California Wrongful Discharge Law Turns Toward The Plaintiff

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Turns Toward The Plaintiff

I. INTRODUCTION

Historically, an employer has been entitled under common law to hire and fire whomever it pleases as part of the employer's right to run its enterprise. While the rest of the industrialized world has left the doctrine behind, most of the United States still supports the idea that an employee and an employer may choose to terminate the employment relationship at any time for any reason. California codified this doctrine in its labor code: "An employment, having no specified term, may be terminated at the will of either party on notice to the other." Despite strong national support in favor of employment-at-will, what is true

1. See Mark A. Rothstein & Lance Liebman, Cases and Materials on Employment Law 3d 882, 882, (1994) (summarizing the rights of management historically to "hire and fire whomever it pleased"); see also Payne v. Western & Atl. Ry., 81 Tenn. 507, 519-20 (1884) (setting forth the first judicial statement about the at-will employment doctrine: "All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."); Samuel Williston & Walter H. E. Jaeger, Williston on Contracts § 1017 (3d ed. 1957 & Supp. 1998); Restatement (Second) of Agency § 442 (1958). See generally, Jay M. Feinman, The Development of the Employment At Will Rule, 20 Am. J. Legal Hist. 118 (1976) (discussing thoroughly the history of the at-will employment doctrine).

2. See St. Antoine, Employee Terminations and the Erosion of the At-Will Employment Doctrine, Developing Rights of Employees in the Workplace 36, 42 (C. Bakaly & J. Feerick eds. 1981) (noting that sixty-five other nations employ a just cause standard of dismissal for its workers); see also Mark A. Fahleson, The Public Policy Exception To Employment At Will – When Should Courts Defer to the Legislature?, 72 Neb. L. Rev. 956, 959 n.9 (1993) (noting that other Westernized countries have abandoned the at-will employment doctrine); Stewart J. Schwab, Life-Cycle Justice: Accommodating Just Cause And Employment At Will, 92 Mich. L. Rev. 8, 9-10 (1993) (acknowledging the view of many commentators that the United States is behind the rest of the world when it comes to at-will employment); Samuel Estreicher, Unjust Dismissal Laws: Some Cautionary Notes, 33 Am. J. Comp. L. 310, 311 (1985) ("We seem to stand virtually alone among the nations of the Western industrialized world in not providing general protection against unjust discharge for private-sector employees. ... ").

3. See Anthony Miller & R. Wayne Estes, Recent Judicial Limitations on the Right to Discharge: A California Trilogy, 16 U.C. Davis L. Rev. 65-66 (1982) (noting that the United States stands out from other industrialized Western European countries by not guaranteeing private sector workers a right of fair dismissal); see also Kathleen C. McGowan, Note, Unequal Opportunity in At-Will Employment: The Search For A Remedy, 72 St. John's L. Rev. 141, 144 (1998) (stating that the at-will employment doctrine is currently "so deeply entrenched within this country's judicial decisions that any deviation from the doctrine is viewed by the courts as a heresy that should not be instituted."). But see Mont. Code Ann. § 39-2-904 (1995) and P.R. Laws Ann. title 29, § 185a (Supp. 1996) (both statutes codify the just cause requirement for all employment).

in practice is much different from the theory. Employment-at-will is often regarded by courts and legislatures as too harsh on employees because of the power the doctrine gives employers. In a market where it is more difficult for an employee to gain subsequent employment than it is for an employer to find another employee, specific state statutes have arisen to limit an employer's ability to fire an employee. Statutory exceptions are now recognized along with three judicial exceptions to the employment at-will doctrine. The judicial exceptions apply when there is: 1) an implied-in-fact promise not to fire the employee except for good cause; 2) an implied covenant of good faith; and 3) when the discharge is in violation of public policy, the exception most frequently used.

5. See Nora J. Pasman, The Public Interest Exception to the Employment-At-Will Doctrine: From Crime Victims to Whistleblowers, Will the Real Public Policy Please Stand Up?, 70 U. DET. MERCY L. REV. 559, 560 n.4 (1993) (noting that the at-will employment doctrine, with the basic public policy exception, "is recognized in 40-45 states"); see also Kenneth J. Kelly, Workplace Litigation, 476 PRAC. L. INST./LMS. 7, 49 (1993) (pointing out that twenty-six states have express public policy based exceptions and eleven more states have limited public policy exceptions to the at-will employment doctrine).


7. See Miller, supra note 3, at 85 (stating that the "modern economic reality may make the employee's freedom to terminate his employment at-will a fiction.") (citations omitted); see also ROTHSTEIN, supra note 1, at 882-83 (noting that approximately sixty million private sector employees are subject to an employment at-will rule, and of the 1.4 million employees that are fired each year, 15,000 are unjust); Laurie A. Erdman, Note, Gantt v. Sentry Insurance: When Can an Employee be Discharged? The Legislative, 25 PAC. L.J. 107, 107 n.3 (1993) (noting that an employer's legal ability to use the at-will employment doctrine as a weapon of threatened discharge produces great power over employees); Jack Stieber & Michael Murray, Protection Against Unjust Discharge: The Need for a Federal Statute, 16 U. MICH. J.L. REFORM 319, 320 (1983) (advocating a statutory solution to "fully protect American workers from the harsh consequences of the employment-at-will rule"); Bill Boyce, Employer's Right to Fire At Will Now Being Eroded, San Diego Union-Tribune, Aug. 14, 1985, at E2 (stating that beginning in the 1960's with the Warren Court and the emphasis on individual rights, employers were limited in terminating employees by restrictions on race, color, religion, sex or age; this seriously weakened the at-will employment doctrine).


9. See Miller, supra note 3, at 67; see also ROTHSTEIN, supra note 1, at 885-926 (recognizing the three exceptions to at-will employment and furnishing various cases in support of each exception); Gregory G. Sarno, Annotation, Liability For Retaliation Against At-Will Employee For Public Complaints Or Efforts Relating To Health Or Safety, 75 A.L.R. 4th 13, 24-27 (1990) (stating views of different jurisdictions recognizing the public policy exception to at-will employment); Christopher L.
This Note explores the current state of the public policy exception to the at-will employment doctrine in California. Part I gives a brief history of the evolution of the employment-at-will doctrine. Part II recounts the development of the public policy exception through California cases. Part III introduces the most recent California Supreme Court decision on the issue, Green v. Ralee Engineering Co., and outlines the majority's reasoning in overturning the Court's own precedent. This section also dissects the majority reasoning and points out inconsistencies within the opinion itself. Part IV examines the Green dissents of Justices Baxter and Brown and specifically inquires into the impact of Green on California Labor Code section 1102.5, the Whistleblower Statute. Part V further explores the reasoning behind the Green dissents and looks at the potential impact Green will have on wrongful discharge litigation in California.

II. PUBLIC POLICY EXCEPTION TO THE AT-WILL EMPLOYMENT DOCTRINE IN CALIFORNIA

California led the way in dismantling the at-will employment doctrine by way of public policy in its seminal 1959 decision, Petermann v. International Brotherhood of Teamsters Local 396. Petermann involved an employee discharged for refusing to perjure himself, and represents the classic wrongful discharge case utilizing the public policy exception as its basis: allowing an employee to sue her employer because she was fired for refusing to break the law.

Petermann limited the at-will contract by expressly holding that an employer who terminates an employee in violation of public policy, even though there is no statutory bar against such a termination, will not be protected by the at-will


10. See supra notes 1-9 and accompanying text.
11. See infra notes 17-45 and accompanying text.
12. 960 P.2d 1046 (Cal. 1998).
13. See infra notes 46-70 and accompanying text.
14. See infra notes 46-70 and accompanying text.
15. See infra notes 71-83 and accompanying text.
16. See infra notes 84-123 and accompanying text.
17. 344 P.2d 25 (Cal. Ct. App. 1959). For a general overview and thorough discussion of the public policy exception to at-will employment in California prior to Green v. Ralee Eng'g, see Erdman, supra note 7, at 107-56.
18. See Petermann, 344 P.2d at 28.
employment doctrine in a suit by that former employee.  

After Petermann came Tameny v. Atlantic Richfield Co., which reiterated Petermann's principles and laid the foundation for wrongful discharge law in California. Like its predecessor, Tameny suggested that where the motive for discharging an employee contravenes substantial public policy principles, the discharge is wrongful. Tameny also added the weapon of tort damages to plaintiff employees, a huge development considering California allows punitive damages to all claims not sounding in contract. The Tameny court opined that public policy interests favoring an exception to the at-will employment doctrine outweigh all other considerations the employer has for termination, including factors supporting the at-will doctrine itself.

Foley v. Interactive Data Corp. served as the precursor to Gantt v. Sentry Insurance Co., setting California's standard for the public policy exception until 1998. Foley established that public policies overcoming the at-will doctrine must be fundamental and must affect society at large rather than a purely personal or proprietary interest of the employer or employee. However, Foley left unanswered the question of whether a violation of a statute or constitutional provision is a sufficiently substantial public policy to support a claim of wrongful discharge.

Gantt subsequently answered that question, taking California wrongful discharge law towards a more restrictive stance, turning away from the liberal exceptions favoring employees that California employment law previously favored.

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19. See id.; see also Miller, supra note 3, at 70.
20. 610 P.2d 1330 (Cal. 1980).
21. See Miller, supra note 3, at 67.
22. See Tameny, 610 P.2d at 1336; see also Miller, supra note 3, at 71.
24. See CAL. CIV. CODE § 3294 (West Supp. 1993) (stating that punitive damages are recoverable in non-contract actions); see also Lawrence C. Levine, Judicial Backpedaling: Putting the Brakes on California’s Law of Wrongful Termination, 20 PAC. L.J. 993, 1050 (1989) (discussing that wrongful discharge cases brought under California’s public policy exception to at-will employment are the only cases in which the employee may recover tort damages).
25. See Miller, supra note 3, at 72.
28. Gantt, which required public policy exceptions to be tethered to a statute or constitutional provision, not including administrative regulations, was overruled by Green, 960 P.2d at 1049.
29. See Foley, 765 P.2d at 378-79.
30. See Gantt, 824 P.2d at 684 (noting that the court in Foley “declined . . . to determine whether the violation of a statute or constitutional provision is invariably a prerequisite to the conclusion that a discharge violates public policy.”).
31. See generally McGowan, supra note 3, at 149-50 (recognizing California’s application of the at-will employment doctrine as “liberalized” compared to strict enforcement states, such as New York, which rarely depart from the at-will doctrine without express legislative authorization). See also Erdman, supra note 7, at 107 (depicting an in depth discussion of the Gantt decision as well as the public policy exception in California leading up to the Gantt decision).
her sexual harassment claim against a supervisor.\(^{32}\) Gantt had gone so far as to contact the Department of Fair Employment and Housing ("DFEH") which assured him that his job was protected from retaliatory discharge.\(^{33}\) The \textit{Gantt} court found difficulty in determining when public policy is sufficiently clear enough to provide the basis for such a potent remedy as wrongful discharge.\(^{34}\)

The court in \textit{Gantt} recognized that public policy, as a concept, is notoriously resistant to precise definition.\(^{35}\) The court warned its judicial successors to venture into this area, if at all, with great care and due deference to the judgment of the legislative branch lest they mistake their own predilections for public policy which deserves recognition at law.\(^{36}\)

The court solved the problem of defining public policy by requiring public policy to be tethered to a statute or constitutional provision, and expressly rejected what other jurisdictions had allowed: permitting such things as administrative regulations to serve as the basis for a public policy wrongful discharge claim.\(^{37}\) The court reasoned that the potential danger of "judicial policy making could be avoided if courts in wrongful discharge actions . . . [are not permitted to] declare public policy without a basis in either the constitution or statutory provisions."\(^{38}\)

Justice Arabian's majority opinion in \textit{Gantt} declared that such a restriction strikes the proper balance because it gives employers notice when to reasonably expect a wrongful discharge case to go forward in spite of the at-will doctrine.\(^{39}\) The majority explained that employers should, at a minimum, know of the fundamental public policies found in constitutional and statutory law.\(^{40}\) At the same time, employees are still protected against employer actions contravening state public policies because an employee acting pursuant to a statutory obligation or constitutional provision is permitted to bring a wrongful discharge claim.\(^{41}\) The majority in \textit{Gantt} reasoned that its holding would serve society's interest in a more

\(^{32}\) See \textit{Gantt}, 824 P.2d at 682-83.

\(^{33}\) See id.

\(^{34}\) See id. at 684.

\(^{35}\) See id.; see also Petermann v. Int'l Bhd. of Teamsters, 344 P.2d 25, 25 (Cal. Ct. App. 1959) (citing various authorities supporting the evasive nature of defining public policy); Pennington, supra note 9, at 1627 n.62 (listing several cases describing the difficulty in defining public policy); \textit{Protecting Employees, supra} note 6, at 1947 ("Developing a coherent doctrine of 'public policy' has long been recognized as a source of judicial difficulty and confusion.").


\(^{37}\) See id. at 687-88.

\(^{38}\) See id. at 687.

\(^{39}\) See id. at 688.

\(^{40}\) See id.

\(^{41}\) See id.
stable job market, while still perfecting and preserving important policies.\(^\text{42}\) Incidentally, the \textit{Gantt} court affirmed judgment for the plaintiff because the employer’s retaliation action against an employee aiding a DFEH investigation was specifically prohibited by statute.\(^\text{43}\)

California courts have since followed \textit{Gantt}, and wrongful discharge law has not seemed to suffer in California due to \textit{Gantt}’s restriction.\(^\text{44}\) However, in September of 1998, the California Supreme Court reversed its holding in \textit{Gantt} and expanded the scope of the public policy exception to wrongful discharge in \textit{Green v. Ralee Engineering}.\(^\text{45}\)

### III. \textit{GREEN V. RALEE ENGINEERING}

Ralee Engineering manufactured fuselage and wing components used in both military and civilian aircraft for companies such as Boeing and Northrop.\(^\text{46}\) Green was an at-will quality control inspector employee of Ralee.\(^\text{47}\) At the time of his discharge, Green was working the night shift inspecting various aircraft parts before the parts were shipped to the plane manufacturers.\(^\text{48}\) Starting in the early 1990s, Green allegedly noticed that Ralee was shipping parts that had failed the inspections he and his team performed.\(^\text{49}\) During the course of two years, Green reported the alleged violations to his supervisor, to management personnel, and even to Ralee’s president.\(^\text{50}\) During his employment, Green made only internal complaints and never went outside the company to the FAA or to any other government agency or even to the plane manufacturers themselves.\(^\text{51}\) Green contended that his complaints were met with various results and that he began photocopying inspection reports in order to preserve the substance of his

\(^{42}\) See id.
\(^{43}\) See id.
\(^{44}\) See generally Stevenson v. Superior Ct., 941 P.2d 1157, 1161 (Cal. 1997) ("T\text{ethering public policy to specific constitutional or statutory provisions serves not only to avoid judicial interference with the legislative domain, but also to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees they discharge. . .}"); Sequoia Ins. Co. v. Superior Ct., 16 Cal. Rptr. 2d 888, 893 (1993) (holding that the statute in question need not prohibit the employer’s precise act, however the claim cannot be loosely based on or simply “derived from” the statute). In \textit{Sequoia}, an insurance manager who claimed he was terminated for refusing to artificially increase reserves to create an illusion of loss and reduce customer refunds was not allowed to bring a charge of wrongful discharge because there was no violation of public policy as stated in a constitutional or statutory provision. See also Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1034 (Cal. 1994) (holding that an employee must show an adequate nexus between termination of employment and public policy violated by employer).
\(^{45}\) 960 P.2d 1046 (Cal. 1998).
\(^{46}\) See id. at 1049.
\(^{47}\) See id.
\(^{48}\) See id.
\(^{49}\) See id.
\(^{50}\) See id.
\(^{51}\) See id.
complaints. In March 1991, Green was discharged after Ralee Engineering shut down its night shift. However, other night inspectors, including some with less experience than Green, were retained by the company. The wrongful termination action that Green filed against Ralee was dismissed by the trial court, which had used Gantt as its rationale.

Green cited the entire Federal Aviation Act of 1958 to support his claim. However, the trial court determined that the Act was not specific enough to fulfill the Gantt public policy exception requirement and granted summary judgment in favor of Ralee Engineering. The California Court of Appeal overturned the summary judgment and reinstated Green's claim after it independently identified several key federal regulations on aviation safety, which Green then relied upon in his case before the California Supreme Court. The appellate court held that the connection between the public policy of safety in airplane manufacture and federal aviation law was sufficient to satisfy the rule in Gantt.

The California Supreme Court agreed with the Court of Appeal, and in so doing, included administrative regulation to the public policy exception. Green expands the public policy exception to the at-will doctrine to now include wrongful discharge claims based upon public policy interests protected by administrative regulations as well as by statutes or constitutional provision. Instead of expressly reversing its own decision from six years earlier, the Green court reasoned that administrative regulations implementing fundamental public policies are "tethered" to the enabling statutes which authorize them, and thus may properly serve as the basis for a wrongful discharge action. This holds true even if the administrative regulations do not govern the particular employer. Although the court stated that

52. See id. at 1049-50.
53. See id. at 1050.
54. See id.
55. See id.
57. See Green, 960 P.2d at 1050.
58. See id.
59. See id.
60. See id. at 1050, 1054 n.6 ( "To the extent that one can read Gantt to conclude that important administrative regulations implementing fundamental public policies are not 'tethered to' legislative enactments, we overrule it.").
62. See Green, 960 P.2d at 1058-59 (countering Ralee Engineering's argument that the FAA regulations did not apply to its business by reasoning that because Ralee's misrepresentation would contribute to the certification of planes built by manufacturers that were covered by the FAA. The court further reasoned that by placing the burden on prime manufacturers, the FAA did not intend subcontractors to ignore those same regulations); see also Badih v. Myers, 43 Cal. Rptr. 2d 229, 231,
the State Legislature is the only governing body “vested with the responsibility to declare the public policy of the state,” the court ultimately held that it is up to the trial courts to determine which administrative regulations sufficiently stem from a statute or constitutional provision to support a wrongful discharge claim on public policy grounds. The majority explained this apparent contradiction by reasoning that courts, using administrative regulations, do not supersede legislative authority because the regulations are formulated by the legislature and implemented by the executive branch.

The majority in Green interpreted the Legislature’s inclusion of administrative regulations in California Labor Code section 1102.5, the Whistleblower Statute, as evidence of the Legislature’s belief that fundamental public policy could be furthered by encouraging employees to challenge employers who ignore these regulations. The court found that delegating the authority to adopt administrative regulations to an administrative agency in order to fulfill the statute’s objective, instead of having the Legislature write the regulation, might still manifest an important and fundamental public policy.

However, while the majority addressed the fact that California’s Whistleblower Statute limits its protection to employees who go outside the confines of their employment to report the suspect activity, the court never addressed why it superseded that provision of the statute.

Allowing the whistleblowing employee to proceed with a wrongful discharge claim without informing a public official of the alleged wrongdoing prevents an employer from completing an important step in the allegation process. Without the benefit of an investigation to determine the veracity of the whistleblower’s claim, an employer could be suddenly thrust into court to defend itself first against an unsubstantiated or proven claim of misconduct by the employer or one of its employees, and second against the termination of an employee for whatever reason.

233 (1995) (holding that a provision of the California Constitution provided a basis for the public policy exception in a wrongful termination case even though the employer was not covered by the Fair Employment and Housing Act ("FEHA"); Stevenson v. Superior Ct., 941 P.2d 1157, 1175 (Cal. 1997) (holding that a public policy wrongful termination claim could not be based on age discrimination as prohibited by the FEHA because the legislature provided for cumulative remedies). But see Thompson v. Mem’l Hosp. at Easton, 925 F. Supp. 400, 407-08 (D. Md. 1996) (holding that because the hospital, not the employee, had the legal duty to report mis-administration of radiation therapy, no public policy protected an employee from discharge when the employee informed hospital officials of the problems).

See Green, 960 P.2d at 1049. See id. at 1061. See id. at 1054. See id. at 1052; see also CAL. LABOR CODE § 1102.5(b) (West 1989) ("No employer shall retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or . . . regulation.").

See Green, 960 P.2d at 1054. See id. at 1064 (Baxter, J., dissenting).
or no reason at all. Although the termination may have been justified by the at-will employment doctrine, such a termination will be difficult for an employer to defend before a potential jury of employees, many of whom are likely to believe that an employer needs good cause to discharge despite what applicable law dictates.

IV. THE GREEN DISSENTS

A. Justice Baxter

The Green opinion was not unanimous; two justices dissented. Justice Baxter had numerous concerns for California employers and employment law in the wake of the decision. At the forefront of his concerns was that Green set forth a standardless rule as to which public policies are sufficient to overcome the statutory and common law rule of at-will employment. Justice Baxter also argued that allowing administrative regulations to serve as the basis for a public policy exception is unfair to employers because no tie is required between the employer and the administrative regulation. Further, the employer would not be assured of notice as to which regulations will suffice. As a consequence of Green, California employers are now responsible for knowing the rules which apply to

69. See id. at 1064 n.5 (Baxter, J., dissenting) (noting that the FAA never conducted an investigation into the misconduct that Green alleged was occurring); see also Sarno, supra note 9 at 20 (noting that the at-will employment doctrine allows an employer to discharge an employee for “good cause, for no cause, or even a cause morally wrong, without being thereby guilty of legal wrong”) (quoting Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1031 (Ariz. 1985)).

70. See Del Jones, Fired Workers Fight Back . . . and Win. Laws, Juries Shift Protection to Terminated Employees, USA TODAY, Apr. 2, 1998, at B1 (stating how juries are often “swayed by appeals to fairness” despite the at-will employment laws that are in place).

71. See Green, 960 P.2d at 1062, 1066.

72. See id. at 1062-66 (Baxter, J., dissenting).

73. See id. at 1066 (Baxter, J., dissenting).

74. See id. at 1063 (Baxter, J., dissenting).

75. See id.; see also Bill Boyce, Employer's Right to Fire At Will Now Being Eroded, SAN DIEGO UNION-TRIBUNE, Aug. 14, 1985, at E2 (stating that the threat of one large damage settlement resulting from a wrongful discharge case turns an employer's everyday operation into a "legal crapshoot" and puts employer decisions, such as what is good cause for firing its own employees, into the hands of a jury instead); Anastasio v. Knights of Columbus, et al., 1998 WL 305498 (Conn. Super. Ct.) at *6 (holding that a plaintiff's failure to plead the particular statute or constitutional basis upon which he relies to support his public policy exception in a wrongful discharge action gives insufficient notice to a defendant).
their business as well as any business with which they contract. Employees are not subject to discipline by the administrative agency promulgating the rule because the employer is not governed by the agency, yet, the employer may still face judicial liability for wrongful discharge based on public policy a court may find pursuant to such a regulation.

In addition, because individual trial judges decide which administrative regulations are sufficient, judges will be allowed to enforce their own predilections for public policy whenever there is some regulatory expression on the subject. Justice Baxter argued that the majority was intruding on the Legislature's domain by expanding the Whistleblower Statute because the Legislature had specifically restricted the statute to situations where an employee reports violations to outside agencies.

B. Justice Brown

Justice Brown joined in Justice Baxter's dissent, but explored the consequences of the majority opinion even further in some areas. Justice Brown's primary concern was that the decision gives ultimate control over articulation and implementation of public policy to the courts, which historically, have done an inconsistent job of defining the parameters of the exception. Justice Brown was sharply critical of the original public policy decision in Tameny and of the court decisions following it which "simply repeated the 'fundamental public policy' mantra, which remains, . . . devoid of meaning or content." Justice Brown surmised that the proper role for courts with respect to the public policy exception is to provide the remedy in situations where there is a "legislative 'gap' . . . in vindication of the public policy the statute implicitly reflects."

76. See Green, 960 P.2d at 1063 (Baxter, J., dissenting) (noting that employers are now "expected to keep themselves fully informed of regulatory schemes applying to others . . . "). See also Judy Greenwald, Lawyers Differ On Effect Of Whistleblower Ruling, BUS. INS., Sep. 14, 1998, at 2-3 (noting lawyers' predictions that employee whistleblowing cases will greatly increase after Green). But see Thompson v. Mem'l Hosp. at Easton, M.D., Inc., 925 F.Supp. 400, 407-08 (D. Md. 1996) (holding that because the duty to report mis-administration of radiation therapy belonged to the licensed hospital and not the plaintiff, no public policy was violated).

77. See Green, 960 P.2d at 1063-64 (Baxter, J., dissenting).

78. See id. at 1065 (Baxter, J., dissenting) (noting that in Green, the plaintiff could not cite any specific statute or regulation to support his claim and that it was the California Court of Appeal that "engage[d] in independent research . . . [and] identified several key federal regulations involving airline safety on which [the] plaintiff . . . relie[d].").

79. See id. at 1064 (Baxter, J., dissenting); see also CAL. LAB. CODE § 1102.5 (West 1989) (restricting the protection of whistleblowers to employees who reveal the suspected wrongdoing to government or law enforcement agencies).

80. See id. at 1066-73 (Brown, J., dissenting).

81. See id. at 1069-70 (Brown, J., dissenting).

82. See id. at 1071 (Brown, J., dissenting).

83. See id. at 1072 (Brown, J., dissenting).
V. *Green's Impact on Public Policy in California*

*Green's* impact on wrongful discharge claims in California remains to be seen.\(^{84}\) Constitutional provisions and statutes will likely remain the main source of public policy for an exception to the at-will employment doctrine.\(^{85}\) But the potential for increased wrongful termination litigation now looms as a real threat for many unwary employers.\(^{86}\)

Regulations are rules and orders issued by different administrative agencies primarily to guide the activity of those who fall under the authority of the agency and its own employees.\(^{87}\) Regulations are not the product of the legislature, so theoretically, they do not have the effect of a statute. However, regulations often play an important role in determining how cases involving a regulatory activity will be decided.\(^{88}\) California has over one hundred regulating agencies, each making independent regulations.\(^{89}\) After *Green*, California employers will need to evaluate and determine which administrative regulations may be considered important enough to constitute protected public policy and consequently serve as a basis for wrongful discharge claims.\(^{90}\) *Green* lends some initial, but vague, direction to employers.\(^{91}\)

The wording of the opinion states that statutorily authorized

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84. As of the time this paper was written, ten California opinions have cited to *Green* and the decisions dealing with the public policy exception to the at-will rule have largely emphasized the statutory or constitutional basis. *See*, e.g., *Nelson v. United Tech.*, 88 Cal. Rptr. 2d 239, 245 (1999); *Cabeza v. Browning-Ferris Indus. of Cal.*, Inc., 80 Cal. Rptr. 2d 60, 63 (1998).

85. *See* *Gant v. Sentry Ins.*, 824 P.2d 680, 684 (Cal. 1992) (outlining the reasons for restricting the public policy exception noting that most cases stemmed from statutory or constitutional authority anyway: "[A]s courts and commentators alike have noted, the cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute, (2) performing a statutory obligation, (3) exercising a statutory right or privilege, and (4) reporting an alleged violation of a statute of public importance . . . .") (footnotes omitted), *overruled by* *Green v. Raleigh Eng'g*, 960 P.2d 1046 (Cal. 1998).

86. *See* *Greenwald, supra* note 76, at 2 (reporting on the split reaction of California labor attorneys into two groups, one side believing "[t]he decision will inevitably lead to a flood of employment litigation" while the other side was unimpressed by the impact the decision would have on wrongful discharge litigation).


88. *See* *id.*

89. *See* *Green v. Ralee Eng'g*, 960 P.2d 1046, 1066 (Cal. 1998) (Baxter, J., dissenting) ("One cannot deny that there are thousands and thousands of administrative regulations that have been promulgated pursuant to state and federal statutes.").

90. *See* *id.* at 1064 (Baxter, J., dissenting).

91. *See* *id.* at 1050, 1054 (stating that adequate administrative regulations would "serve the statutory objective"). Additionally, Justice Baxter stated that the administrative regulation must "advance some substantial public policy goal" in order to support a wrongful discharge claim. *See id.* at 1064 (Baxter, J., dissenting).
regulations that effectuate the California Legislature’s purpose will be sufficient, although the case gives no direction as to what this means.\(^9\) Literally following the wording of the opinion, any regulation ensuring commercial airline safety certainly seems to be sufficient.\(^9\) Moreover, it appears that any regulation implicating public safety in general would likewise pass the *Green* standard.\(^9\)

What seems most disconcerting for California employers is that *Green* has opened the door for a wrongful discharge claim *anytime* an employee is fired for complaining about wrongful activity of its employer or otherwise.\(^9\) Hence, *Green* greatly encroaches on the area of whistleblowing.\(^9\) *Green*’s impact on California’s Whistleblower Statute essentially eliminates the Legislature’s directive that an employee must report any alleged misdoing of an employer or of fellow employees to an outside agency, rather than merely internally.\(^9\) Nationally, whistleblower statutes are responsible for creating the largest source of expansion of wrongful

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92. *See id.* at 1049, 1061 ("[S]tatutorily authorized regulations that effectuate the Legislature’s purpose . . . are ‘tethered’ to statutory provisions . . . . [C]ourts must distinguish between those [statutes and regulations] that promote a ‘clearly mandated public policy’ and those that do not."). *But see Gantt*, 824 P.2d at 687 (stating that "a public policy exception carefully tethered to . . . statutory provision[s] strikes the proper balance."). There is a difference between a public policy being tethered to a statute and public policy stemming from an administrative regulation that is tethered to a statute because the latter is further removed.

93. *See Green*, 960 P.2d at 1058 (stating that the public policy implicated in *Green* was sufficient because it "potentially jeopardized airline passenger safety . . . . Promoting airline safety - the subject of the federal regulations - constitutes a policy of sufficient public importance."). Additionally, even if FAA regulations do not provide an adequate basis for public policy, situations such as those involving *Green* are still protected by the public policy exception to the at-will employment doctrine because "the public interest in airline safety is so profound and the statutory expressions of that concern are so clear . . . ." *See id*; *see also Carrizosa*, *supra* note 61, at 5. *But see Hancock v. Express One Int'l, Inc.*, 800 S.W.2d 634, 636-37 (Tex. Ct. App. 1996) (holding that an employer is not liable for discharging a pilot who refused to fly under conditions violating the FAA regulations because no criminal penalties were attached to the violation); *Adolphsen v. Hallmark Cards, Inc.*, 907 S.W.2d 333, 338-39 (Mo. Ct. App. 1995) (holding that FAA regulations may be source of public policy for exception to at-will employment doctrine, however, not every regulation regarding aviation safety will suffice as an exception).

94. *See Green*, 960 P.2d passim (throughout the *Green* majority opinion, the safety aspect of the regulation is emphasized); *see also id.* at 1061-62 (Kennard, J., concurring) (stating that an employee should be able to recover tort damages "whenever the employer’s action in discharging the employee violated a fundamental public policy delineated in existing law, regardless of the source of the law, including fundamental public policies delineated in administrative regulations and judicial decisions"). *But see id.* at 1065 (Baxter, J., dissenting) ("[T]he congressionally expressed policy to promote air safety . . . is too generalized a mandate to make any enforcement of the policy practicable through employment-related litigation.").

95. *See generally Carrizosa*, *supra* note 61, at 5; *see also Green*, 960 P.2d at 1064 (Baxter, J., dissenting).

96. *See Green*, 960 P.2d at 1064 (Baxter, J., dissenting) ("In enacting section 1102.5, the Legislature made a policy judgment that employees deserve protection from employer retaliation when they go so far as to contact a public agency . . . . I see no basis for second-guessing that legislative judgment . . . .").

97. *See id.* ("[T]he facts and analysis in this case indicate that employees may negate the at-will nature of their employment simply by complaining to their superiors about breaches of contracts with regulated third party entities.").
termination cases and are primarily responsible for the continued erosion of the at-will employment doctrine. California specifically restricted its whistleblower statute to violations reported to public agencies or officials. The Green majority acknowledged as much in its opinion. The issue in Green was not whether administrative regulations could ever be a source of public policy, for Whistleblowers Statute section 1102.5(b) says that such regulations are sufficient for that purpose. However, the court’s decision in Green had no statutory basis to use the whistleblower provision because the statute did not apply to Green. If it did, Green would have retained this statutory protection, and the case would have been able to proceed under Gantt principles using section 1102.5 as the statutory basis for a public policy exception to the at-will employment doctrine.

Using administrative regulations instead of a statute widens the scope of employment law and restricts an employer’s right to fire an employee even though the regulation cited does not apply to the employer. Also, by combining the claims of alleged misconduct and wrongful termination, a jury might automatically associate fault to the employer because of the firing. When an employer is found to have engaged in misconduct, a jury might incorrectly infer that the firing was connected to the misconduct.

In Green, after Green’s termination, Boeing investigated Green’s allegations of defects in shipping, discovering that Ralee Engineering may have indeed been


99. See CAL. LAB. CODE § 1102.5 (West 1989) (“Employer prohibition of disclosure of information by employee to government or law enforcement agency . . . .”).

100. See Green, 960 P.2d at 1052 (Section 1102.5 “does not protect plaintiff, who reported his suspicions directly to his employer. Nonetheless, it does show the Legislature’s interest in encouraging employees to report workplace activity that may violate important public policies . . . .”).

101. See CAL. LAB. CODE § 1102.5(b) (West 1989) (“No employer shall retaliate against an employee for disclosing information to a government or law enforcement agency [based upon a] . . . violation or noncompliance with a state or federal regulation.”).

102. See id; see also Green, 960 P.2d at 1049 (recounting the fact that Green “made all of his complaints internally, and at no time did he complain to outside government sources . . . . [which is] a requirement for § 1102.5 to apply.”).

103. See CAL. LAB. CODE § 1102.5(b) (West 1989).

104. See Green, 960 P.2d at 1066 (Baxter, J., dissenting) (“[T]he majority claim to see a ‘clearly mandated public policy’ in a regulation that has no applicability to defendant . . . . By turning their backs on established precedent, the majority has opened the door to virtually limitless litigation in California . . . .”).

293
shipping defective airplane parts just as Green had alleged.\(^{105}\) However, no investigation was ever conducted by the FAA nor was any action taken by Boeing other than to terminate its contract with Ralee.\(^{106}\) However, in different instances, if the employer has not in fact engaged in wrongful conduct, the inference of wrongdoing still remains where the whistleblowing employee has never gone to an outside agency and instead brings a wrongful termination suit.\(^{107}\) In such a situation, the veracity of the claim is not yet established, but it will be on trial regardless. If Green had gone to the proper public agencies, this case could have been avoided because Green would have been protected by section 1102.5, a statute recognizing a specific and important public policy exception to the at-will employment doctrine.\(^{108}\)

If the \textit{Green} court had stated that it was going to allow whistleblowers to receive protection by reporting only to their employers, it would have overstepped the bounds of its authority and treaded on the Legislature’s domain by reinterpreting the plain meaning of the statute.\(^{109}\) Instead, the court added administrative regulations to the public policy exception, widening the exception not only to whistleblowers that report a violation of administrative regulations, but also to any conduct by an employer that the employee can support by an administrative regulation.\(^{110}\)

Legislatures have passed statutes protecting whistleblowers because of the public good served by such employees; that of exposing wrongdoers for the good of the public.\(^{111}\) However, despite its acknowledgement of the California Legislature’s intent, the \textit{Green} majority superseded the Legislature’s language

\(^{105}\) See Carrizosa, \textit{supra} note 61, at A5 (reporting that Boeing investigated and confirmed Green’s charges and canceled its contract with Ralee Engineering).

\(^{106}\) See \textit{Green}, 960 P.2d at 1064 n.5 (Baxter, J., dissenting).

\(^{107}\) See Smith and Oseth, \textit{supra} note 98, at 181 (noting that employees may not always “blow the whistle” accurately and can “easily misperceive employer motives and conduct”).

\(^{108}\) See CAL. LAB. CODE \S 1102.5 (West 1989).

\(^{109}\) See \textit{Green}, 960 P.2d at 1064 (Baxter, J., dissenting); \textit{see also} Kizer v. Hanna, 767 P.2d 679, 683 (Cal. 1989) (noting in its interpretation of a state statute for medical payments that “if a statute’s language is clear, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.”) (citation omitted); CAL. LAB. CODE \S 1102.5 (West 1989) (plainly stating that the protection to whistleblowing employees applies only to employees reporting violations to outside agencies).

\(^{110}\) See \textit{id.} at 1063 n.3 (Baxter, J., dissenting) (noting that “any ‘fundamental’ regulatory policy affecting the public interest may now qualify as a basis for the public policy exception.”).

\(^{111}\) See Dan Margolies, \textit{Legal Briefs: Worker Loses Verdict Appeal}, KAN. CITY BUS. J., Aug. 15, 1997, at 12 (observing that the rationale behind legislatures’ enactment of whistleblowing statutes is to expose the wrongdoers, which would not occur absent reporting suspicious behavior to outside parties); \textit{see also} John Hoerr, \textit{A Revolution in Employee Rights Is In the Making}, BUS. WK., July 8, 1985, at 72 (stating that allowing an increase in wrongful dismissal cases could acutely affect an employer’s hiring, evaluation and termination procedures because of the huge cost potential of liability); Pennington, \textit{supra} note 9, at 1604 (setting out that the rationale behind enacting whistleblower statutes is the public interest served when an employee is deterred from committing an illegal act which leads to the prevention of the employer or other employees from committing illegal acts).
limiting the statute to violations reported to public agencies, instead expanding the exception to include violations reported internally as well.\textsuperscript{112} The \textit{Green} majority reasoned that the statute shows the Legislature’s interest in encouraging employees to report workplace activity that may violate public policy.\textsuperscript{113}

Even before \textit{Green}, wrongful discharge claims constituted significant court action for California employers.\textsuperscript{114} Compounding the issue is the fact that a wrongful discharge suit costs an average of $80,000 to defend, without even taking potential damages into consideration.\textsuperscript{115} Moreover, at trial, California employers often face unsympathetic juries who disagree with the notion of at-will employment, siding instead with the discharged employee.\textsuperscript{116} With the average award of a wrongful discharge case hovering in the mid six-figure range, any increase in potential liability surrounding this employment area is a source of concern for

\begin{itemize}
  \item \textsuperscript{112} See Green, 960 P.2d at 1052. In \textit{Green}, the court noted as follows: Section 1102.5 does not protect a plaintiff who reports suspicions directly to his employer. Nonetheless, it does show the Legislature’s interest in encouraging employees to report workplace activity that may violate important public policies that the Legislature has stated . . . . Thus our Legislature believes that . . . regulations are sufficiently important to justify encouraging employees to challenge employers who ignore those policies.
  \item \textsuperscript{113} See id.; see also Greenwald, supra note 76, at 2. But see Fox v. MCI Communication Corp., 931 P.2d 857, 859 (Utah 1997) (holding that termination of an employee who reported criminal violations to employer rather than public authorities “did not contravene clear and substantial public policy”).
  \item \textsuperscript{114} See Hoerr, supra note 111, at 76 (estimating that 5,000 to 10,000 wrongful discharge suits are initiated each year); see also Jacqueline R. DeSouza, Alternative Dispute Resolution: Methods To Address Workplace Conflict In Health Services Organizations, HOSP. & HEALTH SERV. ADMIN., Sep. 1, 1998, at 453 (finding that litigation of workplace disputes has increased over 2,000% over the past 20 years with wrongful discharge comprising the largest source of employment litigation). But see Jury Verdict Research study found in Committee Report for 1995 California Senate Bill No. 964, 1995-96 Regular Session available in WESTLAW at Comm. Rep. CA S.B. 964 (stating that wrongful termination cases for manufacturer employers constitute only six percent of suits filed against them and had the second to lowest average verdict awarded out of five major categories of cases examined).
  \item \textsuperscript{115} See David Frum, \textit{The Right to Fire}, FORBES, Oct. 26, 1992, at 76 (average based on a California sample).
  \item \textsuperscript{116} See Bill Boyce, If the Boss Gives You the Ax, He May End Up Paying for It, CHICAGO TRIBUNE, July 9, 1985, available in 1985 WL 2529727; see also Hoerr, supra note 111, at 73 (“[C]lases often go to juries made up largely of employees who are sympathetic to the problem of other employees.”); Hoerr, supra note 111, at 74 (quoting former Labor Secretary, John T. Dunlop: “I think the notion that an employer can get out of bed and fire anybody for any old reason is repugnant to a society of employees . . . .”); Anne Fisher, Ask Annie, FORTUNE, April 13, 1998, at 172 (advising that although the law predominantly supports the at-will employment doctrine, a jury often disregards the law because they equate a general perception of unfairness with wrongful discharge).
\end{itemize}
employers. With those amounts in mind, California employers, faced with the prospect of increasing numbers of wrongful discharge cases, will be less likely to fire employees even if the claim would not have upheld in court. Over time, employers will have incentives to reduce the number of workers because of the risk of hiring a "bad" employee. Green appears to have effectuated an end to at-will employment in California.

A number of other jurisdictions have adopted laws similar to Green's approach, allowing administrative regulations to support a public policy exception to the at-will employment doctrine.

117. See Kenneth T. Lopatka, The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s, 40 BUS. LAW 1, 3 (1984) (recounting results of two California jury surveys of superior court decisions showing plaintiffs in wrongful discharge cases prevail 90-95% of the time with average awards of $450,000 to $548,000); see also Committee Report for 1995 California Senate Bill No. 964, 1995-96 Regular Session available in WESTLAW at Comm. Rep. CA S.B. 964 (quoting from a study conducted by the California Labor and Employment Section of the California State Bar that the average verdict in a wrongful discharge suit was $519,000 in 1989 and $1.5 million in 1991 and that the median verdict in the three years after the Foley case tripled in size); Cliff Palefsky, Wrongful Termination Litigation: 'Dagwood' and Goliath, 62 MICH. B.J. 776 (1983) (noting that 90% of wrongful discharge cases proceeding to juries ended with plaintiffs' verdicts and an average award of $450,000); Pasman, supra note 5, at 561 (noting that various studies dealing with California juries show that employees win approximately 70% of wrongful discharge claims with average awards ranging between $300 to $500,000). Nationwide, individual employees have received wrongful discharge verdicts as high as $20 million, $4.7 million, $3.5 million, $2.57 million and $2 million. See id. With punitive damages available, jury awards exceeding $1 million are common. See id.

118. See Jones, supra note 70, at B1 (outlining some of the difficulties employers have in firing employees at all).

119. See Frum, supra note 115, at 80; see also Jones, supra note 70, at B1 ("[T]he sudden shift in wrongful discharge litigation is hurting job creation because [employers] are reluctant to hire unproven workers they can't fire."). The Jones article also cites a 50% increase in the number of California small business owners who would be willing to hire welfare recipients whose wages would be subsidized by the government if there was no threat of a wrongful discharge lawsuit. See id; see also Hoerr, supra note 111, at 72 (stating that increased wrongful discharge allowances could "have an enormous impact on management methods").

120. See Green, 960 P.2d at 1066 (Baxter, J., dissenting) (stating that the thousands of administrative regulations, coupled with the lack of a meaningful standard for determining what is sufficient public policy, "makes it inevitable that the once-limited exception will become the general rule and effectively nullify the concept of at-will employment"); see also Jones, supra note 70, at B1 (noting the exceptions to at-will employment have all but swallowed up the rule).

121. See generally, Linda Forsythe, Comment, Duration of Employment—At-Will, 56 U. MO. KAN. CTRY L. REV. 343, 357-58 (1988) (outlining the approach of different jurisdictions to the public policy exception to at-will employment); Mark D. Wagoner, Jr., The Public Policy Exception to the Employment At Will Doctrine In Ohio: A Need For A Legislative Approach, 57 OHIO ST. L.J. 1799, 1808 & n.35 (1996) (providing a non-exhaustive list of cases which outline the various acceptable public policy requirements in each state that would qualify for the public policy exception to at-will employment). For examples of different states who follow approaches similar to Green, see, e.g., Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 512 (N.J. 1980) (allowing a wrongful discharge action where a "clear mandate of public policy" is found and where such mandates are garnered from administrative regulations); Cloutier v. Great Atl. & Pac. Tea Co., Inc., 436 A.2d 1140, 1144 (N.H. 1981) (holding that any showing by an employee that her employer acted in bad faith or with malice will support a claim
Other jurisdictions continue to follow a Gantt approach to the public policy exception. Connecticut, Wisconsin, Kentucky, Texas, and Ohio, among others, allow for a public policy exception, but restrict the basis for such a claim to statutes or constitutional provisions. Iowa specifically rejects Federal Aviation Administration regulations as a basis for a public policy exception to at-will employment.

VI. CONCLUSION

The American dream has become tied to the American job, and with that has come a changing attitude about an employee’s right to keep that job. By allowing administrative regulations to provide a public policy basis for wrongful discharge claims, the California Supreme Court may have over stretched the bounds provided by the State Legislature, while recognizing a national employment trend. The days for an employer to arbitrarily discharge an employee appear to be numbered.