

SUPREME COURT
OF THE
STATE OF CONNECTICUT

S.C. NO. 16593

NICOLE ANN THIBODEAU

v.

DESIGN GROUP ONE ARCHITECTS, LLC

BRIEF OF *AMICI CURIAE*
THE CONNECTICUT CIVIL LIBERTIES UNION FOUNDATION,
THE CONNECTICUT CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN,
AND THE ACLU WOMEN'S RIGHTS PROJECT

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I. INTRODUCTION

This case will determine whether pregnant employees of establishments with fewer than three employees have any legal recourse to challenge discriminatorily motivated terminations. This Court has on many occasions recognized a cause of action for wrongful discharges that contravene a clear public policy. See, e.g., Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471 (1980) (public policy of consumer protection); Faulkner v. United Technologies Corp., 240 Conn. 576 (1997) (public policy against government contract fraud); Parsons v. United Technologies Corp., 243 Conn. 66 (1997) (public policy in favor of sole complaint). *Amici* will argue below that the state Constitution and gender discrimination statutes recognize and affirm the public policy against pregnancy discrimination, and that the state pregnancy discrimination statute does not, by its terms, abrogate this common law protection.

II. STATEMENT OF FACTS AND PROCEEDINGS

This is an appeal from a decision of the Appellate Court that reversed a decision of the Superior Court granting summary judgment to the defendant-appellant, Design Group One Architects, LLC ("Design Group") on the complaint of the plaintiff-appellee, Nicole Anne Thibodeau ("Ms. Thibodeau"). Ms. Thibodeau's complaint alleged a common law claim of wrongful discharge in violation of public policy and a violation of the implied covenant of good faith and fair dealing. The background and facts supporting the complaint have been fully outlined in the Brief of the Plaintiff-Appellee, at 3-4, which *amici* adopt and incorporate by reference.

This Court granted the petition on the following question: Did the Appellate Court properly conclude that there exists a public policy in Connecticut that forbids an employer

of fewer than three employees from terminating an at-will employee on the basis of pregnancy?

III. ARGUMENT

A. Public Policy Claims Properly May be Derived From the State Constitution.

In 1980, the Supreme Court of Connecticut first recognized an exception to the traditional “at-will” employment doctrine by holding that an employee has a right of action against her employer when her improper discharge is found to contravene important public policy. Sheets v. Teddy’s Frosted Foods, Inc., 179 Conn. 471, 474-77 (1980). In doing so, the Court added Connecticut to the rapidly growing list of states to recognize such actions. Id. at 476 (citing Petermann v. International Brotherhood of Teamsters, 174 Cal.App.2d 184, 189, 344 P.2d 25, 27 (1959); Frampton v. Central Indiana Gas Co., 260 Ind. 249, 252, 297 N.E.2d 425, 427-28 (1973); Sventko v. Kroger Co., 69 Mich.App. 644, 648-49, 245 N.W.2d 151, 153-54 (1976); Brown v. Transcon Lines, 284 Or. 597, 603, 588 P.2d 1087, 1090 (1987); Glenn v. Clearman's Golden Cock Inn, Inc., 192 Cal.App.2d 793, 798, 13 Cal.Rptr. 769, 772 (1961); Nees v. Hocks, 272 Or. 210, 216-19, 536 P.2d 512, 515 (1975); Reuther v. Fowler & Williams, Inc., 255 Pa.Super. 28, 31, 386 A.2d 119, 120 (1978)). Since 1980, Connecticut has recognized the principle that an employer’s contract rights may be overridden by “competing claims of public policy.” Sheets, supra, 179 Conn. at 477. See also Faulkner, supra, 240 Conn. 576, 579 (1997). Those public policy claims may be derived from “applicable state statutes and constitutions.” Sheets, supra, 179 Conn. at 476.

The Petitioner correctly argues that, in the absence of state action, the constitutional right to equal protection is not enforceable against private parties. However, *amici* do not seek the right to enforce the state Constitution against a private party. Rather, they recommend that this Court utilize the state Constitution as a source or guide for interpreting common law public policy rights. The Connecticut Supreme Court has stated time and again that the state Constitution can be used in wrongful discharge cases to prove the existence of a given public policy. Daley v. Aetna Life & Cas. Co., 249 Conn. 766, 799, 803-04 (1999); Antinerella v. Rioux, 229 Conn. 479, 492 (1994); Morris v. Hartford Courant Co., 200 Conn. 676, 680 (1986); Sheets, *supra*, 179 Conn. at 476.¹

This principle has also been recognized in other states. As the California Supreme Court has also noted, “[f]or our purposes here, however, whether [the California Constitution provision prohibiting sex discrimination] applies exclusively to state action is largely irrelevant; the provision unquestionably reflects a fundamental *public policy* against discrimination in employment – public or private--on account of sex.” Rojo v. Kliger, 52 Cal.3d 65, 90, 801 P.2d 373, 389, 276 Cal. Rptr. 130,146 (1990). The state Constitution is “declaratory of this state's fundamental public policy against sex discrimination” *Id.* See also Roberts v. Dudley, 140 Wn.2d 58, 71 (1999) (en banc) (“statutory definition of ‘employer’ does not exclusively limit the policy against discrimination to large employers.”); Luedtke v. Nabors Alaska Drilling, Inc.,

¹ Importantly, one Superior Court recently recognized a cause of action for wrongful discharge based on the contravention of an alleged public policy derived solely from the state Constitution. Samuels v. Management Services of New England, Inc., 1999 WL 179622 at *1.

768 P.2d 1123, 1130 (Alaska 1989) (public policy supporting protection of employee privacy is actionable despite state constitutional requirement of state action); Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 618 (3d Cir. 1992) (state and federal Constitutions may form the basis for public policy underlying wrongful discharge cause of action, even in the absence of state action).

Furthermore, if, as this Court has held, the right to be free from sex discrimination is a fundamental civil liberty, a statute seeking to render that right meaningless for some women would be unconstitutional. See, e.g., Horton v. Meskill, 172 Conn. 615, 641-42 (1977) (protections contained in Article First of the Connecticut Constitution are fundamental civil liberties). Because we presume both rationality and constitutionality, Conn. Gen. Stat. § 46a-51 should not be read to extinguish the promise of equal protection, even in a private setting. See, e.g., Interlude, Inc. v. Skurat, 253 Conn. 531, 539 (2000) (presume Legislature intended sensible result) (citations omitted); Stafford Higgins Indus., Inc. v. Norwalk, 245 Conn. 551, 566 (1998) (presumption in favor of constitutionality) (citations omitted). Properly interpreted, Conn. Gen. Stat. § 46a-51 et seq. confer certain remedies and establishes a procedure for persons seeking those remedies. It cannot and should not be read to eliminate other avenues relief.

B. Connecticut's Gender Discrimination Statute Does Not Preclude A "Wrongful Discharge" Action for Pregnancy Discrimination.

Connecticut General Statutes § 46a – 51 et seq. do not bar the right to pursue a common law cause of action. The Connecticut Supreme Court has stated that a

“statute which creates a new remedy for a right already existing under the common law is generally directory only, and does not preclude the use of existing common law remedies.” Krulikowski v. Polycast Corp., 153 Conn. 661, 667 (1966) (quoting 3 Sutherland, *Statutory Construction* (3d Ed.) § 5812, at 95). Furthermore, the Court has insisted that “[I]nterpreting a statute to impair an existing interest . . . is appropriate only if the language of the Legislature plainly and unambiguously reflects such an intent.” Lynn v. Haybuster Mfg., Inc., 226 Conn. 282, 289 (1993). The Court only recognizes “those alterations of the common law that are clearly expressed in the language of the statute” Id. at 290.

Connecticut General Statutes § 46a-51 et seq. create a statutory right of action for employees who have been discriminated against on the basis of sex. Section 46a-60(a)(7) bars discrimination on the basis of pregnancy.² Section 46a-51(10) specifically limits that statutory right of action to employees of businesses with three or more employees. However, nowhere does the statute explicitly indicate that employees of businesses with fewer than three employees are barred from bringing a common law suit for wrongful discharge. Only an explicit exclusion of this common law right or an explicit statement of exclusivity can justify a reading of Conn. Gen. Stat. § 46a-51 et seq. that bars an employee’s right to bring a suit for wrongful discharge.

Indeed, instead of supplanting the common law tort of wrongful discharge, Conn. Gen. Stat. 46a-51 et seq. provides additional procedural and remedial rights. As outlined by the plaintiff-appellant in her brief, at 15-17, there are several distinct

² Section 46a-51(17) also includes pregnancy discrimination in the definition of gender discrimination.

advantages accompanying a claim under that statute that are not available under the common law wrongful discharge action. First, the CHRO is an available forum. Second, an employer with three or more employees may be subject to temporary or permanent injunctive relief, attorney's fees and court costs. Under the tort of wrongful discharge a plaintiff is limited to loss of wages and benefits and compensatory damages. These differences support the notion that, in designing Conn. Gen. Stat. 46a-51 et seq., the Legislature intended to create a procedural and remedial scheme that went above and beyond what was already available under the existing tort claim. However, there is no indication that, in so doing, the Legislature intended to be eliminating common law rights.

C. The Importance of Recognizing Plaintiff's Public Policy Claim.

This case is of particular importance in light of the number of Connecticut employees who will be affected by this Court's ruling. As of January 25, 2002, the Connecticut Department of Labor reported that there are 53,575 employers in Connecticut with three or fewer employees. Facsimile from Doreen LeBel, Connecticut Department of Labor, to Thomas Benoit, Legal Assistant (January 25, 2002). Although the Legislature apparently intended to restrict the jurisdiction of the Commission on Human Rights and Opportunities to employers with three or more employees in Conn. Gen. Stat. § 46a-51, it cannot reasonably be construed to have intended that a fundamentally important public policy concern itself could have applied to all but an estimated 40,000 to 100,000 Connecticut workers. Public policy concerns, like Constitutional rights, apply without jurisdictional limits.

Nor can it be said that the public policy recognized by the Legislature in its gender discrimination laws has become any less important. In an October 2001 report, the United States General Accounting Office found that women have not progressed significantly toward the goal of pay equity. United States General Accounting Office, No. GAO-02-156, *Women in Management: Analysis of Selected Data From the Current Population Survey* (October 2001). This report found that women in management are less likely than their male counterparts to be married, suggesting that the glass ceiling still exists for women of childbearing age. *Id.* at 12. Perhaps even more significantly, the study found that, in 1995 and 2000 alike, “full-time female managers . . . earned less than male full-time managers.” *Id.* at 18. Indeed, in 7 out of 10 industries studied, women managers earned less compared to their male counterparts in 2000 than they did in 1995. *Id.* at 19 (woman managers earn less in the following industries: communications; business and repair services; entertainment and recreation services; other professional services; retail trade, finance, insurance and real estate; professional medical services).

Anti-discrimination laws, including those protecting against pregnancy discrimination, were designed to assist women to overcome obstacles to equality in the workplace, including but not limited to pay equity. See, e.g., California Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 288-89 (1987) (purpose of federal Pregnancy Discrimination Act is the same as the purpose behind Title VII as a whole, i.e., to promote equality of employment opportunities and remove barriers to equal employment). See also, H. Rep. 95-948, at 6-7, *reprinted in* Legislative History of the Pregnancy Discrimination Act of 1978, at 152-53 (1980) (“Although recent attention has

been focused on the coverage of disability benefits programs, the consequences of other discriminatory employment policies on pregnant women and women in general has historically had a persistent and harmful effect upon their careers. Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant. Therefore the elimination of discrimination based on pregnancy in these employment practices in addition to disability and medical benefits will go a long way toward providing equal employment opportunities for women, the goal of Title VII of the Civil Rights Act of 1964.”) Although the state and federal laws creating an express statutory cause of action include numerous procedural limits, and special remedial and enforcement rights, the public policy they embody – and, surely, the public policy embodied in the Connecticut Constitution, as well – is not so limited. See, e.g., Conn. Const., art. first, § 20. See also California Federal, 479 U.S. at 285 (federal legislation against sex discrimination is a floor, not a ceiling). The Legislature cannot have intended that its recognition of the existence of an important public policy based on fundamental constitutional rights would result in the extermination of that right for some random subset of women workers. More importantly, the Legislature has not expressly abrogated this common law public policy right.

Finally, recognizing a public policy exception to the at-will employment doctrine for pregnancy discrimination will not, as has been suggested, open any floodgates of litigation. Pregnancy discrimination claims are comparatively rare, in part because of the clear public consensus that such discrimination is unfair and unlawful. In the CHRO, for example, of the 3,346 employment discrimination claims filed with the

agency in 2000, only 25 involved discharge based on pregnancy. Annual Report of the Commission on Human Rights and Opportunities, 2000 at 19. Facsimile from Gayle Hettrick, CHRO, to Erin Boggs, Staff Attorney (February 6, 2002). And the argument that this type of public policy claim might be extended to more common types of racial and ethnic discrimination by small employers is unlikely because minority employees in small firms already are fully protected under 42 U.S.C. §1981. See Barbara Lindemann Schlei & Paul Grossman, Employment Discrimination Law, 2nd Ed., 669 (ABA Section of Labor and Employment Law, Bureau of National Affairs 1983). See also Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975) (in addressing issues related to the timely filing of employment discrimination charge with EEOC pursuant to Civil Rights Act of 1964, the court said, “[s]ection 1981 is not coextensive in its coverage with Title VII. The latter is made inapplicable to certain employers.”); Johnson v. Tufon Group, Inc., 2001 WL 210046, at *2, n.4 (D.Md.) (although the court ultimately found that there was not a violation of 42 U.S.C. § 1981, it noted, “[u]nlike Title VII, section 1981 applies to any employer, regardless of how many people it employs).

IV. CONCLUSION

For these reasons, the *amici* respectfully urge the Court to affirm the ruling of the Appellate Court.