353 (Ill. 1978) (holding that punitive damages were allowable under the public policy exception).
135. U.S. CONST. amend. VII.
136. Greenbaum, supra note 127, at 69 n.16 (citations omitted).
137. See supra note 129. In Oklahoma, the statute of limitations on most tort claims is two years.
12 OKLA. STAT. § 95 (1991). For most contract actions, the statute of limitations is five years. Id.
remedies is usually left to implication.\textsuperscript{139} The general rule, accepted in a majority of jurisdictions, is that where a statute creates a new right or imposes a new duty, the remedy provided by the statute for enforcement of that right is exclusive.\textsuperscript{140} However, where a right is established at common law, before a statutory remedy is created, the statutory remedy will generally be considered merely cumulative.\textsuperscript{141}

There are two related but analytically distinct instances in which these standard presumptions of statutory construction are rebutted. First, where a statute creates a new right, the new remedy will not be deemed exclusive if such remedy is plainly inadequate to vindicate the rights involved.\textsuperscript{142} Conversely, a statute's provision of detailed and comprehensive relief for a preexisting common law right will often be taken as indication that the legislation was intended to preempt other channels of relief.\textsuperscript{143} Second, although there is some authority to the contrary, most courts have held that a person aggrieved by the violation of a civil rights statute may pursue a remedy necessary for full restitution, even if the statute does not expressly provide for such a remedy.\textsuperscript{144}

Using the general rules of statutory construction, it is possible to draw a typology of public policy exception cases dealing with employment discrimination. Three categories of cases can be identified. The first category encompasses cases in which a claim under the public policy exception was allowed as a result of actions attendant to the employment discrimination, such as retaliation for filing a complaint with the EEOC or for resisting an unlawful activity.\textsuperscript{145} Although these cases arise from a charge of employment discrimination, they closely resemble retaliatory discharge cases, a well-recognized use of the public policy exception.\textsuperscript{146}

The second category covers cases in which courts have analyzed the source of the public policy in question and scrutinized the legislative intent in enacting the particular anti-discrimination statute. Absent indication of legislative intent to preempt the common law, courts have allowed common law claims where the public policy is rooted in a source other than the human rights statute itself.\textsuperscript{147} However, where the anti-discrimination statute is the source of the state public policy or the comprehensive

\textsuperscript{139} 2A NORMAN SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 50.05 (4th ed. 1975) [hereinafter SUTHERLAND].


\textsuperscript{141} SUTHERLAND, supra note 139, § 50.05, at 441.


\textsuperscript{143} SUTHERLAND, supra note 139, § 50.05, at 440-41; see also Mahoney v. Crocker Nat'l Bank, 571 F. Supp. 287 (N.D. Cal. 1983).

\textsuperscript{144} See, e.g., Pompy v. General Motors Corp., 189 N.W.2d 243 (Mich. 1971); Randall v. Cowlitz Amusements Inc., 76 P.2d 1017 (Wash. 1938).

\textsuperscript{145} See infra text accompanying notes 150-59.

\textsuperscript{146} See supra note 84.

\textsuperscript{147} See infra text accompanying notes 164-68.
nature of the statute indicates a legislative intent to preclude other remedies, courts have generally held that the statutory remedy is exclusive.\textsuperscript{148}

The third category consists of cases in which courts have focused on the grounds for implying a private right of action from a statute that does not expressly allow for such an action. Where the remedies in the state human rights statute have been found insufficient to enforce the public policy of the state or provide redress to the discharged employee, some courts have allowed plaintiffs to seek the more generous \textit{ex delicto} remedies available under the public policy exception.\textsuperscript{149}

\section*{1. Category One: Retaliation for Resistance to Discrimination}

The first category is well exemplified by contrasting two cases from Oregon. In \textit{Holien v. Sears, Roebuck & Co.},\textsuperscript{150} the plaintiff alleged that she had been given poor evaluations, denied pay raises, and ultimately discharged when she resisted her supervisor's sexual advances. The plaintiff sued, claiming unlawful sex discrimination under the Oregon Fair Employment Act and a public policy wrongful discharge.

The \textit{Holien} court began its analysis by noting that sexual harassment on the job was forbidden by both state and federal law.\textsuperscript{151} However, the court indicated that, while sexual harassment was odious, such conduct alone did not form the basis of a claim under Oregon's public policy exception.\textsuperscript{152} Instead, the court held that the plaintiff's termination for exercising her right to resist the harassment was the appropriate basis for the common law claim.\textsuperscript{153} Analogizing termination for resistance to sexual harassment to termination for filing a worker's compensation claim, the court in \textit{Holien} emphasized the retaliatory conduct directed against the plaintiff.\textsuperscript{154} Thus, the court resisted the opportunity to create a general common law action for employment discrimination, choosing instead to find that \textit{Holien} presented a standard type of public policy exception case: an employee dismissed for exercising a legal right.\textsuperscript{155}

In \textit{Kofoid v. Woodward Hotels, Inc.},\textsuperscript{156} the Oregon Court of Appeals was presented with a case that was superficially similar to \textit{Holien}. The plaintiff in \textit{Kofoid} was a waitress in the dining room of a restaurant owned by the defendant. The plaintiff, alleging that she had been fired as a result of a scheme to eliminate women from the dining room serving staff, brought a wrongful discharge suit. The court in \textit{Kofoid} acknowledged that the defendant's alleged motive of eliminating women from the dining room staff offended an important public policy of Oregon.\textsuperscript{157} Nevertheless,

\begin{itemize}
\item \textsuperscript{148} See infra text accompanying notes 169-72.
\item \textsuperscript{149} See infra text accompanying notes 174-89.
\item \textsuperscript{150} 689 P.2d 1292 (Or. 1984); see also Goldsborough v. Eagle Crest Partners, 805 P.2d 723 (Or. Ct. App. 1991) (holding that a public policy tort covers discharge in retaliation for resisting sexual harassment).
\item \textsuperscript{151} \textit{Holien}, 689 P.2d at 1297.
\item \textsuperscript{152} Id. at 1300. The Oregon criteria for the public policy exception are enumerated at supra note 84.
\item \textsuperscript{153} Id.
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Id.
\item \textsuperscript{156} 716 P.2d 771 (Or. Ct. App. 1986).
\item \textsuperscript{157} Id. at 774.
\end{itemize}
the court held that the facts in the case failed to justify a claim under the public policy exception to at-will employment because the plaintiff was not discharged for pursuing a legal right, but simply because she was a female.158 Distinguishing Holien as a case based on retaliation, the court stated that discrimination alone was not actionable at common law.159

The approach used by the courts in Holien and Kofoid represents an attempt to reconcile the public policy exception's traditional emphasis on volitional activity with the laudable desire to discourage discrimination in the workplace. The cases do not attempt to expand the public policy exception to cover employment discrimination, but, rather, by looking for evidence of retaliation, try to fit employment discrimination within the accepted parameters of the exception. However, the match does not necessarily work well, as represented by the different results in Holien and Kofoid. While the cases are distinguishable on a factual basis, they are not so readily differentiated on a theoretical one. If the concern of the Holien court is to eliminate workplace sexual discrimination, it seems inconsistent to jettison that commitment simply because, as in Kofoid, there is no evidence of a retaliatory discharge. Yet, the result in the latter case was required by a strict adherence to the guidelines of the public policy exception. Holien and Kofoid, therefore, point up both the possibilities and limitations of using a narrow view of the public policy exception in employment discrimination cases.

2. Category Two: Examining the Sources of the Common Law Action

In determining the exclusivity of a statutory remedy for discrimination, cases falling within this class have focused on two considerations: First, is there a common law right not to be discriminated against that antedates passage of the state anti-discrimination statute? Second, does the statutory remedy appear to have been intended by the legislature to be exclusive?160 Where there is evidence that the legislature intended the anti-discrimination statute to supersede the common law, the remedy provided by that statute will always be held to be exclusive.161 Likewise, if the statute creates the right as well as provides a remedy, courts will usually hold that it forecloses all other avenues of redress.162 In cases where the right existed prior to the statute, however, the statutory remedy will be deemed exclusive only where it appears that the legislature intended that it be so.163

In Bernstein v. Aetna Life & Casualty,164 the Ninth Circuit Court of Appeals was asked to determine whether Arizona would apply the public policy exception to a case of employment discrimination. In reaching its decision, the Ninth Circuit placed great effort in determining the sources of the state's public policy against employment

158. Id.
159. Id.
161. See supra text accompanying notes 138-44.
162. See supra text accompanying notes 138-44.
163. See supra text accompanying notes 138-44.
164. 843 F.2d 359 (9th Cir. 1988).
discrimination. Finding that the public policy of Arizona against discrimination was anterior to the passage of the state's human rights statute and further recognizing that the state statute was not intended to be exclusive, the court held that a public policy exception claim could be maintained. This line of reasoning was subsequently affirmed by the Arizona Court of Appeals in Broomfield v. Lundell. Similarly, a New Jersey court held that the state's public policy against sex discrimination was grounded in the state constitution; thus, the later passage of a state anti-discrimination statute provided only a remedy cumulative to a preexisting common law cause of action based on the state constitution.

The search for a source of public policy beyond the anti-discrimination statute itself offers a potentially promising source of integrating employment discrimination into the public policy exception. In most instances, however, this search has led courts to dismiss common law claims based on workplace discrimination. In Mahoney v. Crocker National Bank, for example, the plaintiff, claiming age discrimination, brought suit under the California Fair Employment and Housing Act as well as the public policy exception. The court acknowledged that a claim under the public policy exception would be allowed if the common law right existed prior to the enactment of the anti-discrimination statute. However, the court in Mahoney concluded that a common law right did not exist before the statute and, given the comprehensive nature of the statute, no private right would be implied. This method of analyzing the compatibility of common law and statutory remedies for discrimination has been followed in a number of other jurisdictions as well. In these cases, the courts have held that, where a right is created by a statute, the plaintiff will be limited to the remedies provided by the statute.

Where the state's expression of public policy can be found to predate the remedies provided by an anti-discrimination statute, there are logical grounds for allowing a common law remedy in addition to statutory relief. However, in most states, discrimination was not actionable at common law prior to the enactment of an employment discrimination statute. As a result, the reasoning employed in this

165. Id. at 364-65 (noting the rules of statutory construction).
166. Id. at 365.
170. Id. at 293.
171. Id. at 293-94. The court contrasted its finding with that of the court in Hentzel v. Singer, 188 Cal. Rptr. 159 (Cal. Ct. App. 1982). Hentzel concerned whether the Occupational Safety and Health Act preempted California's wrongful discharge action. The Hentzel court concluded that there was no preemption of the common law action because the public policy against health and safety hazards in the workplace predated the Act's prohibitions. Id. at 162-63.
category of cases offers little basis for the widespread creation of a common law of workplace discrimination.

3. Category Three: Implying a Private Right of Action from State Anti-Discrimination Statutes

In cases where a statute creates a right without explicitly providing for a private civil remedy, it is possible that such a remedy will be implied at common law.¹⁷³ In these instances, courts have concentrated on the legislative intent in enacting the statute.¹⁷⁴ Where there is evidence that the legislature intended to make the statutory relief exclusive, courts have refused to acknowledge private causes of action.¹⁷⁵ However, courts have occasionally been willing to grant a private right of action if the statute is interpreted as leaving room for supplemental remedies.¹⁷⁶

Consistent with the general judicial reluctance to recognize a common law of employment discrimination, most courts that have considered implied causes of action have rejected their availability where an anti-discrimination statute also provides remedies.¹⁷⁷ These courts have usually followed a similar approach: finding that the remedial scheme in the statute was comprehensive, the court held that this was indication that the legislation was intended to be the sole source of relief. In Wehr v. Burroughs,¹⁷⁸ for example, the District Court for the Eastern District of Pennsylvania held that the Pennsylvania state human rights statute did not imply a private civil remedy. The court stated that "sound policy dictates that the statutory remedial scheme be adhered to since we can presume that the legislature would have provided additional relief in the statute if it thought it necessary."¹⁷⁹ Similarly, in Melley v. Gillette Corp.,¹⁸⁰ a Massachusetts court rejected an implied common law action. The court, noting the advantages a plaintiff gains in a common law action, reasoned that such an action would conflict with the comprehensive remedial scheme outlined in the statute.¹⁸¹

Given the general tendency of civil rights statutes to allow for supplemental remedies, courts should be reticent to conclude that a specific statute precludes all other sources of relief.¹⁸² Only in cases where there is clear indication that the statute

¹⁷³. Restatement (Second) of Torts § 874A (1979).
¹⁷⁵. See, e.g., Scharn v. Curtis, 752 F.2d 1257 (7th Cir. 1985) (refusing to recognize a private right where statute provides adequate relief to plaintiff).
¹⁷⁹. Id.
¹⁸¹. Id. (stating that the "creation of a new common law action based on the public policy expressed in [the] statute would interfere with the remedial scheme").
¹⁸². See supra text accompanying notes 118-23.
was intended to be the exclusive mechanism of relief should courts foreclose other remedies. One of the most thoughtful and instructive considerations of these issues was provided by the Washington Supreme Court in *Bennett v. Hardy.* In *Bennett*, the plaintiffs claimed that they had been fired due to their age. However, the state human rights statute, which prohibited age discrimination, applied only to employers with eight or more employees. The defendant in *Bennett* had less than eight employees and, therefore, fell outside the coverage of Washington’s anti-discrimination statute. Consequently, the trial court concluded that no statutory cause of action existed against the defendant.

The Washington Supreme Court reversed the trial court’s dismissal of the age discrimination claim. Noting that the Washington Law Against Discrimination was silent regarding remedies against an employer engaged in discriminatory practices, the court held that aggrieved employees had an implied civil action under the statute. This right, the court continued, existed even for employees, such as the plaintiffs in *Bennett*, who fell outside the statute’s coverage.

The *Bennett* court reasoned that it was the duty of courts to fashion remedies where a statute has created a right of recovery but failed to specify relief. Holding that an implied cause of action furthered the purposes of the state anti-discrimination statute and was indeed necessary to assure the effectiveness of the legislation, the court further concluded that the statute was not intended to be exclusive. As a result, the court held that an implied common law action was a justified measure to further combat employment discrimination.

The *Bennett* approach provides the most well-reasoned ground for integrating employment discrimination into the common law. While *Bennett* placed significance on the lack of remedies provided in the Washington statute, its analysis seems equally applicable to cases where a statute does provide limited administrative remedies. Where the recognition of an implied cause of action would further the policies underlying such a statute or supplement inadequate remedies, a strong case can be made that such an implied action should be allowed even where limited administrative relief is available.

**V. Tate: The Right Decision for the Wrong Reasons?**

Part IV of this note outlined the justifications for allowing a common law action to supplement statutory relief for employment discrimination. There are both sound policy reasons and logical analytical grounds for recognizing such a private right of action. Thus, the decision in *Tate* can be defended. However, as this part of the note discusses, the *Tate* court failed to articulate any coherent basis for its holding.

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184. *Id.* at 1266.
185. *Id.* at 1262.
186. *Id.* at 1264.
187. *Id.* at 1261 (citations omitted).
188. *Id.* at 1261-62.
189. *Id.* at 1262.
mistakenly relying instead on a maxim of statutory construction that had little relevance to the specific facts presented in the case. This part critically analyzes the holding in *Tate* and presents two alternative grounds that provide greater justification for the result in that case.

A. *Tate*: A Critique

Against the backdrop of the analytical framework derived from other cases on the common law of employment discrimination, much of the Oklahoma Supreme Court's reasoning in *Tate* seems faulty. The confusion largely stems from the court's attempt to place *Tate* in the second category of cases: cases which have stressed the sources of the public policy against discrimination.\(^{190}\) The *Tate* court primarily emphasized that the Oklahoma Anti-Discrimination Act was not intended to supplant the existing common law rights of an aggrieved employee.\(^{191}\) While this characterization of the Oklahoma statute is well founded, the court ignored a fundamental point: the question of statutory preemption would only be salient if there was a common law right in Oklahoma not to be discriminated against that predated the passage of the anti-discrimination statute.\(^{192}\) In fact, there was no such common law right in Oklahoma and, as a result, much of the court's analysis in *Tate* is misdirected.

The rules of statutory construction that are adumbrated in *Tate* are generally similar to those of other jurisdictions. For example, the court acknowledged that where a statute creates a new right, breaches of that right are usually compensable only by the remedies provided in the statute.\(^{193}\) On the other hand, where a statute creates a new remedy for a preexisting common law right, the statutory remedy will only be cumulative.\(^{194}\) There is only one unique aspect to statutory construction in Oklahoma that is relied upon by the *Tate* court. In some jurisdictions, legislative intent to supersede the common law is implied from the existence of a comprehensive and detailed statute.\(^{195}\) By statutory mandate in Oklahoma, however, the common law remains in full force unless a statute explicitly provides to the contrary; legislative intent to preempt the common law is never inferred.\(^{196}\)

The lack of explicit prohibition of other remedies in the Oklahoma Anti-Discrimination Act is significant, but not in the way understood by the *Tate* court. The court acknowledged that the source of the public policy against race discrimination in *Tate* was the Oklahoma statute itself;\(^{197}\) there was no mention of any other foundation for the public policy exception. However, the *Tate* court was blithe to the implication of this fact: in Oklahoma, there simply was no common law action for employment

\(^{190}\) See supra text accompanying notes 160-72.
\(^{192}\) See supra text accompanying note 163.
\(^{193}\) *Tate*, 833 P.2d at 1226 n.36.
\(^{194}\) Id.
\(^{195}\) SUTHERLANE, supra note 139, § 50.05, at 440-41.
\(^{196}\) 12 OKLA. STAT. § 2 (1991). The statute provides in relevant part that "the common law, as modified by constitutional and statutory law, judicial decisions and the conditions and wants of the people, shall remain in force in aid of the general statutes of Oklahoma." *Id.*
\(^{197}\) *Tate*, 833 P.2d at 1225.
discrimination that predated passage of the state anti-discrimination law. Thus, contrary to the court's understanding, Tate is really not a case about preemption, in which a statutory remedy for discrimination was superimposed on a preexisting common law right, but an example of a case where a statute created a new right, the right to not be discriminated against, as well as provided a remedy for a violation of that right. As there was not a preexisting right against discrimination, it was nonsensical for the court to characterize the state anti-discrimination statute as "cumulative." The reasoning of the second category of cases should actually have led the court to reject Tate's claim under the public policy exception; where a statute creates a right and a remedy, that remedy will usually be held to be an exclusive one.198

Given, however, that the anti-discrimination statutes are generally not intended to be exclusive, the Tate court should have examined other possible justifications for granting a common law action. Both the first and third categories of discrimination-based public policy exception cases suggest reasons for holding that the plaintiff in Tate should be afforded a common law remedy. Like cases in the first category, the court could have emphasized the retaliation directed against the plaintiff in Tate for filing a complaint with the EEOC. By finding evidence of retaliation, the court could have found that Tate presented a standard type of public policy exception case. Alternatively, following the third category, the Oklahoma court could have concentrated its analysis on delineating the circumstances in which a new private right of action is implied from a statute. Either of these approaches provides more persuasive justification for the result in Tate than is actually offered by the decision.

B. Redeciding Tate: Alternative Grounds for Allowing a Supplemental Common Law Action

1. Tate as a Retaliatory Discharge Case

In Tate, the plaintiff alleged that his termination was in retaliation for filing a discrimination complaint with the EEOC. The court, however, placed little emphasis on the retaliatory motives of the employer, seemingly holding that discrimination alone was sufficient for a claim under Oklahoma's public policy exception.199 However, retaliation against an employee who exercises a legal right to file a complaint with a government agency can clearly be fit into the public policy exception. The Tate court did not need to decide the more novel question of whether discrimination fell under the exception to at-will employment.

By emphasizing the retaliatory actions of the employer, the Tate court would be following the example of the Oregon court in Holien v. Sears, Roebuck & Co.,200 in

198. See supra text accompanying notes 160-72.
199. The court in Tate states that "the employee who brings a common-law tort action . . . occasioned by either a racially motivated discharge or by one in retaliation for bringing a racial discrimination complaint" would state a claim under Oklahoma public policy exception. Id. at 1230-31 (emphasis added). This language indicates that discrimination alone will justify a common law claim.
200. 689 P.2d 1292 (Or. 1984).
which the public policy exception was applied to a discharge based on resistance to sexual harassment. In *Holien*, the court held that the plaintiff had a legal right to resist unlawful harassment; thus, the criteria for a public policy exception claim were clearly met.\(^{201}\) Likewise, the *Tate* court could have emphasized the legal right to file complaints with the EEOC and the retaliation due to the filing of the claim. This would have provided a narrow but persuasive rationale for the decision in *Tate* to allow a supplemental common law action.

2. *Tate* as Imposing a Private Cause of Action from the Oklahoma Anti-Discrimination Statute

The United States Supreme Court has outlined the proper criteria for determining whether a private right of action should be implied from a federal statute.\(^{202}\) This test has been applied to state statutes as well.\(^{203}\) The Court's guidelines for the proper use of implied rights of action indicate that such an action should be allowed in cases of employment discrimination.

In *Cort v. Ash,\(^{204}\) the Supreme Court articulated a four-part test for determining whether a private right of action should be implied from a statute that facially provides for no such claim. The thrust of the Court's reasoning was that a private action should be implied only when the action would help achieve the overall legislative purpose of the statute.\(^{205}\) Specifically, the *Cort* test requires that courts determine:

(a) whether the plaintiff is in the class the statute sought to benefit;
(b) if there is legislative intent to create or deny a private judicial remedy;
(c) whether a private judicial remedy would be consistent with the legislative scheme; and
(d) whether the cause of action is one traditionally relegated to state law.\(^{206}\)

This test, echoed by the language of the *Restatement (Second) of Torts,\(^{207}\) is designed to aid a court in ascertaining the legislative intent of a statute.

\(^{201}\) *Id.* at 1300. *See supra* text accompanying notes 150-55.


\(^{204}\) 422 U.S. 66, 78 (1975).

\(^{205}\) *Id.*

\(^{206}\) *Id.* For applications of the *Cort* test to anti-discrimination statutes, see Greenbaum, *supra* note 127, at 105-08 (writing that *Cort* supports recognizing a common law action in employment discrimination cases); Murg & Scharman, *supra* note 4, at 352-54 (arguing the *Cort* test militates against recognizing a common law remedy for employment discrimination).

\(^{207}\) Section 874A of the *Restatement (Second) of Torts* addresses the appropriate contexts in which a private cause of action may be implied from a statute:

When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class, a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

*Restatement (Second) of Torts § 874A (1979).*
Clearly cases of employment discrimination meet the first prong of the *Cort* test; a victim of discrimination is a member of the class that anti-discrimination statutes were designed to protect. The fourth prong is also easily met as erosion of the at-will rule has historically developed through the common law.\(^\text{208}\) Less obvious but equally true is that a common law employment discrimination claim meets the second and third prongs of *Cort*.

Discerning legislative intent can be particularly difficult in the cases of state statutes. There is often little explicit indication of the legislature's intent regarding private remedies.\(^\text{209}\) In the case of state anti-discrimination statutes, however, the analogy to federal civil rights statutes offers a useful guide. Like their federal counterparts, state civil rights laws are best viewed as a floor to relief, and not as a ceiling.\(^\text{210}\) Given the legislative willingness to allow multiple mechanisms of recovery for civil rights violations, common law actions for employment discrimination seem consonant with the statutory intent and would undoubtedly further the goal of deterring workplace discrimination that underlies these statutes.\(^\text{211}\) The third and fourth prongs of the *Cort* test are fulfilled.

In recognizing an implied right of action from the Oklahoma Anti-Discrimination Statute, a court would be giving judicial acknowledgment to the overarching purpose of all civil rights statutes: eliminating discrimination. The implied right of action is the most persuasive analytical approach to forging a common law action for discriminatory discharge. Creating a remedy broader in scope than that available by focusing on retaliatory discharge, the implied cause of action provides a coherent approach for integrating employment discrimination into the common law public policy exception to at-will employment.

**VI. Conclusion**

Increasingly, the merits of the employment-at-will rule are being questioned. An employer's arbitrary and unfettered right to discharge employees no longer seems to comport with society's standards of fairness. The at-will rule is particularly unacceptable when it is used as legal support for an employer's bigotry. It should not be surprising then that courts have moved to limit the ability of employers to

\(^{208}\) For a discussion of the development of employment-at-will in the United States, see supra text accompanying notes 9-48.

\(^{209}\) *See generally* Bauman, *supra* note 203, at 1252.

\(^{210}\) *See supra* text accompanying notes 118-37.

\(^{211}\) One further indication that the Oklahoma legislature did not intend for the Anti-Discrimination Act to preclude common law remedies is found in the Act's provision for a private right of action solely for handicap discrimination. 25 OKLA. STAT. § 1901 (1991). As the *Tate* court noted, it is anomalous that victims of handicap discrimination are afforded greater relief than victims of equally pernicious race discrimination. *Tate*, 833 P.2d at 1218. Indeed, such divergent remedies for members of a single remediable class — victims of discrimination — is contrary to the Oklahoma Constitution. OKLA. CONST. art. V, § 46. Implying a private cause of action for race discrimination from the Oklahoma Anti-Discrimination Act is not only grounded in the framework of *Cort*, but also the only way to make the statute coherent and free of constitutional infirmity.
discriminate on the basis of status characteristics, such as race, sex, and religious affiliation.

There are both sound policy and analytical grounds for extending the public policy exception to at-will employment to cover employment discrimination. Anti-discrimination statutes have almost universally been interpreted as allowing for supplemental avenues of relief. Moreover, a common law action, by virtue of its procedural advantages for a plaintiff, is a powerful tool in reducing workplace discrimination, the avowed goal of most civil rights statutes. The Tate decision is, then, ultimately a correct result. Yet, by its uncertain analysis, the Tate court failed to offer reasoning equal in quality to the equity of its decision.

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