Chapter 2 Wrongful Discharge Law in California

2.1 A. Introduction

In 1872, California became the first state to establish employment *at will* as the presumed nature of the employment relationship. California Labor Code section 2922 provides that [a]n employment, having no specified term, may be terminated at the will of either party on notice to the other. On its face, it would appear that absent an agreement to the contrary, an employer is free to discharge an employee at will, regardless of motive, for bad cause, good cause or no cause at all.

In practice, however, an employers right to discharge employees has been restricted by the courts and by the federal and state legislatures. A large body of statutory law has developed to protect employees against certain kinds of discrimination and retaliation. For example, the at-will status of an employee does not insulate the employer from liability for discriminatory discharge under the California Fair Employment and Housing Act. In addition, courts created common law exceptions to the at-will doctrine, allowing employees to raise three types of *wrongful discharge* claims: (1) breach of an express or implied contract to discharge only for cause; (2) breach of an implied covenant of good faith and fair dealing; and (3) termination in violation of public policy. By the early 1980s, courts were allowing tort damages (*e.g.*, emotional distress and punitive damages) in cases brought under the last two of the three wrongful discharge theories: breach of covenant and violation of public policy. Employees also were raising tort claims under other common law and statutory theories such as assault, battery, interference with contract, defamation, fraud, negligence and infliction of emotional distress.

2.1.1 *Foley* & the Limitation of Tort Damages

In 1988, the California Supreme Court addressed all three judicially created theories of wrongful termination in *Foley v. Interactive Data Corp.*[1] The court held that employees could not recover tort damages for breach of the covenant of good faith and fair dealing. The *Foley* court also recognized suits for breach of an implied contract to terminate only for cause.

The court also continued to recognize that a discharge in violation of public policy exposes an employer to tort damages, even in cases involving at-will employees. However, the public policy violated must be a compelling one. For example, the plaintiff alleged he had been discharged for informing the company that one of its executives was under investigation by the Federal Bureau of Investigation (FBI) for crimes against a previous employer. The court held that this constituted information of *private* interest but not of compelling *public* interest. Therefore, the plaintiff could not establish a tort claim based on wrongful termination in contravention of public policy.

Soon after *Foley*, the California appellate courts began to reject specific tort claims absent a showing of violation of a public policy.[2] The California Supreme Court in *Gantt v. Sentry Insurance*[3] reemphasized that the public policy at issue must be important and clearly established. In other words, the court held public policy must be established by statute or the constitution; judges could not determine public policy for this purpose on their own initiative. However, *Foley* and *Gantt* left open the important question of whether individuals could obtain tort damages by styling their employment-related claims as tort claims. Employees thus continued to assert such tort theories as infliction of emotional distress, fraud and interference with contract.

In 1993, the California Supreme Court, in *Hunter v. Up-Right, Inc.*,[4] upheld the *Foley* limitation of tort damages where an employees fraud claim was based on the employers alleged misrepresentation about the reasons for the employees termination. Concluding that the plaintiff was eligible for contract damages only, the court held that the alleged fraud was indistinguishable from the termination itself and therefore was not a basis for tort damages. However, three years later, the California Supreme Court, in *Lazar v. Superior Court (Rykoff-Sexton, Inc.)*,[5] unanimously ruled that a terminated employee *may* sue his or her former employer for having been fraudulently induced to enter into an employment contract with the employer. This decision significantly eroded the protection employers believed arose from the *Hunter* decision, limiting the ability of an employee to recover damages based upon fraud claims relating to the employees termination. The court explained that the distinction between the situations in *Hunter* and *Lazar* is that the misrepresentations in *Hunter* were aimed at effecting his termination, which the employer could have accomplished directly without resorting to falsehoods. The alleged misrepresentations in *Lazar*, however, were aimed at inducing the employee to accept an offer of employment, a result the employer could not have achieved truthfully because the employee had required assurances that the position would be secure. The court thus allowed the employee to seek fraud damages, including the costs of relocation, damages arising from loss of security and income,

emotional distress damages, punitive damages and other damages proximately caused by the wrongful conduct of the employer.

In 1998, the California Supreme Court, in *Green v. Ralee Engineering Corp.*,[6] expanded the availability of tort damages in public policy wrongful termination cases by allowing public policy to be derived from regulations promulgated by an agency empowered by statute to do so. Indeed, the high court expressly overruled its earlier decision in *Gantt* to the extent that the case precluded finding a fundamental public policy in such a regulation. The regulation at issue in *Green* had been promulgated by the Federal Aviation Administration and directly related to Congresss strong public policy favoring the safe manufacture of passenger aircraft. The court observed, however, that for such a regulation also to express a strong public policy, it must be consistent with the intent of the authorizing law and reasonably necessary to effectuate the legislative purpose.

In another significant development further expanding wrongful discharge claims, the California Supreme Court held that an employee may assert a claim for wrongful demotion in breach of an implied-in-fact contract not to demote employees except for good cause. In *Scott v. Pacific Gas & Electric Co.*,[7] two senior engineering managers sued their employer for wrongful demotion, alleging that the company had breached an implied contract term not to demote employees without good cause. The demotions were ostensibly the result of an internal investigation into the practices regarding an engineering corporation owned on the side by the managers. Company policies did not prohibit employees from engaging in outside business unless there was a conflict of interest with the company. As a result of the investigation, the company ultimately demoted the managers from their supervisory positions, resulting in a 25% cut in their salary and benefits. In support of their wrongful demotion claim, the managers relied heavily on the companys progressive discipline policy that it had failed to follow.

The supreme court noted that the progressive discipline system applied to all employees and that the employees had a reasonable expectation that the company would follow its own policies, the central premise of which was to discipline employees only for cause. In reaching its decision, the court reasoned it was seeking to enforce the actual understanding of the parties to a contract, and in so doing may inquire into the parties conduct to determine if it demonstrates an implied contract.[8] Thus, whether the partys conduct creates an implied contract is generally a question of fact that involves examining not only express agreements between the employer and employees, but also the employers policies, practices and communications.[9]

2.2 B. Current Status of Wrongful Discharge Theories

2.2.1 Implied-in-Fact Contractual Restrictions on At-Will Employment

Despite the limitations set forth in *Foley,* California courts continue to recognize the existence of implied-in-fact employment agreements terminable only by just cause. Prior to *Foley*, the leading case on this issue was *Pugh v. Sees Candies, Inc.*,[10] in which the plaintiff, a long-term management employee, was given assurances of job security over his 32 years of service with the company. The company also maintained a practice of terminating administrative employees only for cause. Upon his discharge, the plaintiff alleged he was terminated without cause in breach of an implied-in-fact employment contract.

The appellate court agreed that the circumstances of the plaintiffs employment gave rise to an implied contract that his employment could be terminated only for cause. The court held that longevity of service without criticism, adoption of policies promising fairness, assurances of continued employment by company officers, merit raises and numerous promotions through the ranks could imply a contractual obligation not to discharge without cause. In *Foley*, the California Supreme Court approved this analysis and restated the four main factors that are significant to a determination of whether an implied-in-fact contract exists:

1. the personnel policies and practices of the employer;
2. the employees longevity of service;
3. actions or communications by the employer reflecting assurances of continued employment; and
4. practices in the industry.[11]

Other California courts have continued to develop the law of implied contracts along similar lines.[12]

In *Guz v. Bechtel National, Inc.*,[13] the California Supreme Court held that the mere passage of time in the employers service coupled with raises and promotions, do not, in and of themselves, create an implied-in-fact contract that the employee is no longer at-will. After 22 years of employment with the company and a history of steady raises and promotions, the plaintiff was terminated as part of a reduction in force. The plaintiff

argued that an agreement not to terminate except for good cause could be implied by combining several factors outlined in *Foley*, including:

his long service;

assurances of continued employment in the form of raises, promotions and good performance reviews;

the companys written personnel policies, which suggested that termination for poor performance would be preceded by progressive discipline; and

testimony by a company executive that company practice was to terminate employees for good reason and to reassign, if possible, a laid-off employee who was performing satisfactorily.

In rejecting the plaintiffs arguments, the supreme court found that although the companys written personnel documents provided contractual limits on the circumstances under which employees would be terminated, the documents themselves did nothing to restrict the companys right to reorganize, reduce and consolidate its workforce for whatever reasons it wished. In other words, the court agreed with the employer that it had the absolute right to eliminate the plaintiffs work unit, even if the decision was based on dissatisfaction with the eliminated units performance, and even if the personnel documents entitled an individual employee to progressive discipline procedures before being terminated for poor performance.

The California Supreme Court also rejected the plaintiffs claim for breach of the covenant of good faith and fair dealing. Citing *Foley*, the court made clear that the implied covenant of good faith and fair dealing cannot supply limitations on termination rights to which the parties have not actually agreed. The *Guz* court further disapproved of the analysis by the appellate court in *Pugh* to the extent it suggests that the implied covenant imposes limits on an employers right to terminate beyond those either expressed or implied in fact in the employment contract itself.

2.2.1(a) Express Statements of At-Will Employment

Implied agreements to terminate only for cause sometimes can arise even when the employer states, in writing, that the employment is at will. The California Supreme Court has noted that the more clear, consistent and prominent the at-will language is set forth in handbooks and materials given to employees, the greater the likelihood that employees will be unable to prove any contrary understanding.[14] For example, in *Dore v. Arnold Worldwide, Inc.*, the California Supreme Court enforced a provision of an offer letter that stated that employment was at will and could be terminated at any time, even though the offer letter did not specifically state whether cause was required for termination.[15] In another case, the court of appeal enforced a written at-will contract provision in an integrated employment agreement, which was substantiated by at-will language in the employee handbook.[16] This defeated the employees claim for breach of

an implied contract, and the court held that any evidence contradicting the at-will agreement was inadmissible.[17]

However, the mere insertion of at-will language into a contract after a series of agreements without at-will terms does not automatically transform the employment relationship into one that is at will.[18] For instance, in *McLain v. Great American Insurance Cos.*,[19] the plaintiff signed an employment application that contained an at-will provision and allowed for the terms of employment to be changed at any time. The court held that the provision permitting changes meant that the at-will provision was subject to modification by subsequent statements and conduct, allowing for an implied contractual obligation not to terminate without cause.

Also, at-will-like language may not be sufficient to overcome evidence of an implied employment agreement not to terminate without good cause. In *Soules v. Cadam*,[20] the plaintiff had signed a document that stated, no representation of employment conditions or rates of pay, other than set forth above, shall be valid. The court commented, however, that, consistent with *Foley*, factors other than express terms are relevant in determining the existence of an implied employment agreement. Because the employer presented no evidence showing the absence of such factors, while the plaintiff presented evidence of her length of service, promotions, raises and superior performance ratings, the court held that there was a triable issue of fact as to whether the employer had impliedly agreed the plaintiff would not be discharged absent good cause.[21]

The above cases point to the need for employers to draft policies, applications, and agreements with care. A well-drafted agreement can create employment at will; a poorly drafted policy, or the absence of a policy, can enable a court to find implied contracts of continued employment. It appears that the safest course is to require employees to sign at-will employment agreements that include integration language and require that any modifications be in writing and signed by a company officer.

2.2.1(b) Violations of Specific Personnel Policies

In another development, some courts have enforced specific personnel policies as contracts in themselves, not just as factors implying a limit on discharges. For example, in *Scott v. Pacific Gas & Electric Co.*,[22] which is discussed above, PG&Es personnel policies were the basis of a claim for wrongful demotion in breach of an implied-in-fact contract not to demote except for good cause. In *Kerr v. Rose*,[23] the employer had a written policy of offering reinstatement to laid-off employees if positions became available within two years after the layoff. The plaintiff, who had been laid off, sued his former employer for failing to recall him to work, alleging that positions had become available. The court held that the employers written personnel policies on termination, along with the written policy concerning recall of laid-off employees, implied a

contractual right to be recalled from layoff. These policies were sufficient to state a cause of action for breach of an employment contract.[24]

However, employers are not without the ability to change or terminate existing personnel policies provided that they follow certain guidelines. In *Asmus v. Pacific Bell*,[25] the California Supreme Court approved of the employers cancellation of its layoff policy, which provided that in the event of layoffs, every manager would remain employed with the company. The court held that such an employment policy of indefinite duration can be terminated or modified provided the following three factors are met:

1. the policy has been in place for a reasonable amount of time before it is terminated or modified;
2. employees are given reasonable advance notice that the employer intends to terminate or modify the policy; and
3. termination or modification of the policy does not interfere with the employees vested benefits. Because the *Asmus* rule only applies to policies of indefinite duration, it is important that employers consider drafting personnel policies that neither state nor suggest they will remain in effect for a particular period of time.

In *Knights v. Hewlett Packard*,[26] the employer avoided having its personnel policies enforced as a contract by placing an introductory disclaimer in front of the policy on terminations, which stated: The following is a guide for supervisors involved with an employment termination. The court found that the companys policy on terminations was a guideline only and did not give the employee a contractual right to be terminated in compliance with the policy.

2.2.1(c) Good Cause to Terminate

What happens when an employee is hired under an implied agreement not to terminate without good cause, is eventually fired and challenges the termination in court? Until the late 1990s, California courts were divided as to the jurys role in deciding whether an employer had good cause to terminate an employee. In *Cotran v. Rollins Hudig Hall International, Inc.*,[27] the California Supreme Court determined that the proper inquiry for the jury is whether the factual basis on which the employer concluded a dischargeable act had been committed was reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual. The court went on to define *good cause* as fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual.[28] This includes a reasoned conclusion . . . supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.

In *Silva v. Lucky Stores, Inc.*,[29] the court construed *Cotran* to require that in determining whether good cause exists, three questions must be answered affirmatively:

1. Did the employer act with good faith in making the decision to terminate?
2. Did the decision follow an investigation that was appropriate under the circumstances?
3. Did the employer have reasonable grounds for believing the employee had engaged in the misconduct?

The court noted that investigative fairness contemplates listening to both sides and providing employees a fair opportunity to present their position and to correct or contradict statements prejudicial to their case. The *Silva* court noted that the designation of an impartial, disinterested employee to act as an investigator and the fact that 15 employees had been interviewed and had their positions memorialized provided evidence of the fairness of the procedure used in the case.

The California Court of Appeal reiterated and expanded the holding in *Cotran* in *King v. United Parcel Service, Inc.*[30] In *King,* an employee who had been with the company for nearly 30 years had been terminated for violation of the companys integrity policy. The employees argument that his termination was in breach of an implied contract was rejected by the court, which explained that [o]nce an employer satisfies its initial burden of proving the legitimacy of its reason for termination, the discharged employee . . . must present *specific and substantial* responsive evidence that the employers evidence was in fact insufficient.[31]

However, in *Binder v. Aetna Life Insurance Co.*,[32] the California Court of Appeal reversed summary judgment in favor of an employer on the issue of whether there was good cause to terminate. In *Binder*, the plaintiff had worked for the company for 30 years, had an unblemished service record and was performing his job satisfactorily at the time of his termination. He had recently won a company award that allowed him to be reimbursed for up to $300 for a trip to a resort. He rented a condominium for the weekend but did not receive a receipt. The plaintiff then submitted a fabricated invoice in order to receive the reimbursement that he was entitled to receive. The supervisor with whom the plaintiff had recently been having problems ordered an investigation, noting that the plaintiff was difficult. The plaintiff was later terminated for unethical conduct.

The court found there was a disconnection between the supervisors comments and the limited subject at hand (the investigation regarding the invoice) indicating that there was evidence that the supervisor wanted to terminate the plaintiff.[33] The court also found that an inference could be drawn that the company seized upon the invoice incident as a justification for terminating the plaintiff, which the company really wanted to do for other reasons.[34] Although the court reversed summary judgment, it expressed similar concerns as those stated in *Cotran*that a standard permitting juries to reexamine

the factual basis for the decision to terminate dampens an employers willingness to act and intrudes on the wide latitude that is considered reasonable for employers to have.[35]

In general, courts have recognized that they should not interfere with the legitimate exercise of managerial discretion.[36] In practical terms, if the employer must show cause for termination, the company must show a reasonable and good faith belief that the acts giving rise to the termination occurred. Employers must not neglect to consider this possibility when making discharge decisions that arguably require cause.

2.2.2 The Implied Covenant of Good Faith & Fair Dealing as a Limit on At-Will Employment

Under California law, a covenant of good faith and fair dealing is implied in *every* contract. This covenant requires the contracting parties to be fair to one another in applying contractual terms and, where circumstances arise that the contracting parties did not anticipate, neither party should act in bad faith to deprive the other of contractual benefits. Although *Foley* limited recovery on such claims to contract damages, it did little to explain what was required for a contractually-based covenant claim. The court stated that the covenant does not convert an at-will relationship into one terminable only for cause. The court also apparently rejected the argument that a mere breach of contract, without more, gives rise to a covenant claim.

The appellate courts, therefore, have attempted to define the covenant after *Foley*. For example, in *Jenkins v. Family Health Program*,[37] the plaintiff alleged that when she was hired, the employer represented that her employment would not be terminated except for good cause. She claimed that, despite her satisfactory performance, the employer suddenly and without warning demanded that she sign a letter of resignation, stating that if she refused she would be fired and that it would be very difficult for her to obtain employment elsewhere. The court held that the employers termination of the plaintiffs employment was without good cause and in conscious and reckless disregard of her rights. This resulted in a breach of the implied covenant of good faith and fair dealing.

Another California court upheld a jury verdict for the plaintiff, finding that terminating an employee for refusing to take a drug test could violate the covenant.[38]

One court allowed a recovery for breach of the implied covenant for an at will employee. In *Sheppard v. Morgan Keegan & Co.*,[39] the plaintiff accepted an offer of employment, quit his job, flew from California to Memphis, leased an apartment, set up his office and was placed on the payroll. Prior to beginning work, the plaintiff was terminated. Although the court found no requirement of cause to terminate, it found that the *implied covenant* meant that an employer could not expect a new employee to sever his former employment and move across the country only to be terminated before

the ink dries on his new lease, or before he has had a chance to demonstrate his ability to satisfy the requirements of the job.[40] Generally, however, employees at will cannot raise covenant claims because it is the meaning of at-will employment that an employee can be terminated for a good reason, a bad reason or for no reason.[41]

2.2.3 Public Policy Limitations on At-Will Employment

As noted above, California courts have imposed public policy limitations on an employers ability to terminate an at-will employee. In *Foley,* the California Supreme Court upheld the rationale of its 1980 landmark decision, *Tameny v. Atlantic Richfield Co.*,[42] in which the court held that it was unlawful to discharge an employee for refusal to engage in price fixing in violation of antitrust laws. A *Tameny*-type tortious discharge claim is thus based *not* on the terms of an employment contract, but rather from the duty implied in law on the part of the employer to conduct its affairs in compliance with public policy.[43]

Three years after *Foley*, the California Supreme Court examined whether an employee who was constructively terminated in retaliation for supporting a coworkers claim of sexual harassment had a cause of action for tortious discharge in violation of public policy. In *Gantt v. Sentry Insurance*,[44] the court observed that it was difficult to determine how to draw the line between claims that generally involved matters of public policy and those that concerned merely ordinary disputes between the employer and the employee. To clarify, the court held that the public policy exception must be based on policies derived from constitutional or statutory provisions. An employer is bound, at a minimum, to know the fundamental public policies of the state and nation, as expressed in the constitutions and statutes; thus, the court found that the public policy exception to theat-will doctrine presented no impediment to employers to operate within the bounds of the law. In the *Gantt* case in particular, the statutory basis for the policy was found in a provision of the California Fair Employment and Housing Act (FEHA) prohibiting obstruction of the agencys investigation of a charge. Given its express reliance on a statutory or constitutional basis for a public policy claim, *Gantt* has been seen as narrowing the scope of the public policy exception.[45]

The California Supreme Court refined the public policy tortious discharge cause of action in *Stevenson v. Superior Court (Huntington Memorial Hospital)*,[46] in which the court articulated that, in order for a plaintiff to prevail on such a claim, the public policy must be:

1. embodied in a statute or constitutional provision;
2. for the benefit of the public;
3. articulated at the time of discharge; and
4. fundamental and substantial.[47]

These cases typically arise when an employer retaliates against an employee for refusing to violate a statute, performing a statutory obligation, exercising a statutory right, or reporting an alleged violation of a statute of public importance.[48]

In *Turner v. Anheuser-Busch, Inc.*,[49] the California Supreme Court applied the four-prong test and rejected a public policy claim where all the employee could show was a violation of a corporations internal policies or the provisions of its agreements with others.[50] Moreover, even though the employee in *Turner* ultimately did identify a statute that he claimed was violated by the company, he could not show the required nexus between his reporting a violation of the statute and his alleged forced resignation.[51]

The California Supreme Court has also held that a public policy need not be directly expressed in a constitutional or statutory provision, but instead it may be derived from regulations promulgated by an administrative agency authorized by law to do so.[52] The court reasoned that recognizing public policies founded upon such regulations does not involve the substitution of judicial for legislative policymaking; rather it gives effect to the public policies enacted by the legislature. Legislatures, observed the court, often must delegate to administrative agencies the power to promulgate implementing regulations to carry out the statutory purpose, and, accordingly, in that regard the administrative agency expresses public policy when the regulation is enacted.

Public policy claims have also been rejected when based upon statutes or constitutional provisions that do not regulate private employers conduct or create a private right of action. In *Grinzi v. San Diego Hospice Corp.*,[53] the court dismissed a public policy claim alleging that an employee was terminated in violation of the free speech provision of the First Amendment to the U.S. Constitution and California Labor Code section 96(k). The court concluded the free speech provision of the First Amendment could not support a public policy claim against a private employer because the free speech provision regulates government conduct only. The court also found that Labor Code section 96(k) could not support a public policy claim because this section does not set forth an independent public policy that provides employees with any substantive rights, but rather, merely establishes a procedure by which the Labor Commissioner may assert, on behalf of employees, recognized constitutional rights.[54]

In *McAllister v. Los Angeles Unified School District*,[55] the court considered four factors in concluding that the freedom of speech provisions of the California Constitution do not give rise to a private right of action for wrongful termination: (1) the adequacy of existing remedies; (2) the extent to which a constitutional tort action would change established tort law; (3) the nature of the provision and the significance of the purpose that it seeks to effectuate; and (4) whether the creation of a damages action might produce adverse policy consequences or practical problems of proof.[56] The plaintiff in *McAllister*, a substitute teacher, had been terminated after making political comments at a rally and identifying herself as a teacher for the school district. The court found persuasive the fact that allowing a substitute teacher to pursue a constitutional damages

action would create an inequitable situation where tenured teachers had fewer rights than substitute teachers. The court explained: while the free speech clause reflects an important and fundamental interest, when the considerations mentioned above do not militate in favor of recognizing a constitutional tort action, the relative importance of the right, standing alone, is not a factor of great significance.[57]

Another ground on which a public policy claim will fail is where the alleged basis for the termination is not the reporting of actual illegality, that is, where the informant has a subjective, but unreasonable, belief that he or she is reporting illegal conduct. In this respect, the court of appeal has found a distinction between protected whistleblowing and the reporting of routine internal personnel disclosure.[58]

Similarly, employees who work for companies too small to be covered under the FEHA (fewer than five employees) cannot maintain a public policy wrongful termination claim based solely on the FEHA.[59] However, where there exists a statute or constitutional provision other than the FEHA barring discrimination, employees who work for small companies are not banned from making discrimination claims. For example, in *Badih v. Myers*,[60] the employer was not covered under the FEHA, yet the plaintiff was allowed to maintain her cause of action for pregnancy discrimination based on Article I, section 8 of the California Constitution, which expresses a fundamental public policy against sex discrimination in employment.

Under certain circumstances an employee may be unable to maintain a wrongful termination claim becausealthough the employer discriminated against the employee in a manner that violates one fundamental public policya countervailing public policy justified the employers action or protected the form of discrimination in which it engaged. For example, in *Silo v. CHW Medical Foundation*,[61] the California Supreme Court held that the plaintiff could not maintain a wrongful termination action against a Catholic hospital for discharging him for using what the hospital deemed objectionable religious speech. Specifically, the plaintiff was terminated for continuing to proselytize at work on a religion (non-Catholic) to which he had recently converted, after several requests by coworkers and management that he desist. The court held that, although article I, section 8 of the California Constitution expresses a fundamental policy against religious discrimination in employment and requires reasonable accommodation of employees religious practices, the state and federal free exercise and establishment clauses give religious organizations some degree of latitude to choose their employees in order to define their religious mission. The court thus concluded that there is no clear public policy against religious organizations prohibiting what they consider to be inappropriate religious speech in the workplace.

Likewise, in *Henry v. Red Hill Evangelical Lutheran Church of Tustin*,[62] a California Court of Appeal ruled that a religious school teacher who was living out of wedlock with her boyfriend as they raised their child did not have a claim against the church for wrongful termination based upon marital status discrimination. The trial court held, and the

appellate court agreed, that the churchs decision to terminate the plaintiff was because she violated a church precept, not because of her marital status. As such, there was no public policy violated. Other appellate courts have reached a variety of results in applying the public policy doctrines.[63] Employers should also note that claims for discharge in violation of public policy may be grounded in federal law.[64]

The courts are split on whether employers that discharge employees for refusing drug tests have violated the public policy contained in Californias constitutional privacy provision. For example, in *Semore v. Pool*,[65] the employer terminated the plaintiff because he refused to submit to a pupillary-reaction eye test. The test was given to all employees to determine whether they were under the influence of drugs. The court held that Californias constitutional privacy provision provides some protection against a private employers intrusion. The court further held that there is a public policy concern included in an individuals right to privacy; the plaintiffs right not to participate in the drug test was a right he shared with other employees, and his assertion of the right benefited all employees. Accordingly, the plaintiff was permitted to assert a violation of his constitutional right of privacy as a public policy exception to the at-will termination doctrine.

In contrast, in *Luck v. Southern Pacific Transportation Co.*,[66] the court of appeal held that the right to privacy, by its very name, is a private right, not a public one. Thus, a computer operators termination after refusing to submit to a drug test did not constitute a wrongful discharge in violation of public policy. The court found that while the plaintiffs termination was in bad faith because the company did not have a compelling reason under Californias constitution to invade her privacy, her discharge did not violate any public policy.

The California Supreme Court, in a case involving drug testing of athletes, discussed the issue of drug testing in the workplace even though it declined to rule specifically on that issue.[67] In dicta, the *Hill* court stated that, in the employment context, courts should consider the employees reasonable expectation of privacy, as well as the interests of the employee, the employer, and the public under the particular circumstances of each case, in deciding whether a termination related to a mandatory drug-testing policy is actionable. Under this analysis, terminating an employee for refusing to take a drug test is less likely to violate public policy where the employees job duties affect the safety of others.

The California Supreme Court decided in *Ross v. Ragingwire Telecommunications, Inc.* that state employment rights law and public policy do not bar the discharge of an employee who uses medical marijuana.[68] The court held that an employee terminated after failing a preemployment drug test had no claim for wrongful discharge based on his use of marijuana for medicinal purposes under Californias Compassionate Use Act (CUA) because that statute did not address employment law at all and failed to put an employer on notice that it would have to

accommodate medical marijuana users. The court also observed that because federal law still prohibited the use of marijuana, even for medical users, state law could not completely legalize medical marijuana use. Thus, the employer had good cause for terminating the employee (a failed drug test), and there was no violation of public policy.

On the other hand, the California Supreme Court sided with the employee in *Edwards v. Arthur Andersen, L.L.P.*[69] In California, subject only to narrow exceptions, covenants not to compete are unlawful. When an employee refused his prospective new employers demand to execute a termination of noncompete agreement as consideration for release of provisions of an invalid noncompete agreement procured from him by his current employer, the current employer terminated him, and the new employer withdrew its offer of employment. The court held that the former employer tortiously interfered with the employees prospective economic advantage (the new job). It reasoned that an employer could not lawfully make as a condition of employment the signing of a contract containing an unenforceable covenant not to compete.

Likewise, the California Court of Appeal sided with the employee in *Silguero v. Cretegaurd, Inc*.[70] In that case, the employees former employer contacted the employees subsequent employer and informed it that the employee had executed a covenant not to compete prior to the termination of the employees employment with the former employer. The subsequent employer terminated the employee out of respect and understanding with colleagues in the same industry, notwithstanding its belief that noncompete clauses are not legally enforceable here in California. The court held that the employees complaint stated facts supporting a claim for wrongful termination against the subsequent employer in violation of the public policy prohibiting covenants not to compete. The court noted that the complaint alleged an understanding between the subsequent employer and the former employer pursuant to which the subsequent employer would honor the former employers covenant not to compete. Such an understanding, the court held, would be void and unenforceable as against public policy because it unfairly limit[ed] the mobility of an employee and because the former employer should not be allowed to accomplish by indirection that which it cannot accomplish directly. Moreover, the court concluded, permitting a wrongful termination claim against the subsequent employer under the circumstances of the case furthered the interest of employees in their own mobility and betterment.

In a case of first impression, the California Court of Appeal in 2013 held that former corporate officers could sue for wrongful termination in violation of California public policy even if their employer was incorporated out of state.[71] In *Lidow*, the plaintiffa former officer of a foreign corporation based in Delawarebrought a cause of action for wrongful termination in violation of California public policy. He claimed he had been removed in retaliation for complaining about possible illegal or harmful activity and breaches of ethical conduct. Pursuant to the internal affairs doctrine, the local law of the state of incorporation usually governs internal matters, such as those involving the

corporations directors. The court found, however, that claims of wrongful termination in violation of public policy should be treated differently. The court explained, [r]emoving an officer in retaliation for his complaints about possible illegal or harmful activity . . . and breaches of ethical conduct . . . goes beyond internal governance and touches upon broader public interest concerns that California has a vital interest in protecting.[72]

2.2.4 Wrongful Constructive Discharge

Even where an employer does not actually terminate an employee, an employee can still bring an action for wrongful termination using the theory of constructive discharge. If an employee can show that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employees resignation that a reasonable person in the employees position would be compelled to resign, the employee can recover under the constructive discharge theory.[73]

In *Turner v. Anheuser-Busch, Inc.*, the plaintiff claimed he: (1) had observed illegal acts by his coworkers that he reported to management; (2) was reassigned to a lesser paying position in retaliation for those reports; and (3) was given a poor performance rating that ultimately forced him to resign from his job four years later. The California Supreme Court rejected his claim of constructive discharge, holding that there was not a continuous pattern of aggravated adverse working conditions. In general, [s]ingle, trivial, or isolated acts of [misconduct] are insufficient to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge.[74] Instead, the proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee.[75]

In a departure from earlier precedent, the court noted that constructive (*i.e.*, not actual) knowledge by the employer of the intolerable conditions was insufficient to support a constructive discharge claim. Rather, the employer must either deliberately create the intolerable working conditions that trigger the resignation or, at a minimum, must know about them and fail to remedy the situation in order to force the employee to resign.[76]

The court also clarified that a constructive discharge, standing alone, is neither a tort nor a breach of contract. Thus, independent proof of a legally impermissible reason for discharge must be produced before a recovery for constructive discharge will be permitted.[77] *Turner* changed the standard of proof for constructive discharges in California, and the subsequent case law has demonstrated the significance of those changes. For example, in *Gibson v. Aro Corp.*,[78] the court of appeal held that the plaintiffs subjective reactions to a demotion and new job responsibilities were not relevant. Using

the *Turner* standard, the court found that the plaintiffs working conditions were never objectively intolerable, and they certainly were not so at the time of his resignation. The court noted that the plaintiff did not like his new position, nor would he have preferred it if he had a choice. However, that discomfort did not nearly rise to the level of constructive discharge. The court held that under *Turner*, an employee is not permitted to quit and sue simply because the employee does not like a new job assignment or has hurt feelings or a bruised ego.[79] Even if the plaintiffs working conditions were intolerable, the court added that another important element of *Turner* is the showing of a causal connection between the intolerable conditions and action or knowing inaction on the part of an employer. Since the plaintiff in *Gibson* never informed his employer of his dissatisfaction, his claim failed.

On the other hand, in *Bird v. Foss Maritime Co.*, the court held that a constructive discharge could be found where an employees demotion was so radical or could so severely contort or limit an employees work that the demotion became the legal equivalent of a formal firing.[80] The court found that removing an employee from being on an on call list from which he was likely to be called in to work, and instead placing him on an any source list from which he was unlikely to be called into work, constituted a very substantial adverse employment action, so that a jury could conclude for all practical purposes that plaintiff was terminated when he was removed from the on call list and relegated to any source status.[81]

In *Starzynski v. Capital Public Radio*,[82] the court held that an at-will employee has no contractual claim for wrongful constructive discharge on account of intolerable working conditions.

2.3 C. Legislatively Determined Public Policy Exceptions to the At-Will Doctrine

In addition to Californias three common law theories of wrongful discharge discussed above, there are numerous long-standing federal and state statutory limitations on at-will discharges. The following is a list of common examples of those exceptions.

2.3.1 Federal Law

Some common examples of federal statutory limitations on at-will discharges are as follows:

Labor Management Relations Act (LMRA) and National Labor Relations Act (NLRA):[83] prohibit discharge on account of an employees union membership, organizational activities or other protected concerted activities.

Federal Occupational Safety and Health Act (Fed-OSH Act):[84] prohibits discharge on account of an employees refusal to work in an unsafe workplace or for otherwise exercising rights under this Act.

Fair Labor Standards Act (FLSA):[85] prohibits discharge for exercising rights secured by this Acts wage and hour standards.

Employee Retirement Income Security Act (ERISA):[86] prohibits discharge for exercising rights secured by this Act or for preventing an employee from obtaining benefits under a plan covered by this Act.

Title VII of the Civil Rights Act of 1964:[87] prohibits discharge based on race, sex, color, religion or national origin, or in retaliation for exercising rights under this Act.

Age Discrimination in Employment Act (ADEA):[88] prohibits the discharge of an employee age 40 or over where the discharge is age-based. It also prohibits retaliation.

Bankruptcy Reform Act:[89] prohibits discharge of employees solely because they have filed for bankruptcy.

Family and Medical Leave Act (FMLA):[90] for employers with 50 or more employees, prohibits discrimination against an individual for the exercise of the right to take family care leave as provided in this Act.

Sarbanes-Oxley Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act:[91] prohibit retaliation against employees in the financial services industry who provide information and/or assist in an investigation into an employers violation of the Sarbanes-Oxley Act, Securities and Exchange Commission regulations and securities fraud.

Genetic Information Non-Discrimination Act (GINA):[92] prohibits employment discrimination based on employees genetic information.

2.3.2 California Law

Some common examples of state statutory limitations on at-will discharges are as follows:

Labor Code section 96: authorizes the Labor Commissioner to accept claims for loss of wages: (1) as the result of discharge from employment for the garnishment of wages; and (2) as the result of demotion, suspension, or discharge for lawful conduct occurring during nonworking hours away from the employers premises. Labor Code section 96(k) also authorizes the Labor Commissioner to accept claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employers premises.

Labor Code section 98.6: prohibits discharge or discipline of employees or applicants for any lawful conduct occurring during nonworking hours away from the employers premises, or for participating in proceedings before the California Labor Commissioner.

Labor Code section 132a: prohibits discrimination against workers who are injured in the course and scope of their employment.

Labor Code section 230: prohibits discharge for jury service so long as the employee gives reasonable notice to the employer that he or she is required to serve. It also prohibits discrimination in employment for appearing in court as a witness, as required by law, so long as reasonable notice is given to the employer. It also prohibits an employer from discriminating against, retaliating against, or discharging an employee who is a victim of domestic violence or sexual assault for taking time off to obtain a temporary restraining order or other relief.

Labor Code section 230.1: prohibits discrimination and retaliation against an employee who is a victim of domestic violence or sexual assault for taking time off from work to seek medical attention for injuries caused by domestic violence, to obtain services from a domestic violence shelter, program, or rape crisis center as a result of domestic violence, to obtain psychological counseling related to an experience of domestic violence or to participate in safety planning and take other actions to increase safety from future domestic violence, including temporary or permanent relocation.

Labor Code section 230.2: prohibits discrimination and retaliation against an employee who takes time off from work to serve on a jury, appear in court as a victim of or witness to a crime, seek relief from a court to ensure his or her own safety (or his or her childs safety) in domestic violence situations, or seek legal assistance or counseling relating to domestic violence situations.

Labor Code section 232.5(c): prohibits an employer from discharging, formally disciplining or discriminating against an employee for disclosing information about the employers working conditions.

Labor Code section 233: requires employers that provide sick leave for employees to permit an employee to use up to one-half of his or her yearly accrued sick leave to attend to the illness of a child, parent, spouse or domestic partner. Employers are prohibited from denying the use of sick leave or from discharging, threatening to discharge, demoting, suspending or in any manner discriminating against an employee for using or attempting to use sick leave in this manner.

Labor Code section 432.2: prohibits discharge of or retaliation against an employee in *private* employment for refusing to submit to a polygraph, lie detector or similar test.

Labor Code section 1102.5: prohibits retaliation against an employee either for disclosing to a government or law enforcement agency information about violations of law or regulations, or for refusing to participate in an activity that would result in a violation of law.

Labor Code section 1025: requires private employers with 25 or more employees to *reasonably accommodate* an employee who wishes to participate in an alcohol or drug rehabilitation program.

Labor Code sections 6310 and 6311: prohibit retaliation against an employee for exercising rights under Californias Occupational Safety and Health Act (Cal-OSHA).

Fair Employment and Housing Act (FEHA), Government Code sections 12900 *et seq*.: prohibits discrimination based on race, religion, creed, color, national origin, ancestry, pregnancy, physical or mental handicap, medical condition, actual or perceived sexual orientation, marital status, sex or genetic information. It also prohibits discrimination based on age for persons 40 or over. Damages awarded under the FEHA include full tort damages (including punitive damages), as well as lost wages and attorneys fees.

California Family Rights Act (CFRA), Government Code section 12945.2: prohibits discrimination against an individual for the exercise of the right to take family care leave as provided in this Act. The CFRA further prohibits discrimination against individuals who provide information as to their own family care leave or another persons family care leave in a hearing or other proceeding.

Health and Safety Code section 1278.5: prohibits a health facility from discriminating against or retaliating against a patient or employee because that individual has made a complaint or has initiated or cooperated in any investigation of any governmental entity, relating to the care services or conditions of the facility.

Health and Safety Code section 120980(f): provides that the results of an HIV test may not be used to determine an individuals suitability for employment.

Government Code section 12951: makes it unlawful for an employer to adopt or enforce a policy prohibiting the use of any non-English language in the workplace, except under very limited circumstances. Such a policy is illegal unless there is a justifiable business necessity for the language restriction, and the employer gives employees adequate notice of the circumstances and the time when the language restriction must be observed and of the consequences for violating the language restriction.

Military and Veterans Code section 394: prohibits discharge or discrimination of an employee because of the employees membership in the military or naval forces of the state or of the United States. Violations of this section constitute a misdemeanor.

2.4 D. Defending a Wrongful Discharge Case

2.4.1 The Statute of Limitations

The California courts have not definitively ruled regarding the length of the statute of limitations for breach of an implied-in-fact employment contract or the covenant of good faith and fair dealing. However, a court of appeal has found that the statute of limitations period for an action for . . . injury to . . . one caused by the wrongful act . . . of another . . . is applicable to terminations in violation of public policy.[93] Effective January 1, 2003, the statute of limitations period was extended from one year to two years.[94] The California Supreme Court has clarified when the statute of limitations begins to run in wrongful termination cases. The court held that the statute of limitations for wrongful discharge and related job bias, tort, and breach of contract claims begins to run on the actual termination date, rather than when an employee is notified that he will be fired.[95] In a follow-up ruling, the court similarly found that the statute of limitations in a breach of contract action alleging constructive discharge begins to run when the employee is actually terminated, not when the intolerable conditions occur.[96]

2.4.2 The Statute of Frauds

Foley established that the statute of frauds, which requires certain contracts to be in writing, generally is not a defense to wrongful discharge claims. The court in *Foley* held that the statute of frauds could be raised only where it is absolutely clear that the employment contract could not be completed within one year. For example, unwritten permanent employment and satisfaction contracts are not barred by the statute of frauds.

Some courts have been unsure whether the *Foley* holding only applies to contracts of an indefinite term. In *Abeyta v. Superior Court (Jolene Co.)*,[97] the court clarified that

Foley applies to contracts of both indefinite and definite periods. An employment contract is outside of the statute of frauds and enforceable if *either* party can terminate it within one year.

2.4.3 Failure to Exhaust Arbitration and/or Administrative Remedies

Where an employee has entered into a valid predispute agreement to arbitrate, the employer may prevail as a matter of law if the employee later refuses to honor the agreement.[98] In 2000, the California Supreme Court acknowledged that employment arbitration agreements are generally enforceable so long as they meet minimum standards of fairness to enable the employee to vindicate his or her statutory remedies.[99] (For further discussion of the *Armendariz* opinion and the enforceability of arbitration agreements, see Chapter 6 of The California Employer.) In *Martinez v. Scott Specialty Gases, Inc.*,[100] the plaintiff/employee had acknowledged receipt of an employee handbook, which contained an agreement to submit to binding arbitration any disputes arising out of the employment relationship. After he was terminated, the employee filed suit in court and expressly refused to arbitrate his claims despite several reminders by defense counsel that the employee was bound by the arbitration clause. The court dismissed the action on the ground that the employer, having raised arbitration as an affirmative defense, could properly seek dismissal of the case rather than be required to arbitrate. The court held that because the plaintiff had repudiated the agreement, thereby waiving his right to arbitrate, summary judgment was proper.[101]

Where an employee fails to exhaust enforceable administrative remedies before proceeding to court, the employer may also prevail as a matter of law. In *Campbell v. Regents of the University of California*,[102] the California Supreme Court held that claims of retaliation for whistleblowing were first required to go through the administrative process established by the employer, the Regents. The court noted that the Regents acted within their constitutional authority when they adopted the exhaustion requirement, and because of the broad powers given to the Regents under the California Constitution, their policies are entitled to treatment equivalent to a statute. Thus, the employee was required to utilize the Regents administrative remedies before proceeding to court.

Plaintiffs attempt to avoid this administrative exhaustion requirement by filing common law claims in lieu of statutory claims. For instance, where plaintiffs file a common law claim for unlawful discharge in violation of the public policy set forth in California Labor Code sections 1102.5 and 6310 (whistleblower statutes), there is no prerequisite administrative filing requirements.[103] Hence, plaintiffs who miss the statutory deadline for filing an administrative charge, or simply fail to do so, may be precluded from filing statutory claims but possibly may file common law claims based on the policy underlying the predicate statutes.

2.4.4 After-Acquired Evidence

Evidence that an employee committed wrongdoing or was otherwise unqualified for the position may negate a claim for wrongful discharge. In *Camp v. Jeffer, Mangels, Butler & Marmaro*,[104] for example, a husband and wife had lied on their job applications by stating, under penalty of perjury, that neither had been convicted of a felony. They were fired for unrelated reasons and ultimately filed a lawsuit alleging wrongful termination in violation of public policy, among other causes of action. In upholding the summary judgment for the employer, the court concluded that, based on the after-acquired evidence, the plaintiffs were not lawfully qualified for their jobs and therefore were not in a position to complain that they had improperly lost them.

2.4.5 Evidence Limitations

Expert testimony that does not draw from the experts professional experience and expertise cannot support a claim for wrongful discharge. For example, in *Kotla v. Regents of the University of California*,[105] the court held that an industrial psychologist should not have been permitted to testify that certain activities indicated that retaliation had occurred. Such testimony was improper because it is the role of the jury, not the expert, to review the facts and decide whether retaliation motivated a termination. In that case, the court noted that expert testimony is appropriate where an expert opines on matters outside of common knowledge and experience, such as whether a termination was grossly disproportionate to punishment given to other employees and whether an employer significantly deviated from its own policies.

Similarly, evidence of the state of mind of a supervisor who did not contribute to a termination decision cannot support a claim for wrongful discharge. In *Kotla*,[106] an employee relations manager and another manager decided to terminate an employee for using company equipment to do work for another company. The employee claimed that her immediate supervisor (a person other than the employee relations manager and manager) had given her permission to do so. The court concluded that the state of mind of the supervisor could not support a claim for retaliatory discharge, because the supervisor was not involved in the termination decision.[107]

2.4.6 National Labor Relations Act Preemption

The National Labor Relations Act (NLRA)[108] permits employees to engage in collective bargaining, self organization and other activities for their mutual aid or protection. The NLRA prohibits an employer from discharging an employee for union activities, or otherwise interfering with employees in the exercise of the rights guaranteed under the Act. Because the National Labor Relations Board holds exclusive jurisdiction over NLRA matters, the NLRA preempts common law wrongful termination claims if the

plaintiff claims discharge due to union activity.[109] It also preempts some common law wrongful termination claims if the plaintiff claims discharge due to other concerted activity.[110]

2.4.7 Labor Management Relations Act Preemption

Any disputes involving an alleged breach or interpretation of a collective bargaining agreement are governed exclusively by federal law pursuant to section 301 of the Labor Management Relations Act (LMRA).[111] The U.S. Supreme Court has held that claims brought under state law that are based on a collective bargaining agreement provision, or whose outcome depends on analysis or interpretation of the terms of the agreement, are entirely displaced by the force of section 301.[112] The Court has recognized that the primary reason for this policy is to ensure uniform interpretation of collective-bargaining agreements, and . . . to promote the peaceable, consistent resolution of labor management disputes.[113] Also, as one recent decision explained, the theory underlying a claim for breach of the implied covenant was developed to protect employees who lacked the job security created by a collective bargaining agreement.[114] Therefore, individuals protected by a collective bargaining agreement . . . often need not resort to state law claims to obtain relief. As a result, section 301 preempts the California state cause of action for breach of the implied covenant of good faith and fair dealing when an employee enjoys comparable job security under a collective bargaining agreement.[115]

Section 301 preemption is not necessarily limited to breach of contract claims.[116] The fact that a plaintiff has asserted claims in terms of violation of state law, such as harassment and discrimination under the FEHA, does not remove them from the realm of federal preemption. Courts have held that artful pleading will not suffice to avoid preemption under section 301.[117]

2.4.8 ERISA Preemption

The federal Employee Retirement and Security Act (ERISA)[118] exclusively governs the regulation of employee benefit plans. Wrongful termination actions based on allegations that the discharge involved an attempt by the employer to avoid paying health or pension benefits are preempted by ERISA.[119]

2.4.9 Workers Compensation Preemption

Californias Workers Compensation Act provides the exclusive remedy for work-related injuries that cause disability or need for medical treatment.[120] If injured in this manner, the employee may not bring a civil action for damages on claims falling within the scope of workers compensation. Thus, when the misconduct attributed to an employer occurred during a normal part of the employment relationship (*e.g.*, demotions, promotions, criticisms of work, and frictions in negotiations or processing of

grievances), an employee suffering emotional distress causing disability may not avoid the exclusive remedy of workers compensation by characterizing the employers decisions as manifestly unfair, outrageous, harassment or intended to cause emotional disturbance resulting in disability.[121]

Workers compensation has also been held to be the exclusive remedy where an employee is injured as a result of the employers knowing concealment of unsafe working conditions, failure to provide proper safety equipment and violation of environmental safety regulations.[122] In *Fermino v. Fedco, Inc.*,[123] the California Supreme Court described a tripartite system for classifying injuries arising in the course of employment:

First, there are injuries caused by employer negligence or without employer fault that are compensated at the normal rate under the workers compensation system.

Second, there are injuries caused by ordinary employer conduct that intentionally, knowingly or recklessly harms an employee, for which the employee may be entitled to extra compensation under California Labor Code section 4553.

Third, there are certain types of intentional employer conduct, which bring the employer beyond the boundaries of the compensation bargain, for which a civil action may be brought.

Interpreting *Fermino*, the court in *Arendell v. Auto Parts Club, Inc.*[124] held that *Fermino* does not recognize a beyond the compensation bargain exception to workers compensation preemption for negligent or reckless behavior.[125]

Workers compensation does not provide a remedy for injuries arising outside a normal part of the employment, or outside the compensation bargain struck by the legislature in enacting California Labor Code sections 3600 *et seq*.[126] Employees injured under different, more specific, statutes may recover civil damages.[127] Employees who are injured by another employees willful and unprovoked act of aggression may also bring a civil action for damages against the offending employee.[128] Also, workers compensation generally will not bar emotional damages on claims based on a violation of a statute such as the Fair Employment and Housing Act.[129] Additionally, workers compensation does not preempt injuries that are caused by employer actions after an employees termination.[130]

Finally, courts have not precluded, under workers compensation preemption, lawsuits based on contract damages. In *Pichon v. Pacific Gas & Electric Co.*,[131] the plaintiff sued his employer for wrongful termination alleging intentional and negligent infliction of emotional distress. The court held that the emotional distress caused by the termination of employment occurred within the course and scope of employment and that any claim for damages to the plaintiffs psyche was barred by the exclusive remedy of the workers compensation law. The court also held, however, that the exclusivity of

workers compensation did not preclude causes of action for economic or contract damages. In *City of Moorpark v. Superior Court (Dillon)*, the California Supreme Court settled a long-disputed issue and held that an employee who is terminated because of a work-related injury is not limited to his workers compensation remedy, but instead can bring a separate action in superior court for violation of the disability discrimination laws contained in the Fair Employment and Housing Act.[132] The court further held that disability discrimination constitutes a violation of fundamental public policy thereby permitting a plaintiff to bring a common law claim for wrongful termination as well. The court opined that to the extent California Labor Code section 132a, the FEHA and common law remedies overlap, equitable principles preclude multiple recoveries for the same injury.

2.4.10 Failure to Mitigate Damages

Plaintiffs in wrongful termination lawsuits have a duty to mitigate damages allegedly caused by the defendants actions. The general rule is that the measure of recovery by a wrongfully terminated employee is the amount of salary agreed upon for the period of service, less the amount that the employer proves the employee has earned or with reasonable effort might have earned from other employment.[133]

In *Caudle v. Bristow Optical Co.*,[134] the Ninth Circuit Court of Appeals held that a plaintiffs post-termination voluntary withdrawal from the workforce to care for her child barred her recovery of lost pay during the ensuing period. The plaintiff sued for wrongful termination and pregnancy discrimination after being terminated while eight months pregnant. Following her termination, the plaintiff voluntarily left the workforce and decided to stay at home to care for her child. The court reasoned that the plaintiffs voluntary withdrawal from the workforce dispelled any reasonable expectation of continuing employment with the company (she would have done so even if she had never been terminated), and, accordingly, constituted a failure to mitigate damages.[135]

2.4.11 Limiting the Number of Defendants

Plaintiffs will sometimes sue managers and supervisors in their individual capacities. These individuals may be liable for claims asserted against them. Individuals, however, usually are not proper defendants in an action alleging a breach of contract or covenant, because such contracts are between the employer and the employee only.[136] Also, a manager may discharge an employee and not be liable if he or she is acting in the course and scope of his or her management duties, engages in no outrageous conduct and is not acting to further his or her own economic interests at the expense of the discharged employee.[137]

In 2008, the California Supreme Court held in *Jones v. Lodge at Torrey Pines Partnership*[138] that individual supervisory employees cannot be held liable under the

FEHA for unlawful retaliation. In so ruling, the *Jones* court also specifically overruled the only California appellate case (*Walrath v. Sprinkel*)[139] that had held that an employee could maintain a common law wrongful termination action against an individual manager for retaliating against the employee in violation of the FEHA. It, therefore, now appears to be settled that a claim for wrongful discharge in violation of public policy can only be brought against the employer and not individual employees.

Generally, an employer is liable for the willful misconduct of employees acting in managerial capacities,[140] and is liable for willful and malicious torts committed in the scope of an employees employment.[141] A corporate employer may be responsible for punitive damages if it directs or ratifies the acts of its agents.[142] However, if an officer, director or managing agent of a corporate employer has not directed or ratified the acts of its agents, it is not responsible for punitive damages.[143] The California Supreme Court has determined that in order to be considered a managing agent, an employee must be able to exercise substantial discretionary authority over significant aspects of the companys business.[144]

2.4.12 Federal Enclave Doctrine

Whenever a state law claim is asserted based on actions that occurred within property that the federal government has exclusive control over (such as a federal building), the claim may be barred by the federal enclave doctrine.

A *federal enclave* is land over which the federal government exercises legislative jurisdiction.[145] The federal power over such enclaves emanates from [A]rticle I, [S]ection 8, [C]lause 17 of the U.S. Constitution, which gives Congress the power [t]o exercise exclusive legislation in all cases whatsoever over the District of Columbia and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of . . . needful buildings.[146]

A plaintiff working in a federal enclave may assert one of three types of claims against his or her employer:

1. claims authorized by federal law;
2. state law claims not in conflict with federal law that existed when the property became a federal enclave; and
3. state law enacted subsequent to the creation of the federal enclave to the extent authorized by Congress.[147]

Upon receipt of a complaint based on conduct that occurred on federal property, the first question is whether the property is itself a federal enclave.[148] If the claim did occur on federal property, then defendant should determine within 30 days of receipt of the

complaint whether he or she wishes to remove the case to federal court pursuant to U.S. Code title 28, section 1446(b).[149]

The second inquiry is whether the claims are indeed barred by the federal enclave doctrine. Generally, state law claims are barred by the federal enclave doctrine unless the state law cause of action existed at the time the property became a federal enclave or Congress authorized the state law.[150] Thus, defendants should determine when the property became a federal enclave, and then determine when the state law claim was first recognized in California. If the state law claim was not recognized in California when the property became a federal enclave, the claim is barred unless expressly authorized by Congress.[151]

2.5 E. Conclusion

Wrongful termination claims continue as a viable basis for recovery in California, especially where fundamental public policies have been breached by an employer.