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From Little Acorns Great Oaks Grow—Neil Gotanda’s Contribution to the Law Permitting General & Punitive Damages in Employment Discrimination Cases

David Benjamin Oppenheimer†

Although Neil Gotanda’s contributions to critical race scholarship are widely recognized, Gotanda’s work as a practitioner has also had great impact. In this article, the author tells how Gotanda drafted a “controversial set of regulations” for the California Fair Employment Housing Commission which ultimately paved the way for the 1991 amendment of Title VII of the 1964 Civil Rights Act permitting general compensatory and punitive damages in federal employment discrimination cases.

Money talks. The settlement of over one hundred million dollars in the recent Texaco “jellybean” case, and a series of other eight and nine figure settlements in employment discrimination cases, are reportedly changing the way corporate America and the legal profession look at civil rights law.¹ These changes could not have occurred without the amendment of Title VII of the 1964 Civil Rights Act in 1991 to permit the award of general compensatory and punitive damages in federal employment discrimination cases.² In tracing the sources of the 1991 amendment, one branch begins with the work of Neil Gotanda.

Neil Gotanda’s well deserved reputation as an influential legal scholar is largely the result of his work in the 1980s and 1990s in the field of critical race scholarship. The other essays in this symposium celebrate that

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† Associate Professor of Law, Golden Gate University; J.D., Harvard Law school; B.A., University Without Walls-Berkeley. I am grateful to David Garcia, Neil Gotanda, Bill Hastie, Joanne Lewis, Alice Lytle, and Steven Owyang for helping me reconstruct their work with the FEPC, DFEP, DFEH and FEHC during the late 1970’s and early 1980’s, and to my research assistant Sabina Crocette for her able assistance in preparing this essay. Any and all errors are my sole responsibility.

1. See Allen R. Myerson, *As U.S. Bias Cases Drop, Employees Take Up Fight*, N.Y. TIMES, Jan. 12, 1997 at 1 (class action employment discrimination lawsuits resulting in large settlements growing in wake of 1991 Civil Rights Act); Tim W. Ferguson, *Boss Harassment*, FORBES, Nov. 4, 1996 at 150 (same).

2. 42 U.S.C. §1981a (1991).

important work. But Neil's little-known work as a practitioner in the 1970s has also made an important contribution to the law. Before he left California in 1979 to study for his LLM at Harvard, he helped draft a controversial set of regulations for the California Fair Employment & Housing Commission permitting the Commission to award general compensatory and punitive damages in employment discrimination cases brought under California law. These regulations helped pave the way for the 1991 amendment of Title VII, permitting such damages under federal law.

California was among the first states to pass anti-discrimination legislation, enacting the Fair Employment Practice Act [FEPA] in 1959.³ But through the 1960s and early 1970s, the enforcement agency, the Fair Employment Practice Commission [FEPC], was largely moribund.⁴ When Jerry Brown took over from Ronald Reagan as Governor in 1974 the agency was adrift in the bureaucracy of the state Department of Industrial Relations, had a single lawyer, and an enormous backlog of cases. Under Governor Brown, however, the agency was rejuvenated. By 1980, its functions were separated into a prosecuting arm (the Division of Fair Employment Practices—DFEP) and a regulatory/adjudicatory one (the FEPC), and given the status of a free-standing state agency and an independent commission respectively.⁵

This structure remains in place today. Discrimination complaints are investigated and prosecuted by the Department of Fair Employment and Housing (DFEH), an agency whose only function is civil rights enforcement.⁶ Administrative prosecutions are decided by an independent commission charged with hearing cases and issuing regulations interpreting the civil rights laws, the Fair Employment and Housing Commission (FEHC).⁷ By the time the re-organization was complete in 1980 the two entities had a combined total of approximately twenty lawyers.⁸ Among them was a young lawyer who had previously worked at the Asian Law Caucus and California Rural Legal Assistance—Neil Gotanda. After a brief stint as a discrimination law prosecutor, Gotanda was put on special assignment to

3. 1959 Cal. Stat. 121, §1, *repealed and recodified* by 1980 Cal. Stat. 992, ¶11; see CAL. GOV'T. CODE, §12900 (West 1997).

4. Historical assertions stated without citation to authority are based on the recollection of the author, who began observing the work of the FEPC in 1976, while a law student, and worked for two of its successor agencies, the DFEP and DFEH from 1979 through 1987.

5. See 1980 Cal. Stat. 992, §4.

6. See CAL. GOV'T. CODE, §12930 (West 1997).

7. See CAL. GOV'T. CODE, §12935 (West 1997).

8. When the transition began, the agency was directed by Alice Lytle, now a Municipal Court Judge for Sacramento County, on loan to the Superior Court Juvenile Division, and William H. Hastie. By its completion, Lytle had joined the Governor's cabinet as Secretary of State and Consumer Affairs. Hastie joined her to serve as her general counsel. Lytle was replaced first by David A. Garcia, who was subsequently appointed to the bench, and is currently a Superior Court Judge for the City and County of San Francisco, and later by Steven Owyang, who remains Legal Affairs Secretary to the Commission.

the FEPC to help draft the Commission's first set of interpretive regulations.⁹

In this work, Gotanda had to address the question of what damages the Commission could award in employment discrimination cases. Gotanda's proposed regulation provided an expansive reading of the FEHA. The Act provided that upon a finding of unlawful employment discrimination, the Commission was empowered to order the employer "to take such action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay,...as, in the judgment of the commission, will effectuate the purposes of this part."¹⁰ The ensuing regulations included a section on back pay and fringe benefits,¹¹ a section on hiring, reinstatement or upgrading of employees, restoration of membership in labor organizations, and affirmative action goals and timetables,¹² a section on prospective relief, including "rightful place" seniority, front pay, and "red circling,"¹³ and a section on exemplary and compensatory damages.¹⁴ In sum, the regulations authorized the Commission to grant every form of relief that any court had approved in any published discrimination case. The exemplary and compensatory damages section provided that, "while normal monetary relief shall include relief in the nature of back pay, reasonable exemplary or compensatory damages may be awarded in situations involving violations which are particularly deliberate, egregious or inexcusable."¹⁵

The damages proposal was highly controversial. Major employers throughout the State, under the leadership of the Merchants & Manufacturers Association, lobbied the Commission to withdraw the regulation. Among the objectors were Standard Oil, Pacific Telephone, Occidental Petroleum, Provident Insurance, Connecticut General Insurance, Bectel, Caterpillar, Foremost, Clorox, Bank of America, Wells Fargo Bank, Bank of California, Security Pacific Bank, Firestone, and Southern California Gas.¹⁶ But the Commission held to the view that if, in its judgment, compensatory or punitive damages could help effectuate the purposes of the law, they would exercise their authority to grant them.

These regulations were ultimately challenged in court. The incidents giving rise to this challenge occurred in late 1979, as the regulations were going through the drafting and hearing process. The Commodore Home

9. Working with Gotanda on the regulations was Dale Brodsky, who was then a FEPC attorney and is today a school teacher in Oakland, California.

10. CAL. GOV'T. CODE, §12970 (West 1997).

11. CAL. CODE REGS. tit. 2, §7286.9(a)(1) (1995).

12. *Id.* §7286.9(a)(2).

13. *Id.* §7286.9(b).

14. *Id.* §7286.9(c) (repealed 1985).

15. *Id.*

16. The comments are on file with the FEHC in San Francisco. A summary of the comments copied from the Commission's files is on file with the author.

Systems company owned a mobile home manufacturing plant in San Bernardino, at which a man named Johnnie Brown had gone to work as a quality-control inspector in June, 1979.¹⁷ He was fired in November of that year.¹⁸ Bennie Butler had been hired by Commodore in February 1979, as a quality-assurance manager; he too was fired, a month before Brown.¹⁹ Both men filed administrative FEPC complaints, charging they were fired because they were African American.²⁰ In the spring of 1980, they filed a race discrimination action against Commodore in the Superior Court for San Bernardino County, claiming a violation of the FEHA, and their complaint sought general, compensatory and punitive damages.²¹

Brown and Butler's case did not necessarily affect the Commission regulations, which addressed the authority of the Commission itself, not the authority of the courts. Nothing in the FEHA explicitly provided or limited the remedies available to a court hearing an FEHA action.²² The DFEH and FEHC had no role in private litigation once a "right-to-sue letter" had been issued, and no reason to know that the Commodore case had been filed.²³ But when Commodore moved to strike the prayer for damages, Brown and Butler responded by invoking the newly adopted regulation as authority; if the Commission could award such damages, they argued, so could the courts.²⁴

The Superior Court denied Commodore's motion to strike,²⁵ but the Court of Appeal granted a writ of mandate and ordered the Superior Court to strike the prayer for punitive damages.²⁶ The court reasoned that the damages available in civil actions under the FEHA should be no greater than those available in an administrative enforcement action decided by the Commission.²⁷ Thus, if the administrative agency lacked authority to award the damages under the FEHA, a court must be similarly constrained. Relying on the failure of the California Legislature to specify the availability of punitive damages in administrative actions, and the federal decisions denying legal damages in Title VII civil actions,²⁸ the court held that

17. *Commodore Home Systems, Inc. v. Superior Court*, 32 Cal. 3d 211, 214 (1982).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 214-215.

23. The FEHA has since been amended to require parties filing actions in court to serve a copy of the pleadings on the DFEH and the FEHC. See CAL. GOV'T. CODE, §12965 (West 1997).

24. See *Commodore Home Systems, Inc. v. Superior Court*, 177 Cal.Rptr. 526, 529 (Cal.App. 1981) (FEHC lacks authority to award exemplary damages), *vacated by grant of hearing*, *Commodore Home Systems, Inc. v. Superior Court*, *supra* note 17, at 211.

25. See *Commodore Home Systems*, *supra* note 17, at 214.

26. See *Commodore Home Systems*, 177 Cal. Rptr. at 532.

27. *Id.* at 529.

28. See *Richerson v. Jones*, 551 F.2d 918 (3d Cir. 1977) (compensatory and punitive damages not permitted under Title VII); *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), *overruled by Harris v. Richards Mfg. Co.*, 675 F.2d 811 (6th Cir. 1982); see also *Curtis v. Loether*, 415 U.S. 189

the FEHC regulations exceeded the Commission's authority, and were void.²⁹

The FEHC and DFEH staff first learned of the Commodore case when the Court of Appeals decision voiding their regulations was published.³⁰ They joined counsel for Brown & Butler in seeking review by the California Supreme Court.³¹ The Court granted a hearing, vacating the Court of Appeal decision, and held that whatever authority the Commission might have in an administrative proceeding, the courts could award the same damages for a violation of the FEHA as they could in any other civil action.³² Thereafter, in actions brought under the FEHA, plaintiffs plead and recovered all forms of legal damages, as well as equitable relief.

The Commodore case left open, however, the question of whether the FEHC damage regulations were valid. In 1987 the California Supreme Court returned to this question and held that the Commission lacked the authority to award legal damages.³³ The California legislature eventually returned the power to award compensatory damages to the Commission, but replaced its authority to award punitive damages with a provision allowing it to set fines.³⁴ But between the adoption of the regulations in 1980 and the 1987 decision invalidating them, a substantial body of damages law had developed in the Commission's decisions, and their decisions awarding damages had attracted substantial publicity. Thus, although the Commission's awards were not particularly large, they helped create an expectation that employment discrimination victims were entitled to damages.

During this same period, Title VII cases based on race discrimination were undergoing a transformation.³⁵

Because of the availability of legal damages under Section 1981, more and more race discrimination cases were being brought jointly under Section 1981 and Title VII. Like the FEHC awards, the amounts in these cases were hardly large by typical tort standards,³⁶ but they began altering

(1974) (discussing the related issue of whether jury trials are permitted in Title VII cases, characterizing Title VII monetary damages as equitable).

29. *Id.* at 530-32.

30. The author was then a staff attorney for DFEH, and coordinated the DFEH/FEHC legal response to the Court of Appeal decision.

31. The author represented DFEH, appearing as *amicus curiae*, on the petition for hearing, the briefing before the court, and at oral argument.

32. Commodore Home Systems, *supra* note 17, at 214-15.

33. *Dyna-Med, Inc. v. FEHC*, 43 Cal.3d 138 (1987) (An administrative agency may not award punitive damages, and may award general compensatory damages or impose fines only if explicitly authorized by the Legislature).

34. CAL. GOV'T. CODE, §12970 (West 1997) amended by 1992 Cal. Stat. 911.

35. Title VII had been held to permit the recovery of only back pay and out-of-pocket losses, on the ground that these were forms of equitable relief, not legal damages; neither legal damages (including general compensatory damages for emotional distress or other pain and suffering) nor punitive or exemplary damages could be awarded.

36. See *The Civil Rights Act of 1990 Volume 3: Hearings on H.R. 4000 Before the House of*

the view that discrimination cases were not damages cases.

Eisenberg & Schwab reported in 1990 that, as of that year, there had been fifty-nine reported Section 1981 decisions in which damages were awarded. The awards ranged from \$500 to \$800,000, with an average damages award of \$39,167 (median) or \$35,000 (mean).³⁷ There had been ten reported Section 1983 discrimination decisions in which damages were awarded, with awards ranging from \$500 to \$150,000, and an average award of \$29,790 (median) or \$14,700 (mean).³⁸

A study of the first seventeen FEHC decisions applying the damages regulation reveals similarly modest awards.³⁹ While the Commission awarded damages for pain and suffering in fourteen of the seventeen cases in which such damages were requested, the awards ranged from a low of \$5,000 to a high of \$35,000, with a mean of \$11,643 and a median of \$7,500.⁴⁰ In the seven cases requesting punitive damages, the Commission awarded damages in six—all sexual harassment cases. The punitive damages awards ranged from \$7,500 to \$50,000, with a mean of \$27,083 and a median of \$20,000.⁴¹

The federal civil rights awards and Commission awards appear even more modest when compared to the reports of jury awards in "wrongful discharge" tort cases in California, in which very substantial amounts were awarded. For example, a 1988 report issued by the Rand Corporation's Civil Justice Institute reported on 120 cases tried to jury verdicts between 1980 and 1986.⁴² The study reported that plaintiffs prevailed in 67.5% of the cases, with an average (mean) verdict, including defense judgments, of \$436,626.⁴³ If only the plaintiffs' verdicts were considered, the average (mean) judgment was \$646,855.⁴⁴

Despite the modesty of these awards, they represented an important step toward the recognition that discrimination victims should be entitled to the same sorts of compensation as other tort victims. The U.S. Supreme Court dealt this movement a set-back in 1989, however. In that year, the Court decided a number of controversial employment discrimination cases, in each case ruling in whole or part against the interests of women or mi-

Representatives Committee on Education and Labor, 101st Cong. 142, 160 (1990) (prepared statement of Theodore Eisenberg and Stewart Schwab) (hereinafter *1990 Hearings*).

37. *Id.*

38. *Id.* at 164.

39. Maureen Fries, *Analysis of FEHC Decisions Regarding Compensatory and Punitive Damages in Employment Discrimination Cases* (July 30, 1984) (unpublished manuscript on file with author).

40. *Id.*

41. *Id.*

42. JAMES N. DERTOUZOS, ET AL., *THE INSTITUTE FOR CIVIL JUSTICE, THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION* 20 (1988). None of the 120 cases involved discrimination claims. *Id.* at 20.

43. *Id.* at 26.

44. *Id.*

nority parties.⁴⁵ The civil rights community lobbied Congress to restore the rights lost in the Supreme Court's decisions. The resulting legislation, the Civil Rights Act of 1990, was passed by the Congress, but vetoed by President Bush, who called it a "quota bill." The following year a virtually identical bill, the Civil Rights Act of 1991, was again passed, and was signed by the President.

In addition to restoring the rights lost in the 1989 Supreme Court decisions, the 1990 and 1991 bills took up the question of damages under Title VII. As the number of damages actions in race discrimination cases brought under Section 1981 grew, there was growing resentment of the lack of a comparable remedy for sex discrimination victims. Among the witnesses in support of the 1990 and 1991 bills were a number of women who had been sexually harassed but lacked any monetary remedy under Title VII.⁴⁶ Their testimony demonstrated to the Committee, and the Congress, the need for a remedy like the existing California remedy.

The California experience was central to the debate over the 1990 and 1991 bills. The opponents made many of the same arguments raised in response to Neil Gotanda's FEHC regulations in 1980: civil rights laws should be corrective, not compensatory; damages would interfere with conciliation; damages would cause frivolous claims and increase the cost of litigation.⁴⁷ They relied extensively on the California experience with wrongful discharge cases,⁴⁸ and the floodgates allegedly opened by Commodore,⁴⁹ in arguing against expanding Title VII's remedies. The arguments in favor of the bill resonated with the language of the California regulations. Proponents echoed the position staked out by Neil Gotanda in his draft regulations by arguing that, while there are many kinds of appropriate remedies in Title VII cases, general compensatory damages for pain and suffering must be an available option. Furthermore, sometimes employers' conduct is so egregious it must be punished.⁵⁰

45. The cases were *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (restricting adverse impact theory of discrimination); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (1866 Civil Rights Act, 42 USC §1981, applies only to contract formation and breach, not to conditions of employment); *Martin v. Wilks*, 490 U.S. 755 (1989) (white firefighters could sue under Title VII to invalidate federal court consent decree to which they had objected in earlier lawsuit by minority firefighters); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) (Title VII statute of limitations limiting challenge to seniority plan begins to run when plan is adopted, not when its discriminatory results first take effect); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (employer who discriminates against applicant in violation of Title VII is nonetheless entitled to judgment if it proves that it would have taken the same action regardless of its discriminatory motive).

46. See *1990 Hearings*, *supra* note 36, at 2 (testimony of Carol Zabkowitz and Helen Brooms).

47. See *e.g.*, *id.* at 92-105 (testimony of Victor Schachter, California labor lawyer).

48. See *e.g.*, *id.* at 34, 38-39 (testimony of Ralph Baxter).

49. See *e.g.*, *id.* at 314-16 (testimony of Pamela L. Hemminger) (citing Commodore as one of the reasons for the dramatic increase in California wrongful termination litigation).

50. See *e.g.*, CAROLINE D. NEWKIRK, ET AL., NATIONAL WOMEN'S LAW CENTER, TITLE VII'S FAILED PROMISE: THE IMPACT OF THE LACK OF A DAMAGES REMEDY 1-8 (1991).

In the end, the arguments of the proponents prevailed. As a result, discrimination victims, male or female, are now entitled to the same damages as other tort victims, helping make possible settlements like that in *Texaco*. The damages provision of the 1991 Civil Rights Act has many roots; one is the pioneering work of Neil Gotanda.