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Gantt v. Sentry Insurance: When Can an Employee be Discharged? Ask the Legislature.

INTRODUCTION

The employment at will doctrine states that when an employer and employee enter into an employment relationship with no specified duration, the employment is presumed to be at will.[1] "At will" means that the employment relationship can be terminated by either the employer or the employee for any reason or no reason at all.[2] The at will doctrine has gained widespread popularity among employers because it recognizes that the employer is in the best position to make economically efficient decisions with respect to maintaining or terminating the relationship.[3] At will employment has allowed employers to remove a worker for unsatis-

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1. CAL. LAB. CODE § 2922 (West 1989); *see* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 172, 610 P.2d 1330, 1332, 164 Cal. Rptr. 839, 841 (1980) (referring to California Labor Code § 2922 as California's codification of the common law rule of at will employment); JEFFERY L. LIDDLE, *Malicious Termination and Abusive Discharges: The Beginning of the End of the Employment At Will*, EMPLOYEE TERMINATION HANDBOOK 1, 1 (1981) (defining at will employment as an agreement between an employer and employee whereby the employee may voluntarily leave a job or be terminated by the employer for any reason).

The employment at will doctrine is also known as Wood's Rule after Horace C. Wood, who first enunciated the doctrine in 1877. *See* HORACE C. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272-73 (1877) (asserting that the American rule (which became known as Wood's Rule) presumes that an employment for an indefinite period of time is presumed to be at will); *infra* notes 66-68 and accompanying text (discussing Wood's contribution to the development of the employment at will doctrine). *But see* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126 (1976) (criticizing Wood's conclusion that the American case law demonstrated the existence of the employment at will doctrine).

2. *See* Foley v. Interactive Data Corp., 47 Cal. 3d 654, 665, 765 P.2d 373, 376, 254 Cal. Rptr. 211, 214 (1988) (stating that absent an agreement to rebut the at will presumption, an employee can be discharged with or without good cause); Jill Susan Goldsmith, Note, *Employment-At-Will—Employers May Not Discharge At-Will Employees for Reasons that Violate Public Policy*, 1986 ARIZ. ST. L.J. 161, 161 (1986) (noting that the traditional American rule is that employers may discharge an at will employee for good cause, no cause or even a morally wrong cause).

3. *See* Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405-06 (1967) (discussing how the employment at will doctrine is one of the greatest sources of employer power over employees, because the doctrine allows an employer to legally threaten discharge if an employee does not obey the employer).

factory performance at any time to improve workplace efficiency.[4] However, employees, ever at the whim of their employers, have expressed disdain toward at will employment.[5] In the last ten years, due primarily to employee criticism of at will employment, California courts have developed exceptions to the employment at will doctrine.[6] Indeed, courts have recognized that private sector employees, unlike union and civil service employees, are at an unfair advantage in the employment relationship because of the unequal bargaining power that results from at will employment.[7] Furthermore, since private sector employees are not protected from wrongful discharge by statute or bargaining agreements, courts have been encouraged to formulate exceptions to at will

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4. *See* Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 447 (N.Y. 1982) (Wachtler, J., dissenting) (citing *Report of Committee on Labor and Employment Law, At-Will Employment and the Problem of Unjust Dismissal*, 36 Record of Ass'n. of Bar of the City of N.Y. 170, 188, for the proposition that restricting the employment at will doctrine creates workplace inefficiency).

5. *See* Blades, *supra* note 3, at 1405-06 (noting that the employment at will doctrine tends to make the employee a docile follower of the employer's wishes, because the employee can be discharged under the doctrine for balking at an employer's demands); *see also* Foley v. Interactive Data Corp., 47 Cal. 3d 654, 665, 765 P.2d 373, 376, 254 Cal. Rptr. 211, 214 (1988) (stating that without limits on the employment at will doctrine, employees are subjected to threats of discharge that coerce employees into committing crimes or concealing wrongdoing); *Weiner*, 443 N.E.2d at 446 n.7 (noting that at will employment permits arbitrary layoffs that breed a demoralized work force and create inefficiency by generating a disloyal attitude among workers). *See generally* ERZA F. VOGEL, JAPAN AS NUMBER ONE: LESSONS FOR AMERICA 131-157 (1979) (discussing how the reality of job security in Japan compared to the at will status of non-union employees in America results in a happier, more loyal and more productive Japanese work force).

6. Lawrence C. Levine, *Judicial Backpedaling: Putting the Brakes on California's Law of Wrongful Termination*, 20 PAC. L.J. 993, 996-97 (1989). Some exceptions to the employment at will doctrine are the implied-in-fact contract and covenant of good faith and fair dealing, both of which are contract actions. *Id.*; *see infra* note 88 and accompanying text (briefly discussing the contract exceptions); notes 90-142 and accompanying text (summarizing the public policy tort exception to the employment at will doctrine).

Two contract exceptions to the employment at will doctrine were created by the courts beginning in the early 1980s. *See* Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917, 927 (1st Dist. 1981) (establishing the implied in fact promise cause of action of wrongful discharge); Cleary v. American Airlines, Inc., 111 Cal. App. 443, 453, 168 Cal. Rptr. 722, 728 (1st Dist. 1980) (formulating a wrongful discharge cause of action based on the covenant of good faith and fair dealing). For a more detailed examination of the two contract exceptions to the employment at will doctrine, see Brian F. Berger, Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153, 161-67 (1981); William L. Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. 202, 214-24, 245-54 (1985); H. Anthony Miller & R. Wayne Estes, *Recent Judicial Limitations on the Right to Discharge: A California Trilogy*, 16 U.C. DAVIS L. REV. 65, 83-102 (1982); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith* 93 HARV. L. REV. 1816, 1836-44 (1980) [hereinafter *Protecting Employees*].

7. *See* Coppage v. Kansas, 236 U.S. 1, 40 (1915) (Day and Hughes, JJ., dissenting) (arguing that employees should be given equal bargaining status with employers); *Pugh*, 116 Cal. App. 3d at 311 & n.4, 320, 171 Cal. Rptr. at 917 & n.4, 921 (noting the unequal bargaining power between employers and employees); Blades, *supra* note 3, at 1411-12 (stating that individual workers do not have bargaining power to create contracts providing that dismissal be for just cause only); *see also* National Labor Relations Act of 1935, ch. 372, sec. 1, 49 Stat. 449 (providing that unequal bargaining power between employees and employers resulted from employees' lack of full freedom to contract and concentration of employers in large corporations).

employment.[8] This Note will concentrate on the exception most recently confronted by the California Supreme Court in *Gantt v. Sentry Insurance*:[9] the public policy tort exception.[10]

The public policy exception forbids an employer from dismissing an employee for performing an act that public policy would advocate or for refusing to do something that public policy would denounce.[11] For example, California has a public policy of discouraging the commission or solicitation of perjury.[12] Hence, if an employer were to discharge an employee for testifying truthfully, that employer would have wrongfully discharged the employee because the discharge would be in contravention of public policy.[13]

Under the public policy exception there has been a great deal of disagreement between courts over what sources of public policy are appropriate for stating a wrongful discharge claim.[14] While statutes and constitutions are universally accepted sources of public policy, courts are

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8. *See Pugh*, 116 Cal. App. 3d at 320-21 & n.6, 321, 171 Cal. Rptr. at 921-22 & n.6, 921 (noting that union employees constituted less than 28% of the work force in 1973, thus leaving the majority of employees unprotected from wrongful termination); Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 509 (N.J. 1980) (pointing out that many states have recognized the need to protect non-union employees from the abusive practices of employers); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 838 (Wis. 1983) (stating that by modifying the employment at will doctrine, state courts have recognized the need to protect workers from wrongful discharge under circumstances not covered by statute or union agreements); *infra* notes 70-76 and accompanying text (reviewing the protections given civil service and union employees from wrongful discharge and how those protections assisted courts in creating exceptions to at will employment). In 1985, the employment at will doctrine was thought to affect 70 to 75 million workers in the United States. Mauk, *supra* note 6, at 204.

9. 1 Cal. 4th 1083, 824 P.2d 680, 4 Cal. Rptr. 2d 874 (1992).

10. *See* Gantt v. Sentry Ins., 1 Cal. 4th 1083, 1085, 824 P.2d 680, 681, 4 Cal. Rptr. 2d 874, 875 (1992) (stating that review was granted to determine if the plaintiff had stated a wrongful discharge cause of action against public policy and whether the cause of action was preempted by the Workers' Compensation Act (WCA)).

11. Coman v. Thomas Mfg. Inc., 381 S.E.2d 445, 447 (N.C. 1989); Cloutier v. Great Atl. & Pac. Tea Co., 436 A.2d 1140, 1144 (N.H. 1981); *see* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 174, 610 P.2d 1330, 1334, 164 Cal. Rptr. 839, 843 (1980) (affirming the existence of the public policy exception in California and stating that a wrongful discharge action lies where an employee is discharged in contravention of a fundamental public policy).

12. *See* CAL. PENAL CODE § 118(a) (West Supp. 1993) (providing that a person who knowingly testifies falsely under oath will be guilty of perjury); *id.* § 653f(a) (West Supp. 1993) (stating that every person who solicits perjury is punishable by imprisonment or fine).

13. *See* Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 189, 344 P.2d 25, 27 (2d Dist. 1959) (holding that the public policy of discouraging perjury is effectuated if the employee can state a wrongful discharge cause of action for refusing to commit perjury); *infra* notes 97-105 and accompanying text (discussing in detail the holding of *Petermann*).

14. *See Petermann*, 174 Cal. App. 2d at 188, 344 P.2d at 27 (noting that public policy is not subject to precise definition); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 840 (Wis. 1983) (indicating that public policy is a vague concept). *See generally* Levine, *supra* note 6, at 1000-01 (discussing the confusion surrounding the definition of public policy).

split on the acceptability of administrative rules, judicial decisions, and other non-legislative sources of public policy.[15] Some courts follow a narrow approach of using strictly legislative sources for public policy.[16] Other courts advocate a broader approach by including non-legislative sources.[17] Advocates of the broad approach argue that, as declarations of policy, non-legislative sources of public policy are neither less fundamental nor less substantial than legislative sources.[18] The broad approach also ensures that employees are adequately protected from wrongful discharge.[19] On the other hand, the narrow approach is favored by courts wishing to avoid the dilemma of defining public policy.[20] Those favoring the narrow approach also point out that limiting public policy to legislative

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15. *See* Mauk, *supra* note 6, at 229 (listing additional public policy sources as including codes of conduct, ethical principles, and administrative agency rulings). *Compare* Pierce v. Ortho Pharmaceutical Corp, 417 A.2d 505, 512 (N.J. 1980) (asserting that sources of public policy include legislation, administrative rules, regulations and judicial decisions) *and* Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981) (stating that public policy is found in statutes and constitutions, and judicial decisions when the legislature has been silent) *with Brockmeyer*, 335 N.W.2d at 840 (holding that public policy must be evidenced by a constitutional or statutory provision).

16. *See* Adams v. George W. Cochran & Co., Inc., 597 A.2d 28, 33-34 (D.C. 1991) (accepting the public policy exception only where the employee is discharged for refusing to violate a law); Firestone Textile Co. Div. v. Meadows, 666 S.W.2d 730, 732-33 (Ky. 1983) (stating that limiting public policy to statutes and constitutional provisions will ensure an employer's right to have the wrongful discharge cause of action clearly defined); Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (recognizing a narrow public policy exception where public policy is found only in state and federal statutes carrying criminal penalties); *Brockmeyer*, 335 N.W.2d at 840 (Wis. 1983) (holding that public policy must be evidenced by a constitutional or statutory provision).

17. *See* Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1034 (Ariz. 1985) (recognizing that prior judicial decisions as part of a body of common law are an appropriate source of public policy); Parnar v. Americana Hotels, Inc., 652 P.2d 625, 631 (Haw. 1982) (noting that judicial decisions are appropriate sources of public policy); *Palmateer*, 421 N.E.2d at 878 (accepting judicial decisions as a public policy source); Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 877 (Mo. Ct. App. 1985) (stating that public policy can be found in the constitution, statutes, judicial decisions and administrative regulations); Cloutier v. Great Atl. & Pac. Tea Co., 436 A.2d 1140, 1145 (N.H. 1981) (approving non-statutory sources of public policy); *Pierce*, 417 A.2d at 512 (stating that sources such as administrative rules, regulations or decisions are acceptable sources of public policy); Payne v. Rozendaal, 520 A.2d 586, 589 (Vt. 1986) (rejecting the holding of some courts that public policy must be legislatively defined).

18. *See* Gantt v. Sentry Ins., 1 Cal. 4th 1083, 1103, 824 P.2d 680, 693, 4 Cal. Rptr. 2d 874, 887 (1992) (Kennard, J., concurring and dissenting) (criticizing the exclusion of non-legislative public policy); Mauk, *supra* note 6, at 229 (indicating that public policy can be found in sources other than the Legislature).

19. *See Boyle*, 700 S.W.2d at 877-78 (noting that a broad definition of public policy will help ensure that employees which will not be forced to choose between losing their job and violating public policy); *Parnar*, 652 P.2d at 631 (including regulations and judicial decisions as sources of public policy to address the need for job security by protecting employees from wrongful discharge).

20. *See Brockmeyer*, 335 N.W.2d at 840 (arguing for the narrower approach which excludes non-legislative sources because public policy determinations are too difficult to make outside of legislative sources). Public policy has been defined as anything that tends to subvert that sense of security for individual rights, which any citizen ought to feel is against public policy. Safeway Stores, Inc. v. Retail Clerks Int'l Ass'n, 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953) (citing Noble v. City of Palo Alto, 89 Cal. App. 47, 50-51, 264 P. 529, 530-31 (1928)).

sources strikes a balance between employer, employee and public interests.[21] In particular, limiting public policy to legislative sources gives employers greater flexibility in personnel decisions because the number of public policies an employer can violate is limited and easily ascertainable.[22] This limited approach to public policy restricts the number of allowable bases for termination, thereby safeguarding employees from termination.[23] The narrow definition of public policy also provides society with a stable job market since discharge is discouraged in contrast to unrestrained at will employment.[24]

The number and type of employees that will be able to maintain a wrongful discharge suit under the public policy exception will depend upon whether a court adopts a narrow or broad approach to public policy sources.[25] Indeed, the broad approach offers more employees relief from wrongful discharge.[26]

The debate regarding whether definitions of public policy should be limited to legislative sources or expanded to include non-legislative sources has been evidenced by the disagreement among the California appellate courts.[27] Recently, however, the Supreme Court of California ended the debate with its decision in *Gantt v. Sentry Insurance*.[28] In *Gantt*, the court rejected the use of non-legislative sources of public policy for establishing

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21. *See Gantt*, 1 Cal. 4th at 1095, 824 P.2d at 687-88, 4 Cal. Rptr. 2d at 881-82 (advocating that limiting pubic policy to legislative sources strikes the proper balance between the interests of employers, employees and the public); *Brockmeyer*, 335 N.W.2d at 841 (justifying the narrow approach as properly balancing society's interests in a stable job market and increasing industrial productivity).

22. *Gantt*, 1 Cal. 4th at 1095, 824 P.2d at 687-88, 4 Cal. Rptr. 2d at 881-82; *Brockmeyer*, 335 N.W.2d at 841.

23. *Gantt*, 1 Cal. 4th at 1095, 824 P.2d at 687-88, 4 Cal. Rptr. 2d at 882; *Brockmeyer*, 335 N.W.2d at 841.

24. *See Gantt*, 1 Cal. 4th at 1095, 824 P.2d at 687-88, 4 Cal. Rptr. 2d at 882 (arguing that the narrow approach discourages discharge); *Brockmeyer*, 335 N.W.2d at 841 (stating that limiting the public policy exception to legislative sources ensures a stable job market).

25. *See infra* notes 295-318 and accompanying text (discussing the ramifications of the narrow approach to defining public policy sources on wrongful discharge suits in California).

26. *Id.*

27. *Compare* Dabbs v. Cardiopulmonary Management Serv., 188 Cal. App. 3d 1437, 1443, 234 Cal. Rptr. 129, 133 (4th Dist. 1987) (noting that the legislature is not the only source for public policy) *and* Hentzel v. Singer Co., 138 Cal. App. 3d 290, 299-300, 188 Cal. Rptr. 159, 165-66 (1st Dist. 1982) (allowing plaintiff to recover without a statute to establish the public policy existing at the time of the discharge) *with* Becket v. Welton Becket & Assoc., 39 Cal. App. 3d 815, 821-22, 114 Cal. Rptr. 531, 534 (2d Dist. 1974) (rejecting a wrongful discharge claim for lack of a legislatively articulated policy) *and* Gray v. Superior Court, 181 Cal. App. 3d 813, 819, 226 Cal. Rptr. 570, 572 (4th Dist. 1986) (noting that generally a statutory violation must be involved for a wrongful discharge cause of action to be stated under the public policy exception) *and* Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 477, 199 Cal. Rptr. 613, 618 (2d Dist. 1984) (requiring a statutory violation for plaintiff to recover under the public policy exception).

28. 1 Cal. 4th 1083, 824 P.2d 680, 4 Cal. Rptr. 2d 874 (1992).

a wrongful discharge claim, thereby requiring a statutory or constitutional basis for public policy.[29]

The *Gantt* court also addressed whether the public policy exception to at will employment is preempted by statutory remedy schemes.[30] For instance, if a plaintiff states a wrongful discharge cause of action based on a public policy expressed in the Fair Employment and Housing Act (FEHA), employers argue that employees must seek their remedy under the FEHA.[31] Courts, however, differ in their approach to the issue depending on when the public policy came into existence. For instance, the California Supreme Court has held that if a right existed prior to 1959, when the FEHA was enacted, then the wrongful discharge claim based on such a policy is not preempted.[32] Some appellate courts, however, have held that where the public policy implicated in the cause of action was created by the FEHA, the wrongful discharge claim will be preempted by the FEHA.[33] In *Gantt*, the California Supreme Court refrained from deciding

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29. *Gantt*, 1 Cal. 4th at 1095, 824 P.2d at 687, 4 Cal. Rptr. 2d at 881; *see infra* notes 226-244 and accompanying text (discussing *Gantt*'s limitation on the public policy exception).

30. *See Gantt*, 1 Cal. 4th at 1097-98, 824 P.2d at 689, 4 Cal. Rptr. 2d at 883 (observing that defendant argued that the public policy exception was preempted by statutory remedies); Shoemaker v. Meyers, 52 Cal. 3d 1, 23, 801 P.2d 1054, 1067-68, 276 Cal. Rptr. 303, 316-17 (1991) (noting that the plaintiff argued that the public policy exception is not preempted by the exclusive remedy provisions of the WCA); Rojo v. Kliger, 52 Cal. 3d 65, 71, 801 P.2d 373, 375, 276 Cal. Rptr. 130, 132 (1990) (stating that the defendant argued that the public policy wrongful discharge cause of action was preempted by the exclusive remedy provisions of the Fair Employment and Housing Act (FEHA)); *see also* CAL. LAB. CODE § 3600 (West Supp. 1993) (providing that the WCA is to furnish an exclusive remedy for the employee against the employer); CAL. GOV'T CODE §§ 12900-12995 (West 1992 & Supp. 1993) (creating an administrative remedy for violations of unlawful employment practices); *infra* notes 143-162 and accompanying text (discussing preemption of the public policy exception by the FEHA); *infra* notes 164-194 and accompanying text (describing preemption of wrongful discharge claims by the WCA).

31. *See* Ficalora v. Lockheed Corp., 193 Cal. App. 3d 489, 492, 238 Cal. Rptr. 360, 361-62 (2d Dist. 1987) (dismissing plaintiff's wrongful discharge cause of action as being preempted by the FEHA because the public policy foundation for the claim was a FEHA provision); Strauss v. A.L. Randall Co., Inc., 144 Cal. App. 3d 514, 519, 194 Cal. Rptr. 520, 523 (2d Dist. 1983) (affirming dismissal of plaintiff's wrongful discharge claim based on age discrimination as prohibited by the FEHA, because the FEHA provides the exclusive remedy for age discrimination violations). *See generally* David Benjamin Oppenheimer & Margaret M. Baumgartner, *Employment Discrimination and Wrongful Discharge: Does the California Fair Employment and Housing Act Displace Common Law Remedies?*, 23 U.S.F. L. REV. 145, 182-91 (1989) (discussing the issue of displacement of the public policy exception by the FEHA).

32. *See* Rojo v. Kliger, 52 Cal. 3d 65, 82 n.10, 801 P.2d 373, 383 n.10, 276 Cal. Rptr. 130, 140 n.10 (1990) (noting that the FEHA did not preempt the public policy exception to at will employment where the FEHA provision was a codification of a common law public policy); *see also* Fair Employment Practices Act, 1959 Cal. Stat. ch. 121, sec. 1, at 1999-2005 (reenacted as the Fair Employment and Housing Act, 1980 Cal. Stat. ch. 992, sec. 4, at 3138, 3140-65); *infra* notes 153-161 and accompanying text (discussing the court's decision in *Rojo*).

33. *See* Ficalora v. Lockheed Corp., 193 Cal. App. 3d 489, 492, 238 Cal. Rptr. 360, 361-62 (2d Dist. 1987) (holding that a wrongful discharge claim based on retaliation for opposing unlawful employment practices is preempted by the FEHA); Strauss v. A.L. Randall Co., Inc., 144 Cal. App. 3d 514, 519, 194 Cal. Rptr. 520,

whether the public policy exception is preempted when based on a FEHA created public policy because the court upheld the plaintiff's cause of action on alternate grounds.[34]

As an alternative to FEHA preemption, employers have argued that injuries caused by a wrongful discharge are to be compensated under California's Workers' Compensation Act (WCA) as opposed to the civil tort system.[35] Until *Gantt*, the California Supreme Court had not decided whether the WCA preempted the public policy exception.[36] The *Gantt* court, in fact, held that the exception is not preempted.[37]

This Note examines the California Supreme Court's decision in *Gantt v. Sentry Insurance*, and its impact on the public policy exception to the employment at will doctrine. Part I discusses the legal background of the employment at will doctrine, the public policy exception to at will employment and preemption of the public policy exception by the FEHA and the WCA.[38] Part II summarizes the facts of *Gantt* and reviews the majority and dissenting opinions.[39] Finally, Part III discusses the legal implications of the court's decision and the unresolved issues in public policy and wrongful termination cases.[40]

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523 (2d Dist. 1983) (declaring that the FEHA policy of prohibiting age discrimination can not sustain a wrongful discharge claim because the action is preempted by FEHA); *see also* CAL. GOV'T CODE § 12940 (West 1992 and Supp.) (listing unlawful employment practices); *id.* (providing that age discrimination is an unlawful employment practice); *id.* (prohibiting discrimination based on pregnancy); *id.* (stating that to deny a qualified employee from taking family leave is an unlawful employment practice).

34. *Gantt*, 1 Cal. 4th at 1086 n.2, 824 P.2d at 681 n.2, 4 Cal. Rptr. 2d at 875 n.2.; *see Rojo*, 52 Cal. 3d at 82 & n.10, 801 P.2d at 383 & n.10, 276 Cal. Rptr. at 140 & n.10 (leaving open the question of whether the reliance on pre-FEHA policies for the public policy exception will preempt the wrongful discharge claim); *see infra* notes 319-350 and accompanying text (analyzing how the California Supreme Court should rule on the issue of FEHA preempting the public policy exception).

35. *See* Shoemaker v. Meyers, 52 Cal. 3d 1, 10, 801 P.2d 1054, 1058, 276 Cal. Rptr. 303, 307 (1990) (stating that the defendant argued in demurrer that plaintiff's injuries from wrongful discharge were to be compensated under the WCA instead of in a civil action).

36. *Gantt*, 1 Cal. 4th at 1098, 824 P.2d at 689-90, 4 Cal. Rptr. 2d at 883-84.

37. *Id.*

38. *See infra* notes 41-195 and accompanying text.

39. *See infra* notes 196-290 and accompanying text.

40. *See infra* notes 291-349 and accompanying text.

I. LEGAL BACKGROUND

The employment at will doctrine was created in the United States in the late 1800's.[41] By the turn of the century, Legislatures began to create exceptions to at will employment because the doctrine allowed employers to take unfair advantage of employees.[42] The statutory exceptions, however, did not protect all employees, but rather, only those discharged under a narrow set of circumstances such as race.[43] Then, in the late 1950's, courts began to create broader exceptions to the employment at will doctrine, including the public policy exception.[44] The public policy exception allows a plaintiff to recover damages when the discharge was in violation of a public policy, such as when an employee is fired for refusing to commit perjury.[45]

The most important feature of the public policy exception to at will employment is that the exception is based in tort.[46] A tort action in California, unlike a contract action, has no statutory or judicial limits on recoverable damages, thus, making tort actions more desirable to plaintiffs.[47] In particular, the plaintiff in a tort action can recover punitive

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41. *See* Feinman, *supra* note 1, at 122-29 (tracing the historical development of the employment at will doctrine); WOOD, *supra* note 1, at 272-73 (stating that the American rule presumes that an employment of indeterminate length is terminable at will); *see also infra* notes 57-69 and accompanying text (detailing the evolution of the employment at will doctrine in the United States).

42. *See* PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE §§ 1.5-1.8, at 15-17 (1992) (explaining how Congress and state legislatures enacted statutes protecting civil service employees from wrongful discharge and all employees from class based discrimination); *Protecting Employees*, *supra* note 6, at 1817 & n.5 (citing criticism of at will employment as granting the employer too much discretion in termination decisions which result in an unfair advantage of the employer over the employee); *see also infra* notes 70-76 and accompanying text (discussing the statutory exceptions to the employment at will doctrine).

43. *See* PERRITT, *supra* note 42, § 1.5 (noting that only civil service employees were protected by statute from termination without good cause); *id.* § 1.8 (explaining that discharge was prohibited by statute if based on race, religion, sex or national origin); *see also infra* notes 75-76 (listing statutes preventing discharge under certain circumstances).

44. *See* Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 188-89, 344 P.2d 25, 27 (2d Dist. 1959) (creating the public policy exception to the employment at will doctrine); *see also infra* notes 90-142 and accompanying text (tracing the development of the public policy exception); *supra* note 6 and *infra* note 88 (discussing the contract exceptions).

45. *See supra* notes 11-13 and accompanying text (defining the public policy exception).

46. *See* Levine, *supra* note 6, at 1050 (noting that in California the public policy exception to at will employment is the only wrongful discharge cause of action allowing a plaintiff to recover tort damages which are often larger than contract damages).

47. *See* CAL. CIV. CODE § 3294 (West Supp. 1993) (providing that punitive damages may be awarded in actions arising from obligations other than contract). Contract damages are also limited to those that are foreseeable at the time the contract is entered into and which can be proven with certainty. *See* Hadley v. Baxendale, 156 Eng. Rep. 145, 150 (1854) (establishing the foreseeability limitation to contract damages); *see also* FARNSWORTH, CONTRACTS § 12.14, at 912 (2d ed. 1990) (stating that damages are not recoverable if the breaching party had no reason to foresee that the loss would be the probable result of breach); *id.* § 12.15

damages[48] and damages for emotional distress.[49] This potential for larger damage awards with the public policy exception has caused many employers to challenge the exception on the grounds that it is preempted by the exclusive remedy provisions of the Fair Employment and Housing Act or Workers' Compensation Act.[50] A logical analysis of the pre-emption issues requires an understanding of the history and rationale of both the employment at will doctrine and the public policy exception.

A. Historical Development of the Employment At Will Doctrine

The employment at will doctrine arose in an era of Social Darwinism[51] and laissez faire economics[52] where employers and employees were encouraged to contract freely.[53] From Social Darwinism and laissez faire principles came the freedom of contract theory that encouraged

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(noting that damages are not recoverable for loss unless established with reasonable certainty).

48. Levine, *supra* note 6, at 1050. Punitive damages are damages awarded against a person to punish for outrageous conduct and to deter that person and others from similar conduct in the future. RESTATEMENT (SECOND) OF TORTS § 908 (1979). Punitive damages are often awarded in wrongful discharge claims under the public policy exception. *See, e.g.*, Rosenkrantz v. Brown Foreman Corp., No. BC 011 337 (L.A. Central May 27, 1992) (awarding plaintiff $225,000 in punitive damages); Chavet v. First Interstate Bank, No. C 647 298 (L.A. Central Dec. 12, 1991) (granting plaintiff $1,000,000 in punitive damages); Wane v. Great W. Fin. Serv., Inc, No. C 665 154 (L.A. Central June 28, 1991) (awarding plaintiff $270,000 in punitive damages).

49. *See* FARNSWORTH, *supra* note 47, § 12.17 (stating that damages for emotional distress are rarely recoverable in contract even if the limits of unforeseeability and uncertainty are overcome). In California, as compared to the general rule stated by Farnsworth, emotional distress damages are recoverable in contract actions. *See* Frazier v. Metropolitan Life Ins. Co., 169 Cal. App. 3d 90, 107, 214 Cal. Rptr. 883, 892-93 (2d Dist. 1985) (finding that while the plaintiff in a contract action is statutorily barred from punitive damages, damages for emotional distress are recoverable). Damages for emotional distress are often awarded by juries in wrongful discharge cases. *See, e.g., Rosenkrantz*, No. BC 011 337 (L.A. Central May 27, 1992) (awarding $500,000 for emotional distress); *Wane*, No. C 665 154 (L.A. Central June 28, 1991) (awarding plaintiff $239,000 for emotional distress); Kaufman v. Summit Health, Ltd., No. C591 466 (L.A. May 25, 1990) (granting $2,500,000 for emotional distress). For a thorough discussion of the significant differences between tort and contract damages in wrongful discharge cases, see generally Levine, *supra* note 6, at 1050-52 nn.214-219.

50. *See* Shoemaker v. Meyers, 52 Cal. 3d 1, 23, 801 P.2d 1054, 1067-68, 276 Cal. Rptr. 303, 316-17 (1990) (illustrating a defendant attacking a public policy exception case as being preempted by the Workers' Compensation Act); Rojo v. Kliger, 52 Cal. 3d 65, 91, 801 P.2d 373, 389, 276 Cal. Rptr. 130, 146 (1990) (noting that the defendant argued that a wrongful discharge claim was preempted by the FEHA when the public policy was found in the FEHA); *see also infra* notes 143-194 accompanying text (addressing the efforts by employers to preempt the public policy exception with the FEHA and the WCA).

51. *See* JOHN K. GALBRAITH, ECONOMICS IN PERSPECTIVE 57, 121 (1987) (defining Social Darwinism as a theory advocating that the poor and non-survivors in society were the weaklings and that their demise was a way of improving society). By eliminating the least developed citizens and maintaining pressure on the survivors, Social Darwinism maintains that the economy will grow and become more prosperous. *Id.* at 122.

52. Laissez faire economics stands for the principle that economic markets run most efficiently and productively when free from government intervention. GALBRAITH, *supra* note 51, at 51.

53. Feinman, *supra* note 1, at 118; *see* PERRITT, *supra* note 42, § 1.4 (indicating that freedom of contract was desired by employers and employees to maximize the benefit of markets such as wages and profits).

employers to maximize wealth by negotiating for wage, hour and duration terms of employment based on the price the producer could receive for the product.[54] Yet, the concentration of employers and the increasing numbers of employees seeking employment led to augmented employer bargaining power.[55] In the late 1800s, the increased power of employers over employees resulted in unsafe working conditions and no protection against discrimination.[56] This atmosphere of an employer's latitude in treating employees poorly was the backdrop for the creation of the employment at will doctrine.

The American courts originally adopted the English rule regarding employment duration articulated by Sir William Blackstone in 1765.[57] Blackstone's rule presumed that employment agreements with no specified term were for one year.[58] The underlying rationale of the one year rule was that allowing masters to benefit from servants' labor during the planting and harvesting season and then discharging them in order to avoid wages in the unproductive winter was unjust.[59] The presumption was also based on the custom that the master servant relationship was paternalistic.[60] For example, the master provided food, shelter and security for the

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54. *See* PERRITT, *supra* note 42, § 1.4 (tracing the development of the employment at will doctrine).

55. National Labor Relations Act of 1935 ch. 372, sec. 1, 49 Stat. 449 (explaining why Congress needs to oversee and provide for equal bargaining between management and labor).

56. Blades, *supra* note 3, at 1406-09; *see* American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921) (noting that a single worker was helpless, at the turn of the century, in dealing with an employer because the worker was dependent on the daily wage to maintain his family, and thus was unable to leave or resist unfair treatment when the employer refused to pay a fair wage); *see also* VOSE, CONSTITUTIONAL CHANGE 163 (1972) (stating that in the 1890's factory conditions were deplorable, city slums were loathsome and the legal rights of workers in dangerous industries did not exist); GALBRAITH, *supra* note 51, at 96 (noting that poor working conditions led to worker illness and substandard performance). Poor working conditions in factories resulted in workers' decreasing health and productivity and resulted in employers' need to fire employees easily to ensure efficient production. *Id.*

57. 1 WILLIAM BLACKSTONE, COMMENTARIES, *425; *see* Davis v. Gorten, 16 N.Y. 255, 256-57 (1857) (holding that the New York courts apply the English rule of presuming that employment contracts are of a one year duration); Feinman, *supra* note 1, at 119-20 (discussing Blackstone's statement of the one year employment rule in England).

58. 1 BLACKSTONE, *supra* note 57, at *425. The one year rule preserves natural equity by requiring the master to maintain the servant when there is work and when there is not. *Id.*

59. Feinman, *supra* note 1, at 120. Sir Blackstone's rationale for the one year rule is known as the "benefit of the seasons" rationale. *Id.* at 123. Although the rationale was apparently aimed at agricultural workers, the presumption of year long hiring applied to all types of servants, except those employed for a single task. *Id.* at 120. Feinman explained that where the employment agreement provided for a fixed duration, or completion of a certain job, the benefit of the seasons rationale was inapplicable and the English courts created an exception for such employment agreements. *Id.*

60. Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 319-21, 171 Cal. Rptr. 917, 920-21 (1st Dist. 1981) (citing SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 123-31 (1969)).

servant and had general authority to discipline the servant while the servant had a duty to obey.[61]

At the end of the nineteenth century, American courts began to use contract law to shift away from the English rule.[62] The emerging theory of contract law emphasized negotiating for terms such as hours and wages, and gave the employer unilateral power to limit its obligations to the employee.[63] For instance, contract law resulted in an employee's risk of injury during work to shift from the employer to the employee, since employers were no longer obligated to provide medical care and thus, generally refused to do so.[64] The notion of freedom to contract also led American courts to conclude that if the parties to an employment relationship had intended a one year employment contract, they would have expressly provided for such a term in their agreement.[65]

In 1877, Horace C. Wood, a legal scholar, declared that the employment at will rule was in fact the law of the United States and that agreements of an indefinite duration were presumed terminable at the will

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61. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *258-66; *see Pugh*, 116 Cal. App. 3d at 319, 171 Cal. Rptr. at 921 (stating that the master had certain responsibilities for the servant's general welfare).

62. *See* Martin v. New York Life Ins. Co., 42 N.E. 416 (N.Y. 1895) (rejecting the English rule presuming employment for one year, in favor of the employment at will doctrine); Henry v. Pittsburg & L.E.R. Co., 21 A. 157 (Pa. 1891) (holding that an employer can discharge an employee with or without cause); *see also* PERRITT, *supra* note 42, § 1.10 (discussing the impact of contract law on the demise of the employment at will doctrine). *See generally Pugh*, 116 Cal. App. 3d at 319-21, 171 Cal. Rptr. 917, 920-21 (reviewing the history of the employment at will doctrine); PHILIP SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 123-31 (1969) (explaining in detail employment law's shift from master servant law to contract law). For a critical discussion of why the employment at will doctrine was developed, see Feinman, *supra* note 1, at 129-35 (rejecting the theories that freedom of contract or laissez faire economics created the employment at will doctrine and arguing that the developing capitalist economy of the United States gave rise to at will employment).

63. *See* SELZNICK, *supra* note 62, at 131 (stating that at will employment gave the employer unilateral power to determine the terms of employment); *Protecting Employees*, *supra* note 6, at 1824 (discussing the influence of contracts on the employers' duty to the employees). When production was based in agriculture the demand for labor was determined by the seasons and weather. PERRITT, *supra* note 42, § 1.4. Yet, when the Industrial Revolution moved United States production to an industrial base, prices for supplies and consumer requirements began to be determined by the demand for labor. *Id.* Thus, the benefit of the season rationale for the one year presumption was no longer applicable. *Id.*; *see supra* notes 59-61 and accompanying text (discussing the rationale for the one year presumption).

64. *See Protecting Employees*, *supra* note 6, at 1824-25 (noting that the increased use of contract law reduced the employers' financial obligation to the employee leaving the burden of medical care for work related injuries on the employee); *see also supra* note 61 and accompanying text (detailing other obligations of the master to the servant prior to the advent of contract law).

65. *See Protecting Employees*, *supra* note 6, at 1824-25 (stating that the emerging law of contract was used by courts to reject the English rule). In California, the employment at will doctrine is codified in California Labor Code § 2922. *See* CAL. LAB. CODE § 2922 (West 1989) (stating that when the term of duration is not expressly made, it is presumed the employment agreement is at will).

of either party without cause.[66] Wood gave no policy reason for his statement of the law, exposing him to fierce criticism regarding the accuracy of his conclusion.[67] After Wood posited the employment at will rule, it was adopted in a majority of states where it still is the general rule for employment agreements of an indefinite duration.[68] After the turn of the century, however, an increasing recognition of workers' rights caused at will employment to wane.[69]

B. The Decline of the Employment At Will Doctrine

In the first half of the twentieth century, the employment at will doctrine began to erode primarily through statutory enactments.[70] At this time, the growing number of employees and the decline in employment positions reduced employee bargaining power.[71] Employees became concerned about job security which was threatened by at will employment.[72]

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66. *See* WOOD, *supra* note 1, § 134 (stating that an indefinite hiring is presumed at will with the burden of proof on the employee to prove otherwise).

67. *See, e.g.*, Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1030 (Ariz. 1985) (criticizing Wood's conclusion as being unsound); Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880, 886-87 (Mich. 1980) (criticizing Wood's analysis because the cases Wood cited did not support the presumption of one year employment); Feinman, *supra* note 1, at 126 (questioning the basis for Wood's rule because of its lack of policy and legal support).

68. *See* Martin v. New York Life Ins. Co., 42 N.E. 416, 417 (N.Y. 1895) (noting that Wood's rule was the correct statement of the law and was being widely used in 1895); 1 CHARLES LABATT, MASTER AND SERVANT, § 159, at 516 (1913) (conceding that the employment at will doctrine was the law in a majority of states); Feinman, *supra* note 1, at 118 (noting that the employment at will rule exists in almost every jurisdiction in the United States).

69. *See* PERRITT, *supra* note 42, §§ 1.7-1.8 (noting that the move to unionize labor and the civil rights movement led to the erosion of the employment at will doctrine).

70. *See generally* PERRITT, *supra* note 42, §§ 1.5-1.9 (indicating the stages in which the employment at will doctrine had been eroded). The first step in the erosion of the employment at will doctrine occurred when civil service employees were given protection from dismissal by the Lloyd-LaFollette Act. *Id.* Next, union employees gained protection from dismissal by the National Labor Relations Act of 1993, followed by protection against class-based discrimination by the Unemployment Relief Act of 1935. *Id.* Finally, common law protection was given to private sector employees by the Civil Rights Act. *Id.*

71. *See* Blades, *supra* note 3, at 1406-10 (describing examples of the unequal bargaining power between the employer and employee and the role of the employment at will doctrine in that dichotomy). The increasing number of employees at the turn of the century gave employers a larger pool of potential workers, thus giving the employer more power to negotiate favorable terms. *Id.* at 1404 (quoting FRANK TANNEBAUM, A PHILOSOPHY OF LABOR 9 (1951)). The increasing number of employees and analogous concentration of production in corporations also left employees with little opportunity for self employment. Mauk, *supra* note 6, at 205-06. Furthermore, employees could not easily acquire new jobs because termination was starting to be considered a blot on the employment record. *Id.* at 205. Particularly, self employment was no longer viable since corporations had taken over most production and 90% of the work force had become wage or salary earners. *Id.* at 204.

72. For examples of how the employment at will doctrine threatened employee job security, see Garrity v. New Jersey, 385 U.S. 493, 495 (1967) (discussing how police officers were given an ultimatum of self incrimination or discharge); Odell v. Humble Oil & Refining Co., 201 F.2d 123, 124-25 (10th Cir. 1953) (stating

Addressing these concerns, Congress in 1912 gave federal civil service employees protection from dismissal without cause under the Lloyd-LaFollette Act.[73] The Act provided that no person in the federal civil service shall be removed except to promote efficiency.[74] Congress also granted protection for private employees against dismissal based on race, color or creed.[75] States enacted similar legislation to protect employee rights and opportunities in seeking and maintaining employment.[76]

Meanwhile, changes in the United States Supreme Court's constitutional philosophy increased protection of individual rights in the employment termination context.[77] For instance, in *Pickering v. Board of Education*,[78] a teacher was dismissed for publishing a letter in the local newspaper which attacked the school board's handling of a bond issue and its subsequent resource allocation.[79] The Court held that when public employees exercise their right to free speech on issues of public interest, they shall not be subject to dismissal based on such activity.[80] The public interest in unhindered speech, a core principle of the First Amendment,

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that employees were fired for testifying while under subpoena, against an employer); Mitchell v. Stanolind Pipe Line Co., 184 F.2d 837, 837 (10th Cir. 1950) (noting that the employee was discharged for bringing an assault and battery action against a fellow employee); Hardy v. United States, 256 F. 284, 285 (5th Cir. 1919) (stating that the employee was required by the employer to illegally transport liquor or be discharged).

73. 37 Stat. 414, ch. 350, § 5 (1912).

74. *Id.*

75. *See* Unemployment Relief Act, 48 Stat. 22, 23, ch. 17, §§ 1, 2 (1933) (providing that in employing citizens for the purpose of relieving unemployment under the Act, there shall be no discrimination based on race, color or creed); Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1988) (making it unlawful to discharge an employee because of race, color, religion, sex or national origin); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a)(1) (1988) (providing that it is unlawful to discharge an employee on the basis of age); Rehabilitation Act of 1973, 29 U.S.C. § 701 (1988) (guaranteeing equal opportunities for handicapped individuals). *See generally* PERRITT, *supra* note 42, § 1.10 (addressing the statutory changes in the workplace designed to protect employees).

76. While Congress was protecting employees from wrongful discharge, states began outlawing employment discrimination, thereby limiting the freedom employers had under the employment at will doctrine. *See, e.g.*, 1965 Alaska Sess. Laws ch. 117, sec. 6; 1959 Cal. Stat. ch. 121, sec. 1 at 1999; Del. Laws ch. 19, sec. 711 (1953); 1953 Kan. Sess. Laws ch. 249, sec. 1; 1946 Mass. Acts ch. 368, sec. 4; 1963 Neb. Laws ch. 281, sec. 4 at 840; 1955 Pa. Laws 744, sec. 5; 1949 R.I. Pub. Laws ch. 2181, sec. 4; 1962 S.C. Acts sec. 1-360.28.

77. *See, e.g.*, Phelps Didge Corp. v. NLRB, 313 U.S. 177, 187 (1941) (holding that Congress has the power to deny an employer the freedom to discriminate in discharging employees); United States v. Darby, 312 U.S. 100, 113-14 (1941) (establishing Congress' power to set minimum wage laws). *See generally* PERRITT, *supra* note 42, § 1.10 (discussing the changing philosophy of federal courts in recognizing individual rights); VOSE, *supra* note 56, at 163-240 (discussing the change in the United States Supreme Court's constitutional philosophy regarding workers' rights).

78. 391 U.S. 563 (1968).

79. Pickering v. Board of Educ., 391 U.S. 563, 566 (1968).

80. *Id.* at 574; *see* U.S. CONST. amend. V (providing that no person shall be compelled in a criminal case to testify against himself); *Pickering*, 391 U.S. at 574 (rejecting the notion that once individuals become public employees, they relinquish their First Amendment rights).

was considered so fundamental a right by the Court that unless the employee knowingly or recklessly made false statements, the employee could not be dismissed for speaking.[81]

These statutory and judicial developments protecting workers' rights against wrongful termination established a trend favoring employee rights.[82] As a result, state courts became more sensitive to employee complaints.[83] Historically, state and federal courts, using the employment at will doctrine, had protected employers by upholding employer decisions to terminate an employee, even if that decision was based on a principle contrary to public policy.[84] By definition, at will employment provides that a court is not to substitute its judgment for the judgment of the parties.[85] Yet, the public policies inherent in federal and state legislation forced the judiciary to recognize the legislative intent to protect employee rights.[86] In addition, the United States Supreme Court's move to recognize individual rights reinforced the idea that courts had the power

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81. *Pickering*, 391 U.S. at 573-74; *see* U.S. CONST. amend I (prohibiting Congress from passing a law that would prohibit the exercise of free speech); *see also* Slochower v. Board of Higher Educ., 350 U.S. 551, 558-59 (1956) (holding that an individual's right to due process of law is violated when a person is dismissed for asserting the Fifth Amendment privilege against self incrimination). In *Slochower*, an associate professor at Brooklyn College was discharged pursuant to a city ordinance for asserting the Fifth Amendment right against self incrimination. *Id.* at 552-53. Slochower asserted the Fifth Amendment right against self incrimination when questioned regarding membership in the Communist party before the Senate Judiciary Committee. *Id.* at 553. The United States Supreme Court held that Slochower could not be discharged on this basis. *Id.*

82. *See* PERRITT, *supra* note 42, § 1.10 (stating that as courts became more familiar with applying statutes that protected employee rights, they became more uncomfortable with the harshness of a rule which allowed an employee to be discharged for no reason, either good or bad).

83. *Id.*

84. The employment at will doctrine has been the basis for protecting employers from wrongful discharge cases. *See* Geary v. United States Steel Corp., 319 A.2d 174, 175, 180 (Pa. 1974) (affirming the trial court's dismissal of plaintiff's wrongful discharge claim, where plaintiff was discharged after warning corporate officials of a dangerous defect in a new product because of the employees' at will status); Simmons v. Westinghouse Elec. Corp., 311 So. 2d 28, 29, 32 (La. Ct. App. 1975) (granting summary judgment against an at will employee discharged for allegedly sympathizing with efforts to unionize workers because there was no specified duration of employment); Shaw v. Kresge Co., 328 N.E.2d 775, 777, 780 (Ind. Ct. App. 1975) (dismissing employee's wrongful discharge claim where employee was given no notice of his offenses, contrary to policy stated in the employee handbook, because the employee was employed at will).

85. *See* Martin v. New York Life Ins. Co., 42 N.E. 416, 417 (N.Y. 1895) (accepting the employment at will doctrine to avoid substituting the court's judgment for that of the parties to the employment relationship); *see also supra* notes 62-65 and accompanying text (noting the employment at will doctrine was an attempt to get away from court imposed presumptions and defer to party intentions).

86. *See* Mauk, *supra* note 6, at 204 (noting that courts had historically protected employers); PERRITT, *supra* note 42, § 1.10 (stating that the statutory principles in the developing legislation made courts uneasy with common law rules such as the employment at will doctrine which often prevented employee recovery); *see also* Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-2(a)-(c) (1988) (prohibiting discrimination by an employer, employment agency or labor union); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 (1988) (providing that the purpose of the Age Discrimination Act is to promote employment of older persons and prohibit age discrimination in employment).

to change the common law.[87] Thus, courts began to use their power to change the common law and found exceptions to the employment at will doctrine.[88] The first judicially created exception to at will employment was the public policy exception.[89]

C. The Public Policy Exception to the Employment At Will Doctrine

The public policy exception to the employment at will doctrine provides that a tort action will arise where the employment relationship is terminated without good cause and the employer's conduct violates an established public policy.[90] The exception is based on an employer's duty to implement fundamental public policies as embodied in the state penal statutes.[91] This duty was implied from the intent of federal and state statutes that provided redress for employees discharged under limited

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87. *See* Parnar v. Americana Hotels, Inc., 652 P.2d 625, 628 (Haw. 1982) (asserting that state courts modified the employment at will rule or found exceptions to the rule after recognizing the plight of private sector employees who were largely unprotected); *see also supra* notes 77-81 and accompanying text (citing examples of the United States Supreme Court's expansion of employee rights through the due process clause). For an example of a court using its power to change the common law to alter at will employment, see Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 176, 610 P.2d 1330, 1335, 164 Cal. Rptr. 839, 844 (1980) (holding that the presumption of at will employment can be overcome if the employee is discharged in violation of public policy); *infra* notes 90-114 and accompanying text (discussing in detail how the court used common law tort principles of duty and breach to affirm the public policy exception in California).

88. Courts created exceptions to the employment at will doctrine by using public policy, implied in fact promises and implied covenants of good faith and fair dealing. *See* Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 188-89, 344 P.2d 25, 27 (2d Dist. 1959) (creating the public policy exception to the employment at will doctrine); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917, 927 (1st Dist. 1981) (establishing the implied in fact promise exception to at will employment); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 722, 727-28 (1st Dist. 1980) (extending the implied covenant of good faith and fair dealing to employment contracts, thereby creating another exception to the employment at will doctrine).

The implied in fact promise exception is an action arising where an employer intimates to an employee, through conduct, that the employer will not terminate the employee without cause. Levine, *supra* note 6, at 1002. The implied covenant of good faith and fair dealing is implied by law into every employment contract and requires that the employer and employee act in accord with fundamental notions of fairness. *Cleary*, 111 Cal. App. 3d at 453, 168 Cal. Rptr. at 728.

89. *See* Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 189-90, 344 P.2d 25, 27-28 (2d Dist. 1959) (allowing an employee to recover when discharged for refusing to commit perjury since perjury was against public policy).

90. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 176, 610 P.2d 1330, 1335, 164 Cal. Rptr. 839, 884 (1980); Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 188-89, 344 P.2d 25, 27 (2d Dist. 1959).

91. *Tameny*, 27 Cal. 3d at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 884; *see infra* notes 111-114 and accompanying text (explaining why the public policy exception is based on tort).

circumstances.[92] These statutory causes of action, in turn, produced an expectation of fairness in the work place by prohibiting an employer's abusive or discriminatory behavior.[93] The expectation of fairness, then, encouraged courts to protect employees beyond the narrow scope of the statutes, and to recognize an exception to at will employment based on an employer's duty to refrain from violating fundamental public policies when discharging an employee.[94] The exception also grew from academic commentary that criticized the at will doctrine as being both arbitrary in light of statutory limits on discharge and incompatible with the objectives of a broad range of statutes.[95] Today a majority of jurisdictions recognize the public policy exception to the employment at will doctrine.[96]

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92. *See* Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 509 (N.J. 1980) (noting that labor legislation such as the National Labor Relations Act, demonstrates the governmental agenda of preventing employers from using the common law right to discharge as a mode of oppression); *see, e.g.*, 42 U.S.C. §§ 2000e (1988) (prohibiting discharge based on race, gender, color, religion, or national origin); 28 U.S.C. § 1875(a) (1988) (prohibiting discharge for service on grand jury); CAL. LAB. CODE § 6310 (West 1989) (prohibiting retaliation when an employee complains of health and safety problems); *id.* § 230 (West Supp. 1993) (prohibiting discharge or discrimination against an employee for taking time off work for jury duty); *see also supra* notes 75-76 (listing federal and state statutes providing redress for wrongful discharge).

93. Mauk, *supra* note 6, at 228.

94. *Id.*; *see Tameny*, 27 Cal. 3d at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844 (finding that the public policy exception creates a tort duty to refrain from violating fundamental public policies when discharging an employee); *see also supra* note 20 and accompanying text; *infra* notes 115-133 and accompanying text (discussing the definition of fundamental public policy).

95. *See Tameny*, 27 Cal. 3d at 172 n.7, 610 P.2d at 1333 n.7, 164 Cal. Rptr. at 842 n.7 (noting that the academic criticism of the employment at will doctrine influenced the adoption of the public policy exception).

96. For a state by state summary, see generally PERRITT, *supra* note 42, §§ 1.13-1.63; JOHN C. MCCARTHY, RECOVERY OF DAMAGES FOR WRONGFUL DISCHARGE, § 1.4, at 2-32 (2d ed. Supp. 1992). States recognizing the public policy exception are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. The District of Columbia also recognizes the public policy exception. PERRITT, *supra* note 42, §§ 1.13-1.63. States rejecting the public policy exception are: Alabama, Florida, Georgia, Idaho, Louisiana, Maine, New York, Pennsylvania, Rhode Island, and Tennessee. *Id.*

1. Development of the Public Policy Exception in California

The public policy exception in California was created in *Petermann v. International Brotherhood of Teamsters*.[97] In *Petermann*, the California Court of Appeal for the Second District was faced with the issue of whether an employee could state a cause of action for wrongful discharge when terminated for refusing to commit perjury at a legislative hearing.[98] Perjury and the solicitation of perjury is unlawful under California Penal Code sections 118 and 653f.[99] Thus, Penal Code sections 118 and 653f declare that the public policy of California is to proscribe perjury.[100] If an employer were allowed to discharge an employee for refusing to commit perjury, the court reasoned that the policy of prohibiting perjury would not be furthered.[101] Thus, the court allowed the employee to recover damages for wrongful termination.[102] The court reasoned that to allow the employer's act to stand without compensating the employee would be to encourage felonious behavior and would violate the spirit of the law.[103] Therefore, the court established the public policy exception by finding that an employer's statutory right under Labor Code section 2922, to discharge an at will employee, could be limited by statutory or public policy considerations.[104] However, the *Petermann* court never made clear whether the public policy exception was based in tort or contract.[105]

The California Supreme Court adopted the *Petermann* rationale in *Tameny v. Atlantic Richfield Company*,[106] and limited at will employment by imposing a duty to not violate public policy as evidenced in the

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97. 174 Cal. App. 2d 184, 344 P.2d 25 (2d Dist. 1959); *see* Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 838 (Wis. 1983) (stating that *Petermann* is the leading case for the public policy exception); Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 510 (N.J. 1980) (citing *Petermann* with approval in adopting the public policy exception).

98. *Petermann*, 174 Cal. App. 2d at 187, 344 P.2d at 26.

99. *See* CAL. PENAL CODE § 118(a) (West Supp. 1993) (prohibiting perjury while under oath); *id.* § 653f(a) (West Supp. 1993) (forbidding the solicitation of perjury).

100. *See Petermann*, 174 Cal. App. 2d at 188-89, 344 P.2d at 27 (discussing the policy behind California Penal Code §§ 118 and 653f).

101. *Petermann*, 174 Cal. App. 2d at 188-89, 344 P.2d at 28.

102. *Id.* at 188-90, 344 P.2d at 28.

103. *Id.* at 189, 344 P.2d at 27.

104. *Id.* at 188, 344 P.2d at 27; *see* CAL. LAB. CODE § 2922 (West 1989) (creating a statutory right for employers to discharge employees at will where there is no specified term for the duration of the employment).

105. *See Petermann*, 174 Cal. App. 2d at 189, 344 P.2d at 28 (referring to the issue of discharging in good faith but never stating whether the action is in contract or tort); *see also* Levine, *supra* note 6, at 999 (stating that the court never clarified whether *Petermann*'s cause of action rested in tort or contract).

106. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

California Penal Code.[107] In *Tameny*, the court decided whether an employee could recover for wrongful discharge when terminated for refusing to violate a criminal statute.[108] Tameny had been discharged for refusing to fix prices in violation of the Sherman Antitrust Act.[109] Since the *Tameny* case was factually similar to *Petermann*, the *Tameny* court had little difficulty finding that Tameny was wrongfully discharged when fired for refusing to violate the underlying public policy in a criminal offense.[110]

The *Tameny* court then rejected the defendant's argument that the public policy exception sounded only in contract.[111] The court reasoned that the wrongful discharge action is not based on express or implied promises, and that the employer has no contractual obligation to avoid discharging the employee in contravention of public policy.[112] Instead, the public policy exception, like a tort claim, is intended to protect an employee from harm arising from the breach of an employer's duty to act in accord with social policy.[113] Thus, the *Tameny* court held that the action entitled the plaintiff to recover tort damages.[114]

After *Tameny* affirmed the existence of the public policy exception in California, confusion followed regarding the source and basis of public

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107. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980). Other states have also adopted the *Petermann* rationale. *See, e.g.*, Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (finding that the plaintiff could recover compensatory and punitive damages for dismissal for requesting jury duty); Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 388 (Conn. 1985) (allowing tort recovery for an employee dismissed for protesting noncompliance with labeling requirements); Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 512 (N.J. 1980) (adopting the public policy exception, yet finding that the employee had not stated a public policy sufficient for a wrongful discharge cause of action).

108. *Tameny*, 27 Cal. 3d at 169, 610 P.2d at 1331, 164 Cal. Rptr. at 840.

109. *Id.* at 170-71, 610 P.2d at 1331-32, 164 Cal. Rptr. at 840-41; *see* Sherman Antitrust Act, 15 U.S.C. § 1 (1992) (creating a felony for contracting or conspiring to restrain trade or commerce among the states).

110. *Tameny*, 27 Cal. 3d at 174, 610 P.2d at 1334, 164 Cal. Rptr. at 843. The *Tameny* court adopted *Petermann*'s holding that where there is no statute expressly prohibiting the discharge of a worker who refuses to commit perjury, then the public policy underlying the penal code requires that the employer be barred from discharging the employee on such grounds. *Id. Compare* Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 187, 344 P.2d 25, 26 (2d Dist. 1959) (stating that plaintiff was employed by defendant union as a business agent when subpoenaed to testify in a legislative hearing and that plaintiff was fired for refusing to commit perjury as demanded by defendant) *with Tameny*, 27 Cal. 3d at 171, 610 P.2d at 1332, 164 Cal. Rptr. at 841 (alleging that defendant company threatened plaintiff employee to illegally reduce gasoline prices in violation of antitrust laws).

111. *Tameny*, 27 Cal. 3d at 176, 610 P.2d at 1135, 164 Cal. Rptr. at 845.

112. *Id.*

113. *Id.* (quoting PROSSER, LAW OF TORTS 613 (4th ed. 1971)).

114. *Id.* at 174-76, 610 P.2d at 1334-35, 164 Cal. Rptr. at 843-44; *see supra* notes 46-49 and accompanying text (discussing the advantages of tort damages compared to contract damages).

policy.[115] In particular, courts were unsure whether a statutory violation was required to establish a cause of action,[116] whether public policy could be inferred from statutes,[117] or whether public policy could be based on non-legislative sources.[118] In *Shapiro v. Wells Fargo Realty Advisors*,[119] the California Court of Appeal for the Second District held that a cause of action could not be established unless the employee's discharge was caused by a refusal to perform an illegal act or other statutory violation.[120] However, other courts have stated in dicta that the public policy exception does not require a legislatively based policy.[121]

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115. *See* Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (2d Dist. 1959) (stating that public policy is inherently not subject to precise definition); *see also* Levine, *supra* note 6, at 1000-01 (discussing the lower court confusion over the source of public policy); *supra* notes 27-29 and accompanying text (noting the disagreement in the California appellate courts regarding appropriate public policy sources).

116. Courts reasoned that a statutory violation was required for a successful wrongful discharge case since both *Petermann* and *Tameny* dealt with an employer forcing an employee to violate a statute in order to keep their job. *See supra* notes 97-99 and accompanying text (discussing the facts of *Petermann*); notes 106-110 and accompanying text (discussing the facts of *Tameny*).

117. *See* Hentzel v. Singer Co., 138 Cal. App. 3d 290, 299-300, 188 Cal. Rptr. 159, 165-66 (1982) (holding that in the absence of a statute preventing an employer from discharging an employee for complaining of unhealthy working conditions, that a public policy promoting a safe work environment can be inferred from statute).

118. *See Tameny*, 27 Cal. 3d at 174, 610 P.2d at 1334, 164 Cal. Rptr. at 843 (finding that the defendant employer had violated the public policy of the Sherman Antitrust Act in forcing the plaintiff to fix prices); *Petermann*, 174 Cal. App. 2d at 188-89, 344 P.2d at 27 (finding that the employer had violated the Penal Code when suborning the plaintiff to commit perjury); *see also* Hentzel v. Singer Co., 138 Cal. App. 3d 290, 295-96, 188 Cal. Rptr. 159, 162 (1st Dist. 1982) (stating that the issue of public policy was not whether the employer had acted unlawfully but whether the employer had violated a statutory objective). The *Tameny* court did not address the definition of public policy as the facts of the case did not require the court to do so. *See Tameny*, 27 Cal. 3d at 170-71, 174, 610 P.2d at 1331-32, 1334, 164 Cal. Rptr. at 840-41, 843 (alleging that the defendant instructed the plaintiff to engage in criminal activity by fixing gas prices). The public policy against criminal activity was enough to give Tameny a cause of action so the court did not have to address the issue of appropriate sources of public policy. *Id.* While some courts have required a statutory basis for a public policy, no California court has required that there be an actual violation of a statute. Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 477, 199 Cal. Rptr. 613, 618 (1984).

119. 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984).

120. Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 477, 199 Cal. Rptr. 613, 618 (1984); *see* Tyco Indus., Inc. v. Superior Court, 164 Cal. App. 3d 148, 159, 211 Cal. Rptr. 540, 546-47 (1985) (noting that no California case has ever held a public policy sufficient to satisfy the public policy exception without statutory authority).

121. *See* Dabbs v. Cardiopulmonary Management Serv., 188 Cal. App. 3d 1437, 1443, 234 Cal. Rptr. 129, 133 (4th Dist. 1987) (finding that non-legislative sources of public policy are appropriate, but noting that the plaintiff had plead a statutory provision); Koehrer v. Superior Court, 181 Cal. App. 3d 1155, 1165, 226 Cal. Rptr. 820, 825 (4th Dist. 1986) (stating that it is immaterial whether public policy is expressed by the Legislature in statutes or by courts).

For an example of a court finding a cause of action under the public policy exception without a statute directly establishing a policy, see *Hentzel*, 138 Cal. App. 3d at 299-300, 188 Cal. Rptr. at 165 (finding that while no statute prevented discharge of an employee complaining of workplace safety, the plaintiff had stated a cause of action because such policy was implied in the Labor Code). At the time Hentzel was discharged, Labor Code § 6310(a), which prevented discharge for reporting safety or health matters, had not been enacted. *Id.* Hentzel

The California Supreme Court unsuccessfully attempted to resolve the confusion over the appropriate sources of public policy in *Foley v. Interactive Data Corporation.*[122]

2. Foley v. Interactive Data Corporation: *Changing the Focus of the Public Policy Exception in California*

In *Foley v. Interactive Data Corporation,*[123] the California Supreme Court for the first time was presented with the issue of appropriate public policy sources.[124] In *Foley*, the plaintiff was employed by the defendant corporation for seven years when he was discharged for no express reason.[125] Shortly before being discharged, Foley had informed his former supervisor that he was concerned about his new supervisor, Kuhne.[126] Foley told his former supervisor that Kuhne was under investigation for embezzlement.[127] Foley was then discharged shortly after Foley's former supervisor told him to forget about what he had heard.[128] Thus, the court was confronted with the issue of whether Interactive Data Corporation had wrongfully discharged Foley in violation of a duty, imposed by public policy, on employees to report relevant business information to management.[129] The court also considered whether a cause of action for breach of the covenant of good faith and fair dealing existed in the employment context.[130]

Instead of creating a bright line rule regarding appropriate public policy sources, the California Supreme Court established guidelines to direct lower courts in ascertaining public policy.[131] First, the *Foley* court required that a plaintiff establish that the public policy violated be a matter affecting society at large rather than being a purely personal or proprietary

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was discharged for attempting to secure a smoke free work environment. *Id.* at 293, 188 Cal. Rptr. at 161.

122. *See* Foley v. Interactive Data Corp., 47 Cal. 3d 654, 668-72, 765 P.2d 373, 378-80, 254 Cal. Rptr. 211, 216-18 (1988) (establishing guidelines to assist in defining public policy).

123. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

124. *Foley*, 47 Cal. 3d at 668-72, 765 P.2d at 378-80, 254 Cal. Rptr. at 216-18. *See generally* Levine, *supra* note 6, at 1012-14, 1027-32 (discussing the opinion in *Foley* and the public policy exception).

125. *Foley*, 47 Cal. 3d at 663-64, 765 P.2d at 375, 254 Cal. Rptr. at 213.

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

127. *Id.*

128. *Id.* Foley informed his supervisor of Kuhne's investigation because the defendant company did business with the financial community. *Id.*

129. *Id.* at 669, 765 P.2d at 379, 254 Cal. Rptr. at 217.

130. *Id.* at 683-84, 765 P.2d at 389, 254 Cal. Rptr. at 227. *See supra* notes 6 and 88 and accompanying text (defining a cause of action for the breach of the covenant of good faith and fair dealing).

131. *Foley*, 47 Cal. 3d at 668-72, 765 P.2d at 378-80, 254 Cal. Rptr. at 216-18.

interest.[132] In the case of a statutory violation, the court explained that if the statute regulates conduct between private individuals and does not implicate fundamental public concerns, the plaintiff has no cause of action.[133] Second, the court stated that the public policy implicated must be fundamental, substantial and well established at the time of the employee's discharge.[134] However, the court never addressed what sources of public policy were appropriate.[135] In particular, the *Foley* court did not address the lower court debate on whether non-legislative sources were acceptable sources of public policy.[136] Thus, *Foley* apparently shifted the focus of the public policy question from the source of public policy toward an evaluation of the policy's importance and public character.[137]

After *Foley*, the public policy exception took on more importance because the exception became the only action entitling a plaintiff to tort damages.[138] In particular, the court held that an employee can state a

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132. *Id.* at 668-70, 765 P.2d at 378-79, 254 Cal. Rptr. at 216-17. In *Foley*, the court gave no indication of what types of statutes protected purely private interests compared to those interests affecting the public. *Id.* at 669, 765 P.2d at 379, 254 Cal. Rptr. at 217. *But see* Rojo v. Kliger, 52 Cal. 3d 65, 91, 801 P.2d 373, 389, 276 Cal. Rptr. 130, 146 (1990) (suggesting that prohibitions against sex discrimination, which involve the private employer-employee relationship, are an appropriate foundation for a wrongful discharge cause of action based on the public policy exception).

133. *Foley*, 47 Cal. 3d at 670-71, 765 P.2d at 379-80, 254 Cal. Rptr. at 217-18. *But see* PERRITT, *supra* note 42, § 5.12 (noting that drawing distinctions between public and private interests is difficult and often unprincipled).

134. *Foley*, 47 Cal. 3d at 668-70, 765 P.2d at 378-79, 254 Cal. Rptr. at 216-17.

135. *Id.* at 669, 765 P.2d at 379, 254 Cal. Rptr. at 217. The court declined to decide if non-legislative sources of public policy were acceptable for establishing a public policy cause of action. *Id.* However, the court suggested in footnotes that an analogy can be drawn between the public policy exception and illegal contracts to create a new test for determining public policy sources. *Id.* at 667, 670, nn.7 & 12, 765 P.2d at 377-78, 380, nn.7 & 12, 254 Cal. Rptr. 215-16, 218, nn.7 & 12. The analogy implies that if an employer could legally contract for the employee to perform a certain act, or refrain from performing a certain act, then the contract and the ultimate discharge would not violate public policy. *Id.* Jung and Harkness argue that this analogy between illegal contracts and the public policy exception would lead to a restriction of the exception by limiting the number of situations where a discharged employee could recover. *See* David J. Jung & Richard Harkness, *Life After* Foley: *The Future of Wrongful Discharge Litigation*, 41 HASTINGS L.J. 131, 137-38 (1988) (discussing *Foley* and the public policy exception).

136. *Foley*, 47 Cal. 3d at 669, 765 P.2d at 379, 254 Cal. Rptr. at 271; *see supra* notes 14-29 and 115-121 and accompanying text (discussing the debate surrounding public policy sources).

137. *See* Levine, *supra* note 6, at 1027-28 (noting the change in focus on the question of public policy).

138. Prior to *Foley*, the wrongful discharge claim based on the implied covenant of good faith and fair dealing was a tort and contract action. Miller & Estes, *supra* note 6, at 83. However, *Foley* rejected the lower court holdings that the implied covenant of good faith and fair dealing was a tort action, thereby leaving the public policy exception as the only cause of action that entitles a plaintiff to tort damages such as emotional distress and punitive damages. *Id.*; *see Foley*, 47 Cal. 3d at 693, 765 P.2d at 396, 254 Cal. Rptr. at 234-35 (rejecting tort recovery for the covenant of good faith and fair dealing); *see also supra* notes 46-49 and accompanying text (discussing why tort damages are often larger than contract damages in wrongful termination claims).

wrongful discharge claim for a breach of the covenant of good faith and fair dealing,[139] but that such a breach gives rise to contract damages only.[140] Therefore, a plaintiff seeking tort damages became limited to bringing an action for wrongful discharge in violation of public policy.[141] After *Foley*, commentators predicted that employees would state more wrongful discharge causes of action under the public policy exception to receive tort damages.[142] As a result of the new appeal of the public policy exception, employers feared defending more actions under the public policy exception and attacked the exception as being preempted by statutory remedy schemes, such as the Fair Employment and Housing Act (FEHA) and the Workers' Compensation Act (WCA).[143]

3. *Fair Employment and Housing Act Preemption of the Public Policy Exception*

The potential for greater employer liability with the public policy exception to at will employment has led employers to argue that the exception is preempted by the Fair Employment and Housing Act (FEHA).[144] In pertinent part, the FEHA provides for an administrative remedy,[145] to be enforced by the Department of Fair Employment and Housing (DFEH), for violations of the right to be free from employment

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139. *See supra* note 88 and accompanying text (defining the wrongful discharge claim based on the covenant of good faith and fair dealing).

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

141. Levine, *supra* note 6, at 1050.

142. *See* Levine, *supra* note 6, at 1050 (stating that the central effect of *Foley* will be to prevent wrongfully discharged employees from recovering tort damages, unless the action is based on the public policy exception); Joseph Posner, *Yes, There is Life After* Foley, 18 SW. U. L. REV. 357, 357, 361-62 (1989) (asserting that while *Foley* has diminished tort damages for the covenant of good faith and fair dealing action, *Foley* has made recovery on other theories, such as the public policy exception, easier); *see also supra* notes 48-49 (listing recent verdicts for wrongful discharge under the public policy exception).

143. *See supra* notes 30-34 and accompanying text (introducing the issue of FEHA preemption); *infra* notes 164-194 and accompanying text (discussing the WCA and preemption of the public policy exception). *See generally* Oppenheimer & Baumgartner, *supra* note 31 (discussing how the FEHA can preempt a wrongful discharge claim).

144. *See* CAL. GOV'T CODE §§ 12900, 12920 (West 1992) (recognizing the Department of Fair Employment and Housing, whose function is to investigate and seek redress of alleged discrimination); *see also* Rojo v. Kliger, 52 Cal. 3d 65, 71, 82, 801 P.2d 373, 375, 383, 276 Cal. Rptr. 130, 132, 140 (1990) (stating that the defendant moved for summary judgment because the cause of action was preempted by the FEHA). *But see id.* at 82 n.10, 801 P.2d at 383 n.10, 276 Cal. Rptr. at 140 n.10 (noting that the holding does not address whether wrongful discharge based on retaliation or age discrimination will be affected).

145. *See* CAL. GOV'T CODE § 12970 (West Supp. 1993) (providing that remedies for unlawful employment practices include, but are not limited to, reinstatement with or without backpay, payment of actual damages, prospective relief to prevent the recurrence of the unlawful practice, emotional distress damages not to exceed $50,000).

discrimination.[146] The FEHA requires that an individual satisfy the prescribed administrative remedies by filing a complaint with the DFEH, before any civil action can be brought.[147] If the DFEH decides not to pursue an action against the employer, the individual must receive a "right to sue" letter from DFEH before proceeding with a civil suit against the employer.[148] Because the FEHA creates a statutory scheme to remedy employment discrimination the question arises, does the FEHA preempt the common law causes of action for wrongful discharge based on the public policy exception?[149]

In California, courts have stated that if a right is created by statute, and a statutory remedy is provided for violation of that right, the remedy is exclusive for that right.[150] Applying this "new right-exclusive remedy" rule to the public policy exception, lower courts have held that a wrongful discharge cause of action is preempted by the FEHA if the public policy violated is based on a FEHA provision that did not exist at common law.[151] On the other hand, where the right was established prior to the

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146. *See id.* § 12921 (West Supp. 1993) (establishing a civil right to be free from job discrimination); *id.* §§ 12901, 12920 (West 1992) (recognizing the Department of Fair Employment and Housing (DFEH) whose function it is to investigate and seek redress for alleged discrimination); *see also id.* §§ 12960, 12963, 12963.7 (West 1992) (providing for a complaint process through which the DFEH is to investigate claims determine the validity of claims, and try to resolve the matter in confidence).

147. *See id.* § 12965(b) (West Supp. 1993) (allowing an individual to bring a civil suit only after the DFEH has failed or refused to pursue the allegation). For a detailed discussion of the FEHA remedy procedures, see *Rojo*, 52 Cal. 3d at 83-85, 801 P.2d at 383-84, 276 Cal. Rptr. at 140-41.

148. CAL. GOV'T CODE § 12965(b) (West Supp. 1993). The "right to sue" letter gives the employee the right to sue the employer under the FEHA in a civil court. *Id.* The letter must be issued within 150 days from the filing of the complaint. *Id.*

149. Oppenheimer & Baumgartner, *supra* note 31, at 158; *see supra* notes 30-34 and accompanying text (introducing the issue of preemption of the public policy exception by the FEHA).

150. Gantt v. Sentry Ins., 234 Cal. App. 3d 612, 636, 265 Cal. Rptr. 814, 828 (3d Dist. 1990) *superseded by* Gantt v. Sentry Ins., 1 Cal. 4th 1083, 824 P.2d 680, 4 Cal. Rptr. 874 (1992). Where a new right is created by statute the injured party must utilize the statutory remedy if one is provided. *Rojo*, 52 Cal. 3d at 79, 801 P.2d at 381, 276 Cal. Rptr. at 138; Ficalora v. Lockheed Corp., 193 Cal. App. 3d 489, 491, 238 Cal. Rptr. 360, 361 (2d Dist. 1987); Strauss v. A.L. Randall Co., Inc., 144 Cal. App. 3d 514, 518, 194 Cal. Rptr. 520, 523 (2d Dist. 1983).

151. *See Ficalora*, 193 Cal. App. 3d at 492, 238 Cal. Rptr. at 361 (finding that a wrongful discharge claim was preempted by the FEHA when the plaintiff alleged that the discharge was in violation of the FEHA's prohibition against retaliation); *Strauss*, 144 Cal. App. 3d at 519, 194 Cal. Rptr. at 523 (holding that a wrongful discharge cause of action based on FEHA public policy prohibiting age discrimination is preempted by the FEHA because the public policy was created by the FEHA); CAL. GOV'T CODE § 12940(f) (West Supp. 1993) (stating that it is unlawful to discharge an employee in retaliation for opposing unlawful employment practices); *id.* § 12941 (West 1992) (prohibiting discharge based on age); *id.* § 12970(a)(3) (West Supp. 1993) (limiting actual damages to $50,000); *id.* § 12970(e) (West Supp. 1993) (limiting the civil penalty to $25,000); *see also Rojo*, 52 Cal. 3d at 79, 801 P.2d at 381, 276 Cal. Rptr. at 138 (referring to the theory of the California District Court of Appeal for the Second District as the "new right-exclusive remedy" rule). The effect of preemption is that the plaintiff no longer has a civil cause of action and must utilize the administrative remedy which limits actual and punitive damages.

statute creating the remedy, the remedy has been deemed elective.[152] Where a remedy is elective the plaintiff can choose between the statutory and the common law remedy.[153]

In *Rojo v. Kliger*,[154] the California Supreme Court decided that the FEHA did not preempt the public policy exception when an employee was discharged contrary to the public policy discouraging sex discrimination.[155] In *Rojo*, the plaintiffs were forced to leave their employment because they were sexually harassed by the defendant employer.[156] The plaintiffs filed a civil action against the employer claiming wrongful discharge in violation of public policy.[157] The defendants argued that the wrongful termination claim was preempted by the FEHA.[158] The California Supreme Court disagreed.[159] The supreme court held that the FEHA did not preempt common law actions such as the public policy exception because the Legislature intended to supplement existing law with the FEHA, not supplant it.[160] In particular, the court held that a public policy exception is not preempted by the FEHA where the public policy existed prior to the FEHA, such as discouraging sex discrimination.[161] However, the court refused to address whether a wrongful discharge action based on public policy not existing at common law was preempted by the FEHA since such action was not at issue.[162] In addition to arguing that the public policy wrongful discharge claim is preempted by the FEHA, employers have argued that the public policy exception is also preempted by the Workers' Compensation Act.[163]

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152. *Rojo*, 52 Cal. 3d at 79, 801 P.2d at 381, 276 Cal. Rptr. at 138.

153. *Id.* at 82, 801 P.2d at 383, 276 Cal. Rptr. at 140; *see Gantt*, 234 Cal. App. 3d at 636, 265 Cal. Rptr. at 828 (3d Dist. 1990) (stating that whether preemption occurs depends on when the right in question was established (quoting 3 Bernard E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 8 (3d ed. 1985)).

154. 52 Cal. 3d 65, 801 P.2d 373, 276 Cal. Rptr. 130 (1990).

155. Rojo v. Kliger, 52 Cal. 3d 65, 70, 801 P.2d 373, 375, 276 Cal. Rptr. 130, 132 (1990).

156. *Id.* at 71, 801 P.2d at 375, 276 Cal. Rptr. at 132.

157. *Id.* Plaintiffs also alleged assault, battery and intentional infliction of emotional distress. *Id.*

158. *Id.* at 73, 801 P.2d at 376, 276 Cal. Rptr. at 132.

159. *Id.* at 89, 801 P.2d at 388, 276 Cal. Rptr. at 145.

160. *Id.* at 73-76, 801 P.2d at 377-78, 276 Cal. Rptr. at 134-35; *see* CAL. GOV'T CODE § 12993(a) (West Supp. 1993) (providing that nothing in the FEHA is to be construed as repealing California law relating to discrimination by race, color, religious creed, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex or age).

161. *Rojo*, 52 Cal. 3d at 82, 801 P.2d at 383, 276 Cal. Rptr. at 140.

162. *Id.* at 84 n.10, 801 P.2d at 383 n.10, 276 Cal. Rptr. at 140 n.10. For a detailed description of the law prior to *Rojo*, see Oppenheimer & Baumgartner, *supra* note 31.

163. *See infra* note 170 (citing cases where the employer has claimed that a wrongful termination claim is preempted by the WCA).

4. *Workers' Compensation Preemption of the Public Policy Exception*

Like the FEHA, the Workers' Compensation Act (WCA)[164] has been used by employers to challenge the scope of the public policy exception.[165] The WCA provides that when certain statutory conditions are met, the WCA shall be the sole and exclusive remedy against the employer for injuries arising during employment.[166] The conditions for compensation require that there be an employer and employee, that the injury have arisen during the course of employment and that the injury have been proximately caused by the employment.[167] However, there is no compensation when the injury results from the employee's intoxication, intentional self-infliction, willful or deliberate action, employee initiated altercation or felonious act.[168] In addition, the system of compensation is a no fault system since compensation does not depend on the negligence of the employer or employee.[169] Employers prefer compensation under the WCA compared to the public policy exception because recovery is limited by the WCA, unlike a tort action under which an employer could be subject to undefined, almost limitless judgment.[170]

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164. *See* CAL. LAB. CODE § 3200 (West Supp. 1992) (providing for the establishment of the worker's compensation system). California's Workers' Compensation Act (WCA) was established in 1911. *See* Roseberry Act, Cal. Stat. 1911 ch. 399 p. 376 (establishing the workers' compensation system in California). *See generally* ARTHUR LARSON, WORKERS' COMPENSATION LAW § 5.20, at 2-14 to 2-17 (1992) (providing a detailed history of the worker's compensation system in America).

165. *See* Shoemaker v. Meyers, 52 Cal. 3d 1, 23, 801 P.2d 1054, 1068, 276 Cal. Rptr. 303, 317 (1991) (remanding the issue of whether an employee's wrongful discharge claim based on the public policy exception is preempted by the WCA). *See generally* Laura Quackenbush, Note, *Workers' Compensation Exclusivity and Wrongful Termination Tort Damages: An Injurious Tug of War?*, 39 HASTINGS L.J. 1229 (1988) (discussing preemption of wrongful discharge suits by the WCA).

166. *See* CAL. LAB. CODE § 3601(a) (West 1992) (providing that compensation under the WCA is to be an exclusive remedy). *See generally* LARSON, *supra* note 164, § 2.20 (discussing the underlying rationale for the workers' compensation system).

167. CAL. LAB. CODE § 3600(a)(1)-(3) (West Supp. 1993).

168. *Id.* § 3600(a)(4)-(8) (West Supp. 1993).

169. *Id.*

170. *See* Shoemaker v. Meyers, 52 Cal. 3d 1, 23, 801 P.2d 1054, 1067-68, 276 Cal. Rptr. 303, 316-17 (1990) (noting that the plaintiff argued that a public policy cause of action could be found despite the exclusive remedy provisions of the WCA); *see also* Ortiz v. Bank of America Nat'l Trust and Sav., 824 F.2d 692, 695-96 (9th Cir. 1987) (holding that a wrongful discharge claim based on the implied covenant of good faith and fair dealing was not preempted by the WCA); Green v. City of Oceanside, 194 Cal. App. 3d 212, 225, 239 Cal. Rptr. 470, 477 (4th Dist. 1987) (upholding an emotional damage award for wrongful termination because there was no WCA preemption of the claim). The WCA compensates the injured employee for reasonable medical and legal expenses and a percentage of the employee's lost wages. *See* CAL. LAB. CODE §§ 4600, 4621, 4650-4663 (West 1988 and West Supp. 1993). The compensation payment, unlike tort damages, is not intended to make the injured employee whole, but to prevent the employee from going on welfare while disabled. WARREN HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 1.05(5)(a), at 1-29 (2d

The WCA creates what the California Supreme Court calls the compensation bargain, which is triggered when the employment relationship begins.[171] This bargain is central to determining whether a cause of action is preempted by the WCA exclusive remedy provision.[172] The compensation bargain contains two elements: (1) The employer agrees to liability for injury or death of the employee, regardless of fault, in exchange for limited liability;[173] and, (2) the employee must forgo the right to a larger recovery under civil litigation, while gaining quick and certain compensation for injuries.[174] Thus, if compensating an injury would not effectuate the compensation bargain under the WCA, then the exclusive remedy provision is not invoked and a plaintiff can recover tort damages under the public policy exception.[175]

The California Supreme Court was first presented with the issue of whether the WCA preempted the public policy exception in the case of *Shoemaker v. Meyers*.[176] Shoemaker was an investigator for the Department of Health Services.[177] In 1981, he was falsely identified by a psychiatrist as having harassed a doctor during an investigation.[178] Shoemaker was subsequently interrogated by his supervisors.[179] When Shoemaker asked for counsel he was fired for insubordination by Meyers, the Director of Health Services.[180] Shoemaker thereafter filed suit for wrongful discharge in violation of public policy.[181] The trial court

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ed. 1987).

171. *Shoemaker*, 52 Cal. 3d at 16, 801 P.2d at 1062, 276 Cal. Rptr. at 311.

172. *See id.* (stating that the function of the exclusive remedy provision is to give force to the compensation bargain).

173. *See supra* note 170 (discussing the limits on workers' compensation payments).

174. *Id.*; Cole v. Fair Oaks Fire Protection Dist., 43 Cal. 3d 148, 158, 729 P.2d 743, 749, 233 Cal. Rptr. 308, 314 (1987).

175. *See infra* notes 185-191 and accompanying text (explaining in more detail when the compensation bargain will not be effectuated by a cause of action).

176. 52 Cal. 3d 1, 801 P.2d 1054, 276 Cal. Rptr. 303 (1990).

177. Shoemaker v. Meyers, 52 Cal. 3d 1, 7-8, 801 P.2d 1054, 1057, 276 Cal. Rptr. 303, 306 (1990).

178. *Id.* at 8, 801 P.2d at 1057, 276 Cal. Rptr. at 306.

179. *Id.*

180. *Id.* Shoemaker alleged that the termination was also in retaliation for previous problems arising from a 1979 investigation. *Id.* at 9, 801 P.2d at 1058, 276 Cal. Rptr. at 307. In 1979, Shoemaker was assigned to investigate allegations that health centers were illegally allowing services to be performed by non-licensed medical professionals. *Id.* at 7-8, 801 P.2d at 1057, 276 Cal. Rptr. at 306. After investigation, Shoemaker filed a report confirming such allegations and stating that Meyers, the Director of the Department of Health Services, knew of such illegal practices. *Id.* Shoemaker's investigation was then interfered with by Shoemaker's immediate supervisor, Charles Shuttleworth. *Id.* at 8, 801 P.2d at 1057, 276 Cal. Rptr. at 306. After Shoemaker complained to his supervisor, he was given disciplinary counseling, was harassed and was threatened. *Id.* In 1981, a magazine article appeared regarding the illegal activities of health centers and implicated Meyers. *Id.* Shuttleworth threatened Shoemaker and other investigators with discharge if no one confessed to the leak. *Id.*

181. *Id.*

sustained Meyers' demurrer on the ground that the wrongful discharge cause of action was preempted by the WCA.[182]

On appeal, the California Supreme Court stated that the act of termination necessarily arises out of the employment relationship and thus, meets the compensation requirements of the WCA and is compensable under the WCA.[183] The court found no way to distinguish an injury resulting from wrongful termination as opposed to post-termination,[184] demotion and transfer injuries which were construed as arising out of employment.[185] However, the court declined to resolve whether all wrongful discharge claims were preempted by the WCA because not all claims would effectuate the compensation bargain.[186]

The court noted that there are two instances when the exclusive remedy provisions are not applicable because the compensation bargain is not furthered, in which case a plaintiff can recover civil remedies for wrongful discharge.[187] First, the court in *Shoemaker* noted that the exclusive remedy provision is not applicable without the existence of a personal injury[188] sustained during the course of employment.[189] The court noted that defamation[190] exemplified a non-WCA injury since it does not involve physical injury or death and is not anticipated in an employment relationship.[191] Second, the *Shoemaker* court stated that the WCA is not

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182. *Id.* at 10, 801 P.2d at 1058, 276 Cal. Rptr. at 307.

183. *Id.* at 19-20, 801 P.2d at 1065, 276 Cal. Rptr. at 314; *see* CAL. LAB. CODE § 3600 (West Supp. 1993) (providing for compensation without regard to negligence where the employee is injured in the course of employment and all conditions for compensation are met); *see also supra* notes 166-168 and accompanying text (setting out the conditions for workers' compensation).

184. Post-termination injuries are those injuries occurring after the employment relationship has been terminated. *See* Mitchell v. Hizer, 73 Cal. App. 3d 499, 506-07, 140 Cal. Rptr. 790, 794 (1st Dist. 1977) (stating that the employee was injured after discharge when retrieving tools from the employer's premises); Argonaut Ins. Co. v. Industrial Accident Comm'n, 221 Cal. App. 2d 140, 141-42, 34 Cal. Rptr. 206, 207 (5th Dist. 1963) (noting that the employee was injured after termination while picking up a final paycheck); Peterson v. Moran, 111 Cal. App. 2d 766, 767-68, 245 P.2d 540, 540 (2d Dist. 1952) (noting that the employee was injured when he remained at the workplace after being terminated to discuss the reasons for termination).

185. *Shoemaker*, 52 Cal. 3d at 18-21, 801 P.2d at 1064-65, 276 Cal. Rptr. at 313-14.

186. *Id.* at 21, 801 P.2d at 1065, 276 Cal. Rptr. at 314; *see id.* at 23, 801 P.2d at 1067-68, 276 Cal. Rptr. at 316-17 (refraining from deciding whether the public policy exception is preempted by the WCA).

187. *Id.* at 16, 801 P.2d at 1062-63, 276 Cal. Rptr. at 311-12.

188. A compensable injury is one causing disability or need for medical treatment and is therefore an injury to the person and not property. Coca Cola Bottling Co. of L.A. v. Superior Court, 233 Cal. App. 3d 1273, 1284, 286 Cal. Rptr. 855, 860 (4th Dist. 1991).

189. *Shoemaker*, 52 Cal. 3d at 16, 801 P.2d at 1062-63, 276 Cal. Rptr. at 311-12.

190. Defamation is defined as a statement which exposes a person to contempt, hatred, ridicule or obloquy. McGowen v. Prentice, 341 So. 2d 55, 57 (La. App. 1977).

191. *Shoemaker*, 52 Cal. 3d at 16, 801 P.2d at 1062-63, 276 Cal. Rptr. at 312; *see* Howland v. Balma, 143 Cal. App. 3d 899, 902, 192 Cal. Rptr. 286, 287 (3d Dist. 1983) (holding that an employee's defamation claim against the employer is not preempted by the WCA).

the exclusive remedy where the employer's conduct either cannot be defined as stemming from a risk reasonably contained in the compensation bargain, or has a dubious connection to the employment.[192] For example, an employer who fraudulently conceals from the employee and the employee's doctors that the employee had been working in hazardous conditions which caused the employee's disease would be acting in a manner not reasonably contained in the compensation bargain.[193] However, the court in *Shoemaker* did not decide whether the public policy exception is contemplated within the compensation bargain and thus, preempted by the WCA, or whether an employee can proceed in a civil case for wrongful discharge.[194] The California Supreme Court was again presented with the issue of whether the public policy exception is preempted by the WCA in *Gantt v. Sentry Insurance*.[195] Additionally, the court was afforded the opportunity to resolve the debate over appropriate sources of public policy.[196]

II. THE CASE

A. Factual and Procedural Background

Vincent Gantt was a sales manager for Sentry Insurance Company's Sacramento office.[197] Gantt supervised Joyce Bruno, who was a liaison between trade associations and Sentry's Sacramento office.[198] Shortly after being hired, Ms. Bruno approached Gantt regarding the sexual harassment she was experiencing from Gantt's co-supervisor.[199] Gantt reported the problem to his supervisors in the Scottsdale, Arizona regional

192. *Shoemaker*, 52 Cal. 3d at 16, 801 P.2d at 1063, 276 Cal. Rptr. at 312.

193. *See* Johns-Manville Prod. Corp. v. Superior Court, 27 Cal. 3d 465, 477, 612 P.2d 948, 955, 165 Cal. Rptr. 858, 865 (1980) (holding that the employee could sustain an action in damages which was not preempted by the WCA where he had been fraudulently induced by his employer to continue to work in an environment exposing plaintiff to asbestos).

194. *Shoemaker*, 52 Cal. 3d at 23, 801 P.2d at 1068, 276 Cal. Rptr. at 317.

195. 1 Cal. 4th 1083, 1098, 824 P.2d 680, 689, 4 Cal. Rptr. 2d 874, 883 (1992).

196. Gantt v. Sentry Insurance, 1 Cal. 4th 1083, 1098, 824 P.2d 680, 689, 4 Cal. Rptr. 2d 874, 883 (1992).

197. *Id.* at 1087, 824 P.2d at 682, 4 Cal. Rptr. 2d at 876. Gantt was hired to develop the Sacramento sales force. *Id.* Conflicting evidence was presented at trial regarding how successful Gantt was in developing the sales force. *Id.* However, the court found the jury had enough evidence to find that Gantt was terminated for illegal reasons. *Id.*

198. *Id.* Ms. Bruno was also hired as a liaison for Sentry's Walnut Creek office. *Id.* In addition to reporting to Gantt, Ms. Bruno also reported to Gary Desser, the manager of the Walnut Creek office, and Brian Cullen, a supervisor at Sentry's regional headquarters in Scottsdale, Arizona. *Id.*

199. *Id.* Ms. Bruno alleged that Desser was sexually harassing her. *Id.*

office.[200] When Ms. Bruno continued to be harassed, Gantt brought the situation to the attention of his supervisors for a second time.[201] Thereafter, Ms. Bruno was transferred and eventually fired.[202] Gantt was ridiculed by his immediate supervisor for supporting Ms. Bruno.[203]

Ms. Bruno filed a complaint with the Department of Fair Employment and Housing (DFEH) regarding her sexual harassment.[204] During the DFEH investigation, Sentry's in-house counsel, Caroline Fibrance, pressured Gantt to deny he had informed the regional office of the sexual harassment problem.[205] When he refused, Sentry decreased Gantt's yearly performance rating.[206] After the investigation, Gantt was demoted to sales representative and told that he would not be given a book of existing accounts to start his new job.[207] Not having this book made it impossible for Gantt to work.[208] As a result, Gantt was forced to quit.[209]

Gantt brought suit against Sentry claiming tortious discharge in contravention of public policy.[210] The jury awarded Gantt $1.34 million for his claim.[211] The California District Court of Appeal for the Third District noted that Gantt's wrongful discharge claim rested on two different public policies.[212] First, the court found that Gantt was constructively discharged in retaliation for supporting a coworker's sexual harassment

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200. *Id.* Gantt also reported the problem to his immediate supervisor, Dave Berg. *Id.*

201. *Id.* Desser was finally demoted and replaced with Robert Warren. *Id.*

202. *Id.* Ms. Bruno was fired a few months after Gantt's final complaint. *Id.*

203. *Id.* Gantt was present at the meeting in which Berg directed Warren to fire Ms. Bruno and Gantt was ridiculed for supporting her. *Id.* Berg was then replaced with Frank Singer, who was allegedly told to get rid of Gantt, although Singer refrained. *Id.* at 1087-88, 824 P.2d at 682, 4 Cal. Rptr. 2d at 876.

204. *Id.* at 1088, 824 P.2d at 682, 4 Cal. Rptr. 2d at 876. In addition to sexual harassment, Ms. Bruno alleged that Sentry's higher management failed to act on her complaints. *Id.* Sentry's in-house counsel, Caroline Fibrance, was assigned to investigate Ms. Bruno's complaints. *Id.*

205. *Id.* Gantt was also told that Singer and others in the company did not care for him. *Id.*

206. *Id.* Because Gantt felt uneasy about Fibrance, he arranged to meet secretly with John Thompson, the DFEH investigator. *Id.* at 1088, 824 P.2d at 683, 4 Cal. Rptr. 2d at 877. Thompson assured Gantt that he would be protected from retaliation if he told the truth. *Id.*

207. *Id.* at 1089, 824 P.2d at 683, 4 Cal. Rptr. 2d at 877. Gantt's new supervisor, Neil Whitman, threatened to fire Gantt if Gantt undermined Whitman's authority. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 1086, 824 P.2d at 681, 4 Cal. Rptr. 2d at 875; *see* Garcia v. Rockwell Int'l, 187 Cal. App. 3d 1556, 1562, 232 Cal. Rptr. 490, 493 (4th Dist. 1987) (holding that a plaintiff does not have to be discharged to state a wrongful discharge cause of action under the public policy exception); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 178, 610 P.2d 1330, 1337, 164 Cal. Rptr. 839, 846 (1980) (holding that an employee has a cause of action when discharged in violation of public policy); *see also supra* notes 106-122 and accompanying text (discussing the holding in *Tameny*).

211. *Gantt*, 1 Cal. 4th at 1086, 824 P.2d at 681, 4 Cal. Rptr. 2d at 875. Specifically, the jury found that Gantt was discharged for refusing to testify untruthfully to the DFEH and in retaliation for supporting Ms. Bruno's sexual harassment claim. *Id.* at 1089, 824 P.2d at 683, 4 Cal. Rptr. 2d at 877.

212. *Id.* at 1089, 824 P.2d at 683, 4 Cal. Rptr. 2d at 877.

claim.[213] However, the court found that the Fair Employment and Housing Act (FEHA) protects against termination when an employee aides a coworker's harassment claim.[214] Thus, Gantt's first claim of wrongful discharge based on the public policy exception was considered preempted by the FEHA.[215] Second, the court of appeal noted that Gantt was discharged for refusing to withhold information from a public agency investigating the sexual harassment charges.[216] The court held that the FEHA included a public policy prohibiting termination for complying with a FEHA investigation.[217] Yet, the court held this claim was not preempted because such a policy existed prior to the FEHA.[218] Finally, because a violation of public policy is not anticipated within the WCA compensation bargain the court held that the public policy exception was not preempted by the WCA.[219]

Subsequently, the California Supreme Court granted review to determine whether an employee who was terminated in retaliation for supporting a coworker's claim of sexual harassment and for refusing to interfere with a state investigation may state a wrongful discharge action under the public policy exception to the employment at will doctrine.[220] In addition, the *Gantt* court granted review to decide whether the exclusive remedy provisions of the Workers' Compensation Act bar a wrongful discharge claim based on public policy.[221]

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213. *Id.*; *see* CAL. GOV'T CODE § 12940(f) (West Supp. 1993) (prohibiting the discharge of an employee who opposes practices forbidden by the FEHA or assists another in filing a complaint under the FEHA).

214. *Gantt*, 1 Cal. 4th at 1086, 824 P.2d at 681, 4 Cal. Rptr. 2d at 875; *see* Gantt v. Sentry Ins., 234 Cal. App. 3d 612, 637, 265 Cal. Rptr. 814, 830 (3d Dist. 1990) *superseded by* Gantt v. Sentry Ins., 1 Cal. 4th 1083, 824 P.2d 680, 4 Cal. Rptr. 874 (1992) (finding that the prohibition of retaliation for assisting in a DFEH complaint established in Government Code § 12940(f) did not exist at common law and thus is preempted by the FEHA).

215. *See supra* notes 150-153 and accompanying text (discussing the theory of the California District Court of Appeal for the Second District stating that the public policy exception will be preempted by the FEHA if the public policy is based on a FEHA policy not existing before 1959).

216. *Gantt*, 1 Cal. 4th at 1086, 824 P.2d at 681, 4 Cal. Rptr. 2d at 875; *see* CAL. GOV'T CODE § 12975 (West 1992) (providing that any person who resists, prevents, impedes or interferes with the duties of members of the DFEH or the FEHA as they relate to employment discrimination is guilty of a misdemeanor).

217. *Gantt*, 1 Cal. 4th at 1086, 824 P.2d at 681, 4 Cal. Rptr. 2d at 875.

218. *Id.*

219. *Id.*; *see supra* notes 171-175 and accompanying text (defining the compensation bargain).

220. *Gantt*, 1 Cal. 4th at 1085, 824 P.2d at 681, 4 Cal. Rptr. 2d at 875.

221. *Id.*

B. The Majority Opinion

In an opinion by Justice Arabian, the California Supreme Court affirmed the decision of the Court of Appeal for the Third District, holding that Gantt had established a cause of action based on violation of public policy and that such action was not preempted by the WCA.[222] In upholding Gantt's verdict, the court first attempted to resolve whether the existence of public policy could be established from non-legislative sources or whether public policy was restricted to statutory or constitutional provisions.[223] The court reasoned that limiting public policy to legislative sources struck a proper balance in the labor market.[224] Next, the court addressed whether Gantt had established a cause of action under the public policy exception.[225] Finally, the court confronted the issue of whether the public policy exception was preempted by the WCA, given the fact that behavior violating public policy is not ordinarily a part of the employment relationship.[226]

1. Limiting Public Policy to the Legislature's Perceptions

The *Gantt* court began by articulating a new rule to determine the existence of fundamental public policies in wrongful termination cases.[227] In *Foley*, the California Supreme Court had suggested that an analogy could be drawn between public policy in illegal contracts and public policy in wrongful discharge cases.[228] Thus, Gantt argued that because courts in contract law do not restrict themselves to finding public policy in statutes or constitutions when invalidating contracts, courts should not be

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222. *Id.* at 1087, 824 P.2d at 682, 4 Cal. Rptr. 2d at 876. Justice Arabian was joined by Chief Justice Lucas and Justices Panelli, Baxter and George. *Id.* Justices Kennard and Mosk concurred in part and dissented in part. *Id.* at 1101, 824 P.2d at 692, 4 Cal. Rptr. 2d at 886.

223. *Id.* at 1089-95, 824 P.2d at 683-88, 4 Cal. Rptr. 2d at 877-82; *see supra* notes 14-27 and 115-122 and accompanying text (discussing the debate surrounding appropriate sources of public policy).

224. *Gantt*, 1 Cal. 4th at 1095, 824 P.2d at 687-88, 4 Cal. Rptr. 2d at 881-82; *see supra* notes 21-24 and accompanying text (noting that some courts argue that legislative sources strike a balance between employer, employee and societal interests).

225. *Gantt*, 1 Cal. 4th at 1096-97, 824 P.2d at 689, 4 Cal. Rptr. 2d at 883.

226. *Id.* at 1100-1101, 824 P.2d at 691-92, 4 Cal. Rptr. 2d at 885-86; *see supra* notes 164-194 and accompanying text (discussing WCA preemption).

227. *Gantt*, 1 Cal. 4th at 1095, 824 P.2d at 687-88, 4 Cal. Rptr. 2d at 881-82.

228. *Id.* at 1094, 824 P.2d at 687, 4 Cal. Rptr. 2d at 881 (citing Foley v. Interactive Data Corp., 47 Cal. 3d 654, 667 n.7, 765 P.2d 373, 377 n.7, 254 Cal. Rptr. 211, 215, n.7 (1988)); *see Foley*, 47 Cal. 3d at 667, 670 nn.7 & 12, 765 P.2d at 377, 380 nn.7 & 12, 254 Cal. Rptr. at 215, 218 nn.7 & 12 (suggesting that public policy may be limited to conduct that an employer could not contract for or against); *see also supra* note 135 (discussing the analogy between illegal contracts and wrongful discharge).

so limited in wrongful termination cases.[229] The California Supreme Court conceded that, when holding a contract contrary to public policy, California courts do not confine their analyses to legislative policy.[230] In fact, Justice Arabian explained that in contract cases courts frequently hold activities of associations, individuals and corporations as contrary to public policy in areas where the Legislature has not spoken.[231]

Nevertheless, the court observed two principles unrelated to the contract analogy used in *Foley* in rejecting Gantt's comparison between public policy in contracts and wrongful discharge claims.[232] The first principle was that almost all successful causes of action under the public policy exception are based on a legislative public policy.[233] The court also argued that the public policy exception would be a stronger cause of action for employees if the difficulty in defining public policy was limited.[234]

First, most wrongful discharge cases stated under the public policy exception in California and elsewhere have relied on some statutorily or constitutionally defined public policy.[235] Indeed, the court recognized that public policy cases fall into one of four categories: (1) Refusing to violate a statute; (2) performing a statutory obligation; (3) exercising a statutory right; or (4) reporting an alleged violation of a statute of public importance.[236] Since all jurisdictions require the plaintiff to plead a clearly defined and well established public policy,[237] and courts are uncomfortable defining public policy without some direction from the Legislature, the successful public policy cases have tended to fall into one

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229. *Gantt*, 1 Cal. 4th at 1093, 824 P.2d at 686, 4 Cal. Rptr. 2d at 880. Gantt was likely relying on *Foley* dicta for the analogy between illegal contracts and the public policy exception. *See supra* note 135 and accompanying text (discussing how the California Supreme Court in *Foley* drew an analogy between the public policy exception and illegal contracts).

230. *Gantt*, 1 Cal. 4th at 1093-94, 824 P.2d at 686-87, 4 Cal. Rptr. 2d at 880-81.

231. *Id.* at 1093, 824 P.2d at 686, 4 Cal. Rptr. 2d at 880; *see* Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1033 (Ariz. 1985) (noting that courts have traditionally been policy makers, although with the Legislature as their restraint); Safeway Stores v. Retail Clerks Int'l Ass'n, 41 Cal. 2d 567, 574, 261 P.2d 721, 725 (1953) (noting that many state courts do not confine themselves to legislatively defined public policy).

232. *Gantt*, 1 Cal. 4th at 1094-95, 824 P.2d at 687, 4 Cal. Rptr. 2d at 881. The court implied that the difficulty of defining public policy was more important than an analogy to how illegal contracts were treated by the courts, thereby finding that their observations outweighed the strength of the analogy. *See id.* (pointing out that while the analogy to contracts is persuasive, such analogy does not make public policy any easier to define).

233. *Id.* at 1094, 824 P.2d at 687, 4 Cal. Rptr. 2d at 881.

234. *Id.*

235. *Id.*

236. *Id.* at 1090-91, 824 P.2d at 684, 4 Cal. Rptr. 2d at 878.

237. *See supra* notes 131-134 and accompanying text (discussing the *Foley* requirement that a public policy be substantial and well established at the time the employer discharges the employee).

of the above categories.[238] Thus, because all four categories involve statutory provisions, the court found that little would be lost by stating a new rule that limits wrongful discharge claims to statutory or constitutional public policies.[239]

Second, the court recognized that public policy is difficult to define and that its definition can be influenced by a judge's personal predilections, which make public policy unpredictable.[240] The court noted that by limiting public policy to statutes and constitutional provisions, the public policy exception will become clearer.[241] Furthermore, the court asserted that the formulation of public policy should not be a task of the judiciary, but rather a task for the Legislature.[242]

Justice Arabian found that the two principles properly balanced the interests of employers, employees and society.[243] In particular, while employers are bound to know the public policy articulated by the Legislature, the court found that under this new rule, employer termination decisions would be protected from the unfair surprise of violating an unknown public policy since employers would not be bound by public policies articulated by the executive or judicial branch.[244] The court also posited that employees will remain sufficiently protected from public policy violations and that society will be ensured that its public policies, articulated through its representatives, will be effectuated.[245]

Thus, the majority chose to avoid the difficulties of the public policy debate, and instead drew a bright line restricting the public policy exception by requiring a statutory or constitutional basis for the public policy.[246] As the court pointed out, the narrow definition of public policy, limited to statutory or constitutional sources only, has been the preference of a substantial minority of the courts that have addressed the

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238. *Gantt*, 1 Cal. 4th at 1090-95, 824 P.2d at 684-87, 4 Cal. Rptr. 2d at 878-81; *see supra* note 20 (explaining why courts are reluctant to define public policy on their own).

239. *Gantt*, 1 Cal. 4th at 1095, 824 P.2d at 687-88, 4 Cal. Rptr. 2d at 881-82.

240. *Id.* at 1095, 824 P.2d at 687, 4 Cal. Rptr. 2d at 881 (citing Hentzel v. Singer Co., 138 Cal. App. 3d 290, 297, 188 Cal. Rptr. 159, 163 (1982)); *see supra* note 20 and accompanying text (discussing the ambiguity in defining public policy).

241. *Gantt*, 1 Cal. 4th at 1095, 824 P.2d at 687, 4 Cal. Rptr. 2d at 881.

242. *Id.*

243. *Id.* at 1095, 824 P.2d at 688, 4 Cal. Rptr. 2d at 882; *see supra* notes 21-24 and accompanying text (addressing the balance that is struck by following the narrow approach of defining public policy).

244. *Gantt*, 1 Cal. 4th at 1095, 824 P.2d at 688, 4 Cal. Rptr. 2d at 882.

245. *Id.* The court states that society as a whole will also benefit from a stable job market, since discharge will be limited. *Id.*

246. *Id.* at 1094-95, 824 P.2d at 687-88, 4 Cal. Rptr. 2d at 881-82; *see supra* note 20 and accompanying text (discussing the difficulty of defining public policy).

public policy debate.[247] The court then turned to the facts of *Gantt* to determine whether Gantt had established a public policy claim within the court's new definition.

2. *Applying the New Rule Limiting Public Policy to Legislative Sources*

In applying the new rule of limiting public policy to legislative sources, the court noted that there was no need to determine if a public policy existed since Gantt had plead statutory provisions found in the FEHA in support of his wrongful discharge claim.[248] Gantt first claimed he was fired for supporting Ms. Bruno's harassment claim and that Sentry thereby violated Government Code section 12940(f), which encourages the resolution of harassment problems.[249] The California Supreme Court ignored this claim because the court found that Gantt's award could be affirmed on a second public policy ground.[250] Yet, by not addressing whether Gantt had stated a cause of action based on Government Code section 12940(f), a provision not existing prior to the FEHA, the court did not address whether the public policy exception was preempted by the FEHA statutory remedy scheme.[251]

Gantt's second public policy argument was that Sentry violated Government Code section 12975, from which a legislative intent to prohibit interference with the resolution of employment discrimination complaints may be implied.[252] Because Sentry had terminated Gantt for

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247. *Gantt*, 1 Cal. 4th at 1092, 824 P.2d at 685-86, 4 Cal. Rptr. 2d at 879-80; *see supra* note 16 (listing those jurisdictions accepting the narrow definition of public policy).

248. *Gantt*, 1 Cal. 4th at 1095, 824 P.2d at 688, 4 Cal. Rptr. 2d at 882; *see id.* at 1102, 824 P.2d at 692, 4 Cal. Rptr. 2d at 886 (Kennard, J., concurring and dissenting) (stating that the majority's new rule is dicta since the court was not presented with a non-statutory basis for a public policy claim); *see also infra* notes 268-291 and accompanying text (discussing Justice Kennard's criticism of the majority's resolution of the public policy debate).

249. *Gantt*, 1 Cal. 4th at 1095-96, 824 P.2d at 688, 4 Cal. Rptr. 2d at 882; *see* CAL. GOV'T CODE § 12940(f) (West Supp. 1993) (prohibiting an employer from discharging an employee for opposing discriminatory practices).

250. *Gantt*, 1 Cal. 4th at 1095-96, 824 P.2d at 688, 4 Cal. Rptr. 2d at 882; *see infra* notes 252-254 and accompanying text (noting that the second public policy ground was the statutory prohibition on interfering with a DFEH investigation).

251. *Gantt*, 1 Cal. 4th at 1086 n.2, 824 P.2d at 681 n.2, 4 Cal. Rptr. 2d at 875 n.2; *see supra* notes 144-163 and accompanying text (discussing the issue of preemption by the FEHA); *infra* notes 320-350 and accompanying text (addressing whether or not this statutory ground for a public policy claim would preempt the claim).

252. *Gantt*, 1 Cal. 4th at 1096-97, 824 P.2d at 689, 4 Cal. Rptr. 2d at 883; *see* CAL. GOV'T CODE § 12975 (West 1992) (providing that any person who willfully resists, prevents, impedes or interferes with a DFEH investigation is guilty of a misdemeanor).

refusing to thwart the resolution of Ms. Bruno's harassment complaint, the court found that Sentry had violated the public policy prohibiting interference with a DFEH investigation.[253] Subsequently, the court turned to the issue of whether Gantt's wrongful discharge claim was preempted by the Workers' Compensation Act.[254]

3. *Finding that the Public Policy Exception is Not Preempted by the Workers' Compensation Act*

Sentry Insurance contended that if Gantt's wrongful discharge claim was not preempted by the exclusive remedy of the FEHA, then the claim was preempted by the Workers' Compensation Act (WCA), because the act provides the exclusive remedy for work related injuries, including wrongful termination.[255] The court rejected Sentry's argument on three bases.[256] First, the court noted that allowing the WCA to preempt the recently established public policy exception would severely restrict the cause of action by reducing recovery for wrongful termination under the exception.[257] The court refused to so severely restrict the public policy exception because it would have taken away the only tort remedy available for wrongful discharge.[258] Indeed, the court indicated that it would be unfair to withdraw acceptance of the public policy exception in *Gantt*, since the action had been adopted only a few years earlier.[259]

Second, the court found that the WCA did not provide an exclusive remedy because the public policy exception comes under one of the

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253. *Gantt*, 1 Cal. 4th at 1097, 824 P.2d at 689, 4 Cal. Rptr. 2d at 883.

254. *Id.*; *see supra* notes 164-194 and accompanying text (discussing WCA preemption).

255. *Gantt*, 1 Cal. 4th at 1098, 824 P.2d at 689-90, 4 Cal. Rptr. 2d at 883-84; *see supra* notes 166-174 and accompanying text (describing the exclusive remedy provision of the WCA).

256. *Gantt*, 1 Cal. 4th at 1098-1101, 824 P.2d at 690-92, 4 Cal. Rptr. 2d at 884-86.

257. *See Gantt*, 1 Cal. 4th at 1098, 824 P.2d at 690, 4 Cal. Rptr. 2d at 884; Stephen G. Hirsch, *Testing the Reach of Workers' Comp*, THE RECORDER, Dec. 2, 1991, at 1 (describing how the pubic policy exception would be restricted if preempted by the WCA because the exception would lose its appeal for providing tort damages). An example of how the public policy exception would be restricted if preempted by the WCA would be a reduction in damages illustrated by one attorney's estimate that Gantt would have recovered $50,000 under the WCA exclusive remedy, compared to the $1.34 million the jury awarded Gantt under the public policy tort cause of action. *Id.*; *see also supra* note 169 and accompanying text (describing why worker's compensation damages can be less than tort damages).

258. *Gantt*, 1 Cal. 4th at 1098, 824 P.2d at 690, 4 Cal. Rptr. 2d at 884; *see supra* notes 137-141 and accompanying text (discussing how the *Foley* case effectively limited a plaintiff seeking tort damages to a wrongful discharge action based on a violation of public policy).

259. *Gantt*, 1 Cal. 4th at 1098, 824 P.2d at 690, 4 Cal. Rptr. 2d at 884.

exceptions to the WCA.[260] Citing the rule that a wrongful discharge injury is compensable under the WCA unless the compensation bargain is not fulfilled, the court found that a violation of a fundamental public policy is not reasonably expected in the employment relationship and thus, does not further the compensation bargain.[261] The court reasoned that the public policy exception does not vindicate contractual rights but rather aims at aiding a public interest in preventing employers from conditioning employment on violations of public policy.[262] Thus, the court held that the public policy exception is not preempted by the WCA.[263]

The *Gantt* court affirmed the trial court's award of $1.34 million to Gantt based on the theory that Gantt was fired for refusing to interfere with the DFEH investigation in violation of the public policy in Government Code section 12975.[264] The court also found that an employer's violation of public policy as expressed in the FEHA was not contemplated in the compensation bargain of the WCA.[265] Thus, the exclusive remedy provision of the WCA was not invoked and the claim was not preempted by the WCA remedy.[266] However, by grounding Gantt's claim on a FEHA provision with common law origin, the court did not address whether the public policy exception was preempted by the FEHA.[267]

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260. *Id.* at 1100, 824 P.2d at 691, 4 Cal. Rptr. 2d at 885; *see* Shoemaker v. Meyers, 52 Cal. 3d 1, 16, 801 P.2d 1054, 1062-63, 276 Cal. Rptr. 303, 311-12 (1991) (setting out exceptions to the WCA exclusive remedy provisions where the injury arises out of the course of employment and where the employer's conduct cannot be viewed as a risk of employment); *see also supra* notes 185-191 and accompanying text (discussing the exceptions to the exclusive remedy provision).

261. *Gantt*, 1 Cal. 4th at 1101, 824 P.2d at 692, 4 Cal. Rptr. 2d at 886; *see supra* notes 170-174 and accompanying text (discussing the rule regarding preemption by the WCA).

262. *Gantt*, 1 Cal. 4th at 1101, 824 P.2d at 692, 4 Cal. Rptr. 2d at 886 (quoting Foley v. Interactive Data Corp., 47 Cal. 3d 654, 667 n.7, 765 P.2d 373, 377 n.7, 254 Cal. Rptr. 211, 215 n.7 (1988)); *see supra* notes 90-140 and accompanying text (detailing the theoretical basis for the public policy exception).

263. *Gantt*, 1 Cal. 4th at 1101, 824 P.2d at 692, 4 Cal. Rptr. 2d at 886.

264. *Id.* at 1097, 824 P.2d at 689, 4 Cal. Rptr. 2d at 883; *see* CAL. GOV'T CODE § 12975 (West 1992) (prohibiting interference with a DFEH investigation); *Gantt*, 1 Cal. 4th at 1097, 824 P.2d at 689, 4 Cal. Rptr. 2d at 883 (stating that California Government Code § 12975 implies a public policy to protect well motivated employees who truthfully testify about discrimination in the work place since few employees would cooperate with DFEH investigations if not protected from retaliation).

265. *Gantt*, 1 Cal. 4th at 1101, 824 P.2d at 692, 4 Cal. Rptr. 2d at 886.

266. *Id.*; *see supra* note 174 and accompanying text (noting that if the compensation bargain is not effectuated by the cause of action, the exclusive remedy provision would not be invoked and the cause of action would not be preempted by the WCA).

267. *Gantt*, 1 Cal. 4th at 1086 n.2, 824 P.2d at 681 n.2, 4 Cal. Rptr. 2d at 875 n.2; *see infra* notes 319-349 and accompanying text (analyzing how the court should resolve the issue of FEHA preemption).

C. Concurring and Dissenting Opinion by Justice Kennard

Justice Kennard wrote separately, concurring in part and dissenting in part.[268] Justice Kennard concurred with the majority decision that Sentry wrongfully discharged Gantt in contravention of the public policy expressed in California Government Code section 12975 prohibiting interference with a DFEH investigation.[269] Justice Kennard also agreed that Gantt's claim was not preempted by the Workers' Compensation Act (WCA).[270] However, she wrote separately to emphasize that the majority did not address Gantt's first policy theory stating that Gantt was discharged for assisting Ms. Bruno in her sexual harassment problem.[271] According to Justice Kennard, Gantt's case should have been affirmed on this theory as well as the theory that Sentry fired Gantt for failing to frustrate the DFEH investigation.[272] Indeed, several California courts have upheld wrongful discharge claims when the employee was discharged for internally reporting illegal activity.[273] Thus, Justice Kennard stated that the majority opinion should not be read to overrule those cases.[274]

In dissent, Justice Kennard disagreed with the majority's holding limiting the appropriate sources of public policy for a wrongful discharge claim to statutes and constitutional provisions.[275] First, she pointed out that the majority did not need to decide whether non-legislative sources were inappropriate for the public policy exception since Gantt had not based his claim on a public policy lacking a statutory or constitutional

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268. *Gantt*, 1 Cal. 4th at 1101, 824 P.2d at 692, 4 Cal. Rptr. 2d at 886 (Kennard, J., concurring and dissenting). Justice Mosk joined in Justice Kennard's concurrence and dissent. *Id.*

269. *Gantt*, 1 Cal. 4th at 1101, 824 P.2d at 692, 4 Cal. Rptr. 2d at 886 (Kennard, J., concurring and dissenting).

270. *Id.*

271. *Id.* at 1101-02, 824 P.2d at 692, 4 Cal. Rptr. 2d at 886 (Kennard, J., concurring and dissenting); *see supra* notes 246-248 and accompanying text (explaining why the majority did not address the issue of whether Gantt stated a cause of action based on the public policy theory that he was discharged for aiding Ms. Bruno's sexual harassment complaint).

272. *Gantt*, 1 Cal. 4th at 1101-02, 824 P.2d at 692, 4 Cal. Rptr. 2d at 886 (Kennard, J., concurring and dissenting).

273. *Id.*; *see* Collier v. Superior Court, 228 Cal. App. 3d 1117, 1127, 279 Cal. Rptr. 453, 458 (2d Dist. 1991) (holding that an employee has a wrongful discharge claim when discharged for reporting illegal activity of co-workers to the employer); Hentzel v. Singer Co., 138 Cal. App. 3d 290, 299-300, 188 Cal. Rptr. 159, 165 (1st Dist. 1982) (holding that an employee has a cause of action if discharged for complaining about unsafe work conditions or practices).

274. *Gantt*, 1 Cal. 4th at 1101-02, 824 P.2d at 692, 4 Cal. Rptr. 2d at 886 (Kennard, J., concurring and dissenting).

275. *Id.* at 1103, 824 P.2d at 693, 4 Cal. Rptr. 2d at 887 (Kennard, J., concurring and dissenting).

basis.[276] Thus, Justice Kennard accused the majority of delivering an advisory opinion having no binding effect, because the parties had never presented the issue of public policy sources.[277] Justice Kennard stated that the issue should instead be resolved when the facts squarely present the issue of what sources of public policy are appropriate, in order to avoid an error in judgment such as the court made in this case.[278]

Second, Justice Kennard disagreed with the court's narrow interpretation of public policy which restricted public policy to legislative sources.[279] The scope of public policy, in Justice Kennard's opinion, should have been broadened to include judicial decisions, executive orders, administrative regulations and decisions and rules of professional conduct.[280] Indeed, the court had previously relied on common law and a federal executive department order to find that a labor union could not discriminate on the basis of race.[281] Justice Kennard explained that using non-legislative public policy sources can provide notice to the employer and are just as fundamental and substantial as statutes or the constitution.[282]

The majority's limitation of public policy to statutes and constitutions, according to Justice Kennard, presumed that judicial decisions, executive orders, regulations and ethics codes are not expressions of fundamental public policy.[283] To illustrate the weakness of the majority's rule, Justice Kennard pointed to the fundamental, well established public policy of national security and noted that, under the majority opinion, national

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276. *Id.* at 1102, 824 P.2d at 692-93, 4 Cal. Rptr. 2d at 886-87 (Kennard, J., concurring and dissenting).

277. *Id.* at 1102, 824 P.2d at 693, 4 Cal. Rptr. 2d at 887 (Kennard, J., concurring and dissenting); *see* People *ex rel* Lynch v. Superior Court, 1 Cal. 3d 910, 912, 464 P.2d 126, 127, 83 Cal. Rptr. 670, 671 (1970) (announcing that advisory opinions are not in the function or jurisdiction of the California Supreme Court); *see also* CAL. CONST. art. VI, § 10 (providing that the California Supreme Court can comment on evidence and testimony and credibility of witnesses as necessary); *id.* art. VI, § 11 (permitting the Legislature to allow appellate courts to take evidence and find facts when the jury trial has been waived or is not a matter of right).

278. *See Gantt*, 1 Cal. 4th at 1102, 824 P.2d at 693, 4 Cal. Rptr. 2d at 887 (Kennard, J., concurring and dissenting) (arguing that because the majority issued an advisory opinion the court's analysis was flawed).

279. *Id.* at 1103, 824 P.2d at 693, 4 Cal. Rptr. 2d at 887 (Kennard, J., concurring and dissenting).

280. *Id.*

281. *Id.*; *see* James v. Marinship Co., 25 Cal. 2d 721, 734, 155 P.2d 329, 337 (1944) (finding that there is a public policy against racial discrimination even in the absence of a statute).

282. *Gantt*, 1 Cal. 4th at 1103, 824 P.2d at 693, 4 Cal. Rptr. 2d at 887 (Kennard, J., concurring and dissenting). While not citing *Foley v. Interactive Data Corporation* directly, Justice Kennard implied that non-legislative sources of public policy could fit within the *Foley* guidelines of being fundamental, substantial, and well known at the time of discharge. *Id. See* Foley v. Interactive Data Corp., 47 Cal. 3d 654, 668-72, 765 P.2d 373, 378-80, 254 Cal. Rptr. 211, 216-28 (1988); *supra* notes 130-133 and accompanying text (discussing the *Foley* guidelines).

283. *Gantt*, 1 Cal. 4th at 1103, 824 P.2d at 693, 4 Cal. Rptr. 2d at 887 (Kennard, J., concurring and dissenting).

security would not suffice for a wrongful discharge cause of action since there is no legislative proclamation of the policy.[284] Justice Kennard rejected this result of the majority's rule and cited to *Verduzco v. General Dynamics, Convair Division*[285] as an example of why non-legislative sources of public policy are appropriate.[286] In *Verduzco*, the employer did not take precautions to prevent information leaks on a national defense project and the employee was discharged for complaining.[287] The court in *Verduzco*, allowed the wrongful discharge claim because there is a public interest in national security, even though not supported by statute.[288] Hence, Justice Kennard asserted that the result of the majority's holding would be the dismissal of Verduzco's wrongful discharge claim because there is no statutory basis for the public policy of national security.[289] This result is unwise, according to Justice Kennard, because the need for national security, like other public policies, is fundamental and well known even though lacking a statutory basis.[290] Thus, Justice Kennard would have affirmed the lower court holding and left the public policy question for another day.[291]

III. LEGAL RAMIFICATIONS

The decision in *Gantt v. Sentry Insurance* settled the dispute among the California courts of appeal over valid sources of public policy for a wrongful discharge cause of action.[292] The *Gantt* holding also relieves

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284. *Id.* at 1104, 824 P.2d at 694, 4 Cal. Rptr. 2d at 888 (Kennard, J., concurring and dissenting).

285. 742 F. Supp. 559 (S.D. Cal. 1990).

286. *Gantt*, 1 Cal. 4th at 1103, 824 P.2d at 693, 4 Cal. Rptr. at 887 (Kennard, J., concurring and dissenting) (citing Verduzco v. General Dynamics, Convair Div., 742 F. Supp. 559, 562 (S.D. Cal. 1990)).

287. *Id.*; *see Verduzco*, 742 F. Supp. at 562 (applying California law and denying summary judgment because plaintiff stated a violation of public policy even in the absence of a statute).

288. *Gantt*, 1 Cal. 4th at 1103-1104, 824 P.2d at 694, 4 Cal. Rptr. 2d at 888 (Kennard, J., concurring and dissenting); *Verduzco*, 742 F. Supp. at 562.

289. *Gantt*, 1 Cal. 4th at 1103-04, 824 P.2d at 693-94, 4 Cal. Rptr. 2d at 887-88 (Kennard, J., concurring and dissenting).

290. *Id.*

291. *Id.* at 1102-03, 824 P.2d at 692-93, 4 Cal. Rptr. at 886-87.

292. *See id.* at 1095, 824 P.2d at 687, 4 Cal. Rptr. 2d at 881 (holding that public policy must have a constitutional or statutory basis); *cf. id.* at 1102, 824 P.2d at 692-93, 4 Cal. Rptr. 2d at 886-87 (Kennard, J., concurring and dissenting) (arguing that the court did not decide the issue because the majority opinion was dicta on the point of appropriate public policy sources); *see also supra* notes 27-29 and accompanying text (discussing the conflict in the California courts of appeal public policy sources).

employer concerns regarding judicial discretion in defining public policy.[293] Yet, it remains unclear what impact limiting public policy to California statutes and the California constitution will have on wrongful discharge cases since the overwhelming majority of cases have been based on statutory or constitutional provisions.[294] While the court has decided that the public policy exception is not preempted by the WCA, it remains undecided whether a claim can be preempted by the Fair Employment and Housing Act when the FEHA provision that is based on public policy did not exist prior to the enactment of the FEHA.[295]

A. The End of the Public Policy Debate is Anti-Climactic

The impact of the rule expounded in *Gantt*, that public policy can be found only in legislative enactments, is difficult to ascertain. Justice Kennard warned that an unknown number of wrongfully discharged employees will be unable to recover under *Gantt* because not all public policies are grounded in statute.[296] This warning may be too severe since most public policies are articulated in statutes. Yet, if courts do not read *Gantt* broadly to allow public policy to be inferred from statutes, then Justice Kennard's prediction will materialize.

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293. *See* Stephen G. Hirsch, *Court Sets Limits on Public Policy Suits Brought by Fired Workers; Justices Clarify When Workers' Comp is Sole Remedy*, THE RECORDER, Feb. 28, 1992, at 1 (suggesting that California employers have waited since 1980 for a limit on wrongful discharge suits that would reduce employer liability and are pleased that suits will not go forward on each judge's perception of public policy); *see also supra* notes 46-49 and accompanying text (discussing why employers disliked the public policy exception to the employment at will rule).

294. *See* Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 477, 199 Cal. Rptr. 613, 618 (2d Dist. 1984) (asserting that no California case had ever found a wrongful discharge claim based on a non-legislative source). *But see* Verduzco v. General Dynamics, Convair Div., 742 F. Supp. 559, 562 (S.D. Cal. 1990) (holding that the absence of a statute for the public policy of national security does not warrant the dismissal of a public policy cause of action under California law).

295. *See* CAL. GOV'T CODE § 12930(e) (West Supp 1993) (providing a forum to receive, investigate and conciliate complaints of employment discrimination); *supra* notes 143-162 and accompanying text (discussing preemption of the public policy exception by the FEHA).

296. *See Gantt*, 1 Cal. 4th at 1103-04, 824 P.2d at 693-94, 4 Cal. Rptr. at 887-88 (Kennard, J., concurring and dissenting) (arguing that limiting public policy to legislative sources will leave some employees unprotected from wrongful discharge).

1. Courts Should Infer Public Policy From Statutes and Constitutional Provisions

All courts currently agree that when an express statutory provision is violated, public policy is breached.[297] For example, courts have held that a statute, and therefore public policy, is violated where the plaintiff is discharged for refusing to commit an illegal act, such as suborning perjury,[298] for asserting a statutory right, such as participating in a union,[299] or for violating a statute, such as interfering with an administrative investigation.[300] On the other hand, the *Gantt* rule can be interpreted as also allowing public policy to be inferred from the language of a statute.[301] For instance, there is no statute proclaiming a public policy of national security, yet the public interest in national security can be inferred from a statute.[302] Congress has authorized the Secretary of Defense to withhold from the public, data with military applications.[303] By implication, Congress has declared a public policy of national security which could be used as a basis for a wrongful discharge action.[304] Thus, if a court accepts that public policy can be inferred from a statute, the *Gantt* rule will have a broader application than if limited to statutory violations.

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297. *See Shapiro*, 152 Cal. App. 3d at 477, 199 Cal. Rptr. at 618 (requiring that a plaintiff, to show a violation of public policy, must state that the wrongful discharge was in retaliation for asserting a statutory right or refusing to perform an illegal act, or that the employer directly violated a statute).

298. Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 188-89, 344 P.2d 25, 27 (2d Dist. 1959); *see* CAL. PENAL CODE § 118 (West Supp. 1993) (prohibiting a person from knowingly testifying falsely under oath); *supra* note 12 and accompanying text (providing an illustrative example of how a statutory violation is contrary to public policy).

299. Wetherton v. Growers Farm Labor Ass'n, 275 Cal. App. 2d 168, 174-75, 79 Cal. Rptr. 543, 546-47 (1st Dist. 1969); *see* CAL. LAB. CODE §§ 921-923 (West 1989) (providing that no one shall coerce a person from joining a union).

300. *Gantt*, at 1097-98, 824 P.2d at 689, 4 Cal. Rptr. 2d at 883; *see* CAL. LAB. CODE § 12975 (West Supp. 1993) (prohibiting interference with a DFEH investigation); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 840 (Wis. 1983) (limiting the public policy exception to violation of a statute or constitutional provision).

301. *See* Hentzel v. Singer Co., 138 Cal. App. 3d 290, 297-98, 188 Cal. Rptr. 159, 164 (1st Dist. 1982) (allowing an inference from statutes requiring a safe workplace, that the Legislature has proclaimed a public policy prohibiting discharge in retaliation for complaining of an unhealthy work environment).

302. *See* 10 U.S.C. § 130 (1988) (authorizing the Secretary of Defense to withhold data with military application from the public); Verduzco v. General Dynamics, Convair Div., 742 F. Supp. 559, 562 (S.D. Cal. 1990) (stating that 10 U.S.C § 130 evinces a federal interest in protecting military secrets).

303. 10 U.S.C. § 130 (1988).

304. *Verduzco*, 742 F. Supp. at 562.

Lower courts, however, are currently split on whether public policy can be inferred from statute in order for an employee to state a cause of action.[305] Those courts that do not accept that public policy can be inferred from statute should reconsider their position, for their narrow approach ignores the foundation of the public policy exception as set forth in *Petermann v. International Brotherhood of Teamsters*.[306] Whether public policy is found on the face of a statute or implied from a statute, it remains true that the particular policy will be undermined if an employer is allowed to discharge an employee, since it will otherwise encourage the employer's behavior.[307] For example, in passing Proposition 103, California voters declared the public policy that consumers are to be protected from arbitrary insurance rates and practices, insurance companies are to be accountable to the insurance commissioner, and insurance is to be fair, available, and affordable for all Californians.[308] Suppose an employer discharged an employee for refusing to artificially inflate case reserves, which would decrease the company's apparent profitability, in order to justify higher premium rates to the insurance commissioner.[309] The employee would find no statutory provision to support a wrongful discharge claim because no statute actually prohibits the increase of case reserves.[310] The employee's cause of action should not be dismissed, however, because a general public policy prohibiting the unnecessary increase in premiums can be inferred from Proposition 103.[311] As with

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305. *Compare* Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 477, 199 Cal. Rptr. 613, 618 (2d Dist. 1984) (requiring that an employer directly violate a statute before an employee can state a wrongful discharge action) *with* Hentzel v. Singer Co., 138 Cal. App. 3d 290, 298, 188 Cal. Rptr. 159, 164 (1st Dist. 1982) (permitting a public policy to be inferred from a statute).

306. *See* Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 189, 344 P.2d 25, 27 (2d Dist. 1959) (establishing the basic rationale for the public policy exception). The court in *Petermann* reasoned that if an employer was violating a public policy by forcing an employee to break a law, such as committing perjury, then giving an employee a wrongful discharge cause of action would vindicate that public policy. *Id.* *See supra* notes 101-104 and accompanying text (discussing the *Petermann* rationale).

307. *Petermann*, 174 Cal. App. 2d at 189, 344 P.2d at 27.

308. Reduction and Control of Insurance Rates, Initiative Measure Proposition 103 (approved November 8, 1988) codified at CAL. INS. CODE §§ 1861-1861.16 (West Supp. 1993). *See* Sequoia Ins. Co. v. Superior Court, 13 Cal. App. 4th 1472, 1481, 16 Cal. Rptr. 2d 888, 893 (6th Dist. 1993) (stating the legislative purpose of Proposition 103 (citing California Insurance Code § 1861.01 Historical and Statutory Notes (West Supp. 1993))).

309. This scenario is based on the facts of Sequoia Ins. Co. v. Superior Court. *Sequoia*, 13 Cal. App. 4th at 1475-76, 16 Cal. Rptr. 2d at 889-90.

310. *See id.* at 1480-81, 16 Cal. Rptr. 2d at 893 (finding that there is no direct statutory support for the policy that an insurance company cannot adjust or manipulate case reserves).

311. *See* Reduction and Control of Insurance Rates, Initiative Measure Proposition 103 (approved November 8, 1988) codified at CAL. INS. CODE §§ 1861-1861.16 (West Supp. 1993) (proclaiming that Proposition 103 was to be liberally construed and applied so as to fully promote the underlying purposes); CAL.

perjury, the policy underlying Proposition 103 would be subverted if employers were allowed to discharge any employee for refusing to manipulate numbers to deceive the insurance commissioner and consumers. Thus, because the reasoning in *Petermann* is just as relevant where public policy is inferred from a statute, as where the policy is on the face of the statute, courts should adopt a broad approach to *Gantt*'s public policy rule.

The California District Court of Appeal for the Sixth District, however, has recently held that *Gantt* requires that public policy be apparent on the face of a statute.[312] It is true that the *Gantt* court held that public policy is limited to those policies delineated in statute.[313] It is also true that the court's use of the word "delineate" implies more exacting specificity than merely deriving or inferring public policy from statutes.[314] Yet, to focus on one word of the *Gantt* opinion ignores the overall purpose of the *Gantt* rule which is to eliminate surprise to the employer and maintain the employer's flexibility in employment decisions, while still protecting employees from wrongful discharge and society from excessive unemployment.[315] A California employer would hardly be surprised if told that there is a public policy promoting national security or fair and reasonable insurance rates. Hence, allowing public policy to be inferred from statutes does not upset the balance intended by the *Gantt* court, it merely closes a loophole through which many employees may fall. This is especially true when one considers that society also wants the public policies it articulates through the Legislature to be executed. Thus, courts should reject a narrow reading of *Gantt*, as used by the California District Court of Appeal for the Sixth Circuit, and also accept public policies which are inferred from California statutory and constitutional provisions.

INS. CODE § 1861.05 (stating that no rate will be approved by the insurance commissioner if excessive, inadequate or unfairly discriminatory) (West Supp. 1993). An excessive, inadequate or unfairly discriminatory rate is determined by whether the rate reflects the insurance company's investment income. *Id.* As further evidence of the voters' intent to hold down insurance rates, Proposition 103 also prohibited increased insurance rates and premiums unless the company was threatened with insolvency. CAL. INS. CODE § 1861.01(b) (West Supp. 1993). *But see* Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989) (holding § 1861.01(b) unconstitutional).

312. *Sequoia*, 13 Cal. App. 4th at 1481, 16 Cal. Rptr. 2d at 893.

313. Gantt v. Sentry Ins., 1 Cal. 4th 1083, 1095, 824 P.2d 680, 687-88, 4 Cal. Rptr. 2d 874, 881-82 (1992).

314. *See Sequoia*, 13 Cal. App. 4th at 1480, 16 Cal. Rptr. 2d at 893 (arguing that the court in *Gantt*, by using the word delineate, intended public policy to be directly found on the face of the statute, not inferred from a statute). Delineate means to describe in detail. *Id.* (quoting WEBSTER'S NEW INT'L DICTIONARY 597 (3d ed. 1981)).

315. *See Gantt*, 1 Cal. 4th at 1095, 824 P.2d at 687-88, 4 Cal. Rptr. 2d at 881-82 (arguing that limiting public policy to legislative enactments balances the interest of employers, employees and society).

Aside from this debate over whether public policy can be inferred from statutes or not, the *Gantt* rule will have little impact on the number of employees allowed to bring successful wrongful discharge claims.

2. *California's Active Legislature Has Tempered the Impact of* Gantt *on Employees*

At first blush, it seems that the *Gantt* rule will prevent many employees from recovering for wrongful discharge by limiting recovery to discharge in violation of statutorily based public policies. Yet, California's active Legislature has created a statutory basis for most public policies, thus mitigating the effect of the *Gantt* rule on plaintiffs. For instance, some states have held that codes of professional responsibility are appropriate sources of public policy, in addition to legislative sources.[316] In California, however, most of the rules covering ethical attorney conduct are codified in the Business and Professions Code, thereby giving a wrongfully discharged attorney a statutory basis for a cause of action.[317] To illustrate, if an attorney were fired for refusing to maintain an action the attorney knew was unjust, the attorney could cite Business and Professions Code section 6068(c) as public policy that an attorney must not maintain actions that appear to be illegal or unjust.[318] Thus, while the rule articulated in *Gantt* is considered narrow by state courts that have adopted a similar rule, in California the rule will have little effect in limiting the number of public policies which a plaintiff can use to state a cause of action.[319]

316. *See* Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 871 (Mo. Ct. App. 1985) (stating that public policy can be found in professional codes of ethics); Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 512 (N.J. 1980) (finding that sources such as codes of professional ethics can be appropriate sources of public policy).

317. *See* CAL. BUS. & PROF. CODE § 6000 (West Supp. 1993) (establishing the State Bar Act).

318. *See id.* § 6068(c) (West Supp. 1993) (requiring an attorney to maintain only actions, proceedings or defenses that appear to the attorney to be legal or just).

319. *See Gantt*, 1 Cal. 4th at 1092, 824 P.2d at 685-86, 4 Cal. Rptr. 2d at 879-80 (stating that public policy must have a legislative foundation); *see also supra* note 16 and accompanying text (citing those states that have accepted the solely legislative approach to public policy to limit the breadth of the public policy exception).

B. The Public Policy Exception Should Not be Preempted by the Fair Employment and Housing Act

The remaining unanswered question following *Gantt* is whether a wrongful discharge claim based on a public policy created by the FEHA, is preempted by the FEHA.[320] The California Supreme Court held in *Rojo v. Kliger*[321] that the FEHA does not preempt the public policy exception where the policy existed at common law.[322] The California District Court of Appeal for the Second District, however, has held that the FEHA preempts the public policy exception where the policy was created by the FEHA.[323] By upholding Gantt's second claim based on public policy expressed in Government Code section 12975, having a common law counterpart in perjury, the court avoided deciding whether Gantt's first claim based on section 12940(f), with no common law basis,[324] was preempted by the FEHA.[325] However, the California Supreme Court will soon have to address this issue as the Legislature is continually adding to the list of FEHA public policies.[326]

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320. *See Gantt*, 1 Cal. 4th at 1086 n.2, 824 P.2d at 681 n.2, 4 Cal. Rptr. 2d at 875 n.2.

321. 52 Cal. 3d 65, 801 P.2d 373, 276 Cal. Rptr. 130 (1990).

322. *See Rojo*, 52 Cal. 3d at 82, 801 P.2d at 383, 276 Cal. Rptr. at 140 (holding the FEHA does not preempt wrongful discharge claims based on common law public policy); *supra* notes 153-161 and accompanying text (discussing the decision in *Rojo*). *See generally* Oppenheimer & Baumgartner, *supra* note 31 (examining in detail preemption of wrongful discharge claims by the FEHA).

323. *See* Ficalora v. Lockheed Corp., 193 Cal. App. 3d 489, 491-92, 238 Cal. Rptr. 360, 361 (2d Dist. 1987) (holding that where a plaintiff alleges violation of a FEHA public policy not existing prior to the statute's enactment, the public policy exception is preempted); Strauss v. A.L. Randall Co., Inc., 144 Cal. App. 3d 514, 518-19, 194 Cal. Rptr. 520, 523 (2d Dist. 1983) (stating that a civil action alleging a violation of the public policy prohibiting age discrimination is preempted because age discrimination was not prohibited prior to the FEHA). *See also supra* notes 149-152 and accompanying text (discussing the approach to FEHA preemption in *Ficalora* and *Strauss*). *But see Rojo*, 52 Cal. 3d at 82 n.10, 801 P.2d at 383 n.10, 276 Cal. Rptr. at 140 n.10 (expressing no opinion on the holdings of *Ficalora* or *Strauss* because the court was not presented with a FEHA created public policy).

324. *See* Gantt v. Sentry Ins., 234 Cal. App. 3d 612, 637, 265 Cal. Rptr. 2d 814, 830 (3d Dist. 1990) *superseded by* 1 Cal. 4th 1083, 824 P.2d 680, 4 Cal. Rptr. 874 (1992) (finding that Government Code § 12940(f) does not have a common law counterpart).

325. Gantt v. Sentry Ins., 1 Cal. 4th 1083, 1086 n.2, 824 P.2d 680, 681 n.2, 4 Cal. Rptr. 2d 874, 875 n.2; *see* CAL. GOV'T CODE § 12975 (West Supp. 1993) (making it a misdemeanor to willfully resist, prevent, impede or interfere with a DFEH investigation); *id.* § 12940(f) (West Supp. 1993) (providing that an employer is acting unlawfully when discharging an employee because the employee opposed practices forbidden under the FEHA, or the employee testified or assisted in another's complaint against the employer); *see also supra* notes 246-248 and accompanying text (noting that the court in *Gantt* did not decide the issue of FEHA preemption of the public policy exception).

326. For FEHA provisions that likely have no common law or other statutory foundation and would be preempted by the FEHA under the rationale of *Ficalora* and *Strauss*, see, e.g., 1991 Cal. Stat. ch. 462, sec. 4 at 6 (forbidding discharge because an employee exercises the right to family care leave); 1980 Cal. Stat. ch. 619, sec. 1 at 1703 (prohibiting discharge for refusing to be sterilized); 1972 Cal. Stat. ch. 1144, sec. 1 at 2211

1. The New Right-Exclusive Remedy Approach is Contrary to Legislative Intent

The new right-exclusive remedy approach of the California District Court of Appeal for the Second District is contrary to the legislative intent of the FEHA; thus, it should not be used in resolving this preemption issue.[327] The essence of the analysis of the California District Court of Appeal for the Second District is that if the plaintiff is alleging a discharge in violation of a public policy found in the FEHA, and that public policy did not exist prior to 1959 when the FEHA's predecessor was enacted,[328] then the plaintiff's complaint must be dismissed and the plaintiff may only recover under the FEHA.[329] Thus, if an employee is wrongfully discharged on the basis of age, taking family leave[330] or complaining of discriminatory employment practices, the employee will be restricted to those remedies available under the FEHA.[331]

Forcing an employee to recover under the FEHA because an employer violated a FEHA provision enacted after 1959 is contrary to the legislative purpose of the FEHA as discussed in *Rojo v. Kliger*.[332] The court in *Rojo* stated that the California Legislature intended the FEHA to supplement existing antidiscrimination remedies so as to give employees the maximum

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(banning discharge based on age); 1959 Cal. Stat. ch. 121, sec. 1 at 2002 (prohibiting discharge in retaliation for opposing certain unlawful employment practices).

327. *See Rojo*, 52 Cal. 3d at 79, 801 P.2d at 381, 276 Cal. Rptr. at 138 (referring to the approach of the California District Court of Appeal for the Second District as the "new right-exclusive remedy" rule of statutory construction); *supra* notes 149-152 and accompanying text (discussing the approach of the California District Court of Appeal for the Second District); *infra* notes 330-333 and accompanying text (detailing the legislative intent of the Legislature when enacting FEHA).

328. Fair Employment Practices Act, 1959 Cal. Stat. ch. 121, sec. 1 at 1999-2005; *see* Oppenheimer & Baumgartner, *supra* note 31, at 153-55 (detailing the history of the FEHA and its predecessor, the Fair Employment Practices Commission).

329. *See supra* notes 149-152 and accompanying text (explaining that under the rationale of the California District Court of Appeal for the Second District a plaintiff cannot state a tort cause of action).

330. *See* CAL. GOV'T CODE § 12945.2(b)(3) (West Supp. 1993) (defining family care leave as taking leave to care for the employee's child or to care for a parent or spouse with a serious health condition).

331. *See* CAL. GOV'T CODE § 12940(f) (West Supp. 1993) (prohibiting discharge in retaliation for opposing unlawful employment practices); *id.* § 12941(a) (West 1992) (banning discharge based on age); *id.* § 12945.2(j) (West Supp. 1993) (prohibiting discharge when an employee takes leave to care for a sick family member); *see also supra* note 132 and accompanying text (describing the remedies available under the FEHA). Oppenheimer and Baumgartner argue that this approach is proper. Oppenheimer & Baumgartner, *supra* note 29, at 181-82.

332. 52 Cal. 3d 65, 801 P.2d 373, 276 Cal. Rptr. 130 (1990); *see id.* at 72-82, 801 P.2d at 376-83, 276 Cal. Rptr. at 133-40 (discussing the legislative intent of the FEHA in detail); *supra* notes 153-161 and accompanying text (discussing the reasoning in *Rojo*).

opportunity to vindicate their civil rights.[333] The *Rojo* court also found that, under the FEHA, employees can freely seek relief for employment discrimination injuries under any state law, without constraints.[334] Thus, the court reasoned that common law actions, such as the public policy exception, would not be supplemented as intended, if employees were forced to seek a remedy for wrongful discharge solely under the FEHA.[335] Instead, the employee's opportunity to seek punitive damages and unlimited emotional distress damages would be severely restricted if the public policy exception were preempted by the FEHA.[336] Hence, in the context of FEHA created rights, if the court follows the approach in *Rojo* as stare decisis dictates, the court will find that the FEHA does not preempt the public policy exception.[337] A contrary holding would abrogate the Legislature's intent.

2. Gantt *Supports an Employee's Right to Avoid the FEHA Remedies for Newly Created Rights*

The court's language in *Gantt v. Sentry Insurance*,[338] with respect to the issue of preemption by the Workers' Compensation Act (WCA), further supports a holding that the public policy exception is not preempted by the FEHA, when FEHA created rights are involved.[339] In particular, the *Gantt* court expressed an unwillingness to limit the public policy

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333. *Rojo*, 52 Cal. 3d at 74-75, 801 P.2d at 378, 276 Cal. Rptr. at 135 (quoting State Personnel Bd. v. Fair Employment and Housing Comm'n, 39 Cal. 3d 422, 431, 703 P.2d 354, 359, 217 Cal. Rptr. 16, 21).

334. *Id.* at 82, 801 P.2d at 383, 276 Cal. Rptr. at 140. The *Rojo* court stated that nothing in the FEHA indicates an intent to displace preexisting or alternative remedies for employment discrimination. *Id.* at 80, 801 P.2d at 382, 276 Cal. Rptr. at 139.

335. *See id.* at 89, 801 P.2d at 388, 276 Cal. Rptr. at 145 (holding that the public policy exception is not preempted, when involving pre-FEHA rights, because the Legislature intended to supplement common law actions, not abrogate them).

336. *See* Dyna-Med, Inc. v. Fair Employment and Housing Comm'n, 43 Cal. 3d 1379, 1404, 743 P.2d 1323, 1338, 241 Cal. Rptr. 67, 82 (1987) (holding that punitive damages are not available in an action brought by the Department of Fair Employment and Housing); *supra* note 144 and accompanying text (outlining the remedies available under the FEHA, including the cap on emotional distress damages and no provision for punitive damages).

337. *See Rojo*, 52 Cal. 3d at 82, 89, 801 P.2d at 383, 388, 276 Cal. Rptr. at 140, 145 (holding that the FEHA does not displace any common law causes of action, including the public policy tort exception, when a pre-FEHA policy is implicated).

338. 1 Cal. 4th 1083, 824 P.2d 680, 4 Cal. Rptr. 2d 874 (1992).

339. *See id.* at 1100-01, 824 P.2d at 691-92, 4 Cal. Rptr. at 885-86 (discussing why the WCA does not preempt the public policy exception); *supra* notes 252-264 and accompanying text (examining the *Gantt* court's reasoning regarding WCA preemption).

exception by forcing an employee to recover under the WCA.[340] This holding is based on the fact that a violation of public policy is so lamentable that a plaintiff can only truly be compensated by tort damages.[341] Thus, the court has opened the door to an argument that preempting the public policy tort with the limited FEHA remedies would likewise inappropriately limit the public policy exception by reducing a plaintiff's potential recovery for egregious conduct.[342] This argument is persuasive, given the fact that the Legislature did not intend for the FEHA to restrict employee compensation for employer violations of civil rights.[343]

In addition to the legislative intent previously discussed, the Legislature also intended that an employee be compensated through specified means when an employer violates a FEHA created public policy.[344] Thus, one could argue that, because the Legislature has already contemplated the appropriate remedy for a violation of FEHA created rights, that the FEHA is an exclusive remedy scheme like the WCA, and therefore, preempts the public policy exception.[345] Yet, this conclusion would be erroneous for two reasons. First, the *Gantt* court has held that the public policy exception is not preempted by the exclusive remedy provision of the WCA.[346] Indeed, the court found that a violation of a FEHA public policy is so deplorable that an employee can only be compensated with damages for

340. *See Gantt*, 1 Cal. 4th at 1098, 824 P.2d at 690, 4 Cal. Rptr. at 884 (refusing to limit a cause of action that was recently affirmed by the California Supreme Court); *see also supra* notes 254-256 (explaining how WCA preemption of the public policy exception would have limited the doctrine).

341. *See Gantt*, 1 Cal. 4th at 1100, 824 P.2d at 689, 4 Cal. Rptr. at 885 (noting that discharge contrary to public policy is not expected within the employment relationship because such a discharge is particularly egregious); *see also supra* notes 252-264 and accompanying text (discussing why the *Gantt* court did not declare that the WCA preempted the public policy exception).

342. *See supra* note 145 (specifying the remedies of the FEHA); notes 48-49 (listing some recent wrongful discharge verdicts under the public policy exception).

343. *Rojo v. Kliger*, 52 Cal. 3d 65, 74-75, 801 P.2d 373, 378, 276 Cal. Rptr. 130, 135 (quoting State Personnel Bd. v. Fair Employment and Housing Comm'n, 39 Cal. 3d 422, 431, 703 P.2d 354, 359, 217 Cal. Rptr. 16, 21).

344. *See* CAL. GOV'T CODE § 12970 (West Supp. 1993) (providing for reinstatement with or without backpay, payment of actual damages, emotional distress damages not to exceed $50,000, or prospective relief from future conduct); *supra* notes 332-337 and accompanying text (discussing other aspects of the legislative intent surrounding the FEHA).

345. *See* CAL. LAB. CODE §§ 4600, 4621, 4650-4663 (West 1988) (setting forth the compensation that an injured employee is entitled to under the WCA); *supra* notes 171-175 and accompanying text (explaining how the WCA is an exclusive remedy scheme for worker injuries during the course of employment).

346. Gantt v. Sentry Ins., 1 Cal. 4th 1083, 1098-1101, 824 P.2d 680, 690-92, 4 Cal. Rptr. 2d 874, 884-86 (1992).

emotional distress and punitive reasons.[347] Second, the Legislature has specifically stated that the WCA is the exclusive remedy for worker injuries, while the Legislature has failed to give the FEHA similar status.[348] Indeed, the Legislature has expressed intent that the FEHA is not an exclusive remedy for employment discrimination.[349] For example, a plaintiff can receive unrestricted tort relief under the FEHA if the employer opts to transfer the administrative proceeding into superior court.[350] Thus, restricting an employee to the FEHA remedies for violations of post-FEHA rights will prevent an employee from being fully compensated for truly egregious behavior. This is not the intention of the Legislature. The public policy exception should not be preempted by the FEHA, irrespective of the rights implicated, because a contrary holding would be inimical to the FEHA's legislative intent. It would also be adverse to the California Supreme Court's acknowledgement that the public policy exception requires full tort remedies.

CONCLUSION

The California Supreme Court, in *Gantt v. Sentry Insurance*, pared back the public policy exception to at will employment by restricting the sources of public policy upon which an employee can state a cause of action.[351] As a result, at will employees seeking redress for wrongful termination will have to look to statutes or California constitutional provisions in order to establish that an employer violated a public policy. The number of employees affected by the *Gantt* rule will depend on whether a court is willing to infer public policy from statutes. Indeed, lower courts should infer public policy from statutes if they are to remain consistent with the spirit of the public policy exception. The court in *Gantt* did not require that public policy be on the face of a statute, but rather that

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347. *See id.* (holding that the limited remedies available under the WCA is insufficient to compensate an employee terminated in violation of public policy).

348. *See* CAL. LAB. CODE §§ 3601, 3602 (West Supp. 1992) (stating that the WCA is to be the exclusive remedy for worker injuries); *Rojo v. Kliger*, 52 Cal. 3d 65, 74-75, 801 P.2d 373, 378, 276 Cal. Rptr. 130, 135 (noting that the Legislature did not intend for the FEHA to be the exclusive remedy for employment discrimination (quoting State Personnel Bd. v. Fair Employment and Housing Comm'n, 39 Cal. 3d 422, 431, 703 P.2d 354, 359, 217 Cal. Rptr. 16, 21)).

349. *See supra* notes 332-333 and accompanying text (detailing the legislative intent regarding the exclusivity of the FEHA remedies).

350. *See* CAL. GOV'T CODE § 12965(c) (West Supp. 1993) (allowing an employer to transfer a Department of Fair Employment and Housing action into superior court if the Department is seeking emotional distress damages and/or administrative fines).

351. *See supra* notes 227-265 and accompanying text (discussing the majority's decision in *Gantt*).

public policy be delineated in statutory provisions. Thus, courts should look at the purpose of statutory provisions to deduce the public policy the legislature intended to proffer.

The new right-exclusive remedy approach to the issue of whether the FEHA preempts the public policy exception may be appropriate for other statutory remedy schemes, but not for the FEHA. The FEHA was enacted with the intent to provide employees and employers with an alternative avenue for resolving civil rights disputes. Indeed, recent statutory provisions allow the employer to transfer an administrative proceeding to superior court where the employer is no longer protected by the limits on compensatory or punitive damages. Thus, the legislature did not intend to bind employers and employees to the FEHA proceedings and remedies. Therefore, courts should not use a tool of analysis, such as the new right-exclusive remedy rule, to undermine this legislative intent. Instead, courts should hold that the public policy exception is not preempted by the FEHA remedy scheme.

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