CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

BULLETIN

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CALIFORNIA SUPREME COURT REHEARS *FOLEY VS. INTERACTIVE DATA CORP.*

By: Wiliam C. Quackenbush

On April 6, 1987, *Foley vs. Interactive Data Corp.* was reargued before the California Supreme Court. Presenting arguments on behalf of Daniel Foley, the appellant-employee, were Steven J. Kaplan, Mr. Foley's attorney at the Court of Appeal level, and Cliff Palefsky, representing the California Trial Lawyers Association. Also in attendance, representing the California Employment Lawyers Association, were William Crosby, John McCarthy, Joseph Posner, William Quackenbush, and James Stoneman, members of the CELA Executve Board.

Presenting arguments on behalf of Interactive Data Corp. was Robert Kuenzel.

PROCEDURAL BACKGROUND

Mr. Foley filed suit against Interactive Data alleging three causes of action: He was wrongfully terminated in violation of public policy (see *Tameny*); he was terminated in breach of the implied promise not to be terminated except for good cause (see *Pugh*); and he was terminated in breach of the implied covenant of good faith and fair dealing (see *Cleary*).

Interactive Data demurred to the Plaintiff's Second Amended Complaint. The trial court sustained the demurrer without leave to amend, and entered a judgment dismissing the complaint. The plaintiff appealed from the judgment, The Court of Appeal (Second Appellate District) affirmed the judgment on the following grounds:

1. The public policy claim failed to state a cause of action since "there was no statutory violation and no claim that IDC asked him to perform an illegal act."

2. The implied contract (Pugh/good cause) claim was barred by the statute of frauds, since Foley "plainly is asserting that his oral employment contract was for more than one year."

3. The claim for violation of the covenant of good faith and fair dealing failed to state a cause of action, since, "Foley's seven years at IDC fell short of the necessary longevity," and since "Foley does not adequately allege express formal procedures for terminating employees."

In his opening brief filed with the Supreme Court, the appellant argued primarily as follows, as to each of these causes of action:

1. Public policy does not have to be based upon a statute. "The court may declare the existence of a public policy." *(Dabbs v. Cardiopulmonary Management Services,* 234 CR 129 (1987), and the 1986 *Koehrer* decision, support this position.)

2. The implied contract claim is not barred by the statute of frauds, since the contract was capable of being performed within one year. In any event, the Court of Appeal erroneously held that the at-will presumption under Labor Code 2922 could be rebutted only by a written employment contract.

3. Breach of the covenant of good faith and fair dealing does not require establishing longevity of employment Also, "The Court should expressly recognize a cause of action in tort for

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PUBLIC POLICY, IMPLIED COVENANT TESTS COULD HINGE ON FOLEY OPINION

Two of the major questions to be decided by the California Supreme Court when it issues its opinion in *Foley v. Interactive Data Corp.* will be the criteria for alleging and proving breach of the implied covenent of good faith and fair dealing and breach of the public policy in the employment context.

Two recent appellate court decisions, *Dabbs v. Cardiopulmonary Management Services, et al.* (1987) 234 CR 129 and *Ketchu v. Sears Roebuck, Co.* (1986) 186 CA3d 1644 issued the most recent pronouncements as to these tests. In *Dabbs* the Fourth District reversed the granting of a summary judgment where the plaintiff, a respiratory care therapist who refused to work with an untested trainee in the care of iron lung patients - could not point to a specific statutory violation. The court cited withd favor *Hentzel v. The Singer Co.* (1982) 138 CA3d 290 in ruling that alleged retaliatory dismissal for expressing concerns for patient health care may give rise to a tort action for wrongful dismissal, with or without statutory support. The opinion noted that general legislative concern with patient health care and safety but also found support for its decision "in general societal values..." supporting such concerns.

Whether the Supreme Court grants the currently pending petition for review of *Dabbs* may well depend on whether it addresses the "public policy" issue raised in *Foley.*

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wrongful discharge in breach of the covenant of good faith and fair dealing." (As will be seen below, the Supreme Court was primarily interested in discussing this cause of action.)

ARGUMENT/QUESTIONS COMMENTS

The following summarizes most of the Justices' comments and questions, but only some of the parties' arguments and answers. We make no representations that this summary is complete. The quotes may be approximations, but in some instances they are exact quotes. No attempt is made to "interpret" the comments or questions.

Mr. Kaplan opened with the statement that he was not suggesting that every termination requires "just cause." Justice Panelli asked Mr. Kaplan whether a contract had to be established in order to find liability in a case that did not involve a "good cause finding". Justice Eagleson asked Mr. Kaplan whether Labor Code Section 2922 was "good law."

Justice Kaufman asked whether a contract existed in the "typical employment relationship." Justice Broussard asked what must be established for a tort cause of action for breach of the covenant of good faith and fair dealing. He then asked Mr. Kaplan to comment on the test in *Koehrer*, namely, that the plaintiff must show that the employer had no reason to believe he had good cause to terminate the plaintiff. Justice Broussard also asked whether a cause of action would be established if an employer has good cause to terminate, but gives the employee a different reason at the time firing.

Justice Lucas illustrasted the last point by asking if a tort would be established in the following example: The employer has good evidence that the employee is guilty of theft, and fires the employee by providing a false reason, to avoid creating ill will.

Justice Mosk asked what statute sets forth "the obligation" (presumably, public policy) in the Foley case. Mr. Kaplan stated that a statute is not required, under *Dabbs*, *Koehrer*, and *Safeway*.

Mr. Palefsky commenced his comments by returning to the issues relating to good faith and fair dealing. Specifically addressing Justice Panelli, he indicated that there should be no breach of this covenant if the employer's actions are based upon an *honest* belief that just cause existed for termination (even if mistaken). Justice Panelli responded by asking whether the cause of action requires establishing that a contract existed. Mr. Palefsky said, "Yes, but not a contract for just cause." He added that the *Koehrer* test is correct.

Justice Panelli asked if a "good cause" requirement is implicit in the covenant of good faith and fair dealing. Mr. Palefsky said "No" and commented on *Koehrer* and *Khana*. Justice Panelli asked, "How can a bad faith breach *not* be a tort, based on your analysis?" He also asked, in a hypothetical case of a construction contract, whether a contractor could be sued in tort for failure to build the agreed upon building.

Mr. Palefsky responded that the employment relationship is different. Justice Panelli said "We're converting contract damages into tort actions." Justice Lucas asked if a cause of action exists in the case of an employer who fails to give any reason for termination of an at-will employee Mr. Palefsky said "No."

With respect to the public policy cause of action, Mr. Palefsky pointed out Justice Kaufman's views in *Koehrer*. Justice Panelli responded, "That's *his* position."

Mr. Kuenzel began his comments by referring to Section 2922, adding that employers "must be able to terminate with certainty and fairness." Justice Broussard asked whether there can exist grounds for an implied covenant to fire only for good cause; "Does it take 35 years?" Justice Panelli asked, "In your example, are we speaking of an implied agreement or estoppel?"

Justice Broussard asked whether the Foley case involved sufficient basis for an implied term not to terminate except for good cause. Mr. Kuenzel said, "No, seven years is not enough." Justice Mosk said, "Is 32 years long enough? Where's the line?" Justice Broussard asked, "Do you need to join the good old boys' club for job security? We're talking about rights to a job!"

Justice Panelli said, "If you're talking about a contract, whether it's five months or twenty years is irrelevant. The rights aren't acquired by accretion. It doesn't make sense. The problem is in trying to analyze this with the usual contract rules."

Mr. Kuenzel said that five years may sometimes be long enough for an implied contract for job security.

Justice Kaufman asked, "Which cause of action are you speaking of?" Mr. Kuenzel said, "Good faith and fair dealing." Justice Kaufman asked, "Assuming that the plaintiff can't make out a contract for the good cause requirement, is there still a contract for employment?" Mr. Kuenzel replied, "Yes."

Justice Kaufman asked, "The factors of length of employment, etc., are irrelevant for the covenant of good faith and fair dealing, is that not so? What term is Foley claiming in his contract? I'm assuming that his contract did not contain a good-cause term. What is the content of good faith and fair dealing in the relationship?"

Mr. Kuenzel responded that good faith and fair dealing exists, but not with

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tort remedies. Justice Arguelles said, "There's no tort remedy? Or are you saying there's no contract remedy?" Justice Broussard asked, "If we have an at-will employment contract, and a violation of good faith and fair dealing, is the *only* remedy contract damages?" Mr. Kuenzel replied, "Contract remedies are enough in the employment setting."

Justice Panelli asked, "Are you serious in your contention that these contracts are outlawed by the statute of frauds?" Mr. Kuenzel replied, "Contracts for a term are subject to the statute of frauds." Justice Panelli said that the statute would be satisfied in a case where an employee was fired, for good cause, after only two weeks of employment.

Mr. Kuenzel's closing comment was that Koehrer "is correct regarding the subjective and objective elements."

In his closing comments on behalf of Mr. Foley, Mr. Kaplan stated that: (1) the statute of frauds doesn't apply to an implied contract, since the terms of the contract keep changing during the employment; (2) the Court should accept the *Pugh* factors to establish an implied contract; and (3) limiting damages to contract damages will not provide sufficient deterrence to keep employers from engaging in wrongful terminations.

WHY THE JURY IS INDISPENSABLE TO JUSTICE IN WRONGFUL TERMINATION ACTIONS

By: William M. Crosby

As in other areas of tort and criminal law, the jury trial has been under attack in wrongful termination actions. Pending proposals in Sacramento and the recommended reforms published by the special committee of the State Bar Labor and Management Relations Sections, promote arbitration as a preferred alternative to jury trials in employment cases.

Any experienced trial lawyer will attest to the falsity of the premises upon which such proposals are advanced. While arbitration may be of some benefit to relatively small cases, any sweeping reform that would deny an employee the right to jury review would amount to a serious curtailment of his or her right to a fair trial.

Specifically, a 12 or 6 member panel of impartial citizens is much more likely than not to be free of bias and prejudice. Even a seasoned judge or arbitrator, necessarily will carry with him or her a judgmental frame of reference based on that person's own unique life history as an academic, professional, etc. While each juror will also have such bias, a verdict by jury can only be reached when the biases of 12 (or 6) people have effectively counteracted one another.

More importantly, the presumably refined legal mind and a detached prospective of the arbitrator or judge is much less likely to reflect the moral sensibilities and compassion the jury, sitting as the "community conscience." And, jurors will generally be more empathetic to the full measure of outrageous conduct and resultant emotional distress.

While the result may sometimes be a verdict so great as to require reduction by the court and post trial motion, the evil of eliminating the right to a jury trail altogether is not an acceptable alternative. Justice that can only be sought to be achieved through arbitration or a court trial is not full justice. Indeed, a society without a right to a jury trial is a society that can only define justice in terms of the elitist notions of those in control of the judicial process. And, in view of recent election results, it cannot be said that an "independent judiciary" alone can be counted on to uphold the nobler objectives of the law.

These are a few of the reasons why we should be vigilant in opposing efforts to errode the jury system in employment as well as other cases.

CELA, PELA TO CO-SPONSOR ABA RECEPTION SEMINAR

CELA and PELA (Plaintiffs' Employment Lawyers Association) will co-host a seminar and cocktail reception in connection with the ABA National Convention on August 10 in San Francisco. Active participation of all CELA members is requested.

Details as to the agenda, time and place will be forthcoming in the next CELA newsletter. Mark your calendar for what promises to be a stimulating and informative event.

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In *Ketchu* a jury verdict in favor of a discharged employee was reversed as to the implied covenant cause of action due to the failure of the trial court to grant a requested instruction obligating the jury to find for the employer as to that cause of action if it found that its belief in "cause" for a dismissal was mistaken, but in good faith. This opinion has been ordered decertified by the Supreme Court, however, and will be mooted by its opinion in *Foley*.

Until the Supreme Court decertifies or overrules *Dabbs* plaintiff's attorneys in wrongful discharge actions are well advised to carefully consider a possible "public policy" claim, particularly if the Supreme Court requires a finding of actual dishonesty or fraud to support a tort claim based on breach of the implied covenant of good faith and fair dealing. A further advantage in asserting a public policy claim is that no showing need be established as to the existence of an express or implied contract of employment.

The focus of analysis as to any possible public policy cause of action should be whether any type of retaliatory conduct resulting from an employee's expressed concerns as to illegal, unethical or immoral practices of the employer, can be established. If the issue is "potent" a strong argument can be made to the jury to "correct corrupt corporate practices" with a substantial verdict. Care should be taken, however, to assure that evidence can be adduced to substantiate such charges. Otherwise, summary judgment or non-suit may prevent the case from reaching the jury.

"NETWORKING" THROUGH CELA

Plaintiffs' wrongful discharge attorneys more often than not operate as sole practitioners or in small partnerships. Fighting the employee's cause against a large corporation invariably involves litigating against the most skillful defense counsel in big firms that command the most sophisticated resources at their disposal. More often than not two or even three attorneys appear of record on behalf of the defendant. Paralegals, research assistants and the latest in computer research technology are all part of the defense arsenal in the "paper war" that inevitably is waged by the defense. One of the main purposes of CELA is to provide a "network" among the plaintiffs' bar for mutual assistance in the face of this attack by the defense bar. This can be accomplished in the following ways:

1. By sharing briefs, anecdotes, and "tips" as to effective techniques in dealing with certain issues, judges, defense counsel, etc.

2. By attending CELA meetings and seminars where ideas, strategies and trends in the law are discussed;

3. By learning, through CELA, of competent counsel in specific areas of specialization, for purposes of referral and/or association. Your input in any or all of these areas is requested. Please submit any useful points and authorities, written summaries of experiences, or other useful information for publication in the CELA membership or distribution. Equally importantly, attend the CELA general meeting!

CELA FEBRUARY MEETING A SUCCESS

By: William M. Crosby

Discussion of CELA's goals and objectives, insights into recent key appellate cases, and a report on CELA's position on revised rules of professional conduct, highlighted the second CELA general membership meeting on February 28 in Burlingame.

Following introductory remarks by Bill Crosby, Bennett Rolfe, reported on the status of current "computer bank" data storage technology, and how it might be applied to assist CELA members. Joe Posner and Berry Wally reported on the effects of the *Cole* Decision re Workers' Comp preemption of emotional distress claims.

John Hartford discussed causes of action in wrongful termination actions, and Bill Quackenbush reviewed CELA's first "official position paper" on ex parte contacts with corporate employees. A lively discussion followed on the purposes of CELA and how we may best be practically effective.

There was a general consensus that the credibility of the organization will in large measure flow from the quality rather than the shear quantity of our membership. Each member was encouraged to seek out and solicit for membership those plantiff's lawyers who have demonstrated skill and confidence in representing clients, and who are dedicated to the advancement of the cause of employee's rights.

It was agreed that a seminar will be established in May on Current Trends in Employment Law, and effective Practice Techniques.

REPRESENTATION NEEDED FOR UNION CIVIL SERVICE EMPLOYEES

The *"Tameny - Pugh - Cleary* trilogy" that marked the veritable revolution in wrongful discharge law was primarily directed to the non-civil service, non-union employee who,prior to these cases, enjoyed little if any protection against unjust dismissals. Many plaintiffs' attorneys in this field, however, have noted in occasional interviews with dismissed union members or civil service employees, the glaring injustice that continues to accompany many of the termiations of these so-called "protected" employees.

Unon arbitrations may be perfunctory or even collusive, and there is generally no right to a jury reveiw of an unjust civil service dismissal. And, the damage remedies may be limited to back pay and, possibly, reinstatement.

The emotional and financial harm that may accompany these dismissals are, however, often as equally great as with the non-union private sector employee. Even greater skill may be required to circumvent the morass of NLRB pre-emption, exhaustion of administrative remedies, grievance procedures and other anticipated defenses. Attorneys competent to handle these matters should contact Mary Richardson at the office of John C. McCarthy, 401 Harvard Avenue, Claremont, Ca 91711; (714) 621-4984, so that their availabilty can be made known in future newsletters.

SUPPORT COUNTY EMPLOYMENT ATTORNEYS GROUPS

As with any effective organization, the strength of CELA must rest with its county organizations. At present there are active county or area-wide groups of plaintiffs' employers in Los Angeles County, Orange County, and the San Francisco Bay area. These groups, meet at least monthly to present programs and discuss topics of interest in wrongful termination and discrimination cases.

If your county does not presently have such an organization, you are urged to join with other plaintiffs' employemnt lawyers to organize such a group. You may or may not wish to formally associate with a local bar association, adopt by-laws, etc. Participation in such an organization will enhance your skills and increase your effectiveness in influencing the law in the right direction.

CELA NEWSLETTER NEEDS YOUR INPUT

Membership in CELA is not unlike membership in any other organization; benefits will be derived to the extent that one is willing to contribute one's own energies and talents to the organization. Any summary of case settlements, trail strategies, successful arguments or "practice tips" should be written down and submitted for publication in the CELA newsletter. In this manner all CELA members will benefit from your success and you will have contributed to the advancement of our mutual cause of better serving our clients.

Send such proposed material to CELA Newsletter, c/o 18200 Von Karman, Suite 820, Irvine, CA 92715