OP 19-0109

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 8

JAY SPILLERS,

Petitioner,

v.

MONTANA THIRD JUDICIAL DISTRICT COURT,
ANADONDA-DEER LODGE COUNTY,
the HONORABLE RAY DAYTON, Presiding,

Respondent.

ORIGINAL PROCEEDING: Petition for Writ of Supervisory Control
In and For the County of Anaconda-Deer Lodge,
Cause No. DV-17-74
Honorable Ray J. Dayton, Presiding Judge

COUNSEL OF RECORD:

For Petitioner:

Torrance L. Coburn, Tipp Coburn and Associates PC, Missoula, Montana

For Respondent:

Tammy A. Hinderman, Special Assistant Attorney General, DPHHS Office of Legal Affairs, Helena, Montana

Submitted on Briefs: October 2, 2019

Decided: January 21, 2020

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Jay Spillers filed a complaint alleging violations of state and federal antidiscrimination statutes. The Third Judicial District Court held that because Montana's antidiscrimination statutes do not provide for a trial by jury, and because state procedural rules govern procedures in state courts, Montana law precluded a jury trial on Spillers's federal discrimination claims even though federal law allows a jury trial for federal claims. We reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Jay Spillers has a visual disability. In 2016, he applied for an administrative assistant position advertised by the Montana Department of Public Health and Human Services ("DPHHS"). He was not interviewed for the position and was not hired. The applicants DPHHS interviewed were nondisabled females, and the eventual hiree was a nondisabled female.

¶3 Spillers brought claims in August 2017 under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 to 12213 (2012); Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e to 2000e-17; the Montana Human Rights Act ("MHRA"), Title 49, MCA; and the Governmental Code of Fair Practices, §§ 49-3-101 to -315, MCA. Spillers alleged that DPHHS engaged in intentional employment discrimination on the basis of his sex and/or disability, in violation of the above statutes. He sought recovery of damages for economic losses, mental anguish, pain and suffering, and other nonpecuniary losses, as well as punitive damages. Spillers demanded a jury trial on all factual issues in his complaint.

¶4 In February 2019, DPHHS filed a motion to strike Spillers's demand for jury trial. DPHHS contended that the claims brought under Montana law—the MHRA and Governmental Code of Fair Practices—do not allow for jury trials and that the MHRA's exclusivity provision applied to all of Spillers's claims. DPHHS asserted that although Spillers's ADA and Title VII claims provided for a jury trial, that right applied only in federal court and not in state court. DPHHS argued that because the Montana-law claims are not subject to jury trial, the entirety of the matter should proceed to a bench trial as authorized by the MHRA.

¶5 The District Court agreed. It concluded that because Montana procedural law does not provide for a jury trial in discrimination cases, Spillers did not have a right to a jury trial on his federal discrimination claims. Spillers petitioned this Court for a writ of supervisory control, seeking reversal of the District Court's order striking his jury demand. We accepted supervisory control to consider whether Spillers is entitled to a jury trial in state court on his federal antidiscrimination claims. *Spillers v. Third Judicial Dist.*, No. OP 19-0109, Or. (Mont. Feb. 21, 2019); M. R. App. P. 14. We now hold that he is.

STANDARD OF REVIEW

¶6 The District Court's determination that Montana law precluded a jury trial on Spillers's federal claims is a conclusion of law, which we review for correctness. *Dukes v. Sirius Constr.*, 2003 MT 152, ¶ 11, 316 Mont. 226, 73 P.3d 781 (citation omitted).

DISCUSSION

¶7 Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2. The ADA prohibits

discrimination in employment based on disability and guarantees equal opportunities for those with disabilities. 42 U.S.C. § 12112. The Civil Rights Act of 1991 ("1991 Act") created a right to recover additional compensatory and punitive damages in cases of intentional violations of Title VII and the ADA. 42 U.S.C. § 1981a. The 1991 Act further provided a party seeking such damages the right to demand a jury trial. 42 U.S.C. § 1981a(c).

¶8 The MHRA prohibits certain types of discrimination in employment on the basis of one's gender or physical disability, among other bases. Section 49-2-303(1)(a), MCA. The Montana Department of Labor and Industry has the authority to enforce the MHRA. Section 49-2-210, MCA. The MHRA establishes administrative procedures and legal remedies to redress acts constituting unlawful discrimination. The MHRA's exclusivity provision, § 49-2-512(1), MCA, provides:

> The provisions of this chapter establish the exclusive remedy for acts constituting an alleged violation of chapter 3 [Governmental Code of Fair Practices] or this chapter, including acts that may otherwise also constitute a violation of the discrimination provisions of Article II, section 4, of the Montana constitution or 49-1-102. A claim or request for relief based upon the acts may not be entertained by a district court other than by the procedures specified in this chapter.

¶9 Thus, the MHRA's exclusive remedial scheme limits the plaintiff to the specific procedures and remedies established in the MHRA.[1] *Saucier v. McDonald's Rests. of Mont., Inc.*, 2008 MT 63, ¶ 39, 342 Mont. 29, 179 P.3d 481; *see also Griffith v. Butte Sch. Dist. No. 1*, 2010 MT 246, 358 Mont. 193, 244 P.3d 321. If the agency dismisses a

[1] Complaints alleging violations of the Governmental Code of Fair Practices follow the procedures of the MHRA. Section 49-3-315, MCA.

discrimination claim, the charging party "may commence a civil action for appropriate relief on the merits of the case[.]" Section 49-2-511(3)(a), MCA; *see also Griffith*, ¶ 36. We have held that a state discrimination claim in district court may not be tried before a jury, *Saucier*, ¶ 42, and the parties do not argue otherwise.

¶10 Spillers argues that his federal claims are separate and distinct from the state claims, with a separate right to a jury trial granted by federal law and authorized by Montana law. 42 U.S.C. § 1981a; M. R. Civ. P. 38, 39. He asserts that although his claims center on allegations of the same discriminatory conduct, the MHRA, Title VII, and the ADA each grant substantive rights. He argues that not every violation of the MHRA constitutes a violation of federal law and thus the claims should be considered separately. He points out that the MHRA does not allow recovery of punitive damages, whereas Title VII and the ADA allow such damages in the case of intentional discriminatory conduct. Section 42-2-506(2), MCA; 42 U.S.C. § 1981a. Spillers contends that under *Landgraf v. USI Film Prods*., 511 U.S. 244, 281, 114 S. Ct. 1483, 1505 (1994), the right to a jury trial under § 1981a is a substantive right to his federal discrimination claims over which the District Court exercises concurrent jurisdiction.

¶11 DPHHS responds that the MHRA's exclusivity provision clearly and unambiguously applies to a claim for relief based on acts that might constitute a violation of those state antidiscrimination laws, regardless of whether the claim arises under state or federal law. DPHHS asserts that because Spillers's federal claims are based upon the same acts constituting alleged violations of Montana's antidiscrimination statutes, those claims are governed exclusively by the MHRA. DPHHS argues that the MHRA's preclusion of a

jury trial is purely procedural; it applies "solely to secondary conduct—how a discrimination claim will be administered by the state court system—not to the conduct giving rise to the claim." It contends that by assigning the role of trier of fact to the judge, rather than to a jury, the MHRA does not create or eliminate a federal cause of action or change the extent to which a defendant is liable for discrimination under federal law. Thus, because of the MHRA's exclusivity provision and the general principle that state procedure controls in state courts, Montana law applies, and Spillers does not have a right to a jury trial in state court.

¶12 In *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 821, 110 S. Ct. 1566, 1567 (1990), the United States Supreme Court concluded that "Congress did not divest the state courts of their concurrent authority to adjudicate" civil actions brought under Title VII. It is undisputed that the District Court had subject matter jurisdiction over Spillers's federal antidiscrimination claims and thus had concurrent jurisdiction with the federal courts to hear such claims. State courts acting in Title VII and ADA cases are required to apply federal substantive law; a state court's enforcement of federal antidiscrimination laws should be done "in light of the purpose and nature of the federal right." *Felder v. Casey*, 487 U.S. 131, 138-39, 108 S. Ct. 2302, 2307 (1988) (superseded by statute on other grounds). But state courts generally may establish the procedures governing litigation in their courts. *Felder*, 487 U.S. at 138, 108 S. Ct. at 2306. As a general rule, then, federal law "takes the state courts as it finds them[,]" and a federal procedural right "simply does not apply in a nonfederal forum." *Johnson v. Fankell*, 520 U.S. 911, 918-21, 117 S. Ct. 1800, 1805-06 (1997) (citations omitted).

¶13 State procedural rules may be displaced, however, when they conflict with the substance of a federal cause of action being litigated in state court. *Felder*, 487 U.S. at 151, 108 S. Ct. at 2313-14. For example, the United States Supreme Court held in *Dice v. Akron, Canton & Youngstown R.R. Co.* that the State of Ohio could not deny a railroad worker a jury trial in a Federal Employers Liability Act ("FELA") claim because the right to trial by jury "is part and parcel of the remedy afforded railroad workers under [that] Act." 342 U.S. 359, 363, 72 S. Ct. 312, 315 (1952) (citing *Bailey v. Cent. Vt. Ry. Co.*, 319 U.S. 350, 354, 63 S. Ct. 1062, 1064 (1943)). The Court concluded that "the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure'" that could be denied in the state court proceedings. *Dice*, 342 U.S. at 363, 72 S. Ct. at 315; *see Brown v. W. Ry. Of Ala.*, 338 U.S. 294, 70 S. Ct. 105 (1949). *Dice* stands for the proposition that state courts may follow their own rules of procedure but must see that those rules "do not burden a plaintiff's federal rights under" federal statutes. *See Ward v. Soo Line R.R. Co.*, 901 F.3d 868, 872-73 (7th Cir. 2018); *Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636, 651 (7th Cir. 2014) (holding that state courts have an obligation to follow federal procedural rules when they are specifically tied to the federal claim).

¶14 DPHHS asserts that the United States Supreme Court has "readily classified" the jury trial right set out in 42 U.S.C. § 1981a(c) as "plainly a procedural change" in federal discrimination law, not a substantive one. *Landgraf*, 511 U.S. at 280, 114 S. Ct. at 1505. A closer reading of *Landgraf*, however, shows that DPHHS incorrectly contextualizes the Court's statement that the jury trial addition was "plainly a procedural change." *Landgraf*

analyzed the new jury trial provision to determine whether it applied retroactively to discrimination claims filed before its enactment. Landgraf's Title VII suit was pending on appeal when the Civil Rights Act of 1991 took effect. The 1991 Act created a right to recover additional compensatory and punitive damages and authorized any party to demand a jury trial if such damages were claimed. 42 U.S.C. § 1981a. The Supreme Court addressed whether the 1991 Act could apply retroactively to allow a jury trial on damages, holding that it did not.[2] *Landgraf*, 511 U.S. at 247, 114 S. Ct. at 1488. The Court stated: "The jury trial right set out in § 102(c)(1) [42 U.S.C. § 1981a(c)] is plainly a procedural change . . . that would ordinarily govern in trials conducted after its effective date. If § 102 did no more than introduce a right to jury trial in Title VII cases, the provision would presumably [be treated under the retroactivity analysis as a procedural change]." *Landgraf*, 511 U.S. at 280-81, 114 S. Ct. at 1505. The Court held, however, that because the jury trial right was available only when the complaining party sought the new compensatory or punitive damages authorized in the 1991 Act, the "jury trial option must stand or fall with the attached damages provisions" and thus did not apply retroactively. *Landgraf*, 511 U.S. at 281, 114 S. Ct. at 1505.

¶15 Federal courts have held that the right to a jury trial provided by 42 U.S.C. § 1981a is substantive, not procedural, and therefore could not be applied retroactively. In *Davila*

[2] The presumption against retroactivity—new changes in laws applying to suits arising before their enactment—is "deeply rooted" in American jurisprudence. *Landgraf*, 511 U.S. at 265, 114 S. Ct. at 1497. Changes in procedural rules, however, generally are applied in suits arising before their enactment without raising concerns about retroactivity because rules of procedure regulate secondary, not primary, conduct. *Landgraf*, 511 U.S. at 275, 114 S. Ct. at 1502.

v. New York Hosp., 813 F. Supp. 977, 984, 986 (S.D.N.Y. 1993), decided before *Landgraf*, the court conducted the same analysis subsequently used in *Landgraf* when it determined that the jury trial right under the 1991 Act was substantive, not procedural. It held that when Congress enacted the 1991 Act, it had "done more than merely increase an offender's potential liability"; it had impacted a defendant's substantive rights and liabilities. *Davila*, 813 F. Supp. at 986 (citing *Stout v. Int'l Bus. Mach. Corp.*, 798 F. Supp. 998, 1006-07 (S.D.N.Y. 1992)). The court held that the 1991 Act's right to a jury trial did not apply retroactively. *Davila*, 813 F. Supp. at 986. In *Miller v. Runyon*, the court cited *Landgraf* for the principle that "it is well established that the substantive rights set out in the Civil Rights Act of 1991 § 102, including the right to trial by jury, are not retroactive[.]" 88 F. Supp. 2d 461, 473 (M.D.N.C. 2000) (citing *Preston v. Virginia ex rel. New River Comm. Coll.*, 31 F.3d 203, 207 (4th Cir. 1994)). In *Head v. Centr. Reserve Life Ins. of N. Am. Ins. Co.*, 256 Mont. 188, 197-98, 845 P.2d 735, 740 (1993), we relied on federal case law in holding that a plaintiff seeking recovery of benefits under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)—over which state and federal courts share jurisdiction—is entitled to a jury trial. The case here is stronger because, where ERISA is silent, the 1991 Act expressly provides for trial by jury.[3]

¶16 The federal cases likewise are persuasive here. Because the jury trial right attaches to the damages provision, and without the claimed damages would not exist, it more closely

[3] We pointed out in *Head* our earlier statement that an action for damages under 42 U.S.C. § 1981 (prior to the 1991 Act) "is by nature legal and must be tried by a jury on demand." *Head*, 256 Mont. at 197, 845 P.2d at 740-41 (quoting *Breese v. Steel Mountain Enters.*, 220 Mont. 454, 457, 716 P.2d 214, 216 (1986)).

resembles a substantive right than a purely procedural provision. It is tied directly to the new compensatory and punitive damages authorization and, in this context, is part of a substantive right granted by Congress in the 1991 Act authorizing punitive and compensatory damages in Title VII claims.

¶17 The Dissent's focus on the Seventh Amendment as the basis for Spillers's federal jury claim, Dissent, ¶ 28, misapprehends the source of the Title VII jury trial right. The Seventh Amendment guarantees the right to jury trial in federal civil proceedings. The Dissent relies on *Minneapolis & St. Louis R.R. Co. v. Bombolis*, in which the United States Supreme Court held that the Seventh Amendment does not govern trial by jury in state courts. 241 U.S. 211, 36 S. Ct. 595 (1916). But the Seventh Amendment is not the basis upon which Spillers's federal claim to a jury trial arises. Instead, Congress expressly established the right to a jury trial in the 1991 Act for claims previously not afforded a jury trial under the Seventh Amendment. The jury right in Title VII is statutory.

¶18 The Dissent's insistence that a federal right to jury trial does not preempt "Montana's neutral procedure that provides claims of unlawful discrimination are to be tried before a judge, and not a jury," Dissent, ¶ 21, supposes that the Title VII grant of a jury trial is merely a procedural rule. As the federal cases overwhelmingly conclude, it is a substantive right. Plainly, no one would suggest that Montana could deny a jury trial in a FELA case. And within the context of a discrimination claim, it seems straightforward enough that a state court could not deny a Title VII plaintiff her right to claim punitive damages, even though state law does not allow such damages for a state-law discrimination claim. The 1991 Act specifically granted the substantive right to a jury trial in federal

discrimination claims, and—like in a FELA case—it is too closely intertwined with other substantive rights under Title VII to classify it as a "mere local rule of procedure." *Dice*, 342 U.S. at 363, 72 S. Ct. at 315 (citations omitted).[4] When a federal statute bestows a substantive right, the state court must honor that right in any proceeding over which it exercises concurrent jurisdiction.

¶19 Spillers's complaint alleges intentional employment discrimination on the basis of his sex and/or disability in violation of the ADA and Title VII and seeks damages authorized by the 1991 Act.[5] Because the jury trial right under the 1991 Act "must stand or fall with the attached damages provisions," Spillers has a federal substantive right to a jury trial on his federal claims. Though based upon acts also constituting alleged violations of the MHRA, his federal claims are separate and distinct from his state law claims. We hold that Spillers has a right to a jury trial on his federal claims in state district court. The MHRA applies to his state claims and § 1981a of the 1991 Act applies to his federal claims. The right to a jury trial is guaranteed under federal law and is separate and distinct from

[4] The Dissent seizes on dictum in *Dice* to argue that "had Ohio abolished jury trials in negligence cases *altogether* Ohio would not have had to provide jury trials for cases arising under [FELA]." Dissent, ¶ 30. What the Supreme Court actually said was that *Bombolis* "might be more in point had Ohio abolished trial by jury in all negligence cases including those arising under the federal Act." *Dice*, 342 U.S. at 363, 72 S. Ct. at 404. This dictum is not instructive because FELA does not statutorily mandate a jury trial; the Court found such a right because FELA was "largely fashioned" from federal negligence common law and, at common law, the "jury is the tribunal under our legal system to decide [questions of negligence.]" *Bailey*, 315 U.S. at 352-53, 63 S. Ct. at 1064. Section 1981a grants a substantive right to a jury trial; it does not arise inherently under common law like the FELA right at issue in *Dice.*

[5] Spillers's complaint sought punitive damages, which are unrecoverable against governmental agencies. 42 U.S.C. § 1981a(b)(1). Because Spillers also sought compensatory damages under 42 U.S.C. § 1981a, the analysis remains the same.

the MHRA's procedures. The District Court has broad discretion to determine how the trial of Spillers's complaint will be administered. *Fink v. Williams*, 2012 MT 304, ¶ 18, 367 Mont. 431, 291 P.3d 1140.

CONCLUSION

¶20 The District Court erred when it concluded that Montana procedural law applied under the MHRA and denied Spillers a jury trial on his federal claims. We reverse and remand for further proceedings consistent with this Opinion.

/S/ BETH BAKER

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR

Justice Laurie McKinnon, dissenting.

¶21 I respectfully dissent. Spillers filed four claims against DPHHS arising from the same facts. Spillers contends he was discriminated against when he applied for a position with DPHHS and, although he maintains he was the most qualified, DPHHS refused to interview or hire him for the position. Spillers asserts violations of the ADA, 42 U.S.C. §§ 12101-12213; Title VII, 42 U.S.C. §§ 2000e to 2000e-17; the MHRA, Title 49, MCA; and the Governmental Code of Fair Practices, §§ 49-3-101 to -315, MCA, and requests a jury trial on all his claims because 42 U.S.C. § 1981a allows a claim for compensatory and punitive damages to proceed before a jury in federal court.

¶22 In my opinion, a federal procedural right does not preempt Montana's neutral procedure that provides claims of unlawful discrimination are to be tried before a judge, and not a jury. The Court today substantially upends well-established Montana judicial procedure based entirely on the fact that a federal remedial statute allows for a jury. States may establish rules of procedure governing litigation in their own courts. *Felder v. Casey*, 487 U.S. 131, 138, 108 S. Ct. 2302, 2306 (1988). When a litigant chooses to file a § 1981a claim in state court, he takes the state court as he finds it. Montana does not afford *any* litigant in an unlawful discrimination proceeding trial by jury; and our decision today displaces our neutral statutory scheme based on a federal procedural rule. Henceforth, a litigant only needs to attach a § 1981a claim to defeat Montana's neutral procedure for litigating unlawful discrimination claims. At a minimum, having both a judge and jury adjudicate the same facts, as the Court concludes here is warranted, risks rendering the bench trial inefficacious or, otherwise, risks interference with the uniform determination of claims.

¶23 The general rule, "bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." *Johnson v. Fankell*, 520 U.S. 911, 919, 117 S. Ct. 1800, 1805 (1997). The Court must begin with the "normal presumption against preemption" of state procedure when federal claims are filed in state courts and hold the party seeking to displace state law with a "heavy burden of persuasion." *Johnson*, 520 U.S. at 918, 117 S. Ct. at 1805. "No one disputes the unassailable proposition . . . that States may establish rules of procedure governing litigation in their courts." *Felder*, 487 U.S. at 138, 108 S. Ct. at 2306. Conversely, where

state courts entertain a federally created cause of action, the "federal right cannot be defeated by the forms of local practice." *Brown v. Western Ry. Co. of Alabama*, 338 U.S. 294, 296, 70 S. Ct. 105, 107 (1949). For example, a "state court cannot refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers." *Testa v. Katt*, 330 U.S. 386, 393, 67 S. Ct. 810, 814 (1947) (citation omitted). "The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State *create a court* competent to hear the case in which the federal claim is presented." *Howlett v. Rose*, 496 U.S. 356, 372, 1100 S. Ct. 2430, 2440 (1990) (emphasis added). States have great latitude to establish the structure and jurisdiction of their own courts. When evaluating whether § 1981a's provision for a jury to decide particular damages preempts Montana's neutral state procedure, it is important to focus on the source and scope of the federal right at issue. *Johnson*, 520 U.S. at 921, 117 S. Ct. at 1806. However, before evaluating the source and scope of the federal right, I will address Montana's statutory framework for handling unlawful discrimination claims arising in Montana.

¶24 State procedure for unlawful discrimination proceedings in Montana is clear. The Montana legislature expressly mandated, through the MHRA, the procedures and remedies to redress conduct which falls within the definition of unlawful discrimination. "Consequently, a plaintiff subjected to acts which constitute unlawful discrimination in employment may not maintain a traditional tort action based on that conduct; rather, the plaintiff is limited to the specific procedures and remedies in the MHRA." *Saucier v.*

McDonald's Rests. of Mont., Inc., 2008 MT 63, ¶ 39, 342 Mont. 29, 179 P.3d 481 (citation omitted). A party may commence a civil action in district court following an administrative hearing before the Human Rights Commission. Section 49-2-509(5), MCA. However, this type of civil action "may not be entertained by a district court other than by the procedures specified" in the MHRA. Section 49-2-509(6), MCA; *Saucier*, ¶ 42. Accordingly, "a discrimination claim in district court may not be tried before a jury because the MHRA provides for only a 'contested case hearing' conducted in accordance with the Montana Rules of Civil Procedure." *Saucier*, ¶ 42; §§ 49-2-505 and 49-2-509, MCA. These procedures and remedies constitute the *exclusive* means of redress for conduct which falls within the MHRA's definition of unlawful discrimination. Significantly, in *Vainio v. Brookshire*, 258 Mont. 273, 277, 852 P.2d 596, 599 (1993), this Court concluded the codified procedure requiring *all* adjudications alleging unlawful discrimination be before a judge did *not* violate Montana's constitutional right to trial by jury. I turn now to the source and scope of the federal right allowing for damages to be decided by a jury.

¶25 It is undisputed that the Civil Rights Act of 1991 created a right to recover compensatory and punitive damages from governmental entities for certain violations of the ADA and Title VII. Section 1981a, entitled "Damages in Cases of Intentional Discrimination in Employment," effected a major expansion in relief available to victims of employment discrimination. Under § 1981a, a Title VII plaintiff may seek compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. As a result, a Title VII plaintiff is no longer limited to recovery of backpay, but may seek

future compensatory damages and damages related to nonpecuniary loss. In addition, when it is shown that an employer acted "with malice or with reckless indifference to the [plaintiff's] federally protected rights," a plaintiff may recover punitive damages. 42 U.S.C. § 1981a(b)(1). The new compensatory damages provision of the 1991 Act is "in addition to," and does not replace or duplicate, the backpay remedy allowed under prior law. Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(1)-(2), Pub. L. No. 102-166, § 102(a)(1), 105 Stat. 1071, 1072. Therefore, to prevent double recovery, the 1991 Act provides that compensatory damages "shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)]." Civil Rights Act of 1991, § 102(b)(2), 42 U.S.C. § 1981a(b)(2). This expansion of remedies included that the trier of fact could be a jury; however, a judge could also decide the issue of compensatory and punitive damages.

¶26 The Court holds that "Spillers has a federal substantive right to a jury trial on his federal claims." Opinion, ¶ 19. However, the plain language of § 1981a indicates that it expands the *remedies* available to Title VII plaintiffs rather than the *substantive* rights of those entitled to Title VII's protections. Indeed, the particular remedies available are only to those plaintiffs who establish the existence of unlawful discrimination under enumerated sections of the Act. Section 1981a contains no language which expands the substantive rights of individuals and is, therefore, strictly remedial in nature. Its provisions apply only where a plaintiff establishes an underlying violation of Title VII. Section 1981a cannot stand on its own and is wholly dependent on a violation of Title VII and other substantive Acts.

¶27 Consistent with this statutory framework, numerous courts have concluded that § 1981a expands only the remedies available to plaintiffs who suffer violations of Title VII's substantive provisions. *Varner v. Illinois State Univ.*, 150 F.3d 706, 718 (7th Cir. 1998), *vacated on other grounds*, 528 U.S. 1110, 120 S. Ct. 928 (2000); *Huckabay v. Moore*, 142 F.3d 233, 241 (5th Cir. 1998); *Pollard v. Wawa Food Market*, 366 F. Supp. 2d 247, 250-52 (E.D. Pa. 2005); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 255, 114 S. Ct. 1483, 1492 (1994).[1] Accordingly, Congress created a "procedural" right to a jury trial as an option for assessing damages pursuant to the expanded remedial provisions of § 1981a—which are tethered to the underlying substantive Title VII claims. *Landgraf*, 511 U.S. at 280-81, 114 S. Ct. at 1505 ("The jury trial right set out in § 102(c)(1) [§ 1981a] is plainly a procedural change . . . .").

¶28 Congress has undoubted power to regulate the practice and procedure of *federal* courts and may, to that end, delegate to the United States Supreme Court the authority to make rules not inconsistent with statutes or the United States Constitution. Federal Rule of Civil Procedure 38(a) provides: "The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate." Congress, by enacting § 1981a, clearly contemplated the existence of

[1] *Landgraf* held that § 1981a "allows a plaintiff to recover in circumstances in which there has been unlawful discrimination in the 'terms, conditions, or privileges of employment,' . . . even though the discrimination did not involve a discharge or loss of pay. In short, to further Title VII's 'central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination,' . . . the 1991 Act effects a major expansion in *relief* available to victims of employment discrimination." *Landgraf*, 511 U.S. at 255, 114 S. Ct. at 1492 (citations omitted; emphasis added).

concurrent powers and duties of both federal and state courts to administer the rights conferred by federal statute in accordance with the procedure prevailing in state courts. Congress, when it allowed a jury to determine compensatory and punitive damages in unlawful discrimination litigation, acted pursuant to the Seventh Amendment of the United States Constitution, which guarantees the right to jury trial in *federal* civil proceedings. Congress certainly cannot grant a right to jury pursuant to state law, and its authority to require a court to provide a jury must be rooted in the federal Constitution—here, the Seventh Amendment.

¶29 Although the Seventh Amendment allows for a jury trial in federal proceedings, "the Seventh Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same." *Minneapolis & S. L. R. Co. v. Bombolis*, 241 U.S. 211, 217, 36 S. Ct. 595, 596 (1916). The Seventh Amendment is not one of the amendments incorporated to the states through the Fourteenth Amendment. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432, 116 S. Ct. 2211, 2221 (1996). Therefore, Spillers's request for a jury trial in state court is premised upon congressional action taken pursuant to the Seventh Amendment of the United States Constitution. Although Spillers does not assert a Seventh Amendment right to a jury trial, the Seventh Amendment is the *basis* upon which his federal claim to a jury trial arises. The Supreme Court has consistently held that states are not constitutionally required to provide a jury trial in civil cases. *See City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 719, 119 S. Ct. 1624, 1643 (1999); *Gasperini*, 518 U.S. at 432, 116 S. Ct at 2221; *Wagner Elec. Mfg. Co. v. Lyndon*,

262 U.S. 226, 232, 43 S. Ct. 589, 591 (1923); *Chicago, R.I. & P.R. Co. v. Cole*, 251 U.S. 54, 56, 40 S. Ct. 68, 69 (1919).

¶30 It is true that the Seventh Amendment to the United States Constitution secures a substantial right in federal proceedings to the right of trial by jury where that right exists in common law or where congressionally provided for. Here, Congress, through the Civil Rights Act of 1991 and the Seventh Amendment, has conferred a right to jury trial in certain federal actions. "But this truth has not the slightest tendency to support the contention that the substantial right secured extends to, and is operative in, a field to which it is not applicable and which it is not concerned." *Bombolis*, 241 U.S. at 218, 36 S. Ct. at 597. The "proposition that as the Seventh Amendment is controlling upon Congress, its provisions must therefore be applicable to every right of a Federal character created by Congress and regulate the enforcement of such right" obscures that the Seventh Amendment's "terms have no relation whatever to the enforcement of rights in other forums merely because the right enforced is one conferred by the law of the United States." *Bombolis*, 241 U.S. at 219-20, 36 S. Ct. at 597. There is "no implication" that state courts, "for the purpose of enforcing the [federal] right . . . [are] to be treated as a Federal Court deriving its authority not from the State creating it, but from the United States." *Bombolis*, 241 U.S. at 222, 36 S. Ct. at 598. However, Montana may not, for example, afford litigants proceedings with juries and then single out federal claims for determination by a judge rather than a jury.

¶31 The Court's reliance on *Dice v. Akron, Canton & Youngstown R.R. Co.* is misplaced. 342 U.S. 359, 72 S. Ct. 312 (1952). In *Dice*, the petitioner brought suit under the Federal

Employer's Liability Act, 45 U.S.C. §§ 51-60. *Dice*, 342 U.S. at 360, 72 S. Ct. at 313. Following a favorable jury verdict for the petitioner and a proper jury instruction on federal law related to fraud, releases, and other devices designed to defeat an injured employee's claims, the trial court entered a judgment notwithstanding the verdict. The United States Supreme Court held that Ohio's law permitting factual questions of fraud to be determined by a judge could not defeat the employee's right to have all issues in his federal claim determined by a jury. *Dice*, 342 U.S. at 361, 72 S. Ct. at 314. The Court was careful to explain that, had Ohio abolished jury trials in negligence cases *altogether*, Ohio would not have had to provide jury trials for cases arising under the Act. *Dice*, 342 U.S. at 363, 72 S. Ct. at 315. However, because Ohio did not do this and had "provided jury trials for cases arising under the federal Act," it could not "single out one phase of the question of fraudulent releases for determination by a judge rather than by a jury." *Dice*, 342 U.S. at 363, 72 S. Ct. at 315. Thus, contrary to this Court's conclusion, *Dice* does not stand for the proposition that a state court is required to convene a jury on a federal claim when Montana does not provide jury trials for unlawful discrimination.

¶32 Spillers's argument for preemption of state procedure is bottomed on his claim that Montana's procedures are interfering with his federal rights. However, applying Montana's procedural rule for proceedings alleging unlawful discrimination does not defeat Spillers's federal claim. Providing for adjudication of federal claims by a judge, as compared to a jury, is not "outcome determinative" as the United States Supreme Court has explained in, for example, *Felder*, 487 U.S. at 151, 108 S. Ct. at 2314. In *Felder*, the failure to comply with a Wisconsin notice-of-claim statute resulted in a judgment

dismissing a complaint that would not have been dismissed—at least not without a judicial determination of the merits of the claim—if the case had been filed in a federal court. *Felder*, 487 U.S. at 134-37, 108 S. Ct. at 2307. One of the primary grounds for the Supreme Court's decision was that because the notice-of-claim requirement would "frequently and predictably produce different outcomes" depending on whether the § 1983 claims were brought in state or federal court, it was inconsistent with the federal interest in uniformity. *Felder*, 487 U.S. at 138, 108 S. Ct. at 2307. Here, Montana's judicial procedure does not interfere with the uniform determination of federal claims because claims for compensatory and punitive damages may still be brought and considered in Montana's courts. When careful examination of the source and scope of the federal right is made, we are informed that the substantive right to damages for unlawful discrimination rooted in a Title VII claim is not defeated by Montana's neutral procedure for handling discrimination claims.

¶33 The Court's proclamation that there is a "federal substantive right" to a jury trial for claims of unlawful discrimination arising in Montana, despite Montana's handling of state claims through non-jury trials, hangs loosely and dangles precariously without any footing. Opinion, ¶ 19. The Court tries to support its rationale by denoting the jury trial right here was created by Congress and that "[t]he jury trial right in Title VII is statutory." Opinion, ¶ 17. While it is clearly true that the right was created by Congress, and is therefore statutory, that does not *ipso facto* establish its applicability to the states. In my opinion, the Court's analysis is seriously flawed, short-sighted, and ignores fundamental principles underlying the presumption *against* preemption of state control of its judicial procedure.

¶34 The propriety of conducting a jury trial in proceedings alleging unlawful discrimination is for Montana to decide. Montana's judicial procedure does not defeat Spillers's federal claim. Importantly, whether Montana should offer jury trials in unlawful discrimination proceedings is not before the Court, and I express no opinion on this issue. My opinion, here—which is based entirely on rules of law respecting preemption; this Court's precedent; and the legislature's codification of procedures to adjudicate claims of unlawful discrimination—is that Montana, and not the federal courts, should control Montana's judicial procedure. I would not allow a federal procedural rule to dictate our judicial procedure; rather, that determination should be made by the Montana legislature or this Court.

¶35 I dissent.

/S/ LAURIE McKINNON

Justice Jim Rice joins in the dissenting Opinion of Justice McKinnon.

/S/ JIM RICE