

# COMMENT

## California Wrongful Discharge Law and the Public Employee

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## INTRODUCTION

Public employees often have enjoyed job protections not available to private sector employees.<sup>1</sup> These safeguards have included fundamental constitutional protections and due process rights.<sup>2</sup> Within the last decade, private sector employees have gained job protections at least comparable to, and in some instances greater than, public employee job protections.<sup>3</sup> Common law actions for wrongful discharge are among the most important new sources of job security in the private sector.<sup>4</sup>

Wrongful discharge law generally offers exceptions to private sector at will<sup>5</sup> employment. Under some circumstances, public sector employees also should be able to bring actions for wrongful discharge.<sup>6</sup> For example, some public employees work under arrangements identical to or very similar to at will employment.<sup>7</sup> Logically, wrongful discharge

<sup>1</sup> See Leonard, *A New Common Law of Employment Termination*, 66 N.C.L. REV. 631, 647 & n.99 (1988).

<sup>2</sup> See *infra* notes 18-35 and accompanying text.

<sup>3</sup> See Gould, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMPLOYEE REL. L.J. 404, 405 (1988) [hereafter Gould, *Arbitration*] (asserting that "the 1980s will be remembered as the decade in which judges forged the idea" that all employees have property interests in their jobs); West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1, 59, 62-64 (assessing job as property in private sector to be more employee wish than legal fact, but showing that many private employees have recently acquired rights similar to those available in public sector).

<sup>4</sup> See Leonard, *supra* note 1, at 634-35.

<sup>5</sup> See CAL. LAB. CODE § 2922 (Deering 1976). Section 2922 provides: "*An employment, having no specified term, may be terminated at the will of either party on notice to the other.*" *Id.* (emphasis added).

This is a classic at will statute, raising the presumption that employment is at will, unless parties have contracted otherwise. See *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 896 (3d Cir. 1983) (noting that at will rule was once "the common law cornerstone of employee relations not covered by either civil service laws or the National Labor Relations Act").

<sup>6</sup> See, e.g., *Walker v. Northern San Diego County Hosp. Dist.*, 135 Cal. App. 3d 896, 185 Cal. Rptr. 617 (1982) (holding that public employee had wrongful discharge breach of contract action against employer, public hospital district).

<sup>7</sup> See Caples & Hanko, *The Doctrine of At-Will Employment in the Public Sector*, 13 SETON HALL L. REV. 21, 23 (1982). Caples and Hanko define the at will public employee as one "'unprotected by any statutory tenure, contractual commitment or collective negotiation agreement. Nor . . . [does such an employee] enjoy Civil Service tenure or other protection.'" *Id.* (quoting *Nicoletta v. North Jersey Dist. Water Supply Comm'n*, 77 N.J. 145, 150, 390 A.2d 90, 92 (1978)).

actions that are exceptions to the at will rule should be available to those public employees. Moreover, the most commonly accepted wrongful discharge cause of action is discharge in contravention of public policy. Because this cause of action is not a mere exception to the at will rule, it may apply to any employment arrangement.<sup>8</sup> Thus, this action should be available to many public employees. For these reasons, California public employees have begun to bring private suits under various theories of wrongful discharge.<sup>9</sup> To date, however, they have not been very successful.<sup>10</sup>

This Comment considers the application of current California wrongful discharge law to public sector employees. Part I traces the development of modern public employment and sketches the differences between public and private employment. Part II discusses current California wrongful discharge actions, examines public employee wrongful discharge actions, and analyzes the effect of governmental tort immunity and administrative remedies. In Part III, this Comment proposes that California law allow all public employees outside of the state civil service system to bring private actions for wrongful discharge.<sup>11</sup>

## I. THE EMERGENCE OF LIMITED JOB SECURITY IN THE PUBLIC SECTOR

### A. *Federal Constitutional Law*

At the turn of this century, courts considered both public and private employers to be "purveyors of privileges."<sup>12</sup> Under this view, a government employer had the same absolute power that a private employer

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This Comment considers the availability of wrongful discharge relief to all California public employees.

<sup>8</sup> *Koehrer v. Superior Court*, 181 Cal. App. 3d 1155, 1166, 226 Cal. Rptr. 820, 825 (1986).

<sup>9</sup> See *infra* notes 57-58 and accompanying text.

<sup>10</sup> See *infra* notes 57-58 and accompanying text.

<sup>11</sup> California state civil service employees probably are limited to administrative remedies and review of administrative decisions in state court. Other California public employees, however, probably can bring wrongful discharge actions in state court after exhausting administrative remedies. For a more thorough discussion of this ambiguous and judicially undecided issue, see *infra* notes 191-202 and accompanying text.

<sup>12</sup> See *Developments in the Law: Public Employment*, 97 HARV. L. REV. 1610, 1742-43 (1984) [hereafter *Public Employment*]; see also Leonard, *supra* note 1, at 632. The author states: "The employment at will rule . . . came into general acceptance around the turn of the last century — providing that an employment agreement of unspecified duration is presumed to be terminable without penalty or notice by either the employer or employee for any or no reason . . ." *Id.* (footnotes omitted).

had to hire or to fire employees at will.<sup>13</sup> Constitutional restrictions on the arbitrariness of governmental action, such as procedural due process,<sup>14</sup> simply did not apply when the government acted as an employer.<sup>15</sup> Indeed, the first amendment scarcely restrained public employers from chilling employee speech with threats of discharge.<sup>16</sup>

Slowly, however, the legal concepts of public and private employment began to diverge. While employment as a privilege remained the rule in the private sector,<sup>17</sup> the United States Supreme Court decided

<sup>13</sup> See *Public Employment*, *supra* note 12, at 1742-43, 1780; Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1442 (1968).

<sup>14</sup> See U.S. CONST. amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law.”); U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”).

The fifth amendment applies to the federal government. The fourteenth amendment applies to states and their political subdivisions.

<sup>15</sup> See *Public Employment*, *supra* note 12, at 1743, 1780 (explaining that, as privilege, government employment did not rise to level of liberty or property interest within meaning of fifth or fourteenth amendments, so government employers free to “discharge their employees summarily”); *cf.* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-8, at 680-81 (2d ed. 1988) (stating that “until quite recently,” courts held that “public employment or other goods and services which federal and state governments provide . . . [as] mere ‘privileges’ . . . could be withheld absolutely . . . [or] conditionally,” as government saw fit).

<sup>16</sup> See *Connick v. Myers*, 461 U.S. 138 (1983). In this decision, the Supreme Court affirmed the modern rule that public employees *do* have free speech rights related to their jobs. Discussing earlier cases, the Court noted:

For most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment — including those which restricted the exercise of constitutional rights. The classic formulation of this position was that of Justice Holmes, who . . . observed: “[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” For many years, Holmes’ epigram expressed this Court’s law.

*Id.* at 143-44 (citation omitted).

In other words, before the 1950s, government employers were fairly free to use the “fear of discharge” to chill employee exercise of first amendment rights. *Cf. id.* at 144-45.

<sup>17</sup> See Gould, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U.L. REV. 885, 886-88 [hereafter Gould, *Job as Property*] (observing that until rise of wrongful discharge litigation in late 1970s, terminable at will rule was clear presumption); Note, *The Employment At Will Doctrine: Providing a Public Policy Exception to Improve Worker Safety*, 16 U. MICH. J.L. REFORM 435, 435 (1983) (stating that even in 1980s “[m]ost of the American work force is employed ‘at will,’ and is therefore subject to discharge at the discretion of employers”); see also Note, *Protecting At Will Employees Against Wrongful*

several cases in the 1950s and early 1960s that developed the concept of public employment as a right.<sup>18</sup> In the wake of this conceptual shift, the Supreme Court extended significant constitutional rights to public employees. For example, fundamental rights such as freedom of speech received at least some protection.<sup>19</sup> Perhaps more important to this analysis, the Court also extended procedural due process protection to many public employees.<sup>20</sup> Under the Court's due process rule, a government employer could not discharge an employee who had "a legitimate claim of entitlement"<sup>21</sup> to a job, unless the employer could show "sufficient cause" for the discharge.<sup>22</sup> Furthermore, when a government

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*Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1816 (1980) [hereafter Note, *Protecting At Will Employees*]. *But see* Leonard, *supra* note 1, at 632-33 (arguing that while at will employment presumption has eroded lately, state and federal legislation "laid the groundwork for undermining the common-law rule" as long ago as New Deal).

<sup>18</sup> See Caples & Hanko, *supra* note 7, at 24 n.10; *see also* Comment, *Cleveland Board of Education v. Loudermill: Procedural Due Process Protection for Public Employees*, 47 OHIO ST. L.J. 1115, 1117-18 (1986) (listing and discussing the Warren Court's most important public employment cases that "laid the foundation for the Court's recognition of a property interest in continued public employment").

<sup>19</sup> *E.g.*, *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (reinstating teacher whom Board of Education fired for criticizing budget policies). After *Pickering*, a public employee's speech on matters of legitimate public concern could not be a motivating factor in the employer's decision to fire. *See Public Employment, supra* note 12, at 1758-59, 1759 n.15; *see also Connick*, 461 U.S. at 144 (listing 1950s and 1960s first amendment, public employment cases "in which *Pickering* is rooted"). *See generally Public Employment, supra* note 12, at 1756-70 (explaining rise of "*Pickering* Doctrine," its substance, and effect).

<sup>20</sup> *See Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *see also* L. TRIBE, *supra* note 15, § 10-9. The public sector economy had expanded, and the government had taken on greater obligations to help the needy. *Id.* Increasing numbers of citizens became dependent on government grants and various promises, such as government contracts, welfare benefits, or government employment. *Id.* The grants and promises that the Supreme Court recognized as fostering citizens' justifiable expectations of entitlement constituted a new form of property. *Id.* at 685-86. In decisions like *Perry* and *Roth*, the Supreme Court held that the government could not take away or destroy such property without due process of law. *Id.* at 686.

In his dissenting opinion in *Roth*, Justice Marshall remarkably suggested extending the Supreme Court's concept of public employment as a right. Justice Marshall proposed that, for hiring, every citizen is entitled to a government job unless the government can show reason for denying it. 408 U.S. at 588 (Marshall, J., dissenting). He also proposed that for other employment practices "whether or not a private employer is free to act capriciously or unreasonably . . . a government employer is different. The government may only act fairly and reasonably." *Id.*

<sup>21</sup> *Roth*, 408 U.S. at 577.

<sup>22</sup> *Perry*, 408 U.S. at 602-03.

employer discharged an "entitled" employee, the employee had the right to "a hearing to provide an opportunity to vindicate" her property right to keep her job.<sup>23</sup> This change was an important departure from the at will employment rule.<sup>24</sup>

This due process, property right rule initially protected only those government employees who could claim clear "entitlement to continued employment."<sup>25</sup> Nothing in the rule dictated that *all* public employees were entitled to continued employment.<sup>26</sup> On the contrary, government employers were still free to hire and to fire employees expressly at will.<sup>27</sup> These unprotected public employees had no more job security than private sector employees hired under the traditional, at will presumption.<sup>28</sup> Moreover, the Supreme Court's decision in *Bishop v.*

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<sup>23</sup> *Roth*, 408 U.S. at 577; see *Public Employment*, *supra* note 12, at 1791-94.

Unfortunately, the Supreme Court has never clearly defined procedural due process. See Comment, *supra* note 18, at 1120. Under *Roth*, a terminated public employee deserved "some kind of hearing" to vindicate a job right. 408 U.S. at 569-70. In the 1970s, the Supreme Court vacillated over exactly what type of hearing. See, e.g., *Arnett v. Kennedy*, 416 U.S. 134 (1974). But see *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). In this eight-to-one decision, the Court partially settled the issue. The Court stated that "'the root requirement' of the Due Process Clause [is] 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" *Id.* at 542 (citation omitted). Thus, a public employee with a property interest in her job generally has a constitutional right to notice of the intended termination and a pre-termination hearing. *Id.* This hearing may be less than a full evidentiary proceeding, but it must include "oral or written notice of the charges against [the employee], an explanation of the employer's evidence, and an opportunity to present [the employee's] side of the story." *Id.* at 545-46.

After termination, the employee has further procedural due process hearing rights. *Id.* at 547-48. The Court in *Loudermill* did not state what the minimum post-termination hearing should include. The Court, however, did hold that a full evidentiary hearing before a referee two and one-half months after termination, with a decision rendered some six months later, satisfied due process requirements. *Id.* at 546-47 & nn.11-12.

<sup>24</sup> See *supra* note 5 (discussing at will employment).

<sup>25</sup> *Perry v. Sinderman*, 408 U.S. 593, 603 (1972).

<sup>26</sup> See, e.g., *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972). State law provided that the employee held his one year nontenured teaching position at "the unfettered discretion of university officials." *Id.* at 567. Thus, the employee could claim no property interest in the job, and the university could discharge him at its will. *Id.* at 578; see also *Caples & Hanko*, *supra* note 7, at 22-23.

<sup>27</sup> See *Roth*, 408 U.S. at 567 & n.4; cf. *L. TRIBE*, *supra* note 15, § 10-9, at 686 (stating that "government remained free to foster *no* expectations in distributing its largesse," and that when such distribution occurred, government remained free to take it away arbitrarily).

<sup>28</sup> See *Roth*, 408 U.S. at 567.

*Wood*<sup>29</sup> narrowed the definition of entitlement. Thus, the Court further reduced the number of public employees who could expect some measure of due process job protection.<sup>30</sup> After *Bishop*, a public employee could pursue an entitlement claim only when the law, ordinance, or regulation that created the job<sup>31</sup> expressly required sufficient cause as a precondition for firing an employee.<sup>32</sup>

Still, due process rights gave "entitled" public employees significant job protection.<sup>33</sup> Furthermore, states could determine which employees

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<sup>29</sup> 426 U.S. 341 (1976).

<sup>30</sup> Originally, the Court had been willing to find that the parties' understandings, based on "an unwritten common law," created entitlements. *Perry v. Sindermann*, 408 U.S. 593, 602 (1972); see L. TRIBE, *supra* note 15, § 10-9, at 689. The author states: "[W]ith the new entitlements generally, the property interest in government employment was protected by procedural due process only insofar as it was derived from reliance induced by the state's express agreement or implied promise." *Id.* Thus, both the government grant or promise creating the job and the employee's own expectation in response to that grant or promise contributed to the creation of an entitlement. *Id.*

The Court, however, retrenched in *Bishop v. Wood*, 426 U.S. 341 (1976). In *Bishop*, a policeman's status as a "permanent employee" did not necessarily create an entitlement to continued employment in light of other city ordinance provisions that provided for the policeman's dismissal from service. *Id.* at 343-47. The Court held that nominal status as a permanent employee did not create an entitlement. *Id.* The city had reserved the right to fire policemen in some instances without cause, and that was enough to withhold the entitlement. *See id.* at 344. Therefore, even if reasonable, the employee's own understanding of status was no longer a factor in the entitlement test. *See id.*

<sup>31</sup> The Supreme Court has stated: "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)); see Comment, *supra* note 18, at 1125-28. Courts examine the language of state statutes, county policy manuals, city charters, etc., that create or define public jobs to determine whether a property right exists. *Id.*

<sup>32</sup> See L. TRIBE, *supra* note 15, § 10-10, at 697.

In its most recent public employment due process decision, the Supreme Court seems to have upheld the entitlement formulation of *Bishop sub silentio*. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 539 & n.5 (1985). Oddly, the creation of the entitlement was not an issue disputed in the lower courts. Yet, the *Loudermill* Court inexplicably found that an entitlement existed. *Id.* at 539.

To understand the importance of the *Bishop* identification of entitlement with a sufficient cause requirement, compare *supra* notes 20-22 and accompanying text. Originally, the sufficient cause requirement could follow a finding of entitlement. *Id.*

<sup>33</sup> Until the 1980s, only unionized workers routinely enjoyed any comparable job security in the private sector. See Leonard, *supra* note 1, at 646-47; Note, *Protecting At Will Employees*, *supra* note 17, at 1816. Only 22% of all private sector employees belonged to unions in 1979. *Id.* at n.2. The majority of private sector employees held jobs under at will contracts. See *supra* note 17 and accompanying text.

During the 1980s, with the rise of common law actions for wrongful discharge, em-

received entitlement<sup>34</sup> and could grant them more protection than constitutional due process required.<sup>35</sup> As a result, public employees in some states enjoyed remarkable job security for the era.

### B. California Law

California courts have taken a progressive approach to the property right doctrine in public employment law. For example, the California Supreme Court granted public employees some forms of job protection before the United States Supreme Court required such safeguards.<sup>36</sup> Yet, even California does not protect many of its public employees from arbitrary termination. California courts, for instance, have held that specially classified employees may have *no* property interest in their

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ployment law dramatically changed. *See* Gould, *Job as Property*, *supra* note 17, at 899; Leonard, *supra* note 1, at 647-61.

<sup>34</sup> *See supra* note 31.

<sup>35</sup> *See, e.g.*, *Skelly v. State Personnel Bd.*, 15 Cal. 3d 194, 211-15, 539 P.2d 774, 786-89, 124 Cal. Rptr. 14, 26-28 (1975) (analyzing Supreme Court decision in *Arnett v. Kennedy*, 416 U.S. 134 (1974), and synthesizing from *Arnett's* plurality and concurring opinions more stringent standard of due process for California civil service employees than Supreme Court's plurality opinion required).

<sup>36</sup> *Compare Skelly*, 15 Cal. 3d at 211-15, 539 P.2d at 788-90, 124 Cal. Rptr. at 30-32 (holding that, in California, permanent civil service employee's due process rights include advance notice of adverse action and pretermination hearing) *with* *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985) (holding, 10 years after *Skelly*, that Constitution requires procedure similar to California's).

As to entitlements, California Supreme Court decisions establishing public employee entitlement generally fall well within the standards articulated in *Bishop v. Wood*, 426 U.S. 341 (1976), and later (apparently) reaffirmed in *Loudermill*, 470 U.S. 532. *See supra* note 32. For example, permanent California state civil service employees own property interests in their jobs because statutory law imposes a "cause" requirement for discharge or discipline. *Skelly*, 15 Cal. 3d at 207-08, 539 P.2d at 783-84, 124 Cal. Rptr. at 23-24. Likewise, non-civil-service but permanent city workers own property interests in their jobs when city personnel rules specify that the city council can discharge nonprobationary employees only for cause. *International Bhd. of Elec. Workers v. City of Gridley*, 34 Cal. 3d 191, 207, 666 P.2d 960, 970, 193 Cal. Rptr. 518, 528 (1983).

When faced with problematic cases, however, California courts have taken a decidedly progressive approach. *See, e.g.*, *Walker v. Northern San Diego County Hosp. Dist.*, 135 Cal. App. 3d 896, 185 Cal. Rptr. 617 (1982). In *Walker*, an appellate court held that a county hospital nurse hired pursuant to an at will statute nevertheless might own a property interest in her job because the hospital's personnel policies possibly created an implied contract of permanent employment. *Id.* at 902-05, 185 Cal. Rptr. at 620-22. The court relied on the recently created, California common law theory of implied-in-fact promise of continued, or permanent, employment. *Id.* For criticism and discussion of the *Walker* decision, see *infra* note 91.

jobs.<sup>37</sup> In these cases, courts have found an employee's own expectation of continued employment irrelevant if a law or regulation clearly imposed at will employment status.<sup>38</sup> This precedent is significant because none of the California statutes authorizing local civil service systems mandate permanent employment.<sup>39</sup> Moreover, the statutory schemes enabling California governmental entities to establish civil service systems<sup>40</sup> also provide broad authority for appointment of non-civil-service employees.<sup>41</sup> Thus, California state and local governments may create any number of public employment positions entirely void of due process or just cause protections. Additionally, even permanent civil service employees clearly vested with just cause and due process protection do not begin their careers with those benefits. Rather, they begin as probationary employees terminable at the will of their employer until, after some specified period, they attain permanent status.<sup>42</sup>

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<sup>37</sup> See, e.g., *Williams v. Department of Water & Power*, 130 Cal. App. 3d 677, 680-81, 181 Cal. Rptr. 868, 870-71 (1982). A city charter provided that a less than half-time, "intermittent" employee had no civil service protection or right to removal only for cause. *Id.* Thus, the employee had no property interest in her job, even though she performed the same tasks as permanent civil service employees. *Id.*

<sup>38</sup> See *Barthuli v. Board of Trustees*, 19 Cal. 3d 717, 722-23, 566 P.2d 261, 263-64, 139 Cal. Rptr. 627, 629-30 (1977); *Williams*, 130 Cal. App. 3d at 680-83, 181 Cal. Rptr. at 870-72. *But see supra* note 36. *Walker v. Northern San Diego County Hosp. Dist.*, 135 Cal. App. 3d 896, 185 Cal. Rptr. 617 (1982), may be distinguished from other public employment cases. In *Walker*, the Hospital District's personnel policies helped to create the entitlement. *Id.* at 902-05, 185 Cal. Rptr. at 620-22. The implied contract of continued or permanent employment did not arise only from continuity or longevity of service. *Id.*

<sup>39</sup> See H. PERRITT, *EMPLOYEE DISMISSAL LAW AND PRACTICE* § 6.5, at 226 (1984) (noting that California statutes providing for municipal and county civil service systems do not specify "whether such systems must guarantee dismissal only for cause").

<sup>40</sup> CAL. GOV'T CODE § 18529 (Deering Supp. 1989) (authorizing temporary state civil service employees); *id.* §§ 19889, 19889.2 (providing for career executive assignments independent of many civil service requirements and protection); *id.* § 31104 (Deering 1974) (authorizing county ordinances to adopt limited civil service systems for any or all county employees except elected officials); *id.* § 45005 (providing that city's civil service ordinance shall designate which departments and employees the system shall include); *see also id.* § 1301 (Deering 1982) (stating that every state office, "the term of which is not fixed by law, is held at the pleasure of the appointing power").

<sup>41</sup> See, e.g., CAL. GOV'T CODE §§ 31100-31117 (Deering 1974 & Supp. 1989) (county civil service schemes); *id.* §§ 45000-45100 (Deering 1974) (city civil service systems); CAL. HEALTH & SAFETY CODE §§ 32000-32121.1 (Deering 1986 & Supp. 1989) (hospital districts schemes).

<sup>42</sup> See, e.g., CAL. GOV'T CODE § 19170 (Deering 1982) (providing that probationary period for state civil service normally lasts six months, although State Personnel

Consequently, a sizeable number of California public employees receive only minimal job security under traditional constitutional doctrine.<sup>43</sup> These public employees are essentially at will,<sup>44</sup> with no more protection in their employment than at will, private sector employees.<sup>45</sup>

Furthermore, public employees who can claim property rights in their jobs may not gain much by having due process as a protection against employer abuse of power.<sup>46</sup> The standard remedy available to a

Board can extend it to one year).

<sup>43</sup> Not all jurisdictions permit their government employers to distinguish between protected or vested employees and unprotected employees at will. *See, e.g.*, L. LARSON, UNJUST DISMISSAL § 4.02, at 4-9 to 4-10 (1989). Larson states:

[P]ublic employers in some jurisdictions have been held to be forbidden to discharge employees arbitrarily or in bad faith, even when the employees were not entitled to job protection under state civil service rules, or did not have a "property" interest in their jobs protected by the Fourteenth Amendment.

*Id.*

<sup>44</sup> *See* Caples & Hanko, *supra* note 7, at 27 (stating that at will employees are common even in public sector).

<sup>45</sup> *See supra* notes 12-13 and accompanying text.

<sup>46</sup> *See Public Employment, supra* note 12, at 1794-1800 (explaining that courts "shy away from insisting that public employers offer their employees elaborate procedural safeguards"); *see also* Caples & Hanko, *supra* note 7, at 26-27 (stating that constitutional due process constraints on government employers may be so weak that even protected employees are "effectively relegated to the status of [employees] dischargeable at will").

Additionally, not all of the Supreme Court Justices who joined in deciding *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), were fully satisfied with the procedural due process standards set by the majority. Justice Marshall objected to the majority's standard for pretermination "notice and an opportunity to be heard." *Id.* at 548. Justice Marshall opined that the employee should receive something resembling a full evidentiary hearing *before* termination. Conversely, the majority would consider requiring such a hearing only *after* discharge. *Id.* In explaining his dissatisfaction with reliance on post-termination procedures, Justice Marshall stated:

[I]t is in no respect certain that a prompt postdeprivation hearing will make the employee economically whole again, and the wrongfully discharged employee will almost inevitably suffer irreparable injury. Even if reinstatement is forthcoming, the same might not be true of backpay . . . and the delay in receipt of wages would thereby be transformed into a permanent deprivation. Of perhaps equal concern, the personal trauma experienced during the long months in which the employee awaits decision, during which he suffers doubt, humiliation, and the loss of an opportunity to perform work, will never be recompensed, and indeed probably could not be with dollars alone.

*Id.* at 550 (Marshall, J., concurring). Note the similarity between this description of a wrongful discharge injury and the injuries that compensatory damages in common law tort actions remedy. *See, e.g.*, 4 F. HARPER, F. JAMES & O. GRAY, THE LAW OF

wrongfully discharged, vested public employee is reinstatement and backpay.<sup>47</sup> In contrast, a private sector employee with no job-related due process rights may recover under common law tort or contract theories.<sup>48</sup> This recovery often far exceeds the monetary value of recovery under the traditional reinstatement-backpay formula.<sup>49</sup> Finally, private actions offer jury trials, while due process requirements do not.<sup>50</sup>

For all of the foregoing reasons, it is not surprising that California public employees lately have sought recovery for wrongful discharge in private actions.<sup>51</sup> Courts and commentators, however, disagree on the propriety of such private actions by public employees.<sup>52</sup>

## II. CALIFORNIA WRONGFUL DISCHARGE LAW AND ITS APPLICABILITY IN THE PUBLIC SECTOR

A California appellate court decided the seminal case of wrongful discharge law in 1959.<sup>53</sup> Yet, until the early 1980s, wrongful discharge suits remained rare.<sup>54</sup> Then, in the space of only a few years, wrongful

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TORTS § 25.10, at 563-64 (2d ed. 1986) (explaining that compensatory damages for pain, suffering, and mental distress do not equal a sum that anyone "would be willing to suffer the injur[ies] for. . . [because such injuries have] no exchange value and there is no attempt to equate them to anything like that").

<sup>47</sup> See, e.g., CAL. GOV'T CODE § 19584 (Deering Supp. 1989); see also *Monroe v. Trustees of Cal. State Colleges*, 6 Cal. 3d 399, 411-13, 491 P.2d 1105, 1112-14, 99 Cal. Rptr. 129, 137-38 (1971) (arguing that reinstatement of college instructor, even 20 years after termination, benefited government employer, society in general, and the employee).

<sup>48</sup> See *infra* notes 59-65 and accompanying text.

<sup>49</sup> See Gould, *Arbitration*, *supra* note 3, at 405 (stating that employees won jury trials for wrongful discharge in more than 70% of cases from 1982-1986, and average damage award was \$652,100); see also S.F. Chronicle, Feb. 18, 1987, at 7, col. 5 (reporting that punitive damage awards in two recent wrongful discharge cases exceeded \$2 million per award).

As commentators often point out, the availability of general tort and punitive damages attracts "the plaintiff's bar." See, e.g., Saperstein, *Introduction and Historical Overview of "At Will" Employment Doctrine*, in WRONGFUL EMPLOYMENT TERMINATION PRACTICE § 1.1, at 2 (1987). Of course, the practical result of a broader, potentially larger recovery for wrongful discharge in the private sector is that private sector employees are more likely to find attorneys willing to pursue their cases.

<sup>50</sup> See *supra* note 23; see also *infra* note 91.

<sup>51</sup> See, e.g., cases cited *infra* note 57.

<sup>52</sup> See *infra* notes 70-104 & 136-40 and accompanying text.

<sup>53</sup> *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

<sup>54</sup> See Saperstein, *supra* note 49, at 2; see also Smullin & Laliberte, *A Comprehensive View of Wrongful Discharge*, in BASICS OF WRONGFUL EMPLOYMENT TERMINATION 97 (1986).

discharge litigation flourished. In 1986, this phenomenon caused one federal district court in California to decry it as a "major flood . . . inundating courts all over California and in many other states."<sup>55</sup> Indeed, a myriad of wrongful discharge cases fill the recent California appellate reports.<sup>56</sup> Yet, of the many reported California cases, only a handful involve public employees.<sup>57</sup> Of these, only three discuss the propriety of a private wrongful discharge action brought by a public employee.<sup>58</sup> Because of the paucity of appellate decisions, there are several undecided questions in this area. Any attempt to answer these questions necessarily must begin with an analysis of California wrongful discharge law.

### A. *Distinctions Between Contract and Tort Theories of Wrongful Discharge*

The leading case on California wrongful discharge law is *Foley v. Interactive Data Corp.*<sup>59</sup> In *Foley*, the California Supreme Court isolated three separate legal theories generally subsumed under the wrongful discharge label.<sup>60</sup> The theories are: (1) breach of an implied-

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<sup>55</sup> *Cox v. Resilient Flooring Div. of Congoleum Corp.*, 638 F. Supp. 726, 735 (C.D. Cal. 1986). See Leonard, *supra* note 1, at 632-35 (arguing that as union-contract just-cause provisions, constitutional protections, civil rights, and antidiscrimination laws all abrogated traditional at will employment presumption, "new consciousness and assertiveness about job security" rose, leading finally, in 1970s and 1980s, to wrongful discharge litigation). See generally Gould, *Job as Property*, *supra* note 17, at 894-99 (examining legal and economic factors, both domestic and international, that led to change in employment law in 1980s).

<sup>56</sup> See D. CATHCART & M. DICHTER, *EMPLOYMENT-AT-WILL: A 1986 STATE-BY-STATE SURVEY* 33-103 (1987) (listing some 60 appellate cases in California, including Ninth Circuit cases applying California law).

<sup>57</sup> See *Kemmerer v. County of Fresno*, 200 Cal. App. 3d 1426, 246 Cal. Rptr. 609 (1988); *Shoemaker v. Myers*, 204 Cal. App. 3d 40, 237 Cal. Rptr. 686 (1987); *Valenzuela v. State*, 194 Cal. App. 3d 916, 240 Cal. Rptr. 45 (1987); *Green v. City of Oceanside*, 194 Cal. App. 3d 212, 239 Cal. Rptr. 470 (1987); *City of Fresno v. Superior Court*, 188 Cal. App. 3d 1484, 234 Cal. Rptr. 136 (1987); *Read v. City of Lynwood*, 173 Cal. App. 3d 437, 219 Cal. Rptr. 26 (1985); *Walker v. Northern San Diego County Hosp. Dist.*, 135 Cal. App. 3d 896, 185 Cal. Rptr. 617 (1982).

<sup>58</sup> See *Kemmerer*, 200 Cal. App. 3d 1426, 246 Cal. Rptr. 609; *Valenzuela*, 194 Cal. App. 3d 916, 240 Cal. Rptr. 45; *Green*, 194 Cal. App. 3d 212, 239 Cal. Rptr. 470.

<sup>59</sup> 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

<sup>60</sup> *Id.* at 662, 765 P.2d at 374, 254 Cal. Rptr. at 212; see also *Koehrer v. Superior Court*, 181 Cal. App. 3d 1155, 1163, 226 Cal. Rptr. 820, 824 (1986) (stating that term "wrongful discharge" is "so broad it is inadequate to distinguish between the possible theories").

in-fact employment contract to discharge only for cause<sup>61</sup> (“breach of implied contract”); (2) breach of the implied covenant of good faith and fair dealing<sup>62</sup> (“bad faith discharge”); and (3) tortious discharge in contravention of public policy<sup>63</sup> (“tortious discharge”). Breach of implied contract discharge and bad faith discharge are both contract-based actions.<sup>64</sup> Obviously, tortious discharge is a tort action.<sup>65</sup>

For most wrongful discharge plaintiffs, the practical difference between a contract and a tort suit is the extent of relief available.<sup>66</sup> The problem differs somewhat for public employees. Many public employees, for example, hold jobs primarily pursuant to statutes or ordinances<sup>67</sup> and only secondarily, if at all, by contracts.<sup>68</sup> Consequently, these employees may not be able to bring contract-based actions for wrongful discharge. On the other hand, some public employees may have *only* contract claims because governmental immunity applies to tort, but not to contract actions.<sup>69</sup>

### B. Contract-Based Actions

The general rule in California is that “the terms and conditions of civil service employment are fixed by statute and not by contract.”<sup>70</sup>

<sup>61</sup> *Foley*, 47 Cal. 3d at 675, 765 P.2d at 383, 254 Cal. Rptr. at 221. See *infra* notes 75-78 and accompanying text.

<sup>62</sup> *Foley*, 47 Cal. 3d at 682-84, 765 P.2d at 389-90, 254 Cal. Rptr. at 227-28. See *infra* notes 92-101 and accompanying text.

<sup>63</sup> *Foley*, 47 Cal. 3d at 665, 765 P.2d at 376, 254 Cal. Rptr. at 214; see *infra* notes 105-33 and accompanying text; see also W. HOLLOWAY & M. LEECH, EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES 249 (1985) (stating that in other jurisdictions tortious discharge labelled “wrongful discharge,” “abusive discharge,” “retaliatory discharge,” or “discharge in derogation of public policy”).

<sup>64</sup> *Foley*, 47 Cal. 3d at 682-84, 765 P.2d. at 388-90, 254 Cal. Rptr. at 226-28. Tort damages are not available in California for bad faith breach of an employment contract. See *infra* notes 92-94 and accompanying text.

<sup>65</sup> *Foley*, 47 Cal. 3d at 667-68, 765 P.2d at 378, 254 Cal. Rptr. at 216. But see *infra* text accompanying notes 105-09.

<sup>66</sup> Cf. L. LARSON, *supra* note 43, § 3.02, at 3-3. Applicable statutes of limitation and available remedies primarily distinguish contract and tort actions for wrongful discharge. *Id.*

<sup>67</sup> See *supra* notes 39-40 and accompanying text.

<sup>68</sup> See *infra* text accompanying notes 83-87.

<sup>69</sup> CAL. GOV'T CODE § 814 (Deering 1982).

<sup>70</sup> *Boren v. State Personnel Bd.*, 37 Cal. 2d 634, 641, 234 P.2d 981, 985 (1951) (adding that “purported contracts” cannot “circumvent” statutory provisions); see also *Miller v. State*, 18 Cal. 3d 808, 814, 557 P.2d 970, 974, 135 Cal. Rptr. 386, 382 (1977) (holding that legislature could unilaterally alter retirement-age term of civil service employment without breach of contract because terms were purely statutory from inception).

The California Supreme Court decisions that articulated this rule, however, dealt exclusively with state civil service employment terms quite explicitly and comprehensively fixed by statute.<sup>71</sup> Subsequent appellate court decisions following this rule also have dealt with civil service employees.<sup>72</sup> These decisions, however, have occasionally misstated the rule as being applicable to “public” employment, rather than to “civil service” employment.<sup>73</sup> Since public employers have the power to hire non-civil-service employees,<sup>74</sup> the distinction is crucial. Non-civil-service public employees may hold their jobs by contract. Thus, they may be able to bring either of the two contract-based, wrongful discharge actions.

### 1. Breach of Implied Contract

Evidence of an implied “good cause” term in an employment contract may overcome the at will employment presumption.<sup>75</sup> Such evidence may include “the personnel policies or practices of the employer, the employee’s longevity of service, actions or communications by the employer reflecting assurances of continued employment, and

<sup>71</sup> *Boren*, 37 Cal. 2d at 637-39, 234 P.2d at 985; *Miller*, 18 Cal. 3d at 811, 557 P.2d at 971, 135 Cal. Rptr. at 387.

<sup>72</sup> *See, e.g.*, *Kemmerer v. County of Fresno*, 200 Cal. App. 3d 1426, 246 Cal. Rptr. 609 (1988); *Valenzuela v. State*, 194 Cal. App. 3d 916, 240 Cal. Rptr. 45 (1987); *Williams v. Department of Water & Power*, 130 Cal. App. 3d 677, 181 Cal. Rptr. 868 (1982).

<sup>73</sup> *Kemmerer*, 200 Cal. App. 3d at 1432, 246 Cal. Rptr. at 612-13; *Williams*, 130 Cal. App. 3d at 680, 181 Cal. Rptr. at 870.

The source of this imprecision is *Miller*, 18 Cal. 3d at 813-14, 557 P.2d at 973, 135 Cal. Rptr. at 389. In *Miller*, the court first states the rule as applicable to “public” employment. The court then restates the rule as limited to “civil service employment.” *Id.*

<sup>74</sup> *See, e.g.*, *supra* notes 39-41 and accompanying text.

<sup>75</sup> *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 680, 765 P.2d 373, 387, 254 Cal. Rptr. 211, 225 (1988). The court stated:

The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore “subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that . . . the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer’s dissatisfaction with the employee’s services or the existence of some ‘cause’ for termination.”

*Id.* (quoting *Pugh v. See’s Candies, Inc.*, 116 Cal. App. 3d 311, 324-25, 171 Cal. Rptr. 917, 924 (1981) (footnote omitted)).

the practices of the industry.'"<sup>76</sup> Under current doctrine, courts must consider these factors according to the particular circumstances.<sup>77</sup> Consequently, courts must determine the existence of an implied-in-fact contract to discharge only for cause on a case-by-case basis.<sup>78</sup>

The only appellate level case applying breach of implied contract in the public sector involved a non-civil-service nurse. In that case, *Walker v. Northern San Diego County Hospital District*,<sup>79</sup> the defendant hospital district fired the plaintiff pursuant to an at will statute.<sup>80</sup> The appellate court, however, reversed a directed verdict for the defendant. The court found that the hospital district's employment handbooks and personnel policies may have created an implied-in-fact contract to discharge only for just cause.<sup>81</sup> The plaintiff's status as a public employee hired under statutory authority did not bar an employment contract between the parties.<sup>82</sup>

Superficially, the holding in *Walker* seems to ignore the rule that "purported" contracts cannot circumvent conflicting statutes.<sup>83</sup> Ex-

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<sup>76</sup> *Id.* (quoting *Pugh*, 116 Cal. App. 3d at 327, 171 Cal. Rptr. at 925-26).

<sup>77</sup> *See, e.g., Foley*, 47 Cal. 3d at 681, 765 P.2d at 387-88, 254 Cal. Rptr. at 225-26.

Of the four factors, longevity of service is the most easily quantifiable. California courts, however, have been very flexible in determining requisite longevity. *Id.* In *Foley*, the court held that six years and nine months was "sufficient time for conduct to occur on which a trier of fact could find the existence of an implied contract." *Id.* The court did not indicate that such "sufficient time" must meet a specific minimum standard. *Id.*

<sup>78</sup> *Id.* (stating that totality of circumstances determines nature of implied contract).

<sup>79</sup> 135 Cal. App. 3d 896, 185 Cal. Rptr. 617 (1982). A hospital district hired plaintiff pursuant to general statutory authority to staff the hospital district. *Id.* at 898, 185 Cal. Rptr. at 618. The hospital's employment handbooks set some terms and conditions of employment. *Id.* at 902-05, 185 Cal. Rptr. at 620-22.

<sup>80</sup> CAL. HEALTH & SAFETY CODE § 32121 (Deering Supp. 1989). The statute grants any local hospital district the power:

To prescribe the duties and powers of . . . officers and employees of any hospitals of the district, to establish offices as may be appropriate and to appoint board members or employees to those offices, and to determine the number of, and appoint, all officers and employees and to fix their compensation. The officers and employees shall hold their offices or positions at the pleasure of the boards of directors.

*Id.*

<sup>81</sup> *Walker*, 135 Cal. App. 3d at 902-05, 185 Cal. Rptr. at 620-22 (citing *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917, 925-26 (1981)). The passage in *Walker* relying on *Pugh* states the essential four-factor test for wrongful discharge by breach of employment contract. *See supra* notes 75-78 and accompanying text.

<sup>82</sup> *Walker*, 135 Cal. App. 3d at 904, 185 Cal. Rptr. at 622.

<sup>83</sup> *See Boren v. State Personnel Bd.*, 37 Cal. 2d 634, 641, 234 P.2d 981, 985 (1951).

amined more closely, however, the *Walker* holding seems sensible. The at will statute that authorized a hospital district to hire nurses also granted the district's board of directors the power to discharge those nurses at its "pleasure."<sup>84</sup> As a result, the district's power to discharge was that of a private employer under an at will employment arrangement.<sup>85</sup> At will employment in the private sector is a presumption, easily superceded by a contract between the parties.<sup>86</sup> The court in *Walker* merely applied the same standard in the public sector.<sup>87</sup>

Essentially, any court following *Walker* would permit implied employment contracts in the public sector as long as the contracts do not *contradict* any terms or conditions of employment fixed by law.<sup>88</sup> A question remains, however, about the appropriate remedy for breach of such a contract: If the contract creates a property interest in the job, does the public employee have a choice between procedural due process<sup>89</sup> and a breach of contract action?<sup>90</sup> No case addresses this issue.<sup>91</sup>

<sup>84</sup> CAL. HEALTH & SAFETY CODE § 32121 (Deering Supp. 1989). For the pertinent text of this statute, see *supra* note 80.

<sup>85</sup> CAL. LAB. CODE § 2922 (Deering 1976); see also Silverman & Seligman, *Theories of Liability*, in WRONGFUL EMPLOYMENT TERMINATION PRACTICE § 2.2, at 22 (1987). In a "frequently quoted passage, the California Supreme Court amplified the employer's right to terminate employment: 'Precisely as may the employee cease labor at his whim or pleasure . . . so, upon the other hand, may the employer discharge.'" *Id.* (quoting *Union Labor Hosp. Ass'n v. Vance Redwood Lumber Co.*, 158 Cal. 551, 554, 112 P. 886, 888 (1910)).

<sup>86</sup> See Caples & Hanko, *supra* note 7, at 21.

<sup>87</sup> See *id.* at 22.

<sup>88</sup> Cf. *Boren v. State Personnel Bd.*, 37 Cal. 2d 634, 641, 234 P.2d 981, 985 (1951) (asserting that purported contracts cannot circumvent *conflicting* statutory provisions controlling terms and conditions of civil service employment); *Miller v. State*, 18 Cal. 3d 808, 813-814, 557 P.2d 970, 973-74, 135 Cal. Rptr. 386, 389-90 (1977) (stating that public employee cannot have vested contractual right to continued employment *contrary* to terms and conditions fixed by statute).

Allowing consensual agreement between the parties to supercede the at will presumption imposed by statute does not circumvent or contradict the statute within the meaning of *Boren* and *Miller*. The public entity employer begins with maximum control over personnel as a result of the statute's at will presumption. Efficient public service may require the employer to use some of that control as a bargaining chip. For example, permanent employment may attract better candidates for jobs. This analysis accords with general statutory civil service schemes for counties and cities that allow for at will employment at the governing entity's discretion. See *supra* notes 39-41 and accompanying text.

<sup>89</sup> After proving a right to procedural due process, the employee then receives appropriate administrative hearings. She may not receive anything more than these hearings. See *supra* note 23 and accompanying text.

<sup>90</sup> An extreme difference exists between the two theories of recovery. An employee's

## 2. Bad Faith Discharge

Prior to 1988, plaintiffs often sought tort damages when they sued for bad faith discharge.<sup>92</sup> Since the *Foley* decision, however, plaintiffs can no longer recover tort damages for bad faith breach of employment contracts.<sup>93</sup> Rather, because the law implies the covenant of good faith and fair dealing into every employment contract, breach of that term can give rise only to suits for contract damages.<sup>94</sup>

Thus, the first requirement for a bad faith discharge action is job creation by contract<sup>95</sup> rather than by statute.<sup>96</sup> Further requirements

self-vindication at a due process hearing results, at best, in backpay and reinstatement. See *supra* note 47 and accompanying text. On the other hand, relief for breach of contract may include compensatory damages, "calculated as the plaintiff's lost earnings minus earnings from any work after the dismissal plus any expenses reasonably incurred in seeking work." H. PERRITT, *supra* note 41, § 4.23, at 165. In essence, this calculation requires the jury to determine how long an employee could have worked at the job from which she was dismissed and how much she would have earned in that time. *Id.* at 165-66. The jury then must calculate reasonable mitigation. *Id.* Reinstatement, as a form of specific performance, is rarely awarded in breach of contract cases. *Id.* Thus, due process relief looks backward for calculation *and* reinstates. Breach of contract relief looks forward for calculation, but usually does *not* reinstate.

<sup>91</sup> For criticism of *Walker v. Northern San Diego County Hosp. Dist.*, 135 Cal. App. 3d 896, 185 Cal. Rptr. 617 (1982) on this issue, see Dolgin & Nelson, *New Remedies for Wrongful Discharge from Public Employment*, in *BASICS OF WRONGFUL TERMINATION* 93, 94-96 (1986). *Walker* is problematic, the authors contend, because the court approved the implied contract theory for an area in which employment is not held by contract, but by statute. *Id.* Consequently, the court's holding effectively afforded a jury trial when one is not traditionally available. *Id.*

<sup>92</sup> See Silverman & Seligman, *supra* note 85, § 2.40.

<sup>93</sup> *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 700, 765 P.2d 373, 401, 254 Cal. Rptr. 211, 239 (1988).

<sup>94</sup> *Id.* at 683-84, 765 P.2d at 389, 254 Cal. Rptr. at 227. Exceptions to the no-tort-damage rule may apply for insurance contracts, but not for employment contracts. *Id.* at 693, 765 P.2d at 395, 254 Cal. Rptr. at 233.

<sup>95</sup> The court stated, "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Id.* at 683, 765 P.2d at 389, 254 Cal. Rptr. at 227 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 (1965)). Therefore, an implied contract to discharge only for cause must also contain the implied-in-law covenant of good faith and fair dealing.

<sup>96</sup> See, e.g., *Kemmerer v. County of Fresno*, 200 Cal. App. 3d 1426, 1432-33, 246 Cal. Rptr. 609, 612-13 (1988) (finding that civil service employee had no bad faith discharge action against employer or supervisors because no employment contract existed for employer to breach in bad faith); *Valenzuela v. State*, 194 Cal. App. 3d 916, 922, 240 Cal. Rptr. 45, 48-49 (1987). The court held that:

[A bad faith discharge claim] simply restates the obligation of the State to deal fairly and in good faith with its employees as required by statute and administrative rules, and remedies for breach of that obligation are in the

vary case by case.<sup>97</sup> Discharging an employee for reasons not related to the job may breach the covenant.<sup>98</sup> Offering a pretextual reason for discharge,<sup>99</sup> acting against an employee on the basis of false accusations without first investigating,<sup>100</sup> and failing to follow the employer's own express personnel procedures<sup>101</sup> may all breach the covenant.

As with breach of an implied contract,<sup>102</sup> however, certain types of bad faith discharge may offer multiple actions. The employee may have one action pursuant to her right to procedural due process and one for breach of the contract covenant.<sup>103</sup> Again, no case addresses this issue.<sup>104</sup>

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administrative procedures provided by the State civil service system, [plaintiff's] exclusive remedy as a State civil service employee.

*Id.*

<sup>97</sup> See *Khanna v. Microdata Corp.*, 170 Cal. App. 3d 250, 262, 215 Cal. Rptr. 860, 867 (1985) (stating that an employer may violate covenant in many ways).

<sup>98</sup> See *Rulon-Miller v. International Business Machs. Corp.*, 162 Cal. App. 3d 241, 252 n.6, 208 Cal. Rptr. 524, 532 n.6 (1984).

<sup>99</sup> See *id.*

<sup>100</sup> See *Wayte v. Rollins Int'l, Inc.*, 169 Cal. App. 3d 1, 215 Cal. Rptr. 59 (1985).

<sup>101</sup> See *Read v. City of Lynwood*, 173 Cal. App. 3d 437, 443-45, 219 Cal. Rptr. 26, 28-30 (1985). A city council had authority to abolish occupied positions with a four-fifths majority vote, but abolished plaintiff's imminent position by only three-fifths vote. *Id.* The court found a possible breach of procedural safeguard, and consequently, a potential breach of the covenant of good faith and fair dealing. *Id.*

<sup>102</sup> See *supra* notes 89-90 and accompanying text. The implied contract theory always implicates due process in California. An employer breaches an implied contract to fire only for cause when acting as if the discharged employee is merely at will, and thus, bereft of due process protection. This error violates the entitled employee's due process rights. See *Walker v. Northern San Diego County Hosp. Dist.*, 135 Cal. App. 3d 896, 905, 185 Cal. Rptr. 617, 622 (1982).

<sup>103</sup> Since a public employee must have a contract to support the covenant of good faith and fair dealing, the employee would own a property interest in the job. Thus, the public employer could not terminate the job without providing due process hearings. See *supra* note 102. Private sector, bad faith breaches often closely resemble violations of due process. See, e.g., *Rulon-Miller v. International Business Machs. Corp.*, 162 Cal. App. 3d 241, 247, 208 Cal. Rptr. 524, 529 (1984) (holding employer's failure to treat like cases alike breached duty of good faith and fair dealing); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (1980) (citing employer's failure to follow its own personnel procedures as salient part of breach). Such cases in the public sector would raise both procedural due process issues and bad faith issues.

<sup>104</sup> See *supra* notes 89-91 and accompanying text.

### C. Tortious Discharge

*Petermann v. International Brotherhood of Teamsters*<sup>105</sup> and *Monge v. Beebe Rubber Co.*<sup>106</sup> are two of the most influential cases in wrongful discharge litigation. Both of these cases were for breach of contract.<sup>107</sup> Yet, courts currently consider the theory on which both cases depended, discharge in violation of public policy,<sup>108</sup> to be a tort.<sup>109</sup>

Individual cases of tortious discharge are not as common as cases brought under contract theories of wrongful discharge.<sup>110</sup> Yet, the action itself is “[t]he most widely accepted theory of wrongful termination.”<sup>111</sup> This wide acceptance is partially due to the rigorous nature of the action: a private wrong (the wrongful discharge) cannot find redress unless a public wrong (an act in violation of strong public policy)<sup>112</sup>

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<sup>105</sup> 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

<sup>106</sup> 114 N.H. 130, 316 A.2d 549 (1974).

<sup>107</sup> *Petermann*, 174 Cal. App. 2d at 188-190, 344 P.2d at 27; *Monge*, 114 N.H. at 133, 316 A.2d at 551. *But see* L. LARSON, *supra* note 43, § 3.02, at 3-4 n.7 (suggesting that plaintiffs' attorneys in *Petermann* and *Monge*, both aware of breaking new ground with public policy actions, conservatively pled in contract to keep from “stretching their luck”).

<sup>108</sup> *See supra* note 63 and accompanying text. For convenience, this Comment refers to the theory as “tortious discharge.”

<sup>109</sup> *See* *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 667-68, 765 P.2d 373, 378, 254 Cal. Rptr. 211, 216 (1988); *see also* *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 176, 610 P.2d 1330, 1335, 164 Cal. Rptr. 839, 844 (1980); *Koehrer v. Superior Court*, 181 Cal. App. 3d 1155, 1165-66, 226 Cal. Rptr. 820, 825-26 (1986); W. HOLLOWAY & M. LEECH, *supra* note 63, at 261; H. PERRITT, *supra* note 41, §§ 5.7-5.17; Seligman, Bryant & Kramer, *Bringing the Action*, in *WRONGFUL EMPLOYMENT TERMINATION PRACTICE* § 4.14 (1987). *But see* *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983) (holding that contractual remedies such as reinstatement and backpay are most appropriate for public policy wrongful discharges). The California Supreme Court has rejected this distinctively minority view. *See Foley*, 47 Cal. 3d at 667-68, 765 P.2d at 378, 254 Cal. Rptr. at 216.

<sup>110</sup> Seligman, Bryant & Kramer, *supra* note 109, § 4.14 (stating that tortious discharge cases “are rare, but present excellent opportunities for favorable verdicts, and are extremely strong vehicles for recovery of punitive damages”).

<sup>111</sup> Note, *Advice to California Employers: An Overview of Wrongful Discharge Law and How to Avoid Potential Liability*, 13 PEPPERDINE L. REV. 185, 188 (1985). *See generally* J. KAUFF & M. McCLAIN, *ADVANCED STRATEGIES IN LITIGATING, SETTLING AND AVOIDING UNJUST DISMISSAL AND AGE DISCRIMINATION CLAIMS* 28 (1987). These authors state that, “The most frequently adopted exception to the at-will rule of employment is the public policy exception.” *Id.* at 88.

<sup>112</sup> *See Foley*, 47 Cal. 3d at 670 & n.11, 765 P.2d at 380 & n.11, 254 Cal. Rptr. at 218 & n.11 (stating that to be tortious, discharge must violate “substantial public policy” and citing with approval other decisions that described requisite public policy basis as “firmly established,” “fundamental,” “substantial,” or “clearly mandated”).

also occurs.<sup>113</sup> Thus, pleading a cause of action for tortious discharge is difficult.<sup>114</sup> The traditional view that an employee works at will probably underlies this “double-wrong” requirement.<sup>115</sup> Under this view, a wrongful discharge is actionable *only* if it wrongs both the employee and society.<sup>116</sup>

California appellate courts disagree over how serious the wrong to the public must be to support a tortious discharge action.<sup>117</sup> In *Tameny v. Atlantic Richfield Co.*,<sup>118</sup> the California Supreme Court held that if a discharge “clearly violated an express statutory objective or undermined a firmly established principle of public policy,”<sup>119</sup> the employer had acted beyond even “the traditional broad authority to discharge at-will employees.”<sup>120</sup> Courts applying the *Tameny* holding have interpreted this language in various ways.<sup>121</sup> Some courts find that “public

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<sup>113</sup> See L. LARSON, *supra* note 43, § 4.02, at 4-3; see also Rongine, *Toward a Coherent Legal Response to the Public Policy Dilemma Posed by Whistleblowing*, 23 AM. BUS. L.J. 281, 293-94 (1985). The author suggests:

It probably makes more sense to view cases based on public policy *sui generis*, for more than private rights and duties are at stake; the heart of the public policy exception is the assertion that employees should not be discharged for asserting rights that the *society* has an interest in protecting.

*Id.* (emphasis in original).

<sup>114</sup> Tortious discharge is inherently paradoxical: the harm that the employer does to the public by subverting public policy becomes merely a ground for providing justifiable individual relief. See Rongine, *supra* note 113, at 293-94. Thus, the employee must prove both individual injury and public injury. *Id.*

<sup>115</sup> See *Newfield v. Insurance Co.*, 156 Cal. App. 3d 440, 444, 203 Cal. Rptr. 9, 11 (1984); L. LARSON, *supra* note 43, § 4.02, at 4-3 to 4-4 (stating that, “Historically, there has been no . . . right to be secure in one’s employment, and it is this point that no doubt leads courts to search for independent policies upon which to hinge their decisions”).

<sup>116</sup> See *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959).

<sup>117</sup> See *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 668-69, 765 P.2d 373, 378-79, 254 Cal. Rptr. 211, 216-17 (1988).

<sup>118</sup> 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

<sup>119</sup> *Id.* at 172, 610 P.2d at 1332-33, 164 Cal. Rptr. at 841-42.

<sup>120</sup> *Id.* In *Tameny*, the employer discharged the plaintiff after his refusal to participate in illegal price fixing. When the court applied its holding to the facts of the case, it focused on public policy embodied in the state’s penal statutes. *Id.* at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844. This application of the doctrine has led some commentators to suggest that the *Tameny* holding applies only to violations of criminal statutes. See Silverman & Seligman, *supra* note 85, § 2.34, at 40-41. See generally W. HOLLOWAY & M. LEECH, *supra* note 63, at 265-66 (stating general rule as “an action will be allowed where the employee is discharged for refusing to commit a criminal act”).

<sup>121</sup> See L. LARSON, *supra* note 43, § 10.05, at 10-30.23.

policy” can reside only in specific statutes.<sup>122</sup> Other courts find substantial public policy embodied in the general intent of statutory schemes,<sup>123</sup> advisory agency guidelines,<sup>124</sup> ethical codes,<sup>125</sup> or judicial decisions.<sup>126</sup> Recently, in *Foley v. Interactive Data Corp.*,<sup>127</sup> the California Supreme Court, after reviewing the question extensively, declined to decide whether nonlegislative sources may support tortious discharge actions.<sup>128</sup>

Still, tortious discharge actions based on statutorily proclaimed public policy are most common.<sup>129</sup> Equally important, actions premised on statutory grounds are most likely to be successful against government employers.<sup>130</sup> Three types of statutory bases for tortious discharge exist: discharge in direct violation of a statute,<sup>131</sup> discharge in response to the

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<sup>122</sup> See, e.g., *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 477, 199 Cal. Rptr. 613, 618 (1984) (noting that statutory basis may be essential and questioning whether courts have power to declare public policy).

<sup>123</sup> See, e.g., *Dabbs v. Cardiopulmonary Management Servs.*, 188 Cal App. 3d 1437, 1443-44, 234 Cal. Rptr. 129, 133 (1987) (finding public policy support within hundreds of safety regulations, a statute not operative until two months after plaintiff's dismissal, and “general societal concerns for qualified patient care”).

<sup>124</sup> See, e.g., *Eisenberg v. Insurance Co.*, 815 F.2d 1285, 1289-90 (9th Cir. 1987) (holding that California Department of Insurance “guidelines” embodied public policy sufficient to support tortious discharge action).

<sup>125</sup> See Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J.L. REFORM 277, 287 (1983) (stating that courts divide over whether code of professional ethics sufficiently expresses public policy).

<sup>126</sup> See *Koehrer v. Superior Court*, 181 Cal. App. 3d 1155, 1165, 226 Cal. Rptr. 820, 825 (1986) (stating that “it is immaterial whether the public policy is proclaimed by statute or delineated in a judicial decision”); cf. *Garcia v. Rockwell Int'l Corp.*, 187 Cal. App. 3d 1556, 1561 & n.1, 232 Cal. Rptr. 490, 493 & n.1 (1986) (allowing whistleblowing employee's tort action even though whistleblower protection statute enacted “after the retaliatory action alleged by plaintiff in this case. . . . [because] the Labor Code section merely enunciated already existing public policy”).

<sup>127</sup> 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

<sup>128</sup> *Id.* at 669, 765 P.2d at 379, 254 Cal. Rptr. at 217.

Oddly enough, the *Foley* court suggested that in some cases, clear statutory basis may not be enough if the statute serves only *private* interests.

<sup>129</sup> See Miller & Estes, *Recent Judicial Limitations on the Right to Discharge: A California Trilogy*, 16 U.C. DAVIS. L. REV. 65, 80-83 (1982).

<sup>130</sup> See *infra* notes 143-48 & 187-88 and accompanying text.

<sup>131</sup> This type of discharge assumes that the contravened statute does not preempt the action for tortious discharge. See *Portillo v. G.T. Price Prods.*, 131 Cal. App. 3d 285, 182 Cal. Rptr. 291 (1982) (holding that Labor Code section barring employer retaliation for employee's filing of workers' compensation claim provided exclusive remedy for its violation and preempted action for tortious discharge).

For an example of direct statutory violation without preemption, see *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982). In this case, worker

employee's exercise of rights protected by a statute,<sup>132</sup> or discharge for opposing the employer's otherwise unrelated violations of statutes.<sup>133</sup> Currently, the first of these actions is most likely to be successful against public employers.<sup>134</sup> The other two types of tortious discharge may be actionable against public employers, depending on the applicability of governmental tort immunity to the action.<sup>135</sup>

### 1. Tortious Discharge in the Public Sector

To date, no California appellate court has upheld a public employee's tortious discharge action.<sup>136</sup> This fact is surprising for two reasons. First, although courts and commentators often analyze the action as a powerful exception to the at will employment presumption,<sup>137</sup> tortious discharge actually applies to every possible employment relation-

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safety statutes did not preempt tortious discharge actions because the statutes established no comprehensive administrative remedies for relief. Rather, the statutes provided for enforcement of a pre-existing common law right. Therefore, the statutes were "cumulative," and enforcement could come in the form of private actions, such as tortious discharge. *Id.* at 301-04, 188 Cal. Rptr. at 166-68.

<sup>132</sup> See, e.g., CAL. LAB. CODE §§ 1101-1105 (Deering 1976 & Supp. 1989) (stating that employers may not interfere with certain employee political rights).

<sup>133</sup> For an example of such a case, see *Hejmadi v. AMFAC, Inc.*, 202 Cal. App. 3d 525, 539-40, 249 Cal. Rptr. 5, 12 (1988) (holding that employee fired after complaining to employer that company shoplifting policy violated Penal Code had action for tortious discharge).

*Hejmadi* is distinguishable from another recent tortious discharge case, *Read v. City of Lynwood*, 173 Cal. App. 3d 437, 219 Cal. Rptr. 26 (1985). In *Read*, the discharged employee also complained to the employer about illegal practices just before the discharge. *Id.* at 444-45, 219 Cal. Rptr. at 29-30. The *Read* employee made only "contentions" without factual support. *Id.* In *Hejmadi*, the plaintiff successfully pled facts sufficient to support a conclusion that the employer's policy and practice violated a statute. *Hejmadi*, 202 Cal. App. 3d at 540, 249 Cal. Rptr. at 12.

<sup>134</sup> See *infra* notes 143-69 and accompanying text.

<sup>135</sup> See *infra* notes 170-90 and accompanying text.

<sup>136</sup> See, e.g., *Read v. City of Lynwood*, 173 Cal. App. 3d 437, 219 Cal. Rptr. 26 (1985). Plaintiff heard of the city manager's alleged involvement with bribery and improper use of city resources. She then reported this information to the mayor. *Id.* at 440-41, 219 Cal. Rptr. at 27. She claimed that her later discharge came in retaliation for her report and premised her tortious discharge action on California's public policy against bribery and corruption. *Id.* "Obviously, California has a strong interest in guarding against such activity." *Id.* at 443, 219 Cal. Rptr. at 29. Plaintiff's list of Government Code and Penal Code statutes supporting that policy, however, had no real connection to her allegation of tortious discharge. *Id.* at 444-45, 219 Cal. Rptr. at 29-30. Thus, the court upheld dismissal of her tortious discharge cause of action. *Id.*

<sup>137</sup> See, e.g., J. KAUFF & M. MCCLAIN, *supra* note 111, at 88.

ship.<sup>138</sup> Thus, this pure tort action should transcend the problems that public employees face when bringing contract-based actions.<sup>139</sup> Second, public sector discharges often involve questions of important public policy that should be sufficient to support the action. After all, the efficiency, the quality, and the costs of government operation always affect the public good.<sup>140</sup>

Why then are there no successful public sector tortious discharge actions reported in California? The main reason may be that governmental tort immunity<sup>141</sup> and quasi-judicial administrative remedies dispose of most cases before trial.<sup>142</sup>

## 2. The Problem of Sovereign Immunity

### a. *Direct Statutory Provision for Liability*

The general principle of California governmental immunity is that “public entities are not liable in tort unless ‘otherwise provided by statute.’”<sup>143</sup> This principle does not mean that a statute must expressly apply to public entities.<sup>144</sup> On the contrary, an action is “provided by statute” for purposes of government liability if it “defines the tort in

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<sup>138</sup> *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 667 n.7, 765 P.2d 373, 377-78 n.7, 254 Cal. Rptr. 211, 215-16 n.7 (1988) (stating that nature of employment relationship is irrelevant for tortious discharge actions); *Koehrer v. Superior Court*, 181 Cal. App. 3d 1155, 1165, 226 Cal. Rptr. 820, 825 (1986) (stating that tortious discharge “reflects a duty imposed by law upon all employers”); *see also* Smullin & Laliberte, *supra* note 54, at 101 (stating that for tortious discharge actions, “it does not matter whether the employment relationship is at-will or on some other basis”); Note, *supra* note 111, at 195 (stating that clear employment handbook disclaimers warning employees of their at will status may save employers from contract-based liability, but not from tortious discharge liability).

<sup>139</sup> *See supra* notes 70 & 83 and accompanying text.

<sup>140</sup> *See* Caples & Hanko, *supra* note 7, at 40 (arguing that “although the public’s, as opposed to the individual worker’s, interest in the employment decision is at best debatable when addressing private sector labor relations, quite the opposite is true in the public sector. There the public has an acute interest . . .”).

<sup>141</sup> CAL. GOV’T CODE §§ 810-996.6 (Deering 1982 & Supp. 1989) [hereafter, collectively, Tort Claims Act]. For a detailed discussion of government tort immunity, *see infra* notes 143-90 and accompanying text.

<sup>142</sup> *See* H. PERRITT, *supra* note 41, § 6.19; *see also infra* notes 191-202 and accompanying text.

<sup>143</sup> A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE 70 (1980) (quoting CAL. GOV’T CODE § 815(a) (Deering 1982)).

<sup>144</sup> *See* Lopez v. Southern Cal. Rapid Transit Dist., 40 Cal. 3d 780, 785 n.2, 710 P.2d 907, 909 n.2, 221 Cal. Rptr. 840, 842 n.2 (1985).

general terms.”<sup>146</sup> Consequently, a statute merely embodying public policy<sup>146</sup> sufficient to support a tortious discharge action against a private employer will not support a tortious discharge action against a public employer.<sup>147</sup> Conversely, a statute actually creating a tortious discharge action *will* support an action against a public employer.<sup>148</sup>

### (1) Specific Statutes

Some California statutes<sup>149</sup> create tortious discharge actions by prohibiting employers from discharging employees in retaliation for activity that the public has an important interest in protecting.<sup>150</sup> Unless

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<sup>146</sup> *Id.* (quoting *Levine v. City of Los Angeles*, 68 Cal. App. 3d 481, 487, 137 Cal. Rptr. 512, 515 (1977)).

<sup>146</sup> *See, e.g.*, *Hejmadi v. AMFAC, Inc.*, 202 Cal. App. 3d 525, 539-40, 249 Cal. Rptr. 5, 12 (1988) (holding that Penal Code statute otherwise unrelated to employment relationship provided basis for tortious discharge action because employer discharged employee after he complained about violations of statute).

<sup>147</sup> Note the essential difference between the statutory basis of a tortious discharge action and the statutory basis required to have any tort action against a public entity under the Tort Claims Act.

For purposes of tortious discharge, statutes enunciate public policy — a matter of substance. Thus, an employee in the Thailand office of a California corporation who refuses to break Thai law and gets fired for it may have a common law tortious discharge action in California based on public policy enunciated in Thai law. *Crossen v. Foremost-McKesson, Inc.*, 537 F. Supp. 1076, 1078-79 (N.D. Cal. 1982).

For purposes of the Tort Claims Act, however, statutes create causes of action — a matter of procedure. Imagine the plaintiff in *Crossen* as a California public employee visiting Thailand on government business. When the employee refuses to break Thai law and gets fired for it, Thai law would not, by itself, impose California liability on the California government employer. The same substantive wrong has occurred, but the public employee has no means of seeking relief, unless some independent statute governing California employers prohibits the discharge. Note also that a statute governing California employers generally would govern public and private employers. *See supra* text accompanying notes 143-45.

<sup>148</sup> For examples of such “created” tortious discharge actions, see *infra* notes 149-67 and accompanying text.

<sup>149</sup> The statutes discussed *infra* notes 150-67 and accompanying text, “create” tortious discharge actions only in a superficial sense. Technically, the private right of tortious discharge action exists in California common law. These specific statutes merely make it clear that the particular fundamental public policies that they embody are sufficient to support a tortious discharge action. *See, e.g.*, *Hentzel v. Singer*, 138 Cal. App. 3d 290, 303, 188 Cal. Rptr. 159, 167-68 (1982). In holding that the plaintiff could bring a tortious discharge action despite the availability of administrative remedies, the court stated: “[Plaintiff’s] complaint does not depend upon a private right of action implied by” the statute at issue. *Id.*

<sup>150</sup> *See CAL. LAB. CODE* § 1101 (Deering 1976) (prohibiting discharge of employee for political activities or beliefs).

such a statute imposes an exclusive remedy for its violation,<sup>151</sup> an employee fired for the prohibited reason can rely on any avenue of relief available, including a tortious discharge action.<sup>152</sup>

Most California statutes that prohibit employee discharge target specific instances of retaliatory discharge.<sup>153</sup> For example, California employers cannot discharge employees because their wages are garnished;<sup>154</sup> because they have arrest records but no convictions;<sup>155</sup> because they work in health care facilities, but refuse to participate in abortions;<sup>156</sup> or because they complain, file suit, or otherwise exercise rights under the California Occupational Safety and Health Act (OSHA).<sup>157</sup> These statutes address important, but narrowly focused, discharge situations. California statutes somewhat broader in scope and effect are those that prohibit retaliatory discharge of whistleblowing employees.<sup>158</sup>

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<sup>151</sup> Imposition of an exclusive remedy may occur in at least three ways. First, the statute may create a new right, not previously known at common law *and* provide a remedy. *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, 301, 188 Cal. Rptr. 159, 166 (1982). In that instance, the provided remedy would be exclusive. *Id.*

Second, the statute may codify a well established common law right and create a remedy, but not impose its remedy as exclusive. *Id.* Then, "the statutory remedy is usually regarded as merely cumulative, and the older remedy may be pursued at the plaintiff's election." *Id.*

Third, the statute may codify an old common law right, but explicitly create an exclusive remedy. *See, e.g.*, CAL. LAB. CODE § 230 (Deering Supp. 1989) (prohibiting discharge for missing work because of jury or witness duty, but imposing reinstatement and backpay as remedy).

<sup>152</sup> California courts uniformly recognize the propriety of suing for tortious discharge when the discharge occurs for a statutorily prohibited reason and no other means of relief preempt the action. *See infra* note 161. Also, note that even if a statute does not specifically prohibit discharge of an employee, it may create an action for tortious discharge if it clearly embodies an existing, important public policy. *See supra* notes 122-28 & 133 and accompanying text.

<sup>153</sup> In contrast, a broad retaliatory discharge statute simply would codify the current common law of tortious discharge. Specifically, such a statute would prohibit "discharge in contravention of public policy." *See Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 665, 765 P.2d 373, 376, 254 Cal. Rptr. 211, 214 (1988). As of this writing, Montana is the only state that has enacted such a broad statute. *See MONT. CODE ANN.* § 39-2-913 (1987). This Comment proposes a broad tortious discharge statute for California, *see infra* notes 223-38 and accompanying text.

<sup>154</sup> *See* CAL. LAB. CODE § 2929 (Deering 1976).

<sup>155</sup> *See id.* § 432.7 (Deering Supp. 1989).

<sup>156</sup> *See* CAL. HEALTH & SAFETY CODE § 25955 (Deering 1988).

<sup>157</sup> *See* CAL. LAB. CODE §§ 6310, 6312 (Deering Supp. 1989).

<sup>158</sup> *See infra* notes 159-69 and accompanying text.

## (2) The General Whistleblowing Statute

A whistleblower is an organization member who discloses, to the public or to internal agencies, "that organization's corrupt, illegal, fraudulent or harmful activity."<sup>159</sup> Whistleblowing employees often lose their jobs because of their disclosures.<sup>160</sup> Frequently, they respond by

<sup>159</sup> R. NADER, P. PETKAS & K. BLACKWELL, *WHISTLEBLOWING* 1 (1972).

<sup>160</sup> Just how much job protection the law should offer whistleblowing employees has generated considerable debate. In general, duty of loyalty to the employer, balanced against duty of conscience, is the key to analyzing whistleblowing cases. See Malin, *supra* note 125, at 277 & n.3, 278; Comment, *Government Employee Disclosures of Agency Wrongdoing: Protecting the Right to Blow the Whistle*, 42 U. CHI. L. REV. 530, 530 (1975). At a minimum, an employee should have an objectively reasonable belief in the accuracy of allegations before disclosure. Malin, *supra* note 125, at 314.

Whether the employee must disclose *first* to the employer before going public is a tougher issue. Compare *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974) (holding that whistleblowing employee who bypassed immediate supervisors had no cause of action for retaliation because employer had right to preserve normal operating procedures) with *Garcia v. Rockwell Int'l Corp.*, 187 Cal. App. 3d 1556, 232 Cal. Rptr. 490 (1986) (holding that even without statutory foundation, whistleblowing employee who disclosed first to federal agency had cause of action against retaliating employer).

Some commentators argue that duty of loyalty requires an initial, internal disclosure. They argue that a requisite initial, internal report can avoid undue harm when would-be whistleblowers have inaccurate information, retaliatory motives, or plain bad judgment. See, e.g., Comment, *supra*, at 530 (arguing that offering whistleblowers too much legal protection "would deny government agencies the modicum of confidentiality that is essential for their efficient operation and might also prevent them from removing employees whose disclosures cause unwarranted harm or demonstrate lack of fitness for their positions").

On the other hand, would-be whistleblowers may distrust employers who already seem guilty of some wrongdoing. Moreover, they often justifiably fear a general coverup or a personal reprisal if they report internally. See, e.g., D. EWING, "DO IT MY WAY OR YOU'RE FIRED!": EMPLOYEE RIGHTS AND THE CHANGING ROLE OF MANAGEMENT PREROGATIVES 176 (1983). Ewing advises employer supervisors to take full advantage of their power when confronted by a whistleblowing subordinate:

Remember that in general you, as management's representative, have the advantage in these discussions. If it's the Greenwald case [potentially polluted municipal water and a concerned city employee threatening to disclose], you're the appointed official of the water department who is known by the mayor and administration, whereas Greenwald is an unknown, recently hired. . . . In other words, it is easier for you to avoid throwing in the towel than it is for the dissident to resist a reasonable offer or proposal. Your reasons for refusing to yield can be communicated to many more people — and faster — than the dissident's can.

*Id.*

suing for tortious discharge.<sup>161</sup> In California, all employees<sup>162</sup> receive general whistleblowing protection from California Labor Code Section 1102.5.<sup>163</sup>

Section 1102.5 prohibits employers from using rules, regulations, or policies to prevent whistleblowing. The statute also prevents an employer from retaliating against an employee who blows the whistle.<sup>164</sup> The whistleblowing employee, however, must disclose the information "to a government or law enforcement agency."<sup>165</sup> The employee also must have reasonable cause to believe that the disclosure reveals a "violation of state or federal statute, or violation or noncompliance with a state or federal regulation."<sup>166</sup> An employee who complies with this law and then gets fired for disclosing may pursue a tortious discharge action.<sup>167</sup>

Public employees also have some special, though narrowly drawn, whistleblowing protections.<sup>168</sup> Public employees also may receive the

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<sup>161</sup> See L. LARSON, *supra* note 43, § 5.03, at 5-7 (stating that whistleblowing actions are on cutting edge of tortious discharge law); Rongine, *supra* note 113, at 293 (stating that "most promising modern development for protection of the whistleblower" is tortious discharge action). See generally W. HOLLOWAY & M. LEECH, *supra* note 63, at 290-96 (providing national overview of whistleblowing protection under common law and statutes).

<sup>162</sup> Because Labor Code § 1102.5 refers to all employers in California, it applies to government employers for purposes of sovereign immunity. See *supra* notes 143-45 and accompanying text.

<sup>163</sup> CAL. LAB. CODE § 1102.5 (Deering Supp. 1989).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> See *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 670 & n.10, 765 P.2d 373, 379 & n.10, 254 Cal. Rptr. 211, 217 & n.10 (1988) (contrasting insufficiency of plaintiff's weak, attenuated statutory basis for tortious discharge action with strong, direct basis for action in California Labor Code § 1102.5); *Ficalora v. Lockheed Corp.*, 193 Cal. App. 3d 489, 492-93, 238 Cal. Rptr. 360, 362 (1987) (stating that under California Labor Code § 1102.5, discharged employee "permitted to rely on the court-created remedy of a wrongful discharge suit" so long as no other statute preempts action). See generally *Hejmadi v. Amfac, Inc.*, 202 Cal. App. 3d 525, 539, 249 Cal. Rptr. 5, 12 (1987) (recognizing action for tortious discharge under California Labor Code § 1102.5).

<sup>168</sup> The California Government Code offers whistleblowing protection to state and local public employees. State employees receive special protection in CAL. GOV'T CODE §§ 10540-10548 (Deering 1987 & Supp. 1989). A second article protects local employees. *Id.* §§ 53296-53299 (Deering 1987).

Both articles impose strict procedural requirements and cautionary limits on would-be whistleblowers. See *id.* §§ 10543, 10548 (Deering Supp. 1989) (proscribing retaliatory action against state employees for disclosing, but also limiting employee civil ac-

more accessible protection of section 1102.5, including the tortious discharge action it creates.<sup>169</sup>

*b. Respondeat Superior*

Derivative liability, or *respondeat superior*, provides another means of bringing a suit in tort against a public entity.<sup>170</sup> Two serious problems, however, confront a tortious discharge action based on this theory.

The initial question is whether an individual defendant, such as a supervisor, can ever be liable for tortious discharge. In general, public officials and public employees are liable in tort to the same extent as private individuals "except as otherwise provided by statute."<sup>171</sup> One commentator suggests that tortious discharge may be an intentional tort under some circumstances.<sup>172</sup> The discharging supervisor certainly in-

tions to cases involving disclosure to particular agencies); *id.* § 53297 (Deering 1987) (requiring disclosure by formal complaint filed with employer, in accordance with local administrative procedures); *id.* § 53298 (providing that complaining employees who disclose false, legally secret or confidential information have no protection, and that complaining employees also have no protection if they are subjects of ongoing discipline when disclosure occurs).

Both articles also provide for civil actions *and* punitive damages if a public employee whistleblower gets discharged in retaliation for disclosing. *See id.* §§ 10548, 53298.5 (Deering 1987 & Supp. 1989). These statutes create civil actions only against supervisory employees who personally retaliate against whistleblowers. *See id.* Thus, they do not directly create bases for tortious discharge actions. Section 10543, however, creates a civil action for any person whom a government official retaliates against for reporting to a particular state agency. Thus, § 10543 creates a narrowly drawn tortious discharge action for state employees. *Id.* § 10543 (Deering Supp. 1989).

<sup>169</sup> *See supra* notes 143-45 and accompanying text (discussing statutory-basis requirement for government tort liability).

This multiplicity of public sector whistleblowing protections is defensible because public employees may have a heightened duty to disclose employer misconduct. *See, e.g.,* W. HOLLOWAY & J. LEECH, *supra* note 63, at 260 (stating that public employees may have special duty to act as whistleblowers because theoretically accountable to public).

<sup>170</sup> CAL. GOV'T CODE § 815.2 (Deering 1982) (making public employers liable in tort to same extent as their employees, *if no governmental immunity applies*).

<sup>171</sup> *See id.* § 820(a) (stating that public officers and employees generally liable for their own torts); *see also* A. VAN ALSTYNE, *supra* note 176, at 74-75. *But see infra* notes 180-88 and accompanying text (discussing doctrine of discretionary immunity which protects individual public employees against some tort liability).

<sup>172</sup> H. PERRITT, *supra* note 41, § 5.6, at 173; *see also* Leonard, *supra* note 1, at 662 (calling action a "tort" may require plaintiff to show employer's intention to inflict injury or at least negligent or reckless infliction of injury).

tends the discharge to cause the employee's unemployment.<sup>173</sup> Moreover, if the supervisor intentionally violates a fundamental precept of public policy sufficient to satisfy the tortious discharge standard,<sup>174</sup> the supervisor's legal culpability is clear.<sup>175</sup> Because *respondeat superior* applies to intentional torts, the employer should be derivatively liable.<sup>176</sup> Yet, there are no cases either holding individuals liable for tortious discharge or dismissing individual defendants as inappropriate parties.<sup>177</sup> Most cases speak of the "employer" acting.<sup>178</sup> The tort simply may not be defined sufficiently at this time for anyone to say conclusively whether individual actors may commit the tort.<sup>179</sup>

Assuming the validity of the intentional tort theory, however, *respondeat superior* under the Tort Claims Act is still subject to discretionary immunity.<sup>180</sup> This statutory doctrine provides that a public employee is immune from liability for any results "of the exercise of [vested] discre-

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<sup>173</sup> See H. PERRITT, *supra* note 41, § 5.6, at 173.

<sup>174</sup> The discharge must cause a "double wrong:" harm to the employee and to the public. See *supra* notes 112-14 and accompanying text.

<sup>175</sup> See H. PERRITT, *supra* note 41, § 5.6, at 173; see also *infra* note 176 (providing hypothetical example).

<sup>176</sup> See W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* 685 (7th ed. 1982). The authors state:

*Respondeat superior* is not limited to negligent torts. An employer may be held liable for the intentional torts of his servant when they are reasonably connected with the employment and so within its "scope." Thus the master may be liable for assault and battery on the part of a servant trying to collect a debt for him, because the servant is still acting in furtherance of his master's business.

*Id.*

<sup>177</sup> See Seligman, Bryant & Kramer, *Bringing the Action*, in *WRONGFUL EMPLOYMENT TERMINATION PRACTICE* §§ 4.67-69 (1987). The authors advise plaintiffs to avoid suing individual defendants, unless the individual "engaged in particularly outrageous conduct." *Id.* at § 4.69. The authors also describe methods for suing individual defendants who took "part in the decision to terminate plaintiff." *Id.* at § 4.68.

Perhaps because the overwhelming majority of tortious discharge actions rise in the private sector without the impediment of sovereign immunity, most plaintiffs have no reason to sue individuals. See *supra* notes 57 & 136 and accompanying text.

<sup>178</sup> See, e.g., *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 665, 765 P.2d 373, 376, 254 Cal. Rptr. 211, 214 (1988).

<sup>179</sup> See Leonard, *supra* note 1, at 662. Additionally, if tortious discharge is a "new tort," some courts suggest that the legislature should create its precise nature. *Id.*; see also *supra* note 113 (describing tortious discharge as "sui generis").

<sup>180</sup> CAL. GOV'T CODE § 820.2 (Deering 1982). "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." *Id.*

tion.”<sup>181</sup> Moreover, if the employee supervisor is immune for an act or omission, the public employer is also immune.<sup>182</sup>

Whether a public employee’s act is “discretionary” under the Tort Claims Act is always a matter of fine interpretation. The leading California Supreme Court case on the question holds that only “quasi-legislative policy-making” decisions are discretionary.<sup>183</sup> This definition would include “basic policy decisions” that supervisors make at high “planning” levels, but not more mundane decisions that they make at “operational” levels.<sup>184</sup> Arguably, a supervisor deliberating over whether to discharge a subordinate employee might exercise sufficient discretion.<sup>185</sup> Within limits, the supervisor might make or adapt general company or organizational policy pertinent to the personnel problem.<sup>186</sup>

A decision to discharge an employee, however, might often be essentially “operational,” and thus not protected by immunity.<sup>187</sup> Moreover, when the decision to discharge an employee violates a substantial precept of public policy, a supervisor would seem to be acting beyond any discretionary powers that the employer could possibly grant.<sup>188</sup> In other

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.* § 815.2. “Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.” *Id.* § 815.2(b).

<sup>183</sup> *Johnson v. State*, 69 Cal. 2d 782, 794, 447 P.2d 352, 360, 73 Cal. Rptr. 240, 248 (1968).

<sup>184</sup> *See id.*; *see also* *Lopez v. Southern Cal. Rapid Transit Dist.*, 40 Cal. 3d 780, 793, 710 P.2d 907, 915, 221 Cal. Rptr. 840, 848 (1985) (citing *Johnson*’s “basic policy decisions” test).

<sup>185</sup> *See* *Kemmerer v. County of Fresno*, 200 Cal. App. 3d 1426, 1437-38, 246 Cal. Rptr. 609, 616-17 (1988) (holding that decision to initiate disciplinary proceedings involves exercise of analysis and judgment as to what is just and proper under the circumstances and is not purely a ministerial act); *cf.* *Dlugosz v. Fred S. James & Co.*, 212 N.J. Super. 175, 183, 514 A.2d 538, 542 (1986) (finding that supervisor’s good faith interpretation of collective bargaining agreement formed basis of discharge decision and that interpretive act was discretionary and thus immune).

<sup>186</sup> *See* cases cited *supra* note 185.

<sup>187</sup> Some supervisors might have such clear guidelines in regard to discharge of employees that the act involves no discretion. Such discharges would be “ministerial” rather than “discretionary.” Such a supervisor would merely implement basic policy, not make it. Thus, discretionary immunity would not apply. *Johnson*, 69 Cal. 2d at 797, 447 P.2d at 362, 73 Cal. Rptr. at 250.

<sup>188</sup> *See* *Ramos v. County of Madera*, 4 Cal. 3d 685, 695, 484 P.2d 93, 100, 94 Cal. Rptr. 421, 428 (1971) (holding that county official’s illegal activity beyond scope of vested discretion and to characterize it as mere abuse of discretion “would permit brutal and wholly unauthorized coercion inflicted under color of law”); *Read v. City of Lynwood*, 173 Cal. App. 3d 437, 442, 219 Cal. Rptr. 26, 28 (1985) (holding that city council acted “outside the limits imposed by the statute granting it discretionary au-

words, no public employee can have vested power to make policy contrary to firmly established public policy. Consequently, assuming that *respondeat superior* is available for tortious discharge actions,<sup>189</sup> governmental tort immunity appears to permit such action on that theory.<sup>190</sup>

#### D. Exhaustion of Administrative Remedies

California state civil service laws provide extensive due process administrative hearing and review procedures for terminated employees.<sup>191</sup> The standard remedy for wrongful discharge at the administrative level is reinstatement and backpay.<sup>192</sup> Local civil service systems may include similar administrative procedures and remedies.<sup>193</sup> Also, some public entities such as small cities, counties, and hospital districts, employ non-civil-service workers. By virtue of their permanent status, these employees may deserve due process protection.<sup>194</sup> In such instances, these small public entities may afford administrative hearings and the standard remedies of reinstatement and backpay.<sup>195</sup>

This widespread availability of administrative adjudication for public sector, wrongful discharge raises several problems. First, public employees with access to administrative remedies probably must exhaust those remedies before filing suit in state court for wrongful discharge.<sup>196</sup> Second, an employee defeated at the administrative level may

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thority" and thus vulnerable to action in tort); *see also supra* note 176 (providing debt-collector hypothetical).

<sup>189</sup> *See supra* notes 170-79 and accompanying text.

<sup>190</sup> The Tort Claims Act itself provides direct statutory authority for *respondeat superior* against government employers. CAL. GOV'T CODE § 815(a) (Deering 1982).

<sup>191</sup> *See, e.g.*, CAL. GOV'T CODE §§ 19570-19589 (Deering 1982 & Supp. 1989).

<sup>192</sup> *See id.* §§ 19583, 19584 (Deering Supp. 1989).

<sup>193</sup> *See, e.g., id.* §§ 31100-31113 (Deering 1974 & Supp. 1989) (allowing county ordinances to create county civil service systems and providing county boards of supervisors with power to appoint civil service commissions to administer local systems).

<sup>194</sup> *See, e.g.*, *International Bhd. of Elec. Workers v. City of Gridley*, 34 Cal. 3d 191, 207-09, 666 P.2d 960, 970-71, 193 Cal. Rptr. 518, 528-29 (1983).

<sup>195</sup> *Cf. id.* at 209, 666 P.2d at 971, 193 Cal. Rptr. at 529 (holding that city should give permanent workers due process hearings; however, in this case reinstatement was not appropriate).

The State Personnel Board is in charge of administering state level civil service hearings in California. The Board may provide such hearings for local agency employees when local governments in California do not. *See* CAL. GOV'T CODE § 19803 (Deering 1982).

<sup>196</sup> *See* B. SCHWARTZ, ADMINISTRATIVE LAW § 8.23 (2d ed. 1984); Bezemek,

have a choice between appealing that decision by mandamus<sup>197</sup> to superior court or filing a new action for wrongful discharge in the same court.<sup>198</sup> A question remains whether an employee who loses after choosing mandamus can then file suit in tort or contract for the same employment discharge.<sup>199</sup>

A final decision on the mandamus claim probably acts as *res judicata*

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*Wrongful Discharge Theories Apply to Public Employees*, CAL. PUB. EMPLOYEE REL., Dec. 1987, at 23.

<sup>197</sup> CAL. CIV. PROC. CODE § 1094.5 (Deering Supp. 1989) (providing mandamus review of administrative decisions to superior court); *see also* B. SCHWARTZ, *supra* note 208, § 9.13, at 549 (stating that mandamus has become “the general utility remedy in California administrative law . . . to secure nonstatutory review of virtually all reviewable agency acts”).

<sup>198</sup> Compare Bezemek, *supra* note 208 with Goldstein & Kennedy, *Should “Wrongful Discharge” Be Applied in the Public Sector?*, CAL. PUB. EMPLOYEE REL., Sept. 1987, at 2, 10.

Bezemek argues that mandamus “is generally available only when a civil suit is unsatisfactory.” The author further asserts that if a plaintiff can sue for tortious discharge after exhausting administrative remedies, obviously a satisfactory civil suit awaits. Therefore, mandamus proceedings are improper. Bezemek, *supra* note 196, at 24 & n.9 (citing *Westlake Comm. Hosp. v. Superior Court*, 17 Cal. 3d 465, 551 P.2d 410, 131 Cal. Rptr. 90 (1976)). This argument comports with one version of the *Westlake* doctrine: mandamus is required after administrative exhaustion only if the hearing itself, and not the decision issuing from the hearing, somehow wronged the employee petitioner. *Id.*

Goldstein and Kennedy, on the other hand, argue that an employee must pursue available administrative remedies through mandamus proceedings *and* succeed before instituting a suit in tort. Goldstein & Kennedy, *supra*, at 10 (citing *City of Fresno v. Superior Court*, 188 Cal. App. 3d 1484, 234 Cal. Rptr. 136 (1987)); *see City of Fresno*, 188 Cal. App. 3d at 1493, 234 Cal. Rptr. at 141 (stating that employee must successfully challenge quasi-judicial administrative decision by mandamus “before filing a tort action based on the same alleged wrong”).

Note that the hospital district in *Westlake* was not a public but a *private* entity. *See City of Fresno*, 188 Cal. App. 3d at 1490, 234 Cal. Rptr. at 139. Moreover, the case arose five years before wrongful discharge actions became common.

<sup>199</sup> Compare Bezemek, *supra* note 196 with Barnes, *Clarifying the “Westlake Doctrine”*, CAL. PUB. EMPLOYEE REL., Dec. 1987, at 27. Bezemek suggests that under *Westlake*, even if an employee must also pursue mandamus before suing in tort, the outcome of the mandamus proceeding will be irrelevant. Additionally, the statute of limitations will not bar the subsequent tort action, no matter how long it takes to complete all proceedings. *See Bezemek*, *supra* note 196, at 24-25.

In contrast, Barnes suggests that under *Westlake*, the plaintiff must prevail on mandamus or lose the right to bring further action in tort. Barnes, *supra*, at 27.

Two unresolved questions remain. First, does an employee have a choice of mandamus or tortious discharge action after exhausting administrative remedies? Second, if the employee pursues mandamus, does failure in that proceeding act as *res judicata* to further action for tortious discharge? *See infra* notes 200-02 and accompanying text.

to the wrongful discharge claim.<sup>200</sup> Similarly, after exhausting administrative procedures, *local* public employees should have a choice between mandamus and wrongful discharge actions.<sup>201</sup> While it also may seem sensible to treat state civil service employees similarly, that probably is not possible under current California law.<sup>202</sup> Wrongfully discharged, state civil service employees apparently have recourse only to statutorily prescribed actions and remedies.

### III. PROPOSAL: AN ARGUMENT IN FAVOR OF WRONGFUL DISCHARGE ACTIONS FOR PUBLIC EMPLOYEES

Farsighted commentators have argued persuasively in favor of entirely new systems to deal with wrongful discharge.<sup>203</sup> These new systems incorporate a presumptive just cause provision in place of the at will rule, along with arbitration or due process hearings, and alternative remedies such as attorneys' fees, front pay,<sup>204</sup> and statutory monetary awards.<sup>205</sup> Without doubting that the entire system of employment law would benefit from such enlightened redesign, this Proposal sketches out more immediate repairs.

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<sup>200</sup> See *Takahashi v. Board of Educ.*, 202 Cal. App. 3d 1464, 1481, 249 Cal. Rptr. 578, 589 (1988) (holding that unsuccessful exhaustion of available administrative remedies followed by unsuccessful mandamus appeal constitutes *res judicata* to subsequent tort claim). Commentators disagree extensively on this point. See, e.g., *supra* notes 196-99.

<sup>201</sup> By a writ of mandamus proceeding, a California superior court can review a local administrative decision with only slight deference to the original administrative findings of fact if the decision affected a fundamental vested right, such as a job. See *Strumsky v. San Diego Employees Retirement Ass'n*, 11 Cal. 3d 28, 44-45, 520 P. 2d 29, 40, 112 Cal. Rptr. 805, 816 (1974); M. O'GARA, CALIFORNIA ADMINISTRATIVE MANDAMUS § 5.65, at 68, § 5.70A, at 75, § 5.74, at 85-86 (Supp. 1988). Thus, the difference between such review and a trial is not drastic.

<sup>202</sup> As an agency created by the state constitution to handle state civil service claims, the State Personnel Board has greater adjudicatory powers than local administrative agencies. The Board's findings of fact receive extreme deference when on review by mandamus to superior court. See M. O'GARA, *supra* note 201, at 68. The difference between this sort of appeal and a trial would be drastic.

<sup>203</sup> See, e.g., Gould, *Job as Property*, *supra* note 17, at 908-14; West, *supra* note 3, at 56-64.

<sup>204</sup> Front pay is wages for a specified number of years that a discharged employee would have earned but for the discharge. See Saperstein & Maulitz, *Remedies*, in *WRONGFUL EMPLOYMENT TERMINATION PRACTICE* § 3.26 (1987).

<sup>205</sup> See, e.g., Gould, *Job as Property*, *supra* note 17, at 908-14; West, *supra* note 3, 56-64.

### A. A Policy Rationale

The rise in public employment job security was one cause of wrongful termination litigation two decades later in the private sector.<sup>206</sup> Today, paradoxically, many private employees have greater job protection than the public employees whose own job protection helped to inspire the change in the private sector.<sup>207</sup> Once in the forefront of employment law development, the public sector now lags behind.<sup>208</sup> Yet, the basic rationale for withholding wrongful discharge actions from public employees is that these employees have their own special protections.<sup>209</sup> This reasoning cannot withstand close scrutiny.

The true reason for withholding new protections from public employees is the unspoken one. Wrongful discharge actions can result in very large damage awards.<sup>210</sup> Government is already expensive enough to run. On the other hand, the government probably is a more sympathetic defendant than a corporate employer. One reason for large damage awards in private sector, wrongful discharge cases is that jurors tend to be hostile to corporate employers and to assume that these employers have deep pockets.<sup>211</sup> As taxpayers, jurors may be less extravagant when reaching into the government's pocket.<sup>212</sup> Moreover, the

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<sup>206</sup> See Leonard, *supra* note 1, at 635. Leonard asserts that several factors, including consciousness of "the job security afforded by civil service laws and case law expanding constitutional job protections in the public sector," altered the outlook of the private sector work force. *Id.* at 634. This new outlook led to "lawsuits brought by employees . . . protesting their terminations as being unfair or unlawful." *Id.* at 635; see also Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 319-22, 171 Cal. Rptr. 917, 920-22 (1981). In this seminal California case, the court concluded an erudite discussion of modern employment law evolution with a telling comparison between public and private employees. *Id.* Many public employees, the court stated, had civil service and due process job security protections; some private employees had recently developed analogous common law protections through wrongful discharge suits. *Id.*

<sup>207</sup> See Leonard, *supra* note 1, at 634.

<sup>208</sup> Even in the area of fundamental constitutional protection, public employees no longer necessarily enjoy special rights. See, e.g., *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983). This court used the principle of free speech protection, as public employees have enjoyed it, as the public policy basis for a private sector, tortious discharge action. *Id.* at 899-900. In effect, the court applied first amendment constraints to a private employer. *Id.*

<sup>209</sup> See, e.g., *Kemmerer v. County of Fresno*, 200 Cal. App. 3d 1426, 1433, 246 Cal. Rptr. 609, 613 (1988).

<sup>210</sup> Gould, *Arbitration*, *supra* note 3, at 405.

<sup>211</sup> *Id.* at 406.

<sup>212</sup> *But see Green v. City of Oceanside*, 194 Cal. App. 3d 212, 239 Cal. Rptr. 470 (1987) (suggesting that defendant city erred by waiving certain defenses and relying instead on jury for vindication).

government will not be liable for punitive damages.<sup>213</sup> Consequently, extending wrongful discharge actions to public employees poses less economic threat than a quick glance at the private sector experience would suggest.

### B. The Common Law

The explicit exception to sovereign immunity for actions based on contract indicates that the legislature intended governmental entities to honor valid agreements.<sup>214</sup> California courts should allow public employees to sue under either of the contract-based wrongful discharge theories when these employees hold public jobs by contract, whether express or implied.<sup>215</sup> Additionally, public employees should have a choice of remedies when they sue in private actions under contract theories of wrongful discharge:<sup>216</sup> (1) reinstatement and backpay,<sup>217</sup> or (2)

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<sup>213</sup> See CAL. GOV'T CODE § 818 (Deering 1982).

<sup>214</sup> See *id.* § 814 (Deering 1982).

<sup>215</sup> See *supra* notes 61-62 and accompanying text.

<sup>216</sup> This proposal attempts to combine the remedies presently available under due process (*i.e.*, reinstatement and backpay) with the remedies potentially available under breach of contract, wrongful discharge theories. See *supra* notes 47 & 90 and accompanying text.

Private actions for wrongful discharge are almost always preferable to due process hearings and remedies. See *supra* note 46 and accompanying text for a brief discussion of due process weaknesses. Yet due process actions offer reinstatement, a form of specific performance not commonly available outside of traditional labor law actions. See *infra* note 241 and accompanying text. Some wrongfully discharged public employees may prefer to seek reinstatement and backpay rather than prospective contract damages. Therefore, this Comment proposes that employees have the opportunity to pursue *either* remedy in a breach of implied contract or a bad faith discharge suit. Thus, if an employee wants the job back, she can seek that remedy in one action. Otherwise, she would have to litigate to establish her entitlement to the job and then argue her case for reinstatement at a due process hearing.

<sup>217</sup> See *infra* notes 239-42 and accompanying text (describing traditional labor law remedies of reinstatement and backpay and discussing arguments for and against reinstatement in wrongful discharge actions).

An employee who returns to a job after prevailing in breach of contract litigation may not face the problems that, perhaps, a returning whistleblower could expect. For example, a department might terminate employees for neutral, budget-related reasons. The public employer might rely on an at will statute in the decision to discharge employees. See *supra* notes 79-87 and accompanying text. The supervisor(s) making the decisions simply might not be aware that implied terms to discharge only for cause had modified the authority to discharge employees. *Cf. id.* This would amount to an administrative error. Resulting litigation would not necessarily carry the same amount of animosity as a tort action. The wronged employee might prefer to return to her permanent job rather than settle for contract damages and the prospect of a job search.

prospective contract damages.<sup>218</sup>

California courts also should allow public employees to bring common law suits for tortious discharge, as long as clear authority forms the basis of the public policy violated.<sup>219</sup> Discretionary immunity can protect a public employer from specious tortious discharge claims.<sup>220</sup> The requirement of administrative remedy exhaustion also will deflect the claims of public employees who have substantial due process protections.<sup>221</sup> Finally, governmental immunity from punitive damages can protect the public from exorbitant losses.<sup>222</sup>

### C. A Tortious Discharge Statute

The California Legislature could forestall a chaos of piecemeal decisional law and help to resolve other problems in the public and private sectors by enacting a comprehensive, statutory wrongful discharge scheme.<sup>223</sup> Thus far, however, California legislative efforts to enact wrongful discharge statutes have failed.<sup>224</sup> Because an employee's job security and an employer's right to run a business necessarily clash, debates over wrongful discharge law always involve volatile economic and political issues. Proposed bills generally begin with either pro-employee or pro-employer bias.<sup>225</sup> In California, legislative consensus on bills will be difficult to achieve, if not impossible.

One reasonable alternative to a comprehensive statutory wrongful discharge scheme is to enact only a tortious discharge statute. The legislature could allow contract-based actions for wrongful discharge to continue under common law.<sup>226</sup> The most obvious benefit to this approach

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<sup>218</sup> See *supra* note 90.

<sup>219</sup> See *supra* notes 105-33 and accompanying text.

<sup>220</sup> See *supra* notes 180-90 and accompanying text.

<sup>221</sup> See *supra* notes 191-202 and accompanying text.

<sup>222</sup> CAL. GOV'T CODE § 818 (Deering 1982).

<sup>223</sup> The first, and at this writing the only, state to enact a comprehensive wrongful discharge statutory scheme is Montana. Wrongful Discharge from Employment Act, ch. 641, §§ 1-9 (1987) (current version at MONT. CODE ANN. §§ 39-2-901 to 39-2-914 (1987)) [hereafter, collectively, the Montana Act].

<sup>224</sup> California legislators have proposed several comprehensive wrongful discharge schemes, but none have proceeded beyond committee hearings. See CAL. S.B. 427 (1987) (introduced Feb. 17, 1987, but Committee on the Judiciary hearings on bill cancelled at author's request one year later); see also CAL. S.B. 222 (1989) (introduced Jan. 19, 1989) [hereafter S.B. 222]. At this writing, S.B. 222 has suffered through two unpropitious hearings by the Senate Committee on the Judiciary.

<sup>225</sup> See, e.g., S.B. 222. This proposed bill would sharply curtail the availability of wrongful discharge actions in California. *Id.* § 2882.

<sup>226</sup> The breach of implied contract action requires examination of the particular cir-

is that it will not require abrogation of the at will employment presumption.<sup>227</sup>

The new tortious discharge statute should provide that *any* employer would be liable for its violation.<sup>228</sup> Thus, it would cover public employers.<sup>229</sup> Under this statute, government would not be subject to exactly the same liabilities as private employers.<sup>230</sup> Yet, employees in the private and public sector would enjoy reasonably commensurate protection under the law.

The tortious discharge statute should appear as follows, as an amendment to Division Three, Chapter Two, Article Four<sup>231</sup> of the California Labor Code:

§ 2929.9. DISCHARGE FROM EMPLOYMENT IN CONTRAVENTION OF PUBLIC POLICY: MEANING OF PUBLIC POLICY

(a) No employer shall discharge an employee:

(1) in a manner that violates public policy;<sup>232</sup>

cumstances of the employment relationship. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 680-81, 765 P.2d 373, 387-88, 254 Cal. Rptr. 211, 225-26 (1988). Likewise, bad faith discharge is determinable only for the particular employment relationship, as agreed to by the contracting parties. *Id.* at 683, 765 P.2d at 389, 254 Cal. Rptr. at 227 (stating that every contract imposes duty of good faith and fair dealing in its performance and enforcement). Thus, statutory definitions as to what constitutes breach of implied contract or bad faith breach of contract will always exclude some possible employment contract configurations — and some potential plaintiff employees.

Tortious discharge, on the other hand, is not as difficult to define because it does not depend on any particular employment circumstances. *See Koehrer v. Superior Court*, 181 Cal. App. 3d 1155, 1166, 226 Cal. Rptr. 820, 826 (1986). Thus, tortious discharge is more amenable to codification.

<sup>227</sup> *See Koehrer*, 181 Cal. App. 3d at 1166, 226 Cal. Rptr. at 826 (stating that tortious discharge cause of action applies whether employment is held by contract at will, for term, or otherwise).

<sup>228</sup> *Accord* the Montana Act. The Act provides a version of the tortious discharge action. The Act states that discharge is wrongful if “it was in retaliation for the employee’s refusal to violate public policy or for reporting a violation of public policy.” MONT. CODE ANN. § 39-2-904 (1987). The Act applies to anyone who “works for another for hire,” except independent contractors. *Id.* § 39-3-903. The Act does not apply, however, if an employee has an alternative “procedure or remedy for contesting the dispute.” *Id.* § 39-2-912. Thus, the Montana Act probably would not apply to public employees with due process hearing rights.

<sup>229</sup> For an argument that tortious discharge should be available to public employees, see *supra* note 140 and accompanying text.

<sup>230</sup> Even without express limitation of damages, CAL. GOV’T CODE § 818 (Deering 1982) would bar punitive damages against a public employer.

<sup>231</sup> The current title of this article is “Termination of Employment.” It contains, *inter alia*, § 2922 — the at will statute.

<sup>232</sup> This provision does not include bad faith discharge as part of the codified tort. Bad faith discharge occurs when the employer violates the covenant of good faith and

(2) in retaliation for the employee's refusal to violate public policy;<sup>233</sup> or

(3) for reporting any violation of public policy.<sup>234</sup>

(b) "Public policy" means a substantial policy protective of the public or the public good and established by constitutional provision, statute, administrative regulation, judicial decision or other like governing pronouncement.<sup>235</sup>

This proposed statute essentially codifies California tortious discharge law. If enacted, the statute would establish a uniform principle for the public policy basis required to bring a tortious discharge action. Additionally, since California public employers are liable in tort only if a statute provides for liability,<sup>236</sup> this statute would extend the tortious discharge action to many public employees.<sup>237</sup> Only state civil service employees might automatically fall outside its purview.<sup>238</sup>

#### D. Remedies Under Statutory Tortious Discharge

Under common law, no court would order specific performance of a personal service contract.<sup>239</sup> By denying specific performance, courts avoided forcing unwanted or distasteful personal associations.<sup>240</sup> Modern labor law has created an enormous exception to that traditional

fair dealing by interfering with the employee's benefit under the contract. *See* *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 683, 765 P.2d 373, 389, 254 Cal. Rptr. 211, 227 (1988). Only if such interference *also* violated a "substantial" public policy would that hypothetical employee have a cause of action under this proposed tortious discharge provision.

<sup>233</sup> *Accord* MONT. CODE ANN. § 39-2-904(1) (1987).

<sup>234</sup> *Accord id.*

<sup>235</sup> *Contra id.* § 39-2-903 (limiting public policy to one in effect at time of discharge, concerning public health, safety or welfare, and established by constitutional provision, statute, or administrative regulation).

The definition of public policy in this Comment's proposed § 2929.9 does not conflict with the current California common law definition. *See supra* notes 111-33 and accompanying text.

<sup>236</sup> CAL. GOV'T CODE § 815(a) (Deering 1982).

<sup>237</sup> *See supra* notes 143-45 and accompanying text (explaining that statute does not have to specify *public* employer liability, only *employer* liability).

<sup>238</sup> State civil service employees probably could not sue under the proposed statute because of the extensive administrative remedy system currently in place for those employees. For a brief examination of this issue and associated complications under California law, see *supra* notes 196-202 and accompanying text.

<sup>239</sup> *See* J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 16-5 (3d ed. 1987); West, *supra* note 3, at 10; *cf.* CAL. CIV. CODE § 3390 (Deering 1984) (stating that courts cannot specifically enforce either an obligation to perform personal service or an obligation to employ another in personal service).

<sup>240</sup> J. CALAMARI & J. PERILLO, *supra* note 239, § 16-5. Another reason common law courts avoided ordering specific performance of personal services contracts was the

rule by making reinstatement, a form of specific performance, a standard remedy for public employees and unionized private employees.<sup>241</sup> "Damages" awarded, along with reinstatement, often include backpay and restoration of benefits.<sup>242</sup>

Under a statutory tortious discharge law, courts should not have the power to order reinstatement.<sup>243</sup> Forced association is reinstatement's most serious threat.<sup>244</sup> Since tortious discharge actions often reveal illegal or unethical employer practices, the likelihood of ill will and continuing trouble<sup>245</sup> between parties after the suit is especially great. Moreover, redress of the "double wrong" necessary to bring the tortious discharge action<sup>246</sup> demands more than a belated return to some ideal status quo.<sup>247</sup> Thus, an aggrieved employee who sues for tortious discharge should receive tort damages, but *not* reinstatement.<sup>248</sup>

### CONCLUSION

New rights do not always indicate progress. Rather, they are often mere adjustments, society's attempt to preserve values in the whirl of a changing world. Old remedies for loss of employment in the public sector, such as due process hearings, reinstatement, and backpay, can no

difficulty in supervising or in enforcing the resulting performance. *See West, supra* note 3, at 11.

<sup>241</sup> *See generally West, supra* note 3, at 14-40 (providing thorough legal analysis and historical overview of reinstatement as traditional labor law remedy).

<sup>242</sup> *See CAL. GOV'T CODE* §§ 19583, 19584 (Deering Supp. 1989) (providing for reinstatement, backpay, and restoration of benefits for state civil service employees who prevail at due process hearings).

<sup>243</sup> The real purpose of the tortious discharge action is two-fold: to compensate individual employees for their injuries and to protect the public welfare when an employer violates public policy. *See supra* notes 110-14 and accompanying text. Reinstatement and backpay simply do not fulfill that two-fold purpose.

<sup>244</sup> W. HOLLOWAY & M. LEECH, *supra* note 63, at 417-18.

<sup>245</sup> *See West, supra* note 3, at 40-44 (arguing that reinstatement developed as somewhat successful remedy for private sector, unionized workers mainly because threat of strikes kept employers from retaliating against reinstated union members).

<sup>246</sup> *See supra* notes 112-14.

<sup>247</sup> As an example, an employee discharged for disclosing illegal employer or supervisor activities would return to an inevitably hostile environment. The employee's disclosures not only would have led to an expensive wrongful discharge suit, but also to potential court or agency punishment of the responsible supervisor. Other sorts of tortious discharge situations pose similar, if less predictable, problems for a returning employee.

<sup>248</sup> *See supra* notes 217 & 239-41 and accompanying text. For a strong argument against reinstatement as a remedy for any type of wrongful discharge, *see West, supra* note 3, *passim*.

longer handle the problems which their designers intended them to redress. At worst, they bar or preempt the new wrongful discharge actions.<sup>249</sup> At best, they offer only mediocre, second-rate alternatives to the new actions. Thus, the relative limitations now obvious in the traditional remedies may actually discourage workers from aspiring to public service careers.<sup>250</sup>

A government that fails to honor employment contracts or that mismanages personnel in ways actionable but for sovereign immunity is not a government acting in the public's best interest. Under relatively unusual circumstances, public employees currently may bring contract-based actions for wrongful discharge. Public employees, however, encounter difficulty in bringing tortious discharge actions.<sup>251</sup> A codification of current tortious discharge law would extend the action to many public employees and constitute one step toward a modernized system of public employment job security.

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<sup>249</sup> See CAL. GOV'T CODE § 18500 (Deering Supp. 1989) (stating that one purpose of state civil service system is to provide secure career employment).

<sup>250</sup> Cf. Caples & Hanko, *supra* note 7, at 40 (arguing that traditional public interests in efficient and honest government suffer from public employers' arbitrary or bad faith employment decisions).

<sup>251</sup> Tortious discharge is eminently appropriate in the public sector. See *supra* note 169; see also *supra* notes 137-42 and accompanying text.