Employment Discrimination and Wrongful Discharge: Does the California Fair Employment and Housing Act Displace Common Law Remedies?

By David Benjamin Oppenheimer

Clinical Assistant Professor of Law, University of San Francisco; J.D., Harvard Law School (1978); B.A., University Without Walls/Berkeley (1972)

Margaret M. Baumgartner*

Introduction

In 1959, the California Legislature enacted the Fair Employment Practices Act ("FEPA"). The FEPA broadly prohib-
ited employment discrimination based on race, religion, and ethnicity. The Fair Employment Practices Commission was created to receive, investigate, and conciliate charges of discrimination falling within the FEPA's jurisdiction. In the thirty years since its passage, the FEPA has been substantially expanded. It now prohibits discrimination or harassment based on race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, age over forty, and pregnancy.

During these same thirty years, three common law causes of action have developed in California that directly challenge the legality of an employee's discharge: (1) tortious wrongful discharge in violation of public policy; (2) breach of the implied in law con-


3. CAL. LAB. CODE § 1411 (Deering 1976) (repealed 1980). Section 1411 was reenacted as the CAL. GOV'T CODE § 12920 (Deering 1982). As originally enacted in 1959, section 1411 provided: "It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and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 abridgement on account of race, religious creed, color, national origin, or ancestry." CAL. LAB. CODE § 1411 (Deering 1976) (repealed 1980).


5. CAL. GOV'T CODE §§ 12940, 12941, 12945 (Deering 1982 & Supp. 1988). The Department of Fair Employment and Housing also has responsibilities in the areas of housing discrimination, access to public accommodations, and discrimination and affirmative action by government contractors. Id. § 12930 (Deering 1982). These areas are beyond the purview of this Article.

6. Numerous actions may also arise out of the termination that challenge not the actual firing, but its motives, process, or effects. E.g., Alcorn v. Anbro Eng'g, Inc., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970) (an employee fired in a humiliatingly public setting may have claims for intentional or negligent infliction of emotional distress); Young v. Libbey-Owens Ford Co., 168 Cal. App. 3d 1037, 214 Cal. Rptr. 400 (1985) (an employee intentionally struck by a co-employee may have an action for assault and/or battery against the employer); Rulon-Miller v. International Business Machs., 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984) (an employee fired because of a romance with an employee of a competitor may have a claim for invasion of privacy); Kelley v. General Tel. Co., 136 Cal. App. 3d 278, 186 Cal. Rptr. 184 (1982) (an employee publicly fired for falsely proclaimed misuse of funds may have a claim for defamation); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (an employee fired at the insistence of another employee may have an action against the co-employee for wrongful interference with contractual rights).

tractual covenant of good faith and fair dealing; and (3) breach of express or implied in fact terms of the employment contract. In addition, the California Constitution creates an independent right not to be discriminated against in employment.

This Article addresses the question of whether a terminated employee’s remedies for wrongful discharge based on either sex or race discrimination are displaced by the Fair Employment and Housing Act ("FEHA"), thereby eliminating the possibility of a civil action based on one or more of the otherwise viable common law theories. The answer depends in part on whether public policies against discharging employees because of race or sex exist independent of the FEHA. This Article will examine the history and reasoning of those cases that discuss exclusivity of remedy under the FEHA, and will explore the history of California’s public policies against race and sex discrimination in employment. The conclusion reached is that displacement of common law remedies for some kinds of employment discrimination is proper in certain limited situations, but is never proper for race or sex discrimination claims.

I. OVERVIEW OF WRONGFUL TERMINATION LAW IN CALIFORNIA

Most non-union employees in California work without a written employment contract and without a specified term of employment. California law generally provides that unless the parties

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10. CAL. CONST. art. I, § 8. The constitutional provision provides: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin." Id. The original provision, article XX, section 18 of the California Constitution of 1879 was slightly rephrased in 1970, and amended and renumbered as article I, section 8 in 1974.

The unprecedented protection of women's rights created by the California Constitution of 1879 was brought about in part by the lawsuit of Clara Shortridge Foltz, who had been denied admission to Hastings College of Law. For an entertaining and informative discussion of Ms. Foltz's life and work, see B. Babcock, Clara Shortridge Foltz: "First Woman," 30 ARIZ. L. REV. 673 (1988).
11. About 25% of California employees are employed by unions. CALIFORNIA DEPT. OF
agree otherwise, the term of a person's employment is "at will," and therefore that employment may be terminated by either party without cause. An employer's right to terminate employees at will is not, however, totally unfettered. In addition to various statutory restrictions, California common law provides that an employee may not legally be fired when the termination violates: (1) public policy; (2) an express or implied in fact contractual promise, such as a promise to fire only for good cause; or (3) the covenant of good faith and fair dealing, which is implied by law in all California contracts.

Considerable confusion has been created by the judiciary's failure to distinguish between these three common law theories. Justice Kaufman of the California Supreme Court has suggested the confusion can be avoided by the use of the terms "breach of employment contract" for breach of contract cases, "tortious discharge" for public policy cases, and "bad faith discharge" for cases involving breach of the covenant of good faith and fair dealing.

Justice Kaufman's nomenclature will be used throughout this Article.

A. Tortious Discharge

An employee's action for tortious discharge requires proof that the termination violated a statutory objective or an established


14. See, e.g., Cal. Elec. Code § 1655 (Deering Supp. 1988) (prohibitions against terminating an employee for taking time off to serve as an election officer); Cal. Lab. Code § 132(a)(1) (Deering Supp. 1988) (employee filing a workers' compensation claim); Id. § 230 (employee taking time off to serve on a jury or as a witness); Id. § 2929(b) (Deering 1976) (garnishing of an employee's wages to pay a judgment).


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public policy. The modern doctrine has its California roots in the 1959 case, Petermann v. International Brotherhood of Teamsters. In Petermann, the California Court of Appeal held that an employee who was fired after refusing his employer’s demand to lie at a legislative hearing was entitled to civil relief for the termination. The court explained that “it would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge an employee . . . on the ground that the employee declined to commit perjury.”

Petermann was approved and relied on by the California Supreme Court in Tameny v. Atlantic Richfield Co. Tameny held that an employee fired because he refused to participate in an illegal price fixing scheme had a tort cause of action for wrongful discharge. The court held that the employer violated fundamental principles of public policy when it fired the plaintiff for refusing to break the law. California courts have held that many actions by an employer may violate fundamental principles of public policy, thus supporting an employee’s tortious discharge suit, including retaliatory terminations for refusing to commit an illegal act, (perjury), whistle-blowing on illegal activity, protesting unsafe working conditions, joining a union, and serving as an election officer.

Although broad, the underlying public policy bases for a tortious discharge case are not without limits. The recent case of Fo-

19. Id. at 188-89, 344 P.2d at 27.
20. Id. at 188-89, 344 P.2d at 27-28.
22. Id. at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844.
23. Id. at 178, 610 P.2d at 1336, 164 Cal. Rptr. at 845.
24. Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984) (refusing to deliver spoiled milk).
ley v. Interactive Data Corp.\textsuperscript{29} helped define these limits. In Foley, the California Supreme Court held that the policy providing a basis for the action must benefit public rather than private interests. The court concluded that the policy could be grounded in a statutory or constitutional source and left open the possibility that it could be found in a well established judicially created policy.\textsuperscript{30} The damages available for a tortious discharge cause of action include the entire range of tort damages.\textsuperscript{31}

\section*{B. Breach of Employment Contract}

Terminated employees may have an action for breach of contract. A typical contract action alleges that the termination breached the employment contract because the termination was without good cause. This action requires an implied or express promise of continuing employment absent good cause for termination. The action has a long history, but its modern application can be traced to the California Court of Appeal decision of Pugh v. See's Candies, Inc.\textsuperscript{32} In Pugh, the plaintiff alleged that he was terminated without good cause after thirty-two years of employment, in violation of the employer’s promise that he would be fired only for good cause. The court of appeal agreed that an enforceable promise to terminate only for good cause could be implied from an employer’s language and/or conduct.\textsuperscript{33} Later cases have found a promise by looking to actual promissory language or to language or conduct creating an expectation that the employee will be terminated only for good cause, such as assurances found in employee handbooks or in an employer’s general employment policies and practices, the employee’s longevity of service, and general industry practices.\textsuperscript{34} The action is limited to contract damages,\textsuperscript{35} but the

\begin{itemize}
\item 29. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).
\item 30. \textit{Id.} at 668, 765 P.2d at 378, 254 Cal. Rptr. at 216. See \textit{infra} notes 268-76 and accompanying text.
\item 33. \textit{Id.} at 329, 171 Cal. Rptr. at 927.
\item 34. See, \textit{e.g.}, Walker v. Northern San Diego County Hosp. Dist., 135 Cal. App. 3d 896, 904-05, 185 Cal. Rptr. 617, 622 (1982).
\item 35. See, \textit{e.g.}, Parker v. Twentieth Century Fox Film Corp., 3 Cal. 3d 176, 474 P.2d 689, 89 Cal. Rptr. 737 (1970) (employment contract damages are measured by subtracting dam-
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scope of contract damages in the employment context is uncertain.\textsuperscript{36}

C. \textit{Bad Faith Discharge}

California law considers all private employment relationships to be contractual and imposes as a term in all contracts a covenant of good faith and fair dealing.\textsuperscript{37} Terminating an employee in violation of this covenant gives rise to a cause of action for bad faith discharge.

This cause of action was first explicitly recognized in California in \textit{Cleary v. American Airlines, Inc}.\textsuperscript{38} In \textit{Cleary}, the employee was terminated after eighteen years of employment. The airline claimed the plaintiff violated its employment regulations by stealing, leaving his work area without authorization, and threatening another employee with bodily harm.\textsuperscript{39} The plaintiff claimed that the charges were fabricated and inadequately investigated, and that the true company motivation was his union-organizing activities.\textsuperscript{40} The \textit{Cleary} court agreed both that the implied covenant of good faith applied to the employment relationship and that long-term employment and employer policies establish a duty that the employer not terminate an employee in bad faith.\textsuperscript{41} Later cases have applied the doctrine to considerably shorter periods of employment than the eighteen years in \textit{Cleary}.\textsuperscript{42}
Despite widespread application of the bad faith cause of action between 1980 and 1988, courts had difficulty distinguishing between a breach of the implied covenant of good faith and a mere breach of contract. Generally, however, a bad faith claim, unlike a breach of contract claim, required that an employer knew or should have known that it had no legitimate basis for terminating the employee. The distinction between the contract and bad faith claims was especially important because tort damages, including emotional distress damages and punitive damages, were available under a bad faith discharge claim. After Foley, the distinction is less significant because only contract damages are available.

Although the three common law causes of action are described as analytically distinct, claims for wrongful termination frequently raise all three theories. Decisions often apply the requirements of one of the three causes of action to the other two. This is particularly true in judicial decisions that discuss both tortious discharge and bad faith actions, or bad faith and breach of employment contract actions. The confusion is understandable because the same facts may support a claim for tortious discharge and for bad faith discharge when, for example, an employee is terminated because he or she refused to break the law on the employer’s behalf. Similarly, when an employee with many years of tenure is terminated, longevity of employment supports an implied promise to terminate only for good cause and a finding of the existence of bad faith. In many cases, all three common law theories for wrongful discharge are applicable.

47. See, e.g., Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 179 n.12, 610 P.2d 1330, 1343 n.12, 164 Cal. Rptr. 839, 846 n.12 (1980).
II. STATUTORY ACTION FOR WRONGFUL TERMINATION UNDER THE FEHA

A. History of the FEHA

The FEPA as enacted in 1959 applied only to employment discrimination on the basis of race, religious creed, color, national origin, or ancestry. The legislature has since added as additional categories sex, physical handicap, medical condition, marital status, age over forty, and pregnancy. The current provision of the FEHA also prohibits retaliation for participating in Department of Fair Employment and Housing (“Department” or “DFEH”) or Fair Employment and Housing Commission (“Commission” or “FEHC”) proceedings or for complaining about activities that the FEHA prohibits. Although the FEHA initially created no express right of private action, it now provides the right to bring a civil action in any of the state’s trial courts and provides plaintiffs with a broad choice of venue.

In 1980, the FEPA was consolidated with the Rumford Fair Housing Act (“Rumford Act”) to form the FEHA. Although the FEPA as enacted in 1959 created a single administrative body, the Fair Employment Practices Commission (“FEPC”), to both investigate and adjudicate claims, the legislature amended the statute in 1978 to provide for two administrative agencies: the DFEH, which investigates, conciliates, and prosecutes administrative actions for discrimination, and the FEHC, which adjudicates DFEH claims.

49. See supra notes 2-3 and accompanying text.
52. Id., ch. 431, § 1, 1975 Cal. Stat. 923, 923.
57. An express right of private action was added to the FEPA in 1977. See CAL. GOV'T CODE § 12965(b) (Deering Supp. 1988); see also Brown v. Superior Court, 37 Cal. 3d 477, 691 P.2d 272, 208 Cal. Rptr. 724 (1984) (FEHA venue statute allows suit to be filed in the county in which discrimination occurs, and controls even when non-FEHA causes of action arising from same facts are joined).
60. CAL. GOV'T CODE §§ 12901, 12930 (Deering 1982). Between 1978 and 1980, the two agencies were within the California Department of Labor and were named, respectively, the
and makes rules regarding the proper interpretation of the FEHA.61

The relief the FEHC may give in employment cases includes, but is not limited to, hiring, reinstatement, back pay, and restoration to membership in any respondent labor organization.62 The Commission may not award punitive or exemplary damages.63 The Department may also bring an action in superior court for a temporary restraining order, or other orders granting preliminary or temporary relief, pending the resolution of its administrative action,64 and may seek judicial enforcement of Commission decisions.65 Currently under review by the California Supreme Court is whether the Commission has the right to award damages for emotional distress.66 In a private civil action brought under the FEHA, compensatory and punitive damages are available.67

The FEHA contains language that sets forth California’s public policy with regard to employment discrimination, the purpose of the FEHA, and the FEHA’s relationship to civil rights. With regard to public policy, section 12920 states:

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 race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age.68

The FEHA declares that its purpose is to provide effective remedies that will eliminate such discriminatory practices.69 As to

Division of Fair Employment Practices and the FEPC. Id. § 12901.
61. Id. §§ 12903, 12935.
62. Id. § 12970(a) (Deering Supp. 1988).
64. CAL. GOV’T CODE § 12974 (Deering 1982).
65. Id. § 12973 (Deering Supp. 1988).
66. Peralta Community College Dist. v. Fair Employment & Hous. Comm’n, 181 Cal. App. 3d 1065, 226 Cal. Rptr. 794 (FEHA could order remedy of compensatory damages, including emotional distress damages, when employee was allegedly fired for refusing her supervisor’s sexual advances), review granted, 181 Cal. 3d 1085, P.2d 918, 229 Cal. Rptr. 144 (1986).
68. CAL. GOV’T CODE § 12920 (Deering 1982).
69. Id.
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the FEHA's relationship to civil rights, the statute contains two sections. The first such section declares that the rights the FEHA creates and protects are deemed civil rights:

The opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age is hereby recognized as and declared to be a civil right.70

The FEHA also provides:

The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this part shall be deemed to repeal any of the provisions of the Civil Rights Law or any other law of this state relating to discrimination because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age.71

B. Operation and Coverage of the FEHA

If an employee is terminated for what the employee believes is a discriminatory reason, the employee may file with the DFEH a "complaint," which is also known as a "charge of discrimination," against the employer within one year of the discriminatory practice.72 The Department maintains field offices in major cities throughout the state for the purpose of receiving and investigating such complaints.73 Once a complaint is filed by an employee, the Department is required to make a prompt investigation.74 The Department has one year to determine whether it will prosecute the case.75 Until a decision to prosecute is made, the DFEH acts as a neutral fact finder, not as an advocate.76

If the Department determines that an unlawful employment

70. Id. § 12921.
71. Id. § 12993(a).
72. Id. § 12960 (Deering Supp. 1988). If the plaintiff received knowledge of the discrimination only after the one-year limitation had expired, the plaintiff has an additional 90 days from the one year cut-off in which to bring the claim. Id.
73. Id. § 12930 (Deering 1982).
74. Id. § 12963.
75. Id. § 12965(a) (Deering Supp. 1988).
76. See id. § 12969 (Deering 1982).
practice has been committed, and is unable to eliminate the unlawful practice through conference, persuasion, or conciliation, it may issue an "accusation,"77 which is the administrative law equivalent of a civil complaint. The accusation formally charges the employer with unlawful discrimination and demands a Commission hearing.78 Once the Department decides to issue an accusation, the Department is no longer a neutral fact finder, but an advocate.79 The DFEH issues an accusation and pursues the employee’s complaint at no expense to the employee.80 The employee may, under the Commission’s procedural regulations, seek to intervene as an actual party and participate in the administrative hearing.81

If an accusation is not issued within 150 days, or if the Department determines in less than 150 days that it will not be issuing an accusation, the Department must provide the employee with a "right to sue" letter informing the employee of the right to file a civil claim in the superior, municipal, or justice courts.82

From the employee’s perspective, filing a complaint with the DFEH has both advantages and disadvantages. The agency provides a mechanism for speedy resolution of some complaints and the possibility of some discovery without cost to the employee.83 Approximately twenty-eight percent of the cases filed are settled without further litigation.84

For some, however, the DFEH process may be inhibiting. Employees must contact a field office85 and be interviewed by a non-

77. Id. § 12965 (Deering Supp. 1988).
78. Id. § 12965(a).
79. Id. § 12969 (Deering 1982).
80. See id.
81. 2 CAL. ADMIN. CODE § 7448 (1983).
82. CAL. GOV’T CODE § 12965(b) (Deering Supp. 1988).
83. See id. §§ 12963.1-3 (Deering 1982).
84. See STATE & CONSUMER SERVICES AGENCY, STATE OF CALIFORNIA, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING ANNUAL REPORT 1987-88, at 1 (1988). A recent report by the General Accounting Office of the United States Congress reported significant problems with the investigation of cases by the northern California offices of the DFEH. The report disclosed deficiencies in over half the cases examined in which the DFEH had found no evidence of discrimination. QUACKENBUSH, CALIFORNIA EMPLOYMENT LAWYER ASSOCIATION BULLETIN 4 tables 2.1-2.4 (Nov. 1988). In over half such cases, the allegations were not fully investigated. Id. In over half, there was critical evidence offered by the employee that was not verified. Id. In over one-fifth of the cases, relevant witnesses were not interviewed. Id. Relevant witnesses identified by the employee were less likely to be interviewed than witnesses identified by the employer. Id.
85. Offices are located in Bakersfield, Fresno, Los Angeles, Oakland, Sacramento, San
lawyer who decides whether the employee appears to have a valid claim.\textsuperscript{86} The employee is told that ultimately she or he must be able to prove the discrimination case, and that to do so is difficult.\textsuperscript{87} Almost half of those who attempt to file administrative complaints are told that they have no valid charge, and the agency declines to accept the complaint.\textsuperscript{88} By contrast, anyone may file a civil complaint and thereafter redraft the complaint until it properly states a cause of action.\textsuperscript{89}

If the DFEH accepts an administrative complaint, the employee's allegations are drafted by a non-lawyer and must be signed by the employee under penalty of perjury.\textsuperscript{90} The defendants the employee wants to name in the complaint may or may not be included, at the option of the DFEH officer.\textsuperscript{91} No "Doe" defendants are permitted.\textsuperscript{92} By comparison, a civil complaint need not be verified\textsuperscript{93} and may name "Doe" defendants.\textsuperscript{94}

The FEHA applies only to those forms of discrimination explicitly set forth in the FEHA's description of prohibited conduct.\textsuperscript{88} Unlike similar civil rights statutes, the FEHA's list of un-

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\textsuperscript{86} Much of this information comes from the direct knowledge of David Oppenheimer, the lead author of this Article. Professor Oppenheimer worked for the DFEH as a staff attorney for seven years, from 1979 to 1986.

\textsuperscript{87} See DEPT. OF FAIR EMPLOYMENT & HOUSING, CONSULTANT I BASIC TRAINING MANUAL 8-12 (1989) (on file at the FEHC office, San Francisco, California).

\textsuperscript{88} Attorneys Accuse Fair Employment Agency of Refusing to Investigate Valid Complaints, San Francisco Banner Daily Journal, Apr. 19, 1989, at 1, col. 1; Remarks by Talmidge Jones, Director of the DFEH, at meeting of the FEHC, San Francisco (Dec. 15, 1988) (on file at the FEHC office, San Francisco, California).

\textsuperscript{89} CAL. CIV. PROC. CODE § 473 (Deering Supp. 1988). Amendments to complaints are allowed "in furtherance of justice, and on such terms as may be proper . . . " Id.

\textsuperscript{90} See supra note 86. See also CAL. GOV'T CODE § 12960 (Deering Supp. 1988) (complaint must be verified).

\textsuperscript{91} See supra note 86.

\textsuperscript{92} Id.

\textsuperscript{93} CAL. CIV. PROC. CODE § 446 (Deering Supp. 1988); see, e.g., Parke & Lacy Co. v. Inter Nos Oil & Dev. Co., 147 Cal. 490, 494, 82 P. 51, 52 (1905). A civil complaint may contain inconsistent theories, but if a complaint is verified, "the rule does not permit the pleader to blow both hot and cold in the same complaint on the subject of facts of which he purports to speak with knowledge, under oath.'" Faulkner v. California Toll Bridge Auth., 40 Cal. 2d 317, 328, 253 P.2d 659, 666 (1953) (quoting Beatty v. Pacific States Sav. & Loan Co., 4 Cal. App. 2d 692, 697, 41 P.2d 378, 381 (1935)). Thus, a plaintiff who is not required to verify a complaint has more leeway in pleading.

\textsuperscript{94} CAL. CIV. PROC. CODE § 474 (Deering 1972).

\textsuperscript{95} Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 490, 595 P.2d 592, 612, 156 Cal. Rptr. 14, 34 (1979) (claim for discrimination in employment based on
lawful practices is exhaustive, not simply illustrative. Thus the FEHA does not apply to discrimination based on sexual orientation, nor to age discrimination against those who are under forty. It generally applies only to employers and the agents of employers who regularly employ five or more persons, although charges of unlawful harassment may be filed against an employer of any size. The FEHA does not apply to nonprofit religious organizations, individuals employed by their immediate family, or those employed by certain facilities licensed to assist the disabled.

III. DISPLACEMENT OF COMMON LAW CLAIMS BY THE FEHA

The FEHA is silent on the question of whether the remedy it provides is exclusive. A split exists on whether the FEHA displaces any or all of the common law actions for wrongful termination, both among the divisions of the California Courts of Appeal and the United States District Courts that decide employment cases under California law. At one extreme, one case in the United States District Court for the Eastern District of California has held that the FEHA does not displace any common law actions for sex-based employment discrimination. At the other extreme, decisions in the California Courts of Appeal and the United States District Courts taken cumulatively, have held that the FEHA displaces not only the three common law actions that directly challenge the validity of the termination, but all common law sexual orientation discrimination not covered by FEHA).

96. Id.
97. Id. at 491, 595 P.2d at 613, 156 Cal. Rptr. at 35.
98. CAL. GOV'T CODE § 12941 (Deering 1982).
99. Id. § 12926(c) (Deering Supp. 1988).
100. Id. § 12940(h).
101. Id. § 12926(c).
102. Id. § 12926(b).
103. Froyd v. Cook, 681 F. Supp. 669 (E.D. Cal. 1988) (employee alleged she was terminated for complaining about sexual harassment).
claims that are in any way related to the discrimination and/or the employment relationship. One case goes so far as to hold that if the termination was "bottomed on allegations of employment discrimination," the employee is precluded from bringing any common law claim whatsoever arising from the termination, even if the employee is not bringing a discrimination claim.

A. Development of the Displacement Doctrine

The first case to discuss the issue of displacement of common law remedies for employment discrimination by the FEHA was *Strauss v. A.L. Randall Co.* The plaintiff in *Strauss* alleged that after seventeen years of employment he was fired at age fifty-five because his employer considered him too old for his floral supply sales job. He filed a complaint charging both a violation of the FEHA and tortious discharge. The public policy on which he relied was found in the FEHA prohibition of age discrimination against those over age forty. The court rejected his tort claim, holding that a plaintiff who sued for age discrimination did not have a common law cause of action for tortious discharge.

A critical element in the court's reasoning was the fact that the FEHA was the plaintiff's sole source of public policy. The court found that absent the FEHA statutory declaration, California had no public policy against age discrimination, and an employee had no right to be free from such discrimination.
policy against age discrimination existed only as part of the FEHA's statutory scheme, which not only established the policy but also provided a procedure for remedying violations of that policy. Further, the court found that the FEHA's remedy was comprehensive. The court relied on cases holding that statutory remedies are exclusive where a statute creates a right not previously recognized by the common law, and the statute both provides an adequate and comprehensive remedy and establishes specialized and detailed procedures for the statute's enforcement. Thus, violations of age discrimination could be enforced only through an FEHA action.

In determining that absent the FEHA there was no public policy prohibiting age discrimination and no right to be free from such discrimination, the Strauss court primarily relied on language taken from Gay Law Students Association v. Pacific Telephone & Telegraph Co. indicating that the FEHA's list of prohibited bases for discrimination was restrictive. In Gay Law Students, a class of gay and lesbian organizations and individuals sued Pacific Telephone & Telegraph for sexual orientation discrimination and sued the DFEH for refusing to process sexual orientation claims. After holding that the plaintiffs had properly stated causes of action for violations of the California Constitution, the public utilities code, and the labor code section prohibiting political discrimination, the Gay Law Students court turned briefly to the FEHA claim. The court held that unlike the Unruh Civil Rights Act, which merely codified the common law, the FEHA enumera-

113. Id.
114. Id. at 519, 194 Cal. Rptr. at 523.
115. Id. at 518-19, 194 Cal. Rptr. at 523-24 (citing Orloff v. Los Angeles Turf Club, 30 Cal. 2d 110, 113, 160 P.2d 321, 322-23 (1948); Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist., 65 Cal. App. 3d 121, 131, 135 Cal. Rptr. 192, 199 (1977)).
116. Id. at 520-21, 194 Cal. Rptr. at 524.
120. Id. at 467-75, 595 P.2d at 597-603, 156 Cal. Rptr. at 19-25.
121. Id. at 475-86, 595 P.2d 602-09, 156 Cal. Rptr. at 24-31.
122. Id. at 486-89, 595 P.2d at 609-11, 156 Cal. Rptr. at 31-33.
tion of prohibited discrimination expanded existing common law rights.\textsuperscript{123} Therefore, the FEHA's list of prohibitions was exclusive rather than illustrative.\textsuperscript{124} As a result, the court held that although there was a private right of action for sexual orientation discrimination in employment based on the California Constitution, the labor code, and the public utilities code,\textsuperscript{125} such claims were not covered by the FEHA, and the DFEH need not process them.\textsuperscript{126}

With no FEHA claim being recognized for sexual orientation discrimination, the \textit{Gay Law Students} court did not have cause to consider, and did not consider, the question of whether an FEHA claim would displace any common law remedies. The court did not determine that, in the absence of a prohibition in the FEHA, discrimination based on sexual orientation was lawful. It only held that the FEHA administrative process could not be invoked.\textsuperscript{127}

The language in \textit{Gay Law Students} concerning the FEHA's creation of new rights has been heavily relied on in all of the major cases holding that the common law remedies for wrongful discharge are displaced by the FEHA.\textsuperscript{128} However, taken in context, the case is poor authority for the proposition that the common law did not protect the underlying substantive right to be free of employment discrimination. At most, \textit{Gay Law Students} requires individualized examination regarding each particular kind of discrimination to determine its status when it joined the list of FEHA prohibitions.

The \textit{Strauss} decision is well reasoned in its determination that age discrimination claims do not support a tortious discharge action, at least when the FEHA remedy is available. Employees fired because of their age had no tortious discharge action prior to the expansion of the FEHA to prohibit such discrimination. If an employer is covered by the FEHA, employees should be expected to use the statutory process. However, reliance on \textit{Strauss} outside the

\begin{itemize}
\item \textsuperscript{123} Id. at 490, 595 P.2d at 612, 156 Cal. Rptr. at 34.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Id. at 492, 595 P.2d at 614, 156 Cal. Rptr. at 34.
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Id.
\end{itemize}
area of age discrimination is improper without first determining whether the type of discrimination alleged is only a violation of policy because of the FEHA.

Absent an examination of the particular right asserted, one cannot conclude, based on Gay Law Students, that before the FEHA's passage employment discrimination was lawful, or that its 1959 status was frozen in time. The common law is constantly evolving, and legislative or constitutional acts independent of and subsequent to the passage of the FEHA may create new rights not previously provided by the common law.129

Three months after the Strauss decision, the same issue of exclusivity arose in the United States District Court for the Northern District of California. In Mahoney v. Crocker National Bank,130 a class of plaintiffs brought a statutory and common law action against the employer for age discrimination in employment. Without citing Strauss, the court held that the tortious discharge claim was displaced by the FEHA.131 The reasoning was based on the same assumption as Strauss: because no cause of action for age discrimination in employment existed before the FEHA, the remedy provided for by the FEHA was exclusive.132 The Mahoney court found in the FEHA's specific and detailed remedial scheme a legislative intent that the FEHA be exclusive.133

In both Strauss and Mahoney, the courts examined statutory and judicial authority to determine if a cause of action for age discrimination existed prior to the FEHA.134 In the displacement cases that followed, however, the decisions went awry by concluding that an examination of the prior history of the legality of the complained-of discrimination was unnecessary, even when the claim was for a form of discrimination other than age discrimination.135

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129. See supra notes 293-322 and accompanying text.
131. Id. at 294.
132. Id.
133. Id.
B. Expansion of the Displacement Doctrine Beyond Age Discrimination

The first expansion of the displacement doctrine was into the area of religious discrimination. In *Baker v. Kaiser Aluminum & Chemical Corp.*, the first published decision to follow *Strauss* and *Mahoney*, the plaintiff filed a claim alleging that he had been wrongfully terminated at age fifty-one after fifteen years of employment. The complaint included actions for tortious discharge based on age discrimination, breach of employment contract based on an implied-in-fact promise to terminate only for good cause, and bad faith discharge. Facing summary dismissal of each claim on the facts, the plaintiff attempted to amend his complaint to allege religious discrimination. The court, relying on *Strauss* and a case since depublished, refused to hear the religious discrimination claim, holding that "there is no common law cause of action for employment discrimination in California." The court made no examination of whether religious discrimination violated either public policy or the common law prior to the FEHA's enactment.

The religious discrimination claim in *Baker* was summarily dismissed, and the court therefore never discussed the plaintiff's claims with regard to the legal bases of tortious discharge, breach of employment contract, and bad faith. Soon thereafter, a decision from the same district expanded *Strauss* by expressly applying *Strauss*' reasoning to sex discrimination claims brought under breach of employment contract and bad faith theories.

In *Hudson v. Moore Business Forms, Inc.*, the plaintiff filed a claim charging her former employer with sex discrimination in employment in violation of the federal and state equal pay acts, the FEHA, express contract provisions to terminate only for good cause and not to discriminate based on sex, and the implied cove-

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137. *Id.* at 1317.
138. *Id.*
139. *Id.* at 1322.
nant of good faith and fair dealing. The court dismissed part of the plaintiff's FEHA claim because the complaint filed with the DFEH did not sufficiently describe the discrimination and thus had not given proper notice of the plaintiff's grievance.

Turning to the contract claims, the court concluded that, to the extent these claims were based on sex discrimination, they were entirely displaced by the FEHA. Relying on Gay Law Students and Strauss, the court reasoned that because the FEHA created new rights not found in the common law, the plaintiff's claim that the contract expressly prohibited sex discrimination was an unacceptable attempt to incorporate a right created by the FEHA into a common law contract action. The court also dismissed the bad faith claim on the same displacement basis.

The Hudson court failed to discuss whether the employment contract itself can explicitly create rights entirely separate from the statutory protections against employment discrimination.

The court also failed to note that Strauss, the case upon which it relied, concerned a tortious discharge theory, not a breach of employment contract theory. Nor did Hudson discuss whether there was a public policy against or a civil action for sex discrimination, prior to the FEHA amendment prohibiting such discrimination.

The Hudson court's decision cannot be justified by reliance on Strauss alone. The decision that an employer and employee cannot agree to a contract term promising non-discrimination goes far beyond the question addressed in the possible displacement of a tortious discharge cause of action. Under Strauss, for a tortious discharge action to be displaced, the court must examine the history of an asserted discrimination and determine whether a public policy prohibited such discrimination prior to the passage of the FEHA. A breach of contract action, however, should concern only the terms of the contract entered into between the parties and

144. Hudson v. Moore Business Forms, Inc., 609 F. Supp. 467, 470 (N.D. Cal. 1985). In addition, the plaintiff claimed interference with advantageous economic agreement. Id. This claim was dismissed for lack of evidence to rebut the claim that the individual defendants were acting within the scope of their employment. Id. at 475.
145. Id. at 472-73.
146. Id. at 474.
147. Id.
148. Id. at 475.
whether the asserted discrimination is prohibited by that contract. Nothing in the FEHA expressly prohibits parties from creating separate rights under an employment contract, a point the court does not discuss. Further, because a bad faith claim is again based on contract principles, the application of Hudson's reasoning to this cause of action is similarly misguided. Finally, the assumption that sex discrimination in employment did not violate the common law is not supported.\footnote{149} For these reasons, Hudson is seriously flawed.

The question of exclusivity of the FEHA in the area of race discrimination was taken up by the California Court of Appeal in Robinson v. Hewlett-Packard Corp.\footnote{150} The plaintiff filed a complaint alleging that he had been fired because of his race.\footnote{181} His causes of action included bad faith termination, breach of an implied-in-fact contract to terminate only for good cause, and race discrimination in employment in violation of the FEHA.\footnote{152} He also pleaded an action for intentional infliction of emotional distress based on racial slurs directed at him by his supervisor.\footnote{183} The court interpreted the Strauss decision and certain language in the FEHA to require displacement of plaintiff's bad faith discharge claim and breach of contract claim, but did not discuss displacement with regard to his intentional infliction of emotional distress claim.\footnote{154} The relevant statutory language relied on in Robinson is found at California Government Code section 12993(c).\footnote{185} The statute

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\begin{itemize}
\item 149. See infra notes 293-304 and accompanying text.
\item 152. Id. at 1120, 228 Cal. Rptr. at 597. The court interpreted the plaintiff's "inartful pleading" to include five causes of action, including bad faith discharge, race discrimination in violation of the FEHA, invasion of privacy, intentional infliction of emotional distress, and wrongful discharge based on retaliation for asserting legal rights. Id. at 1119-20, 228 Cal. Rptr. at 597.
\item 153. Id. at 1127-30, 228 Cal. Rptr. at 602-05.
\item 154. Id. at 1124-25, 228 Cal. Rptr. at 600-01.
\item 155. CAL. Gov't Code § 12993(c) (Deering 1982). Section 12993(c) states:
\begin{quote}
While it is the intention of the Legislature to occupy the field of regulation of discrimination in employment and housing encompassed by the provisions of
\end{quote}
\end{itemize}
provides that the legislature intends to occupy the field of discrimination, but limits its exclusivity provision to ban only local laws.\textsuperscript{156}

The Robinson court applied this language and determined that to the extent the plaintiff’s bad faith discharge claim was based on race discrimination, it was displaced by the FEHA.\textsuperscript{157} However, the court found, if the employee’s claim was based on an act by the employer that was outside the area of race discrimination, the fact that the claim was accompanied by an allegation of race discrimination would not foreclose other common law tort claims.\textsuperscript{158} The decision rejects the breach of contract claim with no discussion of whether the reasons for rejecting a tortious discharge claim apply with equal force to a breach of employment contract claim, nor whether racial discrimination in employment violated either the common law or public policy at the time the FEHA was passed. To the extent the Robinson reasoning replicates that of Hudson, it is likewise flawed.

The Robinson court separately considered the question of the intentional infliction of emotional distress claim based on racial harassment.\textsuperscript{159} The court discussed two California Supreme Court decisions from the 1970’s. In the first, Alcorn v. Anbro Engineering, Inc.,\textsuperscript{160} the plaintiff was fired after being told by his supervisor that the supervisor did not “want any ‘niggers’ working for me.”\textsuperscript{161} The court permitted the plaintiff’s action for intentional infliction of emotional distress. In a later case holding that punitive damages may be awarded in a civil suit for race discrimination brought under the FEHA, the California Supreme Court referred to Alcorn as having “recognized a right independent of the FEPA to seek emotional distress and punitive damages when overt racial malice

\begin{quote}
this part, exclusive of all other laws barring discrimination in employment and housing of any city, city and county, county, or other subdivision of the state, nothing contained in this part shall be construed, in any manner or way, to limit or restrict the application of section 51 of the Civil Code.
\end{quote}

\textit{Id.}

156. \textit{Id.} \S 12993. For a discussion of the meaning of section 12993, see \textit{infra} notes 221-30 and accompanying text.


158. \textit{Id.} at 1126, 228 Cal. Rptr. at 602.

159. \textit{Id.} at 1127-30, 228 Cal. Rptr. at 603-05.


161. \textit{Id.} at 497, 468 P.2d at 217, 86 Cal. Rptr. at 89.
is the motive for discharge."

In the second case considered by the Robinson court, Agarwal v. Johnson, the plaintiff's supervisor directed racial slurs toward him and recommended the plaintiff's dismissal on the false claim that he was not qualified to work at his current position. The plaintiff sued for intentional infliction of emotional distress. A verdict in his favor was upheld.

Relying on these decisions, the Robinson court concluded that the plaintiff could pursue his claim for intentional infliction of emotional distress based on racial harassment. The court did not discuss the possibility that, if a bad faith discharge claim based on race discrimination would be displaced under the reasoning that the legislature meant to occupy the field of race discrimination in employment, an intentional infliction of emotional distress claim based on race discrimination might also be displaced by the FEHA under this same reasoning.

In Ficalora v. Lockheed Corp., the same panel of judges that decided Strauss subsequently examined the question of displacement where the claim was retaliation against the employee after the employee complained about sex discrimination. In Ficalora, the plaintiff charged that she had been fired because she complained to the United States Department of Labor about sex discrimination on the job. Her claim, filed after the FEHA statute of limitations had expired, charged tortious discharge and bad faith discharge. As her source of public policy, the plaintiff identified not only the FEHA but also a labor code provision that prohibits retaliation by employers against employees reporting violations of law to the government. The court considered the possibility that the retaliation she complained of violated public policy prior to or

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164. Id. at 941, 603 P.2d at 63-64, 160 Cal. Rptr. at 146-47.
165. Id. at 944, 603 P.2d at 65, 160 Cal. Rptr. at 148.
166. Id. at 947, 603 P.2d at 67, 160 Cal. Rptr. at 150.
169. Id. at 491, 493, 238 Cal. Rptr. at 361, 362.
170. Id. at 492, 238 Cal. Rptr. at 361 (citing CAL. LAB. CODE § 1102.5(b) (Deering Supp. 1988)).
independent of the existence of the FEHA.\textsuperscript{171} It determined that even if there were a prior public policy, her claim was still displaced by the FEHA.\textsuperscript{172}

The court reasoned that in passing the FEHA, the legislature stated its intent to occupy the entire field of regulation of employment discrimination.\textsuperscript{173} Thus, any independent public policy against employment discrimination, whether enacted before or after the FEHA, and any breach of contract rights for discrimination, were all subsumed by the FEHA. Moreover, the court decided that the cause of action for tortious discharge recognized in \textit{Tameny} and its progeny applied only to terminations that violate public policy where the firing itself is not prohibited by any specific statute.\textsuperscript{174} Because the plaintiff in \textit{Ficalora} was suing under a statute that not only expressed the public policy, but also provided a remedy, the court held that remedy must be exclusive.\textsuperscript{175}

The \textit{Ficalora} court distinguished the decision in \textit{Hentzel v. Singer.}\textsuperscript{176} In \textit{Hentzel}, the plaintiff was allowed a public policy tort claim when he was fired in retaliation for attempting to obtain a smoke-free environment in the workplace.\textsuperscript{177} The Occupational Safety and Health Act ("OSHA")\textsuperscript{178} prohibits such retaliation.\textsuperscript{179} The court in \textit{Hentzel} determined that a well-established tort for retaliatory wrongful termination for reporting health and safety violations existed long before the passage of OSHA.\textsuperscript{180} Thus, the court concluded, the remedy given under OSHA for retaliatory discharge was cumulative with other remedies for wrongful termination rather than exclusive.\textsuperscript{181}

The court in \textit{Ficalora} distinguished \textit{Hentzel} on the ground

\begin{thebibliography}{99}
\bibitem{171} Id.
\bibitem{172} Id.
\bibitem{173} Id. See infra notes 221-36 and accompanying text. See also \textit{Cal. Gov't Code} § 12993(c) (Deering Supp. 1988).
\bibitem{175} Id. at 492-93, 238 Cal. Rptr. at 362. The plaintiff sued under California Labor Code section 1102.5(b). \textit{Id}.
\bibitem{176} Id. at 493, 238 Cal. Rptr. at 362 (citing \textit{Hentzel v. Singer Co.}, 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982)).
\bibitem{179} Id. § 6310 (Deering Supp. 1988).
\bibitem{181} Id. at 300, 188 Cal. Rptr. at 165-66.
\end{thebibliography}
that in *Hentzel* the plaintiff had the benefit of a pre-existing right of action, while in *Ficalora* there was no pre-existing action because the labor code policy was passed after the FEHA. The *Ficalora* court apparently lost sight of its earlier assumption that a public policy against retaliation, the basis of the plaintiff’s claim, existed prior to the passage of the FEHA. The distinction between the facts in *Hentzel* and in *Ficalora* was one between statutory remedies that are exclusive because the statute’s terms state they are exclusive, and statutory remedies that are cumulative because a statute articulates pre-existing rights and is silent on the issue of exclusivity of remedy. The *Ficalora* court’s reasoning in distinguishing *Hentzel* is flawed because it fails to distinguish and address this difference between exclusive and cumulative statutory remedies. The court’s more serious problem, however, is in its reading of an explicit requirement of exclusivity into the FEHA.

The broadest displacement decision as of yet is that of the United States District Court for the Northern District of California in *Diem v. City & County of San Francisco*. The plaintiff, a Jewish, former firefighter, alleged that he had suffered slurs, harassment, and physical assaults, with the encouragement and ratification of his supervisors, because of his religion and ethnicity. His complaint included statutory claims, including an FEHA claim for religious discrimination, and state common law claims for tortious discharge, intentional and negligent infliction of emotional distress, negligence, assault and battery, and defamation. Relying on *Strauss, Hudson,* and *Mahoney,* the court ruled that all of the common law claims were fully displaced by the FEHA because the basis of all of the actions was religious discrimination and harassment. By displacing not only the wrongful discharge causes of action, but other common law torts as well, the decision expands the cases it relies on beyond their holdings. Thus, *Diem* is in clear

183. *Id.*
184. *See infra* notes 221-36 and accompanying text.
186. *Id.* at 808.
187. *Id.* at 811.
188. *Id.* However, the court did allow plaintiff’s religious discrimination claim under California Civil Code section 51.7, which prohibits violence or threats of violence on account of religion. *Id.* at 812.
conflict with the holdings of Alcorn, Agarwal, and Robinson, as well as the reasoning of Strauss and Mahoney.

C. Judicial Limitations on the Displacement Doctrine

The cases that part company with Strauss and its progeny do so by narrowing its application; none directly challenge its premises. Some of the subsequent cases, involving displacement of age discrimination causes of action, limit Strauss to displacement of tortious discharge claims and bad faith claims where the violation of public policy or bad faith action was based exclusively on age discrimination. Another case limits Strauss to age discrimination by declining to displace any part of a sex discrimination claim. These cases reject the expansive reading of Hudson and Diem that all claims that involve discrimination in the employment context are displaced.

The first line of cases limiting displacement held that if one, but not the sole, motivation for the wrongful termination is discrimination, the breach of employment contract and bad faith discharge claims are not displaced. In the three United States District Court cases taking this approach, breach of employment contract and bad faith discharge claims were permitted while tortious discharge claims, if brought, were dismissed.

In Clement v. American Greetings Corp., the plaintiff, demoted after nineteen years of service, brought statutory age discrimination claims and common law breach of employment contract and bad faith discharge claims, but did not allege tortious discharge. The court read Strauss narrowly to apply only to claims based solely on age discrimination that are coextensive with statutory claims, and permitted the plaintiff's common law claims to be heard. In Pfeifer v. United States Shoe Corp., the plaintiff, as in Clement, did not plead a tortious discharge, but alleged both statutory age discrimination claims and common law contract

192. Id. at 1327-28.
193. Id. at 1331.
and bad faith claims.\(^{198}\) The bad faith and contract claims were permitted because "these claims are not solely dependent on the age discrimination allegation, [so] they are not, as a matter of law, preempted by the age discrimination provisions of the FEHA."\(^{199}\) In *Harlan v. Sohio Petroleum Co.,*\(^{200}\) the court dismissed an age discrimination claim under the tortious discharge theory, relying on *Strauss,* but denied dismissal of breach of contract and bad faith claims because they were based only in part on the alleged age discrimination; they were also based in part on separate facts that raised an inference that a contract had been breached and breached in bad faith.\(^{198}\)

A broader decision rejecting displacement is the United States District Court case of *Froyd v. Cook.*\(^{201}\) The plaintiff, a dispatcher for the Rio Vista Police Department, alleged she was sexually harassed and, when she complained about the harassment, discharged in retaliation for complaining.\(^{202}\) She sued for wrongful discharge without designating the theory or theories upon which she was relying.\(^{203}\) The defendant sought dismissal based on the displacement doctrine.\(^{204}\)

The *Froyd* court began its analysis of whether the tortious discharge claim was displaced by examining whether sex discrimination in employment and retaliation for complaining about unfair employment conditions violated California’s public policies.\(^{205}\) The court pointed to article I, section 8 of the California Constitution,\(^{206}\) which prohibits sex discrimination in employment, and to a 1971 California Supreme Court decision holding that sex discrimi-

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195. Id. at 971.
196. Id. at 972.
198. Id. at 1030-31.
200. Id. at 670.
201. Id. at 672 n.8.
202. The defendant actually based its defense on “preemption” rather than “displace-
ment,” following the language of many of the cases discussed herein. Id. at 670 n.2. Judge Karlton correctly explained that while “preemption” is commonly used to describe the dis-
placement problem, preemption generally concerns questions of hierarchy, such as federal preemption of state claims. Id. Where a remedy is allegedly exclusive, as argued here, the question is not whether it preempts other claims but whether it displaces them. Id. The use of “displacement” in this Article is credited to Judge Karlton’s observation.
203. Id. at 672.
204. See supra note 10.
nation claims were entitled to strict scrutiny in equal protection analysis because the right to be free of sex discrimination in employment is fundamental. The court also noted two 1966 cases that upheld the right of public employees to be free from retaliation for complaining about employment conditions. It concluded that both sex discrimination in employment and retaliation for complaining about sex discrimination violate public policy, independent of the FEHA.

The court then examined the question of displacement of common law remedies in light of these independent public policy breaches. The court pointed out that the FEHA explicitly provides that the FEHA does not repeal any provision of the "Civil Rights Law" or any other state law relating to discrimination. The FEHA does explicitly preempt local ordinances on the subject. The court concluded that the statute's language leaves uncertain the question of whether it should be read to displace common law claims.

The court next examined the cumulative remedy analysis utilized in Hentzel v. Singer Co. Hentzel held that where a statute creates a remedy for violations of a pre-existing right it does not displace the pre-existing remedies; the statutory remedy is merely cumulative. The Froyd court concluded that the cumulative remedy analysis was controlling for sex discrimination in employment, notwithstanding the Strauss court's holding that age discrimination did not violate public policy prior to the FEHA's prohibition. The existence of public policies against sex discrimination and against retaliation for complaining about unfair working conditions were long standing. Therefore, as to these vio-

207. Id.
208. Id. at 673-77.
209. Id. at 673.
210. CAL. GOV'T CODE § 12993(c) (Deering 1982). See supra note 155.
lations the FEHA was merely cumulative.215

D. The FEHA Does Not Require the Displacement of Common Law Actions for Employment Discrimination

This section examines the FEHA's language and history, and the doctrines relied on in Strauss, and concludes that the legislature did not intend to make the FEHA exclusive.

1. Comparison With the Workers' Compensation Act

If the FEHA contained the kind of exclusivity provision found in the Workers' Compensation Act,216 the question of displacement would be relatively easy. The Workers' Compensation Act, passed to replace negligence actions from workplace accidents with a no-fault system, expressly provides: “[T]he right to recover such compensation, pursuant to the provisions of this division is . . . the exclusive remedy for injury or death of an employee . . . .”217 Although the Workers' Compensation Act's exclusivity is subject to judicially recognized exceptions, such as intentional acts218 and, in-

215. Id. at 677. A California Court of Appeal has recently taken Froyd a step further, and held that for a charge of sexual harassment, the plaintiff not only has a common law right independent of the FEHA, but that she need not exhaust the FEHA administrative remedies. Rojo v. Kliger (Rojo I), 205 Cal. App. 3d 646, 252 Cal. Rptr. 605 (1988).

In Rojo I, the court reasoned that the FEHA must be broadly construed to effect the intent of the legislature. Id. at 653, 252 Cal. Rptr. at 609. Broad construction required an interpretation of section 12993 that only local law was preempted. Id. The court also relied on section 12930 (“the remedies and procedures of this part shall be independent of any other remedy or procedure that might apply”) and section 12993 (“nothing contained in this part shall be deemed to repeal . . . any other law of this state relating to discrimination”). Id. at 654, 252 Cal. Rptr. at 609. Read together, the court thought it unmistakable that the legislature did not intend the FEHA to be exclusive. Because the FEHA was not meant by the legislature to be exclusive, it was unnecessary to ascertain whether there was a pre-existing cause of action, although the court went on to identify pre-existing causes of action to bolster its conclusion. Id. at 655-56, 252 Cal. Rptr. at 610-11.

A rehearing was granted on November 22, 1988, and in a new decision filed as this Article went to press, Rojo v. Kliger (Rojo II), 89 Daily Journal D.A.R. 4207 (Mar. 29, 1989), the court again held that the FEHA was not exclusive, but that in FEHA actions the plaintiff must exhaust the DFEH administrative remedy. Id.


terestingly, acts that violate the FEHA, it generally displaces otherwise valid tort actions. In contrast, the FEHA contains no such express exclusivity language.

2. The Language and Legislative History of the FEHA Do Not Support Displacement of Common Law Claims

As discussed in the Robinson and Froyd cases, California Government Code section 12993(c) does state that it was the legislature's intent in passing the FEHA to "occupy the field" of regulation of discrimination exclusive of all other anti-discrimination laws passed by local governments. Robinson looked at the language and concluded that the bad faith discharge claim based on race discrimination was displaced by the FEHA. Froyd looked at the same language and concluded that it merely excluded local regulation of discrimination.

California Government Code section 12993(c) contains not only language stating it intends to "occupy the field," but also says that "nothing contained in this part shall be construed in any manner or way, to limit or restrict the application of Section 51 of the Civil Code [the Unruh Civil Rights Act]." Section 12993(a) states that "nothing contained in this part shall be deemed to repeal any of the provisions of the Civil Rights Law or any other law of this state relating to discrimination . . . ." The civil rights law of California is the Unruh Civil Rights Act ("Unruh Act"), which has no application to employment discrimination. The statutory language appears enigmatic.

The meaning of section 12993 can be understood only through

220. Compare State Personnel Bd. v. Fair Employment & Hous. Comm'n, 39 Cal. 3d 422, 703 P.2d 354, 217 Cal. Rptr. 16 (1985) (the jurisdiction of the FEHC and the California State Personnel Board were concurrent because the FEHA was not meant to supplant existing common law remedies for employment discrimination).
224. CAL. GOV'T CODE § 12993(c) (Deering 1982).
225. Id. § 12993(a).
an examination of its statutory history. The current language of the section is a merging of one section from the FEPA and one section from the Rumford Act.\textsuperscript{227} The original FEPA section provided:

Nothing contained in this part shall be deemed to repeal or affect the provisions of any ordinance relating to such discrimination in effect in any city, city and county, or county at the time this act becomes effective, insofar as proceedings theretofore commenced under such ordinance or ordinances remain pending and undetermined. The respective administrative bodies then vested with the power and authority to enforce such ordinance or ordinances shall continue to have such power and authority, with no ouster or impairment of jurisdiction, until such pending proceedings are completed, but in no event beyond one year after the effective date of this part.\textsuperscript{228}

Thus, the FEPA removed from local government the right to enforce their employment discrimination laws and placed that power in a centralized state agency.

Enforcement of housing discrimination laws under the Rumford Act was handled quite differently. The Rumford Act originally provided:

As it is the intention of the Legislature to occupy the whole field of regulation encompassed by the provisions of this part, the regulation by law of discrimination in housing contained in this part shall be exclusive of all other laws banning discrimination in housing by any city, city and county, county, or other political subdivision of the State. Nothing contained in this part shall be construed to, in any manner or way, limit or restrict the application of section 51 of the Civil Code.\textsuperscript{229}

The Unruh Act, which, among other areas, prohibits housing discrimination, provides for enforcement either by private action or by local prosecution by city attorneys or district attorneys.\textsuperscript{230} Thus, by the passage of the FEHA, the legislature disallowed local enforcement and regulation of employment discrimination, but enforcement of housing discrimination was permitted at both the

\textsuperscript{228} \textit{Cal. Lab. Code} § 1432 (repealed 1980).
\textsuperscript{229} \textit{Cal. Health & Safety Code} § 35743 (repealed 1980).
state and local levels. The FEHA's language about occupying the field came only from the fair housing law, not the employment discrimination law. Under the housing discrimination law, unlike the employment discrimination law, local enforcement through the district or city attorney was permitted, but no local government was allowed to legislate. The concern regarding occupying the field was merely a concern about local government regulating or legislating in this specific area. It cannot logically be extended to encompass a repeal of common law actions in the area of employment discrimination.

When the statutes were combined into the FEHA, the legislature failed to account for the distinction between its grant of local enforcement of the Unruh Act and the unavailability of such enforcement for the fair employment law. It would be illogical to suddenly apply the prohibition of local laws against housing discrimination to displace all laws concerning employment discrimination. The legislature, by combining the two sections, intended to centralize the enforcement of the two acts under one agency and to disallow local regulation, but not enforcement, of housing or employment discrimination. It expressed no intent to prevent application of the common law to employment discrimination. To read section 12993(c) to displace all common law remedies for discrimination would be to read into the section more than was intended. The language of section 12993(a) reinforces this interpretation because it explicitly states that the FEHA does not repeal any other law of this state.

This analysis also explains the references to the Unruh Act in the FEHA. Although the Unruh Act does not apply to employment discrimination, it does apply to housing discrimination and the FEHA covers both employment and housing. The legislature, by excepting the Unruh Act from its limitations on local enforcement, explicitly provided that the two statutes work together.

3. The FEHA Is Not Made Exclusive by Implication

Even though a close examination of the FEHA discloses that neither section 12993(c), nor any other section, expressly provides for exclusivity, it could be argued that the legislature, by implication, meant the FEHA to be exclusive. Although the denial of common law rights by implication is disfavored, it is not unthink-
The strongest argument for interpreting the FEHA to require displacement by implication is raised in the findings of Strauss and Mahoney that the FEHA provides a specific, detailed, and comprehensive scheme to investigate and provide remedies for employment discrimination, and that it must therefore have been intended to be exclusive. Underlying that argument is the assumption that the government is not going to create and maintain such a comprehensive scheme and then let people simply ignore it if they choose. The argument fails on two grounds: (1) the FEHA is not comprehensive, and (2) by permitting a private right of action, the legislature nullified any reason for maintaining the FEHA as exclusive.

The argument that the FEHA is comprehensive fails to account for the large number of workers excluded from its protection. Except in cases of unlawful harassment, employers of fewer than five persons are not regulated by the FEHA. Neither are nonprofit religious organizations, including religious schools and hospitals. Persons employed by their own family are outside the FEHA’s protection, as are those working in certain licensed works shops for the disabled. Because the FEHA fails to provide administrative protection to these groups, the FEHA is not “comprehensive” under the normal meaning of the word.

In order to protect the use of the administrative remedy, the FEHA, like the Workers’ Compensation system, could have provided an exclusive administrative right of action. However, the legislature has seen fit to open the courts to civil actions under the FEHA rather than limiting plaintiffs to an administrative proceeding. By permitting the escape from the administrative system, the legislature has nullified any implication that it meant the administrative action to be exclusive.

233. CAL. GOV’T CODE § 12926(c) (Deering Supp. 1988).
234. Id.
235. Id. § 12926(b).
236. There is some question as to whether there was a private right of action under the FEHA prior to the passage of California Government Code section 12965(a) in 1977. Whatever the original intent, it is clear that there is now such a right. See CAL. GOV’T CODE § 12965(a) (Deering Supp. (1988) (formerly CAL. LAB. CODE § 1422 (Deering 1976) (repealed 1980)).
E. Displacement Is Only Appropriate Where an Act of Discrimination Is Wrongful Only Because it Violates the FEHA

Having concluded that the legislature did not intend the FEHA to be exclusive, the question remains whether there are acts of discrimination that violate the FEHA but are not subject to common law claims, thus limiting an employee to an FEHA statutory cause of action. This section examines and compares the bases and policies upon which the common law claims and the FEHA rest. It concludes that in certain situations, tortious discharge actions and bad faith actions, if permitted, would only exist because of reliance on the FEHA's policies. In these situations, the common law actions are not viable. In most cases, including all contract claims and many tortious discharge and bad faith claims, the common law claim does not rely exclusively on the FEHA's policies. In these situations, the common law claims are not displaced.

1. Breach of Employment Contract

An action for breach of the employment contract protects the right of private persons to reach enforceable agreements about the terms and conditions of employment. The right to enforce private agreements is of sufficient importance to be constitutionally protected from unwarranted government interference. Nothing in the FEHA suggests an intent to prevent employers and employees from privately contracting for additional non-discrimination protections beyond those provided by statute.

Although employment contracts may be implied by the facts of the employment relationship, they may also be express agreements, such as the express agreement not to discriminate alleged in Hudson v. Moore Business Forms, Inc. An employer and employee are not required to enter into such a private non-discrimination contract and may be satisfied with the statutory remedies for discrimination established by the legislature. The employee, however, may desire the greater sense of security that comes with an explicit guarantee and may have the bargaining power to suc-

cessfully negotiate for such security. The employer may believe that explicit guarantees of non-discrimination attract and retain better employees, improve morale, or reduce litigation costs. If the employer and employee freely choose to contract for more protection against discrimination than the law requires, the FEHA provides no reason to interfere with their agreement.240 Indeed, one of the first victories of the civil rights movement was Congress' passage of the Civil Rights Act of 1866241 guaranteeing blacks the same right of contract provided to whites. There would be a cruel irony in determining that the FEHA, another civil rights law, has now rendered non-discrimination contracts unenforceable.

Despite the existence of the FEHA, the right to contract for non-discrimination is far from trivial. An employer and employee may elect to provide substantially more protection to the employee than those guaranteed by the FEHA.242 They may decide, for example, on a private grievance procedure for speedy resolution of any disputes.243 They may agree on a greater accommodation for an employee's pregnancy or handicap, or may negotiate a more comprehensive anti-harassment education program than the FEHA requires. They may agree that any termination or other employee discipline must be for good cause.244

If the employer and employee reach such an agreement, the procedural as well as substantive consequences for a contract action are significant. First, the FEHA contains a one-year statute of limitations,245 while claims based on oral contracts are subject to a two-year limitations period,246 and those based on a written contract benefit from a four-year period.247 Thus, many claims filed too late for relief under the FEHA are timely as contract claims.

240. For a statement of the interests protected by the FEHA, see generally Cal. Gov't Code § 12920 (Deering 1982).
242. They cannot, however, contractually agree that the FEHA's provisions are inapplicable. See generally Cal. Civ. Code § 3513 (Deering 1984) (statutes propounded for the public good cannot be waived).
247. Id. § 337 (Deering 1972).
Second, the burden of proof of discrimination in a statutory discrimination action remains on the employee throughout the trial.\textsuperscript{248} In a contract action, the employer usually carries the burden of proving that terminating the employee before the end of the contract period was justified.\textsuperscript{249} Third, discrimination claims are often subjected to scrutiny for dual or mixed motivation. The portion of the motivation for a termination that must be discriminatory to trigger the remedial provisions of the FEHA is uncertain.\textsuperscript{250}

Here, again, the parties can contract for clarity regarding the permissible motivations for termination. Lastly, if an employee is forced to choose between an FEHA action and a breach of contract action, the employee must elect a factual explanation of the employer's conduct before any response to the charge from the employer.\textsuperscript{251} The employer may subsequently provide information leading the employee to conclude that the abandoned alternative would have been a better choice. Such an election is not required of other civil complainants because inconsistent facts and theories may be pled in a civil complaint.\textsuperscript{252} At a practical level, the displacement of the breach of contract action in cases involving em-

\textsuperscript{248}. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) (the plaintiff in a title VII case has the burden of proving discrimination by a preponderance of the evidence).

\textsuperscript{249}. In the absence of a specific agreement in an employment contract regarding who carries the burden, the employer carries the burden of proving the employee's termination was authorized under the contract. Wise v. Southern Pac. Co., 1 Cal. 3d 600, 604-05, 463 P.2d 426, 428, 83 Cal. Rptr. 202, 204 (1970).


\textsuperscript{251}. For instance, if an employee was fired, ostensibly because he refused to break the law on his employer's behalf, and two years later in depositions the employer claims he fired the plaintiff because of his race (in violation of the employment contract), plaintiff may be unable to amend his complaint to plead breach of contract or FEHA violations because the statutes of limitations have run. Because the employer's motives cannot be fully explored until discovery has begun, a possibility exists that the employer will put forth a reason for the termination upon which the employee can no longer sue, due to the running of the statute of limitations.

\textsuperscript{252}. Lambert v. Southern Counties Gas Co. of Cal., 52 Cal. 2d 347, 352, 340 P.2d 608, 611 (1959) (plaintiff may plead inconsistent causes of action in separate counts of a single complaint).
Employment discrimination is a considerable hindrance to the victims of discrimination.

2. Traditional Torts

Actions for various long-recognized or "traditional," torts should also be treated as distinct from FEHA claims. The right to bring an action independent of the FEHA for emotional distress was sustained by the California Supreme Court in the 1970's253 and again in 1982.254 Even assuming that the court was concerned only with the intentional or negligent infliction of emotional distress actions in Alcorn255 and Commodore,256 actions for assault, battery, defamation or other common law torts should also be independently available. No FEHA provision suggests the need for displacement of traditional torts. The bases of these torts are different from those actions created by the FEHA.257 It is repugnant to our system of justice to require that the victims of personal injuries, inflicted by reason of discriminatory animus, be foreclosed from a legal action solely because the infliction of their injuries also violates the discrimination law, whereas employees who have not been discriminated against may have a tort cause of action.

3. Tortious Discharge and Bad Faith Termination

Tortious discharge actions depend on a determination that the employer violated a public policy.258 Bad faith cases depend on a determination that the employer acted in bad faith.259 Both kinds of cases require careful examination of the source that indicates

257. For instance, the intentional infliction of emotional distress cause of action is intended to provide relief for the outrageous conduct of others, whether or not occurring in the employment context. See Agarwal v. Johnson, 25 Cal. 3d 932, 160 P.2d 58, 160 Cal. Rptr. 141 (1979) (plaintiff stated a cause of action for intentional infliction of emotional distress where employer's use of racial epithets constituted outrageous conduct).
the employer's actions violated public policy or were in bad faith, to determine whether a claim based on that source is displaced by an FEHA action. Those claims in which the employer's actions are only in bad faith or in violation of public policy because of a policy derived entirely from the FEHA are on a different footing from those claims that have a basis independent of the FEHA.

In examining a tortious discharge or bad faith action based entirely on a claim of age discrimination, the Strauss court's reasoning regarding displacement is well taken. Strauss reasoned that when the legislature expanded the FEHA to age discrimination, it created two things: (1) a right to be free from age discrimination, and (2) a process by which complaints for age discrimination could be processed. To the extent that process is sufficient to enforce the new right, the Strauss court properly concluded that the FEHA process is exclusive because without the FEHA there would be no violation of public policy. Where there is a source of policy independent of the FEHA, however, Strauss is inapplicable. In such cases, the common law discharge actions are not displaced by the FEHA.

IV. PUBLIC POLICY PROHIBITS SEX AND RACE DISCRIMINATION IN EMPLOYMENT INDEPENDENT OF THE FEHA

Because a common law action based on public policy does exist if a policy independent of the FEHA prohibits discrimination, a critical question is which acts of discrimination violate public policies independent of the FEHA. This section examines California public policy and concludes that race and sex discrimination in

261. Strauss v. A.L. Randall Co., 144 Cal. App. 3d 514, 520, 194 Cal. Rptr. 520, 524 (1983). In some cases the FEHA establishes a new civil right for all employees without providing an enforcement process for some of the employees. The introductory section of the FEHA, Cal. Gov't Code §§ 12901-12906 (Deering 1982 & Supp. 1988), declares policies and establishes "civil rights," but the enforcement process does not cover all employers. Id. § 12940. For instance, an employer of four employees is not subject to investigation by the DFEH except for allegations of harassment. Id. §§ 12926(c), 12940(h). Thus, a fired employee is not entitled to the benefit of the DFEH's assistance in framing a complaint and receiving a free investigation. Given the policy against discrimination found in the FEHA, the employee should still be free to litigate the validity of the discharge in a tortious discharge and/or bad faith action.
employment violate the state's public policies.

A. Public Policy Defined

When the *Petermann* court created the action for tortious discharge, it noted that public policy "is inherently not subject to precise definition." Two views have since emerged on how public policy is defined or found in California. One view recognizes only the legislature or the constitution as the proper source of public policy. The other view accepts both the legislative and constitutional source and also permits the judiciary to determine policy. The California Supreme Court in *Tameny* endorsed the expansive view, saying that an employer's right to discharge an employee was subject to statutory limitations and considerations of public policy where the discharge "violated an express statutory objective or underminded a firmly established principle of public policy."

Court of appeal decisions applying *Tameny* have been divided, with some courts applying *Tameny* to any principle the court could identify as a firmly established fundamental policy, and others limiting *Tameny*’s application to situations where the discharge violates either a statute or a policy expressed in a statute.

The *Foley* decision has shed considerable light on these con-
troversies. In Foley, the plaintiff claimed that he had been discharged because he informed his employer that his new supervisor was under investigation for embezzlement. The plaintiff sued under all three of the common law discharge theories. His tortious discharge claim was based on the statutory obligation of an agent to disclose to his principal material information known to the agent. The supreme court in Foley concluded that "whether or not there is a statutory duty requiring an employee to report information relevant to his employer's interest, we do not find a substantial public policy prohibiting an employer from discharging an employee for performing that duty."

The court drew a distinction between policies that benefit private interests and those that benefit the public at large. In a footnote, the court articulated the following test:

The absence of a distinctly "public" interest in this case is apparent when we consider that if an employer and an employee were expressly to agree that the employee has no obligation to, and should not, inform the employer of any adverse information the employee learns about a fellow employee's background, nothing in the state's public policy would render such an agreement void. By contrast, in the previous cases asserting a discharge in violation of public policy, the public interest at stake was invariably one which could not properly be circumvented by agreement of the parties.

The court went on to discuss why agreements to commit perjury or violate the antitrust laws, two instances where tortious discharge claims were allowed, would be void as against public policy if this test were applied.

Applying this test in the discrimination context, the question is whether an employer and employee could agree to disregard any obligations the employer would otherwise have to not discriminate. If public policy prohibits such an agreement, a discharge based on

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269. Id. at 664, 765 P.2d at 375, 254 Cal. Rptr. at 213.
270. Id. at 662-63, 765 P.2d at 374, 254 Cal. Rptr. at 212.
271. Id. at 663, 765 P.2d at 375, 254 Cal. Rptr. at 213.
272. Id. at 670, 765 P.2d at 380, 254 Cal. Rptr. at 218.
273. Id. at 670 n.12, 765 P.2d at 380 n.12, 254 Cal. Rptr. at 218 n.12 (emphasis in original).
274. Id.
that form of discrimination is tortious. If a contract to discriminate would be void as against public policy, even in the absence of the FEHA, there is an independent policy basis for a wrongful discharge action.\textsuperscript{275} The Foley court limited its discussion to finding policy through statutory or constitutional sources. The court noted that a tortious discharge claim may be based only on a policy that is “firmly established” at the time of the discharge, and the existence about which reasonable persons can have little disagreement.\textsuperscript{276} However, the court left unsettled the question of whether judicial decisions can create public policy in California.

The narrow view regarding the source of public policy, that the policy upon which a tortious discharge action is founded must be statutory, is articulated in Shapiro v. Wells Fargo Realty Advisors.\textsuperscript{277} In Shapiro, an employee argued that his discharge without good cause was tortious because “it is the public policy of California to promote job security and stability in the community.”\textsuperscript{278} The Shapiro court discussed both the language in Tameny suggesting that there can be a public policy action absent statutory authority and the earlier case of Mallard v. Boring.\textsuperscript{279} The Mallard court concluded that a termination for volunteering for jury duty did not violate established public policy.\textsuperscript{280} In attempting to reconcile Tameny and Mallard, the court in Shapiro concluded that to establish a tortious discharge the employee must show that the discharge was either in direct violation of a statute or in contravention of a “substantial public policy principle.”\textsuperscript{281} In reaching this conclusion, the court did not hold that legislative policies alone are substantial, it simply held that it is not the public policy of California that discharges must be for cause. This conclusion is hardly controversial. Shapiro has since been read incorrectly, however, as

\textsuperscript{275} In the federal courts, private contracts to discriminate have long been held to be unenforceable as against public policy. Jones v. Alfred M. Mayer & Co., 392 U.S. 409 (1968); Shelley v. Kraemer, 334 U.S. 1 (1948).

\textsuperscript{276} Foley v. Interactive Data Corp., 47 Cal. 3d 654, 668, 670 n.11, 765 P.2d 373, 378, 380 n.11, 254 Cal Rptr. 211, 216, 218 n.11 (1988).

\textsuperscript{277} 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984).

\textsuperscript{278} \textit{Id.} at 477, 199 Cal. Rptr. at 618.

\textsuperscript{279} 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960).

\textsuperscript{280} \textit{Id.} at 394, 6 Cal. Rptr. at 174-75.

authority for the proposition that generally the only source of public policy which will serve as the source of wrongful discharge actions is the legislature.\textsuperscript{282}

A broader reading of public policy is demonstrated by the decision in \textit{Dabbs v. Cardiopulmonary Management Services}.\textsuperscript{283} The plaintiff in \textit{Dabbs}, a respiratory therapist, walked off the job instead of working a particular shift in a hospital because she believed that the shift was so understaffed that it would jeopardize the health, safety, and welfare of her patients.\textsuperscript{284} The court of appeal discussed and disagreed with \textit{Shapiro}'s supposed requirement that the employee identify a statutory violation to make out a tortious discharge claim.\textsuperscript{285} The court stated that although the hospital had not violated any statute, there was a fundamental public policy in favor of fostering qualified patient care, the plaintiff's termination violated this public policy, and the termination was therefore tortious.\textsuperscript{286} After criticizing \textit{Shapiro}, however, the court identified a number of statutes that lent support to its determination of policy.\textsuperscript{287}

Applying the new \textit{Foley} test, the \textit{Dabbs} conclusion is unassailable. A contract between the plaintiff and her employer to provide substandard care would be void because of public policy.\textsuperscript{288} The duty involved in \textit{Dabbs} was not a statutory duty owed by the employer to the employee, but a duty of care owed by both to the employer's patient.\textsuperscript{289} The health and safety interests at stake could not properly be circumvented by agreement of the parties. Therefore, firing an employee for attempting to promote these interests gives the employee a tortious discharge cause of action.\textsuperscript{290}

Even without the \textit{Foley} test, the more open language of \textit{Tameny} and \textit{Dabbs} could be reconciled with the more restrictive

\textsuperscript{283} 188 Cal. App. 3d 1437, 234 Cal. Rptr. 129 (1987).
\textsuperscript{284} Id. at 1439, 234 Cal. Rptr. at 130.
\textsuperscript{285} Id. at 1443, 234 Cal. Rptr. at 133.
\textsuperscript{286} Id.
\textsuperscript{287} Id. at 1443-44, 234 Cal. Rptr. at 133.
\textsuperscript{288} CAL. BUS. \& PROF. CODE §§ 3700-3775 (Deering 1986 & Supp. 1988); see also CAL. CIV. CODE § 1667 (Deering 1971).
\textsuperscript{290} Id. at 1445, 234 Cal. Rptr. at 134.
language of Shapiro. The reconciliation begins with Justice Kaufman's discussion of the problem in Koehrer v. Superior Court.291 Justice Kaufman explained that the two views:

[A]re in effect two aspects of a single doctrine: fundamental public policy may be expressed either by the legislature in a statute or by courts in decisional law. Insofar as affording remedies to an employee discharged in contravention of a fundamental public policy is concerned, it is immaterial whether the public policy is proclaimed by statute or delineated in a judicial decision.292

Justice Kaufman's explanation, however, still does not address the issue of how to determine public policy when the legislature has not created it. In both Dabbs and Shapiro, the court is understandably reluctant to exceed the proper limits of judicial restraint by simply declaring the right of courts to set policy. A reasonable solution is to hold that where the legislature, by statute, has determined public policy, it must be applied to a tortious discharge action using the Foley test. However, where a policy principle is asserted without statutory support, courts should exercise greater caution. If prior decisional law has determined the existence of a public policy, the courts may apply it. If no such determination has previously been made, the court must be confident that the policy is so clear and “substantial” that it is one “over which reasonable people cannot disagree” before it may be used as the basis for a tort action.

B. Sex Discrimination in Employment Violates the Public Policy of California Independent of the FEHA

Sex discrimination in employment has long been considered a violation of the public policy of California. California’s first constitution was enacted in 1848. It was completely redrafted in 1879.293 Article XX, section 18 of the California Constitution of 1879 provided: “No person shall, on account of sex, be disqualified from entering upon or perusing any lawful business, vocation or profession.”294 The section has since been expanded to other areas of dis-

292. Id. at 1165, 226 Cal. Rptr. at 825.
293. The constitution of 1879 replaced the original 1848 constitution.
294. CAL. CONST. art. XX, § 18 (1879, amended and renumbered 1974).
ciliation and renumbered as article I, section 8.296 The section was first applied in 1882, in In re Maguire,296 to invalidate a San Francisco ordinance prohibiting women from waiting on patrons in places serving alcohol. The California Supreme Court held that the constitution provided "as the permanent and settled rule and policy of this State, that there shall be no legislation either directly or indirectly incapacitating or disabling a woman from entering on or pursuing any business, vocation, or profession permitted by law to be entered on [by men]."297

The court's language in Maguire appears to limit the constitution's application to state action, but later decisions of the court have explained that the rights provided by the California Constitution are not so limited. As the court explained in Winchester v. Howard,298 the original California Constitution was modeled on the United States Constitution, limiting the state constitution's scope to the regulation of power between governmental branches and units, and between government and the people. However, beginning with the constitution of 1879, Californians have used the constitution to make law that preempts the legislature.299 This law-making power would be ineffective if legislative action was required to make enforceable the rights created in the constitution.300 Thus, "such constitutional provisions must be held to be self-executing when they can be given reasonable effect without the aid of legislation, unless it clearly appears that such was not intended."301 In Commodore Homes Systems v. Superior Court,302 the California Supreme Court has recently confirmed, in dicta, that the employment discrimination section of the California Constitution prohibits private discrimination.303 A United States District Court has permitted a plaintiff alleging sexual harassment in a case against a private employer to claim violations of both article

295. See supra note 10.
296. 57 Cal. 604 (1881).
297. Id. at 608.
299. Id. at 439, 69 P. at 79.
300. Id. at 440, 69 P. at 79.
301. Id.
302. 32 Cal. 3d 211, 649 P.2d 912, 185 Cal. Rptr. 270 (1982).
303. Id. at 220, 649 P.2d at 917, 185 Cal. Rptr. at 275. Justice Newman cited to article I, section 8 of the California Constitution stating it "covers private as well as state action." Id.
I, section 8 of the California Constitution and the federal employment discrimination law, title VII of the Civil Rights Act of 1964. 304

Article I, section 8 of the California Constitution thus appears to have an impact on FEHA displacement in two ways. First, it creates a pre-existing independent right to be free of discrimination based on sex, giving rise to an independent action. Second, unrelated to whether the provision creates its own private right of action, the constitution clearly provides a long-established fundamental public policy against sex discrimination in employment. The sex discrimination plaintiff seeking a public policy basis for either a tortious or bad faith discharge claim need not look to the FEHA to find that policy. Because there is a well established, independent public policy prohibiting sex discrimination in employment, no claims for sex discrimination in employment are displaced by the FEHA.

C. Race Discrimination in Employment Violates the Public Policy of California Independent of the FEHA

In examining the question of public policy prohibitions of race discrimination, there are two sources of policy: the California Constitution and judicially created policy.

Article I, section 8 of the California Constitution, which prohibits sex discrimination in employment, was expansively amended in 1974 to provide: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national origin." 305 Even if there were no pre-existing public policy against race discrimination in private employment at the time of the passage of the FEHA, Californians clearly spoke out against such discrimination by amending the constitution in 1974. There can be no stronger declaration of public policy. Article I, section 8 is a public policy source independent of the FEHA, which supports an action for tortious

304. Ambrose v. United States Steel Corp., 39 FEP Cases (BNA) 30 (1985). The article I, section 8 claim was successfully tried and a defense motion for new trial based on lack of weight of evidence was denied, but the decision does not disclose whether the defendant moved to dismiss the constitutional claim on a state action theory. Id. at 39.

305. CAL. CONST. art. 1, § 8. There was an intermediate amendment in 1970 to modernize the language with no substantive effect. Id.
discharge. Although this policy against race discrimination did not exist prior to the passage of the FEHA, the constitution is the prime legal document with which all other laws must comply.\textsuperscript{306} Thus, even though it came later in time than the FEHA, it still creates an independent source of public policy, which may be the basis of a tortious discharge action.

Even without the constitutional provision, race discrimination in private employment was recognized by the courts as a violation of public policy well before the 1959 passage of the FEHA. In the 1944 case \textit{James v. Marinship Corp.},\textsuperscript{307} the California Supreme Court considered the question of what effect should be given to a "closed shop" agreement between a defendant union and an employer that allowed for employment only of union members, where the union did not allow black membership.\textsuperscript{308} The court concluded that either the closed shop agreement was unenforceable or the union would have to be integrated because employment discrimination based on race violated the public policy of California.\textsuperscript{309} In reaching its decision, the court considered the argument that a legislative pronouncement of public policy was necessary to restrict a union's right arbitrarily to exclude individuals from membership.\textsuperscript{310} The court concluded that exclusion may be restrained, without relying on a particular statute to supply the pronouncement of public policy, because the court could determine the exclusion to be "tortious and contrary to public policy."\textsuperscript{311}

In finding the policy against discrimination, the court relied in part on cases prohibiting arbitrary discrimination by innkeepers and common carriers.\textsuperscript{312} These prohibitions have been greatly expanded and are now codified in the Unruh Act.\textsuperscript{313} The court noted in \textit{Marinship} that "[t]he analogy of the public service cases not only demonstrates a public policy against racial discrimination but also refutes defendants' contention that a statute is necessary to

\begin{footnotes}
\item 306. \textit{See} \textit{id.} \textsuperscript{\textit{\textsection} 26}.
\item 307. \textit{Id.} at 730, 155 \textit{P.2d} 329 (1944).
\item 308. \textit{Id.} at 737, 155 \textit{P.2d} at 334. A closed shop agreement is an agreement between an employer and a union that the employer will only hire the union's employees. Thus, if a union would not admit black members, the employer would have no black workers to hire.
\item 309. \textit{Id.} at 737, 155 \textit{P.2d} at 339.
\item 310. \textit{Id.} at 734, 155 \textit{P.2d} at 337.
\item 311. \textit{Id.} at 740, 155 \textit{P.2d} at 339-40.
\item 312. \textit{Id.} at 740, 155 \textit{P.2d} at 339-40.
\item 313. \textit{CAL. CIV. CODE} \textsuperscript{\textit{\textsection} 51} (Deering Supp. 1988).
\end{footnotes}
enforce such a policy where private rather than public action is involved.”  

In 1948, in Hughes v. Superior Court, in the California Supreme Court extended its holding in Marinship to provide that racial discrimination by a private employer, not just a union, was a violation of public policy. A group of civil rights activists in Richmond, California picketed a Lucky Stores market, demanding that Lucky hire black clerks. The picketers were enjoined, but continued to picket, and were subsequently charged with and convicted of contempt of court. In upholding the conviction, the California Supreme Court explained that “[t]he controlling issue is whether the sole objective involved - the discriminatory hiring of a fixed proportion of Negro employees regardless of all other considerations - is lawful.” The court concluded that such discriminatory hiring was not unlawful. 

Hughes has been relied on as authority for the proposition that racial discrimination was unlawful, independent of the FEHA. Hughes was also independently relied on by then California Attorney General (now California Supreme Court Justice) Mosk in determining that a private employer’s plan to hire at least one black employee on each of its work crews was a violation of California law. Public policy rejects any racial discrimination in private employment.

Thus, both the California Constitution and long-standing California judicial decisions establish that racial discrimination by employers, whether public or private, violates public policy. In articulating an underlying policy basis for a tortious discharge action, a race discrimination claimant need not rely on the FEHA.

316. Id. at 852, 198 P.2d at 886.
317. Id. at 858, 198 P.2d at 890 (Carter, J., dissenting opinion).
318. Id. at 852, 198 P.2d at 886-87.
319. Id.
322. See id. at 202.
Conclusion

California law provides both a statutory action for employment discrimination and three common law causes of action for wrongful discharge. The California courts have issued differing opinions limiting common law causes of action based on a variety of factors, one important issue has been whether any of the three wrongful discharge actions, or indeed any tort cause of action based on discrimination in employment, should be displaced by the FEHA. Because the legislature did not explicitly or by implication make the FEHA exclusive, the only instances in which the FEHA should displace other actions is when the only basis for a cause of action is a public policy for which the FEHA is its sole source, and the employee has an FEHA cause of action.

Contract actions are based on private, not public, policy and are entirely independent of statutory rights. They should never be displaced. Traditional torts that may occur in the employment context are also independent of statutory rights, and thus they too should never be displaced. Bad faith termination and tortious discharge actions should only be displaced when the public policy upon which the plaintiff relies has no source other than the FEHA. When, however, there is a source of public policy independent of the FEHA, such as for sex or race discrimination, the FEHA should not displace any common law actions for employment discrimination in California.