SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/22/02			DEPT. 71
HONORABLE Soussan G. Bruguera	JUDGE	K. GARCIA	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
C. RANDLE, C.A.	Deputy Sheriff	NONE	Reporter

8:30 am	BC257610	Plaintiff Counsel	NO APPEARANCE
	DAVID PIMENTEL VS HISPANIC PHYSICIAN IPA	Defendant Counsel	NO APPEARANCE

NATURE OF PROCEEDINGS:

NON-APPEARANCE FILE REVIEW

The Court adopts its tentative ruling on defendant's motion for summary judgment as its order on the motion as follows:

The defendant's objections are overruled.

As to the first cause of action for wrongful termination, although employment contracts are generally terminable at will, California courts recognize a narrow exception to this rule: (A)n employer's traditional broad authority to discharge an at-will employee may be limited by statute...or by considerations of public policy. Tamney v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 172. See, Ca. Prac. Guide Employment Litigation Ch. 5:2.

The elements for wrongful termination in violation of public policy are: (1) an employer-employee relationship; (2) termination or other adverse employment action; (3) termination of plaintiff's employment was a voilation of plublic policy (or more accurately, a "nexus" exists between the termination and the employee's protected activity; (4) termination was a legal cause of plaintiff's damage and (5) the nature and extent of plaintiff's damages. Holmes v. General Dynamics Corp. (1993) 17 Cal. App. 4th 1418, 1426; See also, Ca. Prac. Guide Employment Litigation Cr. 5:10.

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A Tamney claim may be based on the employee's refusal to violate a statute. Gantt v. Sentry Ins. (1992) 1 Cal. 4th 1083, 1090-1091; See also, Ca. Prac. Guide Employment Litigation Ch. 5:195. However, refusal to engage in unlawful acts does not give rise to a Tamney claim where no fundamental public policy is voilated. De Soto v. Yellow Freight Systems Inc. (1992) 957 F. 2d 655, 658; See also, Ca. Prac. Guide Employment Litigation Ch. 5:210.

Although no prcise guidline exists, courts consider the following factors in determining whether a policy is "substantial and fundamental": (1) whether it is similar to other policies that have been declared to be substantial and fundamental and (2) whether there is broad and consistent statutory and legislative support for the policy. Sullivan v. Delta Airlines Inc. (1997) 58 Cal. App. 4th 938, 943-944; See also Ca. Prac. Guide Employment Litigation Ch. 5:116.

The fact that the legislature has made the employer's conduct a crime indicates a "fundamental" public policy in involved. Gould v. Maryland Sound Industries Inc. (1995) 31 Cal. App. 3d 1137, 1148-1149; See also Ca. Prac. Guide Employment Litigation Ch. 5:117.

As to whether Health & Safety Code Section 1371.35 and Social Security Act Sections 1816(c)(2), 1842(c)(2), 1876(g)(6)(A) demonstrate a fundamental public policy

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to support a Tamney claim, in the instant case, plaintiff asserts that he was fired for reporting to his superior, Head Administator Ms. Amparo Romero, that defendant was violating Labor Code Section 1371.35 by failing to timely reimburse payment for completed claims and failing to pay for interest based on the tardy reimbursement payment. Plaintiff's job was to sign off on the face sheet of the monthly timeliness reports, prepared by another employee, and send the reports to various health plans. However, plaintiff noticed that the reports did not contain accurate information. As a result, he refused to sign the reports unless he was given permission to generate the reports himself to ensure the integrity of the process.

Defendant argues that even if plaintiff was fired for reporting a violation of Healt and Safety Code Section 1371.35, such a violation does not give rise to a wrongful termination cause of action because the law does not state a fundamental public policy. Rather, the statute contains a system of licensing and regulation relating to the property rights of an HMO or the ability of an intermediary (such as defendant) to do business. The reporting of untimely payment of claims benefits primarily affects the employer's economic interest. Moreover, a violation of the statute does not constitute a crime.

In the Tamney case, the Court held that an employer's obligation to refrain from discharging an employee who

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refuses to commit a criminal act reflects a duty imposed by law on all employers in order to implement the fundamental public policies embodied in the state's penal statutes. Tamney v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 176 (as indicated in Petermann v. International Brotherhood of Teamsters (1959) 174 Cal. App. 2d 184.)

The instant case is distinguishable from Tamney and Petermann. It is not evident that a violation of Health and Safety Code Section 1371.35 constitutes a crime. In both cases, the public policy behind the state's penal statutes supported a wrongful termination claim based on public policy. Here, while plaintiff had to sign off on the face sheet of the Monthly Timeliness Report, it is not indicated that he was signing off as to the report's accuracy. Rather than be forced to partake in the violation, it seems that plaintiff noticed defendant's violation of the provision and reported the violation. Thus, since it was not apparent that a violation of the statute is criminalized and it is not clear that any otherwise unlawful basis exists, no public policy basis can be found in the state's penal statutes.

Moreover, it is not apparent that a fundamental public policy exists otherwise. As defendant points out, Health and Safety Code Section 1371.35 requires reimbursement for completed claims and furthermore requires mandatory interest payments if a complete claim is not timely reimbursed. It is not evident

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that a fundamental policty forms the basis for the statute. Policies that have been held to be fundamental include: (1) policies agains race, sex and age discrimination in employment, (2) policies against disability discrimination in employment, (3) workers' health and safety laws (unsafe working conditions), (4) anti-trust laws and laws against bribery and kick-backs (involving illegal, unethical or unsafe practices), (5) laws prohibiting covenants not to compete with employer (refusing to sign an illegal covenant not to compete), (6) laws prohibiting fradulent business practives and (7) law requiring prompt payment of wages (illegally withholding pay). Ca. Prac. Guide Employment Litigation Ch. 5:125 - 5.131

The policy embodied in state regulations requiring drivers to carry registration papers in their automobiles have been held to be not fundamental. DeSoto v. Yellow Freight Systems Inc. (1992) 957 F.2d 655,658; Ca. Prac. Guide Employment Litigation Ch. 5:140

Plaintiff has failed to show a fundamental public policy supporting the Tamney claim.

As to whether plaintiff is protected under Labor Code Section 1102.5 as a whistle-blower, the code section protects employees from an employer's retaliation for an employee's disclosure of information to a government or law enforcement agency. But it does not

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protect employees who report their suspicions directly to their employers (unless it is a public employer). Green v. Ralee Eng. Co. (1998) 19 Cal 4th 66,77; See also Ca. Prac. Guide Employment Litigation Ch. 5:220

Defendant further contends that the cause of action for wrongful termination is without merit since plaintiff admitted at deposition that he never reported anythin (statutory violations) of defendant to the California Health Care Finance Administration or other such agency. Rather, defendant contends that plaintiff sought to report the violations to a government agency, but never followed through. See complaint, 18. Plaintiff contends that he did complain of the violation to his supervisor, Head Administrator Ms. Amparo Romero. See plaintiff's declaration, 11.

While plaintiff admits not having reported the violation to an agency, he did report the violation to Ms. Romero. Cases exist where the Court has applied Labor Code Section 1102.5 when an employee reported wrongful conduct to management. Gould v. Maryland Sound Industries Inc. (1995) 31 Cal. App. 4th 1137,1148-1149; See also Ca. Prac. Guide Employment Litigation Ch. 5:222, Collier v. Superior Court (1991) 228 Cal. App. 3d 1117, 1123; See also Ca. Prac. Guide Employment Litigation Ch. 5:224. Based on such circumstances, it appears that Labor Code Section 1102.5 may apply. However, no Tamney claim lies for reporting activities that serve only the

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private interest of the employer rather than a public interest. Thus, because Health and Safety Code Section 1371.35 is not based on a fundamental public policy of the state, the cause of action fails.

As to the second cause of action for intentional infliction of emotional distress, the elements of this cause of action are (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress, (2) the plaintiff's suffering severe or extreme emotional distress, (3) actual and proximate (or legal) causation of the emotional distress by the defendant's outrageous conduct and (4) either the uncivilized conduct must have been directed to plaintiff or defendant acted with reckless disregard of the plaintiff and the probability that his or her conduct would cause severe emotional distress to that plaintiff. Christensen v. Superior Court (1991) 54 Cal. 3d 868, 903; KOVR-TV Inc. v. Superior Court (Whittle) (1995) 31 Cal. App. 4th 1023.

Defendant argues that Workers' Compensation provides the exclusive remedy for purported injuries to plaintiff arising out of and in the course of his employment. (Labor Code Section 3600.) Thus, because a cause of action for wrongful discharge fails, the cause of action for intentional infliction of emotional distress is preempted by the Workers' Compensation Act. Plaintiff does not make any

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argument regarding the exclusivity, but rather asserts that a wrongful termination cause of action exists.

Without demonstrating that a Tamney claim for wrongful discharge based on public policy exists, the cause of action for intentional infliction of emotional distress is preempted.

Summary judgment as to the first and second causes of action is granted.

A copy of this minute order shall be attached to the transcript of the proceedings in this matter and collectively shall comrise the order of this Court.