Developments in California Wrongful Discharge Law

Michael L. Jensen†

INTRODUCTION ................................................ 27
I. WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY .................................................... 28
II. BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING .............................. 31
III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ...... 34
IV. EXCLUSIVITY OF WORKERS' COMPENSATION REMEDY .... 35
V. STATUTORY PREEMPTION .................................. 36
VI. OTHER TOPICS OF INTEREST .............................. 38
CONCLUSION ................................................ 39

INTRODUCTION

The essential background for any discussion of wrongful discharge law is the employment-at-will rule. In California, this rule is established in the Labor Code: "[A]n employment, having no specified term, may be terminated at the will of either party on notice to the other." In recent years, California has narrowed this traditional at-will rule. The judiciary first recognized certain exceptions to the rule in a series of seminal cases in the early 1980s: Tameny, Pugh and Cleary. Since the decisions in those cases, both employers and employees have sought to define the limits of these exceptions.

This portion of the Symposium will review the latest state and federal court decisions dealing with wrongful discharge law in California.

† Partner, Luce, Forward, Hamilton & Scripps, San Diego, California; Member, Equal Employment Opportunity and Employee Rights in the Workplace Committees, Labor and Employment Law Section, American Bar Association.

1. CAL. LAB. CODE § 2922 (Deering 1976).
For the purposes of this discussion, “wrongful discharge law” includes discharge in violation of public policy, breach of the implied covenant of good faith and fair dealing, breach of express or implied employment contract and related causes of action such as intentional and negligent infliction of emotional distress.

While wrongful discharge litigation is a booming field, both employers and employees are in need of guidance from the courts. The California Supreme Court has recently granted review in a number of wrongful termination cases. One of the most eagerly awaited is Foley v. Interactive Data Corp., which practitioners expect will provide some much needed direction in the wrongful termination area. In fact, Foley was reargued before the California Supreme Court on April 6, 1987. No one knows when that decision will come down. Hopefully, a clear opinion in Foley will provide direction in this volatile area of law. There will almost certainly be some changes from what the courts of appeal have been doing.

However, those who are waiting for drastic changes in the area of wrongful termination law, and certainly those who are waiting for an elimination of this kind of litigation altogether, will be disappointed. Wrongful discharge is here to stay. Foley may change certain aspects of this field, but will not abolish it. The intent of this presentation is to highlight recent cases and to provide a sense of the direction in which the courts of appeal and the California Supreme Court are going in this area. I will first address the state of the law with respect to the basic causes of action, then discuss various defenses and other litigation considerations such as the exclusivity of the workers’ compensation remedy, statutory preemption and finally the statute-of-frauds issues.

I

WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY

The cause of action for wrongful discharge in violation of public policy was recognized in Tameny v. Atlantic Richfield, in which the plaintiff was fired for refusing to participate in an illegal price-fixing scheme. The most important issue which has yet to be settled is whether

---

5. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).
or not a statutory violation or a statute as a basis for public policy is necessary to state a cause of action for wrongful-termination violation of public policy. This issue is addressed in Foley.

Foley concerns an employee who alleged that he was discharged for voicing his concern about his new supervisor who was under investigation for embezzling from a former employer. Foley claimed his discharge violated public policy. The trial court held that Foley had not stated a cause of action for public policy wrongful discharge because he did not "allege that he was terminated in retaliation for asserting his statutory rights or for his refusal to perform an illegal act at the request of his employer or that his employer directly violated a statute by dismissing him."6

There are several cases from the different courts of appeal which deal with the issue of what authority is necessary to define a public policy.7 Koehler v. Superior Court8 is particularly interesting because the decision was written by Justice Kaufman, who now sits on the California Supreme Court. The suit was based on a written contract which was terminated before the end of the term. Although the court found no violation of public policy, and, therefore, the plaintiffs lost, Justice Kaufman's opinion may be a step forward in the efforts of plaintiffs' lawyers to establish the standard that no statutory violation is necessary to state a cause of action for public policy wrongful termination. Judge Kaufman stated in his opinion that "fundamental public policy may be expressed either by the legislature in a statute or by the courts in decisional law."9

Under this theory of wrongful discharge, plaintiffs may not even need to be discharged to state a cause of action. This seemingly anomalous result comes from Garcia v. Rockwell International.10 That case was brought by an employee who had been suspended without pay and then demoted allegedly for revealing the employer's overcharging practices to a federal agency. Justice Trotter, writing for the court, concluded that:

An 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.11 That court did not define what "disciplinary action" means. Clearly, a

---

6. 184 Cal. App. 3d at 248, 219 Cal. Rptr. at 870.
9. Id. at 1165, 226 Cal. Rptr. at 820.
11. Id. at 1562, 232 Cal. Rptr. at 493.
demotion or a suspension is a disciplinary action. But Garcia raises interesting questions about what actions by employers, short of those obviously disciplinary ones, might fall within that kind of rationale.

Justice Trotter also wrote the decision in Dabbs v. Cardiopulmonary Management Services. The plaintiff, a respiratory therapist, refused to work on a night shift at a hospital because it was understaffed. She claimed it would endanger the "health, safety and physical well-being of the patients" for whom she was responsible. It was the usual practice to have three experienced respiratory therapists on duty for the night shift and she was asked to work with only one inexperienced therapist. She refused to work. She was warned. When she still refused to work, she was discharged. She brought an action for public policy wrongful discharge, among other things.

The court of appeal followed previous cases holding that, initially, no statute has to serve as the basis for a public policy wrongful termination lawsuit. However, the court was cautious and covered the bases. It found a legislative source for its interpretation of public policy in a number of different statutes in the Business and Professions Code which were designed to ensure the safety of patients. A similar result was obtained in Eisenberg v. Insurance Company of North America, where the court upheld a cause of action for public policy wrongful discharge when an employee alleged that he was called upon to handle more cases than guidelines set down by the Insurance Department allowed an agent to handle.

There is some hope for employers in DeSoto v. Yellow Freight Systems, Inc. which came down from the Ninth Circuit this year. Generally speaking, employers fare better in the federal courts while plaintiffs fare better in the state courts. That should not surprise anyone since it is the continuation of a trend. In DeSoto, an employee refused to drive a truck because he thought it was a violation to drive a truck bearing an expired vehicle tag. Unfortunately, he was wrong. The court decided that even though the employee acted in good faith, he bore the risk of making an error. The court held that because there was no violation,
there could be no public policy violation and upheld the discharge. The
court distinguished Garibaldi v. Lucky Food Stores, Inc., because in
that case the employee had correctly interpreted the law in refusing to
deliver adulterated milk.

II
BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND
FAIR DEALING

The next topic is the implied covenant of good faith and fair dealing. This is an area where I think employers are most hopeful that the Foley
decision will have some impact. From all reports there was a lot of ac-
tive questioning at oral argument on this part of the Foley decision. In
that case, the court of appeal held that there had to be a showing of
longevity of employment and a specific breach of an express employer
policy regarding the adjudication of employment disputes. On the facts,
the court held that seven years of employment was not long enough.
In addition, there was no sufficient allegation of "express, formal procedures
for terminating employees" that were violated. Thus, the implied cove-
nant of good faith and fair dealing was not breached.

Until the court decides Foley, we must turn to other courts to see
the current law. I want to comment briefly on several cases decided by a
federal district judge. The judge decided four cases at the same time,
one of which has subsequently been reversed, all granting summary
judgment for the employer. I think you have to read those cases with a
little bit of caution because of that reversal. But they are helpful in show-
ing that summary judgment can and will be granted, even though, in my
judgment the plaintiffs should have been able to raise a material issue of
fact.

Several cases in the California courts of appeal raise important is-
ues. Gray v. Superior Court delighted employee lawyers when it was
released. There is a classic phrase in the court of appeals decision that
struck fear in the hearts of most employer lawyers. The most important
issue in the case was the breach of the implied covenant of good faith and
fair dealing. The complaint was badly drafted, but the court recognized
that "thrashing about in this thicket of words, there is a cause of action

19. DeSoto, 820 F.2d at 1438.
20. 726 F.2d 1367 (9th Cir. 1984), cert. denied, 471 U.S. 1099 (1985).
22. Id.
23. Eisenberg v. Insurance Co. of N. Am., 815 F.2d 1285 (9th Cir. 1987); Wagner v. Sanders
24. Eisenberg, 815 F.2d 1285.
for breach of the covenant." \(^{26}\)

The court's willingness to search for a cause of action in the complaint has struck fear in the hearts of employers' lawyers that a breach of the covenant could be found in the "thicket of words" in almost every complaint.

The Koehrer \(^{27}\) decision, which came down after Gray, provided a little bit more insight as to how a cause of action for breach of the implied covenant should be pleaded. Justice Kaufman stated a caution, which is somewhat helpful, that:

[C]are must be taken in each case to determine whether the alleged breach is of an obligation imposed by law and thus a tort . . . or breach of an obligation consensually created by the parties in the terms of the contract and thus simply a breach of contract. \(^{28}\)

The court went on to say:

If the employer merely disputes his liability under the contract by asserting in good faith and with probable cause that good cause existed for discharge, the implied covenant is not violated and the employer is not liable in tort. \(^{29}\)

That is the good news for employers, because from the employer perspective, most discharges are the result of probable cause and are in good faith.

However, this good news for employers is short-lived because in Koehrer, the plaintiffs merely alleged that they had fully performed under the employment contract, that the defendants lacked probable cause, and that at the time that the contract was terminated, the defendants knew that the plaintiffs were performing under the contract. These bare allegations were sufficient to state a cause of action for breach of the implied covenant of good faith and fair dealing.

Another case that provided, for a brief while anyway, some clarification on standards in this most troubled area of the law, is Ketchu v. Sears, Roebuck & Co. \(^{30}\) Because it is currently pending before the California Supreme Court, it is interesting on its facts although it is no longer precedential. The plaintiff was discharged for allegedly fighting with another employee while on the job. There is a dispute as to what actually happened in the altercation. However, Sears maintained that it discharged Ketchu after he struck another employee and voiced his refusal to work with the man any longer. Sears asked that the jury be instructed that an

\(^{26}\) Id. at 821, 226 Cal. Rptr. at 573.


\(^{28}\) Id. at 1169, 226 Cal. Rptr. at 828.

\(^{29}\) Id. at 1171, 226 Cal. Rptr. at 829 (citing Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 36 Cal. 3d 752, 770, 686 P.2d 1158, 1167, 206 Cal. Rptr. 354, 363 (1984)).

employer’s good faith belief that it had good cause to discharge the employee was sufficient. The court of appeal agreed and reversed the trial court. The court held that if an employer acted on an honest but mistaken belief that it had grounds for discharging an employee then there is no breach of the covenant.\textsuperscript{31} That decision cannot be used as precedent now; it was depublished with the granting of the petition for hearing.

The \textit{Caplan v. St. Joseph's Hospital}\textsuperscript{32} case involved someone who had unquestionably been terminated due to a reduction in force. The hospital was cutting back its staff and then closing its doors. At that time the plaintiff was owed $10,000 in back pay. However, the plaintiff then learned that the hospital had been engaged in improper practices concerning not refunding overpayments to patients. He then revealed this fact to the media and the hospital subsequently withheld his backpay.

Caplan sued alleging that the hospital’s conduct violated the implied covenant of good faith and fair dealing. The court agreed, even though no discharge was involved.

The rationale of \textit{Tameny} and related cases seems equally applicable to the instant case. In all such instances the court seeks to deter employers from wrongful retaliation against employees and it is the nature of the employer’s conduct rather than harm to the employee that determines whether the covenant has been breached. That appellant was denied back pay, rather than wrongfully discharged, strikes us as a meaningless distinction.\textsuperscript{33}

A favorable case for employers, and a difficult one for plaintiffs, is \textit{Duerksen v. Transamerica Title Insurance Co.}\textsuperscript{34} The plaintiffs had been working as salespeople for over thirty years for the defendant and its predecessor. The plaintiffs had been told that as long as they performed satisfactorily, “you have a job here as long as you want.” The employee handbook also contained an assurance of fair treatment.\textsuperscript{35} Nevertheless, Duerksen was informed that the company would fire him unless he took a new position and doubled his productivity. Duerksen retired and sued.

The court treated this in an interesting fashion. There is some dicta that can be interpreted in a number of different ways. The court said: “We emphatically reject the idea that whenever an employee is faced with ‘impossible’ job demands, he or she may retire or resign and then challenge the employer’s policies and practices through the singularly in-

\begin{thebibliography}{99}
\bibitem{31} Id. at 1652, 231 Cal. Rptr. at 585.
\bibitem{33} Id. at 1199, 233 Cal. Rptr. at 905.
\bibitem{35} Id. at 650, 334 Cal. Rptr. at 523.
\end{thebibliography}
There is also some discussion of how incongruous it would be for nonunionized employees, if they are willing to quit, to have tort remedies, while union employees are denied that remedy. The court concluded that it could not approve that result.

Gerlund v. Electronic Dispensers, International reaffirms the principle that if there is express language in an agreement that it can be terminated at any time for any reason, no contrary agreements can be inferred. In this case, it was important because the court held that the plaintiffs could not argue that there is a breach of the implied covenant of good faith and fair dealing in view of the express at-will language. There was no question about the plaintiffs' performance; it was exceptional. However, the contract was terminated so that the employer could institute a new and more favorable commission structure. When the parties could not reach an agreement, the plaintiffs brought suit. The court would not allow parol evidence in the face of the integrated written contract and the plaintiffs lost.

III

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The modern tort of intentional infliction of emotional distress is a related cause of action often found in wrongful discharge suits. Robinson v. Hewlett-Packard stands for the proposition that even though a termination is proper, the manner of the termination and other unconscionable conduct could be the basis for a cause of action. In this case, the objectionable conduct was racial slurs. Thus, even if you can legitimately terminate someone, the manner in which it is done is important.

An interesting case in this area is Gilchrist v. Jim Slemons Imports, which established that it is not enough to allege and prove small detriments to one's psyche or slight physical damage to oneself in order to establish intentional infliction of emotional distress. The court viewed the plaintiff's injuries as slight, and stated: "[T]he distress Gilchrist suffered . . . was not substantial: he felt terrible and he felt almost sick, but he did not have severe headaches, nausea, insomnia or similar symptoms. . . . Gilchrist felt distraught only from having to tell his wife the bad news on the night he was fired." This was seen to be a normal reaction to getting fired and not sufficient to state a claim for emotional distress, "A contrary result would convert every wrongful termination case into a claim for emotional distress." The court then overturned a jury

36. Id. at 653, 234 Cal. Rptr. at 525.
39. 803 F.2d 1488 (9th Cir. 1986).
40. Id. at 1499.
award for intentional infliction of emotional distress, because there was not enough proof of injuries to establish the claim.

IV
EXCLUSIVITY OF WORKERS’ COMPENSATION REMEDY

I turn now to the area of exclusivity of the workers’ compensation remedy and, in particular, to Cole v. Fair Oaks Fire Protection District.41 This case is important for a couple of reasons. First, it is a California Supreme Court case which came down when Chief Justice Bird was sitting on the court; I think that fact was significant. And, obviously, it is the leading precedent in this area of the law.

The facts, at least as alleged, are extraordinary. The plaintiff alleged that his department chief harassed him unmercifully because he was a union representative. He claimed that there was an evaluation procedure created solely to harass him, that he was publicly and humiliatingly stripped of his captain position, caused to do humiliating and menial tasks, and a number of other things. All of these harassments, he claimed, caused him to have a totally disabling cerebral vascular accident so that he could not move, care for himself or even communicate except by blinking his eyes.42

The plaintiff argued that workers’ compensation should not be his exclusive remedy since the employer acted with the express purpose of creating emotional distress. In this situation, even though it was a physical injury typically exclusively covered by workers’ compensation, the facts invited the court to find a way to avoid the limiting effect of the statute. But the court did not take the invitation and, in fact, emphatically rejected the opportunity, stating:

[W]hen the misconduct attributed to the employer is actions which are a normal part of the employment relationship, such as demotions, promotions, criticisms of work practices, and frictions in negotiations as to grievances, an employee suffering emotional distress causing disability may not avoid the exclusive remedy [of workers’ compensation.]43

The decision left open a lot of questions. For example: What happens if the injury does not cause disability? What is disability: is it physical disability or emotional disability? While these questions leave some room for plaintiffs, there is significant language in the case which should be used by employers to overturn intentional infliction claims.

In Spratley v. Winchell Donut House, Inc.,44 the employee tried to avoid the exclusive remedy of workers’ compensation by alleging only

42. Id. at 152-53, 729 P.2d at 744-45, 233 Cal. Rptr. at 309-10.
43. Id. at 160, 729 P.2d at 750, 233 Cal. Rptr. at 315.
emotional injuries in her complaint. The plaintiff had allegedly been fraudulently induced to become an employee by the employer's deliberately false promises that the shop was well protected. Unfortunately, plaintiff was seriously injured when someone broke into the shop and beat her severely. The court once again held that workers' compensation was her exclusive remedy even though the fraudulent statements which eventually caused her to be injured occurred prior to the employment relationship.45

However, courts still allow some emotional distress claims aside from workers' compensation. In *Hart v. National Mortgage & Land Co.*,46 the facts were slightly different. The plaintiff alleged his supervisor, another male, would grab Hart's genitals, grab Hart around the waist and try to mount him and make sexually suggestive gestures accompanied by crude remarks. Hart was able to avoid the result of *Spratley* and *Cole*, perhaps because the facts were so outrageous. The court held that workers' compensation was not the exclusive remedy because this was not the type of conduct that is supposed to happen in the workplace. The court concluded that:

[T]he time should and has come to cast aside the arbitrary and sometimes irrationally applied 'physical versus emotional harm' approach . . . . [W]hen employers step out of their roles as such and commit acts which do not fall within the reasonably anticipated conditions of work, they may not hide behind the shield of workers' compensation.47

V
Statutory Preemption

In many situations in which an employee would like to sue for wrongful termination, she will find the area preempted by state or federal labor laws. I will briefly review several cases that discuss this problem in depth.

A. Fair Employment and Housing Act

In California, the Fair Employment and Housing Act has been held to be the exclusive remedy for an employee's discrimination claims. Thus, in *Wagner v. Sanders Associates, Inc.*48 the court granted summary judgment for the employer when the employee's claim for breach of the implied covenant of good faith and fair dealing was based on age discrimination. However, at least one court has recently stated in dicta that not every claim that might arise out of discrimination is barred by the admin-

---

45. *Id.* at 1414, 234 Cal. Rptr. at 125.
47. *Id.* at 1429-31, 235 Cal. Rptr. at 73-75.
Interestingly one case, Robinson v. Hewlett-Packard, also allowed a cause of action for intentional infliction of emotional distress on the basis of race discrimination.50

B. ERISA

There have been a couple of Supreme Court decisions in the ERISA area which have reaffirmed and, in fact, expanded the preemptive force of ERISA. In Metropolitan Life Insurance Co. v. Taylor,51 the court concluded that an employee's common law tort and contract claims were preempted by ERISA because the lawsuit "relate[s] to [an] employee benefit plan." Taylor had been terminated for failing to return to work after an injury for which he had collected disability payments and had brought suit for wrongful discharge and breach of contract.

C. Railway Labor Act

The California Supreme Court has recognized a very broad preemptive standard under the Railway Labor Act.52 In DeTomaso v. Pan American World Airlines,53 the court concluded that the standard is whether or not the conduct complained of is "arguably governed by' or has a 'not obviously insubstantial relationship to' the collective bargaining agreement . . . ."54 DeTomaso concerned an employee who was discharged after an investigation and a discussion with the union's representative for fraud, dishonesty and an abuse of company policy. The court argued that "if an employee can institute a civil action... the value of arbitration as a dispute resolution tool will be undermined."55 The court's broad preemption standard prevents end-runs around the carefully crafted procedures set out in the RLA. However, so long as tort claims are not discharge-related, they may be brought under the Federal Employers' Liability Act.56

D. Labor Management Relations Act

Under the Labor Management Relations Act, several recent cases

54. Id. at 527-28, 733 P.2d at 620, 235 Cal. Rptr. at 298 (quoting Magnuson v. Burlington N., Inc., 576 F.2d 1367, 1369-70 (9th Cir. 1978)).
55. Id. at 528, 733 P.2d at 620-21, 235 Cal. Rptr. at 298-99.
are interesting. In *Scott v. New United Motors Manufacturing, Inc.*, there was no preemption where the employee was probationary and thus had no remedy under the grievance and arbitration provisions of the contract. In general, however, when there is a statutory remedy, the employee has no wrongful discharge remedy.

VI

OTHER TOPICS OF INTEREST

A. Statute of Limitations

In California, the limitation for wrongful discharge suits is an open question. *Miller v. Indasco*, which is before the supreme court, held that wrongful discharge causes of action, like most tort suits, have a one-year limitation. Once again, review has been granted, so it cannot be cited. However, *Eisenberg*, a recent Ninth Circuit case, allowed a two-year statute of limitation on a breach of the covenant of good faith and fair dealing under California Civil Code section 339. So, again, this is an open issue that can be argued.

B. Statute of Frauds

There has been disagreement among the district courts as to whether an oral employment contract lasting as long as the employee’s work is satisfactory is within the statute of frauds. An early case, *Newfield v. Insurance Co. of the West*, held that suit on the oral agreement was precluded by the statute of frauds. However, the California Supreme Court has granted review in a number of cases addressing this issue and it is commonly presumed that *Newfield* will be overturned. Currently, courts of appeal are treating it in this fashion and holding that

---

58. Snow v. Bechtel Constr., Inc., 647 F. Supp. 1514 (C.D. Cal. 1986) (plaintiff’s claim that he was discharged for reporting nuclear power plant safety violations is exclusively covered by the Energy Reorganization Act and employment concern was preempted by the NLRA); Bassett v. Attebery, 180 Cal. App. 3d 288, 225 Cal. Rptr. 399 (1986) (NLRB has exclusive jurisdiction over wrongful discharge claim alleging federal labor law violations).
60. Eisenberg v. Insurance Co. of N. Am., 815 F.2d 1285 (9th Cir. 1987); see supra notes 16-20 and accompanying text.
such an oral contract is not subject to the statute of frauds defense.  

C. Removal Jurisdiction

In cases where the tort claim may be preempted by federal statute, employers may try to remove the suit to federal court. The most recent case on removal jurisdiction decided by the Supreme Court is *Williams v. Caterpillar Tractor Co.* The Court held that a state law claim for breach of an individual employment contract which was not “substantially dependant” on interpretation of a later collective bargaining agreement, was not removable to federal district court on the basis of a possible preemption defense under section 301 of the LMRA. The Court observed, “the plaintiff is the master of the complaint . . . and the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.” However, the court reaffirmed that where state law claims are completely preempted by federal law they may be removed to federal court. This so-called “artful pleading” doctrine is applied primarily in cases raising claims preempted by section 301 of the LMRA.

D. Collateral Estoppel

The issue of collateral estoppel deserves a mention. Recent legislation added section 1960 to the California Unemployment Insurance Code. The law now prohibits any finding of fact or law made during an Unemployment Insurance Appeals Board hearing from having any conclusive effect in any subsequent proceeding.

CONCLUSION

This presentation has highlighted a number of cases in a variety of areas for your review. Some of the law may change, when the California Supreme Court decides *Foley*. Obviously, *Foley* is not going to be the last pronouncement in this area of the law, and it is not going to resolve all questions. Obviously, we are going to have many *Foleys* in the future. It behooves us in the meantime to be familiar with the courts of appeal decisions.

---

65. Id. at 2431.
66. Id. at 2433.
69. CAL. UNEMP. INS. CODE § 1960 (Deering 1987).