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REASONS TO ESCHEW FEDERAL LAWMAKING AND EMBRACE COMMON LAW APPROACHES TO GENETIC DISCRIMINATION

CANDICE HOKE¹

Good afternoon. It's a privilege to be here, particularly since I am an employment law teacher with scant understanding of the gravity of genetic discrimination prior to preparing for this conference.

The main charge to me is to show you alternatives other than, for instance, federal legislation that could be deployed to rectify genetic discrimination.

You may have noticed that in our conference materials, and in a number of the presentations, there has been either an explicit or an implicit call along the lines of "there ought to be a law that ..." Professor Hoffman and I agree: there ought to be some laws, but I want to talk to you a little bit about two possible, two real goals here.

One is to ask you to critically evaluate whether a federal statute is the right remedial response at this point in time, and secondly, to ask you to start thinking about the possibility of drafting into service what we in law refer to as traditional state common-law approaches that actually might give us more and better ways to remedy what's going on than simply turning to Congress.

I. FEDERAL LEGISLATION—TIMING AND IMPACT

Now, as background for talking to you, I'd like for you to reflect, not about the idealized Congress of the United States, but who is in Congress; right now who are the individuals that actually fill the U.S. Senate and House of Representatives.

A VOICE: Not a pretty picture.

PROFESSOR HOKE: Indeed. That's the backdrop for what we're going to discuss now.

As others have mentioned to you, we have a wide range of law-making entities at the federal and state levels.

Federal law in this country has obvious power and influence. Federal law has the capacity to create mandatory duties and prohibitions, and its scope, unless limited, can be nationwide. The broad influence that it exerts is frequently not recognized. Even where federal law is not controlling, state courts and state policy entities will often look to the federal law for guidance as to what is truly right and good, and incorporate federal standards into state law.

But, given the actual identity and commitments of those who are currently in control of federal policy making, specifically those in control of Congress, is this a proper time to press for federal legislation? Especially since whatever balance the federal policy strikes will exert great influence over related state law, we must raise this question.

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Federal law possesses an additional power that Professor Hoffman has mentioned, and that is the problem of pre-emption. Federal pre-emption of state law can occur via explicit language within a statute—for instance, the ERISA statutes. A provision may expressly mandate there shall be no state power to issue law in a particular arena. But power also rests within the courts to hold that certain federal law *impliedly* preempts state law and state policy from a subject area.

So when federal statutes are enacted, one potentiality is that they will be viewed to be setting the entirety of policies for the nation, and not simply the *federal* rule for the subject matter that the feds are controlling at that point. In other words, enactment of federal legislation may mean that the feds have the first, last, and complete words on the given subject until statutory amendment occurs.

Your response might be: so what? This sounds great. If I'm going to work on creating any kind of legislation, I'd rather have it have the broadest possible impact and there's really no reason to talk about anything else.

Let me inventory various considerations that should be evaluated before choosing to press for federal legislation, in addition to the identity and values of the current Congress. First, a federal statute on an issue does tend to rigidify a policy for a large number of years. Let's say we pass a statute this year. It is very unlikely that the issue will resurface on the legislative agenda in Washington for another decade. That means we better have our ducks lined up well to achieve exactly what we want because we probably will not have another opportunity for a good while. It's rare for legislation to be permitted onto the congressional agenda simply for the purpose of correcting errors or omissions, or to rectify compromises, when an omnibus bill on the subject has been recently enacted. So, we must recall the difficulty in getting the subject matter back onto the legislative agenda.

Second, as previously mentioned, the legislation may be deemed to be pre-emptive and thus, eliminate the novel State initiatives that have other speakers have discussed. If some of the other States' efforts are more progressive on the subject than what can be obtained via federal legislation, and might be used as models for other States and for later federal legislation, the elimination of these other models because of a judicial ruling of federal pre-emption would seem an unwise strategy.

The third concern, and I would say critical point, which was mentioned yesterday in Paul's [Miller] talk and several times today, is that the authoritative interpretive power over federal legislation lies in our federal courts. We currently have a problem with federal court decisions taking positions rather hostile to employee interests. So, again, I would suggest that this is yet another cause to consider alternatives to the rather reflexive embrace of seeking federal lawmaking.

Thus, I am suggesting that when you start thinking "there ought to be a law," an additional series of questions must be raised about *what kind of law*, rather than moving quickly from the position in favor of new law to the conclusion that it has to be *federal* law.

You can ask, for instance, *from which level of government*, state or federal, should the law issue? Second, *by which mechanism* do you want the new policy to emanate? It need not be statutory, coming from the legislature. It may be that it would be better to emerge from the court systems. This morning Harry Zanville reminded us about the federal common-law power. Again, under this group of federal judges, I'm a little leery of advocating federal judicial policymaking. I doubt the federal courts will strike a fair balance between employees and employers right

now. But when we talk about state common law, at least in Ohio, for instance, we have many promising opportunities.

But I still haven't convinced you not to look seriously at federal legislative possibilities, I encourage you to ask at least these questions. First, assess whether the policy debate around the set of issues, for instance, genetic discrimination, has matured to such a point that you believe we are ready for a piece of national legislation that has the potential to congeal the policy in this country for a good many years. Or, are we rather in an infant stage where we still have some thinking to do? We need to think through the implications of various regulatory options before we can fashion what we think would be a wise and sound policy.

Second, consider how much experience has been gained through state initiatives or even other non-national federal initiatives, such as the Executive Order, that can be evaluated critically in deciding what kind of omnibus law is needed. For instance, as a part of this process, assessments should be made of the efforts several states have already undertaken. Professor Hoffman said that there had been 31 initiatives in the States already. Has there been sufficient time to evaluate those efforts? Have we obtained careful, critical, comparative analyses of these various statutes and other kinds of state policy initiatives as to their relative merits and demerits before we start moving forward on a federal level? For instance, the Massachusetts statute, which is heralded as the best one currently is critiqued by George Annas as deficient in some major ways. Undertaking these kinds of experiments would be very beneficial before trying to fashion omnibus federal legislation.

Third, evaluate your political power realistically. Does your set of interests have sufficient national legislative influence so that the national legislative result will actually be beneficial rather than a series of compromises that might set back your whole agenda?

Fourth, and perhaps most importantly, consider whether there is a presidential administration which will favorably interpret your legislation and likely issue helpful interpretive regulations and engage in useful enforcement. In its absence, it may be unwise to move forward with federal legislation at this time.

If, as I believe, you have concluded that it is not yet time for federal legislation, perhaps you are willing to consider options at the State level. It's worth mentioning that even when we do focus on state legislation, it is usually easier; often, fewer and lower barriers are interposed to State legislative enactments. One of the constitutional roles of State governments is that of policy experimentation. In many of the constitutional decisions from the U.S. Supreme Court, the strengthening of federalism—the allocation of power between a national and subnational governments—has been justified in part so that different policy arrangements will emerge and critical evaluation can occur before we try to fashion a more consistent federal policy.

Focusing on the State level also allows proponents to educate a portion of the population about a particular policy area and garner their support for legislative efforts before trying to go national. So, for instance, the people in Ohio (where the State lacks a statute) could be educated about the problem of genetic discrimination by insurers and employers. A statutory effort could be enacted. Then, if later it seems prudent to move forward on a national level, the educational efforts in each State will mean that a significant portion of the public will have been exposed to the problems justifying national legislation and will encourage their federal legislators in that effort.

II. STATE COMMON LAW REMEDIES

Short of passing state legislation, of enacting a state statute, are there other remedies or legal protections for genetic discrimination available to employees at the State level? The possibilities are present if traditional remedies residing within the power of the state courts are re-fashioned.

A. *Background for NonLawyers*

You may be aware that the American court system derives its structure and traditional powers from the courts of merry 'ole England, centuries before the new world received English settlements. Embedded in our state courts are what are termed "traditional common-law powers." What that term means is open to some interpretive controversy, but one of the benefits of moving in the common-law direction is that at its core, courts have the power to fashion policy, rights, duties, and remedies for violation of those rights and duties without any enactments from the state legislature.

In fact, this is exactly the way we obtained most of our property rights, our contract rights and our duties to avoid personal injuries known as torts – via the courts, not through legislatures. These rights were fashioned by courts incrementally over the centuries. Many times today, however, people tend to think in terms of having to go to a legislature for the creation of new rights. This is simply false. One can turn to the courts generally only through litigation but the litigation invokes the courts' inherent and historical powers. Basically the procedural structure of invoking common-law powers is to identify existing rights that are just a step away, so to speak, from the rights that the proponent is attempting to have recognized at this point in time, and then the proponent argues to the court that we are so close that this is just a tiny step and the new right is within the broad tradition of this group of rights. For centuries, we have engaged in common law policymaking through our courts.

Some contemporary legislators, however, have expressed concerns about these traditional common law judicial powers. They offer comments such as: "Only the legislature has the power to create policy or to write the law." Traditionally, the legislatures were not engaged in very much statute-making at all because of transportation problems, communication problems, *et cetera*. The courts were the locus of law making. That's the way it was historically and, although the ease with which the legislators can now travel and gather has changed dramatically, these traditional judicial powers have not been withdrawn. The common law powers are latent powers waiting to be invoked.

B. *Ohio Tort of Wrongful Discharge in Violation of Public Policy*

While somewhat tardy when compared with many other States nationally, Ohio has embraced the tort of wrongful discharge for violation of public policy. Indeed, more recently, Ohio courts have been among the most innovative in fashioning a balance between employer and employee rights rather than continuing to repose virtually all of workplace power in the employer. The judges involved in this effort include Ohio Supreme Court Justices of both major political parties.

This new tort was designed to create grave disincentives for any employer that might attempt to elicit worker assistance in activities that would undermine important public policy. The tort's origins date to a 1959 California case where the discharged employee had been subpoenaed to appear at a state legislative hearing to

testify concerning the employer's business activities.² The employee claimed the employer had requested that he testify untruthfully but that he had testified truthfully. Displeased with the employee's testimony, the employer fired the worker from his job.

In evaluating whether any new legal protections should be accorded to workers, the court noted that although the criminal law offered penalties for suborning perjury, the civil law had been largely silent. Yet the court opined that the civil law should also seek to vindicate the important public interest at stake by creating a damages remedy for employees who were discharged when they refused to cooperate in an employer-led violation of important public policy. The court reasoned that exposure to litigation and significant money damages would provide powerful disincentives to employers who might otherwise condition continued employment upon the workers' violation of law.

The range of employer conduct that falls within the rubric of "violating public policy" is dynamic and not easily defined. The Ohio Supreme Court has recently announced a four-part test to determine when employer conduct will give rise to the tort, in Ohio referred to as a *Greeley* claim.³ First, the discharged worker must identify a clear public policy arising from the State or federal Constitution, a statute or administrative regulation, or the common law. For instance, in the context of someone who is discharged because of genetic discrimination, the law that might be identified as constituting clear public policy might be drawn from the federal Rehabilitation Act,⁴ equivalent State legislation, from the federal Americans With Disabilities Act,⁵ or if it is a genetic trait that is racially or ethnically linked, from antidiscrimination statutes.⁶ Although slightly more of a stretch, the policies embedded in HIPAA might also be used to establish a clear public policy forbidding the use of genetic information in a manner that harms a workers' access to employment.⁷ Notably, the State court can draw out a policy or value that is shorn of prescribed statutory procedures or other impediments and enforce it via the common law.⁸

²See *Petermann v. Intern'l Brotherhood of Teamsters*, 344 P.2d 25 (Cal. App. 1959).

³See *Kulch v. Structural Fibers, Inc.*, 677 N.E. 2d 308 (Ohio 1997). *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St.3d 228, 55 N.E.2d 1981 (1990) first announced the judicial acceptance of the tort but *Kulch* articulated the governing four-part legal test.

⁴Rehabilitation Act of 1973, 29 U.S.C. § 705-794a.

⁵Americans With Disabilities Act, 42 U.S.C. § 12101-12213.

⁶Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000s-17.

⁷Health Insurance Portability and Accountability Act of 1996. HIPAA forbids group health plans from establishing rules for enrollment eligibility based on "genetic information." An insurer cannot refuse to insure an employer's group that seeks health insurance because particular members of the group have genetic predispositions toward certain illnesses.

⁸See, e.g., *Kulch v. Structural Fibers, Inc.*, 677 N.E. 2d 308 (Ohio 1997); *Helmick v. Cincinnati Word Processing, Inc.*, 45 Ohio St.3d 131, 543 N.E.2d 1212 (1989).

Second, the discharged worker must show that for an employer to dismiss employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy that was identified in step one. For instance, where an employee is discharged simply because of test results showing she carries a marker for a racially linked disease, the argument would elaborate that the clear public policies protecting workers from losing their jobs because of racial discrimination will be undermined if the employer is not held accountable in tort.

Third, the worker is required to demonstrate that the plaintiff's dismissal was motivated by conduct related to the public policies identified in steps one and two — a causation requirement. So long as the record lacks additional justifications for the discharge, step three may be relatively easily to satisfy.

Fourth and finally, the worker must show that employer lacked an overriding legitimate business justification for the dismissal. Whether the fact that the worker would have caused a significant increase in the premiums for employer-provided health insurance constitutes a legitimate and sufficient overriding business reason for the dismissal would have to be determined in judicial decisions.

How easy is it to bring and win such a case? In Ohio we have been very fortunate over the past decade during which *Greeley* claims have been authorized. One of the best examples of the creative way this approach can be used is to describe a landmark whistleblower case—*Kulch v. Industrial Fibers, Inc.*

Whistleblowers were so named because they are said to have “blown the whistle” (similar to a referee) on illegal activities within the employer or company. The brutal fact of the whistleblower cases nationwide is that employers have a great propensity to fire the worker-whistleblowers and sometimes to do so after an array of abusive treatment toward them in the workplace. Ohio's legislature responded to the problem of discharged whistleblowers by enacting a prolix, cumbersome statute with all sorts of pre-requisites that had to be met by the employee who was blowing the whistle if the employee were to be protected from job loss or other employer retaliation. For instance, except when reporting criminal activity, the statute requires an employee to notify the employer orally about the concern, provide appropriate time for the employer to remedy the situation, then file a written complaint internally with the employer, and then and only then, the employee may file a report with a law enforcement agency. If any of the preliminary steps are missed, the Ohio whistleblower statute will not protect the employee from retaliation, including discharge.

It does not require great insight into humanity to suggest that most workers do not know and will not ever completely understand the progression of steps that must be followed in order to protect themselves and their jobs from retaliation. If a concerned worker does make a report to a government agency and is thereafter fired, at that point the employee may visit an attorney and receive the tardy observation that because the worker failed to walk through X, Y and Z steps, the law provides no assistance.

In the *Kulch* case, one enterprising attorney noticed that the Ohio courts had already declared that the new common law tort remedy could be the vehicle for enforcing statutory rights even if the procedural prerequisites for the statutory remedy had not been met. The attorney argued that the Ohio whistleblower statute should be handled in this manner as well. The workers' attorney contended that embedded in our state public policy could be found the concern that employees should be able to bring forward to public officials information about wrongful,

illegal conduct of the employer that harmed the public interest, and that workers should not be penalized for that responsible citizenship with the loss of the job. The defendant employer responded by noting that the public policy of Ohio was to protect workers from retaliation *if and only if* the procedural prerequisites of notice to the employer had been met.

The Ohio Supreme Court generally agreed with the employees' point of view and declared that the state's policy is to protect whistle blowers. The Court said that it fell within its common law powers to recognize the employer's conduct as fitting within the established tort of wrongful discharge for violation of public policy. Moreover, the tort did not require the satisfaction of the procedural prerequisites enunciated within the statute.

In sum, many legislative compromises emerge in workplace law because employers are pushing their interests and employees are (normally less effectively) trying to push their interests, and the outcome is a statutory mess. The Ohio Supreme Court can be viewed as extracting the core substantive policy and enforcing it through the common law, shearing the substantive policy from the impediments.

Whether the State Supreme Court should be engaged in this activity is contestable but the fact is, it is occurring and does have a long legal tradition external to the State of Ohio. And the Court has handled a state discrimination statute in a similar manner, by allowing an antidiscrimination policy to be enforceable against an employer which did not employ the minimum number of employees for the statute to be operative.⁹ The Court reasoned in part that sexual harassment was a violation of the public policy of Ohio no matter how small the employer, and allowed the worker to pursue the lawsuit as a common law tort of wrongful discharge in violation of public policy even though the state statutory requirements had not been satisfied.

Thus, the flexibility of state common law warrants its exploration by proponents of substantive protections from genetic discrimination in employment. Both State common law and statutory options should be plumbed for possibilities before turning to the risky effort to enact a federal statute that might undermine progressive innovations in the States.

⁹Helmick v. Cincinnati Word Processing, Inc., 45 Ohio St.3d 131, 543 N.E.2d 1212 (1989).

