Workers' Compensation Exclusivity and Wrongful Termination Tort Damages: An Injurious Tug of War

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by

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The California Labor Code provides that workers' compensation is "the sole and exclusive remedy of the employee . . . against the employer." The Code also provides, however, that an employee can pursue tort damages in an action at law against the employer if (1) conditions of compensability do not exist, or (2) there is an applicable statutory exception to the exclusivity bar.

In 1987 two California Courts of Appeal for the first time faced the issue whether it is appropriate to apply this exclusivity provision to bar claims for wrongful termination injuries. In Shoemaker v. Myers, the Third District Court of Appeal held that workers' compensation was the exclusive remedy for wrongful termination damages, both pre- and post-termination. In seeming contrast, the Fourth District Court of Appeal in Green v. City of Oceanside upheld a jury award for a discharged em-

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1. CAL. LAB. CODE § 3602(a) (West Supp. 1987). See infra note 40 and accompanying text.

2. Id. § 3600(a)(1)-(9). "Conditions of compensability" is a term of art. Of those conditions enumerated in the Code, this Note focuses on only two conditions: 1) services performed must arise out of employment and be in the course of employment, and 2) injuries must be proximately caused by the employment. Id. § 3600(a)(2)-(3); see infra notes 31-34 and accompanying text.

3. Id. § 3602. See infra notes 45-52 and accompanying text.

4. In this Note "wrongful termination cause of action" means termination of employment either in violation of public policy or by breach of the implied covenant of good faith and fair dealing. See, e.g., Tameny v. Atlantic Richfield Co., 27 Cal. App. 3d 167, 172, 610 P.2d 1330, 1331, 164 Cal. Rptr. 839, 842 (1980)(employee brought action alleging employer had wrongfully discharged him for refusing to participate in illegal price fixing scheme); Khanna v. Microdata Corp., 170 Cal. App. 3d 254, 215 Cal. Rptr. 860 (1985)(action against employer for fraud, and breach of contract, wrongful discharge, and breach of covenant of good faith and fair dealing). "Wrongful discharge" does not refer to any other cause of action that may be related to termination of employment, such as negligent or intentional infliction of emotional distress.


ployee's post-termination emotional distress damages.\(^7\)

Superficially, *Shoemaker* and *Green* suggest that the Third and Fourth Districts of the California Courts of Appeal are in conflict over the applicability of the exclusivity doctrine to wrongful termination causes of action. This Note explains, however, why these decisions are *not* in conflict. The illusion of a conflict results from the courts' confusion over whether the exclusivity doctrine applies to wrongful termination claims. This confusion, in turn, stems from the lack of any accepted, coherent analysis to ascertain whether workers' compensation is the exclusive remedy for all of a particular plaintiff's work-related harms, particularly when that injury has been caused by a wrongful termination. Moreover, *Shoemaker* and *Green* are not in conflict because they are procedurally and factually distinguishable.

The need for a comprehensive analysis of wrongful discharge damage claims extends beyond the facts of either *Shoemaker* or *Green*. For example, disputes are appearing in California appellate courts over whether the exclusivity doctrine provides an affirmative defense to wrongful discharge.\(^8\) A step-by-step analytical framework is needed now.

This Note examines the tug of war between workers' compensation exclusivity and wrongful termination tort damages, and proposes an analytical approach that will avoid confusion. Section I examines the scope of the Workers' Compensation Act and the relevant modern sections of the act.\(^9\) Section II discusses the judicial creation and development of three wrongful termination causes of action: breach of contract; violation of public policy; and breach of the implied covenant of good faith and fair dealing.\(^10\) Section III reviews the cases that paved the way for the conflict between wrongful termination tort damages and workers' compensation exclusivity.\(^11\) Section IV recounts the facts and holdings of the recent wrongful discharge cases that address whether workers' compensation exclusivity bars wrongful termination damages.\(^12\) Section V critically analyzes each of these cases.\(^13\) Section VI suggests a step-by-step, analytical approach to determine whether workers' compensation should be the exclusive remedy for any given wrongful termination "in-

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\(^8\) See, e.g., Valenzuela v. State of Cal., 194 Cal. App. 3d 916, 240 Cal. Rptr. 45 (1987) (highway patrolman alleged superiors harassed him, forcing him to take disability retirement); see also, Ortiz v. Bank of Am., 824 F.2d 692 (9th Cir. 1987) (employee's workers' compensation settlement did not bar relief for breach of covenant of good faith and fair dealing).

\(^9\) See infra notes 15-53 and accompanying text.

\(^10\) See infra notes 54-92 and accompanying text.

\(^11\) See infra notes 93-149 and accompanying text.

\(^12\) See infra notes 150-83 and accompanying text.

\(^13\) See infra notes 184-227 and accompanying text.
This four-step analysis considers the following issues: (1) Whether the damages of a wrongful termination cause of action are an "injury" under workers' compensation; (2) whether a wrongful termination injury satisfies all of the requisite conditions of compensability; (3) whether the wrongful termination cause of action comes within the scope of the exclusivity doctrine; and (4) whether any statutory or implied exceptions to exclusivity apply to a wrongful termination injury.

I. Workers' Compensation Overview

The workers' compensation system was imported into the United States from England in the early 1900s. Its adoption was a reasonable response to the needs of employees injured on the job, especially in the wake of the Industrial Revolution. California's early enactments of a workers' compensation plan developed into the Workmen's Compensation, Insurance and Safety Act of 1917. In 1937 the Act was restated and codified in the California Labor Code.

A. Underlying Purpose

Workers' compensation is premised on a trade-off: the employer assumes no-fault liability for injuries caused by the employee's work and, in exchange, is relieved of the potential burden of large civil action damage awards. The employer's liability is essentially limited to the employee's reasonable medical and legal expenses, plus compensation for a percentage of the employee's lost wages. The percentage is based on the extent and duration of the employee's disability.

The California Constitution states that the purpose of workers' compensation is to provide substantial justice expeditiously, inexpensively, and without encumbrance. One commentator has said that "the essential intent of such a system is limited to assuring the injured workman..."
and his dependents a reasonable subsistence while he is unable to work, and to effectuating his speedy rehabilitation and reentry into the labor market.”\textsuperscript{23} Thus, the compensation payment is intended not to make the injured employee whole, but to prevent the employee from going on welfare while disabled.\textsuperscript{24}

B. Injury

The starting point and focus of any workers’ compensation claim by an employee is an injury.\textsuperscript{25} As early as 1915, the compensation law was amended to include injuries other than those caused by a work accident.\textsuperscript{26} The California Labor Code provides a somewhat circular definition of an injury: “‘Injury’ includes any injury or disease arising out of the employment.”\textsuperscript{27}

As currently defined, “injury” has been construed to mean \textit{bodily} injury.\textsuperscript{28} However, “bodily injury” has been interpreted to include an injury to the nervous system which manifests itself as a mental disorder. To the extent that such a mental impairment is disabling and caused by the work environment, it is treated as an injury under the workers’ compensation system.\textsuperscript{29}

In 1968, the Labor Code was amended, adding the following provisions to the definition of “injury”:

\begin{quote}
§ 3208.1. An injury may be either: (a) “specific,” occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) “cumulative,” occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. . . .

§ 3208.2. When disability, need for medical treatment, or death results from the combined effects of two or more injuries, either specific, cumulative, or both, all questions of fact and law shall be separately determined with respect to each such injury, including, but not
\end{quote}

\textsuperscript{23} 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN’S COMPENSATION § 1.05(5)(a) at 1-29 (2d ed. 1987).
\textsuperscript{24} Id. § 12.01(1) at 12-2 to -3 (citing West v. Industrial Accident Comm’n, 79 Cal. App. 711, 180 P.2d 972 (1947)).
\textsuperscript{25} 2 W. HANNA, supra note 23, § 11.01(1), at 11-3.
\textsuperscript{26} See J. MASTORIS, CIVIL LITIGATION AND WORKERS’ COMPENSATION: A CONTINUING CONFLICT 50.
\textsuperscript{27} CAL. LAB. CODE § 3208 (West Supp. 1988). This includes “injuries to artificial members, dentures, hearing aids, eyeglasses and medical braces of all types; provided, however, that eyeglasses and hearing aids will not be replaced, repaired, or otherwise compensated for, unless injury to them is incident to an injury causing disability.” Id. Note that work-related damage to personal property is not an “injury” except as specified in § 3208. Id. § 2802.
\textsuperscript{28} San Francisco v. Industrial Accident Comm’n, 183 Cal. 273, 275, 191 P. 26, 26 (1920).
\textsuperscript{29} 2 W. HANNA, supra note 23, § 11.01(2)(e), at 11-9.
limited to, the apportionment between such injuries of liability for dis-
ability benefits, the cost of medical treatment, and any death benefit.

§ 5303. [N]o injury, whether specific or cumulative, shall, for any
purpose whatsoever, merge into or form a part of another injury; nor
shall any award based on a cumulative injury include disability caused
by any specific injury or by any other cumulative injury causing or
contributing to the existing disability, need for medical treatments or
death. 30

C. Conditions of Compensability

In order for a work-related injury to be covered by workers’ com-
pen-sation, the following conditions must all concur when the injury is
sustained: 31 (1) there must be an “employer” and an “employee,” as de-
defined in the statute; 32 (2) the employee must be performing a service aris-
ing out of or incident to his employment, and he must be acting within
the course of his employment; 33 and (3) the injury must be proximately
caused by the employment. 34

The following conditions, however, preclude employee compensa-
tion: When the injury is caused by the employee’s own intoxication; 35

30. CAL. LAB. CODE §§ 3208.1–2, 5303 (West Supp. 1988); see also Kyles v. Workers’
finding is not required as a condition to recovery for needed medical treatment under workers’
compensation statutes).

31. CAL. LAB. CODE § 3600(a) (West Supp. 1988); see also, 2 W. HANNA, supra note 23,
§ 8.03(2), at 8-12 to -16 (discussing California’s uniquely restrictive compensation statute and
the judiciary’s disregard of these statutory restrictions).


33. Id. § 3600(a)(2). The “course of employment” requirement tends to be liberally in-
terpreted to include many off-premises and even rule-violating activities, as long as they are
reasonably related to what the employment contract expressly or impliedly authorizes. See,
e.g., State Employees’ Retirement Sys. v. Industrial Accident Comm’n, 97 Cal. App. 2d 380,
Indeed, all of the workers’ compensation statutes are to “be liberally construed by the courts
with the purpose of extending their benefits for the protection of persons injured in the course

34. CAL. LAB. CODE § 3600(a)(3) (West Supp. 1988). This “proximate cause” require-
ment is unique to the California compensation statute. 2 W. HANNA, supra note 23, § 8.03(4),
at 8-16. The courts have tended to construe “proximate cause” so broadly that even a merely
coincidental connection can satisfy the statutory requirement of a causal connection. Albert-
son’s, Inc. v. Workers’ Comp. Appeals Bd., 131 Cal. App. 3d 308, 315-16, 182 Cal. Rptr. 304,
308-09 (1982); 2 W. HANNA, supra note 23, § 8.03(5)(e), at 8-21 to -24. Moreover, the causal
connection between the employment and the injury need not be the sole cause of the injury but
may be merely a contributing cause. State Comp. Ins. Fund v. Industrial Accident Comm’n,
176 Cal. App. 2d 10, 17-21, 1 Cal. Rptr. 73, 78-80 (1959). Yet, “compensation will not be
awarded where the nature of the employee’s duties provides merely a stage for the event or the
employment itself was not a positive factor influencing the course of the disease process.” 2 W.
HANNA, supra note 23, § 8.03(6)(h), at 8-31 (citing Albertson’s, Inc. v. Workers’ Comp. Ap-
peals Bd., 131 Cal. App. 3d 308, 182 Cal. Rptr. 304 (1982)).

when injury or death is intentional or self-caused;\textsuperscript{36} when the employee is injured as a result of his own physical aggression\textsuperscript{37} or felonious act for which he is convicted;\textsuperscript{38} or when the injury arises out of voluntary, off-duty nonwork-related activities by the employee that are not required by the employment.\textsuperscript{39}

D. Exclusivity and Exceptions

Generally, workers' compensation is the employee's exclusive remedy against his employer for any injury sustained by the employee.\textsuperscript{40} There are, however, several exceptions to this rule. First, an employee may file a claim for benefits under workers' compensation, for damages in the civil court, or for both. If an employee brings a tort action against an employer in an attempt to recover damages for a work injury, the employer has the burden of proving the affirmative defense that workers' compensation is the employee's exclusive remedy, unless an employee-employer relationship is clearly shown in the complaint.\textsuperscript{41} Thus, an employer who fails to raise or to prove the issue of employment will be subject to the court's jurisdiction. If claims are filed for both benefits and damages, the first final determination of jurisdiction by either the civil court or the Workers' Compensation Appeals Board is binding on the other tribunal.\textsuperscript{42} Moreover, when an employer does not object to a tort action brought by the employee, in addition to a workers' compensation claim, the actions will proceed in both forums; nevertheless, the employer "may always have an offset for payments made in one jurisdiction against the judgment or award in the other tribunal."\textsuperscript{43} Finally, if any of

\begin{itemize}
\item \textsuperscript{36} Id. § 3600(a)(5)-(6).
\item \textsuperscript{37} Id. § 3600(a)(7).
\item \textsuperscript{38} Id. § 3600(a)(8).
\item \textsuperscript{39} Id. § 3600(a)(9).
\item \textsuperscript{40} Id. § 3602(a) ("Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer . . . .")
\item \textsuperscript{41} Doney v. Tambouratgis, 23 Cal. 3d 91, 96-99, 587 P.2d 1160, 1163-65, 151 Cal. Rptr. 347, 349-51 (1979) (affirmed damages award to employee alleging assault and battery where employment relationship did not appear on face of complaint and employer did not raise it as an affirmative defense). An "employee" is "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed . . . ." CAL. LAB. CODE § 3351 (West Supp. 1988).
\item \textsuperscript{42} J. MASTORIS, supra note 26, at 41.
\item \textsuperscript{43} Id. at 42.
\end{itemize}
the conditions of compensability do not concur, or if the circumstances fall within one of several codified exceptions the exclusivity rule will not bar a civil action.44

The Labor Code expressly permits an injured employee to seek damages in an action at law when the employee's injury or death is the result of or is aggravated by the employer's wrongdoing.45 In addition, the 1982 amendment to the workers' compensation law46 codified three "implied exceptions" to the exclusive remedy provision that had been recognized at common law:47 (1) the dual capacity doctrine;48 (2) intentional physical assaults by the employer;49 and (3) fraudulent concealment of an

44. "Where the conditions of compensation set forth in section 3600 do not concur, the liability of the employer shall be the same as if this division had not been enacted." CAL. LAB. CODE § 3602(c) (West Supp. 1988).

45. Section 3602(b) permits an action for damages:
(1) Where the employee's injury or death is proximately caused by a willful physical assault by the employer.
(2) Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation . . . .
(3) Where the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person.

Id. § 3602(b)(1)-(3).

Labor Code section 3706 provides another exception where the employer has failed to obtain workers' compensation insurance for his employees. Section 4558 provides a "power press guard" exception.

46. Assembly Bill 684 was enacted in 1982 by the California legislature and became effective January 1, 1983. Prior to its enactment, the bill was described as being a "benefit/reform package" that provided a trade-off of substantial increases in indemnity and benefits in exchange for extensive reforms. See Benefit/Reform Package Emerges for Legislative Action, 10 CALIF. WORKERS' COMP. RPTR. 145, 145 (1982). The reforms included a preponderance-of-the-evidence test for questions of fact, a one-year time limit to request vocational rehabilitation benefits, and "tightening" of the exclusive remedy law to preclude actions at law for damages against the employer based on the fact of the employer's dual capacity relationship to the employee prior to or at the time of the injury. On the other hand, the bill permitted actions for damages for those exceptions set forth in Labor Code section 3602(b)(1)-(3). See supra note 45.

The bill also provided for changes in the remedy for serious and willful misconduct by the employee (for example, elimination of the former $10,000 ceiling on the 50% surcharge on the amount of compensation otherwise recoverable).

47. CAL. LAB. CODE § 3602(a), (b)(1)-(3) (West Supp. 1988).

48. See, e.g., Bell v. Industrial Vangas, Inc., 30 Cal. 3d 268, 637 P.2d 266, 179 Cal. Rptr. 30 (1981) (employer-manufacturer could be held strictly liable, in employer's capacity as manufacturer, for injury to employee using employer's product); Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8 (1952) (employer-physician, who negligently treated employee, could be liable in a common-law malpractice action in his capacity as physician). The current status of the dual capacity doctrine is reflected in California Labor Code § 3602(b)(3). See supra note 45.

49. See Magliulo v. Superior Court, 47 Cal. App. 3d 760, 779, 121 Cal. Rptr. 621, 635 (1975) (exclusivity provisions do not apply to an intentional physical assault by employer); see
employee’s injury.\textsuperscript{50} Two other common-law exceptions, however, were not included in the amendment: (1) defamation;\textsuperscript{51} and (2) intentional infliction of emotional distress, when the primary claim is for a non-disabling emotional injury and, at most, any physical injury is mere "makeweight."\textsuperscript{52}

This codification of select exceptions has led some litigants to assert that the legislature intended thereby to bar any future judicially-implied exceptions to exclusivity.\textsuperscript{53} The status of the defamation and emotional distress "exceptions"—and whether, in fact, they should be viewed as exceptions at all—is discussed in sections III through V. First, however, it is important to review the creation and development of three wrongful termination causes of action. These causes of action call upon theories of breach of contract, public policy, and the implied covenant of good faith and fair dealing.

II. Development of Wrongful Termination Causes of Action

A. Wrongful Termination Breach of Contract

An employee may base a wrongful termination claim on a breach of contract theory. In such actions, the employee is limited to the tradi-
tional, foreseeable contract damages, which invariably exclude emotional distress and punitive damages.54 Labor Code section 2922 provides that "[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other."55 In contrast, where the employment is for a specified term of more than one month, section 2924 states that the employer may terminate the employment at any time if the employee has willfully breached, has habitually neglected, or has been continually incapable of performing his duty.56

When the employment is not for a specified term, courts have qualified the harshness of the at-will doctrine by recognizing an exception if the employer and employee agreed, either expressly57 or impliedly,58 that the employee would not be discharged except for good cause. When such a promise exists, the employee who is discharged without good cause may recover damages for breach of the employment contract.59 Damages for the breach are the amount of compensation—including, for example, salary, bonus, and pension rights—that the employee would have earned over a reasonable period of employment, had he not been terminated, less any compensation actually earned by the employee during that time.60

Similarly, courts have construed Labor Code section 2924 as meaning that employment for a specified term of greater than one month (and thus not part of the at-will doctrine) is terminable by the employer dur-

54. Unless the employee can prove that his unusual damages were due to special circumstances that were known or should have been known by the employer at the time of entering the contract, the employee is precluded from an award of unusual damages. See generally 1 B. Witkin, Summary of California Law, Contracts § 815, at 733-34 (9th ed. 1987) (discussing California's application of the rule in Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854) "[I]f special circumstances cause some unusual injury, special damages are not recoverable . . . unless the circumstances were known or should have been known to the guilty party at the time he entered into the contract.").


56. Id. § 2924.

57. See, e.g., Rabago-Alvarez v. Dart Indus., Inc., 55 Cal. App. 3d 91, 96, 127 Cal. Rptr. 222, 225 (1976) (discharge contrary to contractual promise of permanent employment so long as work was satisfactory).

58. See, e.g., Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 322, 324-26, 171 Cal. Rptr. 917, 922, 924-25 (1981). An employer's right to discharge an at-will employee is limited "when the discharge is contrary to the terms of the agreement, express or implied." Id. at 322, 171 Cal. Rptr. at 922. The express or implied promise may be based on the employer's words, conduct, custom, or some combination thereof. Id. at 329, 171 Cal. Rptr. at 927.


A "contract of employment" is "a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person." Cal. Lab. Code § 2750 (West 1971).

60. See, e.g., Drzewiecki v. H. & R. Block, 24 Cal. App. 3d 695, 701, 101 Cal. Rptr. 169, 172 (1972) (sustaining award of damages based on evidence of future lost wages over a reasonable period of ten years, reduced by current expected earnings).
ing the term only for good cause. \( ^{61} \) Damages for a breach of the employment contract in this context are the amount of compensation agreed upon from the date of the breach to the date on which the contract was to have terminated. \( ^{62} \)

B. Tort

(1) Public Policy Wrongful Termination

For many years, the courts have recognized that a cause of action for wrongful termination in violation of public policy exists in addition to a cause of action for breach of an employment contract. \( ^{63} \) Such a "violation" may be based on either statutory \( ^{64} \) or decisional law. \( ^{65} \) The employee must prove, inter alia, that his employment was terminated because he refused to participate in the employer's violation of a public policy, \( ^{66} \) or that the termination itself violated public policy. \( ^{67} \)

Initially, damages for a wrongful termination in violation of public policy were limited to traditional contract damages. \( ^{68} \) In Tameny v. Atlantic Richfield Co., \( ^{69} \) however, the California Supreme Court recognized that this cause of action also warranted tort damages. The court asserted that termination of employment in violation of public policy is a tortious act, not merely a breach of a contractual promise. \( ^{70} \) The court

\( ^{61} \) CAL. LAB. CODE § 2924 (West Supp. 1988); see, e.g., Koehrer v. Superior Court, 181 Cal. App. 3d 1155, 1166, 226 Cal. Rptr. 820, 826 (1986) (section 2924 permits termination of an employment contract for cause even when the contract is for a specified term, and the term has not expired).

\( ^{62} \) See, e.g., Parker v. Twentieth Century-Fox Film Corp., 3 Cal. 3d 176, 181-82, 89 Cal. Rptr. 737, 740, 474 P.2d 689, 692 (1970) (measure of recovery is amount of salary agreed upon for period of service less amount employer proves employee earned or might have earned from other employment); Rabago-Alvarez v. Dart Indus., Inc., 55 Cal. App. 3d 91, 97-98, 127 Cal. Rptr. 222, 225-26 (1976) (court deducted employee's earnings in subsequent employment from earnings he would have had under employment contract).


\( ^{66} \) Tameny, 27 Cal. 3d at 177, 610 P.2d at 1336, 164 Cal. Rptr. at 845.

\( ^{67} \) See, e.g., Koehrer v. Superior Court, 181 Cal. App. 3d 1155, 1165-66, 226 Cal. Rptr. 820, 825-26 (1986) (dictum) (discharge for taking time off to serve on a jury, or for refusing to adopt employer's political line violation of public policy).


\( ^{69} \) 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

\( ^{70} \) Id. at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844.
explained that the labeling of the discharge as “wrongful” is not based on the contract terms, but rather arises out of a duty implied in law on the part of the employer to conduct its affairs in compliance with public policy.\(^7\) Thus, damages may be awarded not only for the value of lost compensation and benefits under the employment contract, but also for consequential economic damages, emotional distress, punitive damages, and other items deemed appropriate by the trier of fact.\(^7\)

(2) Wrongful Termination Based Upon the Implied Covenant of Good Faith and Fair Dealing

The third theory on which a wrongful termination claim may be based is breach of the implied covenant of good faith and fair dealing. The plaintiff-employee in Tameny tried to state such a cause of action in addition to his violation of public policy claim.\(^7\) In its now-famous footnote twelve, however, the court side-stepped whether Tameny could state a cause of action on that theory, because “neither plaintiffs nor defendants suggest[ed] that the elements of a cause of action for breach of the implied covenant in this context would differ from the elements of an ordinary wrongful discharge action . . . .”\(^7\)

The Second District Court of Appeals soon followed through on the implications of footnote twelve. In Cleary v. American Airlines, Inc.,\(^7\) the court found “elements” which differed from the public policy wrongful discharge action. The Cleary court stated that “the longevity of the employee's service, together with the expressed policy of the employer, operate[d] as a form of estoppel, precluding any discharge of such an employee by the employer without good cause.”\(^7\) The court thus recognized a new cause of action despite the fact that the employee had also alleged that he was discharged for engaging in union organizing activ-

\(^71\) Id. In dictum in Koehrer v. Superior Court, 181 Cal. App. 3d 1155, 1163-71, 226 Cal. Rptr. 820, 823-29 (1986), the court labeled this cause of action a “tortious discharge” and distinguished it from both the breach of employment contract cause of action and the “bad faith discharge” cause of action (also known as a breach of the implied covenant of good faith and fair dealing).

Recently, this “tortious discharge” cause of action was extended to allow a demoted and only temporarily suspended employee to maintain an action for wrongful termination where the employer was allegedly retaliating against the employee for “whistle-blowing”; such retaliation is a violation of Labor Code section 1102.5. Garcia v. Rockwell Int'l. Corp., 187 Cal. App. 3d 1556, 1562, 232 Cal. Rptr. 490, 493 (1986), rev. denied (April 16, 1987).

\(^72\) 2 CALIFORNIA JURY INSTRUCTIONS, CIVIL No. 10.43, at 49-50 (7th ed. Supp. 1987) [hereinafter BAJI].


\(^74\) Id. at 179 n.12, 610 P.2d at 1337 n.12, 164 Cal. Rptr. at 846 n.12.

\(^75\) 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

\(^76\) Id. at 456, 168 Cal. Rptr. at 729. Cleary was an 18-year employee.
ity—a classic, statutory violation of public policy.\textsuperscript{77}

Unlike the breach of employment contract cause of action discussed above, the court held that this "wrongful discharge" cause of action sounded in both contract and tort. The employee was thus potentially "entitled to an award of compensatory damages, and, in addition, punitive damages . . . ."\textsuperscript{78} The two types of wrongful termination action differ conceptually as well. Whereas the contract action arises from a breach of a promise implied in fact in the employment agreement, the tort action arises from a violation of a duty implied in law.

Prior to \textit{Cleary}, the covenant of good faith and fair dealing was recognized as an obligation that the law implies into every contract.\textsuperscript{79} According to some courts, this covenant obligates each party to refrain from taking any action that injures the right of the other to receive the benefits of the agreement.\textsuperscript{80} Until \textit{Cleary}, however, tort damages for breach of this covenant had been awarded only in suits brought by insureds against insurers.\textsuperscript{81} The \textit{Cleary} extension of tort damages to a breach of the covenant in the employment context appears to have been premised, at least in part, on the similarity between the employer-employee relationship and the insurer-insured relationship. These similarities include the unequal bargaining positions of the parties and the reliance by the insured and the employee on the party in the superior position to provide security.\textsuperscript{82}

Since \textit{Cleary}, California appellate courts have both expanded and contracted the parameters of the cause of action for breach of the covenant.\textsuperscript{83} In \textit{Khanna v. Microdata Corp.},\textsuperscript{84} the employee was terminated solely because he had sued his employer for commissions that the employer owed him. Despite the fact that Khanna had only worked for the employer for two years, the court said that he would be able to maintain his cause of action sounding in tort because of the employer's bad faith.\textsuperscript{85} The court stated that the factors relied on in \textit{Cleary}—longevity of em-

\textsuperscript{77} \textit{Id.} at 454, 168 Cal. Rptr. at 729.
\textsuperscript{78} \textit{Id.} at 456, 168 Cal. Rptr. at 729.
\textsuperscript{79} \textit{See, e.g.}, Comunale v. Traders & General Ins. Co., 50 Cal. 2d 654, 658, 328 P.2d 198, 200 (1958) (citing Brown v. Superior Court, 34 Cal. 2d 559, 564, 212 P.2d 878, 881 (1949)).
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{See, e.g.}, Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 820, 598 P.2d 452, 457, 157 Cal. Rptr. 482, 487 (1979) (special relationship between insured and insurer illustrates public policy considerations to support exemplary damages).
\textsuperscript{82} \textit{Cleary}, 111 Cal. App. 3d at 448-49, 455, 168 Cal. Rptr. at 725, 729.
\textsuperscript{83} The California Supreme Court has not yet recognized this cause of action in the employment context. \textit{But see supra} note 74 and accompanying text. At this writing, however, the Court is about to issue its first opinion regarding the covenant of good faith and fair dealing in the employment context. \textit{See} Foley v. Interactive Data Corp., 174 Cal. App. 3d 282, 219 Cal. Rptr. 866 (1985), \textit{rev. granted}. — Cal. 3d —, 712 P.2d 891, 222 Cal. Rptr. 740 (Jan. 30, 1986).
\textsuperscript{85} \textit{Id.} at 253-57, 264, 215 Cal. Rptr. at 861-63, 869.
employment and the employer’s policy—are not the sine qua non to establishing a breach of the covenant of good faith and fair dealing implied in every employment contract . . . . To the contrary, a breach of the implied covenant of good faith and fair dealing in employment contracts is established whenever the employer engages in “bad faith action extraneous to the contract, combined with the obligor’s intent to frustrate the [employee’s] enjoyment of contract rights.”

As with public policy wrongful termination, damages for breach of the covenant of good faith and fair dealing may include not only the value of the lost compensation and benefits under the employment contract, but also consequential economic damages, emotional distress, punitive, and other items of damage deemed appropriate by the trier of fact.

C. Constructive Wrongful Termination

An employment termination may be either “actual” or “constructive.” A termination is actual when the employer notifies the employee, either orally or in writing, that his employment is terminated. It is constructive when the employee resigns because of the employer’s conduct, if a reasonable person in the employee’s position would have acted similarly.

Generally, courts do not require that the employer have intended,
by his conduct, to cause the employee to resign. To establish public policy wrongful termination, however, the employee must demonstrate "facts and circumstances showing that the employer had actual or constructive knowledge of the intolerable actions and conditions and of their impact on the employee, and could have remedied the situation."  

Any of the wrongful termination causes of action discussed above may be based on an actual or constructive termination. For example, if an employee resigns because of conduct in violation of public policy—such as discriminatory or retaliatory conduct by the employer—or because of conduct by the employer that would constitute a breach of the implied covenant of good faith and fair dealing, or of an employment contract there may be constructive termination.

III. Antecedent Cases to the Conflict Between Workers' Compensation Exclusivity and Wrongful Termination

Tort Damages

With the judicial creation of tort remedies for wrongful termination causes of action in 1980, the scene was set for the eventual conflict between workers' compensation exclusivity for work-related injuries and wrongful termination tort damages for termination-related injuries. At least a decade before the creation of tort remedies for wrongful termination, signs of this ultimate confrontation began to appear in cases alleging the related tort of intentional infliction of emotional distress. Subsequently, the confrontation was extended to defamation cases.

A. Intentional Infliction of Emotional Distress: Termination Cases

The tort of intentional infliction of emotional distress has been the most fertile source of cases prior to the current confrontation, for two reasons. First, the cause of action requires the plaintiff to allege suffering severe emotional distress as a result of the defendant's knowing or reck-


91. Id.

92. Id.; see also Moreno, 20 Cal. 2d at 534-35, 127 P.2d at 916-17 (resignations under duress constitute unlawful discharge); Monge v. Superior Court, 176 Cal. App. 3d 503, 507-08, 222 Cal. Rptr. 64, 65-66 (1986) (sexual discrimination and harassment constitutes a constructive termination of employment); Keithley, 11 Cal. App. 3d at 449-52, 89 Cal. Rptr. at 812-15 (police officer unlawfully discharged because excessive pressure from his superiors forced him to resign).


94. See infra notes 98-106 and accompanying text.
less and outrageous conduct. Since severe emotional distress is required, often an injury compensable under workers' compensation will have been sustained—an injury requiring medical treatment, resulting in a disabling physical symptom, or resulting in a mental disability. Second, the fact patterns in cases alleging intentional infliction of emotional distress are often quite similar to those occurring before or during a wrongful termination. For example, allegations of harassment, discriminatory conduct, or false accusations commonly appear in both types of action.

Ten years before the judicial creation of tort remedies for wrongful termination, the California Supreme Court in Alcorn v. Anbro Engineering, Inc. held that a wrongfully terminated employee stated a cause of action for intentional infliction of emotional distress. Alcorn alleged that his foreman responded to some advice by shouting, "'You goddam niggers are not going to tell me about the rules . . . .' " and then firing him. Alcorn also alleged facts sufficient to indicate that the foreman maliciously intended to cause Alcorn to suffer physical and mental distress, and that he did sustain distress in the form of shock, nausea, and insomnia. Even though Alcorn was reinstated through grievance and arbitration procedures, he was allowed to pursue a tort action to recover both actual and punitive damages incident to the termination. It should be noted that the employer never raised workers' compensation exclusivity as an affirmative defense, even though shock, nausea, and insomnia might have been compensable if the other conditions of compensation concurred.

Nine years later, exclusivity was raised as a successful affirmative defense to an employee's termination-related intentional infliction of emotional distress claim. In Gates v. Trans Video Corp., the employee apparently suffered distress during a dispute over using his accrued overtime and vacation time to extend his sick leave while he recovered from a work injury. The dispute culminated in his being fired. He was subjected to further distressing conduct by the employer when he went to retrieve his personal possessions from his desk, following the termination. After all of these incidents, Gates reportedly suffered from in-

95. PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 56-65 (5th ed. 1984); see also Alcorn v. Anbro Eng'g, Inc., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970) (plaintiff suffered from shock and other disturbances to the nervous system).
97. See infra notes 98-106 and accompanying text.
99. Id. at 496-97, 468 P.2d at 217, 86 Cal. Rptr. at 89.
100. Id. at 497-98, 468 P.2d at 218, 86 Cal.Rptr. at 90.
101. Id. at 497, 468 P.2d at 217-18, 86 Cal. Rptr. at 89-90.
102. See J. MASTORIS, supra note 26, at 52.
104. Id. at 199-200, 155 Cal. Rptr. at 488-89.
somnia, aggravation of the pain from his work injury, a preoccupation with what had happened, and a worsening of sexual relations with his wife. He also sought medical and counseling treatments.\textsuperscript{105}

The Second District held that the exclusivity provision of workers' compensation barred the employee's intentional infliction of emotional distress claim.\textsuperscript{106} The court held that exclusivity applied because (1) the employee's injuries were sustained \textit{while he was still an employee} for workers' compensation purposes, and (2) he alleged that he was physically injured and disabled as a result of the employer's acts. Thus, under the facts of this case, distress suffered following the termination was suffered while the plaintiff was still an employee as well.

B. Intentional Infliction of Emotional Distress: Nontermination Cases

Until 1987, with the exception of \textit{Gates}, the issue of exclusivity only arose in cases in which the employee was \textit{not} terminated. Beginning in 1978 with \textit{Renteria v. County of Orange},\textsuperscript{107} courts began to focus on the nature of the alleged emotional distress to determine whether exclusivity should bar an action at law in this context. \textit{Renteria} claimed that his employer treated him in a degrading manner, placed him under surveillance, interrogated him at length, and discriminated against him because of his Mexican-American heritage.\textsuperscript{108} \textit{Renteria} alleged neither that his resulting mental distress caused any physical or mental illness, nor that it resulted in an employment disability.\textsuperscript{109} The \textit{Renteria} court held that workers' compensation exclusivity did \textit{not} bar the employee's cause of action for intentional infliction of emotional distress because nondisabling mental suffering, not accompanied by a physical injury, is not a compensable injury under workers' compensation.\textsuperscript{110} Moreover, the court recognized that although Labor Code section 4553 provides a fifty percent surcharge against an employer for injuries caused by the employer's serious and willful misconduct, "[w]here there is no compensable injury, fifty percent of nothing is still nothing, and Labor Code section 4553 cannot function as a deterrent."\textsuperscript{111}

The \textit{Renteria} decision is significant because the court declined to interpret the Workers' Compensation Act as shielding employers from liability for noncompensable injuries caused by the employer's intentionally outrageous conduct, and, further, because the court construed the employee's cause of action for intentional infliction of emotional distress

\textsuperscript{105} \textit{Id.} at 201, 155 Cal. Rptr. at 489.
\textsuperscript{106} A second cause of action, for conversion of personal property, was not barred. \textit{Id.}
\textsuperscript{107} 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978).
\textsuperscript{108} \textit{Id.} at 835, 147 Cal. Rptr. at 447.
\textsuperscript{109} \textit{Id.} at 840, 147 Cal. Rptr. at 451.
\textsuperscript{110} \textit{Id.} at 840, 842, 147 Cal. Rptr. at 451-52.
\textsuperscript{111} \textit{Id.} at 841, 147 Cal. Rptr. at 452.
to be an implied exception to exclusivity. 112 Renteria is also significant for adopting an essence of the action test advocated by nationally renowned workers' compensation commentator Arthur Larson:

“If the essence of the tort, in law, is non-physical, and if the injuries are of the usual non-physical sort, with physical injuries being at most added to the list of injuries as a makeweight, the suit should not be barred. But if the essence of the action is recovery for physical injury or death, the action should be barred even if it can be cast in the form of a normally non-physical tort.” 113

Following Renteria, courts rather arbitrarily and inconsistently determined whether or not to apply the exclusivity bar by evaluating whether an alleged physical injury was significant or only makeweight. 114

In January 1987, the California Supreme Court handed down the important decision of Cole v. Fair Oaks Fire Protection District. 115 Even though the court applied pre-1983 law, nothing in the decision suggests that it would not be equally applicable to the present version of the Labor Code. The language and facts of Cole have provided ammunition for both employees and employers in subsequent wrongful termination actions. It must be emphasized, however, that Cole itself is not a wrongful termination case, and that Supreme Court review was limited to causes of action for intentional infliction of emotional distress and loss of consortium. 116

112. Id. at 842, 147 Cal. Rptr. at 452. This Note suggests that, since the emotional harm in Renteria is not an “injury” for the purposes of workers' compensation, exclusivity is inapplicable; the “implied exception” recognized in Renteria is therefore unnecessary. See discussion infra in Section VI.


116. Id. at 151, 162-63, 729 P.2d at 744, 751-52, 233 Cal. Rptr. at 309, 317. It should be noted that the Court of Appeal affirmed the demurrer as to eight of the ten original causes of action, “but reversed with directions to permit amendment of the complaint as to causes of action for defamation and for false light invasion of privacy.” Id. at 151, 729 P.2d at 744, 233...
The facts in *Cole* were particularly egregious. Allegedly in retaliation for Cole's union activities, management engaged in a campaign of harassment, during which management made false accusations of dishonesty regarding Cole's workers' compensation claim for hypertension, conducted a "kangaroo" hearing, demoted him from fire captain to an entry level position, and attempted to force his retirement.\(^{117}\) Reportedly as a consequence of the harassment, Cole suffered a totally disabling cerebral vascular accident.\(^{118}\) The stroke left him unable to move, except to communicate by blinking his eyes.\(^{119}\)

The court held that Cole's claims were barred by the exclusive remedy provision.\(^{120}\) First, it held that *Renteria* did not apply because Cole did suffer a compensable physical injury or disability; thus, the deterrents of compensation and additional recovery under Labor Code section 4553 were available to him.\(^{121}\)

Next, the court addressed the significance of an employer's *purposely* causing an employee to suffer emotional distress that results in disability.\(^{122}\) While noting that an employer's mere reckless disregard would not warrant an exclusivity exemption, the court found that an employer's supervisory conduct is inherently "intentional."\(^{123}\) Nonetheless, to avoid "throw[ing] open the doors to numerous claims already compensable under the compensation law,"\(^{124}\) the court extended the exclusivity bar to Cole's action for intentional infliction of emotional distress.\(^{125}\) Thus, an employee cannot avoid exclusivity by merely "characterizing the employer's decisions as manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance resulting in disability."\(^{126}\)

In dictum, however, the court also stated that exclusivity will shield an employer's intentional misconduct only with regard to "actions which are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances . . . ."\(^{127}\) The court recognized that employees may recover for intentional misconduct that has caused some disability in cases involv[ing] conduct of an employer having a "questionable" relation-

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117. *Id.* at 152-53, 729 P.2d at 744-45, 233 Cal. Rptr. at 309-10.
118. *Id.* at 153, 729 P.2d at 745, 233 Cal. Rptr. at 310.
119. *Id.* at 152-53, 729 P.2d at 744-45, 233 Cal. Rptr. at 310.
120. *Id.* at 151, 729 P.2d at 744, 233 Cal. Rptr. at 309.
121. *Id.* at 156-57, 729 P.2d at 748, 233 Cal. Rptr. at 313.
122. *Id.* at 160, 729 P.2d at 750, 233 Cal. Rptr. at 315.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
ship to the employment, an injury which did not occur while the em-
ployee was performing service incidental to the employment and which
would not be viewed as a risk of the employment, or conduct where the
employer or insurer stepped out of their proper roles.\textsuperscript{128}

Two months after \textit{Cole}, the Fourth District Court of Appeal
adopted this language in \textit{Hart v. National Mortgage \& Land Co.}\textsuperscript{129} In
\textit{Hart}, the employer’s ratification of a supervisor’s sexually offensive
remarks and suggestive physical gestures was deemed to be conduct having
a “questionable relationship to employment, and . . . neither a risk, an
incident, nor a normal part of Hart’s employment . . . .”\textsuperscript{130}

Hart alleged both tort damages (physical and emotional distress)
and work disability.\textsuperscript{131} Nonetheless, the court stated:

We believe the time should and has come to cast aside the arbitrary
and sometimes irrationally applied “physical versus emotional harm”
approach in favor of another factor more logically connected to the
workers’ compensation suit-at-law choice. That factor is whether the
acts complained of were a “normal part of the employment relation-
ship”, or, whether the acts were incidents of the employment
relationship.\textsuperscript{132}

Because the intentional misconduct had a questionable relationship to
the employment, workers’ compensation exclusivity was not a bar to
Hart’s suit for intentional infliction of emotional distress, despite the al-
leged physical injury and work disability.\textsuperscript{133}

\textbf{C. Defamation}

Another tort frequently asserted by wrongfully terminated employ-
ees is defamation. This tort has been construed as an “implied excep-
tion” to exclusivity. The Third District, in the recent case of \textit{Howland v.
Balma},\textsuperscript{134} quoted approvingly a Massachusetts court:

The [Workers’ Compensation] act has been interpreted to encompass
physical and mental injuries arising out of employment, whereas the
gist of an action for defamation is injury to reputation, irrespective of
any physical harm or mental harm. We recognize the conceptual
problem inherent in the employee’s [complaint] including physical and
mental injury as elements of damage in the defamation claim. How-
ever, we feel that to block the main thrust of this action because of
peripheral items of damages, when a compensation claim could not
purport to give relief for the main wrong of injury to reputation, would

\textsuperscript{128} \textit{Id.} at 161, 729 P.2d at 751, 233 Cal. Rptr. at 316.
\textsuperscript{129} \textit{189} Cal. App. 3d 1420, 1429-31, 235 Cal. Rptr. 68, 74-75 (1987), \textit{rev. denied} (June 17,
1987).
\textsuperscript{130} \textit{Id.} at 1430, 235 Cal. Rptr. at 74.
\textsuperscript{131} \textit{Id.} at 1425-26, 235 Cal. Rptr. at 71.
\textsuperscript{132} \textit{Id.} at 1429, 235 Cal. Rptr. at 73-74 (citation omitted) (quoting \textit{Cole v. Fair Oaks Fire
Protection Dist.}, 43 Cal. 3d 148, 160, 729 P.2d 743, 750, 233 Cal. Rptr. 308, 315 (1987)).
\textsuperscript{133} \textit{Id.} at 1427-32, 235 Cal. Rptr. at 72-76 (citation omitted in opinion).
\textsuperscript{134} 143 Cal. App. 3d 899, 192 Cal. Rptr. 286 (3d Dist. 1983).
be incongruous, and outside the obvious intent of the exclusiveness clause.\textsuperscript{135}

Thus, \textit{Howland} indicates that the workers' compensation system was not intended to cover claims for injury to reputation, even when physical injury has resulted.

The \textit{Howland} court also invoked Professor Larson's "essence of the action" rationale,\textsuperscript{136} previously relied upon in intentional infliction of emotional distress cases.\textsuperscript{137} Howland's action for damages to reputation was allowed to proceed even though he had previously executed a workers' compensation compromise and release for his slander-related physical and mental injuries.\textsuperscript{138}

D. Cases Involving Pretermination Injuries

Most civil actions brought by employees have alleged injuries suffered following their termination. Some cases, however, have involved pretermination injuries. \textit{Georgia-Pacific Corporation v. Workers' Compensation Appeals Board}\textsuperscript{139} addressed the issue whether an employee's claim was compensable under workers' compensation, not whether it was excluded. The employee had sought only workers' compensation coverage—not a tort remedy—for cumulative stress, allegedly suffered through the day of the employee's termination. The court, annulling an award of workers' compensation benefits, stated in dictum:

Had the record demonstrated that the injury was caused by termination, it is clear the [employee's] injury would not be compensable, because it would not be work-related within the meaning of Labor Code § 3600, which requires that an injury arise out of employment, occur in the course of employment, and be proximately caused by the employment rather than termination of employment. [The employer] correctly asserts that a termination for economic reasons—or for any other reason—does not invoke workers' compensation liability; of course, if the termination is wrongful, the employee is entitled to pursue other legal remedies.\textsuperscript{140}

Larson makes a similar point in his treatise on workers' compensation: "The controlling fact in establishing exclusiveness is the relationship of the parties at the time of occurrence of the injury. Their relationship at other times, such as the time of the employer's miscon-
duct or the time of bringing the suit, is immaterial."141

Larson's view emphasizing the timing of the injury was adopted in Spratley v. Winchell Donut House, Inc.142 While Spratley is not a termination case, it is significant because the court looked to the timing of the injury rather than of the misconduct in determining whether the exclusivity doctrine applied.143 Spratley was severely injured during a robbery at work.144 She conceded that workers' compensation was the exclusive remedy for her physical injury,145 but she brought a civil suit for emotional distress damages resulting from the employer's fraudulent inducement of her acceptance of employment.146 Spratley claimed that the employer failed to follow through on his pre-employment promises that the workplace would be safe.147

The court held that, because Spratley's injuries were suffered during her employment, her fraudulent inducement claim satisfied the conditions of compensability and was thus barred by the exclusivity doctrine.148 The fact that her employer's alleged misconduct—his false promises—occurred before the employment relationship began was irrelevant according to the court.149

This section has briefly reviewed the significant tort cases of the 1970s and 1980s that have defined the relationship between the workers' compensation system and tort causes of action. Whereas Renteria and its progeny asked whether the asserted injury was essentially physical or nonphysical, Cole and Hart changed the focus to whether the employer's actions were a normal part of the employment relationship. Other cases, such as Georgia-Pacific Corp. and Spratley, have looked more to the relationship between the employee and employer at the time of the injury.

IV. Recent Cases Dealing with the Conflict Between Workers' Compensation Exclusivity and Wrongful Termination

Tort Damages

In 1987, four California cases finally addressed the conflict between the exclusivity doctrine and wrongful termination causes of action. Shoemaker v. Myers150 was the first of these cases, followed by Ortiz v. Bank

141. 2A A. LARSON, supra note 15, § 65.13, at 12-13 (May 7, 1987).
143. Id. at 1412, 234 Cal. Rptr. at 122-23.
144. Id. at 1410, 234 Cal. Rptr. at 121.
145. Id. at 1412, 234 Cal. Rptr. at 122.
146. Id. at 1410-11, 234 Cal. Rptr. at 122.
147. Id. at 1412, 234 Cal. Rptr. at 122-23.
148. Id., 234 Cal. Rptr. at 123.
149. Id. at 1416-17, 234 Cal. Rptr. at 125-26.
of America National Trust and Savings,\textsuperscript{151} Green \textit{v.} City of Oceanside,\textsuperscript{152} and Valenzuela \textit{v.} State of California.\textsuperscript{153} While two of these cases, Shoemaker and Green, appear to put the Third and Fourth Districts in conflict, section V explains why this is not true.

A. Shoemaker \textit{v.} Myers

In Shoemaker \textit{v.} Myers,\textsuperscript{154} Shoemaker alleged that he was assigned to investigate claims concerning health care center violations and related misfeasance within his own department. He submitted a report that substantiated the claims, but was advised by department officials to cease his investigation. When he objected to their obstruction of the investigation, he was chastised by his supervisor.\textsuperscript{155} Months later, he was mistakenly identified as the person responsible for harassing a psychiatrist's patients. Nevertheless, management ordered him to be interrogated three times. When Shoemaker invoked his statutory right of representation under the Public Safety Officers Procedural Bill of Rights Act, management fired him for insubordination.\textsuperscript{156}

Shoemaker's first amended, verified complaint set forth causes of action for "tortious wrongful termination, wrongful termination in violation of former Government Code section 19683, wrongful termination in violation of public policy, . . . [and] intentional infliction of emotional distress . . . ."\textsuperscript{157} Shoemaker alleged that his employer's wrongful and malicious acts caused severe emotional and physical injuries that would result in permanent disability.

The trial court sustained the employer's demurrer with leave to amend, indicating that the various causes of action for wrongful termination and for intentional infliction of emotional distress were all barred by the exclusivity provisions of workers' compensation, because physical

\begin{itemize}
  \item \textsuperscript{151} 824 F.2d 692 (9th Cir. 1987).
  \item \textsuperscript{152} 194 Cal. App. 3d 212, 239 Cal. Rptr. 470 (4th Dist. 1987), \textit{rev. denied} (Oct. 29, 1987).
  \item \textsuperscript{153} 194 Cal. App. 3d 916, 240 Cal. Rptr. 45 (4th Dist. 1987).
  \item \textsuperscript{155} \textit{Id.} at 791, 237 Cal. Rptr. at 688.
  \item \textsuperscript{156} \textit{Id.} at 791-92, 237 Cal. Rptr. at 688-89.
  \item \textsuperscript{157} \textit{Shoemaker}, 192 Cal. App. 3d at 792, 237 Cal. Rptr. at 689. The court stated in part: Section 19683 was a "whistleblower" statute prohibiting the use of official authority by any state officer or employee or any person whatsoever to discourage, restrain, interfere with, coerce or discriminate against any other state officer or employee who in good faith reports violations of any state or federal law on the job or directly related thereto. Any person guilty of such wrongful conduct could be liable to the offended party in an action for civil damages.
\end{itemize}
disability is compensable. Although Shoemaker subsequently amended his complaint and deleted the physical injury references, the trial court found that he failed adequately to explain the deletions and reiterated its earlier decision, as though the physical injury references were still part of the complaint.

The Third District Court of Appeal, adopting the Renteria approach to intentional infliction of emotional distress claims determined that Shoemaker's physical injuries were more than mere makeweight and held that exclusivity barred the causes of action for wrongful termination and intentional infliction of emotional distress. The court also rejected Shoemaker's contention that his employer's intentional misconduct should exempt these causes of action from the exclusivity bar. Extending Cole v. Fair Oaks Fire Protection District, the court stated that "[d]isciplinary hearings and actions, such as termination, are an inherent part of the employment setting and thus a normal risk of employment."

Lastly, the court rejected Shoemaker's argument that since his claim was based on a "whistleblower" statute that allowed a civil action for damages, his claim should not be barred by the exclusive remedy provisions of workers' compensation. Shoemaker asserted that rules of statutory construction should resolve any conflict between the statutes in his favor because the whistleblower statute was enacted more recently. The court, however, held that the exclusivity bar of the workers' compensation statute, which is more specific as to the nature of the injury and as to the relationship between the parties, should prevail.

On August 26, 1987, the California Supreme Court granted Shoemaker's petition for review.

B. Ortiz v. Bank of America National Trust and Savings

Less than two months after Shoemaker, in Ortiz v. Bank of America

158. Id. at 792, 237 Cal. Rptr. at 689.
159. Id. at 792-93, 237 Cal. Rptr. at 689.
160. See supra notes 107-27 and accompanying text.
161. Shoemaker, 192 Cal. App. 3d at 793-95, 237 Cal. Rptr. at 689-91.
163. Shoemaker, 192 Cal. App. 3d at 796, 237 Cal. Rptr. at 692.
164. See supra note 157 regarding the "whistleblower" statute, former Government Code section 19683.
165. Shoemaker, 192 Cal. App. 3d at 796-98, 237 Cal. Rptr. at 692-93. But cf. Jones v. Los Angeles Community College Dist., 198 Cal. App. 3d 794, 807-09, 244 Cal. Rptr. 37, 41-45 (injuries sustained as a result of racial discrimination, which is proscribed by a civil rights statute, constitute a harm separate from a disabling physical injury covered by workers' compensation; therefore, the workers' compensation exclusive remedy statutes will not bar a tort claim of statutory racial discrimination, because the statutes cover separate wrongs).
National Trust and Savings, the Ninth Circuit, applying California law, addressed the conflict between wrongful termination and workers' compensation. Ortiz was terminated following eighteen years of employment. She filed workers' compensation claims for psychic injuries that produced a continuing disability. Ortiz' subsequent compromise and release of her workers' compensation claim indicated that her psychic injuries had arisen out of her employment. She agreed to release the bank from all claims or causes of action regarding or resulting from her injuries, but also filed a state civil action for breach of the covenant of good faith and fair dealing, breach of contract, and discrimination. The bank then removed the case to federal court.

In special verdicts the jury found that the workers' compensation release did not bar her claim for breach of the covenant of good faith and fair dealing. The jury also found that the bank had breached the covenant, and it awarded Ortiz damages for lost wages, pension benefits, and other fringe benefits. The jury, however, found that she was not entitled to damages for emotional distress.

In upholding the jury award to Ortiz for her employer's breach of the implied covenant of good faith and fair dealing, the court explained that a workers' compensation settlement does not eliminate the injured worker's right to pursue a civil action for the invasion of other interests, absent a specific provision in the release to that effect. The court stated that California's "primary rights doctrine" requires analysis of the different rights involved:

[T]he right protected by the [Workers' Compensation Act] is the right not to be physically or emotionally injured on the job, while the right protected by the covenant of good faith is the right not to be unfairly deprived of the benefits of employment. The harm Ortiz suffered was the loss of employment and the damages she received were for loss of income and fringe benefits. The WCA covers the injuries and risks of employment, not injuries flowing from unemployment.

The court also pointed out that the rationale behind the emotional distress cases was inapplicable because Ortiz did not sue for intentional infliction of emotional distress. "Rather she prevailed on a claim of breach of the covenant of good faith and fair dealing, i.e., a claim that the [employer] unfairly and in bad faith deprived her of her right to receive the

167. 824 F.2d 692 (9th Cir. 1987).
168. Id. at 694.
169. Id.
170. Id.
171. Id.
172. Under California's "primary rights doctrine," the invasion of one primary right gives rise to a single cause of action. There is only one cause of action for one personal injury that is incurred by reason of one wrongful act. See, e.g., Slater v. Blackwood, 15 Cal. 3d 791, 795, 543 P.2d 593, 594, 126 Cal. Rptr. 225, 226 (1975).
173. Ortiz, 824 F.2d at 695-696.
benefits of employment."

C. Green v. City of Oceanside

Two weeks after Ortiz, the California Fourth District Court of Appeal upheld a jury award of damages for emotional distress suffered as a result of wrongful termination. Green sued for wrongful termination and breach of the covenant of good faith and fair dealing. He was notified of his termination by mail while on medical leave to obtain psychological counseling, a need the court presumed was caused by unfair chastisement at work.

The court rejected the employer’s contention that an award of damages for emotional distress should be barred by the exclusivity provisions because Green’s employer failed to raise exclusivity as an affirmative defense. Previously, the employer had asserted only that damages caused by wrongful termination could not overlap those damages to which Green was entitled under workers’ compensation. Consequently, the trial court instructed the jury that it could not award damages for stress Green suffered prior to his termination.

In upholding the jury award for Green’s post-termination emotional distress damages, the appellate court indicated that a wrongful termination rarely would result in a compensable injury under workers’ compensation:

We question whether the damages suffered by a plaintiff as a result of a wrongful termination may properly be termed an “injury” for the purposes of section 3600. The Supreme Court appears to be comfortable with a rule stating that a civil suit will be barred by the exclusive remedy doctrine only if “the essence of the wrong is personal physical injury or death . . . .” [Even if the damages are termed an injury], however, the reasoning of Renteria v. County of Orange and its progeny would strongly suggest that a cause of action for wrongful termination is not barred by the exclusive remedy provisions because it rarely if ever would result in an employment “disability,” a necessary predicate for workers’ compensation.

D. Valenzuela v. State of California

Less than one month after Green, the Fourth District decided

174. Id.
176. Id. at 216, 239 Cal. Rptr. at 471.
177. Id. at 218, 239 Cal. Rptr. at 472.
178. Id. at 223, 239 Cal. Rptr. at 475.
179. Id. at 223 n.2, 239 Cal. Rptr. at 475 n.2.
Valenzuela v. State of California. Valenzuela alleged that he was "forced" to take a disability retirement after enduring a campaign of harassment by his supervisor. He claimed that he suffered physical and emotional injuries and work disability as a result of the harassment; that he was agitated and depressed; that he could not work or sleep; and that he suffered from palpitations, weight loss, headaches, and earaches.

The Valenzuela court did not address whether the exclusivity provisions applied to Valenzuela's cause of action for breach of the covenant of good faith and fair dealing because Valenzuela had failed to exhaust his administrative remedies. The court, however, affirmed the trial court's dismissal of Valenzuela's cause of action for intentional infliction of emotional distress, holding that workers' compensation was Valenzuela's exclusive remedy because his injuries were compensable. Apparently his injuries were deemed compensable because he was sufficiently disabled to take a disability retirement.

V. Critical Analysis of Recent Cases Dealing with the Conflict Between Workers' Compensation Exclusivity and Wrongful Termination Tort Damages

The four cases discussed in the preceding section illustrate differing approaches to the exclusivity issue. This section sets forth a critical analysis of each of these cases.

A. Shoemaker v. Myers

The opinion in Shoemaker v. Myers is seriously flawed in several respects. The court (1) failed to examine separately the "essence of the action" and conditions of compensability as to each cause of action, (2) failed to distinguish between normal and wrongful termination when the employer's intentional misconduct has a questionable relationship to the employment, and (3) erred when it perceived a conflict between the "whistleblower" statute and workers' compensation exclusivity statutes. As a result, Shoemaker is an excellent illustration of the logical traps awaiting the unwary court in the confrontation between wrongful termination and workers' compensation.

(1) Essence of the Action

First, the court—without explanation—applied the physical versus emotional harm analysis used in the intentional infliction of emotional

182. Id. at 922-24, 240 Cal. Rptr. at 49-50.
183. Id. at 919-24, 240 Cal. Rptr. at 47-50.
distress cases\textsuperscript{185} both to the various wrongful termination causes of action and to Shoemaker’s cause of action for intentional infliction of emotional distress.\textsuperscript{186} Determining whether a physical injury allegation is more than a mere makeweight \textit{may} be critical in assessing whether workers’ compensation is the employee’s exclusive remedy for the \textit{intentional infliction of emotional distress} cause of action. Prior to Shoemaker, however, there was no case law that applied this factor to a \textit{wrongful termination} cause of action.

The Shoemaker court’s problematic analysis may be traced to several errors. First, it neglected to examine whether the essence of any of the wrongful termination causes of action involved a compensable injury under workers’ compensation. Severe emotional distress is the essential damage element of intentional infliction of emotional distress. Determining whether the physical injury is more than mere makeweight is a key to the “essence” of that action because it directly answers the question whether a compensable injury under workers’ compensation is involved. In contrast, the main harm of wrongful termination is deprivation of the benefits of employment,\textsuperscript{187} and emotional distress damages typically are secondary to or derivative from that harm.\textsuperscript{188} Deprivation of the benefits of employment is not the basis of an “injury” within the purview of the Workers’ Compensation Act;\textsuperscript{189} therefore, it is not compensable. Thus, if the “essence of the action” is wrongful deprivation of employment, the action should not be barred by the exclusivity doctrine even if there is some incidental physical injury or other resulting disability related to emotional distress.\textsuperscript{190}

Arguably, an employee could use the tort of “wrongful termination” to shield against exclusivity. For example, an employee might be reinstated with back pay shortly after his wrongful termination (and thus not substantially deprived of his right to the benefits of the employment), and

\textsuperscript{185} \textit{See supra} notes 107-28 and accompanying text.
\textsuperscript{186} \textit{Id.} at 793-95, 237 Cal. Rptr. at 689-91.
\textsuperscript{187} \textit{Cf.} Ortiz v. Bank of Am. Nat’l Trust and Sav., 834 F.2d 692, 696 (9th Cir. 1987)(right protected by covenant of good faith is right not to be unfairly deprived of the benefits of employment).
\textsuperscript{189} \textit{Cf.} Howland v. Balma, 143 Cal. App. 3d 899, 904, 192 Cal. Rptr. 286, 289 (1983) (slander and resulting damage not within purview of workers’ compensation law); \textit{see also} Ortiz v. Bank of Am. Nat’l Trust and Sav., 824 F.2d 692, 695-96 (9th Cir. 1987) (right protected by covenant of good faith is right not to be unfairly deprived of benefits of employment, while right protected by workers’ compensation is right not to be physically or emotionally injured on the job). In addition, where the cause of action is for wrongful termination in violation of public policy, courts should also take into account the additional underlying harm resulting from infringement of the right to be free from the particular public policy violation.
\textsuperscript{190} 2A A. LARSON, \textit{supra} note 15, § 68.34(a), at 13-110 to -111 (1987).
his post-termination, compensable, emotional-physical injuries might be extremely disabling. Then, the essence of the action might truly be his physical injury or disability, and not the deprivation of employment.

Shoemaker was reinstated several months after being terminated. He claimed that he would probably have some unstated, residual permanent disability, despite amelioration of his total disability as of his reinstatement date. Aside from the court's general indication that Shoemaker alleged that his health was harmed as a result of the unlawful termination, there were no facts to suggest that his emotional distress or disability was caused by the wrongful termination rather than by the employer's pretermination misconduct. Thus, the opinion neglects to establish, as it should, that his termination-caused harm was either compensable or rising to a level sufficient to recharacterize the "essence of the action" as a physical injury or disability (rather than a deprivation of employment).

Perhaps because the Shoemaker court failed to distinguish the wrongful termination causes of action from intentional infliction of emotional distress, it also failed to contrast the timing of wrongful termination injury as opposed to that of an intentional infliction of emotional distress injury. For an injury to be compensable under workers' compensation, it must arise out of, occur in the course of, and be proximately caused by the employment. While the employer's misconduct in wrongfully terminating an employee typically does arise out of and occur in the course of the employment, the "deprivation of employment" damages (for example, wage loss and post-termination emotional distress) arise out of, occur in the course of, and are proximately caused by the unemployment that follows.

Additionally, workers' compensation law distinguishes between "separate" and "cumulative" injuries. By analogy, Shoemaker's wrongful termination was a separate post-termination "injury," not compensable under the workers' compensation statutes, and requiring a separate accounting of damages. It was distinct from, albeit related to, his pretermination, compensable injuries. Thus, even if pretermination distress existed as a result of the employer's campaign of harassment, aggravation of that distress by wrongful termination should have been separately assessed as a byproduct of the "separate" injury of wrongful termination.

191. Shoemaker, 192 Cal. App. 3d at 792, 237 Cal. Rptr. at 689.
192. Id. at 795, 237 Cal. Rptr. at 689.
193. Id.
194. CAL. LAB. CODE § 3600(a) (West Supp. 1988).
197. Id. § 3208.1.
termination—an injury that is not within the purview of workers’ compensation law.

(2) Normal Risks of Employment

After disposing of exclusivity and compensability, the Shoemaker court held that termination is a “normal risk” of employment, so that there is no implied or statutory exception to exclusivity, as there might have been if the termination were intentional misconduct only questionably related to the employment.\(^{198}\) There are two flaws in this logic.

First, it is highly doubtful that wrongful termination is a “normal risk” of employment. A termination for good cause or because of a good faith mistaken belief that good cause exists would be a normal risk of employment. In contrast, a discharge that is either a violation of public policy or a bad faith attempt to deprive the employee of his right to the benefits of the employment agreement is not a normal risk of employment. The Shoemaker court failed to distinguish between the normal risk of legitimate termination and the abnormal risk of wrongful termination.

Second, by again failing to analyze separately the causes of action for wrongful termination and intentional infliction of emotional distress, the court ignored the fact that the main harm in a wrongful termination cause of action—deprivation of employment—is noncompensable under workers’ compensation.\(^{199}\) Instead, the Shoemaker court treated Shoemaker’s termination merely as the intentional misconduct element of his cause of action for intentional infliction of emotional distress. Finding Shoemaker’s “injury” to be compensable under that legal theory, the court erroneously required that the employer’s misconduct have a “questionable relationship” to the employment before it would allow an exemption from exclusivity.\(^{200}\)

The court should have applied the Renteria principle that an action at law should not be barred where there has been intentional misconduct causing a noncompensable harm.\(^{201}\) The Renteria court reasoned that it would be unfair to apply Labor Code section 4553, which permits a fifty percent surcharge to deter serious and willful misconduct by the employer, to situations where it will only produce “50 percent of


\(^{199}\) Georgia-Pacific, 144 Cal. App. 3d at 75, 192 Cal. Rptr. at 645.


nothing.”

(3) Statutory Construction

Finally, the Shoemaker court applied the rule of statutory construction that a narrower, more specific statute takes precedence over a broader, more general statute. The main flaw in the court’s reasoning is its initial assumption that Government Code section 19683, the “whistleblower” statute underlying each of Shoemaker’s wrongful termination causes of action, was in conflict with the workers’ compensation statute. In reality, the “whistleblower” statute and the workers’ compensation statutes do not conflict. The type of harm sought to be redressed by the whistleblower statute is not the type of injury contemplated by the workers’ compensation law. The essence of an action based on the whistleblower statute is not physical injury or disability, but rather it is the right to be free of retaliation for “blowing the whistle” on unlawful acts. The comparative specificity of the whistleblower and workers’ compensation statutes—used as the deciding factor by the court—is irrelevant because the statutes address two essentially different rights.

B. Green v. City of Oceanside

Superficially, the Fourth District Court of Appeal’s decision in Green v. City of Oceanside appears to conflict with the Third District’s decision in Shoemaker. In contrast to Shoemaker, Green held that the workers’ compensation exclusive remedy provisions did not bar the employee’s wrongful termination cause of action. It must be remembered, however, that Green’s employer failed to raise exclusivity as an affirmative defense, whereas in Shoemaker the employer’s demurrer was sustained because of the exclusivity bar. Also, Green did not allege any physical injury or disability associated with his termination-caused emotional distress. Shoemaker, however, did allege physical injury and disability, at least part of which may have been construed to be termination-caused. Thus, the procedural posture and facts of each case may well explain the differing results. The potential for conflict and for confusion, however, does not end here.

202. Renteria, 82 Cal. App. 3d at 841, 147 Cal. Rptr. at 452.
203. Id. at 796-98, 237 Cal. Rptr. at 692-93.
204. See supra note 157.
206. Id. at 216, 239 Cal. Rptr. at 471.
207. Id. at 224-25, 239 Cal. Rptr. at 476-77.
In Green, the court questioned "whether the damages suffered by a plaintiff as a result of a wrongful termination may properly be termed an 'injury' for the purposes of § 3600." Since section 3600 of the Labor Code sets forth the conditions of compensability, one might construe the Green court to question whether wrongful termination damages could arise out of, occur in the course of, or be proximately caused by the employment. If Green's "question" regarding wrongful termination damages was intended to be answered in the negative—suggesting that wrongful termination damages are noncompensable under workers' compensation—then the court would be in conflict with the Shoemaker court, which argued that terminations are "an inherent part of the employment setting." The Green court not only left its own question unanswered, but it went on to say "that a cause of action for wrongful termination would not be barred by the exclusive remedy provisions because it rarely if ever would result in an employment 'disability', a necessary predicate for workers' compensation." The logic of Green would fail if its question of wrongful termination damages were intended to be answered unequivocally in the negative. In this dictum, the court implicitly seems to be leaving open the possibility—albeit "rarely if ever"—that wrongful termination damages might be an "injury" and might satisfy the conditions of compensability where the wrongful termination results in an employment disability. While this logic is not altogether satisfactory, this dictum may be a further indication that there is no true conflict between the Third and Fourth Districts, since the Shoemaker court may have construed the employee's disability to have been at least in part the result of the wrongful termination.

The Green court erred, however, if it meant that an employment disability resulting from a wrongful termination can bring the wrongful termination cause of action within the scope of the exclusivity doctrine. As discussed earlier, a disability resulting from a wrongful termination arises out of, occurs in the course of, and is proximately caused by unemployment, rather than by employment.

C. Ortiz v. Bank of America National Trust and Savings

In Ortiz v. Bank of America National Trust and Savings, the only relevant issue before the Ninth Circuit was the employer's contention that the exclusivity doctrine should apply to overturn a jury award of damages for lost wages, pension and fringe benefits for a wrongful termi-

211. Green, 194 Cal. App. 3d at 223, 239 Cal. Rptr. at 476.
212. CAL. LAB. CODE § 3600(a) (West Supp. 1988).
214. Green, 194 Cal. App. 3d at 224, 239 Cal. Rptr. at 476 (emphasis added).
216. 824 F.2d 692, 695 (9th Cir. 1987).
nation breach of the covenant of good faith and fair dealing. The court upheld the jury award, correctly pointing out that the wrongful deprivation of the benefits of employment is not within the purview of workers' compensation and that such a deprivation flows from unemployment, not employment.\textsuperscript{217} Ortiz did not cross-appeal the jury's denial of emotional distress damages, apparently because she had executed a workers' compensation settlement and release for disabling "psychic injuries" arising from her employment.\textsuperscript{218} Thus, unlike the court in Shoemaker, the Ortiz court did not preclude an action at law for wrongful termination, despite the fact that there was arguably a related, compensable emotional distress injury. It is unclear from the opinion, however, whether Ortiz had alleged emotional distress damages resulting from the wrongful termination that were distinct from the psychic injuries covered by the workers' compensation settlement and release.\textsuperscript{219} Theoretically the jury's denial of such damages would have been erroneous. Jury instructions providing that such damages would be precluded because of the settlement and release would also have been erroneous. The court commented, however, that the jury award was appropriate both because the employee did not assert a cause of action for intentional infliction of emotional distress and because the jury did not award her any damages for emotional injuries resulting from her treatment by the employer.\textsuperscript{220} These comments are potentially misleading because the court places undue importance on the name of the tort rather than on the essence of the action.

D. Valenzuela v. State of California

In Valenzuela v. State of California,\textsuperscript{221} causes of action both for wrongful termination breach of the covenant of good faith and fair dealing and for intentional infliction of emotional distress were before the Fourth District Court of Appeal. The wrongful termination action was dismissed, however, because the employee failed to exhaust his administrative remedies.\textsuperscript{222}

One might speculate about the significance of the court's total silence over whether the exclusivity doctrine applied to the wrongful termination cause of action, especially because Valenzuela was decided by two of the three judges who had handed down the Green opinion less than one month earlier.\textsuperscript{223} Green alluded to the possible bar of exclusivity...
ity for claims of employment disability resulting from the wrongful termination. In Valenzuela, the employee allegedly suffered an employment disability prior to his termination, as a result of the employer's mistreatment. The court's silence about the applicability of the exclusivity bar to the wrongful termination action may, thus, reflect the court's view that exclusivity was inapplicable, since the employment disability did not result from the wrongful termination.

The court did hold, however, that workers' compensation was the employee's exclusive remedy for the intentional infliction of emotional distress cause of action. The Valenzuela court's treatment of the two causes of action separately is also relevant, especially in contrast to Shoemaker's analytical treatment of them as indistinguishable.

VI. Proposed Four-Step Analytical Approach

The preceding review demonstrates that there is substantial confusion among California courts in their approaches to the exclusivity issue. For example, the Shoemaker Court failed to distinguish between the various causes of action; and the Green court wrongly implied that wrongful termination damages could constitute an "injury" for workers' compensation purposes. These decisions, along with Ortiz and Valenzuela, also appear to lack a logical framework for analyzing exclusivity issues, especially as they relate to wrongful termination claims. This section suggests such a framework.

Absent a consistent approach to predict whether exclusivity will apply to a wrongful termination cause of action, plaintiffs may be reluctant to plead either their temporarily or partially disabling emotional distress injuries and distress-related "physical" injuries that were caused by the termination, or their related causes of action for intentional infliction of emotional distress. Plaintiffs may fear that any such allegations will bar their wrongful termination actions at law. If tort damages are supposed to make the plaintiff "whole," the necessity for such a pleading strategy is clearly unfair to the plaintiff. A consistent approach to evaluating whether exclusivity applies to the facts of a wrongful termination case would facilitate more accurate pleading of the plaintiff's true damages. In rare cases, it could even steer the plaintiff into the workers' compensation forum first.

224. Green, 194 Cal. App. 3d at 223-24, 239 Cal. Rptr. at 476.
225. Valenzuela, 194 Cal. App. 3d at 918-919, 240 Cal. Rptr. at 46.
226. It can be surmised that Valenzuela's employer did not assert exclusivity as a defense to the good faith and fair dealing cause of action.
Employers would also benefit from a consistent approach to this issue. Ideally, providing employers with a clearer understanding of what types of intentional misconduct may expose them to tort liability will deter that misconduct. Finally, a generally accepted, step-by-step analytical scheme will promote judicial efficiency and uniformity of law.

Most of the current confusion for parties attempting to decide which causes of action are appropriate—and legally acceptable—can be resolved by adoption of a four-part analysis. In its skeletal form, this four-step approach asks the following questions, in sequence:

1. Was there an “injury” within the purview of workers’ compensation law?
2. Did the conditions of compensability concur as to that injury?
3. Does the cause of action fall within the scope of the exclusive remedy provision?
   a. Is the nature of the tort within the scope contemplated by the workers’ compensation statutes?
   b. Is the essence of the cause of action an injury under workers’ compensation law?
4. Is it clear that none of the statutory or “implied” exceptions to exclusivity apply?

If the answer to all questions is “yes,” then workers’ compensation is the exclusive remedy. If the answer to any of the four main questions is “no,” then the exclusive remedy provision does not apply, and the employee can pursue an action at law.

A. Step One: Was There an “Injury” Within the Purview of Workers’ Compensation Law?

The starting point for any potential workers’ compensation claim must be a determination whether there was an “injury.”

The Labor Code provides that an injury must cause a mental or physical work disability or a need for medical treatment. For example, a wrongfully terminated employee who needs psychiatric treatment to deal with his loss of self-esteem has suffered an “injury” for which he needs medical treatment. An employee who cannot work a full day on a new job because of continuing problems with depression has suffered an “injury”—a partial, mental work disability. An employee who is unable to work at all for a period of three months because of a heart attack has suffered an “injury”—a total, perhaps temporary, physical work disability.

This first step does not distinguish between physical and mental injuries. Such a distinction is not inherent in the Labor Code provisions

230. 2 W. HANNA, supra note 23, § 11.01(1), at 11-3.
and may be merely an idiosyncrasy of decisional law with regard to the cause of action for intentional infliction of emotional distress.

B. Step Two: Did the Conditions of Compensability Concur as to that Injury?

If an "injury" exists, the more difficult question is whether all of the conditions of compensability concurred at the time of the employee's injury.\(^{232}\) The Labor Code requires that the injury arise from and in the course of employment, and that it be proximately caused by the employment.\(^{233}\) For example, if a wrongfully terminated employee's need for psychiatric treatment develops after he is no longer employed by the defendant-employer, the conditions of compensability would not concur as to that injury. Similarly, if an employee's partially disabling depression develops while the employee is sitting at home without a job or while being turned down by new employers, the conditions of compensability would not concur. Likewise, if the employee suffers a heart attack following his termination, the conditions of compensability would not concur. In each case, the injury does not arise in the course of employment.

Less clear is whether the conditions of compensability concur where the employee needs psychiatric treatment while being harassed on the job, but does not actually seek treatment until after his loss of self-esteem is worsened by the wrongful termination. Analytically, there are two separate injuries. First, there is the emotional distress caused by on-the-job harassment. That injury might satisfy the conditions of compensability since it arose from, in the course of, and was proximately caused by the employment. In that case, the employee's exclusive remedy would be workers' compensation. Second, there is emotional distress arising out of, in the course of, and proximately caused by the unemployment.\(^{234}\) That injury most likely would not satisfy the conditions of compensability since it occurred after the employment was terminated.

In an even more difficult fact pattern, suppose the employee suffers angina pains caused by the stress of being subjected to harassment at work and is consequently only able to work part-time. Then, as a result of a wrongful termination, his heart condition is aggravated, and he has a totally disabling heart attack two weeks after his discharge. Again, there are two injuries. The angina pains and partial disability arose out of, in the course of, and were proximately caused by the employment; they satisfy the conditions of compensability. In contrast, the disabling heart attack at least arguably arose out of, in the course of, and was proxi-

\(^{232}\) See id. § 3600(a).

\(^{233}\) Id.; see supra notes 31-39 and accompanying text.

mately caused by the unemployment and would not satisfy the conditions of compensability.

In analyzing these fact patterns the focus should always be on the timing of the injury, not on the timing of the employer's misconduct (e.g., the wrongful termination). Additionally, if an earlier, compensable injury caused by the employment is later aggravated by the wrongful termination-caused unemployment, the employee should be able to recover tort damages for that portion of the injury caused by the unemployment.236

C. Step Three: Does the Cause of Action Fall Within the Scope of the Exclusive Remedy Provision?

If there is a compensable injury, the trier of fact should next determine whether the particular cause of action falls within the scope of the exclusive remedy provision. This third step addresses two questions. First, is the nature of the technical tort within the scope contemplated by the workers' compensation statutes? Second, is the essence of the cause of action an injury under workers' compensation law?

(1) Is the Nature of the Tort Within the Scope Contemplated by the Workers' Compensation Statutes?

The workers' compensation statutes are intended to provide benefits for injuries caused by employment itself. Wrongful termination causes of action, therefore, are beyond the scope contemplated by the workers' compensation statutes because these actions are intended to recover damages resulting from the deprivation of employment. Although a wrongful termination may additionally result in a derivative injury such as mental or physical disability, the basis for a cause of action for deprivation of employment does not disappear. On the other hand, the mere pleading of wrongful termination should not automatically shield the employee from the exclusivity bar. An additional inquiry must be

235. See 2A A. Larson, supra note 15, § 65.13, at 12-13 (May 7, 1987); cf. Spratley v. Winchell Donut House, Inc., 188 Cal. App. 3d 1408, 1411-12, 234 Cal. Rptr. 121, 122-23 (1987) (when an employee suffers emotional injury during employment, the employees' emotional distress claim satisfies the conditions of compensability and is thus barred by the exclusivity doctrine).

236. Cf. CAL. LAB. CODE § 3208.2 (West 1971) (where there are multiple injuries, questions of fact and law, including apportionment between injuries, will be separately determined for each injury).

237. Id.

238. See Ortiz v. Bank of Am. Nat'l Trust and Sav., 824 F.2d 692, 696 (9th Cir. 1987).


(2) Is the Essence of the Cause of Action an Injury Under Workers' Compensation Law?

The evaluator must also determine whether the essence of the wrongful termination cause of action is the deprivation of employment or, alternatively, an injury under workers' compensation law. For example, if causation of a temporarily but totally disabling heart attack is unclear and the employee is subsequently reinstated with back pay, the essence of the wrongful termination may truly be a compensable "injury" rather than the deprivation of employment. In this case, the employee should be barred from an action at law to recover damages for disabling emotional distress, disabling physical injuries, the need for medical treatment, or punitive damages.

The analysis of the essence of the action, however, should not stop there. If the basis of the cause of action is a violation of public policy, the egregiousness of the underlying violation should be weighed against the severity of the injury. The weighing should consider whether statutes explicitly permit a civil action where there has been such a violation. Similarly, if the cause of action is based on the breach of the covenant of good faith and fair dealing, the egregiousness of the employer's bad faith should be weighed against the severity of the injury. Thus, this balancing approach should be done on a case by case basis, with the outcome heavily dependent on such factors as the severity of the injury, the duration of the unemployment period following the termination, and the egregiousness of the public policy violation or breach.

Even if the significance of the injury is determined to outweigh these other factors, and even if the essence of the wrongful termination action is held to be injury under workers' compensation law—rather than the deprivation of employment—the employee should not be barred from a civil action to recover damages for wage loss, pension, and other fringe benefits. The employee should be barred only from recovering damages for disabling physical injuries, and for medical treatment.

D. Step Four: Is it Clear that None of the Statutory or Implied Exceptions to Exclusivity Apply?

There are several statutory exceptions to the exclusivity bar that the evaluator should consider.241 If, for example, the employer does not carry workers' compensation insurance, the employee can pursue an action at law,242 even where the "extraordinary facts" result in a "yes" answer to each of the first three steps. In most instances, however, the

242. Id. § 3706 (West Supp. 1988).
statutory exceptions will not apply, in which case it must be determined if any implied exceptions apply.

Currently, courts appear to recognize an "implied exception" to exclusivity in certain instances of an employer's intentional misconduct. Thus, where "employers step out of their roles as such and commit acts which do not fall within the reasonably anticipated conditions of work, they may not then hide behind the shield of workers' compensation." An employer's intentional misconduct, either terminating an employee, in violation of public policy, or as a bad faith breach of the implied-in-law covenant, surely exemplifies an employer's stepping out of its proper role. Therefore, an employer that commits such an act should not be able to hide behind the shield of workers' compensation.

Conclusion

The limited liability umbrella of the workers' compensation exclusivity doctrine is an attractive shelter for employers, given the recent deluge of wrongful termination tort claims. The same players (employers and employees) and the same types of injuries (for example, emotional disability) may be involved in both a workers' compensation claim and a wrongful termination action at law. Occasionally, this fact has led courts to apply the exclusivity doctrine erroneously to bar wrongful termination suits.

The confrontation between workers' compensation exclusivity and wrongful termination causes of action first appeared in the appellate courts in 1987. Unfortunately, case law in this area is both limited in scope and analytically confusing. Thus, courts, attorneys, employers, and wrongfully terminated employees need a comprehensive and consistent framework to be able to determine if the exclusive remedy provision applies in a given case.

This Note proposes the following four-step analysis to determine whether exclusivity applies to a particular cause of action: (1) Was there an "injury" within the purview of workers' compensation law? (2) Did the conditions of compensability concur as to that injury? (3) Does the cause of action fall within the scope of the exclusive remedy provision? (4) Is it clear that none of the statutory or "implied" exceptions to exclusivity apply?

A careful, step-by-step application of this analysis to a wide spectrum of fact patterns demonstrates that, except in extraordinary cases, the exclusive remedy provisions of workers' compensation simply do not apply to the wrongful termination causes of action for violation of public policy or breach of the covenant of good faith and fair dealing.

the exclusive remedy provisions of workers' compensation simply do not apply to the wrongful termination causes of action for violation of public policy or breach of the covenant of good faith and fair dealing.