1986

Delaware Employment Practices—A Ten Year Retrospective

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DELAWARE EMPLOYMENT PRACTICES—A TEN YEAR RETROSPECTIVE

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I. INTRODUCTION

Although Delaware courts explicitly affirmed the doctrine of employment at will as recently as 1982, statutes and public policy considerations have made increasingly steady inroads into the doctrine. Arguably, such erosion began with the enactment of the Civil Rights Act of 1866, 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).


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,6 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.7 Part IV describes the procedures followed by plaintiffs in prosecuting, and by employers in defending, claims of unlawful treatment.

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.8 Under the statute, employers are expressly prohibited from discriminating on the basis of race, color, religion, sex, or national origin.9 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.10

1. Race

In cases where the merits of racial discrimination charges have been considered, plaintiffs have been successful in only two instances. In Stallings v. Container Corp. of America,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.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.13 The court found that these “subjective criteria promotion practices” left much room for the “operation of racial bias to the prejudice of blacks,”14 and that the practices did, in fact, have a disparate impact upon blacks.15


10. 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).


12. Id. at 512.

13. 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. Id. at 515-16.

14. Id. at 516.

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. Id. at 516-20.
 Minority fire fighters successfully prosecuted a class action suit alleging discriminatory promotion policies in *Wilmore v. City of Wilmington*.[16] 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.[17] 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.[18] 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.[19]

Other plaintiffs have not fared quite so well. In *Morris v. Board of Education of Laurel School District*,[20] a non-tenured women’s basketball coach’s contract was not renewed, ostensibly due to repeated instances of insubordination.[21] 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,[22] she had

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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.

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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*, plaintiff was dismissed from her job at a state hospital after she failed to report to work for a period of nine days. The day after her termination, she filed a grievance with the State Personnel Commission. The hospital director, after a grievance hearing, upheld her termination. 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. 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.

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. The state moved to dismiss for

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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." 38

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." 39 Consequently, the court granted plaintiff an additional thirty days to file her complaint with the Department of Labor. 40

In Washam v. J.C. Penney Co., 41 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. 42 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. 43 Subsequently, the EEOC determined that there was reasonable cause to believe that plaintiff's discharge was

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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.\(^{44}\) Defendant moved for summary judgment on the ground that plaintiff was barred from relief on his Title VII claims by *res judicata* and *collateral estoppel*.\(^{45}\) 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 *Morris* and *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 *Cannon* and

\(^{44}\) *Id.*

\(^{45}\) *Id.* at 556.

\(^{46}\) *Id.* at 559.

\(^{47}\) *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. *Id.*


\(^{49}\) See, e.g., *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." *Id.* at 1198. Rather than dismiss the complaint, however, the court permitted plaintiffs to amend their complaint to allege the necessary facts.

Though they may ultimately be vindicated, employers faced with a race discrimination claim should prepare for a long battle.

2. Sex and Sexual Harassment

Although the language of Title VII merely prohibits sex-based discrimination, it is now well established that a cause of action for sexual harassment is encompassed within its protection. Acts which will give rise to a claim of sexual harassment, however, have not been identified with any degree of precision. Generally, such cases fall into two broad categories: (1) sexual coercion 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. 38 (1985); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. 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-

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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.

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 greatly higher 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.
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. Plaintiff claimed that she was not promoted to any of sixteen positions, eight of which were eventually filled by women. 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. The court determined that plaintiff had failed to established a **prima facie** case of gender-based discrimination.

Defendants were also successful in *Lanyon v. University of Delaware* and *Robinson v. E.I. du Pont de Nemours & Co.* 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. 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. 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

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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).
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. Plaintiff asserted twelve specific incidents as her basis for claiming that she was sexually harassed. The court found that plaintiff did not meet her burden of establishing that any sexual advances were made toward her. 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. 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.

Instances of sexual discrimination against males, though rare, are not unknown. In Fesel v. Masonic Homes of Delaware, Inc., 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. The court held that plaintiff had established a prima facie case of sex discrimination; nevertheless, the Home rebutted this presumption by showing a legitimate bona fide occupational qualification 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.

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75. 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. Id.
76. Id. at 883.
77. Id. Cf. 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.
79. 447 F. Supp. 1346 (D. Del. 1978), 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. See infra notes 477-486.
80. Id. at 1348.
81. 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.
82. See supra note 79.
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.

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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.\(^89\) 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).\(^90\) 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.\(^91\) If defendant meets this burden, plaintiff must then prove that the proffered reason was a cover-up for retaliation.\(^92\)

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.*\(^93\) 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.\(^94\) Here, though, her employer's response to that complaint was held not to be retaliatory.\(^95\) 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.\(^96\) Her termination subsequent to the filing of her Title VII complaint, however, did establish a *prima facie* case of unlawful retaliation.\(^97\) Nevertheless, she was ultimately unsuccessful because the company

\(^{89}\) 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.  

The black plaintiff in *Goldsmith v. E.I. du Pont de Nemours & Co.* alleged that he was harassed by his area supervisor, placed on probation, and finally terminated for filing Title VII complaints. The court found that plaintiff had indeed been harassed by his supervisor. 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; thus plaintiff had failed to prove that a retaliatory motive prompted his termination.

In *Guilday v. Department of Justice*, plaintiff proved that his failure to receive promotions was due to retaliation for his filing Title VII claims. 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; this was due largely to their awareness of his suit. The court found that defendant's claims regarding plaintiff's poor attitude and work were mere pretexts for retaliation.

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98. Id. at 1202.
100. 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. Id. at 240-43.
101. 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 *res judicata* or *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. Goldsmith v. E.I. du Pont de Nemours & Co., 32 Fair Empl. Prac. Cas. (BNA) 1879, 1882 (D. Del. 1983).
104. 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. 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.'" Id.
107. 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. The plaintiff also successfully proved retaliation in *Toscano v. Nimmo*. 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. 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. 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.

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.

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108. *Id.* at 329-30.
110. *Id.* at 1205.
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.
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

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.\textsuperscript{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.\textsuperscript{129} 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.\textsuperscript{131}

Teachers have a property interest in their continued employment,\textsuperscript{132} but not in any particular procedures for safeguarding that interest provided that minimum constitutional standards are met.\textsuperscript{133} In \textit{Anapol v. University of Delaware},\textsuperscript{134} a tenured professor was reinstated with back pay after he was dismissed without the pre-termination evidentiary hearing required by due process.\textsuperscript{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.\textsuperscript{136}

\begin{itemize}
\item \textsuperscript{129} \textit{Id.} at 1286.
\item \textsuperscript{130} "Although his suspension was not attended by a formalistic observance of procedural niceties, there were present the rudiments of due process." \textit{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:
\begin{quote}
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.
\end{quote}
\textit{Id.}
\item \textsuperscript{131} \textit{Id.} at 1291.
\item \textsuperscript{133} \textit{Brandywine Affiliate, NCCEA/DSEA}, 555 F. Supp. at 852 ("Procedural safeguards, in themselves, are not liberty or property interests").
\item \textsuperscript{134} 412 F. Supp. 675 (D. Del. 1976).
\item \textsuperscript{135} \textit{Id.} at 680.
\item \textsuperscript{136} \textit{Id.} at 678, 680. The court held that under the Third Circuit's opinion in \textit{Skehan 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 *Avallone v. Wilmington Medical Center, Inc.* Plaintiff, the

(2) a reasonable time interval to marshal facts and evidence, (3) an explanation of the substance of the evidence supporting the charges, and (4) an opportunity to present his side of the case in a manner which will permit the decisionmaker to weigh both sides. *Id.* at 678 n.8, 680.

However, merely because the court was reinstating plaintiff with back pay did not mean that the university could not terminate him thereafter as long as it gave plaintiff the procedural safeguards required by due process. *Id.* at 680. The plaintiff's eventual dismissal, therefore, would appear to be a foregone conclusion.

138. *Id.* at 1277.
139. *Id.* at 1281.
140. The court stated:

[D]efendants, by their action in not reviewing Aumiller's contract for the 1976-77 academic term because of his statements on the subject of homosexuality which appeared in three newspaper articles and the circumstances surrounding their publication, violated his right of freedom of expression as guaranteed by the First Amendment. There was no evidence that Aumiller's statements impeded his performance of his duties, substantially disrupted the University, violated an express need for confidentiality, or disrupted his working relationship with his superiors. Nor were defendants able to demonstrate that Aumiller intentionally or recklessly made false statements which reflected adversely on the University. Accordingly . . . defendant's interest in promoting the efficiency of the public services it performs does not outweigh Aumiller's interest in commenting upon matters of public concern.

*Id.* at 1312.
141. *Id.*
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. 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. Moreover, neither the hospital's receipt of medicare and medicaid benefits nor the fact that it was licensed and regulated by the state rendered its activity "state action" for purposes of the fourteenth amendment.

In Chalfant v. Wilmington Institute, 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. 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. The court reversed the district court, holding that the library was the state, and therefore its actions constituted state action. 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. Consequently, the court remanded the case to the district court for consideration of the merits of plaintiff's section 1983 claim.

143. Id. at 933.
144. Id.
145. Id. at 934.
146. Id. at 934.
147. 574 F.2d 739 (3d Cir. 1978).
148. Id. at 743.
149. Id. at 722 (citing Hollenbaugh v. Carnegie Free Library, 545 F.2d 382, 383 (3d Cir. 1976)).
150. Id. at 745.
151. Id.
152. Two judges dissented, finding no state action. Id. at 747 (Garth, J., dissenting).
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.\footnote{161}

In \textit{Hawkins v. Board of Public Education},\footnote{162} a custodial employee in the public school system was terminated for excessive absenteeism. He brought suit under section 1983 and the fourteenth amendment.\footnote{163} The court concluded that the defendant was a "person" within the meaning of section 1983.\footnote{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.\footnote{165} The court found that had due process been observed, the plaintiff would probably have been demoted rather than fired;\footnote{166} consequently, the court reinstated him with back pay to the demoted position.\footnote{167}

In \textit{Sedule v. Capital School District},\footnote{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.\footnote{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.\footnote{170} Plaintiff did not dispute the fact that he had received a pre-termination hearing,

\footnote{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.}
\footnote{162. 468 F. Supp. 201 (D. Del. 1979).}
\footnote{163. \textit{Id.} at 203-04.}
\footnote{164. \textit{Id.} at 214 ("[T]he Board of Education 'can be sued directly under § 1983 for monetary, declaratory, or injunctive relief . . . . ' ") (quoting \textit{Monell v. Department of Social Servs.}, 436 U.S. 658, 690 (1978)).}
\footnote{165. \textit{Id.} at 209.}
\footnote{166. \textit{Id.} at 214.}
\footnote{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.}
\footnote{168. 425 F. Supp. 552 (D. Del. 1976).}
\footnote{169. \textit{Id.} at 556.}
\footnote{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.}
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.

As noted earlier, property interests in employment arise not from the Constitution, but from independent sources. 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, 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. Plaintiff received a satisfactory evaluation upon completion of his first year, but was discharged halfway through the second year for dating the assistant principal. 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. 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.

The court granted plaintiff reinstatement and back pay conditioned on his acceptance of remittitur of the compensatory and punitive damages.

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

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 1303.
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.\textsuperscript{181} 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.\textsuperscript{182}

Although plaintiff had no legally protectible property interest in continued employment, in \textit{Morris v. Board of Education of Laurel School District},\textsuperscript{183} she did have a liberty interest which was entitled to due process protection.\textsuperscript{184} 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.\textsuperscript{185} The court ordered defendants to reconsider the plaintiff for reemployment and awarded damages.\textsuperscript{186}

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.\textsuperscript{187} This code sets out twenty-three specific infractions for which disciplinary action may be taken.\textsuperscript{188} In \textit{Hickey v. New Castle County},\textsuperscript{189} the court held that these provisions created a property interest of which a plaintiff could not be deprived without due process.\textsuperscript{190}

\begin{itemize}
\item \textsuperscript{181} \textit{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. \textit{Id.}
\item \textsuperscript{182} \textit{Id.} at 252.
\item \textsuperscript{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. \textit{Id.} at 209-10.
\item \textsuperscript{184} \textit{Id.} at 210
\item \textsuperscript{185} \textit{Id.} at 214.
\item \textsuperscript{186} \textit{Id.} at 215.
\item \textsuperscript{187} See New Castle County Code § 12-136 (1982). This section provides the procedure to be followed for dismissal of a county employee.
\item \textsuperscript{188} See id. § 12-142. Disciplinary action may be taken for delinquency, inefficiency, incompetency, and various kinds of misconduct. \textit{Id.}
\item \textsuperscript{189} 428 F. Supp. 606 (D. Del. 1977).
\item \textsuperscript{190} \textit{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 amend-
ment prohibits involuntary retirement prior to age seventy.\textsuperscript{197} The
Act’s applicable statute of limitations has engendered repeated litiga-
tion 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 \textit{a 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 legit-
imate. 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{Rechsteiner 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 plain-
tiff’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

\begin{itemize}
\item \textsuperscript{197} \textit{Id. §§ 623(1)(2), 631, 631(a). See Annot., 70 A.L.R.
Fed. 110 (1984). The issue of involuntary retirement is present most
often in instances of arguably coercive incentives for early retirement, in
reduction-in-force (RIF) plans, and in cases in which the effective date of
the 1978 amendment is challenged. See, e.g., McDonnell v. Gannett News
on December 31, 1978, at age 65; 1978 amendments not effective until
January 1, 1979); Marshall v. Delaware River & Bay Auth., 471 F.
Supp. 886 (D. Del. 1979) (1978 amendment inapplicable to pension
plan created in 1971 which required retirement within the protected age
range).
\item \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.”).}
\item \textsuperscript{199} 538 F. Supp. 686 (D. Del. 1982).
\item \textsuperscript{200} \textit{Id. at 688.}
\item \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.
\item \textsuperscript{202} \textit{Id. at 692.}
\item \textsuperscript{203} 75 F.R.D: 499 (D. Del. 1977).
\item \textsuperscript{204} \textit{Id. at 501.}
\item \textsuperscript{205} \textit{Id. at 501-02.}
\item \textsuperscript{206} \textit{Id. at 502.}
\end{itemize}
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.

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. See \textit{The Du Pont Early Retirement Opportunity, Your Tomorrow Can Begin Today} (1983) (available at the E.I. du Pont de Nemours and Company, Inc. personnel office).
\textsuperscript{212} 29 U.S.C. \textsection 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 cases has reached the merits. Hence, the effect of these actions 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\(^{220}\) (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.\(^{221}\) Although the conclusions of the Administrative Law Judge (ALJ) were not included, the court recognized that plaintiff had argued, \textit{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.\(^{222}\) Under the Labor Management Relations Act\(^{223}\) (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.,\(^{224}\) plaintiff was discharged pursuant to the collective bargaining agreement for missing more than three days of work without a satisfactory explanation.\(^{225}\) 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.\(^{226}\) Consequently, the court found no "substantial evidence of fraud, deceitful action or dishonest conduct"\(^{227}\) to indicate that the union had breached its duty to plaintiff.\(^{228}\) The NLRA and


\(^{222}\) Washam, 571 F. Supp. at 557.


\(^{224}\) 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:

\begin{itemize}
  \item 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
\end{itemize
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\(^ {229} \) protects handicapped persons against discrimination by the federal government, federal contractors, or any program or activity receiving federal financial assistance.\(^ {239} \) 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.\(^ {231} \) The trend is toward permitting private actions against the federal government and against grant recipients but not against contractors.\(^ {232} \) In the only Delaware case to utilize this Act, the court followed the trend in disallowing a private right of action against federal contractors.\(^ {233} \)

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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.

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\(^{234}\) 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.\(^{235}\) 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.\(^{236}\) 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\(^{237}\) is the exclusive labor remedy in the railroad and airline industries.\(^{238}\) 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.\(^{239}\) Because the plaintiff in Read v. Baker\(^ {240}\) had failed to exhaust his administrative remedies pursuant to his allegedly wrongful discharge, the court dismissed this charge for lack of subject matter jurisdiction.\(^{241}\) 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.\(^{242}\)

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\(^{236}\) Wood, 440 F. Supp. at 1006.


\(^{239}\) 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. Additionally, federal actions are more attractive because state agencies frequently direct their resources to conciliation efforts, deflecting litigation to the corresponding federal agencies. Furthermore, while the states have concurrent jurisdiction over any claim which is not expressly reserved to the federal sphere, 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 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, the Delaware courts have interpreted it in a parallel manner. In Giles v. Family Court of the State of Delaware, plaintiff, a black woman, alleged that she was denied appointment to a per-

251. See the Wage Payment Complaint statute, 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, 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. 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); 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).

It is possible that a private remedy could be implied, see Cort v. Ash, 422 U.S. 66 (1975), but so far there have been no reported cases indicating that this line of inquiry has been pursued.


258. 411 A.2d 599 (Del. 1980).
manent 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. The supreme court, therefore, remanded with instructions to return the case to the board for procedures consistent with McDonnell-Douglas.

The State Merit System 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, or by defendants to justify the selection of another applicant in a discrimination charge. However, the specific rights therein have also been invoked as the substantive source of a claim. In Peterson v. Hall, 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. Plaintiff appealed to the state Personnel Commission, as he was entitled to do under the Merit Rules. The Commission determined that its jurisdiction to hear plaintiff's appeal had been superseded by the collective bargaining agreement, and the superior court affirmed. The supreme court reversed, holding that the Merit System clearly gave the Commission jurisdiction to review dismissals made "for cause." Furthermore, plaintiff was entitled to have the Commission hear his appeal since he argued that he was inappropriately included in the union.

269. Riner, 434 A.2d at 377.
270. Id.
272. See supra notes 191-194 and accompanying text.
274. 382 A.2d 1355 (Del. 1978).
275. Id. at 1355-56. Engineers having a professional classification or a bachelor's degree were exempted from having to join. Id. at 1356.
276. Id.
277. Id. at 1356-57.
278. Id. at 1357-59.
279. Id. at 1358. The court in 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).

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.
bargaining unit, a question on which the collective bargaining agreement was silent. However, the collective bargaining agreement superseded the Merit Rules in Sullivan v. Local Union of AFSCME. In this case the Department of Corrections temporarily transferred officers to cover vacancies arising from vacations, illness, or other reasons. 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. 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 Control 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. He appealed his dismissal to the Commission, which eliminated two of the charges and determined that those remaining warranted demotion rather than dismissal. Defendant appealed the Commission's action to the superior court, which reversed. The supreme court affirmed the superior court holding that the Merit Rules precluded the Commission from modifying the agency's decision.

These state statutes 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 in

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.\(^{290}\) They may also be filed as independent state actions.

By far, the most frequently utilized common law action is breach of contract.\(^{291}\) Often, the merit of such claims cannot be ascertained, either because the federal court declined to exercise pendent jurisdiction\(^{292}\) or the claim was not specifically addressed in the opinion.\(^{293}\) 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.*,\(^ {294}\) 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

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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 Assoc. 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. Similarly, the court in *Heideck v. Kent General Hospital, Inc.* held that the personnel manual was not a binding contract which would alter plaintiff's status as an employee at will. Plaintiff in *Robinson v. E.I. du Pont de Nemours & Co.* 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.

Another popular corollary claim is for intentional or negligent infliction of emotional distress suffered by a plaintiff as a consequence of an employer's wrongful practices. The plaintiff can recover damages for emotional distress, embarrassment, and humiliation if he can show that he *in fact suffered such injury* and that defendant's conduct was the proximate cause thereof. In *Eckerd v. Indian River School District*, 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," and awarded him damages for his emotional distress.

Other plaintiffs have not been as successful. In *Robinson v. E.I. du Pont de Nemours & Co.*, the court dismissed as meritless plaintiff's

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295. *Id.* at 936.
296. 446 A.2d 1095 (Del. 1982).
297. *Id.* at 1096.
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 cases arose on the defendants' motions for summary judgment; thus the merits of the contract claims were not discussed.

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.
301. *Id.* at 1310.
303. *Id.* at 1367.
304. *Id.*
305. 33 Fair Empl. Prac. Cas. (BNA) 880 (D. Del. 1979); see *supra* notes 52-55 and accompanying text for an example of the behavior which plaintiff claimed caused her emotional distress.
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."

Similarly, the court in *Avallone v. Wilmington Medical Center, Inc.* found neither intentionally nor negligently inflicted emotional distress.

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.

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. At other times, multiple grounds for relief may be available. Often a statute is not really a ground for individual claims because there is no private right of action, 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.\footnote{313} 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.\footnote{314} 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.\footnote{315} A prospective plaintiff should also pay close attention to the effective date of the particular statute, as he may not fall within its coverage.\footnote{316} 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.\footnote{317}

\footnotesize{(no private right of action under the Vietnam Era Veterans’ Readjustment Act of 1972 or under § 503 of the Rehabilitation Act of 1973). \textit{See also supra} notes 230-236 and accompanying text.}


\footnote{314. \textit{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). \textit{See also} Rutherglen, \textit{Notice, Scope, and Preclusion in Title VII Class Actions}, 69 Va. L. Rev. 11 (1983); \textit{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.}

\footnote{315. \textit{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.”

\footnote{316. \textit{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.

\footnote{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}
1. Time Limits

Statutes of limitations often prove to be a major obstacle for plaintiffs bringing employment discrimination claims. Such problems occur because the potential causes of action have different applicable limits, and because time constraints must be satisfied while administrative remedies are pursued. These often conflicting requirements result in a fair amount of confusion regarding the proper deadline.

Several of the most frequently used federal statutes provide a 180-day limit for filing a claim with the appropriate federal agency if the state provides a remedy; if there is no state agency, the period is extended to 300 days. For claims brought under section 1983

F. Supp. 717 (D. Del. 1978), plaintiff filed his Title VII complaint against the Department of Justice, the Immigration and Naturalization Service, and five individual INS employees. Defendants argued that plaintiff should have named the Attorney General of the United States as the sole defendant, and thus moved to dismiss the complaint. The court, however, found that the language of Title VII left the decision of the "appropriate" defendant to the court's discretion. The court, therefore, substituted the head of the INS as defendant for purposes of plaintiff's Title VII claims, and dismissed those claims against the original named defendants.

This problem is unlikely to arise in the case of an employer in the private sector, since most plaintiffs know for whom they work.

318. See Ricks v. Delaware State College, 22 Fair Empl. Pract. Cas. (BNA) 788 (D. Del. 1978), rev'd in part, 605 F.2d 710 (3d Cir. 1979), rev'd, 449 U.S. 250 (1980) (extensive discussion of applicable statutes of limitations). In Spencer v. Roudebush, 443 F. Supp. 149 (D. Del. 1977), plaintiff elected to pursue an avenue of relief which did not require that she be informed of the 30-day limit on filing a civil action after exhausting that remedy; consequently, her failure to comply with that deadline barred her suit.

319. See infra notes 321-328 and accompanying text.

320. See Ferguson, 560 F. Supp. at 1191. At 1191 presents an excellent example of the confusion engendered by statute of limitation; however, the time constraints did not bar amendment of the complaint).

Additionally, the 180-day statute of limitations for filing a discrimination charge under Title VII is inapplicable when the EEOC is the plaintiff. EEOC v. E.I. du Pont de Nemours & Co., 516 F.2d 1297 (3d Cir. 1975).


The Fair Labor Standards Act, 29 U.S.C. § 215 (1983), and the Equal Pay Act, 29 U.S.C. § 206(d) (1983), allow plaintiffs two years to file claims. Other federal statutes, however, only give a plaintiff 30 days to file a complaint with the appropriate agency. See, e.g., Occupational Safety & Health Act of 1970, 29 U.S.C. § 660(C) (1983) (prohibits discharge of or discrimination against an employee who files, institutes, or testifies regarding a complaint to enforce the statute, or who is
and the Constitution directly, the most appropriate state statute of limitations is applied. In Delaware, this is three years. The state statutes generally provide their own requisite time periods, which are often quite short. Common law actions follow their own statutes of limitations. When the only available remedies for a particular cause of action are equitable and no limitation period is specified, the equitable doctrine of laches governs. These time limits can be avoided by alleging a "continuing violation" as long as some conduct of the defendant falls within the statutory period. Additionally, claims can be separated by individual causes of action and by defendant, if there is more than one, for purposes of applying the correct limitation period.

The primary problem with statutes of limitations is twofold: when they begin to run and what, if anything, will toll their running. Generally, a statute begins to run from the time of the allegedly unlawful action. As mentioned previously, this may be avoided by

about to take any of these actions); Energy Reorganization Act of 1974, 42 U.S.C. § 5851(b) (1983) (same); Railroad Safety Act, 45 U.S.C. § 441(b)(1) (1983) (same, but further applies to those refusing to work under conditions reasonably believed to be dangerous).


325. For most tort and contract actions in Delaware, this is the three-year period prescribed by Del. Code Ann. tit. 10, § 8106 (1975).


327. In Stallings v. Container Corp. of Am., 75 F.R.D. 511 (D. Del. 1977), the plaintiffs alleged that they were "attacking a promotion procedure which has operated to their prejudice in the past and which . . . will continue to operate to their prejudice in the future." Id. at 515. The court accordingly held that the claims were not time barred. However, the court granted summary judgment for the defendant in Burris v. Wright Constr. Co., 459 F. Supp. 157 (D. Del. 1978), because no acts alleged in the complaint fell within the three-year statute of limitations for a § 1981 claim.


329. When the allegedly unlawful conduct concerns a dismissal which is to take effect at a later date, the statute begins to run when the decision to terminate
asserting a continuing violation.\textsuperscript{330} The statute may be tolled if doing so would be equitable, but there is no set standard for determining what action will be sufficient to toll its running.\textsuperscript{331} If the time limits for filing with the state agency are shorter than that of the federal statute, missing the state deadline cannot bar plaintiff’s federal claim.\textsuperscript{332}

An additional time problem arises for plaintiffs pursuing administrative remedies. For example, the Delaware statute requires filing an appeal from a decision of the State Personnel Commission within thirty days.\textsuperscript{333} This thirty day period, however, does not include the filing of cross-appeals, as this would compel the prevailing party to file a cross-appeal in anticipation of an appeal or risk being barred by the statute should the losing party file on the thirtieth day.\textsuperscript{334}

At the federal level, Title VII provides a prime example of the confusion encountered in attempting to comply with administrative procedures while preserving one’s right to bring a civil action thereunder. The statute gives a plaintiff ninety days in which to commence a civil action once the EEOC has issued a “right to sue” letter.\textsuperscript{335} The EEOC practice in recent years has been to notify the complainant that it is declining any further involvement in the matter, but that the complainant may obtain a “right to sue” letter if desired.\textsuperscript{336} The courts in Delaware have held that the ninety day period for filing suit following the “right to sue” letter begins to run with the receipt of the first letter advising the plaintiff that the EEOC will no longer

\textsuperscript{330} See supra note 300 and accompanying text.
\textsuperscript{331} See Erlandson v. Pioneer Salt & Chem. Co., 20 Fair Empl. Prac. Cas. (BNA) 716, 717 n.11 (D. Del. 1978) (lists number of actions which will toll the statute); Lanyon, 544 F. Supp. at 1262 (statute tolled for misinformation given by the state administrative agency to plaintiff concerning deadlines for filing a claim); Cannon v. State of Del., 523 F. Supp. 341 (D. Del. 1981) (EEOC’s failure to follow its own procedure tolled the running of the statute as against plaintiff, since she would have been barred from filing suit through no fault of her own).
\textsuperscript{332} Missing the state time limit cannot “shrink the federal remedy.” Erlandson, 20 Fair Empl. Prac. Cas. at 717 (quoting Bonham v. Dresser Indus., Inc., 569 F.2d 187 (3d Cir. 1978)).
\textsuperscript{333} Del. Code Ann. tit. 29, § 5949(b) (1983).
\textsuperscript{334} See Coffin v. Department of Natural Resources & Environmental Control, 391 A.2d 193, 194-95 (Del. 1978).
be involved. Nonetheless this strict interpretation, the ninety day period, like the underlying one, can also be equitably tolled.

2. Exhaustion of Administrative Remedies

Regardless of whether a private right of action is ultimately authorized by a statute, administrative remedies must first be pursued. Initially, the aggrieved party must file a complaint with a certain office or board. This seemingly simple requirement frequently results in confusion because the similarity in name and function of

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337. Id. at 1089-92. The court stated:

The majority of courts which have had similar issues before them have concluded that Section 706(f)(1) contains no authority for a two-letter procedure, and that Congress intended the 90-day limitations period to begin running upon notification that one of the enumerated contingencies had arisen, not upon receipt of a "Right to Sue" letter . . . . Clearly the statute provides no authority for a procedure the operative effect of which is to permit the aggrieved party to decide when the limitations period will begin to run. Id. at 1089-90. See also DeMatteis v. Eastman Kodak, 511 F.2d 306 (2d Cir. 1975). Because plaintiff had not filed suit within 90 days of being informed that the EEOC would take no further action on her complaint, her action was time-barred. See also Robinson, 35 Fair Empl. Prac. Cas. at 884, where the court laid down the law in no uncertain terms:

The plaintiff consulted several lawyers promptly after she received the Right to Sue letter from the EEOC . . . . She had ample opportunity to discover that, under the caselaw in this district, the first letter from the EEOC notifying her of the dismissal of her complaint triggered the 90-day period for filing suit.

338. See Trader, 576 F. Supp. at 1205. Although plaintiffs were unsuccessful in asserting their Title VII claims because the 90 day period had elapsed prior to their filing their complaints, the court stated: "[T]he substantive policy of Title VII—to promote the humanitarian goal of ending employment discrimination—will be equally served by allowing plaintiffs, in appropriate cases, to institute federal court actions despite non-compliance with the 90-day filing period." Id. (emphasis added). Further language suggests that an "appropriate case" would be one in which the defendant was responsible for the late filing. Id. at 1206. See also Lanzer, 544 F. Supp. at 1262 (90-day filing period tolled for misinformation supplied by Delaware Department of Labor concerning deadlines); EEOC v. Delaware Trust Co., 416 F. Supp. 1040 (D. Del. 1976) (despite several errors in delivery of documents, appropriate filing procedures and time period were satisfied).

the various agencies\textsuperscript{340} can easily lead to filing with the wrong agency\textsuperscript{341} as well as failing to file with both the state and federal administrative boards when required by statute.\textsuperscript{342} In addition to following formal administrative procedures,\textsuperscript{343} a complainant may also have to comply with informal ones.\textsuperscript{344} Significantly, there is no requirement that administrative remedies be exhausted when the claim is brought under 42 U.S.C. § 1983,\textsuperscript{345} thus making section 1983 most attractive to a plaintiff falling within its coverage.

3. Relief Sought and Process Desired

Should a cause of action survive the pitfalls of time constraints and administrative procedures, further choices are necessary as to the relief sought and the process most likely to enable the plaintiff to obtain such relief. The process chosen is necessarily dependent upon the preferred relief and will often involve trade-offs. If equitable relief such as reinstatement is desired, the option of a jury is lost.

\textsuperscript{340} See EEOC v. State Dep't of Health & Social Servs., 595 F. Supp. 568 (D. Del. 1984). Under Reorganization Plan No. 1 of 1978, much of this authority was consolidated in the EEOC as part of its enforcement duties. This should simplify the filing process considerably, but the constitutionality of the authority for that reorganization is not free from doubt.

\textsuperscript{341} See EEOC v. Delaware Trust Co., 416 F. Supp. 1040 (D. Del. 1976). In Delaware Trust, even the United States Postal Service was embroiled in the confusion. The plaintiff's letter, addressed to the EEOC, was delivered to the Office of Federal Contract Compliance Programs (OFCCP), the arm of the Department of Labor which enforces discrimination claims against federal contracts. Both of these agencies must be distinguished from federal, state, and local Civil Rights Commissions, which also investigate claims of discrimination.

\textsuperscript{342} See Cannon, 523 F. Supp. at 341 (Title VII claim required to be filed with both the Delaware Department of Labor and the EEOC; EEOC must defer to primary jurisdiction of Department of Labor before it processes a complaint); National Cash Register v. Riner, 413 A.2d 890 (Del. 1979) (claim of age discrimination must first be filed with appropriate state agency to give it an opportunity to resolve the conflict). See Annot., 72 A.L.R. FED. 10 (1985).

\textsuperscript{343} See, e.g., Skomorucha v. Wilmington Hous. Auth., 504 F. Supp. 836 (D. Del. 1980) (Title VII requires that the aggrieved party first file with a state or local authority, and then with the EEOC). See also Annot., 23 A.L.R. FED. 895 (1975).

\textsuperscript{344} See Ferguson v. E.I. du Pont de Nemours & Co., 560 F. Supp. 1172 (D. Del. 1983). In Ferguson, one of the reasons the court gave for rejecting plaintiff's claim for wages commensurate with work she alleged was managerial in nature was that she had never requested any adjustment of her pay based on her belief that as a secretary she was doing managerial work. Similarly, plaintiff's failure to request reconsideration of a review board's decision worked against him in Guilday v. Department of Justice, 451 F. Supp. 717 (D. Del. 1978).

A request for legal relief brings the seventh amendment right to jury trial into play. Sometimes legal and equitable relief may be pursued simultaneously, either because the statute so permits, or because more than one cause of action is being asserted. On the other hand, not all types of relief are available under each potential cause of action. The importance of this decision cannot be overemphasized, since the final choice to pursue a certain type of relief may effectively foreclose other avenues.

A plaintiff desiring monetary relief has several choices: front pay, back pay, compensatory damages, and punitive or liquidated damages. Front pay resembles a promotion with commensurate pay while the plaintiff awaits the actual promotion. Back pay compensates plaintiff for wages which would have been earned but for the improper employment action. Compensatory damages encompass damages other than lost wages; most frequently they are requested for the mental distress engendered by the employer's action. Punitive damages retain their usual meaning in the employment context. Liquidated damages are analogous to punitive damages, but the maximum amount recoverable is often limited by statute.

346. See 29 U.C.S. § 1132(c) (1983) (both injunctive relief and damages are available under ERISA).

347. Hanshaw, 405 F. Supp. at 297. The complainants' prayer for "other equitable relief as the court deems appropriate" was proper since plaintiffs had asserted claims under §§ 1981, 1983, and 1985 as well as Title VII, and "the limits imposed by the equitable nature of the relief granted under section 2000e-5(g) do not apply to the causes of action under section 1981, 1983 and 1985." Id.


350. Back pay does not, however, include compensatory damages. The use of correct terminology is critical. In Erlandson v. Pioneer Salt & Chem. Co., 20 Fair Empl. Prac. Cas. (BNA) 716 (D. Del. 1978), a prayer for "compensatory and punitive damages" was stricken as unrecoverable under the ADEA.

351. "The liquidated damages provision of ADEA ... is 'in effect a substitution for punitive damages and is intended to deter intentional violations of the ADEA.'" Kneisley, 577 F. Supp. at 738 (quoting Kelly v. American Standard, Inc., 640 F.2d 974, 979 (9th Cir. 1981)).

Title VII allows recovery of back pay for the two years prior to the filing of the claim. However, compensatory and punitive damages are unavailable.\(^{353}\) While the ADEA permits a plaintiff to obtain back pay and liquidated damages,\(^{354}\) damages for emotional distress have been interpreted as not being recoverable.\(^{355}\) For violations of constitutional rights, a plaintiff may request compensatory as well as punitive damages.\(^{356}\) Additionally, punitive damages are available in section 1983 actions "primarily for their effect on defendant, and to vindicate the public interest in deterring malicious or wanton conduct by public officials.\(^{357}\) The normal rules for awarding compensatory and punitive damages in a tort or contract action apply to complaints of unfair employment practices brought under common law causes of action.\(^{358}\)

The scope of equitable relief available to a plaintiff is equally broad.\(^{359}\) This relief may include orders to hire, promote, or reinstate.\(^{360}\) It may be only an opportunity to clear one's name\(^{361}\) or to

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353. 42 U.S.C. § 2000e-5(g) (1983) sets out the remedies available under Title VII.


355. Section 7(b) of the ADEA defines monetary relief only in terms of "amounts owing to a person as a result of a violation of this chapter . . . ." The "amounts owing" to a victim of age discrimination are not further defined by state. Pfeiffer v. Essex Wire Corp., 682 F.2d 684 (7th Cir., 1982), cert. denied, 459 U.S. 1039 (1982) (neither damages for pain and suffering nor punitive damages available). See also Rechsteiner v. Madison Fund, Inc., 75 F.R.D. 499 (D. Del. 1977).

356. See Aumiller v. University of Del., 434 F. Supp. 1273 (D. Del. 1977). Plaintiff brought an action under § 1983 alleging that the university did not renew his contract because of his exercise of his first amendment rights. The court awarded plaintiff compensatory damages for the emotional distress, humiliation, and embarrassment suffered by him as a result of the defendants' conduct, and also granted him punitive damages against the university's president for his wanton disregard of plaintiff's constitutional rights. Id. at 1274. Similarly, a jury awarded both compensatory and punitive damages to a high school principal who was terminated with reckless disregard of his constitutional rights to due process and privacy; the court ordered a remittitur, finding the amounts excessive. Schreffler v. Board of Educ. of Delmar School Dist., 506 F. Supp. 1300 (D. Del. 1981).


360. See Aumiller, 434 F. Supp. at 1307. "[R]einstatement is an integral part of the remedy where a teacher, or other public employee, has been terminated from employment for the exercise of rights protected by the First Amendment."

be heard fairly.\textsuperscript{362} Injunctive relief may be available to change decision-making procedures,\textsuperscript{363} require institution of training programs,\textsuperscript{364} or expunge personnel records.\textsuperscript{365} Preliminary injunctive relief may be sought since financial hardship generally accompanies loss of employment.\textsuperscript{366} Seeking equitable relief would prohibit a jury trial; this is probably desirable where the plaintiff's conduct as well as the defendant's may be in issue.\textsuperscript{367}

\textsuperscript{362} See id. at 213. "Under the contractual provisions breached [procedural safeguards against unfair teacher evaluations in specified situations such as this case, plaintiff] had a right to be considered for reemployment in an atmosphere uncontaminated by charges which she did not have a fair opportunity to rebut." \textsuperscript{367} Id. at 213. Accordingly, the court required the school board to consider plaintiff for reemployment for the following school year.

\textsuperscript{363} See Stallings v. Container Corp. of Am., 75 F.R.D. 511 (D. Del. 1977) (court directed defendant to develop a new shift foreman promotion procedure to guard against the subjective procedures challenged by plaintiffs). See supra text accompanying notes 11-13. The court required defendant to submit the plan for its approval prior to its institution.

\textsuperscript{364} See Stallings, 75 F.R.D. at 523 (request denied on the facts but not on principle).


\textsuperscript{366} See, e.g., Skomorucha, 504 F. Supp. at 836 (D. Del. 1980), where such relief was available but not warranted by the facts. Note the financial hardship encountered by plaintiffs following their termination in Eckerd, 475 F. Supp. at 1350, and Aumiller, 434 F. Supp. at 1273.

The standards for granting a preliminary injunction in an employment discrimination case are the same as for any other case. The court must consider the moving party's likelihood of success on the merits, whether the movant will suffer irreparable injury if the injunction is not granted, whether the opposing party will be injured, and the degree to which the public interest will be affected by granting the relief. \textsuperscript{367} Skomorucha, 504 F. Supp. at 838. In Lewis v. Delaware State College, 455 F. Supp. 239, 251 (D. Del. 1978), the court found that plaintiff "made a strong showing that her constitutional rights were violated and that, as a result, she . . . had to accept a lower paying job in other than her chosen field. . . . [N]o further showing of irreparable harm is required."

\textsuperscript{367} "[S]exually aggressive conduct and explicit conversation on the part of a plaintiff may bar a cause of action for sexual harassment." \textit{Ferguson}, 560 F. Supp. at 1196 (citations omitted).

In Knotts v. Bewick, 467 F. Supp. 931, 937-38 (D. Del. 1979), plaintiff's on-the-job conduct had been so "impossible" and disruptive that only nominal damages were awarded in lieu of back pay and reinstatement. \textit{Cf. Goldsmith v. E.I. du Pont de Nemours & Co., 571 F. Supp. 235, 245 (D. Del. 1983)}, which limited plaintiff's relief to damages for retaliatory discharge in light of a work record characterized by absenteeism and low productivity.
The plaintiff should choose the process which will maximize his chances of obtaining the desired relief. The first step is to select a state or federal forum. The relative efficacy of the various state and federal administrative agencies should be considered when making this decision, keeping in mind that a record is being developed during the course of administrative proceedings. Finally, and perhaps most importantly, the plaintiff must decide whether to demand a jury.

It is especially interesting to note that an ADEA claim is one of the few causes of action permitting a jury trial. The jury may decide claims for back pay and liquidated damages, but may not

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Plaintiff's conduct may be relevant in considering whether to reinstate him but not in awarding back pay. See Kneisley v. Hercules, Inc., 577 F. Supp. 726 (D. Del. 1983). A possible exception to this is where plaintiff's conduct is directly related to the request for back pay, as in Stallings, 75 F.R.D. at 522-23. One plaintiff had refused a promotion, which barred his claim for back pay subsequent to the date of his refusal. 368. Section 1983 and claims of constitutional violations may be brought in state as well as federal courts under the state's concurrent jurisdiction to hear any federal question which is not expressly reserved to the federal courts by statute. See generally 28 U.S.C. §§ 1331, 1333, 1338 (1983).

369. As discussed previously, some administrative remedies can be pursued simultaneously; others require an election. In Washam v. J.C. Penney Co., 519 F. Supp. 544 (D. Del. 1981), the court held that an NLRB award based on retaliatory discharge for union activities did not bar plaintiff's EEOC claim for race discrimination. "Neither the NLRB nor the EEOC presented Washam with a forum in which it was possible for him to litigate both racial discrimination and unfair labor practice claims. He presented each to the appropriate agency." Id. at 559 (relying upon Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), and referring to Meltzer, Labor Arbitration and Conflicting Remedies for Employment Discrimination, 39 U. CHI. L. REV. 30 (1971)). See also Note, National Labor Relations Act: The Roles of the NLRB and the Courts of Appeals After Pullman-Standard in Determining Employer Motivation in Section 8(a)(3) Dual Motive Cases, 36 VAND. L. REV. 1095 (1983).

370. This decision is not left to plaintiff alone. Where a cause of action permits a jury trial, defendants have demanded one. As mentioned previously, a defendant may desire a jury trial when plaintiff's conduct is or may be culpable. A defendant may also want a jury trial where its action, though discriminatory, is such as to appeal to the jury's sympathy or understanding. See, e.g., Fesel v. Masonic Home of Del., Inc., 428 F. Supp. 573 (D. Del. 1977) (defendant refused to hire male nurse because the nurses had to attend to the predominantly female residents' personal needs, such as bathing; this will be particularly likely to elicit sympathy from older female jurors who could conceive of themselves in such a situation). Section 1983 permits jury trials. Tyler v. Board of Educ. of New Castle County Vocational-Technical School Dist., 519 F. Supp. 834 (D. Del. 1981). Arguably, they are also allowable under ERISA. See Note, The Right to Jury Trial in Enforcement Actions Under Section 502(a)(1)(B) of ERISA, 96 HARV. L. REV. 717 (1983).


award relief on equitable claims. Realistically, jury members may not be able to identify with a plaintiff of a different sex or race, but may more easily see themselves as growing older. Consequently, the effect of a jury in an age discrimination case could be significant.

B. The Prima Facie Case

1. The Core Elements

Most claims of unlawful employment practices involve a failure to hire, promote, or discharge. However, an employee may also allege a “constructive discharge” if working conditions become so intolerable as to force him to resign. To survive a motion for summary judgment on such discrimination claims, a plaintiff must establish a prima facie case.

The elements necessary to establish a prima facie case of discrimination were first set down by the Supreme Court in \textit{McDonnell-Douglas Corp. v. Green} in the context of a Title VII claim. They have since been required for other causes of action alleging discrimination. Plaintiff must produce evidence that he was a member of the protected class, was qualified for the job from which he was
discharged (demoted or for which he was not hired), and that members not in the protected class were treated more favorably. 379

The first element to be proven is discriminatory motive. 380 Because proving that an employer's practices evidence an actual intent to discriminate requires subjective manifestations of this intent, the courts have adopted two other theories. In the first, applicable to section 1983 and Title VII, a plaintiff is required to show disparate treatment; the focus is on the discriminatory motive underlying the treatment. 381 Plaintiff must demonstrate that similarly situated employees were not treated equally. 382 The more recent theory, utilized
under Title VII alone, allows plaintiff to show the disparate impact of the employer's practices. Liability may be imposed upon an employer under this theory when the challenged practices evince a disparate outcome, regardless of how benign the underlying motive. Thus, practices which are facially neutral in their treatment of different groups but in fact affect one group more harshly than another may be found discriminatory even in the absence of such intent if the practices cannot be justified by business necessity. Disparate impact need not be demonstrated statistically. However, statistical evidence is normally helpful to present an objectively verifiable pattern of disparate impact.

The second element is that plaintiff must be a member of the class protected by the statute; this is simply a matter of showing that the plaintiff falls within the coverage of the statute. Plaintiff conclusion on this record is that the disparity in . . . treatment of Miss Morris and the other coaches was attributable, not to her race, but to the Mitchell letter." Id. See Wilmore, 699 F.2d at 670. 383. 384. Id. 385. Id. (quoting Croker v. Boeing Co. (Vertol Division), 662 F.2d 975, 991 (3d Cir. 1981)). The relationship between a practice justified by business necessity and a bona fide occupational qualification is discussed infra text accompanying notes 477-486.

Plaintiffs . . . are not limited to statistical proof, however. If a plaintiff can show a pattern of individual employment decisions made pursuant to the challenged practice in which qualified blacks are consistently passed over in favor of whites with equal or poorer qualifications, an inference of disparate impact could properly be drawn even though a comparison of the overall results of the practice with what one would expect from a random selection does not produce statistically significant results. Stallings v. Container Corp. of Am., 75 F.R.D. 511, 520-21 (D. Del. 1977). In this case, the court found for plaintiffs on the strength of the non-statistical evidence. Id. at 521. 386. 387. "A prima facie case of disparate impact can be shown by statistical indicia." Wilmore, 699 F.2d at 670. Additionally, the court in Stallings stated that "[o]rdinarily, a plaintiff’s statistical evidence plays a major role in disparate impact cases. If there is statistically significant evidence of disparate impact, absent a showing by the employer of business necessity or the like, the plaintiff is entitled to relief." Stallings, 75 F.R.D. at 520.

Sometimes statistics cannot be used effectively because the absolute numbers involved may be too small for drawing reliable conclusions. See id. at 519. Also, the relevant labor pool with which to compare the actual work force is usually the metropolitan area rather than the boundaries of political subdivisions. EEOC v. du Pont de Nemours & Co., 445 F. Supp. 223 (D. Del. 1978).

must also prove that he was qualified for and applied for the position in question.\textsuperscript{399} In the contexts of discharge and failure to promote claims, qualification for the position may be established by showing that the plaintiff did satisfactory work.\textsuperscript{390} Where a plaintiff has alleged a denial of promotion, a "generalized expression of interest can be considered an application,"\textsuperscript{391} at least in situations where positions were not posted, thus making specific application impossible.\textsuperscript{392}

The last element to be proved by a plaintiff in establishing a \textit{prima facie} case is that the unprotected class has been treated more favorably.\textsuperscript{393} This requirement is normally satisfied by showing that the position was filled by a person not in the protected class,\textsuperscript{394} that the employer continued to seek qualified applicants after rejecting the plaintiff,\textsuperscript{395} or that job benefits were conditioned on sexual favors.\textsuperscript{396} However, plaintiff need not show that the position was filled by another person or that the employer continued to seek applicants in an age discrimination claim involving a reduction-in-force.\textsuperscript{397}

\begin{itemize}
\item \textsuperscript{389} \textit{McDonnell-Douglas}, 411 U.S. at 802.
\item \textsuperscript{391} \textit{Ferguson}, 560 F. Supp. at 1193.
\item \textsuperscript{392} \textit{Id.} Ferguson was quite vocal and persistent in her attempts to obtain a promotion. \textit{See id.} at 1180-81.
\item \textsuperscript{393} \textit{See McDonnell-Douglas}, 411 U.S. at 802.
\item \textsuperscript{394} Because she was not replaced by a male after her termination, plaintiff failed to establish a \textit{prima facie} case of sex discrimination in \textit{Lanyon v. University of Del.}, 544 F. Supp. 1262 (D. Del. 1982), \textit{aff'd}, 709 F.2d 1493 (3d Cir. 1983). However, a plaintiff satisfied this element by alleging that he was fired ostensibly for financial reasons but was replaced within days by a female, and that such action was in furtherance of a company practice to hire males for managerial positions and females for the lower-paying menial jobs. \textit{Zalewski v. M.A.R.S. Enterprises, Ltd.}, 561 F. Supp. 601 (D. Del. 1982).
\item \textsuperscript{395} \textit{See Fesel v. Masonic Home of Del., Inc.}, 447 F. Supp. 1346 (D. Del. 1978).
\item \textsuperscript{396} See \textit{Toscano v. Nimmo}, 570 F. Supp. 1197 (D. Del. 1983), where plaintiff was denied a promotion which ultimately went to another woman who was involved in an affair with the supervisor. Plaintiff had refused to engage in sexual relations with the supervisor. The court stated, "[E]ven where, for example, one woman is promoted over another, if the unsuccessful applicant would not have been treated in the same manner if she were a man, the employer is still liable for sex discrimination." \textit{Id.} at 1199 (citing \textit{Skelton v. Balzano}, 424 F. Supp. 1231, 1235 (D.D.C. 1976)).
\item \textsuperscript{397} \textit{Kneisley}, 577 F. Supp. at 731. The court stated that "[s]o long as plaintiff pursues his theory of the case as involving a discriminatory layoff, he need not introduce evidence of replacement by a younger employee." \textit{Id.}
2. Other Allegations

Rule 8(a) of the Federal Rules of Civil Procedure has simplified the procedure for pleadings by stating that a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." 398 Notwithstanding the more relaxed requirements of Rule 8(a), the Third Circuit has required plaintiff to "set forth with specificity each defendant's alleged violations" in a civil rights complaint. 399 However, some courts may be willing to construe the complaint as a whole to determine if the requisite information is present. 400 When liquidated damages are sought for a willful violation, it is sufficient that the complaint alleges the condition of the mind in general terms. 401

Both Title VII and the ADEA require plaintiffs to allege that all state remedies have been exhausted. 402 A statement that "all timeliness requirements were met," accompanied by affidavits including a copy of the charge filed with the state agency showing that the requisite waiting period had expired, satisfied the Title VII requirement. 403 The complaint need not allege separate acts to charge defendants as acting in both their individual and official capacities. 404 Of course, the complaint must also contain information required in all civil actions, such as a jurisdictional allegation 405 and a properly alleged class for a class action. 406

398. Fed. R. Civ. P. 8(a)(2) provides in pertinent part: "(a) CLAIMS FOR RELIEF. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third party claim shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."


400. See Trader v. Fiat Distributors, Inc., 476 F. Supp. 1194 (D. Del. 1979) (court found complaint not pleaded with enough specificity; advised plaintiffs as to what information to include in their amended complaint).

401. See Rechsteiner, 75 F.R.D. at 502 (relying upon Fed. R. Civ. P. 9(b)).

402. 29 U.S.C. §§ 5000-5(c), 633(b) (1983). The court chastised both parties for failure to comply with such a provision in Rechsteiner, 75 F.R.D. at 507. However, the court may grant leave to amend to correct this deficiency. See Patton v. Conrad Area School Dist., 388 F. Supp. 410 (D. Del. 1979).

403. Hanshaw, 404 F. Supp. at 297. See also Trader, 476 F. Supp. at 1206-07 (willingness to look at record, not only the complaint, for proof of satisfaction of this requirement); Erlandson, 20 Fair Empl. Prac. Cas. at 717 (subsequent affidavits, uncontested by defendant, permitted to satisfy requirement when complaint was "unclear on [its] face").


406. See id. at Rule 23 for requirements necessary to maintain a class action. In a civil rights class action, the class must be properly certified for each claim.
C. The Burden of Proof

Historically, there were three phases to proving a discrimination claim under Title VII. Plaintiff first had to establish a *prima facie* case of discrimination by a preponderance of the evidence. If plaintiff succeeded in doing so, the burden then shifted to defendant to articulate a nondiscriminatory reason for the action. The burden then returned to plaintiff to prove, again by a preponderance of the evidence, that the reasons offered by defendant were merely pretextual. These burdens were modified in *United States Postal Service v. Aikens* to eliminate the alternating burdens in favor of an analysis of all the evidence.

Both standards require plaintiff to ultimately demonstrate by a preponderance of the evidence that the employer intentionally discriminated against him on an impermissible basis. "The plaintiff may succeed in this either directly by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Testimony from similarly situated employees is admissible and may be introduced to rebut an employer's asserted justification for the action. Additionally, evidence of conduct outside

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However, "[t]he rule does not necessitate a showing that each class member presents exactly the same legal and factual questions, but rather that there be some questions of law or fact common to all class members." Wilmore, 30 Fair Empl. Prac. Cas. at 1763. Nor does the requirement of typicality mean that all plaintiffs' claims be identical. Id. at 1764. The class may be divided into subclasses to reduce conflict and generally facilitate management. Marshall v. Electric Hose & Rubber Co., 68 F.R.D. 287 (D. Del. 1975).

407. This burden of proof also applies to those civil rights actions which have adopted the methodology of Title VII, such as the ADEA. See supra note 378.

408. See Ferguson, 560 F. Supp. at 1192 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981)).

409. See id.

410. See id.


412. Id.

413. Id.

the time period may be admissible as it is relevant to the issue of discriminatory intent.415

D. Defenses to a Charge of Unfair Employment Practices

A defendant has several negative defenses available. As discussed previously, the statute may not provide a private right of action, or plaintiff may have failed to exhaust state remedies as required by statute.417 The defendant may contend that it is not subject to the statute: for example, the statute may only apply to employers of a certain size or type, or the defendant’s action occurred prior to the statute’s effective date.418 A defendant may assert that the plaintiff’s claim is barred by the statute of limitations.419

introduce testimony of other Department employees who were allegedly victims of the same coercion as was Kneisley." Id. at 738.

415. Ferguson, 560 F. Supp. at 1191. The court stated:
Once it is found that the plaintiff has a timely claim, evidence relating to past practices, even though not separately actionable, constitutes evidence relevant to discriminatory intent and recovery. This conclusion is virtually dictated by the remedial provisions of section 706(g) which limit the award of back pay to a time period of two years prior to the filing of the charge with the EEOC.


416. See supra notes 161-162, 164 and accompanying text.


418. See Reiver v. Murdoch & Walsh, P.A., 36 Fair Empl. Prac. Cas. (BNA) 997 (D. Del. 1985). Although the court in Reiver ultimately dismissed the case on the ground that the controversy was not ripe, it discussed the applicability of Title VII to a position on the board of directors of a professional corporation. The court noted that "certain private membership clubs, 42 U.S.C. § 2000e(b)(2), religious corporations, associations, educational institutions, or societies, 42 U.S.C. § 2000e(b), are expressly excluded from the prohibitions of Title VII with respect to employment." Id. at 1000.


420. See supra notes 318-338 and accompanying text. This defense was raised in a large number of cases, probably because of the complexity of several periods of limitation coupled with lack of clarity as to when each begins to run.
When a plaintiff alleges that an employer should be liable on the basis of respondeat superior, the employer can successfully defend on the basis that it did not know and should not have known of the acts constituting the violation, or that it took action to rectify the situation. In Robinson v. E.I. du Pont Nemours & Co.,\textsuperscript{421} the court found that plaintiff had never complained to anyone in the company about the alleged sexual advances made by her supervisor, nor did she produce evidence that defendants knew or should have known of the conduct.\textsuperscript{422} In Ferguson v. E.I. du Pont de Nemours & Co.,\textsuperscript{423} the court did not hold the company liable since, when plaintiff notified her supervisors of the harassment to which she was allegedly subjected, the supervisors promptly investigated her complaint and the conduct thereupon ceased.\textsuperscript{424}

The court reached a contrary result in Toscano v. Nimmo.\textsuperscript{425} Although defendant hospital argued that it could not be responsible for the supervisor's unlawful conduct unless his supervisors knew or should have known that such actions were occurring,\textsuperscript{426} the court held that this was not a prerequisite to liability.\textsuperscript{427} Even if the court were to adopt this position, however, the court noted that plaintiff had notified her superiors of the supervisor's conduct yet they failed to take any corrective action.\textsuperscript{428}

In addition, individual defendants may attempt to avoid liability for the corporate action. However, as organizations can only act through individuals, however, an agency relationship is easily found.\textsuperscript{429} When the cause of action is based on section 1983, defendant can

\textsuperscript{421} 33 Fair Empl. Prac. Cas. (BNA) 880 (D. Del. 1979).
\textsuperscript{422} Id.
\textsuperscript{423} 560 F. Supp. 1172 (D. Del. 1983).
\textsuperscript{424} Id. at 1199. The court stated that: employers should not be liable if they seek to alleviate or dispel hostile environments by methods such as strict and prompt remedial measures and strictly enforced and well-known company policies. Further, when supervisory personnel engage in such activity, they act outside the scope of their authority and agency principles, therefore, do not apply.
\textsuperscript{425} 570 F. Supp. 1197 (D. Del. 1983).
\textsuperscript{426} Id. at 1205.
\textsuperscript{427} Id. at 1203-04.
\textsuperscript{428} Id. at 1204.
\textsuperscript{429} See Hanshaw v. Delaware Technical & Community College, 405 F. Supp. 292 (D. Del. 1975) (members of the board of trustees, both as individuals and officials, are properly defendants as they failed to establish that they were not agents of the employer college); Cannon v. State, 523 F. Supp. 341 (D. Del. 1981) (State Personnel Commission is an agent of the employer state for purposes of Title VII action).
argue that it is not a "person" within the meaning of the statute, or that plaintiff's claim does not involve the requisite "state action." 430

The usual procedural defenses are available to a defendant. Thus, a defendant may successfully contend that plaintiff is seeking inappropriate relief or is using an incorrect means of obtaining such relief, 431 or that the plaintiff has brought suit in an improper forum, 432 or that plaintiff's complaint is defective. 433 Defendant may assert that it or the claim is not subject to the court's jurisdiction, 434 or that process has been improperly served. 435 Although these defenses are often effective in securing dismissal of a case, there is always the possibility that plaintiff may be granted leave to amend his complaint to conform to the requisite standard 436 or that plaintiff may pursue his suit in the appropriate forum (assuming that the statute of limitations has not run). 437 Where a plaintiff has been successful in obtaining relief through an administrative proceeding and thereafter brings a civil action, a defendant may claim that this action is barred by res judicata or collateral estoppel. 438

A defendant may obtain summary judgment by negating an element of plaintiff's prima facie case. It may establish, for example,
that its treatment of all employees is fair and consistent (negating
discriminatory motive); that the individual is not a member of the
protected class;\textsuperscript{439} or that plaintiff was unqualified for the position
to which promotion was sought.\textsuperscript{440} Analogous to negation of an
element is the defense of just cause. If defendant can merely articulate
some legally permissible, nondiscriminatory reason for its action, the
plaintiff must show that this explanation is in fact a cover-up for its
discriminatory intent.\textsuperscript{441} The difference between this defense and
negation of an element is that here plaintiff has already established
\textit{a prima facie} case which defendant is attempting to rebut. Explanations
such as another applicant’s superior qualifications\textsuperscript{442} or budget
reductions\textsuperscript{443} are generally sufficient to return the burden of proof
to plaintiff.

The defenses of governmental and official immunity may be
available when a state or its employees are sued. Generally, the two
immunities stand or fall together, as the government can only act
through its officials in the performance of their duties. The Delaware
Tort Claims Act\textsuperscript{444} bars suits against the state and its officials when
the conduct complained of arose out of and in connection with
performance of an official duty, the conduct was in good faith, and
did not constitute gross or wanton negligence.\textsuperscript{445} Though school

\begin{verbatim}
(D. Del. 1981) (plaintiff not a member of the class protected by 1978 amendments
to ADEA prohibiting involuntary retirement prior to age 70 when he was forced
to retire on December 31, 1978, since amendments not effective until January 1,
1979).  
(D. Del. 1983) (plaintiff's claim that she was not promoted to any of 16 different
positions rebutted by evidence that she was only qualified for four of these which
were filled by women more qualified than she).  
at 201.  
442. See Ferguson, 560 F. Supp. at 1186-88 (court examined the qualifications of
the individuals selected for the positions to which plaintiff claimed she was
qualified for promotion and found that all 16 individuals possessed better qualifications
than plaintiff). A contrary result was reached in Toscano v. Nimmo, 570
F. Supp. 1197 (D. Del. 1983), where the court, after examining the evidence of
both plaintiff’s and the selected woman’s credentials, determined that plaintiff was
equally, if not more, qualified than the successful applicant. Thus the court concluded
that the promotion had been awarded on the basis of sexual favors.  
aff’d, 709 F.2d 1493 (3d Cir. 1983) (university's institution of a ten percent across-the-board
budget cut satisfied its burden of asserting a permissible nondiscriminatory
reason for plaintiff's termination).  
445. See infra notes 455-464 and accompanying text. The statute comes into
\end{verbatim}
districts are expressly protected by the Act, a number of actions have been brought against school districts. The standard for common law governmental/official immunity is similar to that codified in the Delaware statute: defendant must show that he acted without malice or awareness that he was violating plaintiff's rights, and that he did not know nor reasonably should have known that his actions violated the plaintiff's constitutional rights.

Good faith must be pleaded and proved by the defendant. Affidavits merely alleging that the official acted in good faith are insufficient to satisfy this requirement. However, good faith exercise of discretionary functions may be demonstrated by the evidence presented at trial. The standard is both subjective (whether defendant acted to deprive a plaintiff of constitutional rights with malicious intent) and objective (whether a reasonably prudent person would have known he was violating one's constitutional rights). However, play when the suit is not barred by some other immunity, such as the eleventh amendment.

446. Del. Code Ann. tit. 10, § 4003 (1984), states in pertinent part: "Any political subdivision of the State, including the various school districts, and their officers and employees shall be entitled to the same privileges and immunities as provided in this chapter for the State and its officers and employees . . . ." (emphasis added).


In Patton, the court dismissed claims for monetary damages against the school board members acting in their official capacities. Plaintiff survived summary judgment on the same claims against the board members acting in their individual capacities, however, pending pleading and proof of good faith performance of individual duties.

448. See Aiello, 426 F. Supp. at 1296 (quoting Skehan v. Board of Trustees of Bloomsburg State College, 538 F.2d 53 (3d Cir. 1976)).


451. See Morris v. Board of Educ. of Laurel School Dist., 401 F. Supp. 188 (D. Del. 1975). In Morris, the court found the board members "acted in reliance on the integrity of Mr. Hupp which they had had no previous reason to doubt." In deciding not to renew plaintiff's contract, "they were acting sincerely in the belief that they were doing right." Id. at 216. Thus, the court held that they only were subject to the injunctive relief obtained by plaintiff.

452. See Aumiller, 434 F. Supp. at 1307. The court stated:
Where a public official who is aware of uncertainties surrounding the propriety of a particular course of conduct pursues that course of conduct without first attempting to resolve factual and legal doubts, this Court
the absence of good faith requires more than a mere abuse of discretion. Should defendant not be entitled to immunity, it may nevertheless be exempt from punitive damages on the basis of its status as a public entity.

The eleventh amendment provides another form of immunity to state defendants. The amendment provides that a state may not be sued in federal court by citizens of a foreign state, and has been extended to prohibit federal actions against a state by its own citizens absent state consent. The most vexing problem is determining whether defendant is "the state." The Third Circuit has held that a governmental agency may claim the state's immunity under the amendment only if the state is the "real party in interest." Several factors are considered in arriving at this determination: (1) state law defining the relationship between the agency and the state; (2) whether the judgment will have to be paid out of the state treasury if plaintiff prevails; (3) whether the agency is performing a governmental or proprietary function; (4) whether the agency has been separately incorporated; (5) whether its operations are autonomous; (6) whether it has the power to sue, be sued, and to contract; (7) whether it is exempt from state taxation; and (8) whether the state has immunized itself from responsibility for the

only can conclude that the public official has shed his cloak of official immunity and acts at his peril.

See also Hanshaw, 405 F. Supp. at 299 (quoting Wood, 420 U.S. at 322).


455. U.S. Const. amend XI, states that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against any of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

456. See id.


If, upon an analysis of these factors the agency is found to be in effect an alter ego of the state, the eleventh amendment will operate to bar a plaintiff's federal action. The Delaware federal courts have consistently held that neither school boards nor the University of Delaware are protected by the amendment. Likewise, housing authorities are not permitted to assert the defense. However, state hospitals and departments of finance are protected, as well as state officials acting in their official capacities when any recovery of damages would be paid from the state treasury.

Some defenses are particular to the statute under which the cause of action is sought. For example, section 1983 proscribes the deprivation of constitutional rights "under color of state law." Thus, state action is a prerequisite to liability under this statute.

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459. See King, 396 F. Supp. at 425-26 (citing Urbana, 415 F.2d at 251).
462. See King, 396 F. Supp. at 426 n.4 and accompanying text. With respect to school boards, the discussion of eleventh amendment applicability in King is especially enlightening. The court there examined the evidence and concluded that the school board was not sufficiently affiliated with the state so as to make it an "alter ego" of the state. Specifically, the court noted that, although the school board lacked complete autonomy over its operations, it alone had the power to reinstate a plaintiff who had been terminated. Any attorney's fees which plaintiff would recover if victorious would come not from the state treasury but from insurance carried by the school board. The school board was permitted to and did retain private counsel rather than rely upon the state attorney general. Id.
463. See Skomorucha, 504 F. Supp. at 835 (based on Wilmington Housing Auth. v. Williamson, 228 A.2d 782 (Del. 1967)).
464. Lillard v. Delaware State Hosp. for the Chronically Ill, 552 F. Supp. 711 (D. Del. 1982). However, the eleventh amendment did not bar injunctive relief against state officials acting in their official capacities when the relief was of prospective application. Id. at 718 (citing Ex parte Young, 209 U.S. 123 (1908)).
466. This appears to be in direct conflict with the eleventh amendment. However, the harshness of denying a plaintiff redress against the state in a federal forum led the courts to develop the factors which will be considered in determining whether the defendant is sufficiently affiliated with the state as to be a state agency to which the amendment will apply. It seems that although a defendant may not be an agent of the state for eleventh amendment purposes, it may still have enough of a
Usually, if defendant has any connection at all to the state, this requirement is easily satisfied.\textsuperscript{467} However, the mere licensing and regulation of a private hospital (as opposed to a state-operated one) does not render that hospital's action that of the state for purposes of section 1983.\textsuperscript{468} Another frequently contested issue in section 1983 cases is whether the defendant is a "person" within the meaning of the statute. School boards are "persons" under section 1983,\textsuperscript{469} as is the University of Delaware.\textsuperscript{470} When section 1983 is applicable to a particular defendant, the affirmative defense of good faith is available.\textsuperscript{471}

Title VII specifically allows for deduction of money earned or which could have been earned by a plaintiff.\textsuperscript{472} Defendant has the task of proving that plaintiff could have, but failed to, mitigate his damages by securing alternative employment.\textsuperscript{473} Whether this set-off provision applies to payment obtained from unemployment compen-


\textsuperscript{468} See Avallone v. Wilmington Medical Center, Inc., 553 F. Supp. 931 (D. Del. 1982).

\textsuperscript{469} See Eckerd, 475 F. Supp. at 1364, where the court said: [T]he Supreme Court's decision in Monell v. Department of Social Services makes it clear that the Indian River Board of Education and the Indian River School District "can be sued directly under § 1983 for monetary, declaratory, or injunctive relief," and that local government officials [here school board members] sued in their officials [sic] capacities are 'persons' under § 1983 in those cases in which, as here, a government would be suitable in its own name."

\textsuperscript{470} Gordenstein, 381 F. Supp. at 725 (university is not a state agency, it is a person under § 1983).

\textsuperscript{471} See supra notes 448-453 and accompanying text.

\textsuperscript{472} 42 U.S.C. § 2000e-5(g) (1983). See Morris, 401 F. Supp. at 214-15. Although there is no language in the ADEA which expressly authorizes set-offs, the Third Circuit has read such a requirement into the statute:

The absence of express set-off language in the ADEA enforcement provisions does not compel the inference that Congress intended to preclude set-offs. The make-whole relief objective is common to both Title VII and ADEA and will be effectuated only if back pay awards are reduced to reflect alternate source earnings.

\textsuperscript{473} See Eckerd, 475 F. Supp. at 1365. Defendants failed to establish that plaintiff could have mitigated his damages, whereas plaintiff had produced evidence that he had indeed sought employment. \textit{Id.}
salation has generated a great deal of controversy.\textsuperscript{474} The Third Circuit has recently disallowed such a deduction on the ground that the statute mentions only income "derived or derivable from earnings" and makes no mention of any other deductions.\textsuperscript{475} However, a reduction of damages for unemployment compensation and actual earnings was permitted in a section 1983 action.\textsuperscript{476}

A further defense specific to Title VII is that of a "bona fide occupational qualification."\textsuperscript{477} The statute itself recognizes that there may be instances when religion, sex, or national origin may be "reasonably necessary to the normal operation of that particular business or enterprise."\textsuperscript{478} Even allowing that such discrimination may be necessary, the statute is very narrowly construed.\textsuperscript{479} To establish such a defense in a sex discrimination claim, the employer must prove:

not only that it had a factual basis for believing that the hiring of any members of one sex would directly undermine the essence of the job involved or the employer's business, but also that it could not assign job responsibilities selectively in such a way that there would be minimal clash between the privacy interests of the customers and the non-discrimination principle of Title VII.\textsuperscript{480}

\begin{footnotesize}
\begin{itemize}
\item[474.] See, e.g., Craig v. Y&Y Snacks, Inc., 721 F.2d 77 (3d Cir. 1983); Eckerd, 475 F. Supp. at 1350; Hawkins, 468 F. Supp. at 201.
\item[475.] See Craig, 721 F.2d at 82. The court apparently finds a distinction between earned and unearned income in the sense that an employee has not worked for unemployment benefits, whereas he has worked when he receives wages from an employer.
\item[476.] See Eckerd, 475 F. Supp. at 1365 (award of back pay reduced by amounts equal to plaintiff's salary and benefits earned during an assistantship at a state university; Hawkins, 468 F. Supp. at 215 (unemployment compensation received by plaintiff deducted from award of back pay).
\item[477.] 42 U.S.C. § 2000e-2(e).
\item[478.] Id. Note that the defense is unavailable for claims of race discrimination by its express exclusion from this section.
\item[479.] See 29 C.F.R. § 1604.2 (1985). The EEOC guidelines state in pertinent part:
\begin{itemize}
\item[(a)] The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly . . . . (i) The Commission will find that the following situations will not warrant the application of the bona fide occupational qualification exception: . . . . (ii) The refusal to hire an individual based on stereotyped characterization of the sexes . . . . (iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers.
\end{itemize}
\item[480.] Fesel, 447 F. Supp. at 1351.
\end{itemize}
\end{footnotesize}
The defense was successfully asserted in *Fesel v. Masonic Home of Delaware, Inc.*,\(^{481}\) in which a male nurse's aide was denied employment at a retirement home due to his sex.\(^{482}\) The court noted that many of the female residents\(^{483}\) would have objected to having a male nurse attend to their personal needs. While customer preference was insufficient to justify sex-related job discrimination, the residents' legally protected privacy interests were implicated here and had to be recognized by the Home in running its business.\(^{484}\) Further, the Home's size and operation were such that it could not hire a male nurse's aide for any shift in such a way that at least one female aide would also be on duty to attend to the female guests' personal needs.\(^{485}\) However, the court stressed the narrowness of its decision, intimating that the decision might well be different were defendant a larger home with more staff.\(^{486}\)

Finally, defendant may assert that plaintiff has an ulterior motive in bringing the suit. This defense is most often raised in sexual discrimination cases. In the context of sexual harassment, this has become known as the "woman scorned" defense,\(^{487}\) where defendant asserts that the case was brought in revenge for the breakup of a relationship. The ulterior motive may be of a more subtle character, such as that found in *Robinson v. E.I. du Pont de Nemours & Co.*,\(^{488}\) in which plaintiff alleged sexual harassment and religious discrimination.\(^{489}\) The court found no evidence to support either claim, noting that plaintiff herself had admitted that she was "casting about for

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482. Id. at 1347.
483. Id. at 1352. Of 30 total guests at the home in 1973, when plaintiff was rejected, 22 were female. Id.
484. Id.
485. Id. at 1353. The shifts were scheduled so as to leave one aide alone on two days per week. The court found that since a patient's personal needs can arise at any hour, selective job assignment simply was not feasible. Id. The court rejected plaintiff's contention that the home could have hired a female "swing person" to assist a male nurse during the times when he would be on duty alone, saying that "[no] duty to accommodate the rights of prospective male employees goes so far as to require the employment of additional personnel." Id. at 1354.
486. Id. at 1353 n.9.
487. The defendant supervisor in *Toscano v. Nimmo*, 570 F. Supp. 1197 (D. Del. 1983), alleged that plaintiff had brought the suit in revenge for his having broken off an affair with her. The court, however, was convinced that this was in fact not the case. Id. at 1201.
489. Id. at 881.
someone to blame for her inability to get along with others."490 Such a defense may be difficult to prove, however, as it necessarily involves knowledge of plaintiff's subjective state of mind. Furthermore, it appears that it would only be successful in a situation where plaintiff's evidence is weak.491 Where plaintiff has a strong case of discrimination, subjective desire for revenge, even if true, should have no bearing on the merits of the case.

V. Conclusion

In view of the relatively small number of cases which reached a determination on the merits, and the fact that few of those were favorable to the plaintiff, it is clear that Delaware plaintiffs within the last ten years have found winning an employment discrimination claim to be quite difficult.492 One possible explanation for the paucity of successful plaintiffs at the reported case level is that the meritorious cases are, for the most part, being resolved at the administrative level. This is buttressed by the observation that the number of victorious plaintiffs is larger when the cause of action does not require exhaustion of administrative remedies, such as section 1983. The cases are surprisingly complex, with many procedural and substantive pitfalls awaiting an inexperienced plaintiff. The many potential causes of action, each with its own set of procedural requirements, and the number of defenses which can be raised to deny plaintiff's claim, therefore, make experienced counsel a necessity. Regardless of the success of the individual plaintiffs, it is clear that the days when an employer could unilaterally discharge an employee without repercussions are over.

490. Id.

491. See supra notes 376-397 and accompanying text. In such a case, the court may dismiss the cause of action or grant summary judgment on another ground, such as failure to establish a prima facie case of discrimination.


493. Of course, the reported cases upon which this article concentrated give no indication of the disposition of cases through administrative proceedings.