

6-1-2004

Revisiting the Public Policy Exception to the Employment-at-Will doctrine Following *Thibodeau v. Design Group One Architects*: Applying an Ethic of Care Analysis

Virginia Brown
University of Connecticut

Follow this and additional works at: http://lsr.nellco.org/uconn_cpilj



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Brown, Virginia, "Revisiting the Public Policy Exception to the Employment-at-Will doctrine Following *Thibodeau v. Design Group One Architects*: Applying an Ethic of Care Analysis" (2004). *Connecticut Public Interest Law Journal*. Paper 10.
http://lsr.nellco.org/uconn_cpilj/10

This Article is brought to you for free and open access by the University of Connecticut School of Law at NELCO Legal Scholarship Repository. It has been accepted for inclusion in Connecticut Public Interest Law Journal by an authorized administrator of NELCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.

Revisiting the Public Policy Exception to the Employment-at-Will Doctrine Following *Thibodeau v. Design Group One Architects*: Applying an Ethic of Care Analysis

Virginia Brown*

* * *

[T]he majority concludes, without expressly saying so, that it is the public policy of this state to permit small employers to discriminate against their employees on the basis of sex.¹

I. Introduction

In 2002, in *Thibodeau v. Design Group One Architects*,² the Connecticut Supreme Court holds that Connecticut's Fair Employment Practices Act, General Statute § 46a-60, provides immunity to employers who have less than three employees. This case will likely stir up controversy among business and civil liberties groups.³

In *Thibodeau*, Nicole Ann Thibodeau brought a wrongful discharge claim based on sex discrimination against her former employer for allegedly firing her because she became pregnant six months after hiring. The trial court granted the employer's motion for summary judgment, but the Appellate Court reversed and held that Thibodeau had a valid common law cause of action based on Connecticut's strong public policy against sex discrimination. Courts, including Connecticut, recognized an exception to the employment-at-will doctrine in cases where there is strong public policy against the action. The exception allows a person who is subjected to treatment that goes against clearly stated public policy to bring a wrongful discharge claim

* Virginia Brown graduated with honors from the University of Connecticut School of Law in 2003. She received her M.A. in English Literature from Trinity College in 2002. While a law student Ms. Brown was active on the Connecticut Public Interest Law Journal and a member of the Moot Court Board. Ms. Brown was awarded first place in the 2002 William H. Hastie Moot Court Competition and second place in the 2002 ABA Real Property, Probate and Trust Law Section Jacques T. Schlenger Student Writing Competition.

¹ *Thibodeau v. Design Group One Architects*, 260 Conn. 691, 719 (2002) (dissenting opinion)

² *Id.* at 691.

³ An amicus brief was submitted by the Connecticut Business and Industry Association, and amici briefs were submitted by the Connecticut Employment Lawyers Association and the Connecticut Civil Liberties Union Foundation.

against his employer. One such public policy is the elimination of sex discrimination, which is clearly documented in statutes, court rules, and even legislative history. Yet, the Connecticut Supreme Court determined that protecting the small employer against claims of discrimination was an even greater public policy agenda than protecting an individual's fundamental right to be free from discrimination. Thus, it appears that in balancing the interests of these two groups, women and small business owners, business owners come out ahead--at least in Connecticut.

The Connecticut Supreme Court's analysis elevates the business owner's interests over more humanistic interests; in this case a woman's fundamental right to be free from discrimination. The Court disagreed with the Appellate Court's analysis, which ruled similar to the majority of states that deal with sex discrimination by small employers. The Appellate Court held that although Thibodeau was not entitled to a statutory remedy, she was entitled to proceed with her claim based on a strong showing of a clear public policy against discrimination as shown by the Connecticut Fair Employment Practices Act. In contrast to the Appellate Court, the Supreme Court held that the Fair Employment Practices Act specifically states in the definition section that "employer" applies to businesses who have more than three employees. Hence, Thibodeau did not have a statutory or common law cause of action against her former employer. While the Appellate Court merely looked to the statute to establish the public policy against discrimination, the Supreme Court, through statutory construction, held that the statute itself expresses a policy concern against subjecting small employers to claims of sex discrimination.

The Connecticut Supreme Court's approach clearly favors a traditional market approach to the law by determining that the business owner's interests are greater than those of persons who are discriminated against. The Court's decision focuses on the economic viability of the business owner and not the fundamental right of the employee to be free from discrimination. In looking specifically at the individual needs of the business owner, the Court decided to shield small employers from discrimination claims because of their economic vulnerability.

The more humanistic value of protecting a person's fundamental right not to be

discriminated against does not override the individualistic concern of not overburdening the small employer. However, it is employees who suffer the most from the effects of sex discrimination and are the most vulnerable. In seeking a more humanistic approach to the law, contemporary legal feminist, Leslie Bender, argues that it is a crucial time for tort law to be revisited: “[t]ort law cries out for feminist insights, methodologies, critiques, and reconstructions. Tort law is mostly common law; law made by judges in response to particular cases (rather than rules made by legislative, executive, or administrative actions). Thus, it is flexible enough to respond quickly to feminism's critiques.”⁴ Nationally, the employment-at-will doctrine continues to erode as nineteenth century ideas of market protection and autonomy are replaced by a more humanistic concern for individual rights and freedoms. Women bring a high number of wrongful discharge claims and it is important to consider how a traditional market based/individualistic approach essentially treats women as the voiceless “other.”

This article breaks down the analysis used by Connecticut courts to define the class protected by anti-discrimination laws and suggests applying an ethic of care approach to wrongful discharge claims alleging sex discrimination. Part II will discuss the historical development of the public policy exception to the at-will-employment doctrine. It will include a synopsis of the *Thibodeau* opinions. Part III will detail the statutory interpretation method that the Supreme Court used to deny Thibodeau her right to bring a cause of action in wrongful discharge and the problems with this method of interpretation. Part IV examines the balancing test that courts use in determining the public policy exception to the at-will-employment doctrine and suggests an alternative to the individualistic/market approach used by the Connecticut Supreme Court. Included in this section, will be an attempt to explain how a traditional market analysis fails to consider a humanistic approach to legal problems.

II. History

A. Public Policy Exception

⁴ Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993).

The “employment at-will” doctrine allows employers to discharge their employees without cause. Through the years, the Connecticut Supreme Court has carved out exceptions to this rule to protect employees from unfair treatment. In *Sheets v. Teddy’s Frosted Foods, Inc.*,⁵ the Court held that when employment termination “contravenes a clear mandate of public policy,”⁶ the employee is entitled to bring a wrongful discharge claim against the employer. This was a narrow exception and the Court was cautious about its ability to erode the employment-at-will doctrine completely. In fact, the Court specifically cautioned against applying this exception absent a clear showing that a strong public policy concern exists.⁷

In *Sheets*, the employee refused to ignore mislabeling on product labels and was terminated. The Court held the strong public policy of consumer protection provided the plaintiff with a valid cause of action for wrongful discharge.⁸ Since *Sheets*, Connecticut courts have continually allowed a cause of action for wrongful discharge based on established public policy. In *Faulkner*⁹, the Court allowed a public policy exception to be established based on a federal statute “against governmental contact fraud as embodied in the Federal Major Frauds Act, 18 U.S.C. §. 1031.”¹⁰ The Court also allowed exceptions to the at-will employment doctrine when a particular statute itself was not violated but rather the statute clearly expressed that the conduct went against public policy.¹¹

Connecticut General Statute § 46a-60, entitled “Discriminatory Employment Practices Prohibited,” provides a basis for establishing strong public policy against discrimination in the workplace. Section 46a-60(a)(1), states in relevant part, that:

[i]t shall be a discriminatory practice in violation of this section: (1) for an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discharge from employment any individual . . .

⁵ *Sheets v. Teddy’s Frosted Foods, Inc.*, 179 Conn. 471 (1980).

⁶ *Id.*

⁷ *Id.* at 477.

⁸ *Id.* at 479.

⁹ *Faulker v. United Technologies Corp.*, 240 Conn. 576, 578 (1997).

¹⁰ *Thibodeau*, 64 Conn. App. At 573, 580.

¹¹ *See Parsons v. United Technologies Corp.*, 243 Conn. 66 (1997).

because of the individual's race, color, religious, creed, age, sex, marital status, national origin, ancestry, present or past history of mental disorder, mental retardation, learning disability or physical disability.

Pregnancy is also a protected condition as set forth in Section 46a-60(a)(7). The Act defines an "employer" to be: "the state and all political subdivisions thereof and means any person or employer with three or more persons in his employ."¹² Nicole Thibodeau established a clear public policy against sex discrimination based on the strong public policy expressed in Section 46a-60(a)(1) and a number of other state and federal statutes. Yet, she was denied the right to bring a cause of action because the Connecticut Supreme Court held that Section 46a-60(a)(1) provides immunity to small employers and therefore overrides the state's public policy to eliminate sex discrimination.

Sex discrimination is a national problem that plagues women who work for both small and large employers. The Equal Employment Opportunity Commission (EEOC) recently announced the outcome of one of its more successful cases against Verizon predecessor Bell Atlantic: "[u]nder the settlement, up to 12,500 current and former female employees in 13 states and the District of Columbia will receive benefits estimated in many millions of dollars that were previously not made available to them for discriminatory reasons related to pregnancy or maternity leave."¹³ EEOC statistics illustrate that sex and discrimination claims rose from 3,385 in 1992 to 4,287 in 2001.¹⁴ However, pregnancy related discrimination cases brought under Title VII amount to only five percent of sex discrimination claims.¹⁵ Although discrimination claims rose, less than half are actionable by the EEOC.

For an employee to support a prima facie case of sex discrimination constitutes a high burden. Further, employers may rely on the bona fide occupational qualification exemption in Title VII to defeat claims of discrimination. The EEOC and many similar state agencies have built-in mechanisms to assist in settling claims of sex discrimination and for filtering out

¹² Conn. Gen. Stat. § 46a-51(10).

¹³ The U.S. Equal Employment Opportunity Commission, *Thousands of Women to Receive Benefits in EEOC-Verizon Pregnancy Bias Settlement*, at <http://www.eeoc.gov/press/10-10-02.html> (last visited April 22, 2004).

¹⁴ *Id.*

¹⁵ See *supra* note 12.

unmeritorious claims. Although a person can still bring a private action based on discrimination, it is not with the EEOC's support. Based on the structure of the EEOC and state counterpart agencies many meritorious claims are not pursued.¹⁶ Clearly, the above statistics only apply to large employers; but, based on the empirical evidence it can be logically assumed that a large number of women are discriminated against by smaller employers.

According to studies put forth by the American Civil Liberties Union, the number of unjust terminations is steadily rising and the consequences for employees can be devastating:

Two million at will employees are fired every year. When impartial arbitrators are given the opportunity to review termination decisions, half of them are found to be unjust. Experts believe that at least 150,000 people are unjustly fired every year. The costs of this injustice are enormous. The financial hardship imposed on workers and their families is severe, but the financial loss is only the beginning. The stress caused by trying to support oneself and one's family without a job, and the loss of self-esteem caused by being fired, combine to drive many fired workers to alcoholism, mental illness, and even suicide.¹⁷

The correlation between wrongful terminations and illness is irrefutable.¹⁸ Recent figures suggest the disparity between depression in men and women is, in part, related to socioeconomic environmental factors, like sex discrimination in the workplace.¹⁹ In light of the rising rate of depression among women, these studies should not go ignored. Both Congress and the Connecticut Legislature took notice. Although these women are without a federal or state statutory remedy, a majority of states enforce common law claims of wrongful discharge against small employers based on strong public policy to eliminate all sex discrimination. This can be largely attributed to the general inequities in allowing an employer to terminate an employment

¹⁶ Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 9(1996).

¹⁷ <http://www.aclu.org/WorkplaceRights/WorkplaceRightslist.cfm?c=182>, American Civil Liberties Union Workplace Rights.

¹⁸ See Susan Nolen-Hoeksema, Carla Grayson, and Judith Larson, *Explaining the Gender Difference in Depressive Symptoms*, AMERICAN PSYCHOLOGICAL ASSOCIATION JOURNAL. Vol. 77, No. 5, 1061-1072 (1999); Ellen Leibenluft, *Why Are So Many Women Depressed?* Scientific American, at <http://www.sciam.com/1998/0698womens/0698leibenluft.html> (last visited May, 2003); National Organization for Women, Issue Report: Sexual Harassment, at <http://www.now.org/issues/harass/issuerep.html> (last visited May, 2003).

¹⁹ See *supra* note 16.

relationship for unjust cause. As aptly stated by critic, Kim Sheenan:

The basic premise underlying proposals to abolish the at-will-rule within the United States is the relative inequity suffered by the employee due to the unequal bargaining positions of the parties, as well as the harsh consequences which can result from discharge. Accordingly, U.S. courts have been increasingly willing to limit the rule and to find exceptions to its application.²⁰

B. Thibodeau v. Design Group One Architects--Connecticut Appellate Court Opinion

Nicole Ann Thibodeau was hired as an office worker by Design Group One Architects (hereinafter, "Design Group") in April 1997. She notified her employer that she was pregnant eight months after being hired. Design Group terminated her employment approximately six months later.²¹ Thibodeau brought a claim of wrongful discharge against Design Group claiming that it discriminated against her because of her pregnancy-related doctor visits. Design Group alleged that she had failed to perform her job in a satisfactory manner. Thibodeau asserted that she was entitled to bring a claim against Design Group because of the public policy against pregnancy discrimination set forth in General Statutes § 46a-60(a)(7).²² The trial court disagreed and granted summary judgment in favor of Design Group. Thibodeau appealed. Design Group acknowledged that Connecticut clearly does have a strong public policy against pregnancy discrimination, but argued that it does not apply to employers with less than three employees. The Appellate Court reversed the trial court decision.²³

In *Thibodeau*, the Appellate Court stated that while the statute clearly does not allow for a statutory remedy for employees who have been discriminated against by employers with less than three employees, the statute itself expresses a clearly mandated public policy in Connecticut against sex discrimination.²⁴ The Court cited specific legislative history from when sex was added as a classification:

²⁰ Kim Sheehan, *Has Employment-At-Will Outlived its Usefulness? A Comparison of U.S. and New Zealand Employment Law*, 28 CAL. W. INT'L.J. 323 (1997).

²¹ *Thibodeau*, 64 Conn. App. at 575.

²² *Id.* at 575.

²³ *Id.* at 577.

²⁴ *Id.* at 587.

Representative, James J. Kennelly stated:

This bill is in furtherance of this legislature's commitment to true equality of opportunity employment. No period in Connecticut legislative achievements has been more enlightened, or more dedicated in the field of human rights This bill represents continued and expanded implementation of sound and realistic 'human rights' legislation and I respectfully urge its adoption.²⁵

The Appellate Court stated, "[T]he language, history and public policy underlying the Act in the present case reflects a cognizably legislative and societal concern for eliminating discrimination on the basis of sex in Connecticut."²⁶ The Court further stated that proof of the strong public policy against discrimination based on sex is established by the following statutes, Title VII of the Civil Rights Act of 1993, 29 U.S.C. § 2601, and the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k). In addition, the Appellate Court held that Connecticut's constitution protects against discrimination and "[t]he right to be free from discrimination is therefore, a fundamental civil liberty."²⁷ These statutes and a number of other Connecticut statutes clearly express Connecticut's public policy against discrimination based on sex.

The Appellate Court also relied on other states' interpretations of anti-discrimination statutes, which allow a public policy exception based on sex discrimination. The Appellate Court cited a Washington opinion in which that Court stated:

[by the statutory section defining employer] the legislature narrows the statutory remedies but does not narrow the public policy which is broader than the remedy provided. Thus, the statutory remedy is not in itself an expression of the public policy, and the definition of 'employer' for the purposes of applying the statutory remedy does not alter or otherwise undue to any degree this state's public policy against employment discrimination. If it is argued that the exclusion of small employers from the statutory remedy is itself a public policy, that policy is simply to limit the statutory remedy, but is not an affirmative policy to 'exempt' small employers from [common law] discrimination suits.²⁸

Similar to the Washington Court decision, the Connecticut Appellate Court opinion was well-reasoned and considered the public policy behind eliminating sex discrimination in the

²⁵ *Id.* at 584. (quoting 12 H.R. Proc., Pt. 6, 1967 Sess., at 2567-68.).

²⁶ *Id.* at 587.

²⁷ *Id.* at 589.

²⁸ *Id.* at 587-8 (quoting *Roberts v. Dudley*, 140 Wash.2d 58, 70 (2000) (en blanc)).

workplace. The Court posited the statutory definition of an employer²⁹ was meant to limit statutory claims to those employers who had more than three employees but not to override the State's larger public policy to eliminate discrimination in the workplace.

In considering the inequities between employers and employees, the Court clearly favored creating a more balanced employment situation: “[t]here are a ‘myriad of employees without the bargaining power to command employment contracts for a definite term,’ and they are ‘entitled to a modicum of judicial protection’ when their rights, as established in the public policy of the state, are contravened.”³⁰ In addition, the Appellate Court stated the legislature did not intend to override the fundamental right to be free from discrimination. As so aptly stated in Judge Flynn’s concurring opinion:

The guarantee of equal rights for pregnant women is not only a strong and clear public policy, but a fundamental one that addresses the very continuance of the human race. If the need to uphold the public policy expressed in our pure food and drug laws justified an exception to the at-will statutes of the employee in *Sheets v. Teddy’s Frosted Foods, Inc.*, the right to equal protection of our laws enjoyed by a woman in the workplace who is pregnant and wrongfully terminated from employment for that reason is stronger. But more--it is fundamental to any system of jurisprudence worthy of the name.³¹

Unfortunately, the Connecticut Supreme Court did not share Judge Flynn’s eloquent sentiment. The Supreme Court reversed the Appellate Court decision based on the reasoning that the statutory definition of “employers” meant to eliminate the burden of defending against claims of discrimination for employers with less than three employees.

C. Thibodeau--Connecticut Supreme Court Majority Opinion

The Connecticut Supreme Court majority opinion, led by Justice Palmer, relied on what it perceived to be the legislature’s clear intent to define and limit liability to employers with more than three employees. Justice Palmer stated that there is clear “general public policy in this state to eliminate all forms of invidious discrimination, including sex discrimination.” However, the

²⁹ Specifically, an employer with less than three employees.

³⁰ *Id.* at 594.

³¹ *Id.* at 596

Supreme Court held that the “exemption contained in the act for employers with fewer than three employees is, itself, an expression of public policy that cannot be separated from the policy reflected in the act’s ban on discriminatory employment practices.”³² The Court goes further, stating that it must follow the “reasons underlying [the] decision” made by the Connecticut legislature, though the motive behind the legislative history is unknown:

Although the legislative history of the act is silent as to why the legislature chose to exempt small employers from the purview of the act, the primary reason for the exemption cannot be doubted: the legislature did not wish to subject the state’s smallest employers to the significant burdens, financial and otherwise associated with the defense of employment discrimination claims.³³

Thus, the majority opinion substitutes its own judgment with the legislature’s silence and looks to the legislative history of the federal anti-discrimination statute rather than the legislative history of the statute in question. The Court cites very specific legislative history from Title VII of the Civil Rights Act.³⁴ The Court makes the broad assertion that “we see no reason why the legislature would have excluded small employers from the act unless it had decided, as a matter of policy, that such employers should be shielded from liability for employment discrimination, including sex and pregnancy related discrimination.”³⁵ The Court then states that the “public policy of this state to shield small employers from having to bear the costs of litigating sex discrimination claims regardless of their merit,” limits any cause of action against an employer with less than three employees.³⁶

One contemplates whether this analysis also extends to race-based discrimination. The dissent also poses this question. The majority opinion seems to leave the door open for employers with fewer than three employees to be “shielded” from the reach of any provisions of the anti-discrimination statute.³⁷ While the Court calls the public policy behind exempting small

³² Thibodeau, 260 Conn. at 706.

³³ *Id.* at 706-7.

³⁴ *Id.*

³⁵ *Id.* at 718

³⁶ *Id.* at 709.

³⁷ Connecticut’s Fair Employment Practices Act includes protection against discrimination based on “race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past mental disorder, mental retardation, learning disability or physical disability, including, but not limited to, blindness.”

employers “a clear expression of public policy,” it fails to state where it finds that clear statement. The legislative history is silent, and so the Court goes beyond the confounds of the legislative history for the Connecticut Fair Employment Practices Act and relies on only specific passages of the legislative history of its federal counterpart, Title VII, to reach its decision. The dissent finds error in this method.

D. Thibodeau--Connecticut Supreme Court Dissenting Opinion

Justice Vertefeuille, joined by Justice Norcott, disagreed with the majority opinion. The dissent argued that the State’s clear public policy to eliminate discrimination trumped any legislative intent contrary to that fundamental purpose. In addition, the dissent argued that although a statutory remedy was not available, the Court maintained *judicial authority* to grant a common law cause of action based on the public policy exception to the at-will-employment doctrine and the State’s strong public policy to eliminate all sex discrimination. The dissent argued: “I am firmly convinced that the legislature did not intend for that lone provision in the act to trump the state’s otherwise clear, compelling and pervasive public policy against sex discrimination.”³⁸

The dissent also asserted that the majority did not fully appreciate the “breadth of the state’s policy against sex discrimination.”³⁹ In support of this assertion, the dissent cites a vast number of state and federal statutes aimed at ending employment discrimination.⁴⁰ In addition, the dissent cites other jurisdictions that held that employees who are discriminated against by small employers and exempt from a statutory remedy may bring a common law cause of action

³⁸ *Id.* at 720.

³⁹ *Id.* at 721.

⁴⁰ *Id.* The following statutes clearly express Connecticut’s strong public policy against discrimination: Gen. Stat. § 31-75 (prohibiting discriminatory employment compensation practices); Gen. Stat. § 38a-358 (prohibiting discriminatory practices by automobile insurers); Gen. Stat. § 46a-58 (prohibiting discriminatory deprivation of rights); Gen. Stat. § 46a-59 (prohibiting discriminatory practices by professional and occupational associations); Gen. Stat. § 46a-60 (prohibiting employment discrimination); Gen. Stat. § 46a-64 (prohibiting discriminatory public accommodations practices) Gen. Stat. § 46a-64c (prohibiting discriminatory housing practices); Gen. Stat. § 46a-66 (prohibiting discriminatory credit practices); Gen. Stat. §Sec 46a-70 (guaranteeing equal employment opportunities in state agencies); Gen. Stat. § 46a-71 (by state agencies); Gen. Stat. § 46a-72 (prohibiting discriminatory job placement by state agencies); Gen. Stat. § 46a-73 (prohibiting discriminatory state licensing and charter procedures).

based on the public policy exception.⁴¹ While the majority distinguished the cases cited in other jurisdictions by claiming that other statutes “contained language explicate declaring a broad public policy to eliminate sex discrimination in employment,” the dissent found little credence in this analysis stating that “a statutory preamble . . . does not necessarily equate to a public policy more comprehensive or more fundamental than the policy of this state.”⁴² In a powerful statement, the dissent charges:

[T]he majority . . . concludes . . . that small employers are exempt from our state’s otherwise clearly established public policy against sex discrimination. In other words, the majority concludes, without expressly saying so, that it is the public policy of this state to permit small employers to discriminate against their employees on the basis of sex.⁴³

The dissent almost mirrors the opinion put forth by the Appellate Court. Clearly Justice Vertefeuille’s argument is based on established principles of public policy exceptions to the at-will employment doctrine established in *Sheets*. The public policy exception, coupled with the strong public policy against sex discrimination, provides a persuasive and logical analysis. Yet, the majority chose to rely on the legislative history of a federal statute and to favor the public policy relating to the protection of small business owners over the individual rights of women. The dissent, on the other hand, felt that statutory construction was not the issue before the Court, stating:

[t]he question in this case is whether a single statutory definition was intended to override this state’s clear public policy against sex discrimination Had the legislature intended to preclude such common-law claims, it certainly knew how to make its intention clear.⁴⁴

In addition, Justice Vertefeuille cites other statutes in which the Supreme Court recognized that the legislature made itself clear as to whether other remedies were precluded. In particular, the dissent cites General Statute § 31-284(a) (Worker’s Compensation Act) which states, in pertinent part, that:

⁴¹ *Id.* at 726.

⁴² *Id.* at 727.

⁴³ *Id.* at 719.

⁴⁴ *Id.* at 724.

An employer who complies with the requirements of subsection (b) of this section shall not be liable for any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment.⁴⁵

In contrast, the legislature did not expressly state or even imply that Connecticut's Fair Employment Practices Act would preclude common law claims of discrimination. The courts used different methods to derive contrary results; yet both integrally relied upon some form of statutory interpretation to reach its result. The conflict may be found in the different approach (market vs. humanistic) that each applied to the same task.

III. The Connecticut Statute Does Not Bar A Wrongful Discharge Claim

Connecticut General Statute § 46a-60(a)(1) clearly and unambiguously protects employees from sex discrimination when the employer has three or more employees. However, the statute does not address discrimination by smaller employers. The canons of statutory construction provide a framework by which courts are able to interpret a statute to determine its purpose and reach. There are many state courts that are more comfortable using legislative history in statutory interpretation to discern the purpose of the legislature. There are others who claim that interpreting legislative history can be according to Judge Harold Leventhal, "equivalent [to] entering a crowded cocktail party and looking over the heads of the guests for one's friends."⁴⁶

As shown by the Connecticut Appellate and Supreme Courts, statutory interpretation can be applied with either a market or humanistic approach depending on the particular statute being considered and the legislative history being reviewed. The statutory interpretation of Connecticut's Fair Employment Practices Act led to the Connecticut Supreme Court determination that small employers were shielded from the reach of the Act.

As will be examined later in this article, the case law suggests that not only women will be affected from this ruling but other groups as well. Ironically, the Appellate Court also relied

⁴⁵ *Id.* The court had previously interpreted Gen Stat. § 52-572n(a) (Connecticut product liability statute) as precluding "common-law product liability claims" based on the court's interpretation of the legislative history.

⁴⁶ Conroy v. Aniskoff, 113 S. Ct. 1562 (1993).

on statutory interpretation and determined that the Act did not shield small employers. Thus, there is a crucial difference between the two methods employed by the Supreme Court and the Appellate Court to discern the purpose of the statute. While the Appellate Court looked to the statute itself as a clear expression of the State's strong public policy against sex discrimination, the Supreme Court employed a method of statutory construction that finds little support in other jurisdictions. The Supreme Court looked to selected sections of the federal anti-discrimination statute to discern the legislative intent of the Connecticut legislature, and focused on the exception for small employers rather than the strong public policy to eliminate sex discrimination. The interpretation of any statute carries a level of uncertainty. As so aptly stated by Felix Frankfurter:

But, unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision. If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness. Apart from the ambiguity inherent in its symbols, a statute suffers from dubieties. It is not an equation or a formula representing a clearly marked process, nor is it an expression of individual thought to which is imparted the definiteness a single authorship can give.

What can be gleaned from the legislative history of Connecticut's Fair Employment Practices Act and its federal counterpart Title VII is that discrimination in employment is a pervasive problem that denies certain groups the opportunity to support themselves and their families. There is no question that the purpose of anti-discrimination statutes is to eliminate discrimination in the workplace and provide a statutory remedy for employees who have suffered from discrimination.

Connecticut's Fair Employment Practices Act provides a statutory remedy for employees who have been discriminated against by employers with three or more employees. The statute does not say that this is the exclusive remedy for employment disputes or that it preempts a common law claim of employment discrimination. Unlike Arizona's anti-discrimination statute that specifically states that "[a]ll definitions and restrictions contained in the [other] statute also

apply to any civil action based on a violation of the public policy arising out of the statute,”⁴⁷ the Connecticut legislature did not intend to deny protection to employees of small companies when it enacted 46a-60. The Supreme Court contends that the legislative history of the federal anti-discrimination statute lends validity to its claim that the legislature wanted to shield small employers from discrimination claims. This contention lacks merit because it only looks at select passages of the legislative history and does not get at the “general intent” of the legislature.

The legislative intent behind the exemption for small employers in Title VII as shown by the minority report of the House Committee on Education and Labor clearly evinces a concern for administrative costs rather than a blanket shield of immunity for small employers against discrimination claims. The Report states:

Additionally, we fear that, in view of the estimated 18-month to two-year backlog that currently exists at the EEOC, the intent of H.R. 1746 to expand the EEOC's jurisdiction will serve only to retard and frustrate the purposes and objectives of the Equal Employment Opportunity Act. . . .The massive expansion of jurisdiction and transferring of various programs to the EEOC at a time when the agency is struggling to control a burgeoning backlog of cases, will further hamstring efforts to bring meaningful and timely relief to persons aggrieved by discriminatory employment conditions. . . .The committee bill . . . will thrust the EEOC into an administrative quagmire which can only delay the attainment of a reasonable standard of operational efficiency that Congress should expect and demand.⁴⁸

As expressed in the above-referenced *Molesworth v. Brandon*, the concerns articulated in the minority report were aimed at curbing administrative costs. The court reasoned that based on these concerns, the legislature did not mean to “preempt the field of employment discrimination.” It stated:

The intent of at least some of the legislators was to exempt small employers from the administrative process under the Act to avoid overburdening the EEOC. It is this intent that is reflected in the language of §§ 14 and 15(b). If the legislature

⁴⁷ Taylor v. Graham County Chamber of Commerce, 201 Ariz. 184 (2001); Hoover v. Devine, 38 Va. Cir. 455, 456 (1996), citing VA. CODE ANN. § 2.1-725 (1996)(“Causes of action based upon the public policies reflected in this chapter shall be exclusively limited to those actions, procedures and remedies, if any, afforded by applicable federal or state civil rights statutes or local ordinances.”) The Virginia Legislature made its intention clear that public policy exceptions were not available. Yet, “a number of Virginia courts have determined that the public policy exception to the employment at will doctrine continues to apply in racial and sexual discrimination cases.” *Id.* at 456.

⁴⁸ *Molesworth v. Brandon*, 341 Md. 621, 634, citing, U.S.Code Cong. & Admin. News 1972 at 2137, 2167, 2176.

had intended to protect small employers from common law wrongful discharge lawsuits, it would have limited § 14 to employers "as defined in § 15" and it would have preempted the field of employment discrimination, which we have previously held it did not do.⁴⁹

Although the Connecticut Supreme Court rejected this analysis in *Thibodeau*, it is accepted in other jurisdictions and finds support directly in the legislative history. Among the most common reasons for extending the public policy exception to employees of small employers is the well-founded principle that it is logical to presume that in regard to anti-discrimination statutes: "the legislature did not intend to abrogate the common law, absent a clear statement to the contrary."⁵⁰ While the legislature limited the reach of the anti-discrimination laws, it neither implied nor expressly stated that it would override state common law. The Connecticut Supreme Court followed this legal maxim in *Elliot v. Sears, Roebuck and Co.*, stating, "we will not interpret a statute to have the effect of altering prior statutory or common law unless the language of the statute clearly expresses an intent to have such an effect."⁵¹ Regardless of the Supreme Court's efforts to master the statutory penumbra of the anti-discrimination statute, *Thibodeau* was not looking for a statutory remedy, in which case the Court's analysis was instructive. Rather, she merely had to establish based on the Court's ruling in *Sheets* that the anti-discrimination statute supported a clear public policy against sex discrimination--this it clearly did.

IV. Public Policy Exception to Wrongful Discharge Claim Exists for Sex Discrimination Claims

The public policy exception to the at-will-employment doctrine supports a claim for wrongful discharge for sexual discrimination based on the established public policy criteria set forth in *Sheets*. Determining whether or not this exception should apply to small employers requires the court to perform a balancing of interests between the business owner and the

⁴⁹ *Id.*

⁵⁰ *Id.* at 632, quoting, *James v. Prince George's County*, 288 Md. 315, 335 (1980)..

⁵¹ *Elliot v. Sears, Roebuck and Co.* 642 A.2d 709, 716 (Conn. 1994). See also, *Connecticut Nat. Bank v. Giacomi* 659 A.2d 1166, 1173(Conn. 1995)("In seeking to discern that intent, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter.")

employee. To use statutory interpretation as a means to shift the focus of the judicial decision away from the competing individualistic interest versus more humanists values is intellectually dishonest. All Nicole Thibodeau had to show was that the anti-discrimination statute clearly supported the public policy of eliminating sex discrimination in the workplace. Thibodeau never sought a statutory remedy for wrongful discharge. It is important to consider why the court favored an individualistic approach over a humanistic approach. Cultural feminists may have the answer to explain why Thibodeau did not get her day in court.

Cultural feminists advocate a philosophical approach to law, based in part on research done by psychologist Carol Gilligan, stressing that we are all connected in some crucial way to one another. Contemporary feminist, Leslie Bender specifically refers to Gilligan's ideas and stresses that "[p]reventing hurt, preserving relationships, and developing cooperative solutions rooted in the concrete particulars of the conflict are objectives of a care-oriented ethical analysis."⁵² Bender's approach to the law favors a method of analysis that is centered on applying attributes that are traditionally thought of as feminine. While Bender specifically refers to these traits as feminine, this article considers an ethic of care analysis as more of a humanistic approach.⁵³ As some of Bender's critics have noted, there is a real concern in perpetuating certain care giving traits with women. Even Bender acknowledges this concern:

⁵² Leslie, Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 37 (1990).

⁵³ The principles behind Alternative Dispute Resolution (ADR), such as value creating as opposed to value claiming, are illustrative of a humanistic approach to legal problems. The principles of ADR mirror those expressed by cultural feminists, such as cooperation, compromise, and continuance. These attributes are very much in line with Bender's ideas of a reformed tort law that is focused more on typically feminine characteristics. Thibodeau was working for an employer and became pregnant. She was then terminated from her position. It is logical to assume that her goal was to continue working in order to support herself and her child. The employer fired her because she had to go to doctor appointments because of her pregnancy. Assuming he did fire her because of her pregnancy, it may be that he was worried she would take maternity leave and then not come back to work. Possibly, he may have been concerned that her level of commitment to the job would wane due to the increased responsibilities of being a mother. Maybe he was just upset that she was missing work in order to take care of her prenatal needs. Bringing the parties together to discuss their worries and motives might allow them to reach an agreement that would serve both their interests and eliminate the misunderstanding that led to the termination. If Thibodeau is missing time from work for doctor visits, perhaps she could make up that time during the workweek with flexible scheduling. Maybe her employer could allow her to do some work from home in order to compensate for the time missed in the office. The employer wants a productive worker and getting the two together with a neutral person could help dispel any misconceptions he may have about her commitment

Caring about and for others' safety and interests is part of reasoning, but it is a part that has been subordinated because of its gender identification with women. Even though the division between reason and care is a false construct, the reason/care paradigm has been useful in feminist legal analysis to illustrate biases, hidden assumptions, and male-centered norms within the legal system and to suggest reconceptualizations that make law more reflective of human experience and more responsive to concerns of justice.⁵⁴

It is perhaps a more enlightened approach that Bender supports, which when applied to cases that pose traditional market-family/male-female conflicts provides a more humanistic approach toward resolving inequities. This is especially important as the patriarchal structure of our current legal realm cannot properly protect the rights of women. As stated by feminist Robin West, “modern jurisprudence is ‘masculine’ . . . the values [and] dangers that characterize women’s lives are not reflected at any level whatsoever in contracts, torts, constitutional law, or any other field of legal doctrine.”⁵⁵

The Supreme Court’s analysis and focus on maintaining the economic viability of small businesses over the rights of women to be free from discrimination clearly suppresses any notion of female autonomy. While reviewing legislative intent and committee reports that led to a particular statutory enactment allows the court to ascertain the concerns and thoughts of parties who either supported or questioned the bill, this approach can be used to weaken anti-discrimination laws. Both the Appellate and Supreme Court examined legislative history to discern the intent of the legislature, but the Appellate Court focused more on humanistic values, such as a woman’s fundamental right to be free from discrimination while the Supreme Court focused on a more traditional market approach.

According to Michael Moberly, the at-will-employment doctrine is based on outdated nineteenth century ideas of traditional market growth.⁵⁶ Moberly suggests that it the “significant changes in twentieth century socioeconomic values” that “prompted a reassessment of the [employment-at-will doctrine].”⁵⁷ Presumably, these values led to the “judiciary’s apparent

⁵⁴ Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 580 (1993).

⁵⁵ Robin West, *Jurisprudence and Gender*, 55 U.CHI. L.REV. 1, 1-3 (1988).

⁵⁶ Michael D. Moberly, *Cranking the Wrongful Discharge Ratchet: Judicial Abrogation of Legislative Limitations on the Public Policy Exception*, 24 SETON HALL LEGIS.J. 43 (1999).

⁵⁷ *Id.*

conclusion that the doctrine's original, absolutist formulation is incompatible with modern economic conditions and employment relations."⁵⁸ After all, it is the business owner who has more power and greater resources than employees who are more dependent on their employment (i.e. the business owner) to support themselves and their families. In the case of women, who struggle to maintain an equal footing with their male coworkers, it is even more problematic to deny them fair working conditions. It is a fundamental right to be free from discrimination, and as more women enter the workplace and take their place in traditionally male-dominated positions, the obstacles to advancement and job security can prove insurmountable. The at-will-employment doctrine is fundamentally flawed in light of the current employment situations in our society. The exceptions to this doctrine, most especially the public policy exception, have allowed the doctrine to evolve into a more comprehensive and humanistic approach toward employment relationships. It is clearly an area of law that illustrates how a humanistic approach eliminates the inequities between the more powerful employer and employee--creating a more even playing field. A traditional market analysis that ignores the fundamental inequities and denies an employee the right to pursue a wrongful termination claim against a former employer is a step backwards. Yet, according to the Connecticut Supreme Court it is the business owner who will be afforded the greatest protection in employment relations.

However, the Appellate Court's analysis is certainly a move toward the ethic of care theory expressed by cultural feminists, as stated by Bender:

The work of Carol Gilligan has been influential for feminist legal theorists studying law's narrow value structure and its failure to represent the full depth of thinking, feeling, and acting in our society. Gilligan's feminist scholarship offers an ethic of care and responsibility to complement traditional ethics of rights and justice. Feminist understandings of responsibility and interconnectedness can enrich how we think about legal responsibility."⁵⁹

Applying an ethic of care analysis suggests that the public policy behind anti-discrimination statutes supports a connection thesis. Instead, the Supreme Court's decision was

⁵⁸ *Id.*

⁵⁹ *Id.* at 583.

based on the concern for small employers maintaining their autonomy and not being overly burdened by defending themselves against claims of discrimination. Regardless of whether these claims are meritorious, the Supreme Court found the legislative intent to be clearly stated. The Appellate Court's method of looking at more humanistic values and concerns is what Bender might call applying an "ethic of care" analysis to the law. It is problematic that the Supreme Court's analysis led to the conclusion that Connecticut's Fair Employment Statute provided a shield of immunity to employers with less than three employees.⁶⁰ While the court considered the legislative history and sought to ascertain the legislative purpose in defining employers as "those with less than three employees," it took silence to mean immunity. It essentially substituted its own judgment to replace the legislative silence to reach the result that employers with less than three employees may legitimately discriminate against employees based on sex. It essentially ignored the "general intent" of the legislature and focused on a market-favored approach to the employment-at-will doctrine.

The Supreme Court's decision is especially troubling in light of its previous decisions that have illustrated a more humanistic approach to judicial decision-making. In *Fahy v. Fahy*, the Supreme Court used statutory interpretation to allow alimony payments to be modified based on a change of circumstances unknown at the time of dissolution.⁶¹ This was clearly not what the legislature intended when it drafted P.A. 90-213. The statute specifically refers to child support payments and not alimony, yet the court exercised its authority to make a public policy extension of that statute. Justice Borden, writing for the majority, stated: "We also conclude, however, apart from P.A. 90-213 Section 46, but using that public act as a source of our own judicial power, that as a matter of common law the modification of alimony orders are required to be treated pursuant to P.A. 90-213, section 46."⁶² Justice Borden continued:

We proceed, therefore, to a more fundamental principle of adjudication. Just as the legislature is presumed to enact legislation that renders the body of law

⁶⁰ Thibodeau, 260 Conn. at 802.

⁶¹ *Fahy v. Fahy*, 227 Conn. 505 (1993).

⁶² *Id.* at 509.

coherent and consistent, rather than contradictory and inconsistent; courts must discharge their responsibility, in case by case adjudication, to assure that the body of the law-both common and statutory-remains coherent and consistent. That principle leads us to conclude that, as a matter of common law rather than as a matter of statutory interpretation, alimony orders should be treated similarly to the way that child support orders are now required to be treated pursuant to P.A. 90-213 section 46.⁶³

Yet, just ten years later Justices Borden joined Justice Palmer to reject this view in *Thibodeau*. It is difficult to reconcile the Supreme Court's decision making process in *Fahy* with *Thibodeau*, especially in light of the concern Justice Palmer expressed about usurping the legislature. Some critics argue the common law has become somewhat of a quagmire in relation to the influx of statutory schemes. As Justice Ellen Ash Peters once stated: "[h]ardly ever is a statute now regarded as a candidate for narrow construction because it may be in derogation of the common law. More often, the issue is rather to what extent a statute is itself a source of policy for consistent common law development."⁶⁴ It was Justice Peters who began the common law development of providing a public policy exception to the at-will-employment doctrine in 1974 when she wrote the opinion in *Sheets*. As best stated by Peters herself: "We are, however, equally mindful that the myriad of employees without the bargaining power to command employment contracts for a definite term are entitled to a modicum of judicial protection when their conduct as good citizens is punished by their employers."⁶⁵ Surely, *Thibodeau* was a "good" citizen. She earned a living and supported herself and intended to support her soon-to-be born baby. She allegedly was terminated because she was pregnant and tending to her prenatal needs. Nicole Thibodeau deserved her day in court. However, Justice Ellen Ash Peters no longer serves on the Connecticut Supreme Court and, therefore, the state's common law has lost its humanistic quality--at least in terms of equal employment. The Appellate Court reasoned that the statute was only needed to establish a clearly defined public policy against sex discrimination. Yet, the Supreme Court performed an unprecedented method of statutory

⁶³ *Id.* at 513-14.

⁶⁴ Ellen Ash Peters, *Common Law Judging in a Statutory World; An Address*, 43 U. PITT. L. REV. 995, 998 (1982)

⁶⁵ *Sheets*, 179 Conn. at 477.

interpretation to determine that the statute itself expressed an even greater public policy than protecting women from sex discrimination: to insulate small business owners from liability. Following the majority of jurisdictions, the Appellate Court looked to the legislative intent behind the enactment of the statute in its entirety. It was clear that the legislature wanted to eliminate sex discrimination in all areas of employment by the enactment of this statute. In the case of Nicole Thibodeau, she was sent a clear message by the highest court in Connecticut: her rights are subordinate to those of small business owners.

It is especially problematic that the Supreme Court's analysis is contrary to its earlier declaration of the importance of the State to promote equality. In *Evening Sentinel v. National Organization for Women*, the Supreme Court expressed the firm resolve of the state to end sex discrimination:

The people of this state and their legislators have unambiguously indicated an intent to abolish sex discrimination. Connecticut has approved the pending equal rights amendment to the United States constitution, House J.R. No. 1, Jan. Sess., pt. 1, vol. 1, 1973 Public Acts, p. LXXIV, and its own Connecticut equal rights amendment, in addition to the CFEP legislation in the present case. The history of this mass of legislation evidences a firm commitment not only to end discrimination against women, but also to do away with sex discrimination altogether.⁶⁶

In fact, the majority of states that dealt with issues relating to the public policy exception to the at-will-employment support Justice Vertefeuille's dissent and the Appellate Court's rationale, including Washington, California, Oklahoma, Ohio, Maryland, and West Virginia.⁶⁷ These courts all dealt specifically with sex discrimination by small employers and reviewed anti-discrimination statutes similar to Connecticut.

The majority of states that allowed public policy exceptions used a more humanistic approach to wrongful discharge claims based on discrimination. The Supreme Court of

⁶⁶ *Evening Sentinel v. Nat'l Org. for Women*, 357 A. 2d 498.

⁶⁷ Sheehan also stresses that internationally, the U.S. belongs to a minority of industrialized countries that failed to support a draft put forward by the International Labor Convention that would have "required employers in ratifying countries to discharge workers only if there was good cause." The vote on the draft was 119 in favor and 7 (including the U.S.) opposed. This market-favored attitude has led to employees relying "mainly on judicially created exceptions to the at-will rule."

California reconciled its public policy exception with statutory exemptions by looking to the “general intent” of the legislature in *Phillips v. St. Mary Regional Medical Center*:

For the foregoing reasons, we conclude that, although the public policies under FEHA and Title VII are in direct conflict in regards to the scope of the religious-entity exemption, a plaintiff may rely on Title VII as a source of public policy for his state common law cause of action for wrongful termination. This conclusion, albeit problematic by allowing a plaintiff to extract public policy from various statutes without complying with certain statutory requirements, is nonetheless consistent with the purpose of both state and federal anti-discrimination laws. In enacting California's anti-discrimination laws, "the Legislature has manifested an intent to amplify, not abrogate, an employee's common law remedies for injuries relating to employment discrimination." The same can be said of Congress's intent in enacting Title VII. Policies against race and sex discrimination are among the state and nation's most fundamental and substantial public policies, and therefore, multiple remedies, while at times overlapping or even conflicting, serve the purpose of maximizing plaintiff's opportunity to seek relief from discrimination based on such impermissible classifications.⁶⁸

In support of its decision, the California Supreme Court relied on general principles of anti-discrimination laws and the intent of the legislature to end discrimination in all areas. The Court's reasoning is directly linked to both the federal and state anti-discrimination statutes:

As with the California Legislature, Congress has promoted liberal construction of its employment discrimination laws to afford the greatest protection to the victims of discrimination. The remedies afforded under Title VII do not preempt a state law claim for wrongful termination in violation of public policy. The Congress specifically provided: "Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State...." The employment discrimination laws of California and the nation, therefore, provide alternative remedies to achieve the goal of combating inequality in the workplace.⁶⁹

The Court relied, in part, on its earlier decision in both *Badih v. Myers* and *Rojo v. Kliger*, in which it allowed employees to bring a cause of action in wrongful discharge against their employers for discrimination based on pregnancy.

In *Molesworth*, the Maryland Court of Appeals held that its anti discrimination statute

⁶⁸ *Phillips v. St. Mary Regional Medical Center*, 116 Cal.Rptr.2d 770, 785(2002).

⁶⁹ *Id.* at 784.

expressed a clear public policy against sex discrimination and that the exemption for small employers “merely excludes small employers from the administrative process of the Act, but [did] not exclude them from the policy announced in [the statute itself].”⁷⁰ The Court goes on to add that “[t]he General Assembly did not intend to permit small employers to discriminate against their employees, but rather intended to promote a policy of ending sex discrimination statewide.”⁷¹ The Court looked specifically at the language in its anti-discrimination statute, Art. 49B, and discerned that it clearly did not provide immunity for small employers and allow them to discriminate. Article 49B specifically states that employment discrimination is prohibited by “any employer,” and does not refer to the definition set forth in the small employer exemption section. The Court goes on to justify its interpretation of the statute by relying on one of the most referred to canons of statutory interpretation: “We seek to read statutes ‘so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless, or nugatory.’”⁷²

The use of the word “any” indicates that the legislature did not want to shield small employers from the greater public policy of ending sex discrimination. More importantly, the Court also stated that it must consider the overall purpose of the legislature by looking at other statutes that prohibit sex discrimination to discern the “general intent” of the legislature--there were over thirty-four anti-discrimination statutes at the time *Molesworth* was decided. The Court held that, “absent a clear statement to the contrary,” the legislature did not mean to abrogate the common law.⁷³

The *Molesworth* Court also looked to the legislative history behind Title VII in an effort to solidify its holding and dispel any misconceptions about the federal counterpart lending support to an argument of preemption of its common law. Specifically, the Court looked to the assertion made by members of Congress who were against expanding the reach of the Act and who argued that the need to exempt small employers was specifically aimed at not overly

⁷⁰ *Molesworth*, 341 Md. at 637.

⁷¹ *Id.*

⁷² *Id.* at 632 (quoting *Montgomery County v. Buckman*, 333 Md. 516, 524 (1994)).

⁷³ *Molesworth*, 341 Md. at 632.

burdening the Equal Employment Opportunity Commission (EEOC). They state: “The EEOC estimated that expanding Title VII to encompass employers with eight or more employees, as originally proposed, would yield a 25% increase in the EEOC workload.”⁷⁴ The minority report of the House Committee on Education and Labor bears repeating:

Additionally, we fear that, in view of the estimated 18 month to two-year backlog that currently exists at the EEOC, the intent of H.R. 1746 to expand the EEOC’s jurisdiction will serve only to retard and frustrate the purposes and objectives of the Equal Employment Opportunity Act . . . The committee bill . . . will thrust the EEOC into an administrative quagmire which can only delay the attainment of a reasonable standard of operational efficiency that Congress should expect and demand.⁷⁵

The decision in *Molesworth* is consistent with an earlier ruling in *Kerrigan v. Magnum Entertainment, Inc.* made by the United States District of Maryland in which a pregnant woman was allowed to bring a cause of action based on wrongful termination against a small employer. The court stressed that “while art. 49B exempts small businesses from its burdensome administrative requirements, there is no reason to construe art. 49B as exempting small businesses from its anti-discrimination policy.”⁷⁶

In *Roberts v. Dudley*, the Supreme Court of Washington held that its anti-discrimination statute established a clear policy against sex discrimination and that the exception for small employers did not override this strong policy:

By this section the legislature narrows the statutory remedies but does not narrow

⁷⁴ *Id.* at 633.

⁷⁵ *Id.*

⁷⁶ *Id.* at 634. (quoting *Kerrigan v. Magnum Entertainment, Inc.*, 804 F. Supp. 733 (D. Md. 1992). *See also* *Kerrigan v. Magnum Entertainment, Inc.*, 804 F. Supp. 733, 736 (D. Md. 1992) (“Maryland courts have not read art. 49B as evidencing an intention to grant small business a charter to discriminate . . . Because art. 49B evidences a clear policy against employment discrimination, and because this court finds no legislative intent on the part of the General Assembly to exempt small businesses from the policy animating art. 49B, the court finds that a wrongful termination claim based on alleged discrimination will lie in Maryland for claimants whose former employers employ less than fifteen persons.”); *Collins v. Rizkana*, 73 Ohio St. 3d 65, 74 (1995) (“Instead, we can only read as evidencing an intention to exempt small businesses from the burdens of R.C. Chapter 4112, not from its antidiscrimination policy”); *Williamason v. Greene*, 200 W. Va. 421, 431 (1997) (“West Virginia Human Rights Act clearly constitutes this state’s ‘substantial public policy’ against sex discrimination and sexual harassment in employment, including retaliatory discharge based thereon. Although the Act does not provide this plaintiff with a statutory remedy, it nevertheless sets forth a clear statement of public policy sufficient to support a common law claim for retaliatory discharge against an employer.”).

the public policy which is broader than the remedy provided. Thus, the statutory remedy is not in itself an expression of the public policy, and the definition of 'employer' for the purpose of applying the statutory remedy does not alter or otherwise undo to any degree this state's public policy against employment discrimination. If it is argued that the exclusion of small employers from the statutory remedy is itself a public policy, that policy is simply to limit the statutory remedy, but is not an affirmative policy to 'exempt[] small employers from [common law] discrimination suits.'⁷⁷

Lynne Roberts worked for a small company for over twenty years. In 1993, she took an unpaid maternity leave from the company and was subsequently fired by her employer. Although her wrongful discharge claim was initially dismissed at the trial level due to the size of the employer, the case was transferred on appeal to the Washington Court of Appeals. The Court of Appeals reversed the trial court ruling and held that a "common law cause of action exists for wrongful discharge when the discharge violates the public policy against discrimination."⁷⁸ The Supreme Court of Washington affirmed this holding. Although its earlier decision in *Griffin* denied a statutory claim for wrongful termination due to the small employer exemption explicit in the statute, the court distinguished *Roberts* based on the fact that the plaintiff in *Griffin* was seeking a statutory remedy. Although Roberts was allowed to proceed with her claim, the concurring opinion of Justice Talmadge echoes traditional (and outdated) concerns regarding the court's shift from a market analysis to a more humanistic approach to statutory interpretation:

Considerable peril to the doctrine of separation of powers arise when, as here, a court purports to find the genesis of common law remedies among statutes that actually offer no remedies. This is breathtaking in its implications. The specter of judicial activism is unloosed and roams free when a court declares, 'This is what the Legislature meant to do or should have done.' It would be wiser to acknowledge our erroneous interpretation of the statute in *Griffin* and allow the plaintiff here her day in court under [this state's anti-discrimination statute].⁷⁹

This reasoning was rejected by the majority in *Roberts*, and it was also dispensed with in *Molesworth v. Brandon* by the Maryland Court of Appeals in 1996.⁸⁰

The reasoning set forth in *Molesworth* and *Roberts* was adopted by courts in a number of

⁷⁷ *Roberts v. Dudley*, 140 Wash. 2d 58 (2000).

⁷⁸ *Id.* at 61.

⁷⁹ *Id.* at 79.

⁸⁰ *See Molesworth*, 341 Md. at 621.

jurisdictions. In *Collins v. Rizkana*, the Supreme Court of Ohio elaborated on the outdated notions associated with the at-will-employment doctrine and the necessity of the public policy exception in order to preserve fundamental liberties:

In adopting the exception, it is often pointed out that the general employment-at-will rule is a harsh outgrowth of outdated and rustic notions. The rule developed during a time when the rights of an employee, along with other family members, were considered to be not his or her own but those of his or her paterfamilias. The surrender of basic liberties during working hours is now seen ‘to present a distinct threat to the public policy carefully considered and adopted by society as a whole. As a result, it is now recognized that a proper balance must be maintained among the employer’s interest in operating a business effectively and profitably, the employee’s interest in earning a livelihood and society’s interest in seeing its public policies carried out.’⁸¹

In allowing the employee to bring a cause of action for wrongful discharge, the Supreme Court of Ohio went further to state the obvious absurdity in allowing small employers to discriminate: “Chapter 4112 does not preempt common-law claims, we cannot interpret R.C. 4112.01(A)(2) as an intent by the General Assembly to grant small businesses in Ohio a license to sexually harass/discriminate against their employees with impunity.”⁸²

Aside from the Connecticut Supreme Court, there are few states that refused to look for the “general intent” of the legislature and resorted to a traditional market approach. Utah is one of a minority of states that does not allow a public policy exception to the at-will-employment doctrine for employees whose former employers have less than the statutorily proscribed employees. In fact, it allowed both sex and age discrimination to go unchecked. However, Justice Durham of the Utah Supreme Court is a staunch supporter of the public policy exception and has issued vehement dissents in both *Burton v. Exam Center Industrial & General Medical Clinic, Inc.*⁸³ and *Gottling v. P.R. Incorporated.*⁸⁴

In *Burton*, an employee brought a wrongful discharge claim against his former employer on grounds that he was discriminated against because of his age. The Utah Supreme Court held

⁸¹ *Collins v. Rizkana*, 73 Ohio St. 3d 65, 68-9 (1995)

⁸² *Id.* at 74.

⁸³ 994 P.2d 1261, 1268 (Utah 2000).

⁸⁴ 61 P.3d 989, 998 (Utah 2002).

that because its state statute against age discrimination exempted small employers, and there were no other statutes that established a public policy against age discrimination, that the employee could not support his cause of action.⁸⁵ It is interesting to note that the Utah Supreme Court specifically addressed the *Molesworth* decision. The Court asserted that *Molesworth* was distinguishable because unlike Utah, Maryland had ““at least thirty-four statutes, one executive order, and one constitutional amendment’ that prohibit discrimination based on sex in certain circumstances.”⁸⁶ Clearly, the Court was not foreclosing the possibility of a sex discrimination case being allowed to provide the basis for a public policy exception. In fact, it specifically stated that: “[s]uffice it to here say that sex, race, religion, and disability may present different considerations and a public policy against discrimination on those grounds might conceivably be found in other statutes of this state.”⁸⁷ Yet, it provided a carefully worded clarification in the next sentence: “That question is not before us and we express no opinion on that subject.” In the dissenting opinion, Justice Durham was vehemently opposed to the majority’s reasoning and concerned that it would reach beyond age discrimination cases:

[T]he majority’s decision will apply to all kinds of employment discrimination . . . the majority has opened the door to all small employers to discriminate not only on the basis of age, but also on the basis of the other categories protected by the Utah Anti-Discrimination Act. . . . In light of the fact that the vast majority of Utah employers qualify as small employers, we should not open this door.⁸⁸

Justice Durham was right. In *Gottling*, the Utah Supreme Court again rejected the public policy exception but did so in regards to sex discrimination. Justice Durham had much to say about the decision:

Today’s decision announces the principle that the majority of Utah workers have *no remedy* whatsoever, statutory or common law, against their employers for discrimination on the basis of race, color, sex, pregnancy, age, religion, national origin, or disability. I cannot agree that the legislature either intended this result or accomplished it in the Utah Anti-Discrimination Act. Such a result violates basic

⁸⁵ 994 P.2d at 1266.

⁸⁶ *Id.*

⁸⁷ *Id.* at 1267.

⁸⁸ *Id.* at 1268.

notions of fairness and human dignity.⁸⁹

It is precisely this concern that was expressed by the Connecticut Appellate Court in *Thibodeau* and subsequently rejected by the Connecticut Supreme Court. Utah is not alone in applying this approach and interpreting its state anti-discrimination statute as providing a shield of immunity for small employers. The fears expressed in Justice Durham's dissenting opinion also reverberate throughout the state of Arizona. Recently, the Arizona Supreme Court denied a claim of race discrimination because of the size of the employer.⁹⁰

In *Chavez*, a divided Arizona Supreme court refused to allow a cause of action based on racial discrimination, stating: "Although we recognize that racial discrimination is fundamentally wrong and undoubtedly against Nevada's public policy, we are constrained by the legislature's decision to address the issue through legislation and to provide statutory remedies for only certain employees."⁹¹ In the concurring opinion of Justice Rose, joined by Chief Justice Maupin and Justice Levitt, he goes directly to the heart of the outdated employment-at-will doctrine in light of any form of discrimination:

My proposal to the majority would be to take the obvious step and declare racial discrimination in employment against our public policy. We have declared that enforcing an employee to work in an unsafe workplace and firing an employee in retaliation of filing a worker's compensation claim are against our public policy. Surely, racial discrimination in employment is on an equal footing with these other declared violations of public policy.

These cases illustrate the internal conflict that these divided courts have in determining whether discrimination based on age, sex, and race should be recognized as a valid public policy exception to the employment-at-will employment doctrine. More importantly, they are illustrative of the dangers of allowing the small employer exemption to override fundamental ideas of fairness and equality for all groups. Connecticut is joining the ranks of a minority of states that allow a market approach to protect business autonomy and trump more humanistic concerns.

⁸⁹ 61 P.3d at 999-1000.

⁹⁰ *Chavez v. Sievers*, 43 P.3d 1022, 1028 (Nev. 2002).

⁹¹ *Id.* at 1025-26.

The result in *Thibodeau* stands out as an anomaly among the majority of states that have reached contrary results. The majority of states that have employment discrimination statutes hold that the employer who has less employees than that specified in the statute is exempt only from a statutory remedy, but that they can still be liable for a common law cause of action for wrongful discharge. As demonstrated through case law, the most common support for this analysis is that the individual states' public policy against discrimination is so great that the legislature does not shield small employers from a common law cause of action. Clearly, other states examined the issues relating to sex discrimination by small employers and reached a result contrary to the Connecticut Supreme Court. These cases illustrate that while an employee is not entitled to a *statutory remedy* from a wrongful employment termination claim this does not preclude a common law cause of action based on the states' clearly defined public policy against sex discrimination. The statutory interpretation of the majority of states that deal with small employer discrimination cases limit themselves to determining the public policy behind the actual statute used to determine such a policy.

V. Conclusion

The Connecticut Supreme Court got it wrong. Beginning with its decision in *Sheets*, the Court continually allowed public policy concerns to trump statutory limitations and grounded precedent on such exceptions. The decision in *Thibodeau* is contrary to the strong public policy against sex discrimination in Connecticut. While the Court claimed to be looking to the legislative history to discern the purpose of the legislature, it instead applied a traditional market approach by determining that employers with less than three employees may discriminate on the basis of sex. The statute was read clearly and applied literally. The problem is that *Thibodeau* was not looking for a statutory remedy. She was merely using the Connecticut Fair Employment Practices Act to establish the strong public policy against sex discrimination in order to bring a common law cause of action for wrongful discharge, as established in *Sheets*. In contrast, the

statutory interpretation that the Appellate Court applied clearly examined the legislative history to find that the overwhelmingly clear public policy in Connecticut was to remove all sex discrimination and not to exempt small employers from this policy. The Supreme Court used principles of statutory construction to circumvent the strong public policy against sex discrimination in Connecticut by placing the interests of business owners over those of individuals who are discriminated against. It allowed this method of statutory construction to defeat a progressive move toward equalizing gender imbalance in the workplace. By ignoring the humanistic approach adopted by the Appellate Court, the Supreme Court presented an interpretation that rejects what cultural feminists consider an ethic of care approach to the law. In light of the conflicting law on this issue across the nation, it will probably not be long before this issue is revisited. Hopefully, the legislature will have had a chance to step in and rectify the court's ruling in *Thibodeau*; otherwise Connecticut's clear public policy against sex discrimination will continue to erode.