Recent Judicial Limitations On the Right to Discharge: A California Trilogy

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INTRODUCTION

Developing constraints on the right of employers to discharge employees have attracted widespread public attention in recent years.[1] Inherent in these developments is a reexamination of the traditional "employment-at-will" status of employees hired for an indefinite term. A cornerstone of this concept is that either party may terminate the employment relationship at any time for any reason or, indeed, for no reason at all.[2]

Private sector employment in the United States differs from that in other industrialized countries, most of which have statutory protections against wrongful discharge for both union and non-union employees.[3] Still, the right of employers to discharge may be limited by specific statutes such as those prohibiting various forms of discrimination. Public sector employees are frequently protected by specific statutes and by due process considerations. Union employees are usually protected by provisions in labor contracts limiting the employer's privilege to discharge for "just or proper cause," and affording the employee redress through grievance procedures and arbitration.

Renewed attention is currently being focused on protection against "unjust" discharge of non-union private sector employees, both mana-

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[1] Weingarten, *Help for Fired Employees*, NAT'L L.J., June 30, 1980, at 2; *The Growing Costs of Firing Nonunion Workers*, BUS. WK, Apr. 6, 1981, at 95; Drucker, *The Job as Property Right*, Wall St. J., Mar. 4, 1980, at 24, col. 4. *See generally* R. COULSON, THE TERMINATION HANDBOOK (1981).

[2] 9 S. WILLISTON & W. JAEGER, WILLISTON ON CONTRACTS § 1017 (3rd ed. 1967 & Supp. 1980) [hereafter WILLISTON]; RESTATEMENT (SECOND) OF AGENCY §442 (1958); 3A A. CORBIN, CORBIN ON CONTRACTS § 684 (1960) [hereafter CORBIN].

[3] B. Aaron, Problems of Unjust Dismissal: Comparisons and New Developments 1 (Jan. 18, 1982) (paper presented at a conference on "Job Protections for Managerial Employees," Institute of Industrial Relations, University of California at Los Angeles) (copy on file at U.C. Davis Law Review office).

gerial and non-managerial. It has been suggested that protection should be provided by statute[4] or even by a constitutional due process theory.[5] However, it appears more likely that this protection will arrive through judicial review of alleged wrongful discharges under contract or tort theories.

This article will review and analyze differing judicial approaches to limiting the power of an employer to discharge. This will be done by considering three recent California cases, each of which represents a different judicial perspective:[6] (1) limitations arising out of a violation of a recognized public policy, (2) limitations arising out of a breach of an implied covenant of good faith and fair dealing, and (3) limitations arising out of a breach of an implied term of the employment contract. While related, the three approaches are theoretically different and vary as to the legal basis of allowable damages. That any given jurisdiction has espoused one of the approaches is no indication that its courts will adopt the other theories as well. Similarly, a rejection of one of the approaches will not necessarily result in a rejection of one or both of the other theories. Thus caution is advisable in evaluating the exact judicial posture of any jurisdiction in this area.[7]

I. REMEDY BASED ON VIOLATION OF PUBLIC POLICY: *Tameny*

A. Introduction

Tameny v. Atlantic Richfield Co.,[8] the foundation of California wrongful discharge law, stands for the proposition that there is a cause of action sounding in tort when an employer discharges an employee for reasons that violate public policy. Questions remain as to what constitutes a violation of public policy and as to the impact of *Tameny* on wrongful discharge cases that do not involve an employer acting contrary to public policy. Yet, these questions do not undermine the

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[4] Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976) [hereafter *Individual Protection*].

[5] Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 13 (1979) [hereafter Peck].

[6] Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1st Dist. 1981); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (2d Dist. 1980).

[7] *See* note 203 *infra*.

[8] Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

strength or firmness of the cause of action established in *Tameny*.

B. The Result in Tameny

In *Tameny*, plaintiff alleged that he was discharged for failure to engage in price fixing. He was a retail sales representative for defendant, and was responsible for "management of relations between Arco and the various independent service station dealers . . . ."[9] He allegedly was pressured to force the independent dealers to lower their prices in a manner that would violate federal and state antitrust legislation.[10] When he refused to yield to the pressure he was threatened with discharge and ultimately fired. According to the complaint, this refusal to engage in price fixing was the "sole reason" for his discharge.[11]

In his complaint, plaintiff sought relief on "three tort causes of action,"[12] an action for breach of contract, and an action for treble damages under the Cartwright Act. The trial court sustained defendant's demurrer to all counts except breach of contract. When the plaintiff dismissed that cause of action, the court entered a judgment for defendant, and plaintiff appealed.[13]

With Justice Tobriner writing the decision, the five member majority of the California Supreme Court[14] reversed the judgment, and re-

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[9] *Id.* at 170, 610 P.2d at 1331, 164 Cal. Rptr. at 840.

[10] Sherman Act, 15 U.S.C. §§ 1-7 (1976); Cartwright Act, CAL. BUS. & PROF. CODE §§ 16700-16760 (West 1964, Supp. 1982).

[11] Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 171, 610 P.2d 1330, 1332, 164 Cal. Rptr. 839, 841 (1980).

[12] *Id.* (The three tort causes of action were "wrongful discharge, breach of the implied covenant of good faith and fair dealing, and interference with contractual relations").

[13] *Id.*

[14] *Id.* at 179, 610 P.2d at 1337, 164 Cal. Rptr. at 846. Joining Justice Tobriner, the majority included Justices Bird, Mosk, Richardson and Newman with Justice Manuel concurring. Justice Clark dissented on four grounds: first, the majority in *Tameny* was usurping the legislative function ("The role of this court does not include overseeing — then overruling — legislatively declared policy.") *id.* (Clark, J., dissenting); second, the California cases upon which the majority relied involved the legislatively created exceptions of Labor Code § 2922, *id.* at 180, 610 P.2d at 1338, 164 Cal. Rptr. at 847 (Clark, J., dissenting); third, if there is a cause of action it should be in contract rather than tort ("*Petermann* holds only that the alleged discharge of an employee for refusal to commit perjury constitutes a breach of contract; the case does not hint of tort liability.") *id.* (Clark, J., dissenting); and finally, while the law clearly allows a tort duty to arise out of a contractual duty, every breach of contract does not constitute a tort ("The cases relied on by the majority wherein causes of action ex delicto arise out of contractual duty are clearly distinguishable. The actionable conduct in each case constituted both contractual and tortious breaches, whereas in the instant case the breach — if

manded the case stating that there was a cause of action for wrongful discharge with sounds in tort:

> [A]n employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. An employer engaging in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer.[15]

The discussion of the rationale for this decision is two-fold: first, is there a cause of action for wrongful discharge and, second, does this action sound in tort?

1. The Existence of the Cause of Action

The court left no doubt that such a cause of action had already been established under a long line of cases in California and other states:

> In a series of cases arising out of a variety of factual settings in which a discharge clearly violated an express statutory objective or undermined a firmly established principle of public policy, courts have recognized that an employer's traditional broad authority to discharge an at-will employee "may be limited by statute . . . or by considerations of public policy."[16]

In a note, the court endorsed the view expressed by many academicians that the arbitrariness of the terminable at-will doctrine is not justified "in light of contemporary employment relationships . . . ."[17] Judging from the sources which the court cited, one would take this phrase to mean that in the present economic marketplace, the employee is at a disadvantage: he cannot terminate his employment at will because he has a great economic and psychological dependency on his job, whereas the employer's task of finding a replacement is rarely burdensome.

Although there are earlier cases in which an action for wrongful discharge was allowed,[18] the most important of the California cases is *Petermann v. International Brotherhood of Teamsters*,[19] one of the "seminal" cases establishing a cause of action for wrongful discharge.

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termination of a no-term employment contract is a breach . . . — is contractual only.") *id.* at 181, 610 P.2d at 1338, 164 Cal. Rptr. at 847 (Clark, J., dissenting).

[15] *Id.* at 178, 610 P.2d at 1337, 164 Cal. Rptr. at 846.

[16] *Id.* at 172, 610 P.2d at 1332-33, 164 Cal. Rptr. at 842.

[17] *Id.* at 172-73 n.7, 610 P.2d at 1333 n.7, 164 Cal. Rptr. at 842 n.7.

[18] Kouff v. Bethlehem-Alameda Shipyard, 90 Cal. App. 2d 322, 202 P.2d 1059 (1st Dist. 1949); Lockheed Aircraft Corp. v. Superior Court of Los Angeles, 28 Cal. 2d 481, 171 P.2d 21 (1946).

[19] 174 Cal. App. 2d 184, 344 P.2d 25 (2d Dist. 1959).

In *Petermann*, the plaintiff alleged he was discharged for refusing his employer's request that he testify falsely before a committee of the state legislature. When plaintiff testified truthfully, he was fired.[20] Perhaps *Petermann* has been so influential because its facts are so compelling,[21] but its influence may also be due to the unequivocal manner in which the court challenged the terminable at-will doctrine: "Generally, such a relationship is terminable at the will of either party . . . for any reason whatsoever . . . . However, the right to discharge an employee under such a contract may be limited by statute . . . or by considerations of public policy."[22] *Petermann* explicitly held that the employer need not violate a statute; it is sufficient if he violates a public policy. And, as shall be discussed below, public policy may be embodied either in statutory language or in "sound morality."[23]

2. Tort and Contract

Since *Petermann* has been followed in numerous cases and the cause of action is firmly established in other jurisdictions, the supreme court in *Tameny* does not appear to doubt the existence of a cause of action for wrongful discharge based upon the employer's violation of public policy. Indeed, the defendant conceded that point and instead strongly challenged the plaintiff's contention that the cause of action was in tort.[24]

The *Tameny* court recognized a tort arising out of a contractual duty: "if the cause of action arises from a breach of a promise set forth in the contract, the action is ex contractu, *but if it arises from a breach of duty growing out of the contract, it is ex delicto.*"[25] Although the duty stems from the contract, it is imposed by law as a matter of social policy rather than stemming from the will of the parties. The Califor-

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[20] *Id.* at 189, 344 P.2d at 28.

[21] The facts in *Tameny* are a close parallel to those of *Petermann*. *See* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 174, 610 P.2d 1130, 1133-34, 164 Cal. Rptr. 839, 842-43 (1980).

[22] Petermann v. International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (2d Dist. 1959).

[23] Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 173, 610 P.2d 1330, 1333, 164 Cal. Rptr. 839, 842 (1980).

[24] *Id.* at 174, 610 P.2d at 1334, 164 Cal. Rptr. at 843.

[25] *Id.* at 175, 610 P.2d at 1334, 164 Cal. Rptr. at 843-44 (emphasis in original). Justice Clark points out in dissent that this maxim does not establish a tort duty: merely because a tort cause of action can arise from contract, does not mean that "every breach of contractual duty is delictual." *Id.* at 181, 610 P.2d at 1338, 164 Cal. Rptr. at 847 (Clark, J., dissenting).

nia courts have strongly supported the tort remedy in wrongful discharge cases. Although *Petermann* did not expressly say the cause of action was in tort, nothing in that case indicates that a wrongfully discharged employee may not maintain a tort action, and cases following *Petermann* interpret it as permitting a tort action.[26] More important, all the wrongful discharge cases (either before or after *Petermann*) that were based upon a violation of public policy have allowed an action in tort.[27]

C. The Nature of the Tort

The conduct of the employer in *Tameny* was wrongful because the motive for discharge was contrary to public policy, evidenced by the fact that the discharge was in violation of a statute. The court in *Tameny* noted that "where the employer's motivation for [a] discharge contravenes some substantial public policy principle, then the employer may be liable to the employee . . . ."[28] The tort of wrongful discharge must therefore be categorized with other types of tort liability relating to the exercise of a right for an improper, ulterior purpose.[29] This category of tort would include malicious prosecution of criminal or civil conduct, abuse of process, interference with contractual relations, and engaging in business to injure another.[30] In all of these torts, malice, in

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[26] *Id.* at 177 n.11, 610 P.2d at 1335 n.11, 164 Cal. Rptr. at 844-45 n.11.

[27] Lockheed Aircraft Corp. v. Superior Court of Los Angeles County, 28 Cal. 2d 481, 171 P.2d 21 (1946); Montalvo v. Zamora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (5th Dist. 1970); Wetherton v. Growers Farm Labor Ass'n, 275 Cal. App. 2d 168, 79 Cal Rptr. 543 (1st Dist. 1969); Glenn v. Clearman's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (2d Dist. 1961); Kouff v. Bethlehem-Alameda Shipyard, 90 Cal. App. 2d 322, 202 P.2d 1059 (1st Dist. 1949).

[28] Tameny v. Atlantic Richfield Co., 127 Cal. 3d 167, 177, 610 P.2d 1130, 1336, 164 Cal. Rptr. 839, 845 (quoting Harless v. First Nat'l Bank, 246 S.E.2d 270, 275 (W. Va. 1978)).

[29] Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1422 (1967) [hereafter Blades]. During the years when the terminable at-will doctrine developed and reigned, the attitude toward wrongful motive was quite different from what it is today. This attitude was expressed in the maxim "malicious motives made a bad act worse, but they cannot make that wrong which in its own essence is lawful." *See* Comment, *Recognizing the Employee's Interests in Continued Employment — The California Cause of Action for Unjust Dismissal*, 12 PAC. L.J. 69, 75 (1980) [hereafter *Employee's Interests*]; Comment, *Public Policy Limitations on the Retaliatory Discharge of at Will Employees in the Private Sector*, 14 U.C. DAVIS L. REV. 811 (1981) [hereafter *Limitations*].

[30] The public policy tort of wrongful discharge may be compared with the tort of intentional infliction of emotional distress. This comparison can be illustrated by one of

the sense of ill will toward the plaintiff, or some other ulterior purpose makes the otherwise permissible conduct wrongful. In the discharge cases, the violation of public policy establishes the wrongfulness of the employer's conduct.[31]

Dean Prosser has pointed out that torts based upon bad motives inherently involve a balancing of policies:

> [T]he real problem underlying the question of motive remains the same one of balancing the conflicting interests of parties, and determining whether the defendant's objective should prevail at the expense of the damage to the plaintiff. Whether the social value of that objective is sufficient to outweigh the gravity of the interference often becomes the question of deciding significance.[32]

This is especially true in the public policy tort of wrongful discharge. In *Tameny* and the other cases of this type, the courts are saying that the public policy violated by the employer, that is, the interest against participation in price fixing, outweighs all other reasons that justify his conduct, including concerns that support the termination at-will doctrine.[33] The pattern is repeated with other interests: public policies allowing workers to file workers compensation claims,[34] to serve as jurors,[35] to associate in a union,[36] or to not commit perjury,[37] outweigh the considerations supporting an employer's freedom to continue to em-

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the cases cited in *Tameny*, Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 44 P. 320 (1896). *Sloane* is essentially an early example of the tort of intentional infliction of emotional distress arising from a contractual duty of a common law carrier. In that case, the railroad ejected the plaintiff before she reached her destination. The tort remedy was chosen essentially because the contract remedy — the cost of another railroad ticket to the plaintiff's destination — was inadequate.

[31] *Id.* at 676-77, 44 P. at 321.

[32] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 5, at 26 (4th ed. 1971); *see Employee's Interests*, note 29 *supra*, at 75.

[33] "By 'public policy' is intended that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." Safeway Stores, Inc. v. Retail Clerks Int'l Ass'n., 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953).

[34] *E.g.*, Sventko v. Kroger Co., 69 Mich. App. 640, 245 N.W.2d 151 (1976); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); *cf.*, Portillo v. G.T. Price Products, Inc., 131 Cal. App. 3d 285, 182 Cal. Rptr. 291 (2d Dist. 1982); *see* note 57 *infra*.

[35] Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).

[36] *E.g.* Wetherton v. Growers Farm Labor Ass'n., 275 Cal. App. 2d 168, 79 Cal. Rptr. 543 (1st Dist. 1969); Glenn v. Clearmen's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (2d Dist. 1961).

[37] *E.g.*, Petermann v. International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (2d Dist. 1959).

ploy only those whom he chooses.[38]

The employer's interest is, of course, in the right to control his business and work force through discipline, layoff, transfer and discharge. This consideration was certainly much stronger at one time than it is now.[39] The owner's right to control the business was almost absolute, according to the turn of the century philosophy which imbued the major constitutional decisions supporting the employment-at-will doctrine.[40] The right of the owner or manager to control a business has been eroded by legislation and regulation.[41] Indeed, the very fact that a cause of action exists for wrongful discharge manifests some degree of erosion.[42]

However, the employer's basic right to control a work force is still

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[38] It should be made clear that although the court speaks in terms of duty and balancing of interests, the cause of action in the case is not negligence, the failure to exercise due care in the discharge of an employee. If a negligence standard was followed, an employer could be liable even when no wrongful motive exists. In *Tameny*, the wrongful motive of the employer creates a higher degree of fault; the scales are tipped heavily against the employer. The employer conduct is so repugnant to public policy that the action will be treated as an intentional tort, with punitive damages available.

[39] Professor Blades points out that this policy stems from the time when the "words 'master' and 'servant' were taken much more literally than they are now." Blades, note 29 *supra*, at 1416.

[40] Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908). Professor Blumrosen has shown that the employment-at-will doctrine actually originated in erroneous statements of a nineteenth century treatise writer. Blumrosen, *Settlement of Disputes Concerning the Exercise of Employer Disciplinary Power: U.S. Report*, 18 RUTGERS L. REV. 428, 432-33 (1964) [hereafter Blumrosen]. Jay M. Feinman has theorized that the employment-at-will rule developed from the needs of business owners to control their middle level managers. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 120 (1976) [hereafter Feinman]. One other commentator has noted that "the court-imposed presumption that the employment contract is terminable at will relies upon the formalistic approach to contract interpretation predominant in late nineteenth century legal thought: manifestations of assent must be evidenced by definite, express terms if promises are to be enforceable." Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1825 (1980) [hereafter *Protecting Employees*].

[41] *See* Blumrosen, note 40 *supra*; Peck, note 5 *supra*; Comment, *The Employment at Will Rule*, 31 ALA. L. REV. 421 (1980) [hereafter *Employment Rule*]; Comment, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975) [hereafter *Common Law Action*]. All of the above present summaries of the various statutes and regulations which govern employment relations.

[42] *See* Blades, note 29 *supra*; Blumrosen, *Worker's Rights Against Employers and Unions: Justice Francis — A Judge for Our Season*, 24 RUTGERS L. REV. 480 (1970); Blumrosen, note 40 *supra*; Blumrosen, *The Right to Seek Workmen's Compensation*, 15 RUTGERS L. REV. 491 (1961).

widely recognized, as it should be.[43] Intelligent decisions must be made about the size and performance of the work force. Individual workers must be trained, guided, and disciplined. Indeed, the public has an interest in a well-run work force.[44] Whatever cause of action is developed for wrongful discharge will to some degree place a chill upon the employer's traditional right to control the work force.[45]

In balancing the interest of the employer against a particular public policy, the courts must answer two questions. First, is the employer's motive for discharging the employee sufficiently repugnant to public policy to justify recovery by this plaintiff? Second, does the establishment of this cause of action, or more important, the broadening of the cause of action to include other public policies, place such a chill on personnel relations that employers can no longer run their businesses efficiently?

Tameny and other cases implicitly answer these questions. Courts have held the employer's conduct sufficiently wrongful to justify recovery, and have apparently determined that the possible chilling effect upon the employer's conduct is inadequate to prevent establishment of the cause of action. However, the second issue is still important whenever the courts are asked, as they will be, to embrace additional public policies that outweigh the employer's interest. At some point the chill on the employer's efficiency will outweigh further expansion. Thus, it must be remembered that "where the employer's motivation for [a] discharge contravenes some *substantial* public policy principle, then the employer may be held liable to the employee for damages. . . ."[46] The policy interest supporting the employer's right may weigh more heavily when balanced against public policies less substantial than those of *Tameny* and *Petermann*.

Tameny and the other public policy cases do not, of course, completely abrogate the employers' rights. Employers may still discharge

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[43] Even Professor Blades, a strong advocate of employee rights and the new causes of action for wrongful discharge, sees the need to protect the employer's right to control the work force by placing the burden upon the plaintiff to establish the wrongful motive and by instituting a higher standard of proof than that normally applied in civil cases. Blades, note 29 *supra*, at 1409.

[44] *See Employee's Interests*, note 29 *supra*, at 79.

[45] In Geary v. United States Steel Corp., 319 A.2d 174, 179 (Pa. 1974), the court, in rejecting a cause of action, placed great emphasis on the effect such an action would have on personnel decisions. *See Common Law Action*, note 41 *supra*, at 1453.

[46] Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 177, 610 P.2d 1330, 1336, 164 Cal. Rptr. 839, 845 (1980) (quoting Harless v. First Nat'l Bank, 246 S.E.2d 270, 275 (W. Va. 1978) (emphasis added)).

employees for good cause and, it would appear, for no cause. The public policy cases merely create an action where the cause for discharge is *wrongful.* The burden is upon the plaintiff to prove the wrongful motive; if this burden is not met, there is no need for the defendant to prove good cause on a business justification. The public policy tort also does not cover those cases in which the employer acted in good faith but, because of legitimate error or even through negligence, discharged an employee without cause. Moreover, the specific public policy tort does not cover those situations in which the employee is discharged for malice or for a reason morally wrongful but not contrary to public policy. However, the public policy cases may provide precedent for the establishment of some other theory, such as a breach of the implied covenant of good faith and fair dealing, to support a cause of action when the employer's motive is malicious or otherwise wrongful, but not contrary to public policy.

D. The Effect of the Tort

The practical effect of the public policy tort for wrongful discharge is to place the burden of proof upon the plaintiff to establish that the employer's motive for the discharge was wrongful. This approach is opposite the customary practice in labor arbitration, in which the burden is on the employer to establish just cause. This difference seems justified in the tort situation, considering the nature of this cause of action exists only because the employer's motive contravenes public policy; that is, because there is "bad cause" for the discharge. "No cause" or a lack of "good cause" is not enough. In arbitration mere lack of just or proper cause is usually sufficient to find for the employee.[47]

Moreover, plaintiffs normally have the burden of proof in tort actions of establishing a prima facie case, and there is no reason to change the approach for this tort. Although a wrongful motive is often difficult for the employee to prove, the burden upon the employer to prove lack of a wrongful motive is no easier; indeed it may be more difficult. All the employer can do is establish a proper motive, good faith, or just cause for the discharge. If the burden was upon the employer to prove a proper motive, and the employer failed, the requirements of the cause of action still would not be met.

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[47] F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 621 (3d ed. 1973) [hereafter ELKOURI].

E. The Sources of Public Policy

In order to establish wrongful motive, the plaintiff must show that the motive contravenes public policy. In almost all situations the source of the public policy is statutory. For example, in *Tameny*, the public policy was directly established based on a potential violation of statues.[48] In other situations the public policy must be determined tangentially from the existence of statutes that have been violated or potentially violated.

1. Direct Statutory Violations

The cases in which the public interest can be determined directly from a potential violation of a statute can be divided into two classes. The first includes those cases, like *Tameny* and *Petermann*, in which the employer discharges the employee in retaliation for the employee's refusal to engage in illegal conduct.

In this first category, the laws the employee refused to violate may or may not be criminal. In *Petermann*,[49] the employer sought to force the employee to perjure himself in violation of California Penal Code Section 118.[50] In *Tameny*, the employer sought to have the employee engage in price fixing, in violation of the Sherman Antitrust Act and the Cartwright Act.[51] Other cases have involved statutes that are regulatory, as opposed to criminal, and that might not be considered as socially important or far reaching as are the antitrust laws. In one case, an X-ray technician was allegedly discharged for her refusal to catheterize patients, which she was not legally qualified to do.[52] In another case the employee was discharged for refusing to violate the state pollution control statutes by falsifying reports.[53] The inherent logic of these

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[48] Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 170, 610 P.2d 1330, 1331, 164 Cal. Rptr. 839, 840 (1980). The statutes are the Sherman Act, 15 U.S.C. §§ 1-7 (1976) and the Cartwright Act, CAL. BUS. & PROF. CODE §§ 16700-16760 (West 1964, Supp. 1982).

[49] Petermann v. International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (2d Dist. 1959).

[50] CAL. PENAL CODE § 118 (West 1970, Supp. 1982).

[51] Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 170, 610 P.2d 1330, 1331, 164 Cal. Rptr. 839, 840 (1980). In *Tameny*, the employer also sought to have the employee engage in conduct that violated an injunction against the employer. *Id.* Another case involving a statutory prohibition on price fixing is McNulty v. Borden, Inc., 474 F. Supp. 1111 (E.D. Penn. 1979).

[52] O'Sullivan v. Mallon, 160 N.J. Super. 416, 390 A.2d 149 (1978).

[53] Trombetta v. Detroit, Toledo & Ironton R.R. Co., 81 Mich. App. 489, 265 N.W.2d 385 (1978).

cases is that a public policy is embodied in the statutory prohibition of certain conduct. This prohibition evidences a legislative determination that conduct in violation of the statute is harmful to the public. Therefore, if an employee refuses to engage in that conduct, he is acting consistently with public policy. If the employer discharges the employee for this conduct, the employer is acting contrary to the public good.

The second group of cases is that in which the employer directly violates a statute by discharging the employee. In these cases, the employers' retaliatory conduct is itself a direct violation of public policy. The most common situation is that of the employee dismissed in retaliation for filing a workers' compensation claim.[54] Many states have provisions prohibiting retaliatory discharge or discrimination for filing a claim, and these provisions create strong evidence of public policy.[55] Employers have argued that these express provisions preempt a private right of action in tort. While some states have rejected this position,[56] California has accepted it.[57] Other examples of direct violation of stat-

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[54] Mitchell v. St. Louis County, 575 S.W.2d 813 (Mo. 1979); Lally v. Copygraphics, 173 N.J. Super. 162, 413 A.2d 960 (1980); Brown v. Transcon Lines, 284 Or. 597, 588 P.2d 1087 (1978); Murray Corp. of Md. v. Brooks, 600 S.W.2d 897 (Tex. 1980); Schrader v. Artco Bell Corp., 579 S.W.2d 534 (Tex. 1979); Texas Steel Co. v. Douglas, 533 S.W.2d 111 (Tex. 1976); *see* Judson Steel Corp. v. Workers' Comp. Appeals Bd., 22 Cal. 3d 658, 586 P.2d 564, 150 Cal. Rptr. 250 (1978); Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956); Raley v. Darling Shop of Greenville, Inc., 216 S.C. 535, 59 S.E.2d 148 (1950); Swanson v. American Mfg. Co., 511 S.W.2d 561 (Tex. 1974). *Contra* Martin v. Tapley, 360 So. 2d 708 (Ala. 1978); Leach v. Lauhoff Grain Co., 51 Ill. App. 3d 1022, 366 N.E.2d 1145 (1977); Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978).

[55] CAL. LAB. CODE § 132(a) (West Supp. 1982); ILL. REV. STAT. ch. 48, § 138.4(h) (1977); ME. REV. STAT. ANN. tit. 39, § 111 (1964); MINN. STAT. ANN. § 176.82 (West Supp. 1982); MO. ANN. STAT. § 287.780 (Vernon Supp. 1982); N.J. STAT. ANN. § 34:15-39.1 (West Supp. 1982); N.Y. WORK. COMP. Law § 120 (McKinney Supp. 1982); N.C. GEN. STAT. § 97-6.1 (1979); OR. REV. STAT. § 659.410 (1981); TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1979); WASH. REV. CODE ANN. § 49.60.210 (1962); *cf.* Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (A state statute made it unlawful for an employer to use any device that would in any manner relieve an employer of obligations imposed by the Workers' Compensation Act. Consequently, the threat of a discharge was held to be a "device" to relieve the employer of a legal obligation within the provisions of IND. CODE § 22-3-2-15 (1976) and hence in contravention of public policy.).

[56] *E.g.*, Brown v. Transcon Lines, 284 Or. 597, 588 P.2d 1087 (1978). *But cf.* Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980) (Occupational Health and Safety Act prohibition on retaliation does not create a private right of action).

[57] Portillo v. G.T. Price Prod., Inc., 131 Cal. App. 3d 285, 182 Cal. Rptr. 291 (2d Dist. 1982). In *Portillo* the court of appeals held that CAL. LAB. CODE § 132(a) (West Supp. 1982) provides an exclusive remedy for discharge due to filing of a workers'

utes involve discharging an employee for serving as an election official,[58] for being active in partisan politics,[59] or for refusing to take a

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compensation claim. That section declares the state policy that "there should not be discrimination against workers who are injured in the course and scope of their employment" and provides a misdemeanor penalty for such retaliatory conduct. Additionally, it provides for damages under CAL. LAB. CODE § 4553 (West Supp. 1982) thereby allowing a 50 percent increase in any compensation award, up to $10,000. Finally, it provides for reinstatement and reimbursement for lost wages and work benefits. Prior to *Portillo*, the supreme court had decertified two cases from other courts of appeal that allowed a civil suit despite § 132(a). Raden v. City of Azusa, 158 Cal. Rptr. 689 (2d Dist. 1979) (Hg. den., opn. decert., Jan. 17, 1980); Meyer v. Byron Jackson, Inc., 120 Cal. App. 3d 59 (advance sheets) (2d Dist. 1981) (Hg. den., opn. decert., Aug. 13, 1981).

Portillo is supportable on its face. It has long been recognized that the workers' compensation scheme is designed to afford workers sure compensation at the expense of full compensation. And, "[w]here the conditions of compensation exist, the right to recover . . . compensation . . . is . . . the exclusive remedy for injury . . . of an employee against an employer." CAL. LAB. CODE § 3601 (West Supp. 1982). Thus, courts will likely be unpersuaded by attacks on the *adequacy* of the compensation provided by § 132(a). There are, however, two grounds for criticizing the result in *Portillo*. First, it may be argued that § 3601 makes workers' compensation an exclusive remedy only for physical, and not for non-physical, injuries. It does not appear that the economic and emotional harm flowing from wrongful discharge is contemplated by § 3601, and such "injuries" may thus be outside the ambit of that section. Second, if § 132(a) is held to be an exclusive remedy, it may be unconstitutional because it uses an apparently irrational measure of the damages flowing from wrongful discharge. Section 132(a) purports to compensate an employee for wrongful discharge by calculating his recovery for the discharge based on the value assigned to an underlying physical injury. The employee is monetarily compensated under the section by invoking the 50% increase rule of § 4553: an employee's compensation for the *discharge* is an additional 50% of the amount recoverable for the underlying injury, up to $10,000. Hence, an employee fired after 20 years for filing a $100 claim will be arbitrarily awarded $50 for his wrongful discharge. Another employee fired after 20 years for filing a $20,000 claim will be arbitrarily awarded $10,000 for his wrongful discharge. Section 132(a)'s damage scheme thus appears irrational because it measures the amount of compensation for wrongful discharge based on the value of an unrelated underlying injury. It should be noted that this criticism goes only to the measure of the damages; because § 132(a) does provide for reinstatement and back pay, the court ultimately may ignore the irrational measure of damages, and uphold the section because it provides some remedy, however inadequate, for retaliatory discharge based on filing of a workers' compensation claim.

[58] Kouff v. Bethlehem-Alameda Shipyard, 90 Cal. App. 2d 322, 202 P.2d 1059 (1st Dist. 1949).

[59] Lockheed Aircraft Corp. v. Superior Court of Los Angeles, 28 Cal. 2d 481, 171 P.2d 21 (1946).

polygraph test.[60]

2. Public Policy Inferred from Statute

In the second type of case, the employer's conduct in discharging the employee is wrongful because it violates a public policy embodied in a statute, even though the employer's act is not a direct violation or potential violation of the statute. In these cases, the public policy is inferred from the existence of the statute. For example, two states have found that discharging an employee for filing a workers' compensation claim violates public policy, even though no provision of that state's workers' compensation statute expressly prohibited discriminatory discharge. In *Frampton v. Central Indiana Gas Co.*, the Indiana Supreme Court inferred that public policy necessarily prohibited a retaliatory discharge:

> [I]n order for the goals of the Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal. If employers are permitted to penalize emplyees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right. Employees will not file claims for justly deserved compensation — opting, instead, to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation.[61]

Similarly, in *Sventko v. Kroger Co.*, the Michigan court of appeals inferred a policy against retaliatory discharge from a provision of its workers' compensation statute prohibiting employers from "consistently [discharging] employees before they qualify under the act in order to evade the provisions of the act."[62] Actions for wrongful discharge have also been based on statutes guaranteeing workers the right to unionize[63] or encouraging citizens to serve on juries,[64] or protecting consumers from credit fraud.[65] In none of these situations did the employer actu-

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[60] Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979).

[61] 260 Ind. 249, 251-52, 297 N.E.2d 425, 427 (1973).

[62] 69 Mich. App. 644, 648-49, 245 N.W.2d 151, 154 (1976); *accord* Shanholtz v. Monongahela Power Co., 270 S.E.2d 178 (W. Va. 1980). *Contra* Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981).

[63] Wetherton v. Growers Farm Labor Ass'n, 275 Cal. App. 2d 168, 79 Cal. Rptr. 543 (1st Dist. 1969); Glenn v. Clearman's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (2d Dist. 1961); *cf.* Montalvo v. Zamora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (5th Dist. 1970) (cause of action allowed when employee engaged attorney to represent him in salary negotiations).

[64] Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).

[65] Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978) (employee attempted

ally violate the law; but rather, his motive contravened the policy embodied in the statute.

3. Public Policy Without Statutory Support

It is difficult to say whether there can be a public policy sufficient to support a cause of action for wrongful discharge absent statutory authority. Although there is dictum in *Tameny* and *Petermann* suggesting that there may be,[66] one California court of appeal has expressly stated that courts have no power to declare public policy in wrongful discharge cases without statutory support.[67] In jurisdictions that do allow the public policy tort for wrongful discharge,[68] asserted public policies that have failed to support the cause of action have been ones with little statutory support. The importance of statutory support is apparent in two cases involving polygraph tests. In *Perks v. Firestone Tire and Rubber Co.*,[69] an action was allowed when the employee was discharged for refusing to take a polygraph test pursuant to a Pennsylvania statute making it a misdemeanor to require such a test as a condition of employment. However, in *Larson v. Motor Supply Co.*,[70] no such statute existed in Arizona and recovery was denied.

In a number of other cases, recovery has been denied absent statutory support for the public policy allegedly violated, even though the discharge might have appeared morally repugnant. In *Geary v. United States Steel Corp.*,[71] a salesman was dismissed for publicly declaring that his company's products were unsafe. Other cases have denied recovery after discharge of "whistle-blowing" employees: for example, for

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to force employer to conform to state and federal consumer credit prohibition laws).

[66] Petermann v. International Brotherhood of Teamsters, 184 Cal. App. 2d 174, 188, 344 P.2d 25, 27 (2d Dist. 1959) (By equating public policy with "sound morality," the court implied that there is no need for a statutory basis for public policy, and hence the courts may determine public policy absent statutory support.). Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 178, 610 P.2d 1330, 1336, 164 Cal. Rptr. 839, 845 (1980); *see Employee's Interests*, note 29 *supra*, at 86; *Limitations*, note 29 *supra*, at 832.

[67] Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (4th Dist. 1960).

[68] *See* Annot., 12 A.L.R.4th 544, 582-598 (1982). This annotation contains a valuable categorization of public policy by subject matter.

[69] Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979) (applying Pennsylvania law).

[70] Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (1978) (plaintiff claimed that public policy was violated because the polygraph test consent form contained "morally offensive" statements).

[71] Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974).

reporting kickbacks,[72] accusing another of a cover-up regarding faulty products,[73] opposing the formulation of a drug considered unsafe because it lacked sufficient testing,[74] or urging correction of misleading information provided to the public.[75] Other courts have declined to find a cause of action when the employer's conduct was offensive to the employee personally, but was not contrary to a statute. Thus, employers have been allowed to discharge employees for planning to attend law school at night,[76] or for having an affair with another employee.[77] Nor was it contrary to public policy to discharge after investigating a personal matter regarding the employee in which the employer has no legitimate interest,[78] or when the employee's supervisor allegedly rated the employer falsely.[79]

However, at least one case has allowed the cause of action with no, or at least minimal, reference to statute. In *Palmateer v. International Harvester Co.*,[80] the defendant allegedly discharged the plaintiff for providing the police with information about a crime that a fellow employee may have committed. The Illinois Supreme Court stated that "[n]o specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of a crime, but public policy nevertheless favors citizen crime fighters."[81] The court based its finding that there was a public policy in favor of supplying information about crime on several grounds: two United States Supreme Court cases which relate to the issue only generally;[82] two Illinois cases which point to the importance of enforcing the criminal codes; a statute which states that citizens must assist police regarding reported crimes when asked to do so; and a malicious prosecution case in which public policy favored a defendant who in good faith but incor-

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[72] Martin v. Platt, 386 N.E.2d 1026 (Ind. App. 1979).

[73] Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Div., 281 Pa. Super. Ct. 560, 422 A.2d 611 (1980).

[74] Campbell v. Eli Lilly and Co., 413 N.E.2d 1054 (Ind. App. 1980); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980).

[75] Percival v. General Motor Corp., 539 F. Supp. 1126 (E.D. Mo. 1975).

[76] Scroghan v. Kraftco Corp., 551 S.W.2d 811 (Ky. 1977).

[77] Ward v. Frito-Lay, Inc., 95 Wis. 2d 372, 290 N.W.2d 536 (1980).

[78] Rogers v. International Business Mach., 500 F. Supp. 867 (W.D. Penn. 1980).

[79] Patterson v. Philco Corp., 252 Cal. App. 2d 63, 60 Cal. Rptr. 110 (1st Dist. 1967).

[80] Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

[81] *Id.* at 132, 421 N.E.2d at 880.

[82] Palko v. Connecticut, 302 U.S. 319 (1937); Marbury v. Madison, 5 U.S. 137 (1803).

rectly reported a crime to the police.[83]

It is possible to say that in *Palmateer*, the court found public policy in a number of judicial decisions. However, the court, by piecing together cases that are only generally related and which alone do not establish a public policy strong enough to support an action for wrongful discharge, shows that it also relied on its own vision of public policy. There may be other cases like *Palmateer*,[84] but still it is the exception.[85] Almost all of the cases allowing the public policy tort have to some degree relied on statutory authority to support the existence of the public policy.

No doubt, *Tameny* is a case of monumental importance: it firmly establishes the existence of the public policy tort for wrongful discharge, and it broadcasts a strong signal to employers that the old doctrine of termination at-will is no longer sacrosanct. It is also important to note what *Tameny* does not do. It does not create a cause of action when the employer merely lacks just cause for the discharge. Although some commentators have called for a "just cause" tort,[86] *Tameny* requires an affirmative showing by the plaintiff that the employer had a wrongful motive, that is, one that contravenes public policy. It would also appear that this policy must be embodied at least tangentially in a statutory language. In the words of the famous statement by the Tennessee Supreme Court, the theory of *Tameny* supports a cause of action

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[83] Palmateer v. International Harvester Co., 85 Ill. 2d 124, 132-33, 421 N.E.2d 876, 879-80 (1981).

[84] Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974); Smith v. Ford Motor Co., 289 N.C. 71, 221 S.E.2d 282 (1976); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978). These cases place little reliance upon statutes; however, none of them provide support for the position that public policy sufficient to create a cause of action can exist without statutory authority. *Reuther* does mention a constitutional provision and more important it relies heavily on the authority of Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975), which in turn relied heavily on statute. *Monge* may be more properly considered a bad faith cause, and *Smith* may be better described as concerning the tort of interference with business relations.

[85] For the argument in favor of public policy limitations grounded solely in the Common Law, see *Limitations*, note 29 *supra*, at 832-36. *See also Employee's Interest's*, note 29 *supra*, at 86. This article cites two cases that are assertedly based on judicially declared public policies; however, one, Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975), seems to rely heavily on statutes and the other, Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974), would be better characterized as a breach of covenant of good faith and fair dealing.

[86] *See* Blades, note 29 *supra*, at 1421-27; Blumrosen, *Strangers No More: All Workers are Entitled to "Just Cause" Protection under Title VII*, 2 INDUS. REL. L.J. 519 (1978); *Peck*, note 5 *supra*, at 44-46.

where there is "bad cause," but not where there is "no cause."[87]

II. REMEDY BASED ON IMPLIED COVENANT OF GOOD FAITH: *Cleary*

A. Introduction

Cleary v. American Airlines, Inc. established a cause of action for wrongful discharge based upon an implied covenant of good faith and fair dealing which exists in every employment contract.[88] To some extent *Cleary* resembles the two other recent cases that have dealt with wrongful discharge: *Tameny*[89] and *Pugh v. See's Candies, Inc.*[90] *Cleary*, like *Tameny*, upheld a wrongful discharge action sounding in tort, though on a different theory than *Tameny*. Like *Pugh*, *Cleary* placed great emphasis upon the employee's long tenure with the employer and the past employment practices of the employer. Using these two factors, the court in *Cleary* found that they supported the existence of an implied covenant of good faith and fair dealing, the breach of which created a hybrid cause of action sounding both in tort and contract.[91] However, *Pugh* interpreted these two factors in a more orthodox manner, finding an implied-in-fact contractual condition not to terminate the employment relation without just cause.[92] Thus, under

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[87] "All may dismiss their employees at will, be they many or few, for good cause, for no cause, or even for a cause morally wrong without being guilty of a legal wrong." Payne v. Western & Atlantic R.R. Co., 81 Tenn. 507, 519-20 (1884) (overruled on other grounds); Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915).

[88] 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (2d Dist. 1980).

[89] 27 Cal. 3d 167, 610 P. 2d 1330, 164 Cal. Rptr. 839 (1980).

[90] 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1st Dist. 1981).

[91] Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 455-56, 168 Cal. Rptr. 722, 729 (2d Dist. 1980); *accord* Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir. 1982).

[92] Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917, 927 (1st Dist. 1981). Regarding the *Cleary* court's view that there was a cause of action sounding in tort, the court in *Pugh* stated:

> We need not go that far, however. In *Cleary* the court did not base its holding upon the covenant of good faith and fair dealing alone. Its decision rested upon the employer's acceptance of responsibility for refraining from arbitrary conduct, as evidenced by its adoption of specific procedures for adjudicating employee grievances. While the court characterized the employer's conduct as constituting "[recognition of] its responsibility to engage in good faith and fair dealing" the result is equally explicable in traditional contract terms: the employer's conduct gave rise to an implied promise that it would not act arbitrarily in dealing with its employees.

Id.; see also Note, *Contract Law: An Alternative to Tort Law as a Basis for Wrongful*

Cleary, an employer may be subject to greater damages including liability for emotional distress and perhaps even punitive damages.

B. The Pleadings and the Result in Cleary

As with many cases dealing with wrongful discharge, the appeal in *Cleary* was taken from the trial court's dismissal following defendant's demurrer. Therefore the court of appeal assumed the truth of the facts alleged in plaintiff's complaint.[93] Plaintiff alleged that he made an oral contract for employment with defendant American Airlines in 1958, and was a permanent employee until dismissed in 1976 due to the company's disapproval of his union activities. Further, he asserted that the reasons given for dismissal (theft, leaving working place, and threatening fellow workers with harm) were untrue and improperly investigated. Moreover, plaintiff claimed he was given an inadequate opportunity to rebut the charges against him, in violation of defendant's own employment policies and procedures. Thus, plaintiff alleged the dismissal was without just cause and wrongful. He claimed damages based on the deprivation of his salary and retirement benefits and on his inability to find further work in the airlines industry.[94]

According to the summary of plaintiff's complaint in *Cleary,* plaintiff sought damages against American Airlines for breach of contract.[95] Also, the court stated that the alleged breach of the implied covenant of good faith and fair dealing is within the "context of the contract cause of action."[96] No mention was made by the court of appeal of an allegation of a cause of action sounding in tort based upon the breach of the implied covenant of good faith and fair dealing. While a cause of action sounding in tort was alleged, the theories behind it were interference with business relations and inducement to breach a contract; and this allegation was directed at defendants other than the employer American Airlines.[97]

The court in *Cleary* acknowledged that although the concept of an implied covenant of good faith and fair dealing was formulated in insurance cases, the implied covenant exists in all contracts, including, of

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Discharge Actions in Illinois, 12 LOY. U. CHI. L.J. 861 (1981).

[93] Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 446-47, 168 Cal. Rptr. 722, 724 (2d Dist. 1980).

[94] *Id.* at 448, 168 Cal. Rptr. at 724-25. The complaint did not allege that plaintiff was deprived of retirement benefits.

[95] *Id.* at 447, 168 Cal. Rptr. at 724.

[96] *Id.*

[97] *Id.* at 448, 168 Cal. Rptr. at 725. The additional actions are irrelevant here.

course, employment contracts.[98] The court found a breach of the implied covenent of good faith and fair dealing because the company terminated a long standing employee (eighteen years) without legal cause, thus depriving him of benefits accruing from his employment,[99] and because defendant violated its own procedures for terminating employees. By adopting such procedures, even in response to union members, the company recognized "its responsibility to engage in good faith and fair dealing rather than in arbitrary conduct with respect to *all* of its employees."[100]

C. Labor Code Section 2922 and the Trend Toward Its Limitations

In holding for the plaintiff, the court in *Cleary* refused to broadly apply California Labor Code Section 2922, which states that "[a]n employment, having no specified term, may be terminated at the will of either party . . . ."[101] The foundation of this statute is the "contractual concept of mutuality of obligation;"[102] since the employee could terminate at any time, the employer could also. Although the court in *Cleary* did not completely reject this concept of mutuality, as did the court in *Pugh*,[103] it criticized the theory because modern economic reality may make the employee's freedom to terminate his employment at-will a fiction.[104] Of course, the most important limitation upon Section 2922 is the public policy exception originated in *Petermann*[105] and confirmed in *Tameny*.[106] The courts have upheld these considerations in private actions for wrongful discharge despite the existence of an oral contract which is apparently terminable at-will.

The court also noted that the termination at-will doctrine, as embodied in Section 2922, has never been absolute because a contract sup-

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[98] *Id.* at 453, 168 Cal. Rptr. at 727-28.

[99] *Id.* at 455, 168 Cal. Rptr. at 729.

[100] *Id.* (emphasis in original).

[101] CAL. LAB. CODE § 2922 (West 1971, Supp. 1982).

[102] Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 448, 168 Cal. Rptr. 722, 725 (2d Dist. 1980).

[103] Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 325, 171 Cal. Rptr. 917, 924 (1st Dist. 1981).

[104] Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 449, 168 Cal. Rptr. 722, 725 (2d Dist. 1980).

[105] Petermann v. International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (2d Dist. 1959).

[106] Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

ported by "independent consideration" is not terminable at-will,[107] even if the term is unspecified. Independent consideration usually means consideration other than the actual services that the employee must perform under the contract.[108] If there is no independent consideration, the contract will be interpreted to mean employment for a reasonable period of time.[109]

The *Cleary* court also examined three cases that exemplify the "increasing reluctance" of the courts to allow an employment contract to be terminated at-will.[110] *Drzewiecki v. H & R Block Co.*[111] upheld a wrongful termination action because of express contractual language indicating the contract was not terminable at-will. *Rabago-Alvarez v. Dart Industries, Inc.*[112] found an implied condition that the contract

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[107] Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 452, 168 Cal. Rptr. 722, 727 (2d Dist. 1980).

[108] Examples of independent consideration are: moving to a new town to accept employment, giving up secure employment to work for a new employer, selling a business in return for money and a promise of future employment. *See* Millsap v. National Funding Corp., 57 Cal. App. 2d 772, 135 P.2d 407 (1st Dist. 1943).

[109] The treatment of independent consideration in *Cleary* is somewhat unique in wrongful discharge cases. Most courts have felt compelled to avoid the independent consideration requirement in some manner since in most cases of wrongful discharge there is no independent consideration. In *Cleary* the rule of independent consideration is presented as an example of how § 2922 has traditionally had exceptions. Another example of the erosion of § 2922 is the rule that a contract for employment so long as the employer is satisfied is only terminable upon showing of actual dissatisfaction. Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 450, 168 Cal. Rptr. 722, 726 (2d Dist. 1980). *See* Coats v. General Motors, 3 Cal. App. 2d 340, 39 P.2d 838 (1st Dist. 1934).

[110] Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 451-53, 168 Cal. Rptr. 722, 727 (2d Dist. 1980).

[111] 24 Cal. App. 3d 695, 101 Cal. Rptr. 169 (5th Dist. 1972). In *Drzewiecki*, the plaintiff contracted to manage tax preparation offices owned by defendant. Among the terms of the contract was the following:

> This agreement shall be for a period of two years from the above date and thereafter shall automatically renew from year to year unless either party gives written notice of termination 90 days prior to renewal date. [*Defendant*] *may give notice of termination only in case of [plaintiff] improperly conducting the business.*

Id. at 700, 101 Cal. Rptr. at 171 (emphasis added). The trial court interpreted this language to mean that the employee was hired for so long as he "properly conducted the employer's business and could not be terminated by [defendant] except for cause." *Id.* at 701, 101 Cal. Rptr. at 172. The court of appeal affirmed using "ordinary rules of construction." *Id.* at 704, 101 Cal. Rptr. at 174.

[112] 55 Cal. App. 3d 91, 127 Cal. Rptr. 222 (1st Dist. 1976). Plaintiff gave up her 16 years employment to work for defendant who assured her permanent employment. The court of appeal found both independent consideration in plaintiff's leaving her old em-

was not terminable at-will. And *Hepp v. Lockheed-California Co.*[113] reversed a summary judgment granted to a defendant who allegedly laid off plaintiff inconsistently with defendant's own written policies. But, none of these cases based recovery on the implied covenant of good faith and fair dealing which was so important to the court in *Cleary*. *Drzewiecki*, *Rabago-Alvarez*, and *Hepp* all relied on established contract principles and, hence, actually provided greater support for the more traditional contract approach taken in *Pugh*.[114] Perhaps these cases and the other exceptions to the termination at-will doctrine in *Cleary* merely establish a trend to limit Section 2922: "These inroads on the absolute right of an employer to terminate at-will employees compel the conclusion that, presently, in many different contexts, there are practical, legally recognized limitations on the right to discharge at-will employees."[115]

D. Implied Covenant of Good Faith and Fair Dealing

In *Cleary*, the court's reliance upon the implied covenant of good faith and fair dealing was at the very heart of its position. It therefore bears considerable scrutiny, especially since the Court of Appeal for the First District in *Pugh* examined similar facts and declined to find a breach of the covenant of good faith and fair dealing.[116]

1. The Insurance Cases

The modern cause of action for breach of the implied covenant of good faith and fair dealing developed in cases against insurance compa-

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ployment and an implied condition not to terminate except for good cause in the employer's assurances. Since the court did not find just cause, plaintiff was awarded lost wages less the amount in mitigation.

[113] 86 Cal. App. 3d 714, 150 Cal. Rptr. 408 (2d Dist. 1978). The court in *Hepp* did not treat this as an exception to the terminable at-will doctrine since plaintiff was laid off, not fired. *Id.* at 720, 150 Cal. Rptr. at 411.

[114] Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1st Dist. 1981). The court in *Pugh* relied on both *Drzewiecki* and *Rabago-Alvarez* for the proposition that contracts of employment in California are terminable only for good cause if either of two conditions exist: (1) the contract was supported by consideration independent of the services to be performed by the employee for his prospective employer; or (2) the parties agreed, expressly or impliedly, that the employee could be terminated only for good cause. *Id.* at 326, 171 Cal. Rptr. at 925. *Pugh* cites *Cleary* as being in "accord" with this quotation. *Id.*

[115] Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 451, 168 Cal. Rptr. 722, 726 (2d Dist. 1980).

[116] Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1st Dist. 1981).

nies. In *Comunale v. Traders & General Ins. Co.*,[117] breach of the implied covenant arose from the defendant insurance company's refusal to defend and settle within its policy limits an automobile accident case. A verdict was returned against the insured,[118] and ultimately the insurance company was held liable for the entire amount of the judgment even though it exceeded the policy limit, because the defendant had refused to settle. "The decisive factor in fixing the extent of Traders' liability is not the refusal to defend; it is the refusal to accept an offer of settlement within policy limits,"[119] thus subjecting the insured to even greater liability.

Crisci v. Security Insurance Co.[120] is another example of how the implied covenant of good faith and fair dealing has been used in insurance cases. The insured had an insurance policy with defendant which provided for general liability protection. The insured was sued, and defendant refused a settlement within the policy limits even though both the defendant's claims manager, and the attorney hired to defend the insured believed there would be a very high award if the case went to trial.[121] The insured lost at trial, and when the anticipated high judgment was entered against her, defendant paid the relatively small amount owed under the policy. The insured sued the insurance company and ultimately received the full amount of the judgment and substantial damages for emotional distress.[122]

The supreme court in *Crisci* upheld the award based on an implied covenant of good faith and fair dealing arising from the defendant's contractual duty not only to pay the face value of its policy, but also to defend any suit against the insured. The duty under the contract included settlement when it was appropriate even though the express terms did not require settlement.[123] The court implied that the breach of the implied covenant also stemmed from the conflict between the insured's interest and the insurer's: "The insurer must give the interests of the insured at least as much consideration as it gives its own

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[117] 50 Cal. 2d 654, 328 P.2d 198 (1958). In *Cleary, Comunale* is cited for the proposition that the implied covenant of good faith and fair dealing exists in all contracts. Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 453, 168 Cal Rptr. 722, 728 (2d Dist. 1980).

[118] Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 657, 328 P.2d 198, 200 (1958).

[119] *Id.* at 659, 328 P.2d at 201.

[120] 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

[121] *Id.* at 428, 426 P.2d at 175, 58 Cal. Rptr. at 15.

[122] *Id.* at 427, 426 P.2d at 175, 58 Cal. Rptr. at 15.

[123] *Id.* at 429, 426 P.2d at 176, 58 Cal. Rptr. at 16.

interests."[124]

The supreme court expanded this use of implied covenant of good faith and fair dealing to a primary insurance carrier in *Gruenberg v. Aetna Insurance Co.*[125] There the insurance company defendant refused to pay plaintiff the face value of a fire insurance contract on the grounds that plaintiff refused to be examined under oath or produce documents as required by the insurance contract. Plaintiff had requested that the examination be waived as long as criminal charges of arson were pending. When the criminal charges were dropped a little over a month later, plaintiff offered to undergo the requested examination, but defendant refused to allow it.[126] Plaintiff alleged that defendant willfully and maliciously sought to deprive him of the benefits of the fire policies by encouraging criminal charges and using his failure to participate in the examination as a pretense for denying liability under the policies.[127]

Cleary repeats the proposition that "there is an implied covenant of good faith and fair dealing in *every* contract . . . ."[128] Although the *Cleary* court cited no California case related to breach of the implied covenant in an employment contract,[129] the court cited one case decided before the insurance cases in which the employer was required to exercise good faith in discharging an employee. In *Coats v. General Motors*,[130] the court of appeal stated: "It is equally well settled that the employer must act in good faith; and where there is evidence tending to show that the discharge was due to reasons other than dissatisfaction

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[124] *Id.*

[125] 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

[126] *Id.* at 571, 510 P.2d at 1035, 108 Cal. Rptr. at 483.

[127] *Id.* at 575, 510 P.2d at 1038, 108 Cal. Rptr. at 486. The *Gruenberg* approach, holding the primary carrier liable to the insured, has been followed in two important cases: Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 598 P.2d 452, 157 Cal. Rptr. 482 (1979), and Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974). *See* Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153, 163 (1981) [hereafter *Defining Torts*].

[128] Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 722, 728 (2d Dist. 1980) (emphasis in original); *see* Crisci v. Security Ins. Co., 66 Cal. 2d 425, 429, 426 P. 2d 173, 176, 58 Cal. Rptr. 13, 16 (1976); Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 573, 510 P.2d 1032, 1036, 108 Cal. Rptr. 480, 484 (1973); Comunale v. Traders & General Ins. Co., 50 Cal. 2d 654, 658, 328 P.2d 198, 200 (1958).

[129] The holding in *Tameny* is not based upon the covenant of good faith and fair dealing but rather upon "public policy and sound morality." Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 173, 610 P.2d 1330, 1333, 164 Cal. Rptr. 839, 842 (1980).

[130] 3 Cal. App. 2d 340, 348, 39 P.2d 838, 841 (1st Dist. 1934).

with the services the question is one for the jury . . . ."[131] However, two points should be noted about *Coats*. A contract for employment as long as work is satisfactory is not truly terminable at-will even though the employer has great discretion in determining what is satisfactory.[132] Also *Coats* did not invoke the implied covenant of good faith and fair dealing as it has ultimately been developed in the insurance cases.[133]

2. The Applicability of the Insurance Cases

It is difficult to tell if the court in *Cleary* is on solid ground in concluding that the implied covenant of good faith and fair dealing exists in employment contracts.[134] The insurance cases are firm in holding that the implied covenant is not limited to insurance contracts. In *Tameny*, the Supreme Court of California recognized in dicta that an implied covenant existed in employment contracts.[135] And, other jurisdictions have based action for wrongful discharge on an implied covenant.[136] Perhaps most important, there is a similarity between employment contracts and insurance contracts. To some degree employers and insurance companies have a position of power over people with whom they contract. These people depend upon both forms of contract for

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[131] *Id.* In *Coats*, the plaintiff participated in a stock bonus plan under which General Motors stock was awarded to employees. If an employee was dismissed for "unsatisfactory service (of which the executive committee [of the corporation was] the sole judge)" the unpaid portion reverted to the bonus fund. *Id.* at 345, 39 P.2d at 840. Upon discharge, plaintiff claimed a certain number of shares, three-fourths of which were to be awarded over the next three years. At trial, plaintiff sought to show that the dismissal was wrongfully motivated by a desire to deprive him of his shares of stock.

[132] *Id.* at 347-48, 39 P.2d at 841.

[133] It is clear that plaintiff was seeking specific performance. *Id.* at 344, 39 P.2d at 840.

[134] In another important case applying the implied covenant of good faith and fair dealing employment cases, the Massachusetts Supreme Court declined to speculate as to whether there was an implied covenant of fair dealing in all employment contracts. Fortune v. National Cash Register Co., 373 Mass. 96, 104, 364 N.E.2d 1251, 1257 (1977).

[135] Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 172-74, 610 P.2d 1330, 1332-34, 164 Cal. Rptr. 839, 841-43 (1980).

[136] *Arizona*, Moore v. Home Ins. Co., 601 F.2d 1072 (9th Cir. 1979); *Illinois*, Criscione v. Sears Roebuck & Co., 66 Ill. App. 3d 664, 384 N.E.2d 91 (1978), Stevenson v. ITT Harper, 51 Ill. App. 3d 568, 366 N.E.2d 561 (1977); *Massachusetts*, McKinney v. National Dairy Council, 491 F. Supp. 1108 (D. Mass. 1980); Maddaloni v. Western Mass. Bus Lines, Inc., 422 N.E.2d 1379 (Mass. App. 1981), Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977); *New Hampshire*, Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974); *New York*, Zimmer v. Wells Management Corp., 348 F. Supp. 540 (S.D.N.Y. 1972).

their security, well-being, and peace of mind. If insurance companies or employers act in bad faith, the consequences can be very severe, indeed much greater than those that result from a breach of contract.

One commentator, however, has forcefully argued that the implied covenant should not be applied to employment contracts.[137] The implied covenant applies to insurance contracts because of their adhesive nature, the fiduciary relationship of the insurer to the insured, and the quasi-public status of the insurance companies.[138] These factors do not exist in the employee-employer relationship. The employment contract is not adhesive: there are no standard forms, the employee is able to understand the conditions, and the employee may even bargain for special terms and considerations.[139] Employers do not have a fiduciary duty to employees, rather the employee is the agent of the employer.[140] Finally, the purpose of the employer's business is usually to make a profit; the employer does not have a quasi-public function of spreading the risk of the loss throughout society.[141]

E. What Constitutes a Breach of the Implied Covenant?

While the insurance cases may help establish the existence of the implied covenant of good faith and fair dealing in all contracts, including those between employer and employee, they shed little light on what constitutes a breach of the implied covenant in the employment setting. The question is whether discharge without just cause is itself a breach of the covenant of good faith and fair dealing, or whether bad faith or wrongful conduct beyond lack of just cause is also required.

Cleary stated that the length of plaintiff's employment (eighteen years), together with the policies and procedures that defendant adopted for the adjudication of employee problems, created a "form of estoppel, precluding any discharge . . . without good cause."[142] The court noted that while "plaintiff has the burden of proving that he was terminated unjustly . . . employer . . . will have its opportunity to demonstrate that it did in fact exercise good faith and fair dealing with respect to plaintiff."[143] Therefore, in *Cleary*, although there is little dis-

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[137] *Defining Torts*, note 127 *supra*, at 154.

[138] *Id.* at 164.

[139] *Id.* at 165-66.

[140] *Id.* at 166.

[141] *Id.* at 166-67.

[142] Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722, 729 (2d Dist. 1980).

[143] *Id.* at 456, 168 Cal. Rptr. at 729.

cussion of the subject, the court appeared to say that breach of the implied covenant of good faith and fair dealing may be shown simply by proving discharge without just cause. If lack of good cause is equated with a bad faith breach of the implied covenant, as it was in *Cleary*, employers' liability will be potentially much greater than if bad faith is taken to require some additional element of wrongfulness.

In the insurance cases, there is more than a hint that the tort remedy was fashioned because insurer's actions often exceeded mere breach of contract. In both *Comunale* and *Crisci*, the insurers did not merely refuse to defend and settle the case against the insured, but also subjected the insured to a much greater liability and concomitant emotional distress. They gambled, knowing that if the insured won at trial, they would at most have to pay the amount of the policy.[144] Such practices prompted the *Comunale* court to state that:

> The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim. Its unwarranted refusal to do so constitutes a breach of the implied covenant of good faith and fair dealing.[145]

Similarly, in *Gruenberg*, there was an element of additional wrongfulness in plaintiff's assertion that his insurer maliciously accused him of committing arson so that he would not undergo examination by the insurance company, thereby giving the company a pretext not to fulfill its obligation under the contract.[146]

Other insurance cases hold that there must be some element of additional wrongful conduct which if not outrageous is at least "exceptionally objectionable."[147] In one case, the company knew of the insured's desperate need, but still unreasonably withheld payment.[148] In another, the company refused the insured's claim despite overwhelming evidence

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[144] *See Defining Torts*, note 127 *supra*, at 162.

[145] Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 659, 328 P.2d 198, 201 (1958). This language is quoted favorably in Crisci v. Security Ins. Co., 66 Cal. 2d 425, 429, 426 P.2d 173, 176, 58 Cal. Rptr. 13, 16 (1967). The *Crisci* court states, however, that the conduct does not have to amount to fraud, dishonesty, or concealment. *Id.*

[146] Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 575, 510 P.2d 1032, 1038, 108 Cal. Rptr. 480, 486 (1973).

[147] *Defining Torts*, note 127 *supra*, at 163 n.39.

[148] Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 461, 521 P.2d 1103, 1109, 113 Cal. Rptr. 711, 717 (1974).

that it was valid. On appeal, the court stated that "the implied-in-law duty of good faith and fair dealing imposes upon a disability insurer a duty not to threaten to withhold or actually withhold payments, *maliciously* and without probable cause, for the purpose of injuring its insured by depriving him of the benefits of the policy."[149] Thus, if the insurance cases stand for the proposition that there must be some additional element of wrongfulness to invoke the use of the covenant of good faith and fair dealing, then the holding of *Cleary* that mere lack of just cause constitutes a breach of the implied covenant is more enigmatic.

Most of the cases that have found a breach of the implied covenant have found additional elements of wrongfulness.[150] Even *Coats v. General Motors* can be construed as having some element of additional wrongfulness beyond mere lack of good cause; plaintiff asserted he had been discharged despite satisfactory service in order to deprive him of stock shares earned prior to his discharge.[151] Moreover, in *Cleary*, the court's discussion of what constitutes a breach of the implied covenant of good faith and fair dealing does not explain how a breach of the implied covenant would differ from the breach of an implied condition not to terminate without just cause found in *Pugh*.[152]

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[149] Fletcher v. National Ins. Co., 10 Cal. App. 3d 376, 401, 89 Cal. Rptr. 78, 93 (4th Dist. 1970) (emphasis added).

[150] In one case, a salesman was discharged in an attempt to avoid paying him a commission he had already earned. Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977). Other cases involving some element of added wrongful conduct include: McKinney v. National Dairy Council, 491 F. Supp. 1108, 1118 (D. Miss. 1980) ("evidence supported by an inference that the termination was motivated by a desire to pay the employee as little of the bonus credit otherwise due him as possible"); Foley v. Community Oil Co., Inc., 64 F.R.D. 561 (D.N.H. 1974) (allegation of malice); Zimmer v. Wills Management Corp., 348 F. Supp. 540, 543 (S.D.N.Y. 1972) (plaintiff required to show that termination was made in bad faith to deprive him of benefits that he had already earned in an escrow agreement); Stevenson v. ITT Harper, Inc., 51 Ill. App. 3d 568, 366 N.E.2d 561, 567 (1977) (recovery denied because plaintiff did not show that his termination was due to a "bad faith effort by [the employer] to avoid its conditional duty to pay pension benefits"). In a New Hampshire case, a woman was fired because she resisted her employer's sexual advances. Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974). Both *Monge* and Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977), note 134 *supra*, were cited in *Tameny* as good examples of the application of the implied covenant of good faith and fair dealing.

[151] Coats v. General Motors Corp., 3 Cal. App. 2d 340, 39 P.2d 838 (1st Dist. 1934).

[152] Pugh v. See's Candies, Inc. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1st Dist. 1981).

Can bad faith be equated with a lack of just causes?[153] If the model of *Tameny* is followed, the answer is no, for *Tameny* requires something more; it requires that there be a wrongful motive, one that violates public policy, to justify the tort remedy.[154] "Bad faith" would then seem to mean that there was also some additional wrongfulness, an improper motive beyond mere lack of just cause behind the discharge.

Professor Blades, in his seminal article calling for the creation of an action for wrongful discharge, argued that ulterior purpose or motive should be the basis for a tort action:

> An analogy which seems particularly suited to the case of a discharge caused by improper motives is the tort action designed to present the perversion of legal procedure to ulterior purposes — abuse of process . . . . [T]he gist of the action is the exercise of a right for an ulterior purpose regardless of whether it can or cannot be otherwise justified . . . . Liability should similarly be visited on the employer who uses his power of discharge for an ulterior purpose and as a means of duress.[155]

Other commentators have urged that wrongful motive be the basis for the tort of wrongful discharge,[156] and the now outdated prima facie tort with its emphasis on intent and motive has also been suggested as a theory upon which to base tort recovery.[157]

To a large degree, the breach of the implied covenant in insurance cases allowed courts to make up for the inadequacy of the contractual remedy: under contract the insurance company would only have to pay the amount owed under the policy even though the damages caused by the company were far greater. The contractual remedy in *Cleary* seems perfectly adequate to compensate the plaintiff for his loss of future

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[153] "Bad faith, an indefinite term, 'imports a dishonest purpose or some moral obliquity . . . . It means a breach of a known duty through some motive of interest or ill will.' " *Employment Rule*, note 41 *supra*, at 440 (quoting Spiegel v. Beacon Participations, Inc., 297 Mass. 398, 416, 8 N.E.2d 895, 907 (1937)).

[154] *See* text accompanying note 29 *supra*.

[155] Blades, note 29 *supra*, at 1423. *Contra* Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment At-Will*, 17 AM. BUS. L.J. 467, 473 (1979) [hereafter Blackburn] (disapproving Blades' position, but not advocating a lesser standard).

[156] Note, *Judicial Limitation of the Employment At Will Doctrine*, 54 ST. JOHN'S L. REV. 552, 575 (1980) [hereafter *Judicial Limitation*]; *see Protecting Employees*, note 40 *supra*, at 1841 ("Perhaps a two tier or sliding scale approach would be appropriate. In the first year of employment only maliciously motivated discharges would be considered to be in bad faith, but afterwards the broader good faith standard could be applied."); Note, *A Remedy for the Discharge of Professional Employees Who Refuse to Perform Unethical or Illegal Acts: A Proposal in Aid of Professional Ethics*, 28 VAND. L. REV. 805, 828 (1975).

[157] *Judicial Limitation*, note 156 *supra*, at 576-77.

earnings and pension benefits he would receive if he continued working.[158] However, the contractual remedy would not compensate for emotional distress or allow punitive damages. The court in *Cleary* did not discuss the form of damages as a reason for choosing a theory of liability. If bad faith is interpreted to contain some element of wrongfulness beyond mere lack of good cause, it would justify the much stronger remedy for breach of the implied covenant of good faith and fair dealing. And, it is entirely possible that there may be unjust discharges, those "that result from negligent investigation, failure to properly appraise the significance of the employee's conduct, or other inadequate but innocent reasons"[159] which do not deserve the full battery of remedies available in the tort which lies for breach of the implied covenant.

F. Tort v. Contract

The cause of action established in *Cleary* sounded "both in contract and in tort."[160] Although there is little discussion of this subject, the basis for the inclusion of a tort remedy appears to be twofold. First, *Tameny* established a tort cause of action for wrongful discharge. Although the California Supreme Court declined to recognize a tort for the breach of the implied covenant because it was unnecessary to do so on the facts and pleadings in the case, the spirit of *Tameny* leans strongly in favor of the creation of a new employee right that sounds in tort.[161] Second, the insurance cases which support the theory of breach of the implied covenant of good faith and fair dealing all create a cause of action that sounds in tort and contract.[162] The extent to which these

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[158] *But see Protecting Employees*, note 40 *supra*, at 1843.

[159] Peck, note 5 *supra*, at 46. However, Professor Peck appears to support a tort for discharge without just cause: "A tort analogy is apt; only slight adjustment need be made from the concept of the reasonably prudent person to the reasonably prudent employer to develop a workable test of whether a discharge or discipline was justifiable." *Id.* at 44.

[160] Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (2d Dist. 1980).

[161] Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 179 n.12, 610 P.2d 1330, 1337 n.12, 164 Cal. Rptr. 839, 846 n.12 (1980). The supreme court in *Tameny* noted that other jurisdictions recognized a wrongful discharge action for breach of an implied covenant of good faith and fair dealing and that in California breach of this covenant sounds both in tort and contract. However, both out-of-state cases, cited in *Tameny*, that apply the implied covenant theory, held that the action sounded in contract. *See* notes 164-65 and accompanying text *infra*.

[162] *See* text accompanying note 115 *supra*.

cases are persuasive is questionable. As noted above, the insurance cases involve some element of additional wrongfulness: the insurance company not only refused to defend but by refusing to settle it knowingly placed the client in a much worse position. One case indicated the company's conduct may have been willful and malicious.

Beyond *Tameny* and the insurance cases, there is little external support for the combined tort/contract approach of *Cleary*. *Pugh* expressly rejected this approach, choosing instead a pure contractual remedy.[163] Moreover, other states have expressly rejected the tort remedy. For example, the Supreme Judicial Court of Massachusetts has observed:

> [S]ome courts have avoided the rigidity of the "at will" rule by fashioning a remedy in tort. We believe, however, that in this case there is remedy on the express contract. In so holding we are merely recognizing the general requirement in this Commonwealth that parties to contracts and commercial transactions must act in good faith toward one another. Good faith and fair dealing between parties are pervasive requirements in our law; it can be said fairly, that parties to contracts or commercial transactions are bound by this standard.[164]

In other good faith and fair dealing cases, the choice of a contractual remedy can be inferred by the denial of tort damages. In a New Hampshire case a plaintiff was denied recovery for mental suffering,[165] and in Illinois the court of appeal limited damages to those allowed for breach of contract.[166] Other cases appear to sound in contract because they are based upon precedent that allows an action in contract only.[167]

Ultimately the court in *Cleary* did not give a full explanation of why it chose to follow the combined tort/contract approach. Using the two factors it found so important, the long tenure of the plaintiff and the defendant's own personnel policies, the court could have found a purely contractual remedy either on the theory of an implied contract condition not to terminate without just cause (like *Pugh*) or even on a theory

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[163] Pugh v. See's Candies, Inc. 116 Cal. App. 3d 311, 328-29, 171 Cal. Rptr. 917, 926-27 (1st Dist. 1981).

[164] Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251, 1256 (1977). The facts in *Fortune* are very similar to those of Coats v. General Motors, Inc., 3 Cal. App. 2d 340, 39 P.2d 838 (1st Dist. 1934) which is cited in *Cleary*. *See also Protecting Employees*, note 40 *supra*, at 1816 (interpreting *Fortune* and *Monge* as contractual remedies).

[165] Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974); *see also Employment Rule*, note 41 *supra*, at 440 (noting that in *Monge* emphasis was placed on the wrongful motive of the employer).

[166] Stevenson v. ITT Harper, 51 Ill. App. 3d 568, 366 N.E.2d 561 (1977).

[167] McKinney v. National Dairy Council, 491 F. Supp. 1108 (D. Mass. 1980); Maddaloni v. Western Mass. Bus Lines, Inc., 422 N.E.2d 1379 (Mass. App. 1981).

based upon the simplified covenant of good faith and fair dealing.

III. REMEDY BASED ON IMPLIED-IN-FACT PROMISE: *Pugh*

A. Introduction

Of the trilogy of California cases involved in the current analysis of sources of remedies of terminated employees, *Pugh v. Sees Candies, Inc.*[168] has the most orthodox setting from the standpoint of contract law theory. While recognizing the remedial rights of employees terminated in violation of public policy, the *Pugh* court found no factual basis for such a remedy[169] and focused its search for possible traditional remedies under breach of contract. Because the case reached the court of appeal following nonsuit, the court did not address the ultimate merits of the action,[170] but merely inquired into the propriety of the nonsuit granted in the lower court.

B. Limitation by Contract Terms

The *Pugh* court acknowledged that, even apart from statutory or constitutional protection, an employer's right to terminate an employee is not absolute, and pinpointed one of the bases for limitation: the terms (express or implied) of the employment agreement.[171] The court observed that a presumption that an employment contract is terminable at-will is subject to contrary evidence since such a presumption is clearly rebuttable. The court noted that this evidence may be found in the express terms of the contract, or in the implied-in-fact terms of the agreement,[172] and may address not only an express or implied fixed term of the relationship but also an express or implied possible condition subsequent. Such a condition would indicate that the relationship

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[168] Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1st Dist. 1981).

[169] *Id.* at 322-23, 171 Cal. Rptr. at 922-23 (1981).

[170] *Id.* at 315, 171 Cal. Rptr. at 918.

[171] *Id.* at 321-22, 171 Cal. Rptr. at 922; *see Defining Torts*, note 127 *supra*, at 154.

[172] Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 324-25, 171 Cal. Rptr. 916, 924 (1st Dist. 1981). For a discussion of implied contractual rights to job security, see CORBIN, note 2 *supra*, at § 561-72A; Blackburn, note 155 *supra*, at 482-85; Olsen, *Wrongful Discharge Claims Raised by At Will Employees: A New Legal Concern For Employees*, 32 LAB. L.J. 265, 267 (1981); *Protecting Employees*, note 40 *supra*, at 1833; Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974) [hereafter *Contract Rights*]. *Contra* Comment, *Limiting the Employer's Absolute Right of Discharge, Can Kansas Courts Meet the Challenge?*, 29 KAN. L. REV. 267, 271 (1981).

would continue until terminated due to occurrence of the condition, for example, an employer's dissatisfaction or the existence of "cause" to terminate the agreement.[173]

Pugh followed contemporary law in summarily disposing of the requirements of mutuality or independent consideration, as prerequisites to enforcing any such promise, whether express or implied-in-fact. Simply because the employee can end the relationship without liability does not provide the employer with an unlimited right to terminate the employee in violation of contractual limitations that may exist.[174] Further, additional independent consideration from the employee, separate and apart from the employee's services, is not required for the validity of an express or implied agreement limiting the right of termination by the employer.[175] The court viewed this "independent consideration" as useful in determining if the promise existed, but treated the rule requiring independent consideration as one of "construction" and not substance.[176]

1. Permitted Evidentiary Inquiries

Since there was no express or implied term in the agreement in *Pugh* which set out a fixed term of employment, the court addressed whether there was evidence upon which a jury might have concluded that there was an implied-in-fact promise by the employer that the employee would not be terminated without cause. The court acknowledged several sources of implied-in-fact promises for continued employment in the absence of good cause to terminate: the personnel practices of the employer,[177] the employee's longevity of service,[178] actions or communications by the employer,[179] and the practices of the industry in which the employer is engaged.[180]

The court noted a limitation on termination without cause flowing from "an implied-in-law covenant of good faith and fair dealing im-

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[173] Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 324-25, 171 Cal. Rptr. 916, 924 (1st Dist. 1981). The *Pugh* court quoted early support of this concept. Lord v. Goldberg, 81 Cal. 596, 601-02, 22 P. 1126, 1128 (1889).

[174] Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 325, 171 Cal. Rptr. 917, 924 (1st Dist. 1981); *see* CORBIN, note 2 *supra*, at § 125, at 535 (1963).

[175] Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 325-26, 171 Cal. Rptr. 917, 924-25 (1st Dist. 1981).

[176] *Id.* at 326, 171 Cal. Rptr. at 925.

[177] *Id.* at 327, 171 Cal. Rptr. at 925.

[178] *Id.*

[179] *Id.* at 327, 171 Cal. Rptr. at 926.

[180] *Id.*

plied in every contract." However, the court appears not to have based its holding on this theory but to have relied on a more traditional approach by considering whether the jury could have found an implied-in-fact promise not to terminate without cause.[181]

2. Evidentiary Factors

Surely, the long term of the employee's tenure (thirty-two years) was an important factor in the court's determination that a jury might have found an implied-in-fact promise not to terminate without good cause.[182] The parameters of the use of this criteria in other cases involving less tenure are unclear.

It is important to note that the court broadened the bases upon which the jury could have found the implied-in-fact promise (of long tenure and employer policy) to embrace the totality of the employment relationship including commendations, promotions, and apparent lack of criticism.[183] In so doing, the court indicated its willingness to permit juries a reasonably broad inquiry into the existence of an implied-in-fact promise not to terminate without cause. The court would allow a broad consideration of evidence in connection with the employment relationship in determining if any presumption of an "at-will" employment relationship can be rebutted by an implied-in-fact promise. Thus, when an implied-in-fact promise not to terminate without cause is alleged as a basis for a breach of contract action growing out of termination, the court would likely permit a nonsuit only if a mere paucity of evidence supports the employee's claim.

3. Burden of Proof

Recognizing the "uncharted waters" of the litigation on remand, the court attempted to set guidelines for the trial by addressing the vital question of burden of proof.[184] The court indicated that the ultimate burden of proof must be on the employee to show that he was wrongfully terminated; once he establishes a prima facie case of wrongful termination, the employer must go forward with proof as to the reason for termination. It is then the employee's burden to show that the stated reason is in fact pretextual and that the real reason or cause is one prohibited by contract or public policy. In the application of labor

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[181] Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917, 927 (1st Dist. 1981).

[182] *Id.* at 328, 171 Cal. Rptr. at 926-27.

[183] *Id.* at 329, 171 Cal. Rptr. at 927.

[184] *Id.*

agreements, in which the promise not to terminate without just cause is express, the burden of showing this cause is normally upon the employer.[185]

The *Pugh* case is unusual in that it involved an employee who was a corporate officer and a member of the employer's board of directors. This apparently prompted the court to caution against applying its holding to managerial and confidential employees. It observed that, in these situations, care must be taken not to interfere with managerial discretion.[186] The exact application of this warning is unclear, except to indicate that in such cases, broader judicial acknowledgement of "cause" may be recognized.

The *Pugh* approach to fashioning a legal avenue for employees seeking redress for discharge is traditional in that it is based on contract law as opposed to a tort concept. However, the *Pugh* theory is contrary to the usual common law approach to termination of employment contracts for an indefinite term. The common law view, first embraced by Wood in 1877,[187] is based upon the presumption that these contracts are terminable at-will by either party for any reason.[188] Since its inception, the "at-will" rule has been criticized and attributed to various socio-economic factors.[189]

Pugh indicates that presumption of the "at-will" status of employment contracts for an indefinite period can be rebutted by showing an implied term of the contract limiting the employer's power to terminate only for good cause.[190] The *Pugh* approach is two tiered. In the first, the court is willing to consider factors rebutting presumption of "at-will" status by showing an implied term of the contract to the contrary. Second, the court suggests those factors that a jury may consider in determining the existence of a limitation on the right to terminate due to an implied term of the agreement.

The *Pugh* setting is somewhat unusual in that the common law "at-will" doctrine is statutory. However, in view of the history of California's codification of common law principles, the statutory source does

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[185] ELKOURI, note 47 *supra.*

[186] Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917, 928 (1st Dist. 1981).

[187] H. WOOD, MASTER AND SERVANT § 134 (1st ed. 1877); *see* Feinman, note 40 *supra*, at 126; *Contract Rights*, note 172 *supra*, at 341.

[188] *Protecting Employees*, note 40 *supra*, at 1818.

[189] Blackburn, note 155 *supra*, at 468-69; Feinman, note 40 *supra*, at 130-31; *Employee's Interests*, note 29 *supra*, at 72-73.

[190] Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 324-25, 171 Cal. Rptr. 917, 924 (1st Dist. 1981).

not disable the court from recognizing that the presumption can be rebutted.[191]

C. The Foundation of the Doctrine

The *Pugh* approach is not novel. Almost twenty years ago, Professor Blumrosen recognized that during the decades prior to his analysis, courts had demonstrated a willingness to "consider the entire relationship of the parties to find that facts and circumstances establish a contract which cannot be terminated by the employer without cause," thus modifying the trend formalized by Wood in the nineteenth century.[192] Under the traditional view, only a clear manifestation of the parties' assent would suffice to permit the court to find that the right of the employer to terminate was limited by a "for cause" requirement.[193]

The *Pugh* approach is consistent with contemporary legal commentary and analysis which indicate that courts are currently more willing to consider surrounding circumstances of the employment relationship in finding an implied promise of the employer to terminate only for good cause.[194] This approach has been recognized as consistent with customary interpretation techniques of commercial contracts permitting "gap filling" by implication of reasonable terms.[195]

It has been suggested that this approach to interpretation of employment contracts would have become the accepted method today if the "at-will" presumption had not gained favor in the late nineteenth century.[196] Developments in landlord-tenant law, which permit consideration of various factors in determining the term of a lease, have been

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[191] "An employment having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month." CAL. LAB. CODE § 2922 (West Supp. 1982). *See Employee's Interests*, note 29 *supra*, at 77-78 (discussing judicial attitudes toward the treatment of codified common law principles in California). The "at-will" doctrine was codified in 1872. The judiciary is less reluctant to modify and interpret common law codifications than other legislative enactments.

[192] Blumrosen, note 40 *supra*, at 432 (1964). For a contemporary treatment of the subject, see R. COULSON, THE TERMINATION HANDBOOK 173-79 (1981), and Note, *Limiting the Right to Terminate At Will — Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201, 206 n.30 (1982).

[193] *Protecting Employees*, note 40 *supra*, at 1818. This view has been described as being overly formalistic and characteristic of judicial thought in the late nineteenth century.

[194] *Id.*; *see* Roberts v. Atlantic Richfield Co., 88 Wash. 887, 568 P.2d 764 (1977).

[195] *Protecting Employees*, note 40 *supra*, at 1833; *see* Sullivan v. Heritage Found., 399 A.2d 856 (D.C. App. 1979) (implied fixed term of employment contract).

[196] Feinman, note 40 *supra*, at 125.

cited as examples of the proper application of contract law to discover the intent of the parties manifested through implied terms of the agreement.[197] Under this approach, resolution of an employer's right to terminate under an employment contract for an indefinite term would be subject to a case-by-case determination,[198] rather than a general presumption.[199]

D. The Contract Remedy

While some commentators have approved the use of contract theory as a basis for relief for wrongful termination,[200] others have criticized that approach in favor of tort remedies.[201] The viability of the contract theory is dependent on the courts' willingness to consider broad factors of the employment relationship in determining the existence of an implied promise. Notwithstanding the courts' cooperation, an ubiquitous factor in an employee's choice of theories is the broader range of damages in tort.[202]

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[197] *Id.* at 130; Blackburn, note 155 *supra*, at 483. Tennessee recognizes the compensation period as non-conclusive evidence of the contract term. McCall v. Oldenburg, 53 Tenn. App. 300, 382 S.W.2d 537 (1964); *see* WILLISTON, note 2 *supra*, at § 1017, at 129-30. *Contra* Henkel v. Educational Research Council, 45 Ohio St. 2d 249, 344 N.E.2d 118 (1976); Singh v. Cities Service Oil Co., 554 P.2d 1367 (Okla. 1976).

[198] The *Pugh* court felt the following factors appropriate for jury consideration in determining the existence of an implied limitation: personnel practices of the employer, the employee's length of service, actions or communication by the employer, and the practices of the affected industry. Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 916, 925-26 (1st Dist. 1981). Personnel manuals and policies have been considered in determining the nature of the employment contract. *See* Toussaint v. Blue Cross and Blue Shield of Mich., 408 Mich. 579, 292 N.W.2d 880 (1980). *Contra* Sargent v. Illinois Institute of Technology, 78 Ill. App. 3d 117, 397 N.E.2d 443 (1979); Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976). The *Pugh* considerations are consistent with the approach of other courts. *Contract Rights*, note 172 *supra*, at 356-62; *see* Haney v. Laub, 312 A.2d 330. (Del. Super. Ct. 1973) (stock option contract held to modify employment contract).

[199] Feinman, note 40 *supra*, at 130. Professor Jacoby concludes that in early nineteenth century American cases, the rate of pay was considered in determining the term of the employment contract. *See* S. Jacoby, An Historical Perspective on the Employer-Employee Relationship 5 (Jan. 18, 1982) (paper presented at a conference on "Job Protections for Managerial Employees," Institute of Industrial Relations, University of California at Los Angeles) (copy on file at U.C. Davis Law Review office).

[200] Blackburn, note 155 *supra*, at 482; Blades, note 29 *supra*, at 1421-27; *Individual Protection*, note 4 *supra* (statutory relief more appropriate than traditional tort or contract law).

[201] *Judicial Limitation*, note 156 *supra*, at 572.

[202] *Protecting Employees*, note 40 *supra*, at 1843. For example, the West Virginia Supreme Court has ruled that actions for wrongful discharge based on tort theories are

CONCLUSION

The primary responsibility of courts is to resolve individual disputes; hence, judicially created law is made piecemeal. The California approach to the law of wrongful discharge, developed in this manner, presents several unresolved questions. Attorneys who work with this area of law must feel a sense of uncertainty as to the state of the wrongful discharge cause of action. Employers face the immediate problem of how to discharge employees without incurring legal liability.

The growing parameters of the causes of action for wrongful discharge will probably make employers deal more formally with their employees. Employees may be asked to sign employment contracts insuring that both parties may terminate the relationship at-will. No doubt present personnel policies are being carefully scrutinized and revised, so as not to lay the foundation for an alleged breach of the implied covenant of good faith and fair dealing, or become the basis of an implied contract term. Employers can be expected to be more circumspect in dealing with long term employees and to avoid statements, evaluations or memoranda that can be used to establish a wrongful motive for discharge. Employers who have not operated under labor agreements requiring "just cause" for dismissal will begin to follow some of the procedures used by those who have such agreements with unions: for example, careful record keeping regarding conduct and performance of employees, and a more formal system of progressive discipline.

Perhaps the greatest uncertainty for all who deal with the present California law is the apparent contradiction between *Cleary* and *Pugh*. Both cases examined similar factors (the long tenure of the employee and the past employment practices of the employer), and found they supported different causes of action and a different set of recoverable damages. If there is a contradiction between these two cases, it is because *Cleary* can be interpreted as creating a cause of action, sounding in tort and contract, for termination without just cause. Although there is language in the case to support this view, many factors point to another interpretation that the cause of action for breach of the implied covenant of good faith and fair dealing should not be allowed for a mere lack of good cause. The insurance cases upon which *Cleary* relies, other California cases (especially *Tameny* and *Petermann*), and cases in other jurisdictions which apply the implied covenant of good faith

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subject to the shorter tort statute of limitations. Shanholtz v. Monongahela Power Co., 270 S.E.2d 178 (W. Va. 1980).

and fair dealing suggest that it should not be invoked absent some element of wrongful conduct by the employer beyond mere lack of just cause. If the apparent contradiction of *Cleary* and *Pugh* is thus resolved, it appears that California has developed a coherent framework for wrongful discharge actions.

Tameny is the California Supreme Court's reaffirmation that employers may not discharge employees in violation of public policy without risking tort liability, and the case provides that public policy may be found in violation of a statute. The contract theory of *Pugh* provides enhanced protection for employees discharged without just cause by recognizing a broad spectrum of factors that juries may consider to find implied-in-fact covenants that limit the right to discharge to just cause. And, *Cleary* grants employees the potential to recover the broader range of tort damages.

Without doubt these three causes of action have eroded the former rule in California that employment contracts for unspecified terms may be terminated at-will, and we may assume that further judicial application of the *Cleary-Tameny-Pugh* trilogy will clarify the extent of this trend. Cases from other jurisdictions will doubtless further amplify developments in this rapidly evolving area. Yet, caution is required in generalizing holdings of the various jurisdictions in view of the diverse theories courts employ in departing from the at-will doctrine.[203]

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[203] In a comprehensive survey of the various states' treatment of the employment-at-will doctrine, the Educational Fund for Individual Rights (Suite 820, 475 Riverside Drive, New York, N.Y. 10115) issued a November 1981 draft report entitled *The Employment-at-Will Doctrine: A State By State Assessment of the Common Law Protection Against Wrongful Discharge* by A. Feliu and D. Telfeyan. It suggests the following general analysis:

States adhering to the traditional rule in rejecting the public policy exemption: *Alabama*, Smith v. American Cast Iron Pipe Co., 370 So. 2d 283 (Ala. 1979); *Florida*, DeMarco v. Publix Super Markets, Inc., 384 So. 2d 1253 (Fla. 1980); *Mississippi*, Green v. Amerada-Hess Corp., 612 F.2d 212 (5th Cir. 1980); *Missouri*, Tolliver v. Standard Oil Co., 431 S.W.2d 159 (Mo. 1968); *New Mexico*, Gonzales v. United Southwest Nat'l Bank, 93 N.M. 522, 602 P.2d 619 (1979); *North Carolina*, Dockery v. Lampert Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978); *North Dakota*, Sand v. Queen City Packing Co., 108 N.W.2d 448 (N.D. 1961); *Ohio*, Henkel v. Educational Research Council, 45 Ohio St. 2d 249, 344 N.E.2d 118 (1976) (refusal to treat annual salary as indicative of contract for one year); *Oklahoma*, Singh v. Cities Service Oil Co., 554 P.2d 1367 (Okla. 1976) (specification of salary not indicative of term of employment contract); *Rhode Island*, School Comm. of Providence v. Board of Regents, 112 R.I. 288, 308 A.2d 788 (1973); *Texas*, Perdue v. J.C. Penney Co., 470 F. Supp. 1234 (S.D.N.Y. 1979) (applying Texas law, rejecting public policy exception); *Utah*, Bihlmaier v. Carson, 603 P.2d 790 (Utah 1979) (reaffirms classical statement of at-will doctrine); *Virginia*, Blevins v. General Electric Co., 491 F. Supp. 521 (W.D. Va.

1980); *Wyoming*, Lukens v. Goit, 430 P.2d 607 (Wyo. 1967).

States with wavering adherence to the traditional rule: *Delaware*, Haney v. Laub, 312 A.2d 330 (Del. Super. Ct. 1973); *Georgia*, Buchanan v. Foxfire Fund, Inc., 151 Ga. App. 90, 258 S.E.2d 751 (1979), American Standard, Inc. v. Jessee, 150 Ga. App. 663, 258 S.E.2d 240 (1979); GA. CODE § 66-101 (1979) (incorporates at-will doctrine); *Louisiana*, Morse v. J. Ray McDermott & Co., Inc., 344 So. 2d 1353 (La. 1977); *Maine*, Terrio v. Millinocket Community Hosp., 379 A.2d 135 (Me. 1977); *Tennessee*, McCall v. Oldenburg, 53 Tenn. App. 300, 382 S.W.2d 537 (1964) (permits consideration of pay period in determining term of contract).

Jurisdictions in which status of doctrine left open by courts: *Colorado*, Lampe v. Presbyterian Medical Center, 41 Colo. App. 465, 590 P.2d 513 (1978); *District of Columbia*, Ivy v. Army Times Publishing Co., 428 A.2d 831 (D.C. 1981); *Iowa*, Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978); *Kentucky*, Scroghan v. Kraftco Corp., 551 S.W.2d 811 (Ky. App. 1977); *Nebraska*, Mau v. Omaha Nat'l Bank, 207 Neb. 308, 299 N.W.2d 147 (1980); *South Carolina*, Hudson v. Zenith Engraving Co., 273 S.C. 766, 259 S.E.2d 81 (1979); *Vermont*, Jones v. Keogh, 137 Vt. 562, 409 A.2d 581 (1979); *Washington*, Roberts v. Atlantic Richfield Co., 88 Wash. 887, 568 P.2d 764 (1977).

States that have recognized exceptions, but not yet applied them: *Arizona*, Moore v. Home Ins. Co., 601 F.2d 1072 (9th Cir. 1979); *Arkansas*, M.B.M. Co., Inc. v. Counce, 268 Ark. 269, 596 S.W. 2d 681 (1980); *Idaho*, Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977); *Maryland*, Adler v. American Standard Corp., 290 Md. 615, 432 A.2d 464 (1981); *Minnesota*, Buysse v. Paine, Webber, Jackson & Curtis, Inc., 623 F.2d 1244 (8th Cir. 1980); *Montana*, Keneally v. Orgain, 606 P.2d 127 (Mont. 1980); *New York*, Chin v. A.T. & T., 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (N.Y. Sup. Ct. 1978); *Wisconsin*, Ward v. Frito-Lay, Inc., 95 Wis. 2d 372, 290 N.W.2d 536 (1980).

States recognizing exceptions on narrow grounds: *Indiana*, Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973), Martin v. Platt, 386 N.E.2d 1026 (Ind. App. 1979); *Kansas*, Murphy v. City of Topeka-Shawnee County, 6 Kan. App. 2d 488, 630 P.2d 186 (1981); *Massachusetts*, McKinney v. National Dairy Council, 491 F. Supp. 1108 (D. Mass., 1980); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977); *New Hampshire*, Howard v. Dorr Woolen Co., 120 N.H. 295, 414 A.2d 1273 (1980); *Oregon*, Brown v. Transcon Lines, 284 Or. 597, 588 P.2d 1087 (1978), Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); *Pennsylvania*, Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979); Geary v. United States Steel Co., 456 Pa. 171, 319 A.2d 174 (1974); *West Virginia*, Shanholtz v. Monongahela Power Co., 270 S.E.2d 178 (W. Va. 1980); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978).

States recognizing exceptions on broad grounds: *California*, Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Pugh v. See's Candies, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1st Dist. 1981); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (2d Dist. 1980); *Connecticut*, Sheets v. Teddy's Frosted Foods, 179 Conn. 471, 427 A.2d 385 (1980); *Illinois*, Palmateer v. International Harvester, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Michigan*, Schipani v. Ford Motor Co., 102 Mich. App. 606, 302 N.W.2d 307 (1981); *New Jersey*, Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980).