

Legal Updates & News

Bulletins

Case Law Medley: U.S. Supreme Court and Pay Discrimination, Sufficient Notice for Medical Leave, Wrongful Termination Based on Reporting Potential Violence in the Workplace, and an Unconscionable Arbitration Agreement

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Employment Law Commentary -- June 2007

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The month of May brought an array of California state and federal decisions that emphasize the need for all employers to properly train managers and supervisors regarding employment policies and the importance of implementing preventive employment practices in the workplace.

Federal Court Decisions

***Ledbetter v. Goodyear Tire & Rubber Co.*, ___ S. Ct. ___ (May 29, 2007)**

U.S. Supreme Court Restricts Statute of Limitations for Pay Discrimination Claims

Introduction: The U.S. Supreme Court recently decided the question of whether, and under what circumstances, a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the discriminatory pay decision occurred outside the limitations period. In *Ledbetter v. Goodyear Tire & Rubber Co.*, ___ S. Ct. ___ (May 29, 2007), the Court held in a 5-to-4 decision that an employee could not maintain a pay discrimination suit based on prior discriminatory evaluations and pay adjustments because “later effects of past discrimination do not restart the clock for filing an Equal Employment Opportunity Commission (EEOC) charge.”

Factual and Procedural Background: Lilly Ledbetter was a supervisor at Goodyear Tire Rubber Company’s (Goodyear) plant in Gadsden, Alabama, from 1979 until her early retirement in November 1998. Ledbetter worked as an area manager for the plant for most of those years, a position that was largely occupied by men. During that time, salaried employees at the plant were granted or denied raises based on their supervisor’s evaluation of their performance. Ledbetter’s salary was initially in line with the salaries of the men performing substantially similar work. Yet over time, her pay began to decrease in comparison to the pay of the male area managers with equal or less seniority. By 1997, Ledbetter was the only woman area manager at the plant, and her pay was 15 to 40 percent less than the pay of her fifteen male counterparts after successive evaluations and percentage-based pay adjustments.

In July 1998 Ledbetter submitted a claim to the EEOC alleging certain acts of pay discrimination based on sex under Title VII of 1964 and the Equal Pay Act of 1963. The district court granted summary judgment in favor of Goodyear on several of Ledbetter’s claims, including her Equal Pay Act claim, but allowed her Title VII pay discrimination claim to proceed to trial. During trial, Ledbetter submitted evidence attempting to prove that during the course of her employment, several supervisors had given her poor evaluations because of her sex. Due to these evaluations, Ledbetter alleged that her pay was not increased as much as it would have been if

she had been evaluated fairly, and that she was being paid significantly less than all of her male colleagues. Ledbetter ultimately alleged that the past pay decisions continued to affect the amount of her pay throughout her employment at Goodyear. Although Goodyear maintained that its evaluations of Ledbetter were nondiscriminatory, the jury found for Ledbetter and awarded her backpay and damages. Goodyear appealed and won, and then Ledbetter appealed to the Supreme Court.

Legal Analysis: Justice Alito delivered the five-member majority opinion of the Court. He began by restating the rule that the EEOC charging period is triggered when a “discrete unlawful practice” takes place. This rule applies to any “discrete act” of discrimination, including discrimination in “termination, failure to promote, denial of transfer, and refusal to hire.” In the case of *Ledbetter*, a pay-setting decision is a “discrete act”; therefore, the period for filing an EEOC charge begins when the act occurs. The Court reasoned that the statute of limitations period runs from the date the employer makes a “pay-setting decision,” and not the date the employee actually receives a paycheck with discriminatory wages, even if the effects of the discrimination were not fully apparent to the employee at that time. The Court acknowledged that although there may have been discriminatory intent behind the original decision that established Ledbetter’s salary level, the employer had no discriminatory intent in setting her subsequent pay raises or issuing her subsequent paychecks beyond the 180-day limitation period.

Ledbetter first argued that pay disparities have a closer kinship to hostile work environment claims than to charges of a single episode of discrimination. Thus, Ledbetter believed that the discrimination claim should not rest on a particular paycheck, but rather on “the cumulative effect of individual acts.” She argued that her paychecks were unlawful because they would have been larger if she had been evaluated in a nondiscriminatory manner prior to the EEOC 180-day charging period. Ledbetter’s claims of sex discrimination were largely based on the misconduct of an individual Goodyear supervisor who allegedly retaliated against Ledbetter when she rejected his sexual advances twice. The supervisor also allegedly falsified deficiency reports about her work. However, no testimony was available from the supervisor because he died before trial—an obstacle that the Court believed would have been avoided had Ledbetter filed a timely EEOC charge.

Justice Ginsburg wrote the opinion for the four dissenting justices, stating that the Court’s majority opinion “immunize[s] forever discriminatory pay differentials unchallenged within 180 days of their adoption.” The dissenters agreed with Ledbetter that pay disparities were different from actions such as “termination, failure to promote . . . or refusal to hire” because they do not involve fully communicated discrete acts that are “easy to identify” as discriminatory. Ginsburg noted that pay disparities occur in small increments and comparative pay information is often not made available to employees. As a result, these small initial discrepancies may not seem sufficient to meet a discrimination case because the discrimination may occur over time. Ginsburg thereafter urged Congress to pass legislation to overturn the majority’s holding.

Application for California Employers: The Supreme Court’s holding implements the statutory intent to ensure that both employers and employees are promptly dealing with discrimination claims. This prompt filing of a discrimination claim puts the employer on notice of the charge and the possibility of having to defend a future employment discrimination suit. The *Ledbetter* decision may also give employers a powerful tool in defending against claims of discrimination other than just pay discrimination, because it may apply to other instances where the harm arose from an action that occurred outside the limitations period.

Senators Edward Kennedy (D-Mass.), Tom Harkin (D-Iowa), Hillary Clinton (D-N.Y.), and Barbara Mikulski (D-Md.) introduced a bill to nullify the Supreme Court’s ruling and amend Title VII to allow plaintiffs to seek redress in situations similar to Ledbetter’s. Representatives Rosa DeLauro (D-Conn.), George Miller (D-Calif.), and Eleanor Holmes Norton (D-D.C.) will introduce companion legislation in the House.

***Davis v. O’Melveny & Myers*, ___ F.3d ___ (9th Cir. May 14, 2007)**

Law Firm’s Arbitration Agreement Found to Be Procedurally and Substantively Unconscionable Under California Law

Introduction: In *Davis v. O’Melveny & Myers*, ___ F.3d ___ (9th Cir. May 14, 2007), the Ninth Circuit delivered another opinion restricting California employers’ ability to enforce employee arbitration agreements. The court nullified a mandatory arbitration agreement covering all employees of O’Melveny & Myers (O’Melveny) on the grounds that the agreement was procedurally and substantively unconscionable under California law.

Factual and Procedural Background: On August 1, 2002, O’Melveny adopted and distributed a new Dispute Resolution Program (DRP) to all of its employees nationwide, including mediation, and culminating in a final and binding arbitration of most employment-related claims that could be brought by and against its employees. The claims covered by the DRP included, but were not limited to, “claims for wages or other compensation due; claims for violation of federal, state, or other governmental constitution, law, statute, ordinance, regulation,

or public policy.” The only claims that were excluded were those filed with the “Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing, the New York Human Rights Commission, or any other similar fair employment practice agency,” in addition to other types of claims listed in the program.

The DRP was distributed to all of the employees via interoffice mail and was posted on the office intranet site, and was effective three months later on November 1, 2002. Jacquelin Davis was employed by the law firm as a paralegal until July 14, 2003. On February 27, 2004, she filed a class action under the Federal Fair Labor Standards Act (FLSA) and several other state and labor statutes, alleging failure to pay overtime for work and during lunch time and rest periods, and for other work exceeding eight hours a day and forty hours a week. She also alleged denial of rest and meal periods. Davis sought declaratory relief that the DRP was unconscionable, and that O’Melveny’s enforcement of the arbitration provisions was an unfair business practice under California’s Unfair Business Practices Act. O’Melveny moved to dismiss the action and to compel arbitration shortly after Davis filed suit. The district court upheld the DRP and granted O’Melveny’s motion. Davis appealed.

Legal Analysis: The question presented in this case was whether the DRP was enforceable, in whole or in part. The “notice provision” requiring notice and a demand for mediation within one year of when the claim is “known or should have been known,” and the confidentiality clause, were two of the specific substantive provisions of the DRP that were at issue on appeal. It was undisputed that Davis’s claims regarding overtime “arose out of” and “related to” her employment for purposes of the scope of the DRP. The Ninth Circuit held that the DRP was procedurally unconscionable, and that it contained four substantively unconscionable or void terms: (1) the “notice” provision; (2) the overly-broad confidentiality provision; (3) the overly-broad “business justification” provision; and (4) the limitation on initiation of administrative actions.

Under California law, an arbitration system is unenforceable if it is both procedurally and substantively unconscionable. The Ninth Circuit held that the DRP was procedurally unconscionable because it was given on a “take it or leave it” basis as are most mandatory pre-dispute arbitration arrangements. The employee’s only option was to abide by the arbitration agreement or work somewhere else.

Turning to substantive unconscionability, the court considered whether the provisions of the arbitration clause “are so one-sided as to shock the conscience.” The DRP’s notice provision was substantively unconscionable because it shortened the statute of limitations by only allowing employees one year within which to give notice from the time when any claim is “known to the employee or with reasonable effort . . . should have been known to him or her.” Even though O’Melveny was also limited to the one-year requirement, the court held that it was only “mutual” on its face, because it was unlikely that O’Melveny would bring any of the claims against its employees.

The provision also required a demand for mediation within one year, and because the mediation must precede the arbitration, this further restricted the employees’ rights. This one-year statute of limitations also barred employees from bringing the “continued violations” theory for an employer’s systematic policy of discrimination consisting of related acts that began prior to the statute of limitations period. With regard to the confidentiality provision, the court held that the arbitration agreement was overly broad and unconscionably favored O’Melveny as written. As a result, the court concluded that the provisions could not be stricken or excised without gutting the entire agreement, rendering the whole DRP unconscionable and unenforceable under California law.

Application for California Employers: Employers should consult with their counsel before implementing any type of mandatory arbitration agreement. Deadlines for employees to assert claims in arbitration should be determined by state or federal statutes of limitations, and should not be shortened by the employer. For additional information regarding the appropriate design of a mandatory arbitration system in employment disputes, see our *Employment Law Commentary* of September 2000 outlining the California Supreme Court’s *Armendariz* decision.

Burnett v. LFW, Inc. d/b/a Habitat Co., 472 F.3d 471 (7th Cir. 2006)

Disclosure of Symptoms Before Cancer Diagnosis Found to Be Sufficient Notice Under the Family Medical Leave Act

Introduction: In *Burnett v. LFW, Inc. d/b/a Habitat Co.*, 472 F.3d 471 (7th Cir. 2006), the U.S. Court of Appeals for the Seventh Circuit, which includes Illinois, Indiana, and Wisconsin, held that an employee provided information over a four-month period that was sufficient to communicate that he had a serious health condition under the Family Medical Leave Act (FMLA).

Factual and Procedural Background: David Burnett worked as a detailer for Habitat Company and was responsible for verifying that apartment equipment and furnishings were in good condition before the arrival of new tenants. His position required him to lift heavy objects, including closet doors and appliances. In late 2003, Burnett reported to his supervisor, Sergio Polo, that he was having health problems that required medical attention. Burnett later declined Polo's offer to transfer him to another position because it would have restricted his access to a bathroom; he told his supervisor that he had a "weak bladder." Burnett also stated that he would be visiting a doctor regarding his bladder problem. In December of 2003, Burnett spoke to Polo again about his health and gave him a copy of the doctor's order for blood work to request some time off from work. On December 11, 2003, Burnett further explained to his supervisor that he recently visited a doctor and learned that he had a high PSA (prostate-specific antigen) and cholesterol, but without any further clarification. On December 16, Burnett met with Polo and union representatives to discuss his extended absence because he had missed several days of work by that time. At the meeting, Burnett told Polo that he had been sick during his week-long absence, and that his illness was probably something similar to that of his brother-in-law, who had been diagnosed with prostate cancer. Polo approved Burnett's sick leave to attend medical appointments on January 6 and 8 at that time.

In early January, Burnett once again requested leave to undergo a prostate biopsy. He gave documentation regarding the procedure to another supervisor who was supposed to forward the information to Polo. Polo then issued several written reprimands for "substandard work" and disruptive behavior to Burnett over the next week. Burnett filed a grievance with the union, and did not return to work until January 26, the day of the grievance meeting, on the advice of a union representative. During the meeting, Burnett told Polo that he was scheduled to undergo a prostate biopsy the following day. After the biopsy, Burnett provided Polo with a "Treatment Plan" which stated that he was to avoid heavy lifting or strenuous activity following the biopsy. Burnett once again submitted a request for vacation days during the first and second weeks in February. He also requested that he receive help at work or a transfer to a light duty assignment—a request that was allegedly ignored by another supervisor. After he did not receive a light duty assignment, Burnett submitted an additional vacation request because he was concerned about being injured. Polo called for another meeting with Burnett on January 29, but Burnett repeatedly stated that he felt sick and wanted to go home. Burnett did not attend the meeting and went home for the day instead. Polo then terminated Burnett for insubordination, effective January 30. Burnett was diagnosed with prostate cancer approximately one week later.

Burnett claimed that the employer interfered with his right to take protected leave under the FMLA, and that Polo terminated him in retaliation for requesting the leave. He also alleged violations against the Americans with Disabilities Act (ADA) by terminating his employment either because his cancer disabled him or because the employer regarded him as disabled by his cancer. The trial court granted LFW's motion for summary judgment under the FMLA, holding that Burnett failed to provide LFW with adequate notice of his serious medical condition as required by the FMLA. The ADA claim was also dismissed because LFW did not know that Burnett had cancer at the time of his termination, nor did LFW have enough information to regard him as having cancer. Burnett appealed this ruling.

Legal Analysis: The Seventh Circuit affirmed the trial court's ruling on the ADA claim, but reversed the FMLA claim and remanded it for trial. The court began by noting that an "employee's notice obligation is satisfied so long as he provides information sufficient to show that he *likely* has an FMLA qualifying condition." On appeal, Burnett was required to show that: (1) he was eligible for FMLA protection; (2) his employer was subject to the FMLA; (3) he was entitled to leave under the FMLA; (4) he provided sufficient notice of his intent to leave; and (5) his employer denied him FMLA benefits to which he was entitled. LFW quickly conceded that Burnett satisfied the first and second elements, and the appellate court further concluded that Burnett had satisfied the third and fifth elements. The court's opinion therefore focused on the fourth element of inquiry, the sufficiency of the notice given to the employer by the employee.

The court stated that although an employee's naked assertion that he is "sick" may be insufficient to trigger FMLA rights, the trial court still erred by relying only on Burnett's statements that he felt sick, while ignoring the surrounding context of Burnett's remarks that were made over a four-month period. The court explained that the trial court should have considered statements that he had made regarding his "weak bladder," his frequent medical appointments, the prostate biopsy, his PSA test results, his feeling sick, and the constant equation of his medical condition to his brother-in-law's experiences with prostate cancer when evaluating the FMLA claims. Burnett even told his employer that he would commit suicide if diagnosed with prostate cancer because he lived alone and could not care for himself. More specifically, the appellate court stated that "Burnett gave an account of symptoms and complaints, which formed a coherent pattern and progression, beginning with initial symptoms, continuing with doctor's visits, and then additional testing and results – all communicated to Polo." As a result, the appellate court believed that Burnett's statements were more than vague, providing LFW with adequate information about his serious medical condition under the FMLA.

The court also noted that requiring an employer to look at the context of a leave request did not place an unreasonable burden on employers. The court stated that "Burnett is not seeking to reach back over a vast

period of time to grasp an isolated mention of illness that was reasonably banished from his employer's institutional memory. He seeks only to invoke Habitat's institutional memory as to the natural course of his illness, which spanned a period of only four months."

Application for California Employers: California employers may be found more often to have received sufficient notice of an employee's serious health condition that is afforded protection under the FMLA, even if the employee never gave the employer actual notice of the medical condition. In effect, this Seventh Circuit decision requires employers to absorb all of the accumulating information about an employee's medical condition as information is received. For example, various statements that were made by Burnett, standing alone, would not have given LFW sufficient notice about his medical condition under the FMLA. However, the court held that Burnett's statements still should have prompted LFW to conduct further investigation into Burnett's health condition, especially if the health condition was one that qualified for leave under the FMLA.

Employers must pay closer attention to their employees' reasons for taking leave and the relevant context surrounding when and under what circumstances the statements are made. All supervisors and managers should be aware of the company's leave policies and should inform the human resources department immediately when an employee makes statements regarding a serious health condition, in order to avoid potential liability. Additionally, employers should be consistent in their approach regarding employee leave issues, and retain copies of proper documentation to justify their employee leave decisions. *Burnett* is another example of the uncertainties that employers face in determining exactly at what point an employee has triggered his FMLA rights.

California Appellate Court Decisions

***Faust v. California Portland Cement Co.*, ___ Cal. App. 4th ___ (2d Dist. May 10, 2007)**

Employers Must Inform Employees of Rights Under the California Family Rights Act upon Verbal Notice

Introduction: In *Faust v. California Portland Cement Co.*, ___ Cal. App. 4th ___ (2d Dist. May 10, 2007), the California Court of Appeal reversed the trial court's decision to grant summary judgment in favor of the employer and found that the employer failed to provide proper notice to the employee under the California Family Rights Act (CFRA). The appellate court held that the trial court erred in granting judgment in favor of an employer who never posted notice, nor informed the terminated employee of his rights under the CFRA, even though the employee gave sufficient verbal notice to the employer of his need to be absent from work for medical reasons.

Factual and Procedural Background: Faust had worked as a lube specialist in a company garage for the California Portland Cement Company (Portland) since 1977. In 2003, he informed his plant manager via email that several employees who worked in the garage had engaged in internal theft and other misconduct. Faust's plant manager subsequently shared the contents of the email with the other employees in the garage. Shortly after learning about the plant manager's actions, Faust began to experience feelings of despair, shortness of breath, panic attacks, and confusion while at work. Faust requested time off from work at that time, but his supervisor denied the request until he was satisfied that Faust had his job duties "under control." Later that day, Faust experienced extreme anxiety and other symptoms of despair when his coworkers failed to respond to his pleas for assistance while he was driving a large fuel truck in a remote area. Faust told a different supervisor about his experience, and they both agreed that Faust should leave the premises.

Faust left work right after the incident and entered a 30-day psychiatric program at Kaiser Permanente five days later. He also filed a workers' compensation claim. The program ended on April 3, 2003, and Faust provided his employer with documentation of his medical impairment from Kaiser, which described his impairment as "anxiety/stress/phobic disorders, depressive, Bipolar/Mood disorders." Faust did not return to work after completing the program because his psychiatric treatment provider told him to stay away from stressful situations. After completing the psychiatric program, Faust began chiropractic treatment on his back. He then gave a copy of the medical certification from his chiropractor to his employer, which stated that he would be unable to perform his work duties from March 31, 2003, through May 1, 2003.

Portland's human resources department attempted to contact Faust on numerous occasions to speak with him regarding his medical certification form from the chiropractor. However, Faust's wife would only allow the human resources manager to speak with her, his chiropractor, or his attorney, stating that Faust was "too stressed out" to speak to the manager. The manager continued her attempts to speak with Faust instead of one of his three representatives, but to no avail. Portland never informed Faust that he could take medical leave under the CFRA or the federal FMLA during this time. On April 23, 2003, Portland terminated Faust's employment because the paperwork that he submitted "was insufficient to sustain an approved absence from work." Faust sued his former employer for disability discrimination, disability harassment, retaliation, wrongful

termination in violation of public policy, and violation of the CFRA, among other claims. The trial court granted summary judgment in favor of the employer. Faust appealed.

Legal Analysis: The court highlighted throughout the opinion that the CFRA imposes certain requirements on employers when dealing with requests for leave from employees. The CFRA states that “the employer should inquire further of the employee if it is necessary to have more information about whether CFRA leave is being sought by the employee and obtain the necessary details of the leave to be taken.” An employer may require that the employee support his request for leave by certification from a health provider. Additionally, the California Code of Regulations requires employers to give their employees *reasonable advance notice* of the CFRA’s notice requirements, and “failure of the employer to give or post such notice shall preclude the employer from taking adverse action against the employee.” The facts support the contention that Faust provided sufficient information to the employer to notify it of his need for leave pursuant to CFRA, but the employer did not advise Faust of his right to leave under the CFRA. The court also stated that Faust made out a prima facie case that he was retaliated against for exercising his CFRA leave. When he availed himself of his CFRA leave, he was terminated by his employer. Therefore, a triable issue of material fact existed with respect to his cause of action for wrongful termination in violation of public policy.

Application for California Employers: Under the CFRA, “it is an unlawful employment practice for an employer of 50 or more employees to refuse to grant a request by an employee to take up to 12 work weeks in any 12-month period for family care or medical leave.” The CFRA “is intended to give employees an opportunity to take leave from work for certain personal or family medical reasons without jeopardizing job security.” Therefore, employers who are subject to the CFRA are required to provide notice to their employees of their rights under the statute. The interplay between the two Acts and workers’ compensation can be confusing, resulting in issues of liability for many employers. The lessons that should be learned from both *Burnett* and *Faust* are that supervisors and managers need to be aware of their company’s leave policies and be sensitive to employees’ requests for medical time off. Employers should also post medical leave policies and inform employees of their rights under both statutes. Properly training supervisors on how to investigate employees’ statements regarding personal or family health issues or absences from work that may trigger protection under CFRA or FMLA is an example of a preventive employment practice that an employer may wish to implement.

***Franklin v. Monadnock Co.*, __ Cal. App. 4th __ (2d Dist. May 24, 2007)**

Employees May State a Claim for Wrongful Termination if Terminated for Reporting Credible Threats of Violence in the Workplace

Factual and Procedural Background: The California Court of Appeal, Second Appellate District, recently ruled that an employee who was terminated for complaining to his employer’s human resources department and the local police department about threats of workplace violence stated a claim for wrongful termination in violation of public policy. In *Franklin v. Monadnock Co.*, __ Cal. App. 4th __ (May 24, 2007), the appellate court held that the public has a vital interest in ensuring that employees are provided a workplace that is free from credible threats of violence and physical assaults. In order to attain a safe and crime-free workplace, employees must be free to bring to the employer’s attention illegal conduct or credible threats of violence without the fear of termination.

Franklin was hired by the defendant as a “heat-treater” on June 1, 2004. Franklin’s co-worker Richard Ventura allegedly threatened the plaintiff and three other employees by stating that he would have them killed. The employees who were threatened elected Franklin to complain about Ventura’s threats to their physical safety to the defendant’s human resources department in order to protect the health and safety of everyone in the workplace. Franklin then complained to the defendant’s human resources department about Ventura’s threats, but the defendant allegedly refused to keep Franklin and his co-workers safe from Ventura, by failing to counsel, warn, or segregate Ventura, and by failing to prevent Ventura from directly assaulting Franklin or his fellow co-workers. A week after Franklin complained to the defendant about Ventura’s threats, Ventura attempted to stab him with a metal screw driver and another unidentified weapon. Franklin reported the assault to the police. Franklin later alleged that he was terminated from his employment as a result of his complaints to the defendant and the police, claiming that the defendant maintained an unsafe place of employment by allowing the threats of violence and attempted violence to continue unheeded in the workplace.

Franklin brought a single cause of action for wrongful termination of employment in violation of public policy against his employer. The trial court granted defendant demurrer with leave to amend Franklin’s original complaint because Franklin did not mention Ventura, Ventura’s threats to co-workers, or Ventura’s assault on him. Franklin’s first amended complaint alleged that Ventura threatened him and three co-workers, and subsequently assaulted Franklin with a screwdriver. The defendant responded with a demurrer, arguing that the new allegations were inconsistent with the original complaint; they claimed that the first amended complaint was therefore a “sham.” The trial court sustained the demurrer to the first amended complaint without leave to

amend on the basis that Franklin had not stated facts sufficient to constitute a cause of action, entering an order dismissing the first amended complaint with prejudice. The appellate court reversed, holding that Franklin's allegations were sufficient to state a claim for wrongful termination based on the public policies that require employers to provide a safe and secure workplace and encourage employees to report credible threats of violence in the workplace.

Legal Analysis: In *Esberg v. Union Oil Co.*, 28 Cal. 4th 262, 272 (2002), the California Supreme Court established four requirements that a "public policy" must meet in order to support a wrongful discharge claim: (1) the policy must be supported by either constitutional or statutory provisions; (2) the policy must be "public" in the sense that it "insures the benefit of the public" rather than serving merely the interests of the individuals; (3) the policy must have been articulated at the time of the discharge; and (4) the policy must be "fundamental" and "substantial."

The appellate court cited *City of Palo Alto v. Service Employees International Union*, 77 Cal. App. 4th 327 (1999), to support its contention that California Labor Code section 6400 *et seq.* and Code of Civil Procedure section 527.8, when read together, establish an explicit public policy that requires employers to provide a safe and secure workplace for their employees. This includes the requirement that an employer take *reasonable steps* to address credible threats of violence in the workplace. The court then went on to define a credible threat as "one that an employee reasonably believes will be carried out, so as to cause the employee to fear for his or her safety or that of his or her family." This definition includes California's policy to protect an employee who complains "in good faith about working conditions or practices which he reasonably believes to be unsafe." The court reasoned that the Labor Code provisions that establish an express public policy requiring employers to take reasonable steps to protect employees from foreseeable occupational injuries and illnesses are akin to a policy concerning injuries in the workplace from foreseeable violence or credible threats of violence. Threats can be crimes; therefore, protecting employees from violence or threats of violence in the workplace is now a fundamental and substantial public policy.

Application for California Employers: The California Court of Appeal has established an explicit requirement that California employers take *reasonable steps* to address employees' credible reports regarding threats of violence and protect employees from violence in the workplace. Employers are also obligated to investigate employees' credible reports of violence or threats of violence in the workplace and refrain from retaliating against employees for reporting a threat.