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Life After Foley: The Future of Wrongful Discharge Litigation

by

DAVID J. JUNG* and RICHARD HARKNESS**

Over the past ten years, California employment law has changed profoundly. While once an employer could fire most nonunion employees for good reason, bad reason, or no reason at all, employees who have been fired now have no less than three legal theories available to challenge their dismissals.\(^1\) Moreover, at least until the California Supreme Court's decision in Foley v. Interactive Data Corporation,\(^2\) an employee who prevailed on one of these theories could expect to recover substantial damages. Verdicts in some wrongful discharge cases reached into the millions of dollars; estimates of average verdicts ran as high as 652,100 dollars.\(^3\)

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1. For convenience, the three theories are referred to as: retaliatory discharge (discharging an employee in violation of some important public policy, as when an employee is fired in retaliation for his refusal to participate in illegal conduct. See, e.g., Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980)); breach of contract (firing an employee in violation of an implied promise only to discharge with cause. See, e.g., Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981), appeal after remand. 203 Cal. App. 3d 743, 250 Cal. Rptr. 195 (1988)); and bad faith discharge (breaching the implied covenant of good faith and fair dealing by, in bad faith, firing an employee who has the right to be fired only for cause. See, e.g., Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980)).


Perhaps in part responding to what employers viewed as a potentially bankrupting flood of litigation, in Foley the California Supreme Court rewrote the law of wrongful discharge by limiting the kinds of damages employees can recover. The court held that while an employee whose discharge violates an important public policy may recover tort damages, one whose discharge merely violates an implied promise not to discharge her without cause may recover only contract damages, even if the employer has acted in bad faith. Refusing to follow a line of authority that had developed in the courts of appeal, the supreme court held that no cause of action in tort arises even if the discharge is in violation of the implied covenant of good faith and fair dealing.

How important is Foley? Because Foley's main significance is in changing the rules of damages that will apply to wrongful discharge cases, the key question is, how much of a difference, in dollars, will the switch from tort to contract make? Is it enough to stem the tide of wrongful discharge filings, or will the pace of litigation continue unabated?

I. The Foley Decision

Daniel Foley had been employed by Interactive Data Corporation for over six and one-half years when he was fired. Claiming he was fired because he had informed his employer that his immediate supervisor was being investigated by the FBI for embezzlement, Foley sued. He alleged causes of action based on each of the available wrongful discharge theories. First, he alleged that Interactive Data had fired him in retaliation for informing on his supervisor, in violation of public policies that encourage such reports. Second, he alleged that the company, by its actions during his years of employment and by the adoption of specific personnel policies, implicitly had promised not to fire him without cause,
and that his dismissal violated that implied contract.\textsuperscript{9} Finally, Foley alleged that his discharge was in bad faith, establishing a tortious breach of the covenant of good faith and fair dealing.\textsuperscript{10} The trial court dismissed Foley's complaint, and, on appeal, the Court of Appeal affirmed.

The California Supreme Court, in an opinion written by Chief Justice Lucas, reversed the Court of Appeal in part, and affirmed in part. According to Lucas, although an employer who fires an employee in violation of an important public policy commits a tort, Foley's dismissal violated no "substantial" public policy.\textsuperscript{11} Although it is usually in the employer's interest for employees to be forthcoming with incriminating information about fellow workers, if an employer wishes to punish such behavior, public policy is indifferent.\textsuperscript{12} Therefore, the court affirmed the dismissal of Foley's retaliatory discharge cause of action.\textsuperscript{13}

Foley fared better, however, on his contract claim. Rejecting an argument that contracts establishing a right to be discharged only for cause must be in writing, the court held that Foley's allegations sufficed to allow his claim of an implied promise not to fire him without cause to go to the jury.\textsuperscript{14} According to the complaint, during Foley's six-plus years of employment, his superiors had repeatedly assured him that his job was secure. He had been promoted consistently, and his salary had increased regularly. Further, his employer had failed to follow its own written "termination guidelines" when it dismissed him. If these facts were proved at trial, the court held, a jury could determine that Foley's employer's conduct amounted to an implied promise not to fire him without cause. Therefore, the trial court erred in dismissing Foley's breach of contract cause of action.\textsuperscript{15}

According to Foley's third cause of action, however, Interactive Data had not merely fired him without cause, they had fired him in bad faith, violating the covenant of good faith and fair dealing. Relying on a series of California appellate court decisions that held an employer's breach of the covenant of good faith and fair dealing was actionable in tort, not merely in contract,\textsuperscript{16} Foley sought punitive damages for his em-
ployer's bad faith, and damages for the emotional distress the discharge had caused him.

Chief Justice Lucas rejected Foley's claim. According to the Chief Justice, while every contract contains an implied covenant of good faith and fair dealing, the purpose of the covenant is to secure the parties' rights under the contract, not to effectuate any broader public policies.\(^{17}\) Therefore, in ordinary cases, the covenant is a part of the law of contracts, not a part of the law of torts, and when the covenant is broken, a breach of contract action—and not a tort suit—is the appropriate remedy. While special cases may exist when public policies are so thoroughly intertwined with the performance of contracts that a breach of the covenant will give rise to a cause of action in tort (insurance contracts, for example), employment contracts are ordinary.\(^{18}\) Contract remedies are available to enforce employment contracts, but that is all, at least until the legislature chooses to act.\(^{19}\) Therefore, the court affirmed the trial court's dismissal of Foley's cause of action for tortious breach of the covenant of good faith and fair dealing.\(^{20}\)

Justices Broussard, Kaufman, and Mosk dissented from the court's refusal to allow tort damages for breach of the covenant of good faith and fair dealing in wrongful discharge cases.\(^{21}\) Each argued, in essence, that the relationship between employer and employee is as "special" as the relationship between insurer and insured. Employees, like insureds, contract for more than economic advantage; they seek security.\(^{22}\) Employees' vulnerability and dependence create the potential for abuse, and contract damages cannot make them whole when that abuse occurs.\(^{23}\) Therefore, if a tort remedy is required when an insurer breaches in bad faith, it also is required when an employer maliciously and arbitrarily discharges an employee.\(^{24}\)

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17. 47 Cal. 3d at 690, 765 P.2d at 394, 254 Cal. Rptr. at 232.
18. Id. at 692-93, 765 P.2d at 395-96, 254 Cal. Rptr. at 233-34.
19. Id. at 700, 765 P.2d at 401, 254 Cal. Rptr. at 239.
20. Id.
21. Justice Mosk also dissented from the court's holding that Foley had failed to state a cause of action for retaliatory discharge. According to Justice Mosk, public policy clearly favors employees reporting the presence of an embezzler to their employers, and, therefore, he would have held that Foley's complaint stated a cause of action for retaliatory discharge. Id. at 724, 765 P.2d at 418, 254 Cal. Rptr. at 256.
22. Id. at 709, 719, 765 P.2d at 407, 415, 254 Cal. Rptr. at 245, 253.
23. Id. at 718, 765 P.2d at 415, 254 Cal. Rptr. at 253.
24. Id. at 719, 765 P.2d at 415, 254 Cal. Rptr. at 253.
II. The Facts of Wrongful Discharge

In *The Facts of Wrongful Discharge*, we described the results of a study of 223 California wrongful discharge cases decided between January, 1979 and May, 1987. In that study, we concluded that selective reports of landmark verdicts, haphazardly reported surveys, and anecdotal evidence had combined to present a misleading picture of wrongful discharge litigation. While certain types of wrongful discharge cases indeed present an alarming risk of liability, in ordinary cases, the risk is also ordinary. Further, by avoiding retaliation against employees who exercise their statutory rights, and by regularizing the personnel process to minimize arbitrariness and bad faith, employers could bring their liability exposure within acceptable limits.

Since publication of *The Facts of Wrongful Discharge*, the database has grown to include all cases reported in Jury Verdicts Weekly between January, 1979 and December, 1988, as well as the published California wrongful discharge opinions for the same period, for a total of 326 cases. These data provide a sound basis for an appraisal of Foley's effects.

A. Before Foley: A Baseline

Tables One and Two provide a baseline against which the effect of Foley can be measured:

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26. Id. at 11.
27. Id. at 10-11.

For each case in the sample, over 20 variables were recorded, including all of the plaintiffs' causes of action, the factual basis for each claim, the result, the result on appeal, general, special and punitive damages awarded, the plaintiff's age, race, and sex, the size and type of company, the length and nature of the plaintiff's employment, and the amount and type of the plaintiff's compensation.
Table One
Total Awards in California Wrongful Discharge Cases:
1979-1988

<table>
<thead>
<tr>
<th></th>
<th>Average Award</th>
<th>Median (1) Award</th>
<th>Expected (2) Award</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Wrongful Discharge Cases</td>
<td>$452,570</td>
<td>$133,700</td>
<td>$317,686</td>
</tr>
<tr>
<td>Retaliation</td>
<td>579,974</td>
<td>215,000</td>
<td>434,980</td>
</tr>
<tr>
<td>Breach of Contract</td>
<td>193,898</td>
<td>100,000</td>
<td>109,594</td>
</tr>
<tr>
<td>Bad Faith</td>
<td>426,929</td>
<td>150,000</td>
<td>333,304</td>
</tr>
</tbody>
</table>

(1) The median award is, simply, the middle award: half of the jury awards in the sample are larger than the median, half are smaller.

(2) The expected award is an average of the awards in all of the cases in the sample, including defense verdicts.

As Table One shows, the extraordinary numbers bandied about in the wrongful discharge debate before Foley were misleading. The average award when plaintiffs won indeed exceeded 450,000 dollars. But not all plaintiffs won, and even when they did, the landmark verdicts that drove up the average awards were few and far between. A more accurate picture of wrongful discharge awards might have been this: More than half the plaintiffs in litigated wrongful discharge cases lost outright, and among those who won, half won less than 135,000 dollars.

Reports of astronomically high average awards also were misleading because they ignored the fact that awards in wrongful discharge cases varied widely according to the legal theory underlying the employee's case. Thus, the average award in cases in which the employer's actions violated an important public policy, or were in bad faith, were over twice as large as the average award when the discharge was simply a breach of a promise not to fire without cause.

The difference between the awards in retaliation and bad faith cases, on the one hand, and contract cases on the other, can be explained very simply. Punitive damages cannot be recovered in contract cases; neither, as a rule, can damages for emotional distress. As Table Two shows, if punitive damage awards were eliminated, the average award in wrongful discharge cases would have dropped by over half, from 579,974 dollars in retaliation cases, for example, to 271,090 dollars. At the same time, the difference in compensatory damage awards should not be underestimated: average compensatory damage awards in retaliation and bad faith cases were about fifty percent greater than those in breach of contract cases. Because the chief effect of the decision in Foley is to limit

Table Two
Compensatory and Punitive Damage Awards by Cause of Action

<table>
<thead>
<tr>
<th></th>
<th>Compensatory Damage Awards</th>
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<th></th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Median Award</td>
<td>Average Award</td>
<td>Expected Award</td>
</tr>
<tr>
<td>All Cases</td>
<td>$100,000</td>
<td>$236,376</td>
<td>$165,926</td>
</tr>
<tr>
<td>Retaliation</td>
<td>103,900</td>
<td>271,090</td>
<td>203,317</td>
</tr>
<tr>
<td>Breach of Contract</td>
<td>100,000</td>
<td>193,898</td>
<td>109,594</td>
</tr>
<tr>
<td>Bad Faith</td>
<td>100,000</td>
<td>252,859</td>
<td>197,407</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Punitive Damage Awards</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Median Award</td>
<td>Average Award</td>
<td>Expected Award</td>
</tr>
<tr>
<td>All Cases</td>
<td>$111,500</td>
<td>$476,589</td>
<td>$151,759</td>
</tr>
<tr>
<td>Retaliation</td>
<td>272,860</td>
<td>641,527</td>
<td>231,662</td>
</tr>
<tr>
<td>Breach of Contract</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Bad Faith</td>
<td>100,000</td>
<td>407,691</td>
<td>135,897</td>
</tr>
</tbody>
</table>

plaintiffs in bad faith cases to contract damages, these figures are critical to understanding *Foley*’s significance.

III. Retaliatory Discharge After *Foley*: "Important" Public Policies

*Foley* offered the court an opportunity to limit the cause of action for retaliatory discharge substantially. The court of appeal, after all, had rejected *Foley*’s claim because it believed employees should be able to establish a cause of action for retaliatory discharge only when their employer has discharged them in violation of public policies derived from specific statutes or constitutional provisions, and not from nonlegislative (that is, judicial) sources.\(^30\) The state supreme court could have followed suit, but chose not to address that point.\(^31\) Instead, the court rejected *Foley*’s claim because the policy he asserted, whatever its source, simply was not public at all. The public, in the court’s view, has no interest in encouraging employees to inform on their fellow employees.\(^32\)

In this regard, *Foley* is an extremely narrow opinion, almost sui generis. An examination of wrongful discharge verdicts and reported cases over the past two years reveals only three cases in which *Foley*

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31. Id. at 669, 765 P.2d at 379, 254 Cal. Rptr. at 217. The court did, however, emphasize that the public policy on which an employee relies must be "fundamental," "firmly established," and "substantial." Id. at 670 n.11, 765 P.2d at 380 n.11, 254 Cal. Rptr. at 218 n.11.
32. Id. at 671, 765 P.2d at 380, 254 Cal. Rptr. at 218.
might have barred recovery. Yet, while the court passed over the opportunity to narrow the retaliatory discharge cause of action to legislatively declared public policies, two footnotes in the opinion may lay the groundwork for later restrictions.

In these two footnotes, Chief Justice Lucas seems to suggest a test for whether a discharge violates public policy that derives from the rule that contracts for an illegal purpose will not be enforced. Thus, in footnote seven, the opinion draws an analogy between declaring a contract unenforceable if it is for an illegal purpose, and vindicating the public interest by refusing to allow employers to require acts contrary to public policy as a condition of employment. Then, in footnote twelve, the opinion demonstrates the lack of a public interest on the facts in Foley by noting that nothing would prevent an employer from making it an express condition of employment that one worker should not inform on another. Is the court suggesting, with these two footnotes, a new test for the violation of an important public policy—perhaps if the employer legally could contract for the employee to perform a certain act, it does not violate any important public policy if she fires an employee who refuses to perform that act?

If this sort of test is what the court has in mind, it may portend a narrowing of the retaliation cause of action. Although no California cases come to mind in which this test would make a difference, cases have arisen in other jurisdictions in which it might. For example, in Novosel v. Nationwide Insurance Co., an employee stated a claim for retaliatory discharge when the employer fired the employee because he refused to lobby against legislation the employer opposed. The Third Circuit held that the first amendment of the United States Constitution established an important public policy of protecting the right to form and express opinions, and that the employer’s acts violated that important public policy. The test hinted at in Foley, however, would come to a different result. Surely, the employer would have been free to hire the employee to lobby, and to fire him if he did not do so effectively, without the contract having been declared illegal. Thus, although the court in Foley passed up the opportunity to narrow retaliatory discharge immedi-

34. Foley, 47 Cal. 3d at 667 n.7, 765 P.2d at 377 n.7, 254 Cal. Rptr. at 215 n.7.
35. Id. at 670 n.12, 765 P.2d at 380 n.12, 254 Cal. Rptr. at 218 n.12.
36. 721 F.2d 894, 900 (3d Cir. 1983).
IV. Breach of an Implied Promise After Foley: Beyond Pugh and Cleary

Although the principle that the course of conduct between an employer and an employee may give rise to an implicit promise only to fire for cause had been widely accepted by the courts of appeal before Foley,37 Foley is the first supreme court decision to endorse it expressly. Beyond simply endorsing the notion of implied contracts, the terms on which the court allowed Foley's case to go to the jury actually may have made it easier for employees to prove an implied contract.

Until Foley, the terms on which an implied contract could be established were defined largely by the case in which the principle was first recognized, Pugh v. See's Candies, Inc.38 According to Pugh, a number of factors are relevant in determining whether an implied promise not to discharge without cause existed: the employer's personnel policies or practices, the duration of the employee's service, the employee's work record, the employer's assurances of continued employment, and industry practices.39 Because the plaintiff in Pugh had alleged that during thirty-two years of employment his work had never been criticized directly, that he had been assured his performance was adequate, and that company officials had stated the company did not discharge administrative personnel without cause, he made out a case for the jury.40

Foley arguably liberalized the terms on which an implied contract will be allowed to go to the jury in two ways. First, although Pugh was a landmark in establishing a cause of action for breach of an implied contract, the court's emphasis on the length of Pugh's service as determining the existence of an implied contract created uncertainty for plaintiffs who followed. How long must one have been employed for the contract to be implied? Thirty-two years, as in Pugh? Eighteen, as in Cleary v. American Airlines, Inc.,41 a case on which Pugh expressly relied? Foley eased this uncertainty by explaining the purpose of the duration requirement.

37. See Foley, 47 Cal. 3d at 681-82, 765 P.2d 388, 254 Cal. Rptr. at 226 (cases cited therein).
40. Id. at 329, 171 Cal. Rptr. at 927.
According to Foley, no fixed length of employment is necessary; rather, the totality of the circumstances must be examined.\(^4\) Because the implied contract derives from conduct by the employer that creates an expectation of continued employment, employees simply must be employed long enough for such conduct to occur.\(^4\) In Foley, six years was long enough; in another case, depending on the employer’s conduct, a year or even a day might suffice.

Second, according to Pugh, the employer’s personnel policies were but one factor among many to be examined in determining whether an implied contract exists. Foley, by contrast, suggests that such policies are determinative, that an employer who does not follow its own written personnel procedures may be liable for breach of an employment contract.\(^4\) Although several courts of appeal had treated personnel manuals as creating binding obligations,\(^4\) the supreme court’s express endorsement of this approach nonetheless is important.

V. Bad Faith After Foley: From Tort to Contract

Usually, when a party to a contract fails to perform, she is liable for the economic losses that were foreseeable when the contract was formed, and that is all. No matter that her breach may have been malicious, no matter that it may have caused the other party to the contract great inconvenience and worry: Contract damages are limited to economic losses, lest too great a burden be placed on the world of commerce, where, after all, breach of contract is an economic fact of life.

In some contracts, however, deliberate breach is not acceptable. Beginning with a series of cases involving insurance contracts, the California courts have recognized that in the context of these contracts, deliberate breach may in fact be so unacceptable that punitive damages may be made available to deter deliberate breaches.\(^4\) Thus, in an insurance contract, once the insured has suffered a loss and seeks coverage, denying the insured the benefits she deserves without any reasonable jus-

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\(^{44}\) Id., 765 P.2d at 388, 254 Cal. Rptr. at 226.


\(^{46}\) Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 820, 598 P.2d 452, 457, 157 Cal. Rptr. 482, 487 (1979) (In the insurance context, the principal purpose of punitive damage awards is "to deter acts deemed socially unacceptable and, consequently to discourage the perpetuation of objectionable corporate policies.").
tification is more than a breach of contract, it is a tort.\textsuperscript{47} An insured who is harmed by such a bad faith breach may recover damages to compensate for her economic losses, and for the emotional distress she suffers as a result of the breach.\textsuperscript{48} Further, she can also recover punitive damages, if she can prove malice.\textsuperscript{49}

In \textit{Tameny v. Atlantic Richfield Co.}, the supreme court had hinted broadly that employment contracts might be as "special" as insurance contracts.\textsuperscript{50} That hint sufficed for the courts of appeal, who soon thereafter held that when an employer breaches an employment contract in bad faith, it is a tort, and tort damages are appropriate.\textsuperscript{51} \textit{Foley} rejected that view, finding that employment is primarily a contractual, economic relationship, to which the ordinary rules of contract law apply. If an employer breaches, in good faith or bad, its liability is to be measured by the rules applicable in contract cases, not by the law of torts.

Eliminating tort damages in bad faith cases will affect the size of wrongful discharge awards drastically simply by eliminating punitive damage awards. Until \textit{Foley}, the average punitive damages award in bad faith cases had been 407,691 dollars, and punitive damages were awarded in forty-three percent of the cases in our sample in which plaintiffs prevailed. If punitive damage awards are eliminated from the sample, the average award in bad faith cases drops by nearly forty percent, from 426,929 dollars to 252,859 dollars.

The opinion in \textit{Foley}, however, did more than eliminate punitive damages awards. It also changed the rules that apply to compensatory damages, primarily by eliminating, or at least apparently eliminating,\textsuperscript{52} damages for emotional distress. Although \textit{Foley} expressly reserved the question of the appropriate measure of damages for breach of an employ-
ment contract, emotional distress damages are not generally available in contract cases.53

It is difficult to measure the effect of eliminating emotional distress damages precisely, because jury verdicts in wrongful discharge cases usually are reported as lump sums, without distinguishing between damages for economic loss and emotional distress damages. A rough estimate can be garnered, however, from a number of sources. First, there are cases in the sample in which the employee prevailed only on a breach of contract theory. Because Foley limits the damages in wrongful discharge cases (other than retaliation cases) to contract damages, the awards in these routine breach of employment contract cases would provide a good picture of future wrongful discharge verdicts, if there were enough of them.

Unfortunately, there have been very few of these routine breach of employment contract cases, and, therefore, it is risky to generalize from them alone. Jury reports, however, do sometimes describe what portion of the verdict was attributable to economic losses, and reports of jury verdicts in Jury Verdicts Weekly generally list the plaintiff's claimed economic losses, even when it is not clear whether those losses are reflected in the final award. Table Three, taking all these data together, makes a fair estimate of what jury awards in nonretaliation cases will look like after Foley.

According to the data contained in Table Three, although Foley will reduce the average compensatory damage award in nonretaliation, wrongful discharge cases substantially, significant amounts of money will still be at stake. Currently, emotional distress damages account for between a quarter and a third of the total compensatory damages, on the average; in some cases, emotional distress awards account for as much as sixty percent to eighty percent of the award. Thus, one would expect the elimination of emotional distress damages to reduce the average award by approximately twenty-five percent to thirty-three percent.54

Oddly, however, the data seem to suggest that the median award will not be greatly affected by Foley; in fact, it may increase. Thus, Table Two shows that the median award for bad faith cases and contract cases before Foley was the same, 100,000 dollars. And, a review of the cases where it is possible to separate the economic and noneconomic losses

54. Thus, in Table Two, where the compensatory awards in bad faith cases and contract cases are juxtaposed, compensatory damages in contract cases average 23% lower than in bad faith cases. In verdicts when economic losses and emotional distress damages have been reported separately, emotional distress awards in bad faith cases have accounted for 36% of the damages, on the average.
Table Three
Bad Faith Cases Before and After Foley

<table>
<thead>
<tr>
<th></th>
<th>Before Foley</th>
<th>After Foley (1)</th>
<th>After Foley (2)</th>
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<tbody>
<tr>
<td>Punitive Damages</td>
<td></td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Average Award:</td>
<td>$407,691</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Median Award:</td>
<td>100,000</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Compensatory Damages

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<th></th>
<th></th>
<th>$252,859</th>
<th>$190,000</th>
</tr>
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<tbody>
<tr>
<td>Average Award:</td>
<td>$252,859</td>
<td>$252,859</td>
<td>$190,000</td>
</tr>
<tr>
<td>Median Award:</td>
<td>100,000</td>
<td>100,000</td>
<td>100,000</td>
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</tbody>
</table>

Total Damages

<table>
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<th></th>
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<th>$252,859</th>
<th>$190,000</th>
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<tbody>
<tr>
<td>Average Award:</td>
<td>$426,929</td>
<td>$252,859</td>
<td>$190,000</td>
</tr>
<tr>
<td>Median Award:</td>
<td>150,000</td>
<td>100,000</td>
<td>120,000</td>
</tr>
</tbody>
</table>

(1) The figures in this column assume that the only change made by Foley is the elimination of punitive damages, and that in a future case, the court will allow recovery of emotional distress damages for breach of an employment contract.

(2) The figures in this column assume that Foley has eliminated both punitive and emotional distress damages. These figures are not precise; rather, they are an extrapolation from data from a number of different sources.

suggests that the median economic loss in bad faith cases over the last two years has been around 125,000 dollars.

These figures, of course, are not definitive; the number of pure contract cases before Foley was very small, and, most likely, economic losses are reported separately only in those cases in which they are high. Nonetheless, the data are suggestive: The elimination of emotional distress damages will lower the average award significantly, because, like the elimination of punitive damage awards, its most obvious effect will be to eliminate the occasional landmark verdict. At the same time, the median award may actually increase, because only cases where a substantial economic loss has been sustained will be filed.

Thus, while the reduction in the average wrongful discharge verdict no doubt will be impressive, the risk of liability for employers may still be significant. For example, in bad faith cases in which it was possible to determine the economic damages claimed and awarded, plaintiffs in

55. The elimination of the occasional, very high emotional distress award will affect the average more than the median because these landmark verdicts have tended to occur in cases when the economic losses are already high. Thus, removing the emotional distress award lowers the average award, while leaving the median award unaffected. For example, the highest emotional distress award over the last two years was $500,000, in a case in which the plaintiff had also suffered $252,400 in economic losses. Gardner v. Charles Schwab, 32 Jury Verdicts Weekly (Jury Verdicts Weekly, Inc.) no. 12, at 7 (March 18, 1988). Removing a $500,000 award from the sample affects the average award tremendously, but because the economic losses alone are greater than the median, the median does not change.
wrongful discharge cases claimed an average of 334,724 dollars in economic losses, and were awarded, on the average, 174,321 dollars.

VI. Defusing Wrongful Discharge

Studies of the much-discussed litigation "explosion" have established that some types of litigation are more "explosive" than others. "Explosive" cases have the potential to generate occasional extraordinarily high verdicts sending the average verdict soaring, attracting publicity and, probably, generating more suits of that kind. Until Foley, bad faith discharge cases were explosive. While most winning plaintiffs in bad faith cases recovered moderate awards, the availability of punitive damages and, to a lesser extent, emotional distress damages, made it possible for juries occasionally to express their extreme disapproval of an employer's actions with a landmark verdict.56

Foley has defused bad faith by restricting plaintiffs to contract damages. Because punitive damages and emotional distress damages are not available, contract damages lack the explosive potential of tort awards. Without punitive and emotional distress damages, the jury's hands are tied. Thus, while only two verdicts in breach of implied promise cases have exceeded 300,000 dollars in the past nine years, twenty percent of all bad faith cases resolved in the plaintiff's favor during the same period resulted in awards over 300,000 dollars, and eight awards exceeded 1,000,000 dollars.

From the defendant's perspective, limiting damages to proven economic losses limits the jury's reach into the employer's deep pocket; from the plaintiff's view, it shackles the jury's conscience. Cases, of course, will come along in which the economic losses are substantial, but even then, the damages will be more predictable because the amount of loss will turn on the evidence, not on the jury's subjective judgment.

So, what is to be expected from this kinder and gentler wrongful discharge litigation? Although well-placed observers differ as to whether Foley has resulted in an immediate decrease in wrongful discharge filings,57 it is inevitable that Foley will reduce the rate of wrongful dis-

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56. For instance, a 32-year-old waitress alleged that she was fired because she filed a worker's compensation claim when she contracted a staphylococcal infection as a result of being required by her employer to walk through raw sewage. She introduced evidence of $300 in special damages. The jury's verdict: $40,000 in general (emotional distress) damages, $1,500,000 in punitive damages (reduced by the trial court to $1,000,000). Bailey v. Foodmaker, Inc., 30 Jury Verdicts Weekly (Jury Verdicts Weekly, Inc.) no. 43, at 1 (Oct. 24, 1986).

charge litigation significantly.\textsuperscript{58} \textit{Foley} left as many questions unanswered as it addressed, and it will take time and litigation to answer those questions. But when the dust settles, \textit{Foley} may reduce the average award in bad faith cases by sixty-five percent or more, and a reduction of that size undoubtedly will reduce dramatically the number of cases that are brought.\textsuperscript{59}

Wrongful discharge cases, after all, are contingent fee cases. Even before \textit{Foley}, plaintiffs' attorneys frequently did not make their expenses back, according to a RAND study,\textsuperscript{60} but at least the risk of undercompensation was offset by the chance of a landmark verdict. After \textit{Foley}, that chance is gone. Even if lawyers are willing to take cases with such reduced prospects, the changes produced by \textit{Foley} may make employees themselves unwilling to pursue a wrongful discharge claim, because the emotional distress or punitive damages award that usually pays the lawyer is gone.

\section*{VII. Making the Most of \textit{Foley}}

Although the loss of the tort cause of action in bad faith cases is clearly a setback, there are a number of avenues employees' lawyers may be able to pursue to offset \textit{Foley}'s effects. Following Justice Broussard's

\begin{itemize}
  \item \textsuperscript{58} Suits based on retaliation will, of course, continue; they may even increase because of the supreme court's reaffirmation of its commitment to that cause of action. But retaliation cases are a small part of wrongful discharge litigation. In our sample, they constituted only 14\% of the cases. Bad faith cases, by contrast, made up 44\% of the sample.
  \item \textsuperscript{59} The RAND Study mentioned earlier clearly confirms that eliminating tort damages in bad faith cases will reduce markedly the frequency of litigation. By comparing the rate of litigation in jurisdictions where no exceptions are recognized to the rule of at-will employment to the rate in jurisdictions where one or more exceptions are recognized, the authors of the RAND Study come to a remarkable conclusion: Litigation rates in jurisdictions where the implied contract causes of action are only marginally higher than litigation rates in jurisdictions that recognize no exceptions to the at-will doctrine at all. RAND Study, \textit{supra} note 3, at 17. In at-will jurisdictions, the RAND Study reported 1.3 court trials per one million employees. In jurisdictions recognizing only implied contract causes of action, they reported 2.2 court trials per one million employees. In jurisdictions recognizing a cause of action in tort for breach of the implied covenant of good faith and fair dealing, they reported 8.8 trials per one million employees. Thus, according to these figures, eliminating tort damages in bad faith cases may reduce the rate of litigation by as much as 75\%.
  \item \textsuperscript{60} RAND Study, \textit{supra} note 3, at 40. As Table Three shows, the average jury verdict in bad faith cases won by plaintiffs before \textit{Foley} was $540,899; the projected average award after \textit{Foley} is $190,000. Because most plaintiffs' attorneys in wrongful discharge cases work for a contingency fee of 40\%, the average attorney's fee would be, respectively, $216,000 before \textit{Foley}; $76,000 after: a difference of $140,000. And while a potential $76,000 fee retains considerable allure, this estimate is based on the average award, which may be misleadingly high, and does not take into account the number of plaintiffs who lose outright.
\end{itemize}
broad hint, they may argue that damages in employment contract cases should include an award for emotional distress. Unfortunately, the precedent supporting such a position is thin. The cases which Justice Broussard cites as supporting recovery are unusual cases; in each, the subject of the contract was highly personal, and the facts were such that an independent tort action easily could have been maintained, thus providing an alternative explanation for the award of emotional distress damages. Indeed, in the only California case to address the issue, the supreme court held that damages for emotional distress are too remote a consequence to be recoverable in a wrongful discharge case.

More promising is the fact that most bad faith cases involve some kind of employer wrongdoing that is arguably tortious in and of itself, so that an independent tort may be pleaded in addition to the wrongful discharge cause of action, resurrecting the hope of punitive and emotional distress damages. Looking at the factual bases of wrongful discharge cases, in over half of the cases there is some form of bad faith conduct on the defendant's part, ranging from pretextual firings as a cover up for personal dislike to deliberate attempts to deprive the employee of benefits. When illicit motives like these are present, creative attorneys will


62. Thus, Allen v. Jones, 104 Cal. App. 3d 207, 163 Cal. Rptr. 445 (1980) and Ross v. Forest Lawn Memorial Park, 153 Cal. App. 3d 988, 203 Cal. Rptr. 468 (1984), involved negligence in the handling of a corpse or in the conduct of a funeral. Negligence in the handling of a corpse that results in emotional harm to a close relative has always been actionable in tort. Johnson v. State, 37 N.Y.2d 378, 382, 334 N.E.2d 590, 592, 372 N.Y.S.2d 638, 641-42 (1975); W. PROSSER, TORTS 58-59 (4th ed. 1971). In fact, in Ross, the plaintiff pleaded her case in tort, not contract. Ross, 153 Cal. App. 3d at 992, 203 Cal. Rptr. at 471. Windeler v. Scheers Jewelers, 8 Cal. App. 3d 844, 88 Cal. Rptr. 39 (1970) involved the negligent loss of wedding rings by a bailee, and the case has been found to hold that damages for emotional distress may be available for negligent infliction of emotional distress arising out of injury to property. Again, the tort (negligent injury to property, not the breach of contract, can explain the result. Wynn v. Monterey Club, 111 Cal. App. 3d 789, 168 Cal. Rptr. 878 (1980), in which a husband recovered damages for the emotional distress he suffered when a gaming club breached its promise not to allow his wife to gamble, appears to be purely a contract case. Because the club's negligence directly affected the marital relationship, however, it is not far afield from similar tort cases. See, e.g., Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (psychiatrist liable to husband for negligent infliction of emotional distress because his negligent diagnosis of wife as syphilitic was directed at the marital relationship, foreseeably and necessarily affecting the husband).

63. See, e.g., Westwater v. Grace Church, 140 Cal. 339, 73 P. 1055 (1903) (damages for injury to feelings are too remote to be recovered in a breach of contract suit for wrongful discharge); see also, Loehr v. Ventura County Community College Dist., 147 Cal. App. 3d 1071, 1081 n.4, 195 Cal. Rptr. 576, 582 n.4 ("It has long been established" that damages for injury to feelings or to the employee's health are not recoverable in a breach of contract action for wrongful discharge.).
find an independent tort. Indeed, even before Foley, pleading an independent cause of action in tort was a common practice in wrongful discharge cases; in the sample, an independent tort cause of action was alleged in seventy percent of the bad faith and breach of contract cases.  

While pleading an independent tort cause of action may open the back door to exactly the punitive and emotional distress damages Foley foreclosed, it opens the door only a crack. Independent tort claims are frequently dismissed before trial, at least when the gravamen of the case is clearly wrongful discharge. The most frequently alleged independent tort, intentional infliction of emotional distress, is difficult to establish, because intent and outrageous conduct must be shown. Further, recent cases have suggested that emotional distress may be classified as an injury compensable through the worker's compensation system, which may result in preempting both intentional infliction of emotional distress and negligent infliction of emotional distress, the second most popular independent tort theory. Finally, when plaintiffs have gotten to the jury on an independent tort theory, recoveries have been modest at best.

The most likely response to Foley, therefore, will be a change in the kind of plaintiffs whose cases are brought. When emotional distress damages and punitive damages were in the picture, what made a good wrongful discharge case was the employer's behavior. If liability could be established, and if the conduct was egregious, the damages could be trusted to the jury's generosity. Foley changes the emphasis from the employer's behavior to the employee's loss, by creating an incentive to

64. The most popular independent torts were intentional infliction of emotional distress and negligent infliction of emotional distress, which together were alleged as independent torts in 45% of the cases in our sample. That, however, does not exhaust the creativity of the plaintiff's bar. Misrepresentation and defamation were well represented (11%), and intentional interference with contract, invasion of privacy, breach of fiduciary relationship, and even conversion also made appearances.


67. In intentional infliction of emotional distress cases, for example, the median award has been $49,000, the average only $59,623, and in only 9% of the cases were punitive damages awarded according to our sample.
accept only cases in which evidence of substantial economic loss can be developed.\textsuperscript{68}

If it were true, as some have argued, that wrongful discharge suits have always primarily benefitted displaced executives and middle managers, Foley's emphasis on economic losses would mean little more than a change in strategy. With the right plaintiff—one with a relatively high salary, no equivalent employment available as a substitute, and substantial savings to support him through the litigation\textsuperscript{69}—Foley simply requires that proving economic losses be given a higher priority in the development of the case. With the benefit of expert economists, proof of substantial economic losses is not complicated.

Wrongful discharge litigation, however, has not just been a golden parachute for middle managers. In both our sample and in the RAND study, only half of the plaintiffs were middle managers or executives. In the RAND study, only eighteen percent qualified as "highly paid executives."\textsuperscript{70} In fact, the protection afforded to employees by the wrongful discharge cause of action reached every strata of the workplace.

More importantly, wrongful discharge litigation has conferred important benefits on ordinary workers beyond simply the chance to sue their employers. There can be little doubt that the threat of liability for wrongful discharge has caused employers to adopt procedures to make employee terminations more fair and less arbitrary.\textsuperscript{71} Fear of liability is a powerful motivator, and that fear led employers, frequently on the advice of counsel, to devise elaborate personnel systems to reduce the chance of illegal action, and, hence, the risk of liability.

Perhaps the most important question to ask about Foley is whether employers will eliminate the personnel systems they had adopted under the pressure of wrongful discharge litigation, now that the pressure is off?

\textsuperscript{68} The elimination of emotional distress damages affects disproportionately employees whose economic losses are small. While the largest emotional distress awards have tended to occur in cases where the economic loss is also large, in smaller cases, emotional distress awards account for a much greater proportion of the award. Thus, in cases in our sample where the total award is less than the median award, emotional distress damages accounted for 42\% of the award, on average. For cases above the median, the emotional distress award accounted for, on the average, 25\% of the total award.

\textsuperscript{69} These characteristics are determined by the requirement that a discharged employee accept an equivalent job if one is available in order to mitigate his losses, and that whatever employment he actually accepts will reduce the damages he can recover. Thus, to maximize the damage award, the plaintiff must be able to show that no equivalent employment was available, and must be financially secure enough to avoid taking any less suitable job.

\textsuperscript{70} RAND Study, supra note 3, at 20.

The answer may be yes. By suggesting that liability for wrongful discharge, other than retaliatory discharge, is simply a matter of contract law, Foley effectively encourages employers to forego the expense of personnel procedures and simply inform its employees that they are employed at-will, forestalling the obligation to fire only for cause.

To do so, however, would be shortsighted, for a number of reasons. The Foley opinion is extremely vague in describing how the obligation to fire only with cause arises. The opinion's only guidance is to look to the "totality of the circumstances,"72 and if the totality of the circumstances are to be the guide, disclaimers and the like may not be effective in circumventing the obligation.73 More important, retaliation is still actionable in tort, and a personnel system that avoids the risk of liability for retaliatory discharge will probably justify its cost. Finally, the cases that have resulted in landmark verdicts have been cases where the employer's actions are, in a word, malicious: they have involved employers who have retaliated against their employees in an unconscionable fashion, or who have fired people out of spite or pretextually, or who have fired people to rob them of commissions or pension benefits.74 When this sort of wrongdoing is present, juries will find a way to sanction it. Thus, in the long run, legal incentives for sound personnel procedures continue to exist, even after Foley.75

VIII. The Danger of Stereotypes

The law of wrongful discharge developed in large part because of a perceived need to limit employers' abusive exercise of the power to fire at will.76 In those terms, Foley amounts to a decision that such abuses can be curbed by allowing employees to contract for job security and enforc-

73. See, e.g., McLain v. Great American Ins., 208 Cal. App. 3d 1476, 256 Cal. Rptr. 863 (1989) (Although the application form the employee filled out expressly stated that he could be terminated with or without cause, the employer's actions before and after hiring the employee modified the employment contract, giving rise to an implied promise not to fire without cause.).
ing those contracts. In theory, the knowledge that liability for the worker's economic losses will follow a breach, combined with the employer's self-interest in retaining good employees, will limit the employer's power without the devastating effect unpredictable tort damage awards have on commercial stability.

As the *Foley* dissenter point out, the majority's analysis depends on a number of empirical propositions about the bargaining power of employees, the relationship between employment and financial security, and the availability of substitute employment that are debatable, to say the least. It also depends on a number of questionable assumptions about wrongful discharge litigation.

Perhaps the most troubling of these is the assumption that "bad faith" or abusive discharges are rare, because rational employers do not undercut their own economic interests by maliciously discharging good employees. According to this view, most wrongful discharge cases are fundamentally disputes over the existence of good cause, and allegations of bad faith are trumped up attempts to reach into the employer's deep pocket. The data, however, tell a different story. Well over half of the time, plaintiffs who prove they were fired without cause also successfully establish bad faith on the employer's part.

How is this to be explained? Surely, prejudiced juries cannot account for all these cases. Are employers, then, irrational? Justice Broussard attributes it to mere shortsightedness: In the short run, an employer may actually gain by firing an experienced, good employee (who makes a high wage) and hiring an inexperienced, good employee (whose wages and benefits are lower). Because traditional contract damages do not require the employer to pay for all the harm his actions cause, they often do not exceed the short-term profits generated by the discharge. Therefore, firing the employee without cause is risk-free. If the employee sues and recovers damages, the employer loses very little. If the employee does not sue, or if he loses, the employer realizes a quick profit (although he would lose out in the long run if his firing practices were known to prospective employees).

While Justice Broussard is correct to observe that contract damages do not necessarily provide a sufficient incentive to avoid arbitrary con-

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79. *Foley*, 47 Cal. 3d at 707, 765 P.2d at 406, 254 Cal. Rptr. at 244 (Broussard, J., dissenting).
duct by employers, there is a more fundamental flaw in the majority's conclusion that economic self-interest is an adequate hedge against bad faith. The majority's conclusion is the product of yet another common, but incorrect, assumption about wrongful discharge: that the usual wrongful discharge plaintiff is a highly paid executive or middle manager who deals more or less directly with his employer, and whose job performance directly affects the employer's financial well-being. In fact, about half of all wrongful discharge plaintiffs are not managers fired by their employers, they are workers fired by their managers. Those managers may act to further the employer's economic well-being, but they may also act out of narrow self-interest, spite, or personal animosity.

Thus, arbitrariness and bad faith creep into personnel decisions because the economic consequences of losing a good employee fall on the employer, not on the particular supervisor who makes the decision to fire. Employment, thus, is not a simple economic arrangement between two parties, in which economic self-interest will ordinarily protect the interests of each. In many instances it is, rather, a relationship between an individual with power in an organization, and nothing at stake—the supervisor—and an individual without power, and everything at stake—the employee. In this context, simple economic rationality will not deter bad faith.

Even acknowledging that the adverse economic consequences of bad faith are an inadequate deterrent, however, tort liability might still be a bad idea. Given that mistakes in personnel matters are inevitable, the risk of tort liability might impose an intolerable cost on employers, if tort judgments are as unpredictable and outrageous as the Foley court believed them to be. But again, the data suggest that tort liability for wrongful discharge is neither outrageous nor unpredictable. In most cases, liability is both moderate and predictable.

80. For a similar analysis of the inadequacies of contract damages, see Traynor, Bad Faith Breach of a Commercial Contract: A Comment on the Seaman's Case, BUS. L. NEWS, Fall 1984, at 1.

81. As evidence for the unpredictability of wrongful discharge litigation, the Foley court refers to an article in which it is claimed that awards in California wrongful discharge suits "actually exceeded settlement demands by 187%." Foley, 47 Cal. 3d at 696 n.33, 765 P.2d at 398 n.33, 254 Cal. Rptr. at 237 n.33 (citing Gould, supra note 3, at 405-06). It is not clear why it should be surprising that awards should exceed demands; indeed, one would expect demands to be less than awards, since a settlement avoids both the risk and the cost of a trial.

The RAND Study in fact suggests that settlement practices in wrongful discharge cases are actually quite rational. Settlement demands "appear to be roughly consistent with reasonable expectations about probable awards," and while offers appear to be unrelated to expected awards, "they are in the range of what the median plaintiff can expect to gain after post-trial adjustments and deductions for legal expenses." RAND Study, supra note 3, at 42-43.
Wrongful discharge litigation always has labored under a stereotype engendered by the publicity attendant on a handful of landmark verdicts. The stereotypical plaintiff is a highly paid executive or manager; the stereotypical issue, whether cause existed for the discharge; the stereotypical result, an unpredictable, high-stakes lottery. The stereotype is not entirely unfounded. Yet for every case that fits the stereotype, another involves an ordinary worker, injured by arbitrary and malicious acts, whose recovery is moderate and predictable. Unfortunately, the decision in Foley seems more responsive to the stereotype than to the facts of wrongful discharge.

Conclusion

After Foley, wrongful discharge plaintiffs only will be able to recover punitive damages and damages for emotional distress if they can show that their discharge violated an important public policy, or that the employer committed some other, independent tort. As a result, the risk of liability to which employers are exposed has been reduced dramatically, perhaps by as much as two thirds. Although the many ambiguities and uncertainties left by the opinion will keep litigation going for a while, there can be little doubt that the expected substantial reduction in awards will lower the rate of wrongful discharge litigation significantly.

This decrease in litigation, however, will affect some types of plaintiffs more than others. Highly paid executives and employees with unique skills will still find suit worthwhile. Ordinary workers, however, may not. Yet, ordinary, nonunion workers were frequent plaintiffs in wrongful discharge litigation, and the threat of liability impelled many employers to develop safeguards against arbitrariness in employment decisions. Because the court's opinion in Foley is so colored by the impression created by a handful of highly visible, landmark verdicts, the effect the decision will have on ordinary wrongful discharge cases, and on the safeguards against abusive discharge inspired by the threat of liability, unfortunately is ignored.

82. Indeed, many of the plaintiffs in the most celebrated cases—Pugh and Cleary, for example—would fit this stereotype.