Loyola of Los Angeles Law Review

Volume 24 | Number 1 Article 3

11-1-1990

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WHO WINS WRONGFUL DISCHARGE LITIGATION IN CALIFORNIA: A PROPOSAL FOR REFORM

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I. INTRODUCTION

In the past decade, California has witnessed an explosion in wrongful discharge litigation.[1] This dramatic increase is due primarily to judicially created exceptions to the presumption of at-will employment embodied in section 2922 of the California Labor Code.[2] The California Supreme Court's 1988 decision in *Foley v. Interactive Data Corp.*[3] narrowed the relief available for wrongful terminations.[4] The *Foley* court held that a plaintiff may receive contract but not tort damages for an employer's breach of the implied covenant of good faith and fair dealing.[5] The availability of ancillary tort causes of action, however, provides plaintiffs with an additional incentive to litigate wrongful discharge cases.[6] While employers have marshalled a number of defenses to com-

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1. S. PEPE & S. DUNHAM, AVOIDING AND DEFENDING WRONGFUL DISCHARGE CLAIMS § 19:01, at 2 n.1 (1987); *see also* Gould, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMPLOYEE REL. L.J. 404, 405 (1988) ("Although there are no precise statistics available, it is clear that wrongful discharge litigation, which was hardly known in the 1970s, is increasing geometrically . . . ."). In the last half of the 1980s, the office at which the author works has handled approximately 400 to 500 wrongful discharge complaints.

2. CAL. LAB. CODE § 2922 (West 1989). The three judicially created exceptions to the at-will rule are: (1) termination in violation of a fundamental public policy of the state, Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 176, 610 P.2d 1330, 1335, 164 Cal. Rptr. 839, 844 (1980); (2) breach of an implied-in-fact contract guaranteeing termination only for good cause, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 326-27, 171 Cal. Rptr. 917, 925 (1981); and (3) breach of an implied covenant of good faith and fair dealing, Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 722, 728 (1980). See *infra* notes 37-58 and accompanying text for an explanation of the at-will rule.

3. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

4. *Id.* at 699, 765 P.2d at 401, 254 Cal. Rptr. at 239.

5. *Id.* at 693, 765 P.2d at 396, 254 Cal. Rptr. at 234-35.

6. Depending on the facts of the particular case, plaintiffs commonly plead some or all of the following tort theories: (1) wrongful termination in violation of public policy; (2) intentional or negligent infliction of emotional distress; (3) defamation; (4) fraud; (5) interference with contract; (6) assault and battery; and (7) false imprisonment. *See infra* notes 63-143 and accompanying text.

bat these tort theories,[7] a good plaintiff's lawyer often emerges from pretrial proceedings with at least one tort theory.[8] Thus, it is unlikely, unless the California Supreme Court further curtails tort actions in the employment context, that wrongful discharge litigation will diminish appreciably in the foreseeable future.[9]

This Article analyzes the wrongful discharge litigation explosion in California in the 1980s. First, it briefly explains why the process needs reform and the origins of wrongful discharge litigation.[10] The Article then surveys important legal developments regarding tort causes of action in the field of wrongful discharge and highlights the likely battlegrounds in California wrongful discharge litigation in the 1990s.[11] The Article next addresses the practical implications of the current system for resolving wrongful discharge disputes.[12] Finally, it proposes reform of wrongful discharge litigation so that both employers and employees can resolve these relatively simple disputes in an expeditious and fair fashion.[13] The author suggests that a streamlined litigation process lasting no more than one year and culminating in a trial by jury provides the best prospect for reforming the current system given the divergent interests of the plaintiffs' bar and management.[14] To strike a

7. Common defenses raised by defense counsel in the pleading and summary judgment stage include: (1) the discharge relates to a private, rather than public, policy; (2) workers' compensation provides the exclusive remedy for allegations of emotional distress; (3) an at-will employee cannot reasonably or detrimentally rely on purported false assurances of continued employment; (4) a qualified privilege attaches to defamatory comments made to interested persons; (5) the manager's privilege precludes a claim of interference with contract; (6) a reasonable person under the circumstances would not fear bodily injury; and (7) an employer has an absolute privilege to detain an employee to investigate workplace misconduct. *See infra* notes 63-143 and accompanying text.

8. *See* Brody, *Wrongful Termination as Labor Law*, 17 SW. U.L. REV. 434, 444 (1988). The prospect for obtaining summary judgment increases substantially if the employer can remove the case from state court to federal court on diversity or federal question grounds. *See* 28 U.S.C. §§ 1332(a), 1441(b) (1988). In federal court, one judge monitors all aspects of the case from filing through trial, and will likely become quite familiar with the facts and applicable legal doctrine. In contrast, in most state courts the judges deciding motions are different than the judges who eventually try the case. Thus, defense counsel should usually remove a case to federal court on diversity or federal question grounds if permissible.

9. The court currently is reviewing Shoemaker v. Myers, 217 Cal. App. 3d 475, 237 Cal. Rptr. 686, *review granted*, 740 P.2d 404, 239 Cal. Rptr. 292 (1987), which raises a number of issues related to the availability of emotional distress damages. The parties briefed the matter over two years ago, and the court heard oral argument on October 4, 1990. It is, of course, impossible to predict what the court will decide.

10. *See infra* notes 16-58 and accompanying text.

11. *See infra* notes 59-143 and accompanying text.

12. *See infra* notes 144-217 and accompanying text.

13. *See infra* notes 218-48 and accompanying text.

14. One commentator has proposed arbitration of wrongful discharge cases, a proposal which the plaintiff's bar strongly opposes because it takes the matter away from juries, who

compromise between these competing factions, the author further suggests that California courts eliminate the numerous ancillary tort issues currently litigated in wrongful discharge suits, focus on whether the employer had good cause to discharge the employee, and award prevailing plaintiffs back pay, reinstatement and reasonable attorneys' fees not to exceed the amount of back pay awarded.[15]

II. THE RATIONALE FOR REFORM

Almost all wrongful discharge cases involve one simple question: Did the employer have good cause to discharge the employee?[16] Plaintiffs, however, often plead numerous tort causes of action in their complaints,[17] thereby requiring defendants to engage in a complex motion practice. In addition, plaintiff and defense counsel often engage in needless discovery through interrogatories and voluminous document requests.[18] Given the delay in reaching trial,[19] defense counsel often designate outplacement experts[20] to attempt to prove that a plaintiff failed to search diligently for comparable employment and, therefore,

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generally favor employees. *See* Gould, *supra* note 1, at 414-15. Former California Supreme Court Justice Joseph Grodin has recommended abolition of the at-will rule, a proposal opposed by management because it would interfere with management's discretion to make employment changes in the workplace. *See* Grodin, *Remedy Wrongful Termination by Statute*, CAL. LAW., July, 1990, at 120.

15. *See infra* notes 225-27 and accompanying text.

16. This precise question constitutes the issue submitted to the arbitrator in virtually all discharges arbitrated pursuant to collective bargaining agreements. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 650-54 (4th ed. 1985). The only exceptions in the non-union context concern probationary employees and employees who expressly acknowledge in writing that employment is at will. *See* Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 482, 199 Cal. Rptr. 613, 621-22 (1984). The California Supreme Court has left open the question of whether express at-will agreement preclude an implied contract claim. Foley v. Interactive Data Corp., 47 Cal. 3d 654, 680 n.23, 765 P.2d 373, 387 n.23, 254 Cal. Rptr. 211, 225 n.23 (1988).

17. Levine, *Judicial Backpedaling: Putting the Brakes on California's Law of Wrongful Termination*, 20 PAC. L.J. 993, 1051 n.215 (1989) ("*Foley*'s limitation on recoverable damages has lead to adding statutory and intentional tort claims to wrongful termination complaints.").

18. *See* Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPPERDINE L. REV. 637 (1990).

19. All cases must be tried within five years of the filing of the complaint. CAL. CIV. PROC. CODE § 583.310 (West 1989). There is a staggering backlog of civil cases in some California courts, and trials frequently do not commence until five years have almost elapsed. *See* Selvin & Kakalik, *L.A. Civil Justice Heads for Gridlock*, L.A. Times, Sept. 14, 1990, at B7, col. 2.

20. S. PEPE & S. DUNHAM, *supra* note 1, § 24:06. Outplacement refers to organizations, such as "headhunters," that assist employees in finding employment. Defense counsel will frequently engage an outplacement expert to assess whether the plaintiff used proper techniques to search for employment.

failed to mitigate damages.[21] Finally, in those cases that do reach trial, the matter may become a battle of the experts who offer their opinions about the amount of front pay[22] and the nature and severity of emotional distress purportedly suffered.[23]

Still, prevailing plaintiffs in wrongful discharge trials in Los Angeles County between 1980 and 1986 received an average jury award of $650,000.[24] On the other hand, the top ten awards averaged nearly four million dollars, whereas fifty percent of all prevailing plaintiffs received $177,000 or less.[25] Moreover, courts frequently reduce jury verdicts post-trial.[26] Taking into consideration the cases settled or dismissed, the average money that changed hands amounts to approximately $220,000.[27] From that $220,000, approximately 40% of the plaintiff's award is deducted for attorneys' fees.[28]

Although prevailing plaintiffs may receive handsome remuneration, at what cost? A wrongfully discharged plaintiff typically does not seek reinstatement to his or her former position.[29] Plaintiffs, however, often wait an inordinate amount of time before receiving any compensation,[30] while lengthy depositions, court appearances and trial testimony can exact an enormous emotional toll.[31] Likewise, fear of job dislocation often results in a plaintiff accepting subsequent employment which, although

21. *Id.*

22. Front pay is a remedy designed to compensate a plaintiff for future monetary losses that will be incurred before full relief from discrimination is attained. S. SHULMAN & C. ABERNATHY, THE LAW OF EQUAL EMPLOYMENT OPPORTUNITY § 9.04[1] (1990). Back pay refers to wages lost by plaintiff to the date of trial. *Id.* The calculation of front pay becomes a critical issue if the plaintiff has not obtained a comparable job as of the date of trial because the amount recoverable can be substantial. For example, an employee discharged at the age of fifty could conceivably recover lost wages to the date of retirement unless the court deems such recovery too speculative or the employer proves the employee failed to mitigate damages. *See id.* § 9.04[3].

23. S. PEPE & S. DUNHAM, *supra* note 1, § 22:36; G. SAPERSTEIN & B. SILVERMAN, WRONGFUL EMPLOYMENT TERMINATION PRACTICE § 7.31, at 301 (1987).

24. S. PEPE & S. DUNHAM, *supra* note 1, § 13:01 (Cum. Supp. 1989).

25. *Id.*

26. *Id.*

27. Jung & Harkness, *The Facts of Wrongful Discharge*, 4 LAB. LAW. 257, 261 (1988).

28. *See* Jung & Harkness, *Life After Foley: The Future of Wrongful Discharge*, 41 HASTINGS L.J. 131, 145 n.60 (1989). Most lawyers prosecute wrongful discharge actions on a contingency fee basis, meaning that counsel will receive an agreed-upon percentage of any ultimate settlement or judgment, less costs incurred in litigating that case. *Id.*

29. Gould, *supra* note 1, at 414 ("[B]y the time the matter gets through a jury trial, if the employee had any interest in reinstatement, it has long since dissipated because of the frustrations inherent in delay and the antagonisms that are associated with it.").

30. Selvin & Kakalik, *supra* note 19, at B7, col. 2.

31. Gould, *supra* note 1, at 414.

similar in compensation, is not ideal.[32]

Wrongful discharge claims also take their toll on employers. Employers incur substantial defense costs even in cases which are ultimately dismissed before trial.[33] Obviously, defense costs escalate significantly if the case goes to trial and is later appealed.[34] The inability to predict when a jury will award emotional distress or punitive damages[35] causes some employers to either settle out of court even the most straightforward cases or retain unproductive or marginal employees.[36] Before describing the protracted litigation process which has resulted from a well-intended response by the judiciary to the harshness of the statutory at-will rule, this Article briefly explains the origins of wrongful discharge litigation.

III. THE AT-WILL RULE AND THE ORIGINS OF WRONGFUL DISCHARGE

The California legislature codified at-will employment over a century ago.[37] As currently codified, section 2922 of the California Labor Code provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other."[38] When section 2922 controls, "the privilege of the employer to discharge the employee with or without cause 'is absolute . . . .' "[39]

Section 2922 creates a rebuttable presumption that the parties to an employment contract with no specified term may terminate that contract at will.[40] That presumption, like other presumptions, is subject to contrary evidence.[41] During the 1980s, California courts created three exceptions to section 2922 which allow discharged employees to sue their

32. *Id.*

33. S. PEPE AND S. DUNHAM, *supra* note 1, § 19:01.

34. *Id.*

35. Jury awards in wrongful termination lawsuits in California between 1982 and 1986 actually exceeded settlement demands by the employees' lawyers by 187%. Gould, *supra* note 1, at 405-06.

36. *Id.* at 411 ("There are many cases where employers have been fearful to dismiss a marginal or unproductive employee as they look down the barrel of a jury gun about to cock.").

37. *See* CAL. CIV. CODE § 1999 (1872) (current version at CAL. LAB. CODE § 2922 (West 1989)); *see also* S. PEPE & S. DUNHAM, *supra* note 1, § 1:03.

38. CAL. LAB. CODE § 2922 (West 1989).

39. Crain v. Burroughs Corp., 560 F. Supp. 849, 853 (C.D. Cal. 1983) (quoting Swaffield v. Universal Ecsco Corp., 271 Cal. App. 2d 147, 167, 76 Cal. Rptr. 680, 692 (1969)); *see also* Marin v. Jacuzzi, 224 Cal. App. 2d 549, 36 Cal. Rptr. 880 (1964).

40. Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 324, 171 Cal. Rptr. 917, 924 (1981).

41. *Id.*

employers: (1) termination that contravenes public policy;[42] (2) breach of an implied covenant of good faith and fair dealing not to be terminated except for good cause;[43] and, (3) breach of an implied-in-fact contract not to be terminated except for good cause.[44] If an employee could satisfy any of these exceptions, the employer would have to show good cause for termination.[45]

California courts had little trouble agreeing that a termination in violation of public policy constituted a tort because such a cause of action arose not from an employment contract, but from a duty implied in law.[46] Similarly, the courts agreed that the implied contract theory gave rise to recovery in contract, not in tort.[47] Nonetheless, although several courts of appeal recognized a tort cause of action for breach of the implied covenant of good faith and fair dealing,[48] the Calfornia Supreme Court never endorsed that principle.[49]

In *Foley v. Interactive Data Corp.*,[50] the California Supreme Court confirmed that a termination in violation of public policy constitutes a tort, and that an employee can obtain contract damages under an implied contract theory if the employee can demonstrate termination without good cause.[51] The court also held that a cause of action for breach of an

42. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 172-73, 610 P.2d 1330, 1332-33, 164 Cal. Rptr. 839, 841-42 (1980).

43. Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 722, 728 (1980).

44. *Pugh*, 116 Cal. App. 3d at 311, 327-28, 171 Cal. Rptr. at 917, 924-25.

45. "Good cause" means " 'a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power.' " *Id.* at 330, 171 Cal. Rptr. at 928 (quoting R.J. Cardinal Co. v. Ritchie, 218 Cal. App. 2d 124, 145, 32 Cal. Rptr. 545, 558 (1963)).

46. *See, e.g.*, Koehrer v. Superior Court, 181 Cal. App. 3d 1155, 1166, 226 Cal. Rptr. 820, 826 (1986) ("As *Tameny* explained, the theoretical reason for labeling the discharge wrongful in such cases is not based on the terms and conditions of the contract, but rather arises out of a duty implied in law on the part of the employer to conduct its affairs in compliance with public policy . . . . [T]here is no logical basis to distinguish in cases of wrongful termination for reasons violative of fundamental principles of public policy between situations in which the employee is an at-will employee and [those] in which the employee has a contract for a specified term. The tort is independent of the term of employment.").

47. *See, e.g., id.* at 1166-67, 226 Cal. Rptr. at 826-27.

48. *See id.* at 1155, 226 Cal. Rptr. at 820; Khanna v. Microdata Corp., 170 Cal. App. 3d 250, 215 Cal. Rptr. 860 (1985); Rulon-Miller v. IBM, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984); *Cleary*, 111 Cal. App. 3d at 453-56, 168 Cal. Rptr. at 728-29.

49. The California Supreme Court did discuss the issue as dictum. *See* Seaman's Direct Buying Service, Inc. v. Standard Oil Co., 36 Cal. 3d 752, 769 n.6, 686 P.2d 1158, 1166 n.6, 206 Cal. Rptr. 354, 362 n.6 (1984) (referring to *Tameny*, court observed "this court intimated that breach of the covenant of good faith and fair dealing in the employment relationship might give rise to tort remedies.").

50. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

51. *Id.*

implied covenant of good faith and fair dealing sounds only in contract, not in tort.[52] In so holding, the *Foley* court overruled *Cleary v. American Airlines, Inc.*[53] and its progeny which had recognized a claim for tortious breach of the implied covenant of good faith and fair dealing.[54] *Foley*'s holding with respect to the unavailability of tort damages is limited to the implied covenant cause of action.[55] At least one subsequent court of appeals decision has intimated, however, that the rationale of *Foley* precludes tort damages in the employment setting for terminations not in violation of public policy.[56] Nonetheless, that issue remains undecided.

Understandably, both pre- and post-*Foley*, plaintiffs have attempted to pursue theories that might yield tort damages.[57] Typically, a wrongful discharge complaint contains several traditional tort causes of action.[58] The next section of this Article examines those ancillary tort causes of action that have led to the protracted litigation process.

IV. TORT THEORIES IN THE EMPLOYMENT CONTEXT

The harshness of the statutory rule of at-will employment has spawned judicial recognition of a series of causes of action most commonly referred to as "wrongful discharge" claims.[59] The original tort theory approved by the California Supreme Court—wrongful termination in violation of public policy—provided a wrongfully discharged employee with the means to recover punitive and, arguably, emotional distress damages.[60] Recognizing the advantages of trying a case before a jury when seeking emotional distress and punitive damages, resourceful

52. *Id.* at 700, 765 P.2d at 401, 254 Cal. Rptr. at 239-40.

53. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

54. *Id.* at 457, 168 Cal. Rptr. at 730.

55. *Foley*, 47 Cal. App. 3d at 700, 765 P.2d at 401, 254 Cal. Rptr. at 239.

56. Fidler v. Hollywood Park Operating Co., No. B038280 (Cal. Ct. App. Sept. 5, 1990) (LEXIS, States library, Cal file) ("[N]either compensatory damages for emotional distress nor punitive damages are recoverable in a wrongful discharge action."). *But see* Lanouette v. Ciba-Geigy Corp., 222 Cal. App. 3d 1094, 272 Cal. Rptr. 428 (1990) (*Foley* only bars tort recovery for implied covenant cause of action, and nothing else).

57. Because of traditional limitations on contract damages, such as foreseeability and certainty, *see* CAL. CIV. CODE §§ 3300, 3301 (West 1970), an award of tort damages provides the prospect for greater recovery.

58. The most commonly pled torts are termination in violation of public policy, intentional or negligent infliction of emotional distress, defamation, fraud, interference with contract, assault and battery and false imprisonment. *See infra* notes 63-136 and accompanying text.

59. *See supra* note 2.

60. *See* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 176, 610 P.2d 1330, 1335, 164 Cal. Rptr. 839, 844 (1980).

plaintiffs' counsel developed a number of additional theories.[61] These theories include intentional or negligent infliction of emotional distress, defamation, fraud, interference with contract, assault and battery, and false imprisonment. Some of these ancillary tort theories have proven more successful than others, but the uncertainty in the law and the number of causes of action routinely pled in wrongful discharge cases permit a large number of claims to survive summary judgment.[62]

A. The Public Policy Exception

Public policy imposes a limitation on an employer's right to discharge an at-will employee.[63] Absent this limitation, "the threat of discharge could be used to coerce employees into committing crimes, concealing wrongdoing, or taking other action harmful to the public weal."[64] *Petermann v. International Brotherhood of Teamsters*[65] first stated this principle in 1959. In *Petermann*, a union business agent alleged that his refusal to commit perjury before a state legislative committee prompted his discharge.[66] The plaintiff in *Petermann* sought only contract damages for his termination.[67] The *Petermann* court held:

> It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.[68]

A number of California decisions following *Petermann* have barred discharge of at-will employees in violation of state policy governing labor-management relations.[69]

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61. The most common of these theories was a claim for tortious breach of an implied covenant of good faith and fair dealing. *See* Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). In *Foley v. Interactive Data Corp.*, however, the California Supreme Court ruled that contract, not tort, damages are recoverable for breach of an implied covenant of good faith and fair dealing. 47 Cal. 3d 654, 696, 765 P.2d 373, 398-99, 254 Cal. Rptr. 211, 236-37 (1988). Plaintiffs typically prefer to proceed to trial with at least one tort theory because they stand the chance to recover emotional distress and punitive damages in addition to the lost wages recoverable in a breach of employment contract case.

62. Brody, *supra* note 8, at 444.

63. Foley v. Interactive Data Corp., 47 Cal. 3d 654, 665, 765 P.2d 373, 376, 254 Cal. Rptr. 211, 214 (1988).

64. *Id.*

65. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

66. *Id.* at 187, 344 P.2d at 26.

67. *Id.* 344 P.2d at 27.

68. *Id.* at 188-89, 344 P.2d at 27.

69. *See, e.g.*, Montalvo v. Zamora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970) (discharge

In 1980, the California Supreme Court in *Tameny v. Atlantic Richfield Co.*[70] declared for the first time that an employee may sue in tort for wrongful discharge if the employer "condition[s] employment upon required participation in unlawful conduct by the employee."[71] In *Tameny*, the plaintiff alleged that his employer fired him for refusing to engage in illegal price fixing of gasoline.[72] The court held:

> [A]n employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests. . . . An employer engaging in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer.[73]

In so holding, the *Tameny* court explained that the cause of action did not depend upon an express or implied promise in the employment contract, "but rather reflect[ed] a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes."[74] Other courts have stressed general social policy objectives by recognizing a public policy exception when termination stems from the employee's assertion of a statutory right or performance of a legal act.[75]

In the aftermath of *Tameny*, the debate surrounding the public policy exception focused on whether the public policy asserted must derive from a statute.[76] California defense counsel successfully persuaded several courts of appeal to limit the holding of *Tameny* in such a fashion.[77]

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of employee for engaging representative to negotiate terms and conditions of employment unlawful); Wetherton v. Growers Farm Labor Ass'n, 275 Cal. App. 2d 168, 79 Cal. Rptr. 543 (1969) (same); Glenn v. Clearman's Golden Cock Inn, Inc. 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961).

70. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

71. *Id.* at 178, 610 P.2d at 1336, 164 Cal. Rptr. at 845-46.

72. *Id.* at 169, 610 P.2d at 1331, 164 Cal. Rptr. at 840.

73. *Id.* at 178, 610 P.2d at 1336-37, 164 Cal. Rptr. at 846.

74. *Id.* at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844.

75. *See, e.g., Foley*, 47 Cal. 3d at 668-69, 765 P.2d at 378-79, 254 Cal. Rptr. at 216-17 (policy implicated must benefit public, not merely private interests of employer); Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 477, 199 Cal. Rptr. 613, 618 (1984) (must allege discharge either "in retaliation for asserting statutory rights, or for refusal to perform illegal act"); *see also* Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (tort damages recoverable for discharge of employee performing jury service).

76. Plaintiff's counsel took the position that any public policy, whether or not derived from a statute, satisfied the exception. *Tameny*, 27 Cal. 3d at 177, 610 P.2d at 1336, 164 Cal. Rptr. at 845. Defense counsel argued that the exception only applied when a specific statute was implicated. *Id.*

77. *See* Gray v. Superior Court, 181 Cal. App. 3d 813, 819, 226 Cal. Rptr. 570, 572 (1986);

At least three other courts of appeal decisions addressing the issue concluded that the public policy need not be embodied in a statute or constitutional provision.[78] These courts indicated that a violation of public policy may derive from firmly established public policy of the state. The California Supreme Court, however, did not resolve this conflict when it decided *Foley*.[79]

The *Foley* court required courts to inquire "whether the discharge is against public policy and affects a duty which inures to the benefit of the public at large rather than a particular employer or employee."[80] Moreover, the court noted that "disparagement of a basic *public* policy must be alleged."[81] In *Foley*, the plaintiff informed his employer that a fellow employee "was currently under investigation by the Federal Bureau of Investigation for embezzlement from his former employer . . . ."[82] The court concluded that under these circumstances the plaintiff could not invoke the public policy exception.[83] The court reasoned that although the information served the employer's interests, no *public* policy was involved.[84] The *Foley* court offered the following guidance in determining what constitutes a public policy as opposed to merely the private interest of the employer:

> The absence of a distinctly "public" interest in this case is apparent when we consider that if an employer and 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. . . . Because here the employer and employee could have agreed that the employee had no duty to disclose such information, it cannot be said that an employer,

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Tyco Indus., Inc. v. Superior Court, 164 Cal. App. 3d 148, 159, 211 Cal. Rptr. 540, 546-47 (1985); *Shapiro*, 152 Cal. App. 3d at 477, 199 Cal. Rptr. at 618.

78. Dabbs v. Cardiopulmonary Management Servs., 188 Cal. App. 3d 1437, 1443-44, 234 Cal. Rptr. 129, 133-34 (1987); Garcia v. Rockwell Int'l Corp., 187 Cal. App. 3d 1556, 1561, 232 Cal. Rptr. 490, 492-93 (1986); Koehrer v. Superior Court, 181 Cal. App. 3d 1155, 1165, 226 Cal. Rptr. 820, 825 (1986).

79. *Foley*, 47 Cal. 3d at 669, 765 P.2d at 379, 254 Cal. Rptr. at 217.

80. *Id.*

81. *Id.*

82. *Id.* at 664, 765 P.2d at 375, 254 Cal. Rptr. at 213.

83. *Id.*

84. *Id.*

> in discharging an employee on this basis, violates a fundamental duty imposed on all employers for the protection of the public interest.[85]

Even under the above analysis, no clear-cut rules exist to determine what activity constitutes a public interest and what constitutes merely a private interest.[86] Thus, the battle in wrongful discharge cases in the 1990's will most assuredly center on case-by-case resolution of this question.

B. Intentional Infliction of Emotional Distress

Most wrongful discharge complaints contain a cause of action for intentional or negligent infliction of emotional distress.[87] To prevail on a common law cause of action for intentional infliction of emotional distress, a plaintiff must prove: (1) the conduct of the defendant was extreme and outrageous, and (2) as a result of such behavior, the plaintiff suffered severe emotional distress.[88] Although some courts have intimated that discharge alone does not constitute extreme and outrageous behavior,[89] others have viewed the issue as a factual inquiry for the jury.[90]

The most common defense employers raise rests on the exclusivity provision of California's Workers' Compensation Act.[91] The statute makes an employer strictly liable for any injury sustained by his or her employee arising out of or in the course of employment,[92] and it states

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85. *Id.* at 670-71 n.12, 765 P.2d at 380 n.12, 254 Cal. Rptr. at 218 n.12.

86. *Compare* American Computer Corp. v. Superior Court, 213 Cal. App. 3d 664, 665, 261 Cal. Rptr. 796, 797 (1989) (employee discharged for internally reporting to management about concerns regarding company embezzlement does not satisfy public policy exception) *with* Verduzco v. General Dynamics, No. 88 1813-G(M) (S.D. Cal. Apr. 3, 1990) (LEXIS, Genfed library, Dist file) (report by employee of defense contractor to management about lax security satisfies public policy exception).

87. C. BAKALY, JR. & J. GROSSMAN, THE MODERN LAW OF EMPLOYMENT RELATIONSHIPS § 12.2 (2d ed. 1989).

88. *See, e.g.*, Bogard v. Employers Casualty Co., 164 Cal. App. 3d 602, 616, 210 Cal. Rptr. 578, 587 (1985) (tort of intentional infliction of emotional distress requires dual showing of outrageous conduct by employer and severe emotional distress suffered by employee).

89. *See, e.g.*, Crain v. Burroughs Corp., 560 F. Supp. 849, 853-54 (C.D. Cal. 1983) (discharge alone not sufficient to constitute outrageous conduct).

90. *See, e.g.*, Lanouette v. Ciba-Geigy Corp., 222 Cal. App. 3d 1094, 272 Cal. Rptr. 428 (1990) (sufficient evidence of employer's outrageous conduct when employee discharged after three weeks into ninety-day probation); Rulon-Miller v. IBM, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984) (sufficient evidence of outrageous conduct when plaintiff discharged for dating competitor's employee).

91. CAL. LAB. CODE §§ 3600-3605 (West 1989).

92. Section 3600(a) states in pertinent part:

> Liability for the compensation provided by this division, in lieu of any other liability

that workers' compensation provides the exclusive remedy for such injuries.[93] Based on this language, defense attorneys have argued that the workers' compensation statute preempts a claim for intentional infliction of emotional distress arising from termination of employment.[94] The statute, however, contains certain specifically enumerated exceptions which, if satisfied, permit an action at law.[95]

Plaintiffs' counsel have made a number of arguments to rebut the workers' compensation defense. The most common arguments raised include: (1) termination from employment does not arise out of or within the course of employment;[96] (2) the exclusivity provisions of the statute only apply to physical injuries, not purely emotional injuries;[97] and, (3) an employer's intentional misconduct is not a "normal" part of the employment relationship and renders the workers' compensation exclusivity rule inapplicable.[98]

Employers gained a partial victory in this area under the California Supreme Court's decision in *Cole v. Fair Oaks Fire Protection District*.[99] The *Cole* court expressly rejected the argument that the intentional na-

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whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur . . . .

Id. § 3600(a).

93. Section 3602 provides in pertinent part:

(a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy for the employee or his or her dependents against the employer, and the fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer.

Id. § 3602.

94. *See infra* note 103.

95. The three exceptions are: (1) willful physical assault, fraudulent concealment of the existence of an injury, and use of defectively manufactured product; (2) failure to secure the payment of compensation; and (3) removal or failure to install power operation press guard, CAL. LAB. CODE §§ 3602(b), 3706, 4558 (West 1989).

96. *See, e.g.*, Georgia-Pacific Corp. v. Workers' Compensation Appeals Bd., 144 Cal. App. 3d 72, 75, 192 Cal. Rptr. 643, 645 (1983) (court, in dicta, intimates that discharge does not arise out of or in the course of employment).

97. *See, e.g.*, McGee v. McNally, 119 Cal. App. 3d 891, 174 Cal. Rptr. 253 (1981) (when thrust of complaint is emotional trauma, workers' compensation does not provide exclusive remedy); Renteria v. County of Orange, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978) (civil action permissible when plaintiff alleges emotional distress unaccompanied by physical injury).

98. *See* Continental Casualty Co. v. Superior Court, 190 Cal. App. 3d 156, 160, 235 Cal. Rptr. 260, 262 (1987).

99. 43 Cal. 3d 148, 729 P.2d 743, 233 Cal. Rptr. 308 (1987).

ture of an employer's misconduct is not "normal."[100] The court, however, did not decide whether discharge from employment arises in the course of employment and, therefore, left open the issue of whether emotional distress flowing from termination comes under the workers' compensation exclusivity rule.[101] While the court in *Cole* recognized that a plaintiff's attempt to distinguish physical from emotional harm under the statute created an artificial distinction, it did not resolve the issue.[102] Since *Cole*, some courts have rejected this distinction, while others have not.[103]

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100. *Id.* at 159-60, 729 P.2d at 750-51, 233 Cal. Rptr. at 314-15. Post-*Cole* cases have disagreed as to what *Cole* meant when it used the term "normal." One court of appeal has suggested that all employer conduct is "normal" unless it fits into one of the three specifically enumerated exceptions to the workers' compensation statute. Pichon v. Pacific Gas & Elec. Co., 212 Cal. App. 3d 488, 499-500, 260 Cal. Rptr. 677, 685 ("[I]f an employee suffers an injury compensable under Workers' Compensation Act, he or she may not recover any damages *caused by that injury* in a civil action for damages unless some exception to the exclusivity provisions of the Workers' Compensation Act is available."), *modified* 212 Cal App. 3d 1369 (1989). Other courts have decided the issue on a case by case basis. *Compare* Semore v. Pool, 217 Cal App. 3d 1087, 1104, 266 Cal. Rptr. 280, 290 (1990) (discharge for refusal to take eye test to determine drug use considered normal part of work relationship) *and* Potter v. Arizona S. Coach Lines, 202 Cal. App. 3d 126, 135, 248 Cal. Rptr. 284, 290 (1988) (failure to comply with duty to notify insured of conversion rights "does not constitute the type of outrageous misconduct so distinct from the normal empolyer-employee relationship that a separate civil cause of action should be permitted") *with* Miller v. Fairchild Indus., 885 F.2d 498, 510 (9th Cir. 1989) (applying California law, layoff of employee following settlement negotiations concerning complaints of racial discrimination not normal pattern of events in the workplace), *cert. denied*, 110 S. Ct 1524 (1990) *and* Hart v. National Mortgage & Land Co., 189 Cal. App. 3d 1420, 1429-31, 235 Cal. Rptr. 68, 73-75 (1987) (intentional infliction of emotional distress not considered normal working condition).

101. *Cole*, 43 Cal. 3d at 160, 729 P.2d at 751, 233 Cal. Rptr. at 315. *But see* Traub v. Board of Retirement, 34 Cal. 3d 793, 670 P.2d 335, 195 Cal. Rptr. 681 (1983) (pre-*Foley* case suggesting that injuries caused by termination arose out of and in the course of employment).

Subsequent decisions of the courts of appeal unanimously hold that discharge by definition arises out of and in the course of employment. *See, e.g.*, Zilmer v. Carnation Co., 215 Cal. App. 3d 29, 40, 263 Cal. Rptr. 422, 427 (1989) ("[I]nsofar as plaintiff alleges he suffered emotional distress by reason of defendants' conduct in causing his termination, his claim is precluded by the 'exclusivity remedy' provision of the Workers' Compensation Act"); Jenkins v. Family Health Program, 214 Cal. App. 3d 440, 450, 262 Cal. Rptr. 798, 803 (1989) (" 'Termination necessarily arises out of the employment relationship since it is the event that ends that relationship.' " (quoting Giorgi v. Verdugo Hills Hosp., 210 Cal. App. 3d 252, 265, 258 Cal. Rptr. 426, 432 (1989)); *Pichon*, 212 Cal. App. 3d at 498, 260 Cal. Rptr. at 684 ("[T]he exclusive remedy for appellant's claim of injury to his psyche, whether caused by on the job harassment or by termination, is provided by the Worker's Compensation Act").

102. 43 Cal. 3d at 160, 729 P2d. at 750-51, 233 Cal. Rptr. at 315.

103. *See Miller*, 885 F.2d at 510 (applying California law, claim for intentional infliction of emotional distress not barred by workers' compensation when no physical disability or injury). *Compare Zilmer*, 215 Cal. App. 3d at 40, 263 Cal. Rptr. at 427-28 (allegations of emotional distress barred by Workers' Compensation Act) *with Lanouette*, 222 Cal. App. 3d at 1111, 272 Cal. Rptr. at 439 (complaint for intentional infliction of emotional distress unaccompanied by physical injury or disabiliy not barred by exclusivity doctrine). Nor can courts agree on

The California Supreme Court will likely decide the issues left open in *Cole* in the pending case of *Shoemaker v. Myers*.[104] In *Shoemaker*, the plaintiff sought damages for physical and emotional injuries allegedly suffered as a result of his discharge from the position of special investigator for the Department of Health Services.[105] He asserted that his discharge violated a statute which prohibits firing state employees for reporting illegal activity to the Attorney General.[106] The court of appeals affirmed the lower court's ruling sustaining a demurrer, holding that all of the personal injuries alleged by plaintiff were compensable only through workers' compensation.[107] Thus, *Shoemaker* provides the California Supreme Court an opportunity to address a number of issues left open in *Cole*.

C. *Other Ancillary Torts*

1. Defamation

A defamation cause of action commonly appears in wrongful discharge complaints.[108] Employees frequently claim that the employer has falsely labelled the employee as insubordinate or incompetent.[109] Em-

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whether a plaintiff has alleged physical injury. *Compare* Goldman v. Wilsey Foods, Inc., 216 Cal App. 3d 1085, 1097-98, 265 Cal. Rptr. 294, 301 (1989) (complaint alleging that emotional distress prevented plaintiff from attending to his occupation stated actual physical disability compensable only through workers' compensaton) *and* Valenzuela v. State, 194 Cal App. 3d 916, 923, 240 Cal. Rptr. 45, 49 (1987) (anxiety, depression, sleep disturbance, heart palpitations, headaches and earaches compensable only through workers' compensation) *with Lanouette*, 222 Cal. App. 3d at 1103, 1112, 272 Cal. Rptr. at 433 (employee who was "shaking and visibly upset" and took "medication to calm [down]" has not alleged physical injury compensable under workers' compensation).

104. 217 Cal. App. 3d 475, 237 Cal. Rptr. 686, *review granted*, 740 P.2d 404, 239 Cal. Rptr. 292 (1987).

105. *Id.* at 478-79, 237 Cal. Rptr. at 688-89.

106. Former Section 19683 of the Government Code provided in pertinent part:

> No state officer or employee nor any person whatsoever shall directly or indirectly use or threaten to use any official authority or influence in any manner whatsoever which tends to discourage, restrain, interfere with, coerce or discriminate against any other state officer or employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of the Attorney General, or the Joint Legislative Audit Committee pursuant to Article 3 (commencing with Section 10540) of Chapter 4 of Part 2 of Division 2, or any other appropriate authority any facts or information relative to actual or suspected violation of any law of this state or the United States occuring on the job or directly related thereto. Any person guilty of such an act may be liable in an action for civil damages brought against him by the offended party. Notwithstanding the provision of section 19682, a violation of this section shall not be a misdemeanor.

CAL. GOV'T CODE § 19683 (West 1980) (repealed 1979).

107. *Shoemaker*, 217 Cal. App. 3d at 485, 237 Cal. Rptr. at 693.

108. S. PEPE & S. DUNHAM, *supra* note 1, § 2:09.

109. *See, e.g.*, Agarwal v. Johnson, 25 Cal. 3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979)

ployees may also plead a defamation count when their employer places the employee under a "strong compulsion" to disclose the contents of statements allegedly made about him or her—the so-called "self-publication rule."[110] Thus, many plaintiffs claim defamation on the ground that they had no choice but to inform subsequent employers of the purportedly false reason for their discharge.[111]

Truth constitutes an absolute defense to a cause of action for defamation.[112] The most successful defense at the summary judgment stage, however, is the qualified privilege afforded to statements the employer made to interested persons about the terminated plaintiff.[113] To rebut the qualified privilege, a plaintiff must demonstrate that the employer published false statements not for a legitimate business reason, but with malice.[114] Obtaining summary judgment based on the qualified privilege often proves difficult because circumstances surrounding defamation cases are quite fact specific.[115] Whether workers' compensation provides the exclusive remedy for emotional distress claims associated with defamation remains an open question.[116]

2. Fraud

Many wrongful discharge complaints contain a cause of action for fraud. Generally, the plaintiff alleges that the employer promised termination only for good cause, but that subsequently the employer broke the

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(statements about job ability, coupled with racial epithets, defamatory); Gray v. Superior Court, 181 Cal. App. 3d 813, 226 Cal. Rptr. 570 (1986) (cause of action for defamation stated where employee dismissed for insubordination).

110. McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 796, 168 Cal. Rptr. 89, 93-94 (1980).

111. *Id.*

112. CAL. CIV. CODE §§ 45, 46 (West 1982).

113. *See* Swaffield v. Universal Ecsco Corp., 271 Cal. App. 2d 147, 162-63, 76 Cal. Rptr. 680, 689-90 (1969) (summary judgment for employer affirmed where qualified privilege attaches to statements about employee made by corporate officer in letter to investor). A qualified privilege attaches to any statement made without malice to an interested person, such as others in management or fellow employees. CAL. CIV. CODE § 47(3) (West 1982). Such a statement is not defamatory. *See* Deaile v. General Tel. Co., 40 Cal. App. 3d 841, 846, 115 Cal. Rptr. 582, 585 (1974) (statement made in meeting with management regarding plaintiff's job performance privileged).

114. *Deaile*, 40 Cal. App. 3d at 847, 115 Cal. Rptr. at 585.

115. *See* Kelly v. General Tel. Co., 136 Cal. App. 3d 278, 186 Cal. Rptr. 184 (1982) (employee accused of misusing company funds avoiding privilege by pleading malice).

116. *See* Howland v. Balma, 143 Cal. App. 3d 899, 192 Cal. Rptr. 286 (1983) (holding workers' compensation does not provide exclusive remedy for emotional distress alleged in defamation cause of action). *But see* Cole v. Fair Oaks Protection Dist., 43 Cal. 3d 148, 159-60, 729 P.2d 743, 750, 233 Cal. Rptr. 308, 315 (1987).

promise.[117] Another ground for fraud arises when the employer made an allegedly false promise as an inducement to the employee to accept employment.[118]

While courts have rarely considered the viability of fraud allegations in the wrongful discharge context,[119] the reported California decisions have summarily dismissed claims of fraud based on a purported promise of good cause termination.[120] Because *Foley*, however, prohibits tort recovery for breach of an implied covenant of good faith and fair dealing, separate fraud counts in wrongful discharge complaints have become increasingly common.[121] Given the fact-specific nature of a fraud cause of action and the dearth of appellate court decisions, many state trial courts will not grant defense counsel summary judgment on such a claim.[122]

3. Interference with contract

In many wrongful discharge complaints, the plaintiff names several individuals, usually supervisors, as defendants.[123] Although the terminology of the cause of action varies, the gist of the claim against the supervisors is that they conspired wrongfully to discharge the plaintiff and interfered with an express or implied contractual requirement of

117. *See, e.g.*, Slivinsky v. Watkins-Johnson Co., 221 Cal. App. 3d 799, 804, 270 Cal. Rptr. 585, 587 (1990) (plaintiff alleged employer fraudulently represented continuing employment).

118. *See, e.g.*, Sheppard v. Morgan Keegan & Co., 218 Cal. App. 3d 61, 266 Cal. Rptr. 784 (1990) (fraud claim survived summary judgment where employer discharged employee prior to his start date but after employee accepted employment offer and moved across country); Burton v. Security Pac. Nat'l Bank, 197 Cal. App. 3d 972, 980, 243 Cal. Rptr. 277, 282 (1988) (fraud claim allowed when employee relies on false promise as an inducement to accept employment); Bondi v. Jewels by Edwar, Ltd., 267 Cal. App. 2d 672, 73 Cal. Rptr. 494 (1968) (plaintiff induced to close his own business based on promise of long term employment can claim fraud when promise not kept).

119. *See* C. BAKALY, JR. & J. GROSSMAN, *supra* note 87, § 10.4.1.

120. *See, e.g., Slivinsky*, 221 Cal. App. 3d at 807, 270 Cal. Rptr. at 589 (reliance by employee on oral promise of continuing employment which contradicts written agreement defining employment as at-will unreasonable).

121. *See, e.g., Slivinsky*, 221 Cal. App. 3d at 802, 270 Cal. Rptr. at 586 (plaintiff alleged employer fraudulently represented she would have continuing employment); Zilmer v. Carnation Co., 215 Cal. App. 3d 29, 263 Cal. Rptr. 422 (1989) (plaintiff alleged employer made fraudulent representations to induce employee's resignation).

122. 1 COURT RULES, LAW AND DISCOVERY POLICY MANUAL (Daily J. Corp.) ¶ 203 (Jan. 2, 1990) (Los Angeles County Superior Court rule requiring moving party to "disprove the assertions of the opposing party") Because a fraud allegation requires inquiry into a party's intent, it is especially difficult to establish intent through a declaration without raising a triable issue of fact which the plaintiff can contest.

123. C. BAKALY, JR. & J. GROSSMAN, *supra* note 87, § 16.5, at 308-09. Plaintiffs often name supervisors to avoid removal to federal court on diversity grounds. *See* S. PEPE & S. DUNHAM, *supra* note 1, § 20:04, at 4.

good cause for termination of employment.[124] To prevail on such a theory, plaintiffs must show that the supervisors acted outside the scope of their authority and for their own individual gain.[125]

The most common defense asserted to a claim for interference with contract is the so-called "manager's privilege."[126] This privilege derives from the principle that corporate supervisors acting on behalf of the corporation cannot induce a breach of the corporation's contract with the employee because the supervisor's confidential relationship with the corporation renders their conduct privileged.[127] A plaintiff can defeat this defense, however, if he or she can set forth specific facts to indicate that the supervisors had purely personal motives, as opposed to the interest of the corporation in the employee's discharge.[128]

4. Assault and battery

Given proper facts, a plaintiff in a wrongful discharge case may successfully plead causes of action for assault and battery.[129] For example, such claims can arise in harassment cases.[130] An assault and battery claim may also lie where the employee has an altercation with a supervisor.[131] In addition, a plaintiff might plead an assault claim when an employer interrogates him or her in connection with a theft or drug allegation and detains the employee during the meeting.[132]

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124. C. BAKALY, JR. & J. GROSSMAN, *supra* note 87, § 16.5, at 308-09.

125. Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 112 P.2d 631 (1941).

126. DeHorney v. Bank of Am. Nat'l Trust & Sav. Ass'n, 879 F.2d 459, 464 (9th Cir. 1989) (applying California law).

127. Wise v. Southern Pac. Co., 223 Cal. App. 2d 50, 72-73, 35 Cal. Rptr. 652, 665 (1963); *see also* Lawrence v. Bank of Am., 163 Cal. App. 3d 431, 437, 209 Cal. Rptr. 541, 545 (1985); Mayes v. Sturdy N. Sales, Inc., 91 Cal. App. 3d 69, 77-78, 154 Cal. Rptr. 43, 48 (1979); Zumbrun v. University of S. Cal., 25 Cal. App. 3d 1, 12-13, 101 Cal. Rptr. 499, 506 (1972).

128. *See* McCabe v. General Foods Corp., 811 F.2d 1336, 1340 (9th Cir. 1987) (applying California law); Los Angeles Airways, Inc. v. Davis, 687 F.2d 321, 325-26 (9th Cir. 1982) (applying California law).

129. Such a cause of action would arise if a male employee sexually harassed a female employee and touched her in the workplace without her consent. Another circumstance would be a "shoving" match between an employee and supervisor during a workplace argument or dispute.

130. *See, e.g.*, Hart v. National Mortgage & Land Co., 189 Cal. App. 3d 1420, 235 Cal. Rptr. 68 (1987) (claim for assault and battery permissible where co-employee grabbed employee's genitals, jumped on him and pinched him).

131. *See, e.g.*, Magliulo v. Superior Court, 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1975) (civil action against employer permissible when employee suffers emotional distress after sustaining back injury when her boss hit her and threw her on ground).

132. *See* Noble v. Sears, Roebuck & Co., 33 Cal. App. 3d 654, 109 Cal. Rptr. 269 (1973) (employer can be liable for intentional tort committed by agent); Alterauge v. Los Angeles Turf Club, 97 Cal. App. 2d 735, 218 P.2d 802 (1950) (employer liable for battery committed by agent against employee).

Inventive plaintiffs' counsel may try to plead an assault and battery count even in cases that do not involve physical contact. For example, an employee might fear physical harm if a supervisor confronts him or her in an aggressive or hostile fashion. The broad definition of assault may, in fact, encompass merely a fear of physical harm.[133] By pleading such a cause of action, plaintiffs could argue that the workers' compensation exclusivity doctrine does not apply to bar emotional distress damages in a civil action because of the codified exception provided for willful physical assault.[134]

Presumably, however, a workers' compensation exclusivity defense to an assault cause of action would lie if the defendant could show that no reasonable person would fear physical harm under the circumstances,[135] or to a battery cause of action if the plaintiff did not actually suffer a willful, physical injury.[136] Nonetheless, the fact-specific nature of both of these defenses may preclude summary judgment on this cause of action.

5. False imprisonment

A related theory that sometimes surfaces in wrongful discharge complaints is false imprisonment.[137] To establish a false imprisonment claim, a plaintiff must show physical restraint accomplished by either force or fear of force.[138] Such a claim may arise if an employer questions an employee's conduct on the job,[139] and the employee reasonably believes that the employer intends to harm the employee upon an attempt to leave the room in which the questioning takes place.[140]

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133. *See* RESTATEMENT (SECOND) OF TORTS § 33 (1965).

134. *See* CAL. LAB. CODE § 3602(b)(1) (West 1989) (plaintiff who demonstrates willful physical assault may proceed in civil action for emotional distress damages).

135. *See* Lowry v. Standard Oil Co., 63 Cal. App. 2d 1, 7, 146 P.2d 57, 60 (1944) (assault is "an invasion of the right of a person to live without being put in fear of personal harm").

136. *See* CAL. LAB. CODE § 3602(b)(1). *But see* People v. Martinez, 3 Cal. App. 3d 886, 83 Cal. Rptr. 914 (1970) (barefoot kick to shin of police officer battery even though no injury suffered because contact was willfully inflicted).

137. Rojo v. Kliger, 209 Cal. App. 3d 10, 257 Cal. Rptr. 158 (court granted employee leave to amend complaint to add claim for false imprisonment against employer), *review granted*, 775 P.2d 1035, 260 Cal. Rptr. 266 (1989); Miller v. United Airlines, Inc., 174 Cal. App. 3d 878, 220 Cal. Rptr. 684 (1985) (employee stated claim for false imprisonment against employer).

138. People v. Martinez, 150 Cal. App. 3d 579, 599-600, 198 Cal. Rptr. 565, 578-80 (1984); Onick v. Long, 154 Cal. App. 2d 381, 386, 316 P.2d 427, 431 (1957).

139. This would arise most frequently when the employer suspects the employee of theft or drug use.

140. *See, e.g.*, Parrott v. Bank of Am. Nat'l Trust & Sav. Ass'n, 97 Cal. App. 2d 14, 22, 217 P.2d 89, 95 (1950) (employer's detention and questioning of employee suspected of embezzlement constituted false imprisonment).

Employers may assert several defenses to such a claim. With respect to interviewing an employee about drug use in the workplace or the theft of company property, some courts might favorably consider the defense that an employer has an absolute privilege to conduct such an interview.[141] Moreover, if the employer hires an outside agency to conduct such interviews, and the agency acts beyond the authority extended to it by the employer, the employer can argue that it is not vicariously liable for such conduct.[142]

The discussion above illustrates the multiple tort theories and defenses that may be raised in even the most simple wrongful discharge case. Because the California Supreme Court has given few definitive answers as to the viability of a number of these theories,[143] plaintiffs will continue to plead numerous torts and defendants will continue to engage in a complex motion practice. The next section of this Article discusses the practical effects of this legal jockeying among counsel.

V. THE PRACTICAL EFFECTS OF WRONGFUL DISCHARGE LITIGATION

The wide variety of tort theories commonly pled in wrongful discharge cases often leads to protracted litigation and heated discovery battles—the lawyers' equivalent of trench warfare.[144] At the conclusion of discovery, both parties often designate experts to testify about emotional distress and other issues.[145] This leads to a whole new round of expensive discovery immediately preceeding trial.[146] At trial, expert testimony

141. *But see* Vandiveer v. Charters, 110 Cal. App. 347, 355-58, 294 P. 440, 444-45 (1930) (employer may be liable for false imprisonment where induces employee by force or fear of arrest to interview).

142. *See, e.g., Noble*, 33 Cal. App. 3d 654, 109 Cal. Rptr. 269 (employer only vicariously liable when agent acts within scope of authority). Vicarious liability refers to acts of an agent that can be imputed to a principal. W.P. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 508 (5th ed. 1984). However, an employer will not be liable for the acts of an agent if the agent was acting outside the scope of the employment. *Id.* at 502.

143. Since 1980, the California Supreme Court has only addressed wrongful discharge issues in three cases. *See* Cole v. Fair Oaks Fire Protection Dist., 43 Cal. 3d 148, 151, 729 P.2d 743, 744, 233 Cal. Rptr. 308, 309 (1987) (workers' compensation provides exclusive remedy where plaintiff injured by harrassment in workplace); *see also* Foley v. Interactive Data Corp., 47 Cal. 3d 654, 663, 765 P.2d 373, 374, 254 Cal. Rptr. 211, 212 (1988) (tort damages not recoverable for breach of implied covenant of good faith and fair dealing); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 169-70, 610 P.2d 1330, 1331, 164 Cal. Rptr. 839, 840 (1980) (tort cause of action exists for discharge in violation of public policy).

144. *See supra* notes 61-62 and accompanying text.

145. *See infra* note 195 and accompanying text.

146. Depositions of experts take place at the end of the discovery process and right before trial. In California, the parties must make a written demand for a list of experts ten days after

regarding when the plaintiff should have obtained alternative employment, the amount of lost wages and benefits, and the nature and severity of a plaintiff's emotional distress make even the most simple wrongful discharge case complex.[147] This section examines the discovery process and the trial of wrongful discharge cases and concludes with a discussion of the effects of wrongful discharge litigation on employees and employers.

A. The Discovery Process

The discovery process begins at a very early stage in a typical wrongful discharge action.[148] Most defendants will serve a notice of deposition and request for production of documents on the plaintiff when filing their answer to the plaintiff's complaint.[149] Depositions can last three, four or even five or more days, depending on the particular allegations.[150] Because most complaints contain a prayer for emotional distress damages,[151] defendants must probe into the most sensitive areas of a plaintiff's life to ascertain the nature and severity of plaintiff's emotional distress.[152]

Normally, plaintiffs' attorneys do not depose the employer's witnesses immediately, but instead send out document requests and interrogatories in order to compile information and better assess the strengths and weaknesses of the employee's case.[153] Until counsel receive such information, they must operate solely on the facts supplied by clients, the limited documentation clients' retained, and the employee's personnel file.[154] In California, a party can request an unlimited number of docu-

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the court sets the trial date or seventy days before the trial date, whichever comes later. CAL. CIV. PROC. CODE § 2034(b) (West Supp. 1990). The parties must exchange their expert lists simultaneously twenty days after service of the demand or fifty days before trial, whichever comes later. *Id.* § 2034(c). Each side must pay the expert's hourly fee for providing deposition testimony. *Id.* § 2034(i)(2).

147. S. PEPE & S. DUNHAM, *supra* note 1, § 22:36. Indeed, because the length of the damage phase of the trial often approximates the length of the liability phase, many employers move the court to bifurcate the trial between liability and damages.

148. *Id.* § 22:01.

149. *Id.*

150. *Id.* §§ 22:13, 22:17.

151. *See supra* note 87.

152. *See* Britt v. Superior Court, 20 Cal. 3d 844, 859, 574 P.2d 766, 775, 143 Cal. Rptr. 695, 704 (1978); *In re* Lifschutz, 2 Cal. 3d 415, 425, 467 P.2d 557, 563, 85 Cal. Rptr. 829, 835 (1970).

153. G. SAPERSTEIN & B. SILVERMAN, *supra* note 23, § 6.10.

154. *Id.* §§ 6.3, 6.10. Employees may obtain any document which they have signed from their personnel files prior to the commencement of litigation. CAL. LAB. CODE § 432 (West 1983 & Supp. 1990). Employees may also review any document in their personnel files at the location where the employer keeps the file. *Id.* § 1198.5.

ments, covering almost every conceivable area of the plaintiff's work history and the employer's policies and procedures.[155]

Both plaintiffs and defendants must produce virtually all documents the opposing party requests and answer interrogatories fully and completely.[156] The parties can, however, preserve any appropriate objections at trial by so stating in the written response.[157] Unfortunately, abuses of the discovery process abound on both sides.[158] Plaintiffs often appear at depositions without all the documents requested by employers and thus, delay the completion of the deposition.[159] Plaintiffs' counsel contend that defendants often give perfunctory answers to interrogatories and, at least initially, withhold certain documents on relevance or other grounds. Although the California Civil Discovery Act of 1986[160] appears to mandate sanctions for a party who brings or opposes a discovery motion without substantial basis,[161] this threat of sanctions has not substantially decreased the motion practice in the discovery phase.[162]

Even before the plaintiff begins to depose the employer's witnesses, costs during the initial discovery phase can escalate rapidly.[163] The costs for a court reporter and preparation of a transcript for a deposition can range anywhere from $600 to $1,000 per day, not including attorneys' fees for deposition preparation and the taking of the deposition itself.[164] In addition, the cost of responding to discovery requests can bring the employer's expenses to well over ten thousand dollars during this early stage.[165]

How a case will proceed after the early discovery stage often depends on the financial resources of the plaintiff and the value the plaintiff's counsel puts on the case.[166] Many plaintiffs' counsel often advance all costs, including deposition fees.[167] Thus, rather than using the shot-

155. CAL. CIV. PROC. CODE § 2031(a) (West Supp. 1990). Fortunately, absent court approval, California has limited the number of interrogatories to thirty-five, exclusive of form interrogatories approved by the Judicial Council. *Id.* § 2030(c).

156. *See id.* §§ 2030(f), 2031(f).

157. *Id.*

158. *See* Reavley, *supra* note 18, at 639-42.

159. *See* S. PEPE & S. DUNHAM, *supra* note 1, § 22:31. In such circumstances, the defendant must make a motion to compel production of documents. CAL. CIV. PROC. CODE § 2031(l) (West Supp. 1990).

160. CAL. CIV. PROC. CODE §§ 2016-2036 (West Supp. 1990).

161. *Id.* § 2023 (West 1983 & Supp. 1990).

162. *See* Reavley, *supra* note 18, at 650-51.

163. S. PEPE & S. DUNHAM, *supra* note 1, § 22:04.

164. *Id.*

165. *Id.* §§ 22:29, 22:30.

166. G. SAPERSTEIN & B. SILVERMAN, *supra* note 23, § 6.1.

167. Jung & Harkness, *supra* note 28, at 145.

gun approach of deposing any potentially relevant witness, many plaintiffs must narrow their choices to reflect a counsel-imposed limitation on available funds.[168] Plaintiff's counsel should, at a minimum, depose the plaintiff's supervisor[169] and a person knowledgeable about the employer's personnel policies.[170]

Once depositions conclude, the employer will normally file a motion for summary judgment or, in the alternative, summary adjudication of issues.[171] Filing such a motion can be quite costly to the employer, especially given the stringent requirements on the motion format which many branches of the superior court have imposed.[172] Plaintiff's counsel must also spend considerable time responding to the motion and submitting counter-affidavits, if appropriate.[173] An employer who loses the summary judgment motion may chose to file a writ of mandate with the court of appeal.[174] A plaintiff may also file a writ to the court of appeal if he or she loses a portion of a summary judgment motion.[175] Of course, if the employer prevails on the motion in its entirety, the plaintiff can appeal.[176] All of this amounts to added expense and time, and delays a final resolution.

If a tort theory survives summary judgment, both parties will likely engage in additional discovery, including depositions of experts.[177] Preparing and deposing experts is often the most expensive part of the litigation process.[178] Psychiatric experts charge anywhere from $100 to $300 an hour for consultation time, deposition preparation and testimony and the party taking an expert's deposition must tender the expert's fee at the commencement of the deposition.[179] Defense experts typically conduct

168. G. SAPERSTEIN & B. SILVERMAN, *supra* note 23, § 6.4.

169. *Id.*

170. *Id.* § 6.5, at 248.

171. S. PEPE & S. DUNHAM, *supra* note 1, § 23:04; *see* CAL. CIV. PROC. CODE § 437c (West Supp. 1990).

172. *See, e.g.*, 1 COURT RULES, LAW AND DISCOVERY POLICY MANUAL (Daily J. Corp.) ¶¶ 200-11 (Jan. 2, 1990). In Los Angeles County, defendants must file a separate statement of undisputed facts, notice of motion, index of out-of-state authority and a proposed order. *Id.* Defendants must attach all deposition pages and exhibits relied on in the motion. *Id.* ¶ 206. The separate statement now must have separate headings for each issue and every fact dispositive of each issue must appear in numerical order below the issue. *Id.* ¶ 207.

173. *See* CAL. CIV. PROC. CODE § 437c (West Supp. 1990).

174. *See id.* § 437c(l).

175. *Id.*

176. CAL. CIV. PROC. CODE § 902 (West 1980).

177. S. PEPE & S. DUNHAM, *supra* note 1, § 22:36; G. SAPERSTEIN & B. SILVERMAN, *supra* note 23, § 7.31, at 301.

178. For a discussion of the need for expert testimony in wrongful discharge litigation, see generally G. SAPERSTEIN & B. SILVERMAN, *supra* note 23, § 7.31, at 301.

179. CAL. CIV. PROC. CODE § 2034(i)(2) (West Supp. 1990).

mental examinations of the plaintiff pursuant to the California Civil Procedure Code.[180] These examinations generally last three hours, can cause an employee great stress and cost the employer much money.[181] Employers typically designate and prepare an outplacement expert[182] to testify about a plaintiff's job search in order to limit the amount of contract damages.[183] Such an expert can testify regarding whether plaintiff, in the expert's opinion, used the proper technique in order to find a job.[184] None of this discovery pertains directly to the basic issue in these cases: whether the employer had good cause to terminate the plaintiff. The subsidiary issues, however, tend to dominate both the discovery process and the trial. This Article next examines the trial of wrongful discharge actions.

B. Trial of Wrongful Discharge Cases

A large portion of the time and cost involved in a trial stems from preparation of jury instructions and motions *in limine*.[185] Given the rapid development of law in this area, and the conflicting decisions among the courts of appeal,[186] the instructions proffered by each side usually differ substantially.[187] Both parties spend a great deal of time preparing jury instructions because the refusal of an appropriate jury instruction preserves important arguments on appeal.[188]

Both the employer and employee in wrongful discharge cases also generally file a number of motions in limine.[189] Many of the employer's motions pertain to the exclusion of evidence regarding claims of emo-

180. *See id.* § 2032 (West 1983 & Supp. 1990). Under section 2032, a mental exam is permissible when a plaintiff puts his or her emotional state at issue in this case. Reuter v. Superior Court, 93 Cal. App. 3d 332, 155 Cal. Rptr. 525 (1979). Whitfield v. Superior Court, 246 Cal. App. 2d 81, 54 Cal. Rptr. 505 (1966).

181. G. SAPERSTEIN & B. SILVERMAN, *supra* note 23, § 7.31.

182. An outplacement expert analyzes what techniques a plaintiff used to find comparable employment and testifies whether such efforts were reasonable. For example, if an employee only responded to two newspaper advertisements in six months, and did not use a headhunter service or send out resumes, an outplacement expert would testify, based on his or her experience in counseling employees, whether the effort was adequate. *See, e.g.*, State Personnel Recruiting Servs. Bd. v. Horne, 732 S.W.2d 289 (Tenn. Ct. App. 1987).

183. S. PEPE & S. DUNHAM, *supra* note 1, § 24:06.

184. *See supra* note 20.

185. S. PEPE & S. DUNHAM, *supra* note 1, § 25.04; G. SAPERSTEIN & B. SILVERMAN, *supra* note 23, § 7.11.

186. *See supra* notes 76-86 and accompanying text.

187. C. BAKALY, JR. & J. GROSSMAN, *supra* note 87, § 15.14.

188. Ortiz v. Bank of Am. Nat'l Trust & Sav. Ass'n, 852 F.2d 383, 386 (9th Cir. 1987) (litigating parties entitled to jury instructions supported by California law).

189. *See* C. BAKALY, JR. & J. GROSSMAN, *supra* note 87, § 15.11.

tional distress or anecdotal testimony of the employee's friends.[190] Defendants often seek to preclude testimony regarding emotional distress in its entirety or, at a minimum, to limit the testimony in some fashion.[191] The plaintiff's motions in limine generally focus on excluding evidence regarding other potential sources of emotional distress—such as marital or family problems—on the ground that the prejudice of such evidence outweighs any probative value.[192] Depending on the deposition testimony of the experts, additional motions may seek to limit or exclude certain opinions set forth by the expert.[193]

At trial, the real risk for an employer is the potential for a large assessment of emotional distress and punitive damages.[194] Accordingly, much of the actual case presentation at trial centers around issues of emotional distress, and the jury hears evidence regarding conflicting psychiatric evaluations of the plaintiff.[195] Thus, even the most simple termination case can turn into a lengthy presentation of complex medical evidence.[196] Consequently, the damage phase of a wrongful discharge trial lasts at least as long as the liability phase.[197]

By the time a wrongful termination trial concludes, an employee may have spent years in litigation,[198] and both the employee and employer have often incurred significant legal expenses.[199] This Article next discusses the practical implications of the wrongful discharge litigation process for both plaintiffs and defendants.

C. The Effect on Plaintiffs and Defendants

All litigation causes strain on those who participate, but the manner in which wrongful discharge litigation has evolved places those embroiled in the controversy under acute stress.[200] Neither plaintiffs nor defendants emerge from this process unscathed.[201]

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190. S. PEPE & S. DUNHAM, *supra* note 1, § 25:04; G. SAPERSTEIN & B. SILVERMAN, *supra* note 23, § 7.13.

191. S. PEPE & S. DUNHAM, *supra* note 1, § 25:04.

192. G. SAPERSTEIN & B. SILVERMAN, *supra* note 23, § 7.13.

193. S. PEPE & S. DUNHAM, *supra* note 1, § 25:04.

194. *See supra* notes 24-25 and accompanying text.

195. G. SAPERSTEIN & B. SILVERMAN, *supra* note 23, § 8.37.

196. *See* S. PEPE & S. DUNHAM, *supra* note 1, § 22:36.

197. For this reason, many defendants move to bifurcate liability and damages. G. SAPERSTEIN & B. SILVERMAN, *supra* note 23, § 8.4.

198. *See supra* note 30 and accompanying text.

199. *See supra* notes 29-36 and accompanying text.

200. G. SAPERSTEIN & B. SILVERMAN, *supra* note 23, §§ 4.5-4.6.

201. Gould, *supra* note 1, at 413 ("[T]he new common law of wrongful discharge has provided employer and employee with the worst of all possible worlds.").

Termination from employment ranks as one of life's most stressful situations.[202] The wrongful discharge litigation process perpetuates this stress.[203] In the course of five or more years of litigation, the employee must relive his or her termination on numerous occasions. In addition, because of the numerous tort theories involved,[204] employees expose themselves to broad discovery probing into the most sensitive areas of their lives.[205] If an employer must defend against a claim of emotional distress, it has a legitimate right to delve into other life events that may have contributed to the stress.[206] This may involve detailed discovery into such matters as marital affairs, sexual fulfillment, drug abuse, alcoholism and a host of other issues.[207] Employers may properly inquire into the employee's psychiatric history, including the subject and nature of counseling sessions prior to the termination.[208] However, because none of these issues involves an assessment of the plaintiff's job performance, they may have no relevance to the question of whether the employer had good cause to terminate the employee.

Wrongful termination lawsuits also have a profound effect on the employer's representatives whose reputations may suffer because of the dispute.[209] Few individuals relish the task of terminating an employee, and often the final decision to terminate an employee comes only after extreme soul-searching.[210] Employers' representatives must relive their decisions for years during the course of litigation. In addition, most complaints now name individual supervisors as defendants.[211] The stigma of being sued can exact a tremendous toll on the supervisor.[212] Moreover, even though most companies agree to defend their supervisors at no cost and bear the financial burden of any ultimate settlement or

202. *See* Foley v. Interactive Data Corp., 47 Cal. 3d 654, 718-19, 765 P.2d 373, 415, 254 Cal. Rptr. 211, 253, (1988) (Kaufman, J., concurring and dissenting).

203. Gould, *supra* note 1, at 413.

204. *See supra* note 61 and accompanying text.

205. *See* Britt v. Superior Court, 20 Cal. 3d 844, 574 P.2d 766, 143 Cal. Rptr. 695 (1978); *In re* Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

206. *Lifschutz*, 2 Cal. 3d at 436, 467 P.2d at 571, 85 Cal. Rptr. at 843.

207. G. SAPERSTEIN & B. SILVERMAN, *supra* note 23, § 7.13.

208. *See Lifschutz*, 2 Cal. 3d at 435, 85 Cal. Rptr. at 842 (medical records relevant to particular condition plaintiff has placed in issue admissible).

209. *See* S. PEPE & S. DUNHAM, *supra* note 1, § 6:03.

210. *Id.* A supervisor's reluctance to confront subordinates with bad news often results in the supervisor failing to communicate unsatisfactory performance until the proverbial straw that breaks the camel's back which results in the employee's belief that the termination was arbitrary or capricious. *Id.* § 3:02.

211. Agarwal v. Johnson, 25 Cal. 3d 932, 160 Cal. Rptr. 141 (1979) (supervisors and company jointly liable for damages); *see* S. PEPE & S. DUNHAM, *supra* note 1, § 6:03.

212. *See* S. PEPE & S. DUNHAM, *supra* note 1, §§ 6:01-6:03.

judgment, supervisors often realize that an adverse result may cause those above them in the corporate hierarchy to second-guess their decisions.[213] Many supervisors feel that if the company loses such a case, they should resign.[214] Others fear that their job may depend on the outcome of the litigation.[215]

Both employees and employers suffer needlessly under the current wrongful discharge litigation system. Although some plaintiffs may ultimately reap a substantial award, the vast majority end up disheartened by the process.[216] The same invariably applies even to victorious employers.[217] Accordingly, the final portion of this Article recommends substantial reform to the wrongful discharge litigation system that will benefit both employees and employers in the long run.

VI. A STREAMLINED LITIGATION PROCEDURE FOR RESOLVING WRONGFUL DISCHARGE DISPUTES

The current system for adjudicating wrongful discharge cases needs drastic reform. Wrongful discharge cases take too long to resolve,[218] involve a discovery process which is far too costly and time consuming[219] and have become needlessly complex to try.[220] Some management proponents have urged arbitration as the sole forum for wrongful discharge disputes.[221] But arbitration has received vocal opposition from the plaintiff bar.[222] Alternatively, former California Supreme Court Justice

213. *Id.*

214. *Id.*

215. *Id.*

216. Gould, *supra* note 1, at 413 ("[T]he employees who benefit are few and far between."). Approximately 25% of cases are disposed of by summary judgment, and another 50-70% settle, usually for a reasonable sum. S. PEPE & S. DUNHAM, *supra* note 1, § 19.01. Fifty percent of the remaining 5-25% of cases that go to trial result in the plaintiff receiving a judgment of less than $177,000. *See supra* note 25 and accompanying text.

217. Gould, *supra* note 1, at 413.

218. For example, in *Foley*, the plaintiff was discharged in 1983 and his case was litigated at least through 1988. *See* Foley v. Interactive Data Corp., 47 Cal. 3d 654, 665, 765 P.2d 373, 375, 254 Cal. Rptr. 211, 213 (1988).

219. G. SAPERSTEIN & B. SILVERMAN, *supra* note 23, §§ 4.4, 4.7. Defendants in wrongful termination cases use extensive discovery as preparation for a motion for summary judgment. Especially if a large corporation is the defendant, witnesses are often located out of state, thus increasing the cost of litigation. *Id.*

220. *Id.*

221. *See* Miller, Foley v. Interactive Data Corp.: *The California Supreme Court Takes Uncertain Steps Toward Certainty in Wrongful Discharge*, 11 WHITTIER L. REV. 595, 603 (1989) ("Perhaps abolition of emotional distress would be a viable trade-off for the more affordable forum of arbitration."); *see also* Gould, *supra* note 1, at 415-16.

222. Gould, *supra* note 1, at 420 ("The current debate about a better system has resulted in a legislative standoff in California.").

Joseph Grodin argues that the California Legislature should abolish the at-will presumption embodied in section 2922 of the California Labor Code,[223] a proposal opposed by management.[224]

The plaintiff's bar will likely attempt to prevent sweeping reform of the current system and will continue to lobby effectively against arbitration. On the other hand, management will likely lobby just as strongly against abolition of the at-will rule. This Article proposes a streamlined litigation procedure for all wrongful discharge cases which will strike a middle ground between management and the plaintiff's bar. It recommends that courts eliminate tort recovery in wrongful discharge cases except for discharges in violation of public policy. This way, the parties will be forced to focus on the main issue of good cause for discharge rather than ancillary issues. Indeed, both the call for arbitration and Justice Grodin's argument to abolish the at-will rule have, as their common core, the notion that these cases involve the relatively simple determination of whether good cause supported the discharge at issue.[225] Once courts focus on the good-cause issue,[226] they should also place rigid limits on discovery and require a trial within one year of the filing of the complaint.[227] To remedy a wrongful discharge, a jury should award back pay and reinstatement to the prevailing plaintiff. Additionally, to satisfy the plaintiff's bar, counsel for a prevailing plaintiff should receive reasonable attorneys' fees not to exceed the amount of back pay awarded.

Initially, this Article urges that courts follow the admonition in *Foley v. Interactive Data Corp.*[228] that "the employment relationship is fundamentally contractual"[229] and refuse to recognize all tort theories except termination in violation of public policy.[230] For discharges not based on the public policy exception, the typical wrongful discharge jury trial should involve only three issues:

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223. CAL. LAB. CODE § 2922 (West 1989).

224. Grodin, *supra* note 14, at 120. This author takes no position on whether arbitration provides the best means to resolve wrongful discharge disputes or whether the Legislature should abolish section 2922. He seeks to suggest a reform that would satisfy both sides.

225. Under Professor Gould's proposal, the same standard would apply in the non-union context. Similarly, abolition of the at-will rule would mean that all terminations would have to be supported by good cause. Gould, *supra* note 1, at 404.

226. Good cause is the focus of all discharges pursuant to a collective bargaining agreement. *See* F. ELKOURI & E. ELKOURI, *supra* note 16, at 650-54.

227. For example pursuant to CAL. GOVT. CODE §§ 68600-68619 (West Supp. 1990) the Los Angeles Superior Court has promulgated rules to attempt to reduce the time it takes to get to trial in a civil action. The goal of this "fast track" program is to dispense of 90% of all civil cases within one year of filing a complaint. *See* L.A. SUP. CT. R. 1100-1210.

228. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

229. *Id.* at 696, 765 P.2d at 398, 254 Cal. Rptr. at 236.

230. *See supra* note 55 and accompanying text.

1. Whether the employment relationship is at-will for the particular employee.
2. If not, whether the employer had good cause to terminate the employee.
3. If the employer did not have good cause to terminate the employee, whether the employee should receive reinstatement, backpay, attorney's fees or a combination of the three.

To answer the first question, the jury should consider " 'the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.' "[231] Otherwise, employment should be deemed at will. Often, however, at least one of these factors exists. Probationary employees certainly should not have any right to termination only for good cause because an employer needs some time to assess its business needs and the employee's performance. Thus, employers should set forth a specific probationary period in their policies. Currently, some employers expressly define employment as at will in writing to attempt to protect themselves against runaway jury verdicts.[232] Several courts have held that a signed, written agreement stating that employment is at will precludes any evidence of a contradictory promise of termination only for good cause.[233] The continuing viability of these at-will agreements is unclear because some courts have permitted their modification during the course of employment.[234] In any event, if courts follow the author's recommended streamlined litigation procedures, including limitations on damages, some employers who have half-heartedly utilized at-will agreements to protect against large tort verdicts may abandon them and, in-

231. *Foley*, 47 Cal. 3d at 680, 765 P.2d at 387, 254 Cal. Rptr. at 225 (quoting Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917, 925-26 (1981)).

232. *See, e.g.*, Crain v. Burroughs Corp., 560 F. Supp. 849, 852 (C.D. Cal. 1983) (written employment contract signed by employee expressly stated employment was terminable at will); Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 482, 199 Cal. Rptr. 613, 621 (1984) (implied contract claim dismissed because employee signed written stock option agreement stating he was employed at will).

233. *Crain*, 560 F. Supp. at 852; Malmstrom v. Kaiser Aluminum & Chem. Corp., 187 Cal. App. 3d 299, 316, 231 Cal. Rptr. 820, 828 (1986); *Shapiro*, 152 Cal. App. 3d at 482, 199 Cal. Rptr. at 621.

234. *See, e.g.*, Wagner v. Glendale Adventist Medical Center, 216 Cal. App. 3d 1379, 265 Cal. Rptr. 412 (1989) (at-will agreement may be modified by subsequent implied agreement). The California Supreme Court has expressly left open the issue of whether express, written agreements providing that employment may be terminated at will can be modified by a subsequent implied agreement. *Foley*, 47 Cal. 3d at 680 n.23, 765 P.2d at 387 n.23, 254 Cal. Rptr. at 225 n.23.

stead, defend the claims by arguing that good cause supported the discharge.

If the employee rebuts the at-will presumption, the issue becomes whether good cause existed for the termination. While some reasons for termination constitute good cause as a matter of law, such as a bona fide economic reduction in force,[235] most wrongful discharge cases simply involve a factual determination as to whether the employee's job performance warranted discharge. If wrongful discharge cases focus solely on this issue of good cause, the entire litigation process should last only one year.[236] Indeed, superior court judges can and should place limitations on discovery and enforce rigid adherence to discovery and motion cut-off dates.[237] Without the numerous subsidiary issues raised by ancillary tort claims, courts could require that depositions of a plaintiff take one or, at most, two days, and courts could limit document requests by plaintiffs to only those documents pertaining to employment policies and the grounds for termination.[238] In short, a litigation process that now stretches through three, four or five years could easily conclude in a year's time.[239] Although some superior courts have a tremendous case backlog,[240] judges might be willing to hear these cases within a year of the filing of the complaint if they knew that the entire trial would last two to three days instead of two or three months.

Under the streamlined procedures outlined above, the same remedial scheme typically employed in arbitrations under collective bargaining agreements should apply in wrongful discharge cases.[241] An arbitrator typically orders reinstatement and back pay or, in certain circumstances, reinstatement without back pay.[242] Although courts traditionally refuse to compel specific performance of employment contracts,[243] arbitrators have frequently done so in the organized labor

235. *See, e.g.*, Malmstrom v. Kaiser Aluminum & Chem. Corp., 187 Cal. App. 3d 299, 231 Cal. Rptr. 820 (1986) (business reorganization because of bona fide economic reasons constitutes good cause for layoff).

236. *See supra* note 227.

237. *Id.*

238. L.A. SUP. CT. R. 1106.4.3.4 ("The Court shall have the responsibility for regulating the timing, scope and completion of discovery.").

239. *See supra* note 218.

240. Selvin & Kakalik, *supra* note 19, at B7, col. 2 ("Civil litigants have to wait over four years for an open courtroom.").

241. Arbitrations pursuant to collective bargaining agreements generally take place within a short specified time period set forth in the agreement. *See* F. ELKOURI & E. ELKOURI, *supra* note 16, at 191-98.

242. *Id.*

243. CAL. CIV. CODE § 3423 (West 1970).

workforce context.[244] Arguably, reinstatement in the collective bargaining context provides a more appropriate remedy than in the non-union context because employees who return to work pursuant to a collective bargaining agreement have the union to provide a check on management.[245] In view of these concerns, courts should permit the employee to make a post-trial motion requesting the court to exercise its equitable power and order the employer to provide outplacement services until the employee finds comparable employment. In an egregious circumstance, the judge could order the accumulation of back pay until outplacement services secure the plaintiff another job. The court could monitor the employee's progress in finding employment through status conferences or other means.

Finally, to achieve the support of the plaintiffs' bar, a prevailing wrongful discharge plaintiff should also recover reasonable attorneys' fees. This should provide plaintiff's counsel with the requisite incentive to continue accepting these cases. In fact, many plaintiff's counsel would probably earn more money annually by recovering fees from litigating a steady stream of wrongful discharge cases than by investing up to five years under the present system and hoping for a large verdict.[246] The amount of attorneys' fees recoverable, however, should be limited to the amount of back pay awarded to keep the damages at a reasonable level.

A streamlined litigation system operating in the manner suggested is far more preferable than the current system and would prove beneficial to both employees and employers. Employees would receive their remedy for wrongful discharge much sooner and might also be able to return to jobs they held for many years prior to the discharge. Plaintiff's attorneys would still have an incentive to represent employees because they could recover substantial attorneys' fees. Plaintiffs would not lose the ability to have their cases considered by a jury of their peers.

Employers gain a substantial degree of predictability of outcome in this streamlined litigation procedure. Defense costs should plummet because of shortened discovery procedures and trials. Although the em-

244. F. ELKOURI & E. ELKOURI, *supra* note 16, at 688-91. The California Civil Code currently prohibits specific performance of employment contracts. CAL. CIV. CODE § 3423 (West 1970). The Legislature could easily amend the civil code to permit reinstatement.

245. *See* F. ELKOURI & E. ELKOURI, *supra* note 16, at 688-91.

246. Under the proposal, plaintiff's counsel could recover attorneys' fees equal to the back pay awarded. Suppose that a plaintiff's counsel handles six two-day trials during a year for employees whose annual salaries average $50,000. Even if counsel prevails in only one half of these cases, he or she could earn approximately $150,000. To earn as much under the current system, the counsel must obtain a verdict in the $400,000 to $450,000 range. As noted, 50% of current verdicts are less than $177,000. *See supra* note 25.

ployer may have to pay plaintiff's attorneys' fees, this amount pales in comparison to the emotional distress and punitive damages awarded in many cases.[247] Although the potential financial loss for employers will be limited, the prospect of an award of backpay, reinstatement and attorneys' fees should deter arbitrary employment terminations.

VII. CONCLUSION

The time has come to reform wrongful discharge litigation. Given the opposition of the plaintiff's bar to arbitration, juries should still decide these cases, but courts should adopt a streamlined litigation procedure and simplify the legal issues. Employees should recover emotional distress and punitive damages only in cases involving termination in violation of public policy. Reinstatement as well as back pay should constitute the remedy for all other terminations. Prevailing plaintiff's counsel should recover attorney's fees not exceeding the back pay award. The above approach will likely receive support from both the plaintiffs' and defense bars because it protects employees from arbitrary discharges, and avoid the excesses that have led to judicial reexamination of wrongful termination actions in recent years.

247. *See supra* notes 24-27 and accompanying text.