Begging The Federal Question: Removal Jurisdiction In Wrongful Discharge Cases

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I. INTRODUCTION

The presumption that an employment relationship for an indefinite period is terminable at the will of either party is uniquely a product of the American common law. This "employment at will" rule was intended to assure managerial autonomy and discretion in the work place by permitting employers to discharge their employees at any time and for any reason. The rule was so well received in the laissez-faire climate of the late nineteenth century that it was codified

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2. The rule "is commonly referred to as 'employment at will' and 'terminable at will.'" Michael T. Zoretic, Comment, Baldwin v. Sisters of Providence: Washington Gives At Will Employees a Gun with No Ammunition to Fight Against Unjust Dismissal, 14 U. PUGET SOUND L. REV. 709, 710 n.2 (1991). The "classic statement" of the rule is that an employer may discharge an employee "for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong." Hillesland v. Federal Land Bank Ass'n, 407 N.W.2d 206, 211 (N.D. 1987) (quoting Payne v. Western Atl. R.R. Co., 81 Tenn. 507, 519-20 (1884), overruled on other grounds, Hutton v. Watters, 179 S.W. 134 (Tenn. 1915)); see also Zoretic, supra note 2, at 711-12 n.8.

3. See Wagner, 722 P.2d at 252-53. See generally Zoretic, supra note 2, at 712 ("The at will doctrine was ideally suited to the economic conditions extant during its emergence: rapid business expansion westward lured many employees away from their previous jobs, temporary agricultural jobs were still common, and most workers did not spend long periods working for a single employer.").
in several states,4 and, for a time, almost attained constitutional standing.5

The basic assumption underlying the employment at will rule is that employers should have complete contractual freedom6 in order to facilitate industrial growth in accordance with free market principals.7 Proponents of the rule argue that it enhances the contractual freedom of employees.8 Others contend that the disparity in bargaining power between employers and employees makes true freedom of contract illusory in the employment context.9 It is largely the latter view that has prevailed.10 Thus, although the employment at will rule thrived for many years, and is still followed in some form by most jurisdic-

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4. See CAL. LAB. CODE § 2922 (West 1989); GA. CODE ANN. § 34-7-1 (Harrison 1990); LA. CIV. CODE ANN. art. 2747 (West 1952); N.D. CENT. CODE § 34-03-01 (1987); S.D. CODIFIED LAWS ANN. § 601-3 (1978); MONT. CODE ANN. § 39-2-503 (1993), that has been modified, but apparently not abrogated, by the enactment of the nation's first comprehensive wrongful discharge legislation. See Hollister v. Forsythe, 22 F.3d 950 (9th Cir. 1994).


6. The employment at will rule has been described as "at best a rule of construction," as opposed to a substantive limitation on the parties' freedom to contract. Leikvold v. Valley View Community Hosp., 688 P.2d 170, 173 (Ariz. 1984).


8. See Magnan, 479 A.2d at 784; but see Zoretic, supra note 2, at 712 n.12 ("Ear[y] . . . courts were not so much concerned with freedom of the employee, but with the fundamental right of employers to discharge employees as they pleased.").


Only the unusually valuable employee has sufficient bargaining power to obtain a guarantee that he will be discharged . . . only for "just cause." It seems fair to estimate that only a very small portion of the non-unionized employees in this country have succeeded in so altering the presumptively at will nature of the employment relationship.

See also Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981) ("With the rise of large corporations conducting specialized operations and employing relatively immobile workers who often have no other place to market their skills, recognition that the employer and employee do not stand on equal footing is realistic.").

10. See Walsh, 629 So. 2d at 146 ("[C]ourts and lawmakers learned over the years that the mutuality of obligations rationale is based on a false premise of equal bargaining power between employees at-will and employers, and that the rule is inadequate to protect employees' interests."); 9A Lab. Rel. Rep. (BNA), Indiv. Empl. Rts. Man. 505:2 (1991) ("Present-day economic relations between employer and employee do not justify the harshness of the [employment at will] rule . . . [because] freedom of contract does not exist between parties of grossly un-equal [sic] bargaining power."); but cf. Bryant v. Shands Teaching Hosp. and Clinics, 479 So. 2d 165, 168 (Fla. Dist. Ct. App. 1985) ("[E]quitable' arguments for a total or partial abrogation of the [employment at will] rule have been rejected, including the alleged unequal bargaining power between an employer and employee . . . .").
tions,\textsuperscript{11} it has gradually fallen into disfavor as the courts have increasingly recognized exceptions to its operation.\textsuperscript{12}

The most widely accepted judicial limitation upon the employment at will rule is the public policy exception.\textsuperscript{13} This exception protects employees from being discharged because they performed an act that public policy encourages or refused to perform an act that public policy condemns.\textsuperscript{14} Most wrongful discharge claims\textsuperscript{15} premised upon the public policy exception are based upon statutory expressions of public policy.\textsuperscript{16} Although the wrongful discharge claim is a common law cause of action arising under state law,\textsuperscript{17} if the employee asserts that his discharge violates the public policy expressed

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\item[12.] See Boudar v. EG & G, 742 P.2d 491, 494 (N.M. 1987).
\item[14.] Wagner, 722 P.2d at 256. "The most obvious example of this type of discharge is the firing of an employee because the employee refuses to engage in some illegal conduct on behalf of the employer." Richard Wall, At Will Employment in Washington: A Review of Thompson v. St. Regis Paper Co. and Its Progeny, 14 U. PUGET SOUND L. REV. 71, 80 (1990).
\item[15.] Although the term "wrongful discharge" (or "wrongful termination") occasionally is given a broader interpretation, see, e.g., Ronald Weisenberger, Note, Remedies for Employer's Wrongful Discharge of an Employee from Employment of an Indefinite Duration, 21 IND. L. REV. 547, 566 n.116 (1988) ("Wrongful discharge' refers to any discharge for which the employer is or may be liable.")., in the present context the term refers to a state common law cause of action, usually sounding in tort, premised upon the public policy exception to the employment at will rule. See, e.g., Woerth v. City of Flagstaff, 808 P.2d 297, 303 (Ariz. Ct. App. 1990).
\item[16.] See Northrup v. Farmland Indus., 372 N.W.2d 193, 196 (Iowa 1985). Employers occasionally argue that "modifications of the at will doctrine are a policy question within the special province of the legislature." Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 841 (Wis. 1983). Some courts have been receptive to that argument, while others have flatly rejected it. Compare Mann v. J.E. Baker Co., 733 F. Supp. 885, 889 (M.D. Pa. 1990) ("The Pennsylvania Supreme Court looks with disfavor on any judicial attempt to limit the employment at will doctrine.") with Percell v. IBM, 765 F. Supp. 297, 300 (E.D.N.C. 1991) ("Because the employment at-will doctrine is a judicially adopted rule, it is the province of the courts to delineate the scope of that rule.")., aff'd, 23 F.3d 402 (4th Cir. 1994).
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in a federal statute, the employer may be entitled to remove the case to federal court on the basis of federal question jurisdiction. This possibility is significant because plaintiffs typically bring wrongful discharge cases in state court, while employers often prefer to have them litigated in federal court where the substantive law is generally more favorable to their position.

This Article focuses on whether the alleged violation of federal law as an element of a state law claim gives rise to a federal question within the meaning of 28 U.S.C. § 1331, thereby creating federal question jurisdiction. The resolution of that issue has been described as the single most difficult problem in determining whether federal question jurisdiction exists.

This Article analyzes the federal question jurisdiction issue in the context of state law claims for wrongful discharge in violation of public policy articulated in federal law. Part II of this Article contains a general discussion of the public policy exception to the employment at will rule. Part III discusses removal and federal question jurisdiction. Part IV analyzes cases relevant to the issue of federal question removal jurisdiction in the wrongful discharge context, including the United States Supreme Court's decisions in Merrell Dow Pharmaceutical,

19. See David M. Lester, A Preemptive Strike: Removing Wrongful Discharge Claims to Federal Court Based Upon Damage Allegations, 5 LAB. L. 641, 641 (1989); see generally Enders v. American Patent Search Co., 535 F.2d 1085, 1092 (9th Cir. 1976) (referring to the "more familiar, relatively more convenient and therefore less expensive state courts."). Obviously, the availability of state law wrongful discharge claims premised upon public policies reflected in federal statutes also raises the question of whether a discharged employee can bring such a claim in federal court in the first instance. See Willy v. Coastal Corp., 855 F.2d 1160, 1169 (5th Cir. 1988). However, the issue is more likely to arise in the removal context because, as the "master of his own pleadings," a plaintiff preferring a federal forum often can assert an express federal claim and join the state law wrongful discharge claim under the pendent jurisdiction doctrine. See Lyster v. First Nationwide Bank Fin. Corp., 829 F. Supp. 1163, 1167 (N.D. Cal. 1993); but see Bally v. NCAA, 707 F. Supp. 57, 60 (D. Mass. 1988) ("A plaintiff cannot manufacture federal jurisdiction by artfully pleading his case so as to make federal law appear prominent.").
20. Kramer, supra note 1, at 261 ("Whenever possible, [wrongful discharge] defendants will remove to a federal forum, because the substantive law there is friendlier to employers.").
21. 28 U.S.C. § 1331 states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."
23. For a broader discussion of the jurisdictional problem, see generally Hirshman, supra note 22.
ticals v. Thompson\textsuperscript{25} and Christianson v. Colt Industries Operating Corp.\textsuperscript{26} This Article concludes that a wrongful discharge claim based solely upon public policy expressed in a federal statute for which there is a private federal statutory remedy should be removable, particularly where the federal courts have exclusive jurisdiction over the direct statutory cause of action. However, the removal of wrongful discharge claims based on other federal sources of public policy, such as federal statutes for which there is no private statutory remedy, is precluded by Merrell Dow and Christianson.\textsuperscript{27}

II. THE PUBLIC POLICY EXCEPTION

The public policy exception has been described as a judicially-recognized "outer limit" to the employment at will rule and is designed to vindicate the rights of employees discharged for reasons that violate public policy.\textsuperscript{28} Although virtually all states recognize the exception in some form,\textsuperscript{29} they disagree on the extent to which it limits an employer's right to discharge its employees.\textsuperscript{30}

The public policy exception began as a narrow rule permitting employees to sue their employers when they were discharged in violation of express statutory prohibitions.\textsuperscript{31} It was expanded to prohibit discharges which violated more general constitutional or statutory expressions of public policy.\textsuperscript{32} More recently, many courts

\textsuperscript{25} 478 U.S. 804 (1986).
\textsuperscript{26} 486 U.S. 800 (1988).
\textsuperscript{27} Although there is also a valid argument for permitting the removal of wrongful discharge claims premised solely on federal laws for which there is no private federal remedy, that result appears to be precluded by Merrell Dow. See infra note 311.
\textsuperscript{29} See Gantt v. Sentry Ins., 824 P.2d 680, 684 (Cal. 1992) ("[T]he vast majority of states have recognized that an at-will employee possesses a tort action when he or she is discharged for performing an act that public policy would encourage, or for refusing to do something that public policy would condemn.").
\textsuperscript{30} See Payne v. Rozendaal, 520 A.2d 586, 588 (Vt. 1986).
\textsuperscript{31} See Wagenseller, 710 P.2d at 1031. "Such [an] express prohibition . . . generally is found only in labor statutes." 1 HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 5.14, at 452 n.144 (3d ed. 1992).
\textsuperscript{32} See Wagenseller, 710 P.2d at 1031. See generally Wandry v. Bull's Eye Credit Union, 384 N.W.2d 325, 327 (Wis. 1986):
The legislature has not and cannot cover every type of wrongful termination that violates a clear mandate of public policy. There are public policies embodied in statutes and the constitution that do not specifically address wrongful discharge but are nevertheless meant to be inherently incorporated into every employment-at-will relationship.

(Citations and internal quotation marks omitted.)
have recognized a cause of action for wrongful discharge even in the absence of constitutional or statutory expressions of public policy.\textsuperscript{33}

For example, several states now recognize wrongful discharge claims based on public policies expressed in decisional law.\textsuperscript{34} In some jurisdictions, a professional code of ethics or unwritten "customs and conventions of the people"\textsuperscript{35} have been found to be sufficient expressions of public policy to support wrongful discharge claims.\textsuperscript{36} Additionally, in order to encourage employees to expose their employers' illegal or unsafe practices,\textsuperscript{37} many states also protect "whistleblowers" from discharge\textsuperscript{38} without requiring a directly applicable constitutional, statutory or decisional expression of public policy. Even a public policy expressed in the law of another state may support a wrongful discharge claim under some circumstances,\textsuperscript{39}

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\item \textsuperscript{33} See Wagenseller, 710 P.2d at 1031. See generally Vigil v. Arzola, 699 P.2d 613, 620 (N.M. Ct. App. 1983) ("There may [be] some instances [in which] the judiciary would have to imply a right as well as a remedy."); rev'd on other grounds, 687 P.2d 1038 (N.M. 1984), overruled on other grounds Chavez v. Manville Prods. Corp., 777 P.2d 371 (N.M. 1989).
\item \textsuperscript{34} See, e.g., Wagenseller, 710 P.2d at 1034, 1036; Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1089 (Wash. 1984).
\item \textsuperscript{35} Payne v. Rozendaal, 520 A.2d 586, 588 (Vt. 1986) (quoting Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Kinney, 115 N.E. 505, 507 (Ohio 1916)); see also Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981) ("In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively.").
\item \textsuperscript{36} See Rocky Mountain Hosp. & Medical Serv. v. Mariani, 916 P.2d 519, 525 (Colo. 1996); Radwan v. Beecham Lab., 850 F.2d 147, 149-50 (3d Cir. 1988).
\item \textsuperscript{37} Wagner, 722 P.2d at 257 (quoting Wagenseller, 710 P.2d at 1035). However, whistleblowing activity may be at least theoretically at odds with "accepted concepts of employee loyalty." Id.; cf. E. Ames, Recent Development, Willy v. Coastal Corp.: The Fifth Circuit Blows the Whistle on Removal Jurisdiction, 63 Tul. L. Rev. 1230, 1239 (1989) (observing that "[m]any persons undoubtedly find whistleblowing less than honorable."). For an extended discussion of the differing interests at stake, see Winters v. Houston Chronicle Publishing Co., 795 S.W.2d 723, 725-34 (Tex. 1990) (Doggett, J., concurring).
\item \textsuperscript{38} Whether the public policy exception protects employees from retaliatory conduct short of discharge is an open question in most jurisdictions. Compare Ludwig v. C & A Wallcoverings, 750 F. Supp. 339, 342 (N.D. Ill. 1990) ("[T]his court declines . . . to extend state law by creating a cause of action for retaliatory demotion."); aff'd, 960 F.2d 40 (7th Cir. 1992) with Garcia v. Rockwell Int'l Corp., 232 Cal. Rptr. 490, 493 (Cal. Ct. App. 1986) ("[A]n employee can maintain a tort claim against his or her employer where disciplinary action has been taken against the employee in retaliation for the employee's 'whistle-blowing' activities, even though the ultimate sanction of discharge has not been imposed.").
\item \textsuperscript{39} See Peterson v. Browning, 832 P.2d 1280, 1282-83 (Utah 1992). The Peterson court reasoned that "[t]he effect on the employee . . . is the same regardless of the origin of the law." Id. at 1283; but cf. Rachford v. Evergreen Int'l Airlines, 596 F. Supp. 384, 386 (N.D. Ill. 1984) (finding it "difficult to discern why Illinois public policy would be implicated by the discharge of an employee of an Oregon corporation for [safety] complaints which [he made] in Oregon").
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although discerning the public policy of another state may occasionally be difficult for courts.\(^{40}\)

Despite these expansive interpretations of the public policy exception, a few courts still confine the exception to public policies expressed in state law.\(^{41}\) However, the better view is that at least some federal expressions of public policy will also support such a claim.\(^{42}\) To the extent that most courts continue to recognize wrongful discharge claims based on federal public policies, the right of employers sued in state court to remove such claims will be debated.\(^{43}\)

### III. Removal and Federal Question Jurisdiction

Generally, Congress grants state court defendants the right to remove to federal court provided that the case could have been brought in federal court initially.\(^{44}\) Thus, determining whether employers can remove common law wrongful discharge claims premised upon federal public policies depends upon whether such claims fall within the federal courts' original federal question jurisdiction.\(^{45}\)

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43. See supra notes 17-19 and accompanying text.


The question . . . is whether [the] incorporation of federal policy into a state law cause of action is sufficient to confer federal subject matter jurisdiction. The issue is, in essence, whether [a state law] wrongful discharge claim [incorporating federal public policy] comes within the language of 28 U.S.C. § 1331, which provides for federal district court jurisdiction over cases "arising under the Constitution, laws, or treaties of
With certain narrow exceptions,46 an employer against whom a federal claim has been asserted in state court has the right to remove the claim to federal court.47 When the right is exercised, removal ordinarily is not limited to the federal claim, but also includes any pendent state law claims48 asserted against the employer,49 as well as any state law claims asserted against "pendent party" defendants.50

The statutory authorization of federal question jurisdiction appears in 28 U.S.C. § 1331,51 which states that "[t]he district courts shall

the United States."


48. The doctrine of pendent jurisdiction permits federal courts to hear state law claims together with federal claims if (1) the federal claims at issue are not frivolous, (2) the state and federal claims arise from a "common nucleus of operative fact," and (3) the claims are such that a plaintiff ordinarily would be expected to try them all in one proceeding. Finley v. United States, 490 U.S. 545, 549 (1989) (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)).


50. In employment cases, the pendent party defendant is often the plaintiff's supervisor. See, e.g., Bailey v. Unocal Corp., 700 F. Supp. 396, 400 n.2 (N.D. Ill. 1988). One federal court has observed that the recently enacted Supplemental Jurisdiction Statute, 28 U.S.C. § 1367, "now allows for the exercise of pendent party jurisdiction, the absence of which previously presented a large obstacle in cases . . . where federal and state claims are asserted against one defendant, [and] only state claims are alleged against other defendants." Alexander by Alexander v. Goldome Credit Corp., 772 F. Supp. 1217, 1221 (M.D. Ala. 1991). For the author's view that pendent party removal jurisdiction may be unavailable in the Ninth Circuit, see Michael D. Moberly et al, Penetrating the Thicket: Pendent Party Removal Jurisdiction in the Ninth Circuit, 30 IDAHO L. REV. 1 (1993-94).

51. Prior to the passage of the Judiciary Act of 1875, Act of March 3, 1875, § 1, 18 Stat. 470, the federal courts had no general federal question jurisdiction. See McGaw v. Farrow, 472 F.2d 952, 955 (4th Cir. 1973). However, federal question jurisdiction has been continuously available in essentially the same form since that time. See Matter of Seven Springs Apartments,
have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 52 Although the Supreme Court has consistently declined to provide a single, precise definition of the "arising under" requirement in § 1331, 53 two tests have emerged which determine whether a cause of action arises under federal law. The vast majority of cases that come under this grant of jurisdiction fall within Justice Holmes's test in American Well Works Co. v. Layne & Bowler Co., 54 which provides that a suit arises under the law that "creates" the cause of action. 55 Federal law therefore "creates" the cause of action where it establishes and defines the rights and obligations of the parties. 56

Because not all cases properly in federal court are "created" by federal law within the meaning of American Well Works, 57 federal question jurisdiction also may be exercised over a claim that is created by state law where resolution of a substantial federal issue is necessary to the disposition of the claim. 58 Thus, even if federal law does not create a plaintiff's wrongful discharge claim, federal jurisdiction nevertheless may exist if "some substantial, disputed question of federal law is a necessary element" of the claim. 59 It is on this basis that federal question jurisdiction is properly asserted over wrongful discharge claims in violation of a public policy expressed in federal law.

57. See, e.g., Drake, 842 F. Supp. at 1411.
58. See Johnson v. Smith, 630 F. Supp. 1, 2-3 (N.D. Cal. 1986) ("[I]t is . . . clear that there may be federal subject matter jurisdiction over causes of action created by state law, if 'some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims.'") (quoting Franchise Tax Bd., 463 U.S. at 13). See generally Willy, 855 F.2d at 1168.
59. Lyster, 829 F. Supp. at 1166 (quoting Franchise Tax Bd., 463 U.S. at 13). Central to the inquiry is a requirement that the state law claim "depend" upon an issue of federal law. Bally v. NCAA, 707 F. Supp. 57, 59 (D. Mass. 1988). The requirement "serves the purpose of preventing a federal district court from finding jurisdiction on the basis of a federal issue that ultimately proves irrelevant to the dispute." Id.
IV. FEDERAL QUESTION REMOVAL JURISDICTION IN WRONGFUL DISCHARGE CASES

A. The Requirement That There Be a Private Statutory Right of Action

The existence of federal question jurisdiction in wrongful discharge cases depends in large measure upon whether the federal statute expressing the public policy upon which the wrongful discharge claim is based establishes a direct private statutory right of action. The importance of that issue stems from the United States Supreme Court's decision in Merrell Dow Pharmaceuticals v. Thompson. Although not itself a wrongful discharge case, Merrell Dow is relevant to this issue because the Merrell Dow Court held that where no direct private right of action exists to remedy a federal statutory violation, there is no federal question jurisdiction over cases relying on the statutory violation as an element of a state law claim. This section discusses the evolution of the Merrell Dow view, including cases decided both before and after Merrell Dow, with particular focus on the impact of Merrell Dow on state law wrongful discharge claims.

1. The Pre-Merrell Dow View

The first case dealing with the removal of a state law wrongful discharge claim based on federal public policy did not require the existence of a private, federal statutory cause of action. The plaintiff in Olguin v. Inspiration Consolidated Copper Co. alleged that he had been wrongfully discharged for making safety complaints in violation of the "public policy enumerated in the statutes of the United States of America and the State of Arizona, including but not limited to the Federal Mine Safety and Health Act." The Ninth Circuit held that

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60. 478 U.S. 804 (1986).
61. 740 F.2d 1468 (9th Cir. 1984).
62. Id. at 1475. The Olguin plaintiff apparently anticipated the decision in Wagner v. City of Globe, 722 P.2d 250 (Ariz. 1986), where the Arizona Supreme Court held that an employee discharged for "expos[ing] activities which . . . may jeopardize health and safety" can state a claim for wrongful discharge in violation of public policy under Arizona law. Id. at 257. Although the Arizona Supreme Court did not recognize a wrongful discharge claim premised upon the public policy exception to the employment at will rule until the year after Olguin was decided, see Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025 (Ariz. 1985), the Arizona Court of Appeals had indicated that Arizona might recognize the exception in Larsen v. Motor Supply Co., 573 P.2d 907, 908 (Ariz. Ct. App. 1977), and the Ninth Circuit had cited Larsen in a pre-Olguin case for the proposition that Arizona "does recognize a limitation on employment discharges that would violate a public policy." Moore v. Home Ins. Co., 601 F.2d 1072, 1074 (9th Cir. 1979).
because the plaintiff had invoked federal law in support of his wrongful discharge claim, the case was removable on the basis of federal question jurisdiction. In reaching its conclusion, the court opined that a state has little interest in enforcing federal law, even if the federal law is incorporated in the state's general public policy.

Shortly after Olguin was decided, the Seventh Circuit reached a different result in Buethe v. Britt Airlines. In Buethe, a pilot brought suit against his former employer for wrongful discharge alleging that he had been terminated for fulfilling a duty under the Federal Aviation Act to refrain from flying a defective aircraft. The Seventh Circuit held that the district court lacked jurisdiction, despite the fact that the plaintiff may have been required to prove that he had a duty under federal law to refrain from flying aircraft with inoperative equipment, thereby requiring the court to resolve issues of federal law. Because the plaintiff's wrongful discharge claim was, in the court's opinion, only indirectly based on a federal statute, the claim

63. Olguin, 740 F.2d at 1475.
64. Id. This portion of Olguin has been interpreted as holding that "contravention of a public policy set forth in federal law does not support a state law claim for wrongful discharge." McCarthy, 2 Indiv. Empl. Rts. Cas. (BNA) at 683 (citing Olguin). However, the Olguin court merely held that the plaintiff's wrongful discharge claim was removable, not that it was untenable. Olguin, 740 F.2d at 1475. The Olguin court's determination that wrongful discharge claims premised upon federal public policies arise under federal law for purposes of federal question jurisdiction remains instructive, particularly in the Ninth Circuit. See id. ("Olguin explicitly invoked federal law in this cause of action and it was therefore removable, if not under section 301, then under the general federal question statute . . . ."). As discussed infra, however, the Olguin analysis has been limited by the Supreme Court's subsequent decisions in Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804 (1986) and Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1988). See, e.g., Gaballah v. PG & E, 711 F. Supp. 988, 991-92 (N.D. Cal. 1989) (interpreting and applying Olguin in a case decided after Merrell Dow and Christianson).
65. 749 F.2d 1235 (7th Cir. 1984).
66. 749 F.2d 1235 (7th Cir. 1984).
69. See Air Line Pilots Ass'n v. FAA, 454 F.2d 1052, 1054 n.5 (D.C. Cir. 1971) (observing that a pilot "could not authorize a flight lacking any . . . required equipment"); cf. Arney v. United States, 479 F.2d 653, 658 (9th Cir. 1973) (stating that "it is the pilot's duty to see that the plane is . . . maintained"); Gibbins v. United States, 251 F. Supp. 391, 396 (E.D. Tenn. 1965) ("It is the pilot's duty to see that the airplane is properly repaired.").
70. See Buethe, 749 F.2d at 1239.
71. Id. The Buethe court observed that "[t]he most one can say is that a question of federal law is lurking in the background." Id. at 1239 (quoting Gully v. First Nat'l Bank, 299 U.S. 109, 117 (1936)); cf. Willy, 855 F.2d at 1171 (concluding that "the role of . . . federal law [in a
did not arise under federal law. Thus, the court held that there was no federal jurisdiction over the claim.

2. *Merrell Dow Pharmaceuticals v. Thompson*

In *Merrell Dow Pharmaceuticals v. Thompson*, the United States Supreme Court considered the issue of removal jurisdiction over a state law claim incorporating a federal element. In *Merrell Dow*, the Court emphasized the importance of the availability of a private federal statutory right of action in considering the removal issue.

The defendant in *Merrell Dow* was the manufacturer and distributor of Bendectin, a prescription antinausea drug often taken by pregnant women to prevent morning sickness. Litigation was commenced in numerous jurisdictions by women claiming that their use of the drug had caused birth defects in their children. In the case that resulted in the Supreme Court's decision, the plaintiffs filed suit in state court alleging common law claims for negligence, breach of warranty, strict liability, and fraud. As part of their negligence claim, the plaintiffs asserted that the drug had been misbranded in violation of the Food, Drug and Cosmetic Act (FDCA) because the labeling did not provide adequate warning of the drug's potential dangers.

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73. *Buethe*, 749 F.2d at 1239. As discussed below, the fact that there was no direct statutory cause of action available to remedy the conduct at issue in *Buethe*, see *Tritle*, 751 F. Supp. at 585, may have been an important (although unstated) consideration underlying the court’s decision (which apparently was reached without the benefit of briefing or argument by the parties). See Buethe, 749 F.2d at 1238 n.3 and 1239.

74. 478 U.S. 804, 814 (1986).

75. Id. at 805.

76. See generally In re Bendectin Litig., 857 F.2d 290, 293 (6th Cir. 1988) (referring to “eleven hundred eighty claims in approximately eight hundred forty-four multidistrict cases,” which represented “only a part of the Bendectin cases . . . brought in numerous federal and state courts around the nation”), cert. denied, 488 U.S. 1006 (1989).


79. *Merrell Dow*, 478 U.S. at 805-06. Among other things, the FDCA requires that drug labels bear “adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health.” 21 U.S.C. § 352(f).
The defendant removed the case to federal court, arguing that the action was founded in part on a federal claim under the FDCA.\textsuperscript{80} Although the district court agreed that federal question jurisdiction existed, the Sixth Circuit reversed, holding that the plaintiffs' cause of action did not arise under federal law.\textsuperscript{81} After concluding that the FDCA did not create a private right of action,\textsuperscript{82} the Sixth Circuit held that federal question jurisdiction would exist only if the plaintiffs' right to relief necessarily depended upon a substantial question of federal law.\textsuperscript{83} Accordingly, because the plaintiffs' reference to the FDCA was only one basis of their negligence claim, and a jury could find that the defendant had been negligent without finding that the FDCA had been violated, the plaintiffs' cause of action did not arise under federal law.\textsuperscript{84}

The Supreme Court granted certiorari and affirmed.\textsuperscript{85} The Court held that the plaintiffs' allegation that a presumption of negligence could be drawn from the defendant's violation of the FDCA did not bring their negligence claim within the district court's federal question jurisdiction.\textsuperscript{86} The Court concluded that where Congress has not established a private, federal cause of action for the violation of a federal statute,\textsuperscript{87} a complaint alleging a violation of the statute as an element of a state law claim does not state a claim arising under federal law.\textsuperscript{88} The Court explained:

[T]he congressional determination that there should be no federal remedy for the violation of [a] federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of

\textsuperscript{80} Merrell Dow, 478 U.S. at 806.
\textsuperscript{81} Thompson v. Merrell Dow Pharmaceuticals, 766 F.2d 1005, 1005-06 (6th Cir. 1985), aff'd, 478 U.S. 804 (1986).
\textsuperscript{82} Id. at 1006. See generally Mellon v. Barre-National Drug Co., 636 A.2d 187, 189 (Pa. Super. Ct. 1993) ("Under the federal decisions that have addressed this issue, it has uniformly been held that there are no private causes of action under the Food, Drug and Cosmetics Act . . . .").
\textsuperscript{83} Thompson, 766 F.2d at 1006.
\textsuperscript{84} Id.
\textsuperscript{85} Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804, 807 (1986).
\textsuperscript{86} Id. at 812.
\textsuperscript{87} The Court's assumption that no private cause of action exists under the FDCA apparently was based upon a concession by the parties, see Thompson, 766 F.2d at 1006, and in the view of one commentator creates "the greatest difficulty in accepting the result reached by the majority." William V. Luneburg, Nonoriginalist Interpretation—A Comment on Federal Question Jurisdiction and Merrell Dow Pharmaceuticals Inc. v. Thompson, 48 U. PITT. L. REV. 757, 764 (1987).
\textsuperscript{88} Merrell Dow, 478 U.S. at 817.
the statute as an element of a state cause of action is insufficiently "substantial" to confer federal-question jurisdiction.89

3. The Post-Merrell Dow View

Following Merrell Dow, a defendant's assertion that a federal statute is an essential element of a state law claim no longer appears to be sufficient in itself to establish federal question jurisdiction.90 Such jurisdiction can exist only if the federal statute asserted as an essential element of the claim creates a private right of action.91 Thus, Merrell Dow effectively limited the Olguin court's holding on the removability of wrongful discharge claims to cases involving federal statutes that provide for private remedies of their own.92

A number of wrongful discharge cases following Merrell Dow confirm this conclusion. In Utley v. Varian Associates,93 for example, the Ninth Circuit held that if a federal law does not provide a private right of action, a state law claim based on its violation does not raise a sufficiently substantial federal question to support federal question jurisdiction under 28 U.S.C. § 1331.95 Because the only federal remedy available in Utley was administrative, the court found insufficient evidence that Congress intended to permit suit against the

89. Id. at 814.
91. Id.
92. See Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1394 n.4 (9th Cir. 1988): In Merrell Dow... the Court considered in detail the principles of removal jurisdiction when applied to a well-pleaded complaint that relies on a state cause of action which incorporates federal law as one of the elements of recovery. The Court held that in such a case, the state claim does not involve a substantial federal question unless the federal law incorporated in the state cause of action provides a federal private right of action for its violation.
93. 811 F.2d 1279 (9th Cir.), cert. denied, 484 U.S. 824 (1987).
94. Utley was a state law employment discrimination action premised in part upon the employer's alleged violation of its federal obligations under Executive Order 11246. Id. at 1281-82. That executive order prohibits government contractors from discriminating against employees and applicants because of race, color, religion, sex, or national origin, and requires that they take affirmative action to ensure that applicants and employees are treated without regard to their race, color, religion, sex, or national origin. Legal Aid Soc'y of Alameda County v. Brennan, 608 F.2d 1319, 1325-26 (9th Cir. 1979), cert. denied, 447 U.S. 921 (1980).
95. Utley, 811 F.2d at 1283.
employer in federal court.96 The Utley court therefore declined to support federal question jurisdiction over the state law claim.97

The United States District Court for the Northern District of California reached a similar conclusion in Hedges v. Legal Services Corp.98 The plaintiff in Hedges brought suit against his former employer, the Legal Services Corporation, for wrongful discharge in violation of public policy.99 Because the plaintiff claimed that his discharge was politically motivated, the court presumed he was relying on the Legal Services Corporation Act,100 a federal statute prohibiting the discharge of an employee based on the employee's political affiliation.101

The court indicated that it might have had jurisdiction if Congress had created a private right of action for violations of the Legal Services Corporation Act.102 Because Congress had not done so,103 however, the court remanded the case to state court. Again, the Merrell Dow decision was interpreted as holding that where no private right of action exists for a federal statutory violation, federal courts have no jurisdiction over cases relying upon a violation of the federal statute as an element of a state law claim.104

In Johnson v. Smith,105 the request for removal was based on an allegation that the plaintiff was wrongfully discharged in violation of

96. Id. Although the Utley court spoke in terms of congressional intent, Executive Order 11246 actually is a product of the executive branch. See Savannah Printing Specialties & Paper Prods. Local Union 604 v. Union Camp Corp., 350 F. Supp. 632, 635 (S.D. Ga. 1972). See generally Eatmon v. Bristol Steel & Iron Works, Inc., 769 F.2d 1503, 1515 (11th Cir. 1985) ("[C]ourts have repeatedly held that executive order 11246 does not create a private cause of action for employees to enforce the equal opportunity clause in their employers' government contracts.").
97. Utley, 811 F.2d at 1283.
99. Id. at 300-01. The Legal Services Corporation is a private nonprofit corporation established by Congress to provide financial support to persons unable to afford legal assistance in civil matters. Id. at 300.
101. Hedges, 663 F. Supp. at 302. The pertinent portion of the Legal Services Corporation Act provides that "[n]o political test or political qualification shall be used in selecting, appointing, promoting, or taking any other personnel action with respect to any officer, agent, or employee of the [Legal Services] Corporation." 42 U.S.C. § 2996d(b)(2).
the public policy prohibiting disability discrimination\textsuperscript{106} embodied in Section 503 of the Rehabilitation Act of 1973.\textsuperscript{107} In holding that the plaintiff's claim did not provide a basis for federal question jurisdiction,\textsuperscript{108} the Johnson court rejected the employer's contention that the federal policy prohibiting disability discrimination supplies the requisite federal question.\textsuperscript{109} The court instead relied upon the fact that the pertinent provision of the Rehabilitation Act has not been construed to create a private right of action for redress of discriminatory conduct.\textsuperscript{110} This statutory scheme, the court concluded, precluded a finding that incorporation of the federal policy against disability discrimination into a state law wrongful discharge claim provides a sufficient basis for removal:

In creating the lower federal courts and vesting in them jurisdiction over all cases "arising under" federal law, Congress presumably intended to provide for the uniform interpretation and application of federal law. That interest would simply not be served by including within federal jurisdiction cases in which Congress specifically did not intend to create a private cause of action. Under such circumstances, the incorporation of a federal policy within a state law cause of action is insufficient to give rise to a sufficiently "substantial" or "direct" federal issue. This sort of case, although tangentially involving a "federal" element, should not fall within federal district court jurisdiction.\textsuperscript{111}

\textsuperscript{106} Id. at 2.

\textsuperscript{107} 29 U.S.C. § 793 (1988). Among other things, the Rehabilitation Act requires certain government contractors to take affirmative action in the employment of qualified individuals with disabilities. Id.

\textsuperscript{108} Several courts have gone further, holding that the public policy embodied in the Rehabilitation Act will not support a state law wrongful discharge claim. See, e.g., Kramer v. St. Louis Regional Health Care Corp., 758 F. Supp. 1317, 1318-19 (E.D. Mo. 1991); D'Amato v. Wisconsin Gas Co., 33 Fair Empl. Prac. Cas. (BNA) 567, 569 (E.D. Wis. 1983), aff'd, 760 F.2d 1474, 1484 & n.13 (7th Cir. 1985).

\textsuperscript{109} Johnson, 630 F. Supp. at 3-4.

\textsuperscript{110} Id. at 3. The Johnson court observed that "Congress has expressly declined to create jurisdiction in any court for claims of § 503 violations, opting instead for an entirely administrative process." Id. at 3. The analysis might have been different had the claim in Johnson been based upon the public policy expressed in § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1988), since that provision generally has been construed to create an implied private federal cause of action. See Moreno v. Consolidated Rail Corp., 63 F.3d 1404, 1413 n.2 (6th Cir. 1995) ("Section 504 does not expressly create a private remedy for individuals with disabilities who have been subjected to discrimination. However, this court and other circuits have implied a private right of action under section 504.").

\textsuperscript{111} Johnson, 630 F. Supp. at 4.
Subsequently, in *Gaballah v. PG & E*,¹¹² the court relied upon *Utley v. Varian Associates*¹¹³ to hold that a wrongful discharge claim premised upon the public policy set forth in the Energy Reorganization Act of 1974¹¹⁴ was not removable because the only remedy available to the plaintiff under the act was administrative.¹¹⁵ The *Gaballah* court therefore concluded that the plaintiff's wrongful discharge claim did not involve a federal question.¹¹⁶

However, the *Gaballah* court observed that the critical factor in *Merrell Dow* and *Utley* was that Congress had not created a private federal remedy for violation of the statutes at issue in those cases.¹¹⁷ The observation of the *Gaballah* court suggests that where Congress has created a private right of action, the presence of a claimed violation of the federal statute as an element of a state law claim should be sufficient to support federal question jurisdiction.¹¹⁸ Although such an inference is logical, the next section discusses why it has not been consistently applied.

B. **The Availability of a Private Federal Statutory Right of Action May Not Be Sufficient to Support Removal**

As the preceding section demonstrates, *Merrell Dow* and its progeny established a *per se* rule that federal question jurisdiction is not established where Congress has not created a private right of action

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¹¹³ 811 F.2d 1279 (9th Cir.), cert. denied, 484 U.S. 824 (1987).
¹¹⁶ *Gaballah*, 711 F. Supp. at 992. This analysis is unpersuasive. Although enforcement of the Energy Reorganization Act begins with the filing of an administrative complaint with the United States Secretary of Labor, who is authorized to award relief in the event that a violation of the act has occurred, "enforcement of the Secretary's order may be initiated by the employee by filing suit in Federal district court." *Wheeler v. Caterpillar Tractor Co.*, 485 N.E.2d 372, 378 (Ill. 1985) (Moran, J., dissenting) (discussing 42 U.S.C. §§ 5851), cert. denied, 475 U.S. 1122 (1986).
¹¹⁷ *Gaballah*, 711 F. Supp. at 992; but see *Patti Alleva, Prerogative Lost: The Trouble With Statutory Federal Question Doctrine After Merrell Dow*, 52 OHIO ST. L.J. 1477, 1561 (1991) (arguing that "the presence or absence of a cause of action or remedy within the federal statute [should be] but one—not necessarily the dispositive—factor for the court to assess").
within a federal statute.\textsuperscript{119} Such a limitation on federal jurisdiction over state law wrongful discharge claims is appropriate. A contrary result would effectively permit states to create federal question jurisdiction where Congress has declined to do so merely by permitting the incorporation of a federal public policy (for the violation of which there is no direct federal remedy) into a state law wrongful discharge claim.\textsuperscript{120}

However, the preceding line of cases did not address the converse situation—where Congress \textit{has} created a private federal right of action.\textsuperscript{121} The dissent in \textit{Merrell Dow} concluded that the majority's holding necessarily means that where there is a private cause of action under the federal statute, federal jurisdiction over a state law claim incorporating the statute would exist.\textsuperscript{122} Others have also alluded to that possibility.\textsuperscript{123} Although that interpretation is appealing, it has not been widely accepted.\textsuperscript{124}

Most courts instead have engaged in a pragmatic, case-by-case analysis in situations where a private federal remedy exists, focusing on whether Congress intended the provision of such a remedy to give federal courts jurisdiction over state law claims which incorporate the pertinent federal statute.\textsuperscript{125} In several instances this approach has resulted in the conclusion that federal courts do not have jurisdiction over state law wrongful discharge claims where the federal remedy provided for in the statute is administrative rather than judicial.\textsuperscript{126} Even where there is a private federal judicial remedy, some courts have found that federal jurisdiction may not exist if the remedy is limited to injunctive relief, and includes no private damages component.\textsuperscript{127}

Two decisions have gone so far as to suggest that the presence of a federal statute establishing a private federal judicial remedy simply will

\textsuperscript{119} \textit{Lyster}, 829 F. Supp. at 1169.
\textsuperscript{121} \textit{See Rains v. Criterion Sys.}, 80 F.3d 339, 347 n.10 (9th Cir. 1996); \textit{Lyster}, 829 F. Supp. at 1169.
\textsuperscript{122} \textit{Merrell Dow}, 478 U.S. at 825 n.4 (Brennan, J., dissenting).
\textsuperscript{123} See, e.g., \textit{Gray v. Murphy Oil USA}, 874 F. Supp. 748, 754 (S.D. Miss. 1994).
\textsuperscript{124} See, e.g., \textit{Mulcahey v. Columbia Organic Chemgs. Co.}, 29 F.3d 148, 152 (4th Cir. 1994); \textit{Willy}, 855 F.2d at 1169; \textit{Gray}, 874 F. Supp. at 754; see \textit{generally Ames, supra note 37}, at 1234 (observing that "a private federal remedy may not be enough to invoke jurisdiction if the relevant federal law is but one theory on which the state claim rests").
\textsuperscript{125} \textit{See Mulcahey}, 29 F.3d at 152.
\textsuperscript{126} \textit{See Utley}, 811 F.2d at 1283; \textit{Gaballah}, 711 F. Supp. at 992; \textit{Johnson}, 630 F. Supp. at 3.
not support federal jurisdiction over state law wrongful discharge claims premised upon the statute.\footnote{128}

For instance, in Zack Co. \textit{v.} Howard,\footnote{129} plaintiffs filed suit in state court alleging that they had been wrongfully discharged in retaliation for reporting safety violations at a nuclear power plant where their employer was a subcontractor.\footnote{130} The employer removed the action to federal court on the basis of federal question jurisdiction, asserting that a federal law, the Energy Reorganization Act of 1974,\footnote{131} which provides for a private judicial remedy,\footnote{132} was an "indispensable element" of the plaintiffs' claim.\footnote{133}

After removal, the district court remanded the action for lack of federal question jurisdiction, concluding that the plaintiffs' claim arose under Illinois law, rather than under federal law, despite the Energy Reorganization Act being the source of public policy upon which the wrongful discharge claim was founded.\footnote{134} The district court based its holding upon the Illinois Supreme Court's decision in Wheeler \textit{v.}

\footnote{128} \textit{See}, \textit{e.g.}, Zack Co. \textit{v.} Howard, 658 F. Supp. 73 (N.D. Ill. 1987); Willy, 855 F.2d 1160 (5th Cir. 1988); Ames, supra note 37, at 1237 ("[T]he [Willy] court [was] just a step from finding that wrongful discharge claims are so firmly planted in the general principles of [state] employment law that their vigor and breadth plainly relegate any incorporated federal element to collateral status.") (internal quotation marks and authority omitted).

\footnote{129} 658 F. Supp. 73 (N.D. Ill. 1987).

\footnote{130} Id. at 75.


\footnote{132} 42 U.S.C. § 5851(e); Masters \textit{v.} Daniel Int'l Corp., 917 F.2d 455, 457 (10th Cir. 1990). However, the private right of action under the Energy Reorganization Act is somewhat unique, in that the relief available is limited to judicial enforcement of orders issued by the Secretary of Labor, whose authority encompasses the right to order reinstatement of a discharged employee, and to award compensatory damages, attorneys' fees and other costs. \textit{See} 42 U.S.C. § 5851(b) and (c).

\footnote{133} Zack Co., 658 F. Supp. at 75. The employer also argued that the plaintiffs' claim was preempted by the Energy Reorganization Act. \textit{Id.} Although the court did not reach that issue, it noted that the Illinois Supreme Court had previously suggested that the Energy Reorganization Act "was not intended to preempt actions for wrongful discharge under state law." \textit{Id.} at 76, 78 & n.2 (discussing Wheeler, 485 N.E.2d at 372); \textit{cf.} Field, 565 A.2d at 1177 (observing that there is "no basis for concluding that the [Energy Reorganization Act] preempts a state law wrongful discharge claim premised upon [Energy Reorganization Act] violations").

\footnote{134} Zack Co., 658 F. Supp. at 77; \textit{see} Field, 565 A.2d at 1181 ("There is nothing inconsistent with the [Energy Reorganization Act] in [a] decision to allow a state law wrongful discharge action premised upon violations of the [Energy Reorganization Act]."); \textit{but cf.} Masters \textit{v.} Daniel Int'l Corp., 917 F.2d 455, 457 (10th Cir. 1990) (Energy Reorganization Act does not support a wrongful discharge claim under Kansas law because the remedies under the federal act are adequate).
Caterpillar Tractor Co.135 Wheeler held that a cause of action for the wrongful discharge of a nuclear worker was based entirely upon state law, "despite the availability of a federal remedy under the Energy Reorganization Act."136 Because the complaint in Zack Co. could be pleaded without relying on federal law, the district court held that the case had been removed improperly.137

Willy v. Coastal Corp.138 is another case suggesting that the existence of a private federal judicial remedy is not in itself sufficient to support federal jurisdiction. In that case, the plaintiff claimed to have been discharged for insisting that his employer comply with various federal environmental statutes.139 He brought suit in state court, alleging wrongful discharge under Sabine Pilot Service v. Hauck,140 which "established a Texas common law wrongful discharge action for at-will employees who have been fired for refusing to perform an illegal act . . . "141 The employer removed the case to federal court on the basis of federal question jurisdiction.142 The employer argued that federal jurisdiction existed because the federal statutes the plaintiff had allegedly refused to violate were a necessary element of his claim,143 and a private, federal remedy was available under those statutes.144

The district court agreed, and denied the plaintiff's motion to remand.145 The Fifth Circuit reversed, noting that the only remedies

138. 855 F.2d 1160 (5th Cir. 1988).
140. 687 S.W.2d 733, 735 (Tex. 1985).
141. Willy, 855 F.2d at 1163. This rule was subsequently extended to a situation in which an employee is discharged "for simply inquiring into whether or not she is committing illegal acts." Johnston v. Del Mar Distrib., 776 S.W.2d 768, 771 (Tex. Ct. App. 1989). The Texas Supreme Court has indicated that "public policy . . . expressed in both state and federal law" can support a wrongful discharge claim under Sabine Pilot Service. McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 70 (Tex. 1989), rev'd on other grounds, 498 U.S. 133 (1990).
142. Willy, 855 F.2d at 1163.
143. Id.
144. Id. at 1168.
available under the pertinent federal statutes were administrative.\textsuperscript{146} Thus, based on the remedies available, the Fifth Circuit found no federal question jurisdiction over the plaintiff’s claim.\textsuperscript{147}

Significantly, the Willy court also concluded that even if a private federal judicial remedy had been available\textsuperscript{148} the federal element in the plaintiff’s wrongful discharge claim would not have been sufficient to establish federal question jurisdiction.\textsuperscript{149} Characterizing the availability of a private federal remedy as the “minimum” requirement for a finding of federal jurisdiction under \textit{Merrell Dow},\textsuperscript{150} the court stated:

While \textit{Merrell Dow} held that a private, federal remedy was a necessary predicate to determining that the presence of a federal element in a state-created cause of action resulted in that cause of action being one which arose under federal law, it did not hold that the presence of any private, federal remedy would in all instances suffice for that purpose.\textsuperscript{151}

The court concluded that there would have been no federal question jurisdiction over the plaintiff’s wrongful discharge claim even if a private federal remedy existed because the wrongful discharge

\textsuperscript{146} Willy, 855 F.2d at 1169. The plaintiff had pursued those administrative remedies before initiating the wrongful discharge litigation that resulted in the Fifth Circuit’s opinion. \textit{Id.} at 1162-63; see also \textit{In re Willy}, 831 F.2d 545 (5th Cir. 1987).

\textsuperscript{147} Willy, 855 F.2d at 1169. The court stated: Just as it would “flout” congressional intent to allow a federal court to exercise federal question jurisdiction over a removed claim for violation of a federal statute that does not provide a federal cause of action, it would equally flout congressional intent to give the federal court original (and hence removal) jurisdiction based on statutes that limit the federal remedy to an administrative action.

\textit{Id.} (citing \textit{Merrell Dow}).


\textsuperscript{149} Willy, 855 F.2d at 1169.

\textsuperscript{150} Id.

\textsuperscript{151} Id. at 1168; cf. Miller v. Norfolk & Western Ry. Co., 834 F.2d 556, 562 (6th Cir. 1987):

[A] finding of an express or implied private right of action is a necessary but not a sufficient indication that the federal question is a substantial one. Rather, even when there is such a cause of action, the use of a federal statute as an element of a state cause of action may or may not raise a substantial federal question depending on the nature of the federal interest at stake in the case.
claim was predicated on both state and federal statutes. Because there was nothing in the pleadings or state law to indicate that state statutes alone were insufficient to support the claim, the court held that the Supreme Court's decision in Christianson v. Colt Industries Operating Corp., which is discussed in the next section, prevented a finding that the wrongful discharge claim arose under federal law.

C. The Significance of an Alternative State Law Public Policy Supporting the Claim

As discussed in the preceding sections, there is no federal question jurisdiction over a state law wrongful discharge claim premised upon a federal public policy if the federal statute establishing the public policy provides for no direct private statutory right of action. The preceding cases also suggest that the mere existence of a private statutory right of action, standing alone, may not be sufficient to support federal question jurisdiction over a wrongful discharge claim. This section expands that analysis by considering what impact the presence of an alternative state law public policy supporting the wrongful discharge claim has on the federal question jurisdiction issue.

1. Jurisdiction Where State and Federal Public Policies Provide Alternative Support for the Claim

In Christianson, the Court considered the circumstances under which a claim will be deemed to arise under a federal statute relating to patents for purposes of federal question jurisdiction under 28 U.S.C. § 1338(a). Although the plaintiff in Christianson prevailed in district court on a patent law theory, the complaint alleged alternative theories of recovery that did not involve patent law. The Court

152. Willy, 855 F.2d at 1169-71; see also Ames, supra note 37, at 1233-36.
153. In other words, the claim was supported by "alternate" theories: [F]irst, that [the plaintiff's] discharge was wrongful because it was on account of his attempt to cause employer compliance with or his refusal to violate federal law, and second that it was wrongful because it was on account of his attempt to cause employer compliance with or his refusal to violate state law.
Willy, 855 F.2d at 1170.
155. Willy, 855 F.2d at 1170-71.
156. Christianson, 486 U.S. at 807. Section 1338(a) provides that "[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases." 28 U.S.C. § 1338(a) (1988).
found federal question jurisdiction to be lacking, holding that the federal courts only have jurisdiction over a claim supported by alternative theories if patent law is essential to each theory.\textsuperscript{158} In reaching that conclusion, the Christianson Court noted that its analysis of federal jurisdiction under 28 U.S.C. § 1338(a) was governed by the principles that apply in determining whether a claim raises a federal question under 28 U.S.C. § 1331.\textsuperscript{159}

A number of courts have applied the reasoning of the Christianson Court to wrongful discharge claims. The court in Willy, for example, applied the analysis from Christianson to a case involving a state law wrongful discharge claim premised upon both state and federal statutes.\textsuperscript{160} The Willy court held that the claim did not arise under federal law for purposes of 28 U.S.C. § 1331 because state law was implicated in each theory supporting the plaintiff's wrongful discharge claim.\textsuperscript{161}

Other courts have reached similar conclusions. For instance, in Rains v. Criterion Systems,\textsuperscript{162} the Ninth Circuit relied upon Willy and Christianson to hold that a plaintiff can allege a violation of the policy against religious discrimination expressed in Title VII of the Civil Rights Act of 1964 (Title VII)\textsuperscript{163} as part of a state law wrongful discharge claim\textsuperscript{164} without converting the claim into one arising under federal law.\textsuperscript{165} The plaintiff in Rains brought suit in state court for wrongful discharge in violation of public policy\textsuperscript{166} after his

\textsuperscript{158} Id. at 810; see also Willy, 855 F.2d at 1171 (discussing Christianson).

\textsuperscript{159} Christianson, 486 U.S. at 808-09; see also Rains v. Criterion Supp., 80 F.3d 339, 346 (9th Cir. 1996) (observing that "the same approach [to analyzing whether a controversy arises under patent law for purposes of § 1338] applies in determining general federal question jurisdiction"); Ames, supra note 37, at 1234 n.28; but cf. Enders v. American Patent Search Co., 535 F.2d 1085, 1088 (9th Cir. 1976) (suggesting that "the 'arising under' language in section 1338 should be construed more strictly than the same language in section 1331").

\textsuperscript{160} Willy, 855 F.2d at 1171; see also Ames, supra note 37, at 1235; Korb, 707 F. Supp. at 67-68.

\textsuperscript{161} Willy, 855 F.2d at 1171.

\textsuperscript{162} 80 F.3d 339 (9th Cir. 1996).


\textsuperscript{164} See, e.g., Holien v. Sears, Roebuck & Co., 689 P.2d 1292, 1303-04 (Or. 1984) (recognizing a state law wrongful discharge claim premised upon the public policy expressed in Title VII in part because the remedies provided for in Title VII were deemed to be inadequate).

\textsuperscript{165} Rains, 80 F.3d at 341-42, 345-47.

\textsuperscript{166} California, where Rains arose, first recognized a wrongful discharge claim premised upon the public policy exception to the employment at will rule in Petermann v. International Bhd. of Teamsters, 344 P.2d 25 (Cal. Ct. App. 1959). The California Supreme Court has indicated that, in order to prevail on such a claim, the plaintiff must show that the employer violated a fundamental public policy "delineated in constitutional or statutory provisions." Gantt v. Sentry Ins., 824 P.2d 680, 687-88 (Cal. 1992).
employment was terminated for what he characterized as “refusing to adopt the . . . religious opinions” of a representative of one of the employer’s major clients.167 The employer removed the case to federal court and the district court granted the employer’s motion for summary judgment.168

On appeal, the Ninth Circuit raised the question of whether the district court had properly exercised jurisdiction, noting that the threshold issue in the case was whether the plaintiff’s wrongful discharge claim arose under federal law.169 Citing Christianson, the Ninth Circuit stated, “[w]hen a claim can be supported by alternative and independent theories—one of which is a state law theory and one of which is a federal law theory—federal question jurisdiction does not attach because federal law is not a necessary element of the claim.”170

Applying that proposition to the facts before it, the Rains court noted that the plaintiff had invoked public policies expressed in Title VII, the California Constitution,171 and the California Fair Employment and Housing Act (CFEHA)172 in support of his wrongful

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167. Rains, 80 F.3d at 342. The court stated that “California law is clear that state public policy forbids employment discrimination on the basis of religion.” Id. at 346; see also CAL. GOV’T CODE § 12920 (West 1992) (“It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of . . . religious creed . . .”).

168. Rains, 80 F.3d at 342. Although the basis for the district court’s summary judgment ruling is not explained in the Ninth Circuit’s opinion, the district court concluded that there was insufficient evidence to support a finding that the plaintiff’s discharge resulted from his failure to adopt the representative’s religious beliefs because, at the time of its decision to discharge the plaintiff, the employer was unaware of his religious conversation with the representative on which the plaintiff’s public policy claim was based. Rains v. Criterion Sys., 70 Fair Empl. Prac. Cas. (BNA) 1660, 1668-69 (E.D. Cal. 1993), vacated and remanded, 80 F.3d 339 (9th Cir. 1996). See generally Byrd v. Johnson, 31 Fair Empl. Prac. Cas. (BNA) 1651, 1668 (D.D.C. 1983) (“In order to establish a prima facie case of religious discrimination, a plaintiff must . . . demonstrate that he . . . communicated his [religious] belief to his . . . employer.”).

169. Rains, 80 F.3d at 342-43.

170. Id. at 346.

171. The plaintiff’s complaint cited Article I, Section 8 and Article I, Section 2 of the California Constitution. Rains, 80 F.3d at 346 n.8. Although the relevance of the latter provision is unclear, the former states, in pertinent part: “A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of . . . creed . . .” CAL. CONST. art. I, § 8. The California Supreme Court has stated that “article I, section 8 . . . unquestionably reflects a fundamental public policy against discrimination in employment . . .” Rojo v. Kliger, 801 P.2d 373, 389 (Cal. 1990) (emphasis omitted); see also David B. Oppenheimer & Margaret M. Baumgartner, Employment Discrimination and Wrongful Discharge: Does the California Fair Employment and Housing Act Displace Common Law Remedies?, 23 U.S.F. L. REV. 145, 189 (1989).

172. CAL. GOV’T CODE §§ 12900-12966 (West 1992). The Ninth Circuit had previously held that the CFEHA “establishes a California public policy against religious discrimination in the workplace.” Cook v. Lindsay Olive Growers, 911 F.2d 233, 238 (9th Cir. 1990). In the same
discharge claim. The court noted that both the California Constitution and the CFEHA prohibit employment discrimination on the basis of religion. Because state law "independently espouse[d] the same public policy established by Title VII," the federal act was not a necessary element of the plaintiff's wrongful discharge claim. In short, even though the claim was supported by a federal theory, the district court lacked federal question jurisdiction because the claim was "also supported by an independent state theory." The court explained that holding in the following terms:

Rains' wrongful termination action, like that of the plaintiff in Willy, can be supported by an independent state theory as well as by a federal theory. In fact, Rains' claim that he was wrongfully terminated in violation of public policy is supported by three alternative theories—one for each of the three sources of law he cites to establish that his termination was in violation of public policy. Only one theory, that which invokes Title VII to establish the public policy, clearly rests on a federal theory. . . . Thus, under Christianson, federal jurisdiction does not lie.

case, however, the court held that a wrongful discharge claim premised upon that public policy is preempted by the CFEHA "because the California legislature intended the statute to be the exclusive remedy for a discriminatory wrongful discharge." Id.

173. Rains, 80 F.3d at 343, 345-46.

174. The correctness of the conclusion that the California Constitution prohibits religious discrimination in private employment is not clear. Although the Ninth Circuit asserted that Article I, Section 8 of the Constitution "explicitly prohibits such discrimination," id. at 346, and the California Supreme Court had previously interpreted that provision to "forbid[] disqualification of employees for religious practices," Rankins v. Commission on Professional Competence, 593 P.2d 852, 856 (Cal. 1979), the provision may not apply to private employers. See Rojo, 801 P.2d at 389; Joseph R. Grodin, Constitutional Values in the Private Sector Workplace, 13 INDUS. REL. L. J. 1, 33 (1991); but cf. Commodore Home Sys. v. Superior Court, 649 P.2d 912, 917 (Cal. 1982) (stating, in dictum, that "art. I, § 8 . . . covers private as well as state action"). In addition, Article I, Section 4 of the California Constitution, which guarantees the "[f]ree exercise and enjoyment of religion without discrimination or preference," CAL. CONST. art. 1, § 4, has been interpreted to prohibit employment discrimination on the basis of religion, see Mandel v. Hodges, 127 Cal. Rptr. 244, 256-58 (Ct. App. 1976), but it also may not apply to private employers, see id. at 257. However, because the CFEHA prohibits religious discrimination in private employment, see CAL. GOV'T CODE §§ 12920-21, 12940 (West 1992), the court's interpretation of the California Constitution is not essential to its ultimate holding. See Rains, 80 F.3d at 345 ("The invocation of Title VII does not confer federal question jurisdiction when the plaintiff also invokes a state constitutional provision or a state statute that can and does serve the same purpose.") (emphasis added).

175. Id. at 345.

176. Id. at 347.

177. Id. Referring briefly to Merrell Dow, the court indicated that its analysis was not altered by the fact that Title VII creates a private right of action. Id. at 347 n.10. The court read Merrell Dow as supporting its conclusion that "even if the federal law incorporated into a state law claim creates a private right of action, the federal interest may still prove insufficiently substantial to confer federal-question jurisdiction" when the claim is "supported by an alternate
A similar analysis appears in *Drake v. Cheyenne Newspapers*. The plaintiffs in *Drake* were employees of a Wyoming newspaper. After being discharged for refusing to wear anti-union buttons during a unionization campaign, the plaintiffs brought suit in Wyoming state court. They claimed that they were wrongfully discharged in violation of public policy for exercising their right to free speech under the United States and Wyoming constitutions.

The newspaper removed the case to federal court, alleging that the plaintiffs' reliance upon the First Amendment to support their wrongful discharge claims created federal question jurisdiction under 28 U.S.C. § 1331. The plaintiffs moved to remand, claiming that the matter did not fall within the court's federal question jurisdiction.

The *Drake* court noted that, as in *Merrell Dow*, federal law had not "created" the plaintiffs' cause of action. Instead, the federal issue in both cases was merely an element of a state law cause of action. Although the court acknowledged that federal jurisdiction may exist where the vindication of a state right depends on the construction of federal law, it concluded that the analysis in *Merrell Dow* compelled the conclusion that the plaintiffs' reliance on the First Amendment was too insubstantial to confer federal question jurisdic-

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theory that does not depend on federal law." *Id.*


179. *Id.* at 1405. There has been considerable litigation over the wearing of union buttons during union organizational campaigns. See *Pay'n Save Corp. v. NLRB*, 641 F.2d 697, 700-02 (9th Cir. 1981).


182. *See generally* Lisa B. Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L. J. 341, 342 & n.6 (1994) (advocating use of the First Amendment "as a source of public policy in wrongful discharge actions under state law"). The *Drake* plaintiffs' reliance upon the First Amendment in the context of their refusal to wear anti-union buttons undoubtedly was premised upon the proposition that "the right to remain silent in the face of an illegitimate demand for speech is as much a part of First Amendment protections as the right to speak out in the face of an illegitimate demand for silence." Russo v. Central Sch. Dist. No. 1, 469 F.2d 623, 634 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973); *see also* *Loekle v. Hansen*, 551 F. Supp. 74, 78 (S.D.N.Y. 1982) ("[T]he first amendment protects both a right to speak and a right not to speak.").


184. *Id.*

185. *Id.* at 1411.

186. *Id.*; *cf* Bingham, supra note 182, at 366 ("[A] private employer's deprivation of [an] employee's First Amendment rights has its source in a state-created right or privilege . . . .").
tion. The plaintiffs could have ignored the First Amendment and relied exclusively on a comparable provision of the Wyoming Constitution without compromising their chances of recovery. Therefore, the court held that federal question jurisdiction would be extended too far by allowing reliance upon the First Amendment as a source of public policy to support its implementation.

The Arizona district court reached a similar result in **Wozniak v. City of Scottsdale**. The plaintiff in **Wozniak** commenced an action in state court against her former employer asserting a state law claim for wrongful discharge. During the course of discovery, she asserted that the employer had violated public policy by monitoring a telephone conversation in contravention of a state statute and the federal Omnibus Crime Control and Safe Streets Act of 1968 (Omnibus Crime Control Act).

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187. **Drake**, 842 F. Supp. at 1410. Ironically, federal question jurisdiction may have existed in **Drake** under the preemption theory, because a discharge for the reasons alleged in that case undoubtedly would violate § 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(3) (1988). See, e.g., Coca-Cola Bottling Co., 226 N.L.R.B. 894 (1976) (discharge for wearing pro-union button violated § 8(a)(3)). See generally **Chavez v. Copper State Rubber**, 897 P.2d 725, 731-32 (Ariz. Ct. App. 1995) (wrongful discharge claim premised upon the contention that the plaintiff was terminated for refusing to treat nonunion employees more favorably than union employees was preempted by the NLRA).

188. See **WYOM. Const. art. I, § 20** ("Every person may speak, write and publish on all subjects, being responsible for abuse of that right . . .").

189. **Drake**, 842 F. Supp. at 1412. Significantly, the free speech provision of the Wyoming Constitution has been described as "broader than that found in the First Amendment." **Tate v. Akers**, 409 F. Supp. 978, 981 (D. Wyo. 1976), aff'd, 565 F.2d 1166 (10th Cir. 1977). Among other things, the **Drake** court observed that "the plain language of [the Wyoming] provision confers an affirmative right to 'speak, write and publish' upon the citizens of [Wyoming], whereas the First Amendment, read literally, does not actually confer an affirmative right but rather protects against governmental infringement of that right." **Drake**, 842 F. Supp. at 1406 n.4.

190. Id. at 1412; see also **Korb**, 707 F. Supp. at 68-70 (reaching a conclusion similar to that in **Drake** based, in part, upon the fact that "free expression is a matter of both federal and state law"). On remand, the **Drake** plaintiffs' wrongful discharge claims were dismissed by a state trial court, and the dismissal was upheld by the Wyoming Supreme Court on the ground that "[t]erminating an at-will employee for exercising his right to free speech by refusing to follow a legal directive of an employer on the employer's premises during working hours does not violate public policy." **Drake v. Cheyenne Newspapers**, 891 P.2d 80, 82 (Wyo. 1995); cf. **Rigsby v. Murray Ohio Mfg. Co.**, 120 Lab. Cas. (CCH) ¶ 56,768, at 81,437 (Tenn. Ct. App. 1991).


192. The state statute provided, in pertinent part, that "a person is guilty of a . . . felony who . . . [i]ntentionally intercepts a wire or electronic communication . . . or aids, authorizes, employs, procures or permits another to so do, without the consent of either a sender or receiver thereof." **ARIZ. REV. STAT. ANN. § 13-3005(A)(1) (1989).**

The employer removed the case to federal court, pursuant to 28 U.S.C. §§ 1441 and 1446(b) on the basis of federal question jurisdiction under 28 U.S.C. § 1331, because the plaintiff relied upon the Omnibus Crime Control Act to support her claim. The plaintiff then moved to remand the case to state court.

The district court noted that the Arizona Supreme Court had adopted the public policy exception to the employment at will rule in Wagenseller v. Scottsdale Memorial Hospital. Under Wagenseller, Arizona's public policy can be found in its constitution, statutory law, and prior judicial decisions. The court noted that wrongful discharge claims premised upon the public policy exception originate under state law. Further, the court observed that the employer in this case was not contending that the Omnibus Crime Control Act preempted the plaintiff's claim. Instead, removal was based upon

194. Addressing the fact that the plaintiff had not invoked the Omnibus Crime Control Act in her original complaint, the court observed that "28 U.S.C. § 1446(b) allows a defendant to remove a case to federal court based upon papers filed after the initial pleading." Wozniak, 9 Indiv. Empl. Rts. Cas. (BNA) at 1471 n.1. Specifically, the statute provides:

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable ...


199. Wozniak, 9 Indiv. Empl. Rts. Cas. (BNA) at 1472. The precise statement to which the Wozniak court was referring is: "[W]e will look to the pronouncements of our founders, our legislature, and our courts to discern the public policy of this state." Wagenseller, 710 P.2d at 1034.


the contention that the case presented a federal question because the plaintiff had relied upon the public policy expressed in the Omnibus Crime Control Act to support her wrongful discharge claim. The court indicated that removal was not barred by the holding in *Merrell Dow Pharmaceuticals v. Thompson* because the federal act provided for a private cause of action for persons whose communications were illegally intercepted.

The court nevertheless granted the plaintiff's motion to remand, finding no federal question jurisdiction. It distinguished *Olguin v. Inspiration Consolidated Copper Co.* because the plaintiff in *Olguin* had not relied "at all" on state law but instead had asserted that he was discharged for complaining about mine safety conditions and participating in labor activities governed by the Federal Mine Safety and Health Act and the National Labor Relations Act respectively. Therefore, the *Wozniak* court concluded that *Olguin* had been properly removed on federal question grounds.

In contrast, the plaintiff in *Wozniak* had cited both state and federal statutes in support of her wrongful discharge claim. The state statute, the court concluded, was sufficient in and of itself to establish a public policy against intercepting telephone conversations...
without the participants’ consent.\textsuperscript{213} Thus, while the Omnibus Crime Control Act also prohibits the interception of wire or electronic communications,\textsuperscript{214} it was not essential to the plaintiff’s wrongful discharge claim.\textsuperscript{215} The plaintiff’s right to relief under state law therefore did not depend upon the resolution of a substantial question of federal law, and the case was not removable on federal question grounds.\textsuperscript{216}

A district court in Oklahoma reached a similar conclusion in \textit{Heckelmann v. Piping Cos.}\textsuperscript{217} The plaintiff in \textit{Heckelmann} was sixty-three years old when the defendant terminated his employment and hired a younger replacement.\textsuperscript{218} The plaintiff brought suit in state court for wrongful discharge, alleging that his termination violated the public policy of Oklahoma\textsuperscript{219} as well as the federal public policy represented by the Age Discrimination in Employment Act of 1967 (ADEA).\textsuperscript{220}

The employer sought to remove the case to federal court, arguing that the plaintiff’s reliance upon the public policy reflected in the ADEA created federal question jurisdiction.\textsuperscript{221} The plaintiff cited, among other things, his own failure to invoke the administrative procedures applicable under the ADEA\textsuperscript{222} to argue that federal jurisdiction was lacking because his claim arose under Oklahoma common law, not the ADEA.\textsuperscript{223}

\begin{footnotes}


\item 217. 904 F. Supp. 1257 (N.D. Okla. 1995).

\item 218. \textit{Id.} at 1259.

\item 219. The plaintiff based his claim upon \textit{Burk v. K-Mart Corp.}, 770 P.2d 24, 28 (Okla. 1989), in which the Oklahoma Supreme Court “adopt[ed] . . . the public policy exception to the at-will termination rule in a narrow class of cases in which the discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law.”


\item 221. \textit{Heckelmann}, 904 F. Supp. at 1259-60.

\item 222. An individual intending to bring suit under the ADEA may not do so without first filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and then waiting sixty days to allow the EEOC to attempt to conciliate the claim informally. 29 U.S.C. § 626(d) (1988).

\item 223. \textit{Heckelmann}, 904 F. Supp. at 1260. The failure to invoke administrative procedures now appears to preclude a plaintiff from pursuing a common law wrongful discharge claim in Oklahoma. In \textit{Atkinson v. Halliburton Co.}, 905 P.2d 772, (Okla. 1995), decided three months after \textit{Heckelmann}, the Oklahoma Supreme Court held that an individual seeking to assert a
The court observed that the plaintiff merely relied upon the public policy set forth in the ADEA, instead of bringing an action directly under that act. Therefore, it was state law rather than federal law that had "created" his cause of action. The court considered whether federal jurisdiction nevertheless existed because the plaintiff's claim depended upon the construction of federal law. Additionally, the court noted that Congress had provided for a direct private federal cause of action under the ADEA. The court therefore concluded that while a finding that federal jurisdiction existed was not precluded by *Merrell Dow,* "[i]n instances in which a private federal remedy does exist, the ultimate question under *Merrell Dow* is whether Congress intended that . . . an action . . . based on state law but incorporating a violation of federal law . . . be brought in federal court."228

Finally, the court held that even though federal precedents interpreting the ADEA might provide guidance in analyzing the wrongful discharge claim, this did not transform the claim into one arising under federal law. Oklahoma had "chosen to replicate" the

wrongful discharge claim under Oklahoma law "must first exhaust his administrative remedies." Id. at 777. See generally M.E. Knack, Note, Do State Fair Employment Statutes by "Negative Implication" Preclude Common-Law Wrongful Discharge Claims Based on the Public Policy Exception?, 21 MEM. ST. U. L. REV. 527, 537 (1991) ("Because of . . . limited remedies found in . . . statutes, [plaintiffs] have in the last decade attempted to circumvent administrative agency proceedings by stating a common law claim for wrongful discharge based on the public policy exception.").


225. The court noted that the plaintiff's wrongful discharge claim was not preempted by federal law because "the ADEA does not preempt state laws permitting recovery for age discrimination." *Heckelmann,* 904 F. Supp. at 1261; but cf. *Howard v. Daiichiya-Love's Bakery,* 714 F. Supp. 1108, 1113 (D. Haw. 1989) (holding that a wrongful discharge claim was preempted by the ADEA). See generally Bailey v. Container Corp., 594 F. Supp. 629, 633 (N.D. Ohio 1984) (observing that "there is no clear statement [in the ADEA] of Congressional intent to preempt . . . and nothing inherent in the nature of age discrimination which requires federal preeminence . . .").


[A] claim for wrongful discharge based on age discrimination does not rest on the violation of any state or federal civil rights statutes. An employee's right not to be discharged on the basis of age is a common law right based upon public policy and is
federal remedies available under the ADEA in the Oklahoma Anti-Discrimination Act,\textsuperscript{230} and an action under the state act "remain[s] [a] state reme[d[y], notwithstanding the existence of the ADEA."\textsuperscript{231} Because the plaintiff had only relied in part upon the ADEA, and the Oklahoma act also made it unlawful to discriminate on the basis of age,\textsuperscript{232} federal jurisdiction over the state law wrongful discharge claim did not exist.\textsuperscript{233}

2. Prohibiting Removal of Wrongful Discharge Claims Supported by State and Federal Public Policies Is Questionable

The analysis of federal question jurisdiction in the cases discussed in the preceding section is inconsistent with the analysis traditionally used by courts in determining whether federal question jurisdiction exists. Accordingly, prohibiting the removal of wrongful discharge claims simply because they are based upon both state and federal public policies is a questionable practice.\textsuperscript{234}

While a plaintiff who has invoked both state and federal law obviously may prevail on the state law theory alone,\textsuperscript{235} the potential "surplusage" of a federal issue traditionally has not precluded a finding of federal jurisdiction.\textsuperscript{236} Moreover, denying an employer the right to remove because the plaintiff may not prevail on the federal theory is at odds with the long-settled rule that the presence of federal

\begin{footnotesize}
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\item independent of any rights accruing under either state or federal civil rights statutes. Although no federal statutes are involved . . ., we believe that federal cases interpreting the Age Discrimination [in] Employment Act . . . are instructive. (authority omitted).
\item 230. OKLA. STAT. ANN. tit. 25, §§ 1101-1901 (West 1987 & Supp. 1995); cf. Helman v. AMF, Inc., 675 F. Supp. 1163, 1165 (S.D. Ind. 1987) (discussing an Indiana statute that the court interpreted as reflecting a state legislative intent for "the ADEA to provide adequate remedies in most circumstances and the state statute [to be invoked in others]").
\item 231. Heckelmann, 904 F. Supp. at 1262.
\item 232. See OKLA. STAT. ANN. tit. 25, § 1302 (A)(1).
\item 233. Heckelmann, 904 F. Supp. at 1262.
\item 234. That may be particularly true where the federal courts have exclusive jurisdiction over claims brought directly under the statute expressing the federal public policy at issue. Cf. infra notes 292-294 and accompanying text.
\item 235. See Willy, 855 F.2d at 1170; Wozniak, 9 Indiv. Empl. Rts. Cas. (BNA) at 1472; Drake, 842 F. Supp. at 1412.
\item 236. See Westmoreland Hosp. Ass'n v. Blue Cross, 605 F.2d 119, 123 (3d Cir. 1979), cert. denied, 444 U.S. 1077 (1980) (finding that federal jurisdiction existed even though the case could have been decided "solely on state law precepts" and the plaintiff's reliance upon federal law was "unnecessary for the ultimate disposition of the case," because the "surplusage of federal claims in the pleadings is not the test"); Valenti v. Practice Management Assoc., No. 91-C-6963, 1991 WL 262893, at *1 (N.D. Ill. Dec. 9, 1991) ("A state court action is removable whenever it contains a claim that arises under federal law, even if the federal claim is asserted in the alternative or as 'surplus.'").
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question jurisdiction is determined on the basis of the record existing at the time the removal petition is filed.\textsuperscript{237} The proper inquiry therefore would focus on whether, as drafted and filed in the state court, the complaint may require the construction of a federal statute, rather than on how the complaint might otherwise have been drafted or on what theory eventually might be relied upon at trial.\textsuperscript{238}

Nevertheless, the analysis in Christianson appears to preclude the exercise of federal jurisdiction in wrongful discharge cases premised upon both state and federal public policies. Thus, only wrongful discharge claims based exclusively upon federal laws creating private federal rights of action appear to be potentially removable;\textsuperscript{239} the removal of wrongful discharge claims based on both state and federal public policies, or upon federal public policies for which there is no private federal right of action, appears to be precluded by Christianson and Merrell Dow.\textsuperscript{240}

3. Jurisdiction Where Federal Public Policy Provides the Sole Basis for the Claim

Willy, Rains, Drake, Wozniak, and Heckelmann still do not resolve all aspects of the question of whether a wrongful discharge claim premised solely upon a public policy reflected in federal law providing a private federal judicial remedy raises a federal question under 28 U.S.C. § 1331.\textsuperscript{241} In order to support a finding of federal jurisdiction

\textsuperscript{237} Westmoreland, 605 F.2d at 123-24.

\textsuperscript{238} Id. Significantly, the plaintiff in Christianson actually prevailed on a federal theory. See Christianson, 486 U.S. at 811 (1988).

\textsuperscript{239} See Wozniak, 9 Indiv. Empl. Rts. Cas. (BNA) at 1472 (suggesting that a wrongful discharge claim may be removable where an underlying federal public policy is "essential to [the] cause of action").

\textsuperscript{240} This result is not without its critics. One commentator has stated, for example, that "it is far from clear why the absence of liability under federal law . . . necessarily suggest[s] the absence of federal jurisdiction to hear a state claim presenting . . . a federal issue." Luneburg, supra note 87, at 765.

\textsuperscript{241} However, the analysis in Willy suggests that federal public policies underlying wrongful discharge claims cannot give rise to federal jurisdiction even in the absence of alternative state law theories, because the "claim as a whole . . . is in essence one under state law." Willy, 855 F.2d at 1171. The same view was expressed in Garg v. Narron, 710 F. Supp. 1116, 1118 (S.D. Tex. 1989), where the court stated:

[A] wrongful discharge claim is not one that arises under federal law for purposes of section 1331. In order for a state claim to arise under federal law, vindication of the state right must turn on some construction of federal law. Additionally, the federal issues must be in the forefront of the case rather than collateral in nature. The Texas common law doctrine enunciated in Sabine is intended to protect the rights of any employee who is fired for refusing to violate any law. It does not matter that the law that the employee would not violate is state or federal. . . . Under Sabine, the role of issues of federal law is more collateral than in the forefront. Thus, there is no federal
under Merrell Dow, not only must a federal statute be a necessary element of the plaintiff's state law cause of action, but the resulting federal issue must be "substantial." Where the only public policy invoked in support of a state law wrongful discharge claim is contained in a federal statute, the federal statute undoubtedly is a necessary element of the claim. Whether the federal issue created thereby is sufficiently substantial to satisfy Merrell Dow is less clear.

Lyster v. First Nationwide Bank Financial Corp. discussed Merrell Dow's substantiality requirement in the wrongful discharge context. The plaintiff in Lyster asserted a wrongful discharge claim in state court contending that he was discharged for reporting banking violations to the Office of Thrift Supervision. The employer removed the case to federal court, alleging that the claim raised a substantial federal question under the "whistleblower" provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), which provides a civil remedy to individuals punished for reporting misconduct at federally-regulated financial institutions. FIRREA was the only law supporting the plaintiff's allegation that his discharge violated public policy. The employer contended that the availability of a private federal remedy under FIRREA reflected a congressional conclusion that the alleged

question jurisdiction that can be used as a basis for removal.

243. See id. at 1169.
244. See id. Justice Brennan has indicated that the requirement of a "substantial" federal issue is "simply another way of stating that the federal question must be colorable and have a reasonable foundation." Merrell Dow, 478 U.S. at 823 n.3 (Brennan, J., dissenting).
246. Id. at 1164-65, 1167.
247. See id. at 1164, 1166.
248. The statute provides, in relevant part, that "[n]o insured depository institution may discharge or otherwise discriminate against any employee . . . because the employee . . . provided information to any Federal Banking agency or to the Attorney General regarding any possible violation of any law or regulation by the depository institution . . . ." 12 U.S.C. § 1831j(a)(1) (1989).
249. Lyster, 829 F. Supp. at 1166.
250. Id. at 1169. It is not altogether clear that the public policy expressed in FIRREA supports a common law wrongful discharge claim. See, e.g., Rouse v. Farmers State Bank, 866 F. Supp. 1191, 1213 (N.D. Iowa 1994).
251. Specifically, the statute states that "[a]ny employee or former employee who believes he has been discharged or discriminated against in violation of subsection (a) of this section may file a civil action in the appropriate United States district court . . . ." 12 U.S.C. § 1831j(b) (1989).
violation of the statute as an element of a state law wrongful discharge action is sufficient to confer federal question jurisdiction.\textsuperscript{252}

The court disagreed. Among other things, it concluded that Merrell Dow's "substantiality" requirement is not necessarily satisfied if the federal statute being invoked is the only example of public policy on which the wrongful discharge claim is based. The court offered little explanation for its holding,\textsuperscript{253} but merely observed that because the plaintiff is "master to decide what law he will rely upon,"\textsuperscript{254} a provision for a private federal cause of action allows the plaintiff to bring a federal case, but does not deprive him of the right to sue under state law alone.\textsuperscript{255}

In contrast, the court in Drake v. Cheyenne Newspapers\textsuperscript{256} suggested that a state law wrongful discharge claim would involve a substantial issue of federal law if the interpretation of a federal statute on which the claim was premised would be "determinative of the resulting judgment."\textsuperscript{257} In other words, federal jurisdiction would exist if resolution of a federal issue would be "necessary to the outcome" of the wrongful discharge claim.\textsuperscript{258}

4. The Propriety of Removing Wrongful Disclosure Claims Based Solely Upon Federal Public Policies

It is difficult to imagine a clearer example of a state law claim involving a substantial federal question than one in which a federal

\textsuperscript{252} Lyster, 829 F. Supp. at 1168.

\textsuperscript{253} Id. Ironically, federal jurisdiction may have existed in Lyster on the alternative ground that the plaintiff's wrongful discharge claim was preempted by FIRREA. See Walleri v. Federal Home Loan Bank, 9 Indiv. Empl. Rts. Cas. (BNA) 59 (D. Or. 1993).

\textsuperscript{254} Lyster, 829 F. Supp. at 1169 (quoting The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913)).

\textsuperscript{255} Id.; cf. Ames, supra note 37, at 1237 n.47:
The situation might have been different had [the plaintiff] sought to invoke federal jurisdiction. But he did not. As "master to decide what law he will rely upon," The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913), [the plaintiff's] decision to file a state law claim in . . . state court should end the matter. (discussing Willy).

\textsuperscript{256} 842 F. Supp. 1403 (D. Wyo. 1994).

\textsuperscript{257} Id. at 1412 (quoting Mountain Fuel Supply Co. v. Johnson, 586 F.2d 1375, 1381 (10th Cir. 1978), cert. denied, 441 U.S. 952 (1979)); see also Bally v. NCAA, 707 F. Supp. 57, 60 (D. Mass. 1988) ("Federal jurisdiction exists only where an issue of federal law is essential to plaintiff's claim; it does not exist where no more can be shown than that a federal context is relevant to that claim.").

\textsuperscript{258} Drake, 842 F. Supp. at 1413. This formulation of the test for federal jurisdiction is consistent with the observation in Merrell Dow that a suit does not arise under federal law "unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." Merrell Dow, 478 U.S. at 814 n.12 (quoting Shulthis v. McDougal, 225 U.S. 561, 569-70 (1912)).
statute provides the only available support for the state law claim.\footnote{259} Because the key to resolving a wrongful discharge claim lies in defining the public policy alleged to have been violated by the employer's conduct,\footnote{260} interpreting and applying federal law is necessary to the outcome of a wrongful discharge claim based solely on federal public policy.\footnote{261} In this context, the removability of state law wrongful discharge claims has serious federalism implications. Specifically, the resolution of a wrongful discharge claim premised solely upon the public policy expressed in a federal law requires the court to determine whether the federal law creates a duty,\footnote{262} and if so, the nature of the duty and whether the employer's conduct constitutes a breach of the duty.\footnote{263} Such an interpretation of federal law appears to be "a clear example of 'a substantial dispute over the effect of federal law' where 'the result turns on the federal question.'"\footnote{264}

In short, because the viability of a claim for wrongful discharge typically depends upon whether the employer has violated the public policy embodied in a particular statute, a substantial portion of the claim would involve interpreting that statute.\footnote{265} The fact that the

\footnote{259. However defined, there is little doubt that the "substantiality" prong of the Merrell Dow test is satisfied in at least some cases where a federal statute is invoked as an element of a state law claim. \textit{See Merrell Dow}, 478 U.S. at 819 (Brennan, J., dissenting). One federal judge has concluded that where a cause of action depends upon whether the employer has violated the public policy embodied in a statute, the claim presents a substantial question under that statute. \textit{See} Spearman v. Exxon Coal USA, 16 F.3d 722, 732 (7th Cir. 1994) (Rovner, J., dissenting).}

\footnote{260. See Wagenseller, 710 P.2d at 1032. The court in Gantt, 824 P.2d at 684, stated: "[D]espite its broad acceptance, the principle underlying the public policy exception is more easily stated than applied. The difficulty . . . lies in determining where and how to draw the line between claims that genuinely involve matters of public policy, and those that concern merely ordinary disputes between employer and employee. This determination depends in large part on whether the public policy alleged is sufficiently clear to provide the basis for such a potent remedy."

\footnote{261. \textit{See}, \textit{e.g.}, \textit{Drake}, 842 F. Supp. at 1412 (suggesting that removal of a state law wrongful discharge claim premised upon the public policy exception may be appropriate where the plaintiff must rely on federal law "as [the] source of public policy").}

\footnote{262. Because a plaintiff asserting a wrongful discharge claim premised upon a federal public policy must prove that he or she was discharged for refusing to violate a duty imposed by federal law, the court considering such a claim would be required to decide issues of federal law. Buethe v. Britt Airlines, Inc., 749 F.2d 1235, 1239 (7th Cir. 1984); \textit{but cf.} Donofry v. Nazareth Hosp., 721 F. Supp. 732, 734-35 (E.D. Pa. 1989) (concluding, without explanation, that "a court will not have to pass upon the validity, construction, or effect of [a federal statute]" where the statute "is used . . . only as [a] source of public policy"). \textit{See generally} Twitchell, \textit{supra} note 24, at 820.}

\footnote{263. \textit{Utley}, 625 F. Supp. at 106.}


\footnote{265. In Spearsman v. Exxon Coal USA, 16 F.3d 722, 732 (7th Cir. 1994) (Rovner, J., dissenting), for example, Judge Ilana Diamond Rovner noted that because a claim for wrongful discharge premised upon Illinois' workers' compensation laws "looks to whether the employer has
statute is federal should be sufficient to give rise to federal question jurisdiction.\textsuperscript{266} That conclusion is particularly compelling where the federal courts have exclusive jurisdiction over the private federal cause of action created by the statute.\textsuperscript{267} The federal interest presumably is strongest where Congress has given the federal courts exclusive jurisdiction over the direct statutory cause of action.\textsuperscript{268}

This point is illustrated by cases in which the federal public policy upon which a wrongful discharge claim is based is set forth in Title VII. Prior to the Supreme Court's decision in \textit{Yellow Freight Systems v. Donnelly},\textsuperscript{269} federal courts were presumed to have exclusive jurisdiction over cases arising under Title VII.\textsuperscript{270} Nevertheless, the public policy underlying Title VII was often invoked in support of common law wrongful discharge claims asserted in both state\textsuperscript{271} and federal courts.\textsuperscript{272} Denying employers the right to remove such claims is contrary to a congressional intent to make federal jurisdiction over claims brought directly under the statute exclusive,\textsuperscript{273} therefore raising serious federalism concerns.\textsuperscript{274} At a minimum, therefore, employers should be entitled to remove state law wrongful discharge claims premised solely upon public policies reflected in federal statutes that provide for private federal statutory causes of action over which

\footnotesize{\textsuperscript{266} See, e.g., Bally v. NCAA, 707 F. Supp. 57, 59 (D. Mass. 1988) (observing that a case may arise under federal law where "federal law supplies the substantive right for which a remedy exists under [state law]").


\textsuperscript{268} See, e.g., Chivas Prods. v. Owen, 864 F.2d 1280, 1286 (6th Cir. 1988).

\textsuperscript{269} 494 U.S. 820 (1990).


\textsuperscript{273} See Graf v. Elgin, Joliet & E. Ry. Co., 790 F.2d 1341, 1345 (7th Cir. 1986) ("[A] state cannot be allowed, merely by the label it attaches to the cause of action, to interfere with the administration of a federal statute."); Knack, supra note 223, at 544 (1991).

\textsuperscript{274} See Twitchell, supra note 24, at 827 n.79. This analysis obviously assumes that federal jurisdiction over the "direct" statutory claim is in fact exclusive, which is no longer the case under Title VII. See \textit{Yellow Freight Sys. v. Donnelly}, 494 U.S. 820 (1990).}
the federal courts have been granted exclusive jurisdiction by Congress. 275

The point is supported by the Wisconsin Court of Appeals' decision in Weyenberg Shoe Manufacturing Co. v. Seidl. 276 The plaintiff in Weyenberg had been employed by the defendant as an accountant. 277 Approximately three weeks before his discharge, he was ordered to report to national guard training camp. Prior to leaving for duty, the plaintiff informed two coworkers that he would be absent from work. At the conclusion of guard camp he returned to work and was informed that his employment had been terminated for failing to advise his supervisor of his whereabouts. 278

When the employer sued the plaintiff to recover the balance due on a promissory note, the plaintiff counterclaimed, 279 alleging a federal claim under the Vietnam Era Veterans Readjustment Assistance Act (VEVRA), 280 and a state law claim for wrongful discharge premised upon a contravention of public policy. 281 For the latter claim, the plaintiff argued that the public policy embodied in VEVRA "prohibits the firing of an employee for performing an obligation to serve in the national guard." 282

The trial court concluded that federal courts have exclusive jurisdiction over claims arising under VEVRA. 283 The plaintiff revised his complaint, invoking a state statute in support of his

275. Cf. Heckelmann, 904 F. Supp. at 1261-62. See generally Eure v. NVF Co., 481 F. Supp. 639, 643 (E.D.N.C. 1979) (observing that courts should be particularly concerned with the "circumvention of [federal] jurisdiction by a state court plaintiff" who "disguises his complaint so that it hides a claim that rests within the exclusive jurisdiction of the federal courts").


277. Id. at 606.

278. Id. The supervisor had received advance notice of the plaintiff's absence from the coworkers to whom the plaintiff had reported it directly. Id.

279. Id. at 607.


281. Weyenberg, 410 N.W.2d at 607. The Wisconsin Supreme Court had adopted the public policy exception to the employment at will rule in Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834 (Wis. 1983).

282. Weyenberg, 410 N.W.2d at 607.

283. Id. This conclusion begs the question of whether a state law wrongful discharge claim premised upon the public policy embodied in VEVRA arises under that act for jurisdictional purposes.
wrongful discharge claim in order to remain in state court. The case was tried in state court under the latter theory, and the jury found that the plaintiff had been wrongfully terminated for participating in national guard exercises.

On appeal, the court concluded that the jury's verdict could not be sustained under the theory on which it was based, in part because the pertinent state statute did not apply to an employee absent from work for national guard training. The court nevertheless affirmed the judgment under the federal theory the trial court had rejected, noting that both the evidence and the jury findings supported an award under the federal statute. In reaching that result, the court rejected the trial court's conclusion that it lacked jurisdiction over claims based upon VEVRA, holding that state and federal courts have concurrent jurisdiction over such claims.

284. Weyenberg, 410 N.W.2d at 607, citing Wis. Stat. § 45.50 (1987). As a further, alternative basis for its dismissal of the plaintiff's original wrongful discharge claim, the court had concluded that "the state law wrongful discharge theory must be based upon violation of state public policy as evidenced by state law." Id. (internal quotation marks omitted). However, the Wisconsin courts now appear to subscribe to the view that wrongful discharge claims can be premised upon public policies reflected in both state and federal statutes. See, e.g., Sampson v. Bissen Co., 118 Lab. Cas. (CCH) ¶ 10,720, at 28,120 (Wis. Ct. App. 1991).

285. The relevant state statute provided, in pertinent part, that any person who leaves a position in private employment for "active service" in the U.S. armed forces or to perform national defense work during a national emergency shall, upon return, "be restored to such position or to a position of like seniority, status, pay and salary advancement as though his service . . . had not been interrupted by such absence." Weyenberg, 410 N.W.2d at 605-06 n.1 (quoting Wis. Stat. § 45.50).

286. Id. at 607.

287. Id. at 608. The court also held that under Wisconsin's narrow view of the public policy exception, an employee must have been terminated for refusing to violate public policy in order to prevail. Because the plaintiff had not refused to violate public policy, but had merely acted in accordance with it, the employer's decision to discharge him did not fall within the exception. Id.; see also Sampson, 118 Lab. Cas. (CCH) at 28,120.

288. See Weyenberg, 410 N.W.2d at 607. The court observed that "a judgment may be affirmed on appeal, even though supported by the lower court on an erroneous theory, where judgment on the correct theory would be proper," because "[a]n appellate court has the power to affirm a judgment if the result was correct even if the reasons were wrong." Id. at 608.

289. See id. at 608-10. The affirmance was on the ground that the evidence supported recovery directly under the federal statute; due to Wisconsin's narrow interpretation of the public policy exception, the statute did not support a state law wrongful discharge claim premised upon the public policy reflected in the statute. Id.; Sampson, 118 Lab. Cas. (CCH) at 28,120 (discussing Weyenberg). For purposes of the jurisdictional analysis relevant here, however, that nuance appears to be inconsequential, because the court affirmed on the basis of a jury finding that the plaintiff had been "wrongfully terminated from his employment contrary to public policy," which was reached after the jury had been instructed that "[p]ublic policy in Wisconsin prohibits firing of an employee for performing an obligation to serve in the Wisconsin National Guard." Weyenberg, 410 N.W.2d at 610.

290. Id. at 607-10.
With this holding, the Weyenberg court appears to have accepted the trial court's apparent conclusion that a state court does not have jurisdiction over a wrongful discharge claim premised upon the public policy expressed in a federal statute if the federal courts would have exclusive jurisdiction over a claim asserted directly under the statute. Although it may be extreme to conclude that federal courts would have had exclusive jurisdiction in this case, the Weyenberg court's analysis suggests that federal courts should at least have concurrent jurisdiction over wrongful discharge claims premised upon federal statutes where the federal courts would have jurisdiction (and particularly exclusive jurisdiction) over claims brought directly under those statutes. And if the federal courts do share jurisdiction over such wrongful discharge claims, employers are entitled to remove them to federal court in cases where they are originally brought in state court.

There are persuasive policy reasons for permitting the federal courts to exercise jurisdiction over state law wrongful discharge claims premised upon federal public policies. The existence of a federal
statute reflects Congress's determination that there is a federal interest in requiring litigants to conduct themselves in conformity with the requirements of the statute.\footnote{297} Disputes over the proper interpretation and application of such a statute inevitably arise, and it is the duty of the courts to resolve those disputes fairly and consistently.\footnote{298} Because state courts may be more likely to arrive at inconsistent interpretations of federal law,\footnote{299} declining to permit federal courts to exercise jurisdiction in cases involving the construction and application of federal statutes undermines these goals.\footnote{300} That is true regardless of whether the federal statute is sued upon directly, or instead is implicated only as an "element" of a state law claim,\footnote{301} and it is particularly true where federal jurisdiction over claims brought directly under the statute would be exclusive.\footnote{302}

VI. CONCLUSION

An employer against whom a federal claim has been asserted in state court generally has the right to remove the claim to federal court.\footnote{303} If a state forum is critical to the plaintiff, he or she can avoid removal by relying exclusively on state law.\footnote{304} A plaintiff who


298. Id. at 826, 828 (Brennan, J., dissenting); see also Johnson v. Smith, 630 F. Supp. 1, 4 (N.D. Cal. 1986) ("In creating the lower federal courts and vesting in them jurisdiction over all cases 'arising under' federal law, Congress presumably intended to provide for the uniform interpretation and application of federal law.").

299. See Luneburg, supra note 87, at 767 (noting that "a state court confronted with a state cause of action alleging a violation of [a federal statute] could adopt an interpretation that would . . . confuse or undercut the intended effect of the [statutory] requirements").

300. See Smith v. Industrial Valley Title Ins. Co., 957 F.2d 90, 97-98 (3d Cir. 1992) (Cowen, J., dissenting) (observing that "claims . . . which are clearly creatures of federal law, should not be subjected to the peculiarities of interpretation in fifty different state forums" because "there is . . . [an] interest in protecting the integrity of federal . . . policy through uniform judicial decisionmaking").

301. Merrell Dow, 478 U.S. at 828 (Brennan, J., dissenting).

302. See Enders, 535 F.2d at 1091 (observing that a "special need for uniformity" is an "important consideration leading to exclusive jurisdiction").


elects to pursue a federal claim, however, ordinarily runs the risk of removal.\textsuperscript{305}

A plaintiff in a wrongful discharge case should not be permitted to avoid removal simply because that plaintiff invokes the public policy underlying a federal statute to support his claim rather than using the federal statute directly.\textsuperscript{306} Wrongful discharge claims premised upon public policies embodied in federal statutes implicate essentially the same concerns that led Congress to create federal jurisdiction over claims brought directly under those statutes.\textsuperscript{307} Further, courts generally are hostile to efforts to manipulate the forum in which a case involving federal issues is heard.\textsuperscript{308}

Nevertheless, \textit{Merrell Dow} and \textit{Christianson} appear to preclude removal of a wrongful discharge claim based upon the public policy expressed in a federal statute if there is no private right of action under the statute,\textsuperscript{309} or if there is an alternative public policy embodied in state law that may support the claim.\textsuperscript{310} Although the former limitation on federal jurisdiction may be appropriate,\textsuperscript{311} the latter limitation is questionable.\textsuperscript{312}

A plaintiff who has relied upon both state and federal expressions of public policy to support a wrongful discharge claim may prevail

\textsuperscript{305} Austwick, 555 F. Supp. at 842.
\textsuperscript{306} See Eure, 481 F. Supp. at 643.
\textsuperscript{307} \textit{Merrell Dow}, 478 U.S. at 828 (Brennan, J., dissenting); cf. Luneburg, supra note 87, at 770 ("[P]leading a federal cause of action based on violation of [a federal statute] would appear to be indistinguishable from . . . alleging a state cause of action which relies on violation of the [statute] . . . .").
\textsuperscript{308} In Espinoza v. Fry's Food Stores, 806 F. Supp. 855 (D. Ariz. 1990), for example, a federal district court retained jurisdiction in a case where the plaintiffs had "attempt[ed] to manipulate remand" by dismissing their federal claim, and the state law claims that remained in the action "turn[ed] upon interpretations of federal law." Id. at 856-57; cf. Austwick, 555 F. Supp. at 842 (denying remand where the plaintiff's efforts had "primarily been channeled in assuring that his claims [were] litigated in state court" because "[t]he tools of removal and remand may not be manipulated"). \textit{See generally} Twitchell, supra note 24, at 825.
\textsuperscript{309} See supra notes 87-89 and accompanying text.
\textsuperscript{310} See supra notes 158-161 and accompanying text.
\textsuperscript{311} Because the state law claim at issue in \textit{Merrell Dow} could have been resolved without resort to federal law, see Thompson v. Merrell Dow Pharmaceuticals, 766 F.2d 1005, 1006 (6th Cir. 1985), \textit{aff'd}, 478 U.S. 804 (1986), there is still room to argue that where the resolution of a federal issue is truly essential to the outcome of a state law wrongful discharge claim, the case is removable regardless of whether there is a direct private right of action under the pertinent federal statute. \textit{See}, e.g., Smith, 957 F.2d at 95 (Cowen, J., dissenting); Clark v. Velocis Corporation, 944 F.2d 196, 198 (4th Cir. 1991). However, the argument is a tenuous one. \textit{See} Gray, 874 F. Supp. at 754 ("Manifestly, the Court's decision in \textit{Merrell Dow} derived principally, if not exclusively, from the fact that the [federal statute] did not provide a federal right of action for its violation.").
\textsuperscript{312} See supra notes 234-238 and accompanying text.
only because the federal policy is found to have been violated.\textsuperscript{313} Where the federal courts have been granted exclusive jurisdiction over an action brought directly under the statute embodying the federal policy,\textsuperscript{314} a refusal to permit removal of a wrongful discharge claim based on the statute clearly undermines Congressional intent.\textsuperscript{315} Because a defendant generally is entitled to remove a claim where federal courts have either concurrent or exclusive jurisdiction, a wrongful discharge claim based on the public policy expressed in a federal statute should also be removable where the federal courts would have concurrent jurisdiction over a claim brought directly under the federal statute.\textsuperscript{316}

Under this analysis, a wrongful discharge claim should be removable whenever it is based upon the public policy of a federal statute and the federal courts would have jurisdiction in a case brought under the federal statute directly.\textsuperscript{317} At a minimum, a wrongful discharge claim should be removable where a federal statute creating a private federal right of action provides the sole expression of public policy supporting the claim, because that result has not been precluded by either Christianson or Merrell Dow.\textsuperscript{318}

\textsuperscript{313} See, e.g., Weyenberg Shoe Mfg. Co., 410 N.W.2d at 607-10.

\textsuperscript{314} Some courts have been unwilling to recognize wrongful discharge claims where there is a direct remedy available under the statute expressing the pertinent public policy. See Tate v. Browning-Ferris, Inc., 833 P.2d 1218, 1224 n.21 (Okla. 1992); Chappell v. Southern Md. Hosp., 578 A.2d 766, 770 (Md. 1990).

\textsuperscript{315} Wagner v. Sanders Assocs., 638 F. Supp. 742 (C.D. Cal. 1986). The Wagner court dismissed a wrongful discharge claim based upon the public policy expressed in a state statute because recognition of the claim would have permitted the plaintiff to circumvent the "elaborate procedural mechanism" established by the statute "by simply filing a claim under the common law," rather than directly under the statute. Id. at 744 (quoting Wilson v. Vlasic Foods, 116 L.R.R.M. (BNA) 2419, 2421 (C.D. Cal. 1984)). One "procedural mechanism" at issue when a federal statute creates a private cause of action is the right of a defendant sued for violating the statute to remove the case to federal court. See, e.g., Resolution Trust Corp. v. Bakker, 801 F. Supp. 706, 709 (S.D. Fla. 1992) (characterizing removal as a "procedural matter").

\textsuperscript{316} See generally Warren, 932 F.2d at 585.

\textsuperscript{317} See supra notes 292 and 294 and accompanying text.

\textsuperscript{318} State law wrongful discharge claims premised upon federal public policies are in many respects analogous to implied private rights of action under federal statutes that do not contain express remedial provisions. See, e.g., Spearman, 16 F.3d at 732 (Rovner, J., dissenting) (observing that wrongful discharge claims are "akin to a federal court implying a civil damages remedy under a federal statute that ... regulates or criminalizes behavior ... but [does] not [provide for] private enforcement of the duties so imposed"); Sanford Street Local Dev. Corp. v. Textron, Inc., 768 F. Supp. 1218, 1224 (W.D. Mich. 1991) (observing that a state law claim premised upon the violation of a federal statute "is little different than an implied right of action under the [statute] for money damages"). An implied civil action of the latter variety arises under the federal statute upon which it is based for purposes of federal question jurisdiction, see, e.g., Enders, 535 F.2d at 1089, and the same presumably should be true of a state law wrongful discharge claim premised upon the public policy embodied in the statute.