DELAWARE EMPLOYMENT PRACTICES—A TEN YEAR RETROSPECTIVE

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I. INTRODUCTION

Although Delaware courts explicitly affirmed the doctrine of employment at will¹ as recently as 1982,² statutes and public policy considerations³ have made increasingly steady inroads into the doctrine.⁴ Arguably, such erosion began with the enactment of the Civil Rights Act of 1866,⁵ which is a general prohibition against racial

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1. The doctrine of employment at will (also known as termination at will) simply states that either party to an employer-employee relationship may terminate the employment at any time. 9 S. WILLISTON, CONTRACTS § 1017 (3d ed. 1967). The doctrine is usually referred to as "Wood's Rule" since it was first articulated by Horace G. Wood in his treatise on employment. H. WOOD, MASTER & SERVANT § 134 (1877). For discussions of employment at will, see Springer, The Wrongful Discharge Case, 21 TRIAL 38 (1985); Decker, At-Will Employment: Abolition and Federal Statutory Regulation, 61 U. DET. J. URB. L. 351 (1984); Epstein, In Defense of the Contract at Will, 51 U. CHI. L. REV. 947; Note, Protecting Employees at Will Against Wrongful Discharge, 96 HARV. L. REV. 1931 (1983).


3. See supra notes 27-28 and accompanying text (the general policy against firing an employee without cause as demonstrated in Delaware's Merit System).


5. 42 U.S.C. § 1981 (1982). Popularly known as § 1981, the statute provides: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

Id.
discrimination. Subsequent federal statutes, most notably Title VII, have also proved to be a fertile source of employment discrimination litigation. In addition, an employee may utilize various state statutes and common law causes of action to press a claim of unlawful treatment or dismissal. Thus, while lip service is paid to the doctrine, courts and legislatures continue to chip away at it.

This article examines actions brought against Delaware employers for unlawful treatment of employees. Parts II and III discuss federal and state actions reported during the ten year period from 1975-1985. Frequently, these decisions deal only with procedural matters and fail to reach the merits; thus the lawfulness of certain behavior is difficult, if not impossible, to assess. Nevertheless, such decisions are critically important since the outcomes effectively foreclose consideration of the merits. Even when the merits are addressed, however, it is often difficult to determine the basis for the decision. A plaintiff will normally assert more than one basis to increase his chances of success, and the opinions frequently do not separate the different causes of action.

II. Federal Causes of Action

A. Title VII—Civil Rights Act of 1964

Title VII provides the most advantageous avenue for a plaintiff seeking relief from alleged unfair employment practices, as it specifically forbids discrimination with respect to compensation and terms and conditions of employment. Under the statute, employers are expressly prohibited from discriminating on the basis of race, color, religion, sex, or national origin. Title VII also protects from reprisal any employee who exercises statutorily granted rights. Despite these

7. This is especially true with respect to the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§ 1981, 1985 (1985). Since Title VII and § 1983 provide the basis for most of the federal litigation in the area of employment, sections 1981 and 1985 will not be considered in this discussion.
favorable substantive provisions, however, Delaware plaintiffs have generally been unsuccessful in prevailing on Title VII claims.\textsuperscript{10}

1. Race

In cases where the merits of racial discrimination charges have been considered, plaintiffs have been successful in only two instances. In \textit{Stallings v. Container Corp. of America},\textsuperscript{11} three black plaintiffs charged that they had been passed over for promotions to shift foremen as a result of Container's racially discriminatory employment practices.\textsuperscript{12} Specifically, plaintiffs established that Container did not post notice of shift foreman openings; had no set procedure by which interested wage-roll employees, upon learning of the openings, could apply for these positions; had no written job qualifications or criteria for shift foremen; and had no systematic review or evaluation of the wage-roll employees' performance or qualifications, either on an ongoing basis or at the time a shift foreman position became available.\textsuperscript{13} The court found that these "subjective criteria promotion practices" left much room for the "operation of racial bias to the prejudice of blacks,"\textsuperscript{14} and that the practices did, in fact, have a disparate impact upon blacks.\textsuperscript{15}


\textsuperscript{11} In only two cases proceeding to the merits were plaintiffs successful. See Wilmore v. City of Wilmington, 669 F.2d 667 (3d Cir. 1983); Stallings v. Container Corp. of Am., 75 F.R.D. 511 (D. Del. 1977).


\textsuperscript{13} \textit{Stallings}, 75 F.R.D. at 515. When a shift foreman position opened up, the plant manager would receive recommendations from the personnel director, the general supervisor, and shift foremen within the department. Wage-roll employees from other departments could be recommended. The ultimate decision was made by the plant manager. \textit{Id.} at 515-16.

\textsuperscript{14} \textit{Id.} at 516.

\textsuperscript{15} The court considered the plaintiffs' descriptions of their own experiences with the system, and statistical data concerning the black population of the pool from which supervisory candidates were chosen and the number of blacks selected for the positions. However, the court's conclusion that disparate impact existed was based upon the evidence of the plaintiffs' own experiences. The court found that the statistical evidence was insufficient to indicate a disparate impact upon blacks. \textit{Id.} at 516-20.
Minority fire fighters successfully prosecuted a class action suit alleging discriminatory promotion policies in *Wilmore v. City of Wilmington*. Plaintiffs charged that an informal system of exposing whites to administrative duties gave them an unfair advantage over minorities on the formal written promotion tests, which included an administrative task analysis section. In reversing the district court, the Third Circuit found that fire fighters were selected for the administrative jobs not for any particular administrative expertise, but because of the personal preferences of their superiors. Moreover, the record showed that minority fire fighters qualified for the administrative jobs were not chosen. As a result, the court found no reason to assume that the qualities of the whites selected were so superior as to explain their better performances on the formal promotional examinations.

Other plaintiffs have not fared quite so well. In *Morris v. Board of Education of Laurel School District*, a non-tenured women's basketball coach's contract was not renewed, ostensibly due to repeated instances of insubordination. Plaintiff, however, alleged that the true motive was racial discrimination. The court found that although plaintiff had presented a *prima facie* case of racial discrimination, she had

17. *Id.* at 669.
18. *Id.* at 675.
19. *Id.*
21. *Id.* at 195. The "insubordination" consisted of the plaintiff's boyfriend attending team practice while waiting for her to finish. The plaintiff had been advised through a memorandum that there were to be no spectators at the practices. However, parents and previous students had attended the practices with the knowledge and apparent acquiescence of the board. *Id.* at 195.
22. See McDonnell-Douglas v. Green, 411 U.S. 792 (1973) (elements necessary to establish a *prima facie* case of racial discrimination: (1) evidence of discriminatory motive, (2) plaintiff is a member of protected class, and (3) those not members of the protected class were treated more favorably). *See also infra* notes 376-396, 411-412. If the plaintiff makes a *prima facie* showing on each element, the burden then shifts to the defendant employer to produce evidence that its action had a legally permissible foundation. Should the employer produce such evidence, the burden returns to the plaintiff to prove "by competent evidence that the presumptively valid reasons for . . . rejection were in fact a covering for a racially motivated decision." *McDonnell-Douglas*, 411 U.S. at 805.

In the case at bar, the court did not accept the school district's explanation that the plaintiff's repeated insubordination caused the board to deny renewal of her contract. The court found that the plaintiff had "convincingly demonstrated that the reasons given . . . for [the] recommendation of non-renewal were not in fact the reasons for that recommendation." *Morris*, 401 F. Supp. at 201.
failed to establish that the board's action was a cover-up for a racially discriminatory decision. Specifically, the court noted that the evidence produced by both parties indicated that the disparate treatment between plaintiff and other coaches was attributable not to her race, but to a letter written by a parent claiming that she was cohabiting with a drug addict. Because plaintiff was unable to prove that her nonrenewal was racially motivated, the court granted judgment for defendant.

A black plaintiff was also unsuccessful in Davis v. Carolina Freight Carriers Corp. Plaintiff had been fired for providing false information on his employment application, but was subsequently rehired. He was again discharged after accumulating a less than distinguished employment record which, in the space of one month, included tardiness, absenteeism, poor recordkeeping, inaccurate and falsified expense records, extended lunches and sleeping at a training seminar. The court found that his termination and replacement by a white did not constitute a racially based firing.


24. A white football coach repeatedly violated the Delaware Secondary School Athletic Association (DSSAA) provisions against allowing non-teacher coaches to assist at practices and games by permitting his son to do so. School officials twice sent a memo to the athletic director requesting him to put an end to this practice. A third memo to the athletic director warned that the violation would have to be reported if it continued. This coach had also consistently failed to attend faculty meetings as required. Despite such violations, this coach was later appointed athletic director, where he continued to violate school and DSSAA rules. However, no disciplinary action was ever instituted against him. Id. at 199-201.

25. Id. at 201-02. Further, the court noted that the plaintiff's own testimony, as well as other evidence, showed that the relationship between the plaintiff and the school superintendent was an amicable one. Id. at 202.

26. Id. at 202.


28. The plaintiff had concealed the fact that he was on probation. Id. at 1494.

29. Id.

30. See Scott v. University of Del., 455 F. Supp. 1102 (D. Del. 1978), aff'd, vacated, and remanded in part, 601 F.2d 76 (3d Cir. 1979), cert. denied, 444 U.S. 931 (1980) (black professor denied tenure; nonrenewal based on opinions of other department members that plaintiff had not developed the high performance levels in scholarship and teaching that would justify renewing his contract; no evidence of racially discriminatory motive); Burris v. Davidson Transfer & Storage Co., 520 F. Supp. 935 (D. Del. 1981), supp. op., 527 F. Supp. 1029 (D. Del. 1982), aff'd without opinion, 714 F.2d 120 (3d Cir. 1983) (black truck driver alleged that employer had discriminated against him by failing to recall him from layoff because of his race; evidence showed that several similarly situated white truck drivers were not recalled from layoffs, which were made according to seniority; plaintiff failed to
Cases involving allegations of racial discrimination which are resolved on procedural matters may also be important. Even though the merits are not addressed, the court's preliminary resolution may provide an indication of how it would rule were the case to proceed to trial. In Cannon v. State of Delaware,31 plaintiff was dismissed from her job at a state hospital after she failed to report to work for a period of nine days.32 The day after her termination, she filed a grievance with the State Personnel Commission.33 The hospital director, after a grievance hearing, upheld her termination.34 Plaintiff then filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that the Personnel Commission had denied her a hearing because of her race. The Commission subsequently provided plaintiff with a hearing and unanimously upheld her discharge.35 The EEOC then processed plaintiff's complaint and informed her of her right to sue. However, the EEOC failed to notify the state Department of Labor of plaintiff's complaint as required by Title VII.36

Pursuant to her right to sue, plaintiff instituted this action alleging that the denial of a hearing before the Personnel Commission was an act of racial discrimination.37 The state moved to dismiss for

 establish *prima facie* case of racial discrimination); EEOC v. E.I. du Pont de Nemours & Co., 445 F. Supp. 223 (D. Del. 1978) (defendant's hiring, transfer, promotion, and seniority system in the past Title VII period did not violate the statute; fact that no blacks had yet moved into upper-level jobs did not prove that post-Title VII employment practices were racially discriminatory).


32. Since plaintiff was a non-probationary employee, she could only be dismissed for good cause. Plaintiff had failed to produce an acceptable medical excuse for her absence. *Id.* at 343.

33. *Id.* Although the Commission has the authority to hear appeals from discharged state employees, a different appeal procedure could be substituted if one was provided in the collective bargaining agreement. It appeared that plaintiff's union had agreed to a different procedure. The state argued that plaintiff's failure to exhaust her administrative remedies deprived the federal court of jurisdiction. Because of the lack of clarity as to the correct appeals procedure, however, the court allowed plaintiff to continue. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. The facts are set out in detail because they are an excellent example of the procedural morass with which an unsophisticated employee is faced if he wants to contest his termination, especially when plaintiff is acting pro se (as was Ms. Cannon). Although the problem may be lessened when a plaintiff is assisted by counsel, this is nevertheless a troublesome situation, and not all courts may be as lenient as the court was here.
failure to exhaust administrative remedies and because the Personnel Commission was not an "employer" within the meaning of Title VII. The court denied the motion, holding that the Personnel Commission was an "agent" of the state of Delaware responsible for supervising the operation of the merit system and the Act expressly covered such an "agent."

Furthermore, the court noted that the EEOC had failed to follow its own regulations by not notifying the Department of Labor of plaintiff's discrimination charge; allowing the EEOC's negligence to bar her right to sue under Title VII would "work an injustice inconsistent with the objectives of Title VII." Consequently, the court granted plaintiff an additional thirty days to file her complaint with the Department of Labor.

In Washam v. J.C. Penney Co., plaintiff alleged that he was discharged from his job as security manager as a result of racial discrimination. Plaintiff filed complaints with both the Delaware Department of Labor and the EEOC. In a separate action, the National Labor Relations Board (NLRB) concluded that defendant had committed an unfair labor practice and ordered that plaintiff be reinstated with back pay. Subsequently, the EEOC determined that there was reasonable cause to believe that plaintiff's discharge was

39. Id. at 345.
40. Id. at 347. 42 U.S.C. § 2000e-5(e) provides that a charge must be filed with the EEOC within 180 days of the "allegedly unlawful employment practice." In this case, the allegedly unlawful act occurred on September 19, 1979. Obviously, then, the statute of limitations would have run, thus barring plaintiff's claim. This is important because the original complaint filed with the EEOC alleged only that plaintiff was deprived of a hearing due to her race. As the hearing was eventually provided, her complaint would be moot. However, the court permitted her to amend her complaint to include allegations of use of improper evidence at the Personnel Commission hearing. As plaintiff had not presented this claim to the EEOC, she was not entitled to the tolling of the 180-day limitations period. Thus, the court held that the 30-day period allowed to plaintiff for filing her complaint with the Department of labor also applied to the filing of her amended complaint. Cannon, 523 F. Supp. at 347.
42. Id. at 557.
43. Id. Prior to the NLRB's final decision, plaintiff was indicted by a state grand jury on charges of fraud and false statements to the unemployment office. He pleaded guilty to one felony count and two misdemeanor counts and was sentenced to four years imprisonment. Id. After the NLRB's decision, defendant reported plaintiff's conviction and incarceration to the NLRB and stated its refusal to reinstate him. The NLRB agreed that defendant did not have to reinstate the plaintiff. Id.
due to racial discrimination and issued a right to sue letter, whereupon plaintiff commenced the instant action.\(^41\) Defendant moved for summary judgment on the ground that plaintiff was barred from relief on his Title VII claims by \textit{res judicata} and \textit{collateral estoppel}.\(^42\) In denying defendant's motion, the court held that, on the facts of this case, neither doctrine barred plaintiff's Title VII claims. The court found that the NLRB's limited jurisdiction did not encompass plaintiff's racial discrimination claim,\(^46\) nor was the court convinced that this claim had actually been litigated before or decided by the NLRB.\(^47\) Furthermore, the legislative history and subsequent judicial construction of Title VII plainly indicated Congress' intention to permit splitting of race discrimination claims.\(^48\)

While each complaint alleging racial discrimination will be considered on its individual facts, one conclusion seems clear. The courts are unwilling to summarily dismiss such complaints without allowing plaintiffs any opportunity to prove their allegations.\(^49\) This is aptly illustrated by both \textit{Morris} and \textit{Davis}, both of which proceeded to trial on the merits even though the evidence indicated substantial reasons unrelated to race underlying their dismissals.\(^50\) This conclusion is also demonstrated by the courts' reluctance to dismiss plaintiffs' causes of action at the preliminary stage, as seen in \textit{Cannon} and

\footnotesize{\textbf{44.} Id. \\
\textbf{45.} Id. at 556. \\
\textbf{46.} Id. at 559. \\
\textbf{47.} Id. at 559-60. The court noted that the Administrative Law Judge's decision, which the NLRB affirmed in its entirety, contained no reference whatsoever to race discrimination. Even if the ALJ had considered the issue of race discrimination, collateral estoppel would still be inappropriate in light of the remedial goals of Title VII, which dictates against limiting claimants to a single forum. \textit{Id.} \\
\textbf{49.} \textit{See, e.g.}, \textit{Trader v. Fiat Distributors, Inc.}, 476 F. Supp. 1994 (D. Del. 1979). Black plaintiffs brought a class action against their employer and their union, alleging that defendants engaged in discriminatory employment practices, conditions, and privileges. While notice pleading is generally sufficient under Rule 8 of the Federal Rules of Civil Procedure, the Third Circuit requires that civil rights complaints specifically set forth the acts which allegedly violated plaintiffs' civil rights. Plaintiffs' complaint contained "vague and conclusory allegations of legal deprivations that fail[ed] to state facts upon which to weigh the substantiality of the claim." \textit{Id.} at 1196. Rather than dismiss the complaint, however, the court permitted plaintiffs to amend their complaint to allege the necessary facts. \\
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sexual advances, or quid pro quo cases in which the employee suffers a tangible job detriment for refusing a supervisor’s sexual advances; and (2) offensive or hostile environment cases where no tangible employment loss is involved. The EEOC has attempted to clarify the definition of sexual harassment through recently published guidelines, thereby giving plaintiffs a clearer standard by which to evaluate such actions. Ultimately, though, each case must be judged on its own facts.

52. See supra note 6.
Sexual harassment in the context of employment can form the basis for a Title VII claim. In the typical case, the female plaintiff claims that her male supervisor requested sexual favors from her and conditioned some job benefit, for example a promotion, on her assent. Such a claim is cognizable under Title VII.
For additional discussions of sexual harassment in employment, see Willboughby, Sexual Harassment in the Work Place: Title VII to the Rescue, 3 Del. L. REV. 1449 (1984); Annot., 46 A.L.R. Fed. 224 (1980).
54. Regardless, not every unwelcome sexual advance violates Title VII. For example, flirtations have been held insufficient. Furthermore, a plaintiff’s own sexually aggressive conduct or explicit conversation may bar a cause of action for sexual harassment. Ferguson, 560 F. Supp. at 1196.
55. Id. at 1197.
56. See 29 C.F.R. § 1604.11(a) (1985). The EEOC guidelines provide: Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when 1. submission to such conduct is made explicitly or implicitly a term or condition of an individual’s employment, 2. submission to or rejection of such conduct by an individual is used as the basis for employment decisions
In *Toscano v. Nimmo*, the female plaintiff alleged that granting of sexual favors was a prerequisite to promotion. The woman eventually selected for the position was engaged in an affair with the supervisor at the time he made the decision. The court found that sexual favors were, in fact, a condition to promotion, notwithstanding defendant’s contentions that the woman chosen was more qualified than plaintiff and that plaintiff had brought the suit in revenge for defendant’s having ended their own affair. The court further held defendant liable for the supervisor’s actions as it failed to take any action against him, even after being notified by plaintiff of his conduct. The court concluded that plaintiff was entitled to a remedy, which would be determined at a later hearing.

The defendant prevailed in *Ferguson v. E.I. du Pont de Nemours & Co.*, a lengthy case in which plaintiff alleged that sexual discrimination manifested itself in denials of promotion, sexual harassment, and refusal to pay wages commensurate with the nature of her work. Plaintiff, a college graduate, expressed a desire for pro-

affecting such individual, or 3. such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

*Id.*

57. *570 F. Supp. 1197 (D. Del. 1983).*

58. *Id. at 1198.*

59. *Id. at 1199.*

60. *Id. at 1199-201.* The facts of this case are particularly egregious. The supervisor, often intoxicated, telephoned female employees from his home and bragged about his sexual encounters with other female employees. He propositioned at least four women under his direct supervision, including plaintiff. He began his affair with the successful applicant (Nelson) prior to the selection. He phoned plaintiff at work and told her he had decided to give the job to Nelson because she was "very good at making him feel good." *Id.* He recommended that the position be graded at a level enabling Nelson to apply; this recommendation, while within hospital guidelines, was unusual enough to suggest that the supervisor intended to promote Nelson. The supervisor also attempted to have his superior sign the paperwork processing Nelson’s selection. *Id.*

61. *Id. at 1202.* The court found that evidence of this alleged affair came primarily from the supervisor; plaintiff denied any involvement with him. The court deemed plaintiff’s credibility greater than that of the supervisor, whose testimony was "riddled with illogical, inconsistent, or preposterous stories." *Id.*

62. *Id. at 1204.* The court was barely able to contain its incredulity: "No disciplinary action was imposed on Segovia and he was not ever reprimanded. To the contrary, he was in effect rewarded for his conduct by being transferred with a promotion." *Id.*

63. *Id. at 1206.*

64. *560 F. Supp. 1172 (D. Del. 1983).*

65. *Id. at 1177.*
motion from her secretarial position to a management level position. Several positions in which she was interested were eliminated during a period of economic recession. 66 Plaintiff claimed that she was not promoted to any of sixteen positions, eight of which were eventually filled by women. 67 The court found that plaintiff was qualified for only four of these positions. Moreover, the individuals selected for these four positions—all women—possessed qualifications superior to those of plaintiff. 68 The court determined that plaintiff had failed to established a prima facie case of gender-based discrimination. 69

Defendants were also successful in Lanyon v. University of Delaware 70 and Robinson v. E.I. du Pont de Nemours & Co. 71 In Lanyon, the court found that plaintiff had failed to establish a prima facie case that she was terminated from her position on the basis of her sex. 72 As a result of a ten percent budget cut, plaintiff’s job was eliminated, and the position was never reinstated. The court also noted that two male employees in this particular department were also adversely affected by the budget cut, thereby rebutting any inference of discrimination. 73 In a strongly-worded opinion, the court in Robinson ruled that plaintiff had “irrationally misconstrued” innocent statements and events and had inferentially admitted that “she was casting about for someone to blame” for her discharges by defendant and

66. Id. at 1180.
67. Id. at 1186.
68. Id. at 1186-88. In a detailed footnote, the court discussed each of the 16 individuals selected, expressly noting their qualifications. Id. at 1186 n.30.
69. Id. at 1199. The court also found that plaintiff failed to establish a prima facie case of sexual harassment. Assuming, without deciding, that the supervisor’s conduct did rise to an actionable level, the court found that defendant promptly investigated plaintiff’s complaints of sexual harassment, and the incidents “indisputably stopped”; therefore defendant was not liable for the supervisor’s conduct on respondeat superior principles. Id. Cf. Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983) (defendant took no action whatsoever on plaintiff’s complaints). Finally, the court found no merit in plaintiff’s wage discrimination claim, finding that even if it was true that she was doing work not expected of a secretary, this did not give rise to an inference of discrimination. Id. at 1199-206. Furthermore, the court noted that plaintiff had admitted that she never requested an adjustment of her salary based on such work, nor was her work substantially identical “with that of a staff person so as to justify a commensurate salary.” Ferguson, 560 F. Supp. at 1193, 1195.
70. 544 F. Supp. 1262 (D. Del. 1982).
72. Lanyon, 544 F. Supp. at 1273.
73. Id. at 1274. The budget cut forced the retirement of one male planner and reduced the salary of plaintiff’s male supervisor. Id.
four other employers.\textsuperscript{74} Plaintiff asserted twelve specific incidents as her basis for claiming that she was sexually harassed.\textsuperscript{75} The court found that plaintiff did not meet her burden of establishing that any sexual advances were made toward her.\textsuperscript{76} Even had she met this burden, she had introduced no credible evidence showing that her job would have been affected by the advances or that the company was aware of the problem.\textsuperscript{77} According to the court, plaintiff's failure to obtain a transfer or promotion and her eventual discharge "were due to her inability to improve certain personality problems she had and which adversely affected her working relationship with others."\textsuperscript{78}

Instances of sexual discrimination against males, though rare, are not unknown. In \textit{Fesel v. Masonic Homes of Delaware, Inc.},\textsuperscript{79} plaintiff, a male nurse, had inquired about employment with defendant and was informed that the Home did not employ male nurse's aides. The Home eventually filled the positions with females.\textsuperscript{80} The court held that plaintiff had established a \textit{prima facie} case of sex discrimination;\textsuperscript{81} nevertheless, the Home rebutted this presumption by showing a legitimate bona fide occupational qualification\textsuperscript{82} defense based upon the privacy interests of its residents. The court rejected plaintiff's argument that the Home could have hired a female "swing person" to assist the on-duty male aide by stating that the Home's duty to accommodate male personnel did not require employment of additional personnel.\textsuperscript{83}

\textsuperscript{74} \textit{Robinson}, 33 Fair Empl. Prac. Cas. at 881.

\textsuperscript{75} \textit{Id.} A representative sample of the alleged sexual harassment is as follows: (a) her supervisor stated, "I live my life at the office"; (b) on one occasion when plaintiff took off her sweater, her supervisor said, "Marion is taking her clothes off"; and (c) there was some office discussion of sexual activity in college. \textit{Id.}

\textsuperscript{76} \textit{Id.} at 883.

\textsuperscript{77} \textit{Id.} Cf. \textit{Ferguson v. E.I. du Pont de Nemours & Co.}, 560 F. Supp. 1172 (D. Del. 1983), involving the same defendant, in which plaintiff's allegations of sexual harassment were promptly investigated and resolved.

\textsuperscript{78} \textit{Robinson}, 33 Fair Empl. Prac. Cas. at 883.

\textsuperscript{79} 447 F. Supp. 1346 (D. Del. 1978), \textit{aff'd}, 591 F.2d 1334 (3d Cir. 1979). The primary issue in the case was whether sex was a bona fide occupational qualification; consequently, the case will be considered in greater detail in the context of the discussion of bona fide occupational qualification. \textit{See infra} notes 477-486.

\textsuperscript{80} \textit{Id.} at 1348.

\textsuperscript{81} \textit{Fesel}, 447 F. Supp. at 1349. Plaintiff demonstrated that: (1) he was male; (2) he applied for and was qualified for the nurse's aide positions; (3) he was rejected; and (4) thereafter, the positions remained open and the home continued to seek applicants.

\textsuperscript{82} \textit{See supra} note 79.

\textsuperscript{83} \textit{Fesel}, 447 F. Supp. at 1354.
In Zalewski v. M.A.R.S. Enterprises, Ltd., plaintiff alleged that he was discharged from his job, ostensibly because payroll was too high and there was not enough work for all the employees. However, a female was hired to perform plaintiff's job within a few days of his dismissal. Plaintiff also alleged that the owner of the company offered him the position of personal secretary, contingent upon his agreement to engage in homosexual relations with the owner. Plaintiff declined the position and was terminated several weeks thereafter. After learning that defendant had replaced him with a female, plaintiff filed a complaint with the EEOC. The complaint stated only that plaintiff was discharged and that a female had been hired in his place. Although plaintiff informed the EEOC of the homosexual proposition, he specifically requested that it not be included in the complaint. The court held that plaintiff's complaint set forth a valid cause of action for sex discrimination, but disallowed plaintiff's claim of sexual harassment.

Although the elements necessary to establish a *prima facie* case of sex discrimination are the same as for race discrimination, few Delaware plaintiffs bringing sex discrimination claims are successful on the merits. It is possible that plaintiffs alleging sex discrimination simply have very weak evidence to support the claims, as in *Robinson*. On the other hand, since the guidelines as to what constitutes such discrimination are not always precise, the conduct of which plaintiff complains may have to be particularly egregious. It is clear, however, that an employer must be prepared to rebut charges of unlawful employment practices upon discharge of an employee.

85. *Id.* at 603.
86. *Id.*
87. *Id.*
88. *Id.* at 604-05. The filing of a complaint with the EEOC is a jurisdictional prerequisite to a suit under Title VII. Since plaintiff never filed the charge of sexual harassment with the EEOC so it could be investigated, he was barred from including it in his present complaint by the statute of limitations and for failure to exhaust administrative remedies. *Id.*

It is unclear whether homosexuals and transsexuals have any right to protection in the employment relationship. The issue has not yet been squarely addressed in Delaware, nor do federal or state statutes expressly provide such protection. One unreported Delaware case involving a transsexual, Davis v. Credit Bureau Affiliated Servs. of Wilmington, No. 81-504 (D. Del. Mar. 25, 1982), held that statutes prohibiting sex discrimination are inapplicable to transsexuals. One reported case had a homosexual plaintiff; however, the suit was brought on first amendment and other constitutional grounds. Aumiller v. University of Del., 434 F. Supp. 1273 (D. Del. 1977).
3. Retaliation for Exercise of Title VII Rights

As noted earlier, Title VII prohibits an employer from retaliating against any employee who has complained of or opposed a discriminatory employment practice. To establish a *prima facie* case of unlawful retaliation, a plaintiff must show: (1) that he engaged in a protected activity (filing a discrimination complaint); (2) that he was subjected to adverse employment action by his employer; and (3) there is a causal link between (1) and (2). Essential to finding a causal link is a showing of the employer’s awareness that plaintiff had engaged in a protected action. Once plaintiff has presented a *prima facie* case of retaliation, defendant has the burden of producing evidence of a legitimate, non-retaliatory reason for the detrimental employment action. If defendant meets this burden, plaintiff must then prove that the proffered reason was a cover-up for retaliation.

The complaint spurring the alleged retaliatory actions need not be to an administrative body or other formal dispute resolution mechanism. In *Ferguson v. E.I. du Pont de Nemours & Co.* the court found that plaintiff’s complaint to management regarding the promotion system and her subjection to sexual harassment was a lawfully protected activity within the meaning of Title VII. Here, though, her employer’s response to that complaint was held not to be retaliatory. Plaintiff’s transfer to the secretarial pool while another position was being sought for her was not an adverse employment action because she maintained her level of pay and the reassignment was not permanent. Since she was unhappy with both her position and her supervisor, the temporary transfer was a rational solution. Her termination subsequent to the filing of her Title VII complaint, however, did establish a *prima facie* case of unlawful retaliation. Nevertheless, she was ultimately unsuccessful because the company

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89. *See Toscano*, 570 F. Supp. at 1205 n.11 (retaliatory conduct may extend to “discouraging” the filing of a discrimination complaint).
91. *See Ferguson*, 560 F. Supp. at 1200. Defendant needs only to prove evidence sufficient to rebut the presumption of retaliation raised by plaintiff; it need not prove the absence of retaliatory motive. *Id.*
92. *Id.*
94. *Id.* at 1200-01.
95. *Id.* at 1202.
96. *Id.* at 1201.
97. *Id.*
had presented her with an opening commensurate with her pay and skill level, which she chose not to accept. Since plaintiff could have remained employed, there was no evidence of the discriminatory animus required for a retaliation claim.\(^93\)

The black plaintiff in \textit{Goldsmith v. E.I. du Pont de Nemours & Co.}\(^99\) alleged that he was harassed by his area supervisor, placed on probation, and finally terminated for filing Title VII complaints.\(^100\) The court found that plaintiff had indeed been harassed by his supervisor.\(^101\) However, the court further found that plaintiff had been placed on probation for consistently high absenteeism and low productivity, and that he had been discharged for willful failure to comply with the terms of his probation;\(^90\) thus plaintiff had failed to prove that a retaliatory motive prompted his termination.\(^102\)

In \textit{Guilday v. Department of Justice},\(^103\) plaintiff proved that his failure to receive promotions was due to retaliation for his filing Title VII claims.\(^104\) Although plaintiff's superiors invariably "highly recommended" him for promotion in their comments on the promotion form, their choice on the form itself merely indicated that they "recommended" him;\(^105\) this was due largely to their awareness of his suit.\(^106\) The court found that defendant's claims regarding plaintiff's poor attitude and work were mere pretexts for retaliation.\(^107\)

\(^{98}\) \textit{Id.} at 1202.
\(^{100}\) \textit{Id.} at 240. However, the court found that plaintiff's claims of excessive monitoring, retaliatory work assignments, and retaliatory hindering of her promotional opportunities were unsupported by the evidence. \textit{Id.} at 240-43.
\(^{101}\) \textit{Id.} The court had previously held that the Delaware Department of Labor's decision that plaintiff had been fired for "just cause" in denying unemployment compensation benefits was not binding by either \textit{res judicata} or \textit{collateral estoppel} in addressing the question of retaliatory motive. None of these agency findings would "negate the possibility that race or retaliation may have also played a role" in plaintiff's treatment, i.e., that a white person would not have been discharged for such conduct. \textit{Goldsmith v. E.I. du Pont de Nemours & Co.}, 32 Fair Empl. Prac. Cas. (BNA) 1879, 1882 (D. Del. 1983).
\(^{102}\) \textit{Goldsmith}, 571 F. Supp. at 240-43.
\(^{103}\) 485 F. Supp. 324 (D. Del. 1980).
\(^{104}\) \textit{Guilday v. Department of Justice}, 451 F. Supp. 717 (D. Del. 1978) (plaintiff's claims of reverse race and reverse religious discrimination were dismissed as barred by the statute of limitations).
\(^{106}\) \textit{Id.} at 327. One supervisor commented: "'However, his present suit against the Service, which definitely [sic] not affecting his work, is inconsistent with the attitude needed to be a supervisor and precludes me from highly recommended [sic] him for a promotion to supervisor.'" \textit{Id.}
\(^{107}\) \textit{Id.} at 333. The court referred to several evaluations prepared by a number
The court awarded plaintiff two promotions with back pay to put him in the position he would have attained had his employer not engaged in retaliatory activity.\textsuperscript{108}

The plaintiff also successfully proved retaliation in \textit{Toscano v. Nimmo.}\textsuperscript{109} After plaintiff complained to a supervisor that a promotion had been conditioned on receipt of sexual favors, plaintiff's own supervisor stopped giving her the information necessary to do her job properly. He also failed to give her the kind of assignments normally given to the person in her position.\textsuperscript{110} She was further harassed with phone calls at work and at home telling her to stop complaining. Additionally, the supervisor deliberately attempted to create the false impression among plaintiff's co-workers that she had engaged in an affair with him.\textsuperscript{111} The court noted that plaintiff's voluntary demotion to a lower level could constitute a constructive demotion, but the facts did not support such a finding in this case.\textsuperscript{112}

A cause of action for retaliation is a potentially powerful weapon, since it is not conditioned on a plaintiff's success on the underlying Title VII claim. Nor does it require that a plaintiff file a formal action with an administrative agency; a complaint to one's supervisor will suffice to make an employer aware that a plaintiff has taken action. However, as in all Title VII cases, if an employer can show a legitimate, non-retaliatory reason for a plaintiff's adverse employment position, plaintiff must then prove that this reason is merely a pretext. For plaintiffs without solid documentation for support, this could prove too high a hurdle to cross. Nevertheless, the cause of action for retaliation is another pitfall of which an employer must be aware when discharging or otherwise taking action against an employee.

\textsuperscript{108} Id. at 334.
\textsuperscript{110} Id. at 1205.
\textsuperscript{111} The supervisor and his wife delivered a note intended for plaintiff to the admissions clerk, a person known to be indiscreet. The note purported to be a refusal to return certain personal items to plaintiff until she returned a necklace. The admissions clerk read the note to other employees. Id. at 1205.
\textsuperscript{112} Id. at 1206. Additionally, plaintiff alleged that other employees in the area were harassing her. The court found the evidence insufficient to establish a claim for constructive demotion. Id.

In contrast to the large number of sex and race discrimination cases filed in Delaware, relatively few complaints have alleged a Title VII violation on grounds of national origin or religious discrimination.113 Those which have been brought have been dismissed without reaching the merits.114 In Ricks v. Delaware State College,115 the plaintiff, a black Liberian, was denied tenure.116 The college had a policy of offering faculty members who did not receive tenure a "terminal" contract to teach for one additional year. At the end of that contract, the employment relationship ended.117 Plaintiff was advised on June 26, 1974, that the college did not intend to grant him tenure and that his employment would be terminated at the end of the 1974-1975 school year.118 Plaintiff did not file his complaint with the EEOC until April 4, 1975.119 The district court held that the 180-day statute of limitations for filing a complaint with the EEOC began at the time the decision to deny tenure was made and communicated to plaintiff, not the date on which the termination became effective.120 Consequently, since plaintiff had not filed within 180 days of June 26, 1974, his complaint was time-barred.121

B. Civil Rights Act of 1870 (Section 1983) and Due Process

Claims based on section 1983122 are necessarily intertwined with

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113. See Robinson v. E.I. du Pont de Nemours & Co., 33 Fair Empl. Prac. Cas. (BNA) 880 (D. Del. 1979) (only Delaware case to allege religious discrimination within the time period under consideration; court did not address plaintiff's claim as she offered no evidence in support thereof).

114. See, e.g., Skomorucha v. Wilmington Housing Auth., 504 F. Supp. 537 (D. Del. 1980). Plaintiff, an American-born white of Polish descent, was replaced in his position as comptroller by a black. Despite allegations in his complaint that his termination was based on national origin, plaintiff offered no evidence to support his claim.


116. Id. at 789.

117. Id.

118. Id. at 790.

119. Id.

120. Id. at 791.

121. In reinstating the district court opinion, the Supreme Court rejected the Third Circuit's reasoning that it would be unreasonable to expect an employee to begin litigation against an employer while still on the job. It should be noted that a great number of suits, especially those alleging denials of promotion, are brought while the employee is still working. It seems that it would be more unreasonable to require such employees to quit their jobs before bringing suit.

constitutional issues since, by its express terms, this section prohibits depriving, conspiring to deprive, or failing to thwart known plans to deprive a person of his constitutional rights. Sometimes statutory and constitutional claims are brought as separate causes of action; more often, though, they are bound together. An advantage to arguing the claims separately is that the defendant must have acted under color of state law to support a section 1983 action. The first issue in such cases, then, is whether the necessary state action existed. Since a private employer normally is not an arm of the state, any cause of action asserting a section 1983 claim combined with a violation of constitutional rights will fail as against a private employer. If the two are argued separately, the constitutional violation may withstand attack. Finally, because employment in the public sector is considered a property right an employee must be accorded due process before he is deprived of this right. This links the due process argument even more closely to section 1983 claims, as state action is more easily shown where the employment is in the public sector.

In Aiello v. City of Wilmington, plaintiff, a city fireman, was suspended after being charged with burglary. He brought suit based on section 1983 and the fourteenth amendment. The court summarily disposed of the section 1983 claim, holding that a city is not a person within the meaning of the statute. In addressing the fourteenth amendment issue, the court found that plaintiff did have

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Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


124. Since the two are usually so inextricably linked, no attempt to segregate the cases by underlying cause of action will be made in this discussion.

125. See Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) (holding that property interests are not created by the Constitution, but are created and defined by independent sources, such as state law or contract; nontenured professor's property interest in continued employment was created and defined by the terms of his employment, which did not provide for renewal; plaintiff had no property interest in his continued employment sufficient to invoke due process).


127. Id. at 1276.

128. Id. at 1283.
a cognizable property interest in his job that was entitled to due process protection because a fireman who had completed the probationary period was deemed a permanent employee and could not be dismissed without cause.129 Notwithstanding plaintiff's legitimate property interest, the court found the rudiments of due process had been satisfied in the manner and timing of his suspension.130 However, the delay of over three months in scheduling plaintiff's hearing may have violated the plaintiff's due process rights. Since the question of whether plaintiff was accorded a hearing "as soon as practicable" after his suspension was one of fact, summary judgment was thereby precluded.131

Teachers have a property interest in their continued employment,132 but not in any particular procedures for safe guarding that interest provided that minimum constitutional standards are met.133 In Anapol v. University of Delaware,134 a tenured professor was reinstated with back pay after he was dismissed without the pre-termination evidentiary hearing required by due process.135 The academic dishonesty which precipitated his discharge (falsification of documents in his promotion dossier) was not the sort of emergency which justified dispensing with procedural safeguards.136

129. Id. at 1286.
130. "Although his suspension was not attended by a formalistic observance of procedural niceties, there were present the rudiments of due process." Id. at 1289. The court found that the assistant chief had asked plaintiff at least twice for a statement clarifying the circumstances of his arrest. Plaintiff made only a limited response. The assistant chief later informed plaintiff that he was suspended until a formal hearing could be held. The court stated:

Due process does not require a governmental bureau charged with the protection of life and property to retain a member on active duty in the face of indications that he may be a danger to himself, others or their property when the member, upon informal confrontation, fails to proffer an explanation or scintilla of reassurance concerning the situation in which he is found. The concept of due process has never been inflexible, and leaves sufficient ground for summary actions in extreme situations.

Id.

131. Id. at 1291.
133. Brandywine Affiliate, NCCEA/DSEA, 555 F. Supp. at 852 ("Procedural safeguards, in themselves, are not liberty or property interests").
135. Id. at 680.
136. Id. at 678, 680. The court held that under the Third Circuit's opinion in Skene v. Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3d Cir. 1974), plaintiff was at least entitled to: (1) clear notice of the charge being considered,
The Plaintiff in *Aumiller v. University of Delaware* brought suit under section 1983 and the first amendment. Plaintiff, a homosexual theater professor, had been interviewed by newspapers regarding problems of gays in the community. At no time did he ever indicate that he was acting as a spokesman for the university. The university, convinced that plaintiff was advocating a homosexual lifestyle, decided not to renew his contract. The court held that the university was a “person” under section 1983 and could therefore be liable for damages. Further, the court found that nonrenewal of plaintiff’s contract, because of his public statements, violated his first amendment rights. Plaintiff was reinstated with back pay, and the defendants were ordered to remove any references to the incident from his employment records and to make no reference to it in any subsequent employment inquiries regarding Aumiller. The court also awarded punitive damages against the president of the university based on his “pernicious insensitivity” to plaintiff’s constitutional rights.

The plaintiff alleged denial of her first and fourteenth amendment rights in *Avalone v. Wilmington Medical Center, Inc.* Plaintiff, the
head nurse, contended that defendant forced her resignation, after she advised her superiors of the dangers of a new feeding technique. She claimed that this violated her rights of freedom of speech, and also that defendant’s action in dismissing her without a hearing denied her due process.\textsuperscript{143} The court noted that the fourteenth amendment encompassed only state action, not the actions of private individuals and entities. It then found that the hospital received no financial assistance from local, state, or federal governments.\textsuperscript{144} Moreover, neither the hospital’s receipt of medicare and medicaid benefits\textsuperscript{145} nor the fact that it was licensed and regulated by the state rendered its activity "state action" for purposes of the fourteenth amendment.\textsuperscript{146}

In \textit{Chalfant v. Wilmington Institute},\textsuperscript{147} the Third Circuit confronted the issue of whether the firing of a public library employee constituted the state action necessary to support a section 1983 claim.\textsuperscript{148} The court stated that whether an entity is the state, and therefore subject to section 1983, depends on analysis of the facts and circumstances of each case as it arises.\textsuperscript{149} The court reversed the district court, holding that the library was the state, and therefore its actions constituted state action.\textsuperscript{150} In making this determination, the court found the following facts dispositive: (1) the library derived more than ninety percent of its funds from tax revenue; (2) the local governments furnishing funds were represented on the library’s governing board; (3) the library was tax-exempt; (4) contracts identified the library as a government agent in furnishing public library services; (5) state law defined the level of library services and its structure, management, and organization; and (6) the main library was located on city-owned property under a rent-free lease as long as it continued to provide library services.\textsuperscript{151} Consequently, the court remanded the case to the district court for consideration of the merits of plaintiff’s section 1983 claim.\textsuperscript{152}

\begin{itemize}
\item \textsuperscript{143} \textit{Id.} at 933.
\item \textsuperscript{144} \textit{Id.}
\item \textsuperscript{145} \textit{Id.}
\item \textsuperscript{146} \textit{Id.} at 934.
\item \textsuperscript{147} 574 F.2d 739 (3d Cir. 1978).
\item \textsuperscript{148} \textit{Id.} at 743.
\item \textsuperscript{149} \textit{Id.} at 722 (citing Hollenbaugh v. Carnegie Free Library, 545 F.2d 382, 383 (3d Cir. 1976)).
\item \textsuperscript{150} \textit{Id.} at 745.
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} Two judges dissented, finding no state action. \textit{Id.} at 747 (Garth, J., dissenting).
\end{itemize}
The plaintiff, a tenured high school music teacher, was discharged for “willful and persistent insubordination” in *Eckerd v. Indian River School District*. He brought suit under section 1983 and the first amendment, claiming that the termination was actually due to his expressed disagreements with school policies and decisions and with his own performance evaluations. Although plaintiff had made these communications to the principal privately, the court held that their private nature did not remove them from first amendment protection. Similarly, defendant’s interest in a smoothly running organization did not permit it to infringe upon plaintiff’s right of free speech. The court then examined defendant’s argument that plaintiff would have been discharged regardless of his communications, and found that plaintiff’s alleged violations would not have justified his dismissal absent the protected speech.

*Hanshaw v. Delaware Technical & Community College* is one of the few cases to allege a conspiracy to deprive one of constitutional rights. In this class action, the plaintiffs complained of race and sex discrimination and retaliation for their exercise of Title VII rights. Further, they asserted that the college typically engaged in such action against blacks, women, and any employee who had previously signed a charge of discrimination. The court reserved a decision.

154. The teachers’ contracts expressly permitted them to express their opinions in response to evaluations and criticism. *Id.* at 1360.
155. *Id.* at 1358 (citing Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979)).
156. *Id.* at 1360.
157. *Id.* Once a plaintiff has made a *prima facie* showing that he is entitled to relief on the basis of a constitutional violation, defendant must demonstrate by a preponderance of the evidence that plaintiff would have been terminated anyway even without consideration of the protected speech. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977).
158. *Eckerd*, 475 F. Supp. at 1361-64. The defendants argued, for example, that plaintiff had missed two faculty meetings in eight years; he failed at least once to have the band appear at a rescheduled football game; he knowingly violated district grading policy by giving lower grades than permitted; and he failed to comply with three requests to provide the principal with a list of students qualified to participate in the County Chorus. The Court found that several of these “insubordinations” occurred as a result of misunderstandings or plaintiff’s negligence; and in no way could be construed as “a continuing and intentional refusal to obey district rules and directives.” Once plaintiff was reprimanded for violation of a rule, he did not violate it again. Moreover, though plaintiff may have disagreed with district policy and practice, he complied with it. *Id.*
160. *Id.* at 294.
on whether the defendant was a "person" under section 1983 until there was more evidence as to the state's relationship to the institution.\textsuperscript{161}

In \textit{Hawkins v. Board of Public Education},\textsuperscript{162} a custodial employee in the public school system was terminated for excessive absenteeism. He brought suit under section 1983 and the fourteenth amendment.\textsuperscript{163} The court concluded that the defendant was a "person" within the meaning of section 1983.\textsuperscript{164} Additionally, because it was the board's policy to terminate employees only upon good cause, plaintiff had a property interest in his continued employment entitling him to due process protection. The court then concluded that plaintiff's termination did not comport with due process as he was not provided with advance notice of the charges against him, given any time in which to prepare a case or given an opportunity to tell his side of the case.\textsuperscript{165} The court found that had due process been observed, the plaintiff would probably have been demoted rather than fired;\textsuperscript{166} consequently, the court reinstated him with back pay to the demoted position.\textsuperscript{167}

In \textit{Sedule v. Capital School District},\textsuperscript{168} plaintiff, a high school principal, was terminated from his position on the ground that he had neglected his duties while involved in an affair.\textsuperscript{169} The evidence showed that plaintiff was often absent from his office for extended periods, and his subordinates noticed that he became less attentive to and interested in his professional responsibilities.\textsuperscript{170} Plaintiff did not dispute the fact that he had received a pre-termination hearing,

\begin{itemize}
\item \textsuperscript{161} \textit{Id.} at 301. Defendant argued that the state was the real party in interest; thus the suit must be dismissed under the eleventh amendment. For discussion of the eleventh amendment as a defense to actions against the state, see \textit{infra} notes 455-464.
\item \textsuperscript{162} 468 F. Supp. 201 (D. Del. 1979).
\item \textsuperscript{163} \textit{Id.} at 203-04.
\item \textsuperscript{164} \textit{Id.} at 214 ("[T]he Board of Education 'can be sued directly under § 1983 for monetary, declaratory, or injunctive relief . . . .' " (quoting Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978))).
\item \textsuperscript{165} \textit{Id.} at 209.
\item \textsuperscript{166} \textit{Id.} at 214.
\item \textsuperscript{167} \textit{Id.} Defendant argued that the post-termination union grievance procedure provided plaintiff with all the process that was due. Because plaintiff had a clear property interest in his continued employment, the post-discharge procedure could not satisfy this interest. \textit{Id.} at 211.
\item \textsuperscript{168} 425 F. Supp. 552 (D. Del. 1976).
\item \textsuperscript{169} \textit{Id.} at 556.
\item \textsuperscript{170} \textit{Id.} His paramour testified that at times plaintiff attended to his school duties only four hours a day. \textit{Id.} at 556 n.13.
\end{itemize}
but alleged that the Board of Education had prejudged his case and intended to discharge him. Noting that plaintiff had to overcome a "presumption of honesty and integrity in those serving as adjudicators," the court found that, based on the board's conduct at the hearing, plaintiff received a fair hearing and so upheld the discharge.\(^{172}\)

As noted earlier, property interests in employment arise not from the Constitution, but from independent sources.\(^{173}\) A property interest may be found in a rule or an understanding which supports a legitimate claim of entitlement. In Schreffler v. Board of Education of Delmar School District,\(^{174}\) plaintiff, also a high school principal, was told at his interview for the position that if he were selected he would be given an initial two-year contract, which would be renewed for three more years if his performance proved satisfactory.\(^{175}\) Plaintiff received a satisfactory evaluation upon completion of his first year, but was discharged halfway through the second year for dating the assistant principal.\(^{176}\) The board's statement that plaintiff's contract would be renewed upon satisfactory performance justified plaintiff's belief that he had a legitimate claim of entitlement to continued employment unless adequate cause existed for nonrenewal.\(^{177}\) As such, he had a property interest to which due process attached. The jury found that plaintiff was not afforded due process and awarded damages.\(^{178}\) The court granted plaintiff reinstatement and back pay conditioned on his acceptance of remittitur of the compensatory and punitive damages.\(^{179}\)

Personnel policies created a legitimate claim of entitlement to continued employment in Lewis v. Delaware State College.\(^{180}\) Although plaintiff, an unmarried residence hall director, served under annual

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171. Id. at 561 (quoting Withrow v. Larkin, 421 U.S. 35 (1975)).
172. Id. at 563. The board members testified that they recognized their duty to approach the hearing free of preconceived, personal ideas of how it should be resolved. The board also carefully questioned each witness at the hearing, which indicated its concern for accurate disposition of the matter; and the members viewed the events set forth in the notice letter to plaintiff merely as charges to be resolved if plaintiff requested a hearing, not as unalterable facts. Id. at 562.
175. Id. at 1305.
176. Id. at 1304.
177. Id. at 1307.
178. Id. at 1305.
179. Id. at 1312.
contracts, the college had a personnel policy providing termination only for cause after completion of a probationary period. Plaintiff had been employed pursuant to such contracts for eight years when she became pregnant and bore a child out of wedlock. The court granted plaintiff's motion for a preliminary injunction, reinstating her as director pending final resolution of the action.

Although plaintiff had no legally protectible property interest in continued employment, in *Morris v. Board of Education of Laurel School District*, she did have a liberty interest which was entitled to due process protection. The court held that a teacher has an interest in her ability to pursue a teaching career. Here, the nonrenewal of her contract for persistent failure to adhere to district directors could potentially severely damage her ability to pursue her chosen profession since most school administrators would not consider a teacher dismissed for this reason. The court ordered defendants to reconsider the plaintiff for reemployment and awarded damages.

Often state or local laws and rules are the basis for finding the existence of a constitutionally protected property right. Under the New Castle County Code, classified service employees have a legally enforceable state law right to continued employment which will support a section 1983 action. This code sets out twenty-three specific infractions for which disciplinary action may be taken. In *Hickey v. New Castle County*, the court held that these provisions created a property interest of which a plaintiff could not be deprived without due process.

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181. *Id.* at 243. Employees could also be terminated when positions supported by grant ceased to receive funding or if the position was eliminated as no longer necessary. Employees discharged for either of these reasons were given priority for other vacant positions at the college. *Id.*

182. *Id.* at 252.

183. 401 F. Supp. 188 (D. Del. 1975). State law established that a nontenured teacher with three full years of experience could not be terminated except for certain reasons. Because plaintiff had not completed three years at the time her contract was not renewed, the statute could not establish a property interest. Nor did she receive such an interest under the district's evaluation procedures. *Id.* at 209-10.

184. *Id.* at 210

185. *Id.* at 214.

186. *Id.* at 215.

187. See New Castle County Code § 12-136 (1982). This section provides the procedure to be followed for dismissal of a county employee.

188. See *id.* § 12-142. Disciplinary action may be taken for delinquency, inefficiency, incompetency, and various kinds of misconduct. *Id.*


190. *Id.* at 609. Plaintiff was entitled to the procedures set forth in *Skehan v.*
The State Merit System was the source of plaintiff’s property interest in continued employment in *Knotts v. Bewick.* Plaintiff was discharged from the Department of Transportation for habitual tardiness and absenteeism, insubordination to supervisors, and harassing coworkers to the point where they threatened a work stoppage if action were not taken against him. Plaintiff received several warnings, both oral and written, regarding his conduct, and was terminated when his behavior failed to improve. The parties did not dispute that the discharge was accomplished under color of state law, thereby making section 1983 applicable. The court held that plaintiff had a property interest by virtue of the State Merit Rules, which entitled him to a pre-termination hearing on reasonable notice.

The foregoing cases indicate that an employee in the public sector has substantially greater job security than does an employee in the private sector. Certainly, a major reason for this is the fourteenth amendment’s added protection through the existence of a property or liberty interest in continued employment once the employee has completed a probationary period—a benefit which employees of private companies do not share. Furthermore, section 1983 provides an additional safeguard to state employees not available to their private counterparts. If it is difficult for a private employer to discharge an employee without incident, it is all but impossible for the state to do so.

### C. Age Discrimination in Employment Act of 1967 (ADEA)

The ADEA prohibits age-based discrimination by private employers and state and federal agencies against persons aged forty to

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Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3d Cir. 1974).


192. *Id.* at 935.

193. *Id.* Merit Rule 14.0600 provides that a classified employee who has completed an initial probationary period may only be dismissed for “just cause,” which includes, but is not limited to, delinquency, misconduct, inefficiency, or inability to perform the work of a position satisfactorily.” *Id.* at 933.

194. *Id.* at 936. However, in light of plaintiff’s poor attendance and performance and his disruption of the work area, the court declined to reinstate him with back pay. Instead, because the court was “confident” that plaintiff would have been dismissed even had he received due process, he was awarded only nominal damages. *Id.* at 937.

195. U.S. CONST. amend XIV, § 1. Section 1 of the fourteenth amendment provides in part: “[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . .” *Id.*

seventy-eight. Like Title VII, it also forbids reprisals. A 1978 amendment prohibits involuntary retirement prior to age seventy.\textsuperscript{197} The Act’s applicable statute of limitations has engendered repeated litigation because it provides for two different periods; the usual case has a two year deadline, but a three year limit applies to “willful violations.”\textsuperscript{198}

The plaintiff in \textit{Grant v. Gannett Co.}\textsuperscript{199} was forced to choose between early retirement and termination.\textsuperscript{200} The court found that he had established a \textit{prima facie} case of age discrimination.\textsuperscript{201} However, the court held that defendant’s reason for discharging him—that he had not responded to the style of the new management—was legitimate. Since plaintiff failed to prove that but for his age he would not have been forced to make a choice between two unpleasant alternatives, the court granted judgment for defendant.\textsuperscript{202}

The court settled several procedural matters in \textit{Reichsteiner v. Madison Fund, Inc.}\textsuperscript{203} Plaintiff was terminated less than eight months prior to eligibility for early retirement; he contended that he was discharged because of his age.\textsuperscript{204} Defendant’s motion to strike plaintiff’s claim for liquidated damages was denied, as the court found that plaintiff’s allegations of facts surrounding his discharge and that his termination was a willful violation of the ADEA satisfied Rules 8 and 9 of the Federal Rules of Civil Procedure.\textsuperscript{205} Defendant also moved to strike plaintiff’s demand for a jury trial because he sought both equitable and legal relief.\textsuperscript{206} While the court recognized that


\textsuperscript{198} \textit{See} Kneisley v. Hercules, Inc., 577 F. Supp. 726, 738 (D. Del. 1983) (“The three year statute of limitations will apply if . . . Hercules knew or should have known that its actions were governed by ADEA.”).

\textsuperscript{199} 538 F. Supp. 686 (D. Del. 1982).

\textsuperscript{200} \textit{Id.} at 688.

\textsuperscript{201} \textit{Id.} at 691. The court recognized the similarity between the provisions of the ADEA and Title VII, and stated that the \textit{McDonnell-Douglas} “shifting burdens” analysis used in Title VII cases was also applicable in the context of an age discrimination action. \textit{Id.} at 688.

\textsuperscript{202} \textit{Id.} at 692.

\textsuperscript{203} 75 F.R.D: 499 (D. Del. 1977).

\textsuperscript{204} \textit{Id.} at 501.

\textsuperscript{205} \textit{Id.} at 501-02.

\textsuperscript{206} \textit{Id.} at 502.
the Third Circuit had upheld the propriety of a jury trial in an ADEA suit seeking only monetary relief,\textsuperscript{207} it declined to read the holding so narrowly as to bar a jury trial on plaintiff’s claim for back pay and liquidated damages.\textsuperscript{208} Finally, the court exercised its pendent jurisdiction and permitted plaintiff to attach his state law breach of contract claim to his federal action.\textsuperscript{209}

The small number of Delaware cases brought under the ADEA suggests that employers are wary of discharging an employee who may be covered under this Act, especially if that employee is replaced by a younger person.\textsuperscript{210} The advent of new early retirement programs, such as that recently instituted by the Du Pont Company,\textsuperscript{211} may initiate more suits under this statute. Notwithstanding its relative disuse, however, the ADEA is an important weapon with which to attack discriminatory employment practices.

\textit{D. Miscellaneous Federal Employment Statutes}

The Employee Retirement Income Security Act of 1974\textsuperscript{212} (ERISA) prohibits discharge of and discrimination against employees to prevent them from attaining vested pension rights. Its protection has been sought in only one Delaware case, \textit{Rechsteiner v. Madison Fund, Inc.},\textsuperscript{213} in which plaintiff alleged that his termination less than eight months before he would qualify for early retirement benefits violated ERISA.\textsuperscript{214} The court, however, did not rule upon this portion of

\textsuperscript{207} Rogers v. Exxon Research & Eng’g Co., 550 F.2d 834 (3d Cir. 1977).

\textsuperscript{208} \textit{Rechsteiner}, 75 F.R.D. at 504. Plaintiff conceded that his prayer for reinstatement was a request for equitable relief and, therefore, he was not entitled to a jury trial. Nor could he get a jury trial on his request for attorneys’ fees and costs, since the statute committed such relief to the court’s discretion. \textit{Id.}

\textsuperscript{209} \textit{Id.} at 506.


\textsuperscript{211} In the beginning of 1985, Du Pont instituted an Early Retirement Opportunity program. The program provided for employees to receive age and service credits which would enable them to receive a vested right to pension payments at an earlier date. \textit{See} The Du Pont Early Retirement Opportunity, Your Tomorrow Can Begin Today (1985) (available at the E.I. du Pont de Nemours and Company, Inc. personnel office).

\textsuperscript{212} 29 U.S.C. § 1140 (1983) provides in pertinent part: “It shall be unlawful for any person to discharge, fire, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provision of an employee benefit plan, this subchapter, section 1201 of this title . . . .”

\textsuperscript{213} 75 F.R.D. 499 (1977).

\textsuperscript{214} \textit{Id.} at 501.
the complaint, as the main controversy centered around ADEA procedural matters. Although its use in Delaware has been minimal, ERISA looms as an effective tool in preventing employers from discharging employees simply to avoid paying pension benefits.

The Fair Labor Standards Act (FLSA) and the Equal Pay Act (EPA), respectively, prohibit discharge of an employee for exercising rights guaranteed by minimum wage and overtime provisions and prohibit sex-based wage differentials. Little can be said about these causes of action in Delaware, because only three cases have alleged violations of these acts, and none of these has reached the merits. Hence, the effect of these statutes on Delaware employment practices is as yet unknown.

215. See supra notes 203-208 and accompanying text.
   (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—
   
   (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee . . . .
217. Id. § 206(d) provides in pertinent part:
   (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.
Sections 8(a)(1), (3), and (4) of the National Labor Relations Act (NLRA) forbid employers from terminating employees for union activity, for protected concerted activity, for filing charges or for giving testimony under the NLRA. In Washam v. J.C. Penney Co., a plaintiff who had been successful in a hearing before the NLRB was not barred by collateral estoppel from litigating Title VII claims. The court noted that the issues actually litigated in the NLRB action were limited by that agency’s jurisdiction. Although the conclusions of the Administrative Law Judge (ALJ) were not included, the court recognized that plaintiff had argued, *inter alia*, that he had been discharged for refusal to testify on behalf of defendant regarding the union activities of another employee. The court found that the ALJ could well have based the decision for plaintiff on that ground. Under the Labor Management Relations Act (LMRA), an aggrieved employee may bring suit in state court if he is able to prove that his union breached its duty of fair representation in handling his grievance. In Smith v. General Motors Corp., plaintiff was discharged pursuant to the collective bargaining agreement for missing more than three days of work without a satisfactory explanation. The court found that the union did not breach its duty to represent him fairly. The union had represented him and argued for his reinstatement even though plaintiff’s records indicated that termination was justified. Consequently, the court found no “substantial evidence of fraud, deceitful action or dishonest conduct” to indicate that the union had breached its duty to plaintiff. The NLRA and

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224. 348 A.2d 691 (Del. Ch. 1975).
225. Id. at 693, 696.
226. Id. at 695. Prior to going on sick leave, plaintiff asked to apply for sickness and accident benefits. To get such benefits, plaintiff had to produce certification by a physician that he was seen and examined by the physician after going on sick leave. Plaintiff never produced such documentation, nor did he visit his physician after going on sick leave. Id. at 693-94. Additionally, as previously mentioned, he had missed more than three consecutive days of work without an acceptable medical excuse. Both of these provisions were contained in his collective bargaining agreement. Id.
227. Id. at 695 (quoting Humphrey v. Moore, 375 U.S. 335 (1964)).
228. Id. at 695. The court also noted that: a labor union does not owe a duty to press to the fullest each and every grievance of its individual members, but rather it has the discretion to
LMRA are useful tools for a union employee who has been discharged, since these give him protection not enjoyed by non-union employees. The scant litigation under these acts in Delaware could indicate either the smoothness of labor relations in the state or that plaintiffs who possibly have such a cause of action are bringing them on other grounds. The Rehabilitation Act of 1973\textsuperscript{229} protects handicapped persons against discrimination by the federal government, federal contractors, or any program or activity receiving federal financial assistance.\textsuperscript{230} Most litigation in this area has involved the question of the existence of a private right of action; the outcome appears to depend upon which section of the Act is invoked.\textsuperscript{231} The trend is toward permitting private actions against the federal government and against grant recipients but not against contractors.\textsuperscript{232} In the only Delaware case to utilize this Act, the court followed the trend in disallowing a private right of action against federal contractors.\textsuperscript{233}

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refuse to prosecute or to abandon particular grievances so long as it does not exercise bad faith or act in an arbitrary or discriminatory manner in so doing.

\textsuperscript{229} 29 U.S.C. §§ 791, 793, 794 (1983). The pertinent part of § 794 states: No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.


in the absence of any legislative history so suggesting, . . . a court should not infer an intent to subject contractors to independent federal actions
The Vietnam Era Veterans Readjustment Association Act and the Veterans Reemployment Rights Act require affirmative action in hiring Vietnam-era veterans by the federal government and federal contractors and in federal employment and training programs. Additionally, they provide a grace period during which returning servicemen cannot be terminated without just cause. As with the Rehabilitation Act, there is no clear private right of action under these acts. The single Delaware court to consider the acts found that such a right did not exist against a federal contractor during the time period in issue. This is not to say that another Delaware court may not find the existence of such a right against federal contractors in the future. However, if the acts’ provisions are interpreted in the same way as those of the Rehabilitation Act, federal contractors will effectively be exempt from them.

The Railway Labor Act is the exclusive labor remedy in the railroad and airline industries. Therefore, in the context of a discharge grievance under the statute, a claim of wrongful termination must first be processed and settled before the appropriate administrative agency. Because the plaintiff in Read v. Baker had failed to exhaust his administrative remedies pursuant to his allegedly wrongful discharge, the court dismissed this charge for lack of subject matter jurisdiction. The statute, however, provides a trap for unwary plaintiffs who do request hearings before an administrative tribunal. Decisions made under the arbitration process are not subject to judicial review unless the circumstances fall within one of the statutory exceptions.

at the instance of individuals and to remedies other than those determined appropriate by the agency in accordance with the contract and the rules, regulation and relevant orders of the Secretary [of Labor].

Id. This wording also appears to preclude use of a third party beneficiary action based on the requirement that the contract include an “affirmative action” covenant for handicapped persons.

239. Id. at 474.
240. Id. at 472.
241. Id. at 477.
242. Koloedey v. Mutual Benefit Ass’n of Rail Transp. Employees, Inc., 526 F. Supp. 1158 (D. Del. 1981). The court upheld the National Railroad Adjustment Board’s decision not to hear plaintiff’s grievance on the ground that the fraternal benefit society which sold legal reserve life insurance to qualified railroad employees was not a “carrier” within the meaning of the Act.
Executive orders may also provide a basis on which an employee may bring a suit for wrongful discharge. Executive Orders 11,246 and 11,375 establish a policy of nondiscrimination on the basis of race, creed, color, national origin, or sex for the federal government, federal contractors, and any federally assisted construction projects. Such orders have not been used directly for claims of employment discrimination in Delaware, but were involved indirectly in *Chrysler Corp. v. Schlesinger*. As a federal contractor, Chrysler was required to file reports of personnel practices so the Labor Department could monitor any discrimination. A third party sought disclosure of the reports under the Freedom of Information Act (FOIA). Chrysler sought to prevent disclosure, arguing that an agency was required to withhold documents falling within the FOIA’s exemptions. The Supreme Court held that the exemptions were not mandatory bars to disclosure. Thus, since the agency had discretion as to whether to disclose the information, the Court found that Chrysler had no right to enjoin disclosure under the FOIA.

With the exception of the Executive Orders, the miscellaneous employment statutes discussed all protect a limited class of persons. Moreover, all of the federal statutes espouse a general policy of nondiscrimination against disadvantaged groups who, until the passage of these statutes, were all but powerless to protest discriminatory practices and discharge under the doctrine of employment at will. It is probably safe to say that, despite the lip service paid to it, the doctrine of employment at will has seen its last days in the federal arena.

III. State Court Actions

There is comparatively little state court activity for redress on claims of unlawful employment practices, perhaps due to the fact

But see Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967) (courts start with a “presumption of reviewability,” and thus may interpret the preclusive effect of such statutes narrowly).

244. *Id.*
245. 611 F.2d 439 (3d Cir. 1979) (implementing Chrysler Corp. v. Brown, 441 U.S. 281 (1979)).
246. *Id.* at 440.
247. *Id.*
249. *Chrysler Corp.*, 441 U.S. at 293.
250. *Id.* at 318-19. The Supreme Court vacated the Third Circuit’s decision and remanded it for further proceedings to consider whether the disclosures would violate the Trade Secrets Act, 18 U.S.C. § 1905 (1983).
that so few state statutes provide for a private remedy.\textsuperscript{251} Additionally, federal actions are more attractive because state agencies frequently direct their resources to conciliation efforts,\textsuperscript{252} deferring litigation to the corresponding federal agencies.\textsuperscript{253} Furthermore, while the states have concurrent jurisdiction over any claim which is not expressly reserved to the federal sphere,\textsuperscript{254} there is a perception that the federal courts are more competent to decide such claims. Nevertheless, a plaintiff may be successful in attacking unlawful employment practices on statutory or common law grounds in state court.

A. State Statutes

The Delaware Antidiscrimination Statute\textsuperscript{255} prohibits discrimination or discharge based on race, marital status, color, age, religion, sex, or national origin. Because its language is similar to that of Title VII,\textsuperscript{256} the Delaware courts have interpreted it in a parallel manner.\textsuperscript{257} In Giles \textit{v.} Family Court of the State of Delaware,\textsuperscript{258} plaintiff, a black woman, alleged that she was denied appointment to a per-

\textsuperscript{251} See the Wage Payment Complaint statute, \textit{Del. Code Ann. tit. 19, § 1112(b)} (1979), which imposes a fine on employers who discharge an employee for filing a complaint about the employer’s failure to pay wages. Additionally, the Polygraphs statute, \textit{Del. Code Ann. tit. 19, § 704(b)} (1979), similarly imposes a fine on employers who condition employment on the employee’s submission to a lie detector test. \textit{But see Del. Code Ann. tit. 10, § 3509} (1975) (Delaware employers prohibited from dismissing an employee because his wages are attached; no private remedy provided); \textit{Del. Code Ann. tit. 19, § 1303} (1979) (forbids discrimination against employees exercising their rights to organize under the statute, but does not expressly create a private cause of action).


\textsuperscript{254} See 28 U.S.C. § 1338 (1983) (patent litigation is within the exclusive jurisdiction of the federal courts).


\textsuperscript{256} See supra note 6. "Delaware State law prohibits employment discrimination in terms almost identical to Title VII itself." \textit{Cannon}, 523 F. Supp. at 344.

\textsuperscript{257} Giles \textit{v.} Family Court of the State of Del., 411 A.2d 599 (Del. 1980) (proper test to determine whether \textit{prima facie} case established is the \textit{McDonnell-Douglas} test); National Cash Register \textit{v.} Riner, 424 A.2d 669 (Del. Super. Ct. 1980) (Title VII elements applied to state age discrimination claim).

\textsuperscript{258} 411 A.2d 599 (Del. 1980).
permanent position because of her race. Plaintiff and a white woman, Jones, had begun working for the state at the same time under a program appointing them to positions for a limited period. They were eligible for permanent employment upon meeting Merit System qualifications. Jones passed the test and received a permanent position. Jones resigned and plaintiff, who had by then passed the test, was asked if she wanted the position. Before plaintiff could accept, however, Jones contacted defendant seeking reinstatement. The Personnel Commission construed the Merit Rules to require that employees seeking reinstatement be given priority over other persons and Jones was reappointed to her old position. Plaintiff filed a complaint with the Equal Employment Review Board, which determined that discrimination had indeed occurred. On appeal, the superior court reversed, concluding that plaintiff had failed to establish a prima facie case under McDonnell-Douglas v. Green. The supreme court affirmed because plaintiff had not shown that defendant had a position for which it continued to seek applicants after rejecting plaintiff.

Plaintiff in Riner v. National Cash Register was a fifty-two year old male who had worked continuously for defendant for thirty-four years. He alleged that he was discharged because of his age. The Equal Employment Review Board found that defendant had engaged in age discrimination. Defendant appealed to the superior court, which reversed the board, holding that the McDonnell-Douglas test applied to a state claim for age discrimination. While plaintiff had established a prima facie case of discrimination, he had failed to show that defendant’s proffered explanations for his termination were pretextual. The supreme court agreed that plaintiff had made a prima

259. Id. at 600.
260. Id.
261. Id.
262. Id.
263. Id. at 600-01.
264. Id. at 602.
265. Id. The Delaware Supreme Court stated that "petitioner was rejected because a person with a higher priority had applied for the position, and ... after she was rejected, the position was effectively closed to persons with her qualifications, and [defendant] did not seek or accept new applications for the position." Id.
267. Id. at 671.
268. Id. at 672.
facie case; however, the board had failed to make any findings of fact regarding the reasons for his termination.\textsuperscript{269} The supreme court, therefore, remanded with instructions to return the case to the board for procedures consistent with \textit{McDonnell-Douglas}.\textsuperscript{270}

The State Merit System\textsuperscript{271} and the merit rules promulgated thereunder are frequently used by plaintiffs to establish the requisite property interest in public employment necessary to invoke due process protection,\textsuperscript{272} or by defendants to justify the selection of another applicant in a discrimination charge.\textsuperscript{273} However, the specific rights therein have also been invoked as the substantive source of a claim. In \textit{Peterson v. Hall},\textsuperscript{274} plaintiff, a civil engineer with a two-year associates' degree, was fired for failure to join a union as required by the collective bargaining agreement.\textsuperscript{275} Plaintiff appealed to the state Personnel Commission, as he was entitled to do under the Merit Rules.\textsuperscript{276} The Commission determined that its jurisdiction to hear plaintiff’s appeal had been superseded by the collective bargaining agreement, and the superior court affirmed.\textsuperscript{277} The supreme court reversed,\textsuperscript{278} holding that the Merit System clearly gave the Commission jurisdiction to review dismissals made "for cause."\textsuperscript{279} Furthermore, plaintiff was entitled to have the Commission hear his appeal since he argued that he was inappropriately included in the

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270. \textit{Id}.
272. \textit{See supra} notes 191-194 and accompanying text.
274. 382 A.2d 1355 (Del. 1978).
275. \textit{Id}. at 1355-56. Engineers having a professional classification or a bachelor's degree were exempted from having to join. \textit{Id}. at 1356.
276. \textit{Id}.
277. \textit{Id}. at 1356-57.
278. \textit{Id}. at 1357-59.
279. \textit{Id}. at 1358. The court in \textit{Peterson} stated that: the Commission has jurisdiction to hear an appeal in such a case, even if, as a matter of law, it must apply the terms of a union contract (requiring all employees in a bargaining unit to join the union, for example) and affirm the dismissal (of an employee who refused to join the union).
\textit{Id}. The court is effectively stating that even if the procedures will definitely result in termination, the Commission must at least give a plaintiff the appearance that his rights have been protected. Depending on one’s outlook, the court’s mandate that the applicable procedure be complied with is either laudable or engenders needless hoop-jumping in a case as certain as this.
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bargaining unit, a question on which the collective bargaining agreement was silent.280

However, the collective bargaining agreement superseded the Merit Rules in Sullivan v. Local Union of AFSCME.281 In this case the Department of Corrections temporarily transferred officers to cover vacancies arising from vacations, illness, or other reasons.282 The court agreed with the union that temporary transfers were governed by the collective bargaining agreement after considering various provisions of the Merit Rule statute and the agreement.283 Consequently, the temporary transfers could only occur in disregard of contract terms when safety or security reasons required such transfers.

The issue in Coffin v. Department of Natural Resources & Environmental Control284 was the Personnel Commission’s authority to modify disciplinary action taken by the employing agency. Plaintiff had been discharged for offensive touching, engaging in a high speed chase, falsifying records, and using his position for personal advantage.285 He appealed his dismissal to the Commission, which eliminated two of the charges and determined that those remaining warranted demotion rather than dismissal.286 Defendant appealed the Commission’s action to the superior court, which reversed.287 The supreme court affirmed the superior court holding that the Merit Rules precluded the Commission from modifying the agency’s decision.288

These state statutes289 and merit rules (in the case of state employees) function to protect an employee from unlawful employment practices in virtually the same manner as the federal statutes. They are especially valuable to an employee who has been treated

280. Id.
281. 464 A.2d 899 (Del. 1983).
282. Id. at 900.
283. Id. at 901-03.
284. 391 A.2d 193 (Del. 1978).
285. Id. at 194.
286. Id.
287. Id. at 194-95.
288. Id. at 195. Merit Rule 21.0240 provides in pertinent part: "‘Except in cases of dismissal, demotion, and suspension, the commission shall have the power to determine the nature of the specific relief to be granted.’” Id. (emphasis added).
289. See also Del. Code Ann. tit. 14, § 1401 (1984) (the teacher tenure statute; only teachers, as defined in § 1401(2), are entitled to rights under the statute); Del. Code Ann. tit. 19, ch. 11 (1941) (wage payment statute gives Delaware Department of Labor authority to enforce claim for unpaid wages; statute not applicable to claim for severance pay, Department of Labor v. Green Giant Co., 394 A.2d 753 (Del. 1978)).
unfairly but has no redress under federal law, although such state law claims are most commonly brought in addition to alleged violations of federal law. Though Delaware may still follow the doctrine of employment at will, the state statutes have whittled it down to a shell of its former self.

B. Common Law Causes of Action

Claims of unfair employment practices can also be brought on traditional common law causes of action. Generally, these claims are asserted in conjunction with allegations of federal violations; the federal court can hear these claims under the doctrine of pendent jurisdiction. They may also be filed as independent state actions.

By far, the most frequently utilized common law action is breach of contract. Often, the merit of such claims cannot be ascertained, either because the federal court declined to exercise pendent jurisdiction or the claim was not specifically addressed in the opinion. In the cases where the claim has been considered, the courts have been unable to find the existence of a contract. In Avallone v. Wilmington Medical Center, Inc., plaintiff's oral contract of employment was for an indefinite period. Moreover, the employee handbook did not constitute a written contract, since it was not in

290. Pendent jurisdiction . . . exists whenever there is a [federal claim], and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

291. The existence of an employment contract is intimately allied with the employment-at-will doctrine. See, e.g., Sandler, supra note 2, at 9, discussing a recent unreported Delaware case, L.H. Doanes Assocs. v. Seymour, No. 83A-MA-1 (Del. Sup. Ct. June 9, 1984). This case involved an employee's claim of entitlement to a cash payment for accumulated compensatory and vacation time after he quit his job. The court held that the employer, "whether unwittingly or knowingly," had changed its policy. " 'The employment contract was modified by an implied agreement consisting of the conduct of the parties involving the very issue of overtime, vacation time, and separation pay.' " Sandler, supra note 2, at 9.

In Delaware, the line of demarcation between contract and employment at will appears to be whether there was a fixed term of employment. Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095 (Del. 1982).


effect at the time she was hired.\textsuperscript{295} Similarly, the court in \textit{Heideck v. Kent General Hospital, Inc.}\textsuperscript{296} held that the personnel manual was not a binding contract which would alter plaintiff’s status as an employee at will.\textsuperscript{297} Plaintiff in \textit{Robinson v. E.I. du Pont de Nemours & Co.}\textsuperscript{293} failed to establish that the defendant breached an oral or written contract when it terminated her because she did not produce any evidence showing the existence of such a contract.\textsuperscript{299}

Another popular corollary claim is for intentional or negligent infliction of emotion distress suffered by a plaintiff as a consequence of an employer’s wrongful practices.\textsuperscript{300} The plaintiff can recover damages for emotional distress, embarrassment, and humiliation if he can show that he \textit{in fact suffered such injury} and that defendant’s conduct was the proximate cause thereof.\textsuperscript{301} In \textit{Eckerd v. Indian River School District},\textsuperscript{302} plaintiff offered evidence that he had experienced difficulty sleeping for six to eight months following his discharge; he had required medical care; he and his family were forced to separate; and he was eventually forced to apply for food stamps. Based on this and other evidence, the court found that “the turmoil claimed by [plaintiff] is only that which a reasonable man might experience under the circumstances,”\textsuperscript{303} and awarded him damages for his emotional distress.\textsuperscript{304}

Other plaintiffs have not been as successful. In \textit{Robinson v. E.I. du Pont de Nemours & Co.},\textsuperscript{305} the court dismissed as meritless plaintiff’s

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\item \textsuperscript{295} \textit{Id.} at 936.
\item \textsuperscript{296} 446 A.2d 1095 (Del. 1982).
\item \textsuperscript{297} \textit{Id.} at 1096.
\item \textsuperscript{298} 33 Fair Empl. Prac. Cas. (BNA) 880 (D. Del. 1979).
\item \textsuperscript{299} In both Rechsteiner v. Madison Fund, Inc., 75 F.R.D. 499 (D. Del. 1977), and Patton v. Conrad Area School Dist., 388 F. Supp. 410 (D. Del. 1975), the court exercised pendent jurisdiction to hear the claims. These \textit{cases} arose on the defendants’ \textit{motions for summary judgment}; thus the merits of the contract claims were not discussed.
\item \textsuperscript{300} Compensatory damages may be collected without bringing a separate tort claim therefor. In Aumiller v. University of Del., 434 F. Supp. 1273 (D. Del. 1977), defendants were required to pay plaintiff for his “emotional distress, embarrassment and humiliation” suffered as a result of their violation of his constitutional rights.
\item \textsuperscript{301} \textit{Id.} at 1310.
\item \textsuperscript{302} 475 F. Supp. 1350 (D. Del. 1979).
\item \textsuperscript{303} \textit{Id.} at 1367.
\item \textsuperscript{304} \textit{Id.}
\item \textsuperscript{305} 33 Fair Empl. Prac. Cas. (BNA) 880 (D. Del. 1979); see \textit{supra} notes 52-55 and accompanying text for an example of the behavior which plaintiff claimed caused her emotional distress.
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\end{footnotesize}
claim of intentional infliction of emotional distress: "[Plaintiff] did not offer any evidence of actions by any of the defendants which could be characterized as so outrageous and intolerable that they would offend generally accepted standards of decency and morality." 306 Similarly, the court in Avallone v. Wilmington Medical Center, Inc. 307 found neither intentionally nor negligently inflicted emotion distress. 308 Plaintiff admitted that she did not become physically ill nor did she consult a psychiatrist or psychologist. Furthermore, the court found that, as a matter of law, defendant’s conduct constituted neither negligent nor intentional infliction of emotional distress. 309

IV. Procedure

A. Choosing a Cause of Action

A plaintiff’s first step is to choose the basis for the complaint. Many times this is clear because only one statute prohibits the conduct. 310 At other times, multiple grounds for relief may be available. 311 Often a statute is not really a ground for individual claims because there is no private right of action, 312 or all statutory remedies

306. Robinson, 33 Fair Empl. Prac. Cas. at 883 (citing RESTATEMENT (SECOND) OF TORTS § 46 comments d & e (1964)).
308. Id. at 938.
309. Id. Because bodily injury or sickness, as well as mental stress, are essential elements of the tort, plaintiff’s own testimony negated this claim. Id. With respect to the allegation of intentional infliction of emotional distress, the court did not find defendant’s conduct to be so extreme and outrageous as to offend common decency. Id.

Other common law actions brought pendent to discrimination actions include defamation and wrongful discharge. The traditional defense of privilege has been successful in defamation actions. See Battista v. Chrysler Corp., 454 A.2d 286 (Del. Super. Ct. 1982). Defendant must conduct the invasion of plaintiff’s privacy; mere inquiries by other persons are insufficient. Avallone, 553 F. Supp. at 939.


may be superseded by a collective bargaining agreement. Some legitimate Title VII claims may be precluded from further action since the complaint generally cannot go beyond what the EEOC or an equivalent agency had an opportunity to conciliate. However, the court may permit a plaintiff to assert a charge broader than that investigated by the EEOC if the conduct occurred subsequent to the filing of the original charge or if the violations are continuing. A prospective plaintiff should also pay close attention to the effective date of the particular statute, as he may not fall within its coverage. Finally, plaintiff should be certain that the correct defendant has been selected; if plaintiff errs, he may be barred by the statute of limitations from ever asserting his charge.


314. See Zalewski v. M.A.R.S. Enterprises, Ltd., 561 F. Supp. 601 (D. Del. 1982) (plaintiff advised the EEOC only that he had been discharged and replaced by a female; court refused to allow plaintiff to add a claim that he was fired for repudiating the owner's homosexual advances on the ground that plaintiff had not submitted this charge to the EEOC for investigation). See also Rutherglen, Notice, Scope, and Preclusion in Title VII Class Actions, 69 Va. L. Rev. 11 (1983); Note, Judicial Responses to the EEOC's Failure to Attempt Conciliation, 81 Mich. L. Rev. 433 (1982). This is discussed more fully in the section on exhaustion of administrative remedies, infra text accompanying notes 339-345.

315. See Ferguson, 560 F. Supp. at 1189. "The subject matter of the complaint may be broader than the charge if the expansion is either reasonably related to the original charge or may reasonably be expected to grow from the original charge."

316. See McDonnell v. Gannett News Serv., Inc., 518 F. Supp. 1326 (D. Del. 1981). Plaintiff brought suit alleging that he was forcibly retired in violation of the ADEA. Plaintiff was retired on December 31, 1978; however, the amendments to the ADEA prohibiting such practice did not become effective until January 1, 1979.

317. Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-16(c) (1983), provides that a federal employee (or applicant for federal employment) aggrieved by the final disposition of or failure to take action on his complaint "may file a civil action . . . in which civil action the head of the department, agency, or writ, as appropriate, shall be the defendant." In Guilday v. Department of Justice, 451