Causes of Action Employee Lawyers Forget

By Phil Horowitz*

* *Phil Horowitz practices with the Law Offices of Phil Horowitz and is Chair of the California Employment Lawyers Association. He has represented employees in wrongful termination, harassment, and discrimination cases for twenty years.*

"Creative minds have always been known to survive any kind of bad training."

– Anna Freud

It boggles the mind. Some lawyers representing employees allege the exact same causes of action in lawsuit after lawsuit. These lawyers trot out the same tired form complaint over and over, doing little more than filling in the blanks.

We are trained that forms are good. As newer lawyers, we learn that the easiest way to write a complaint is to find a sample and use it as a form. I certainly make sample complaints available to other employee lawyers, but forms are nothing more than a starting point. I'm often called for advice by other employee lawyers. At least one third of the time, it turns out there was at least one potentially useful cause of action the lawyer forgot to include in the complaint.

Complaints define the issues in a case and circumscribe what relief may be recovered. They are the first pleading seen by defendants and their lawyers. They are one of the first things that judges and their clerks look at in a case. Why then do so many lawyers give less thought to the complaint than they do to a letter regarding meeting and conferring about a discovery dispute?

Lawyers representing employees should always brainstorm about what causes of action to include in the complaint. Some causes of action are often overlooked. Here are some of them.

Breach of Contract

Everyone knows that a contract to discharge only for good cause can be implied.[1] However, employment contracts come in many flavors. A contract not to discharge without good cause is only one. All too often, employee lawyers forget to ask themselves if any other type of contract was impliedly or expressly agreed upon and breached.

The California Supreme Court in *Scott v. Pacific Gas & Electric Company*[2] rejected the "factually unfounded premise that judicial enforcement of the terms of employment contracts has been confined to the domain of wrongful termination." The *Scott* court held that a contract can be implied prohibiting demotion without good cause.

Long before *Scott* was decided, other published California cases held that employees could bring contract claims contesting actions other than just termination. For example, personnel policies can establish a contract giving laid-off employees preferential rehire rights.[3]

Equally important, an employer's personnel policies and practices can establish an implied contract that employees will not be discharged for poor performance without progressive discipline. Similarly, a supervisor's assurance that an employee will have thirty days to accomplish a particular task can form an express oral contract.

Contracts are forged every day in the workplace. Employee lawyers will find many such contracts if they take the time to talk at length with their clients and think thoroughly.

Breach of the Implied Covenant of Good Faith and Fair Dealing

Rumors of the death of the implied covenant of good faith and fair dealing are greatly exaggerated.

It is true that employees no longer get tort damages for breach of the implied covenant.[4] However, there are still good reasons to plead this cause of action.

Including a covenant cause of action in the complaint gives the jury a chance to look at the facts through a prism of fairness and good faith. Breach of contract jury instructions do not mention fairness or good faith. In contrast, the key jury instruction for breach of the implied covenant asks the jury whether the employer's conduct was "a failure to act fairly and in good faith."[5]

Claims for breach of the implied covenant can also sometimes provide relief when a breach of contract claim cannot. For example, "the covenant might be violated if termination of an at-will employee was a mere pretext to cheat the worker out of another

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1 Foley v. Interactive Data Corp., 47 Cal. 3d 654 (1988).

2 11 Cal. 4th 454, 472 (1995).

3 Hepp v. Lockheed-California Co., 86 Cal. App. 3d 714 (1978).

4 Foley v. Interactive Data Corp., 47 Cal. 3d 654 (1988).

5 CACI No. 2423.

contract benefit to which the employee was clearly entitled, such as compensation already earned."[6]

Many at-will employees are fired just before stock options vest, just before the commission on a big sale becomes payable, or just before an annual payment to the employee becomes due. For these employees, a covenant claim may provide the best or only relief.

The covenant may also provide relief for newly-hired employees who are fired without being given a chance to perform.[7]

Promissory Fraud

If you include a cause of action for breach of contract in the complaint, you have concluded that the employer broke its promise. The follow up question to consider is whether the employer ever intended to honor its promise in the first place. If it did not, you should consider pleading a cause of action for promissory fraud.

The California Supreme Court in *Lazar v. Superior Court*[8] held that an employee who allegedly had been falsely promised job security could pursue a claim for promissory fraud. The court stated that, "[a] promise to do something necessarily implies the intention to perform; hence where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud."[9]

A cause of action for promissory fraud may proceed even if the promise was not enforceable as a contract.[10] However, a false promise will not give rise to a promissory fraud claim if it is "too vague to be enforced."[11]

Proving an employer's lack of intent to perform its promise is often done through circumstantial evidence. Failure to perform the promise is not alone enough to prove fraud, but hasty repudiation of the promise or failure to even try to honor it can be sufficient.[12]

Full tort damages may be recovered for promissory fraud. If the false promise caused the employee to move to, from or within California, double damages are also available under California Labor Code sections 970-972.

Common Law or Constitutional Cause of Action for Discrimination

Everyone knows employees can sue for employment discrimination using the California Fair Employment and Housing Act (FEHA). What employee lawyers sometimes forget is that employees can, and normally should, also plead a common law or Constitutional claim for discharge in violation of the public policy against discrimination.[13]

The public policy against employment discrimination is found in both FEHA and in Article 1, Section 8 of the California Constitution. Article 1, Section 8 of the California Constitution prohibits discrimination because of "sex, race, creed, color or national or ethnic origin." It remains to be seen whether those prohibitions will be deemed illustrative and Section 8 held to also prohibit other arbitrary group-based discrimination.

Pleading a public policy cause of action can route a discrimination case around many legal roadblocks. For example, if a FEHA claim is dismissed for failure to fully and properly exhaust administrative remedies, the public policy claim will normally survive. The situation may be more complicated for public employees.[14]

Pleading a public policy claim can also solve statute of limitations problems. FEHA claims must be commenced by filing an administrative complaint within one year.[15] In contrast, there is at least a two-year statute of limitations for claims for discharge in violation of public policy.[16]

A public policy cause of action can also be used to address discrimination by employers exempted from FEHA, and retaliation for opposing it, at least if the type of discrimination is listed in Article 1, Section 8 of the California Constitution.[17]

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6 Guz v. Bechtel National, Inc., 24 Cal. 4th 317, 353, fn. 18 (2000).

7 Sheppard v. Morgan Keegan & Co., 218 Cal. App. 3d 61, 67 (1990).

8 12 Cal. 4th 631, 638 (1996).

9 *Id.*

10 *Id.*

11 Rochlis v. Walt Disney Co., 19 Cal. App. 4th 201, 216 (1993).

12 Tenzer v. Superscope, Inc., 39 Cal. 3d 18, 30 (1985).

13 Rojo v. Kliger, 52 Cal. 3d 65, 89-91 (1990).

14 Williams v. Housing Authority of City of Los Angeles, 121 Cal. App. 4th 708 (2004).

15 Cal. Gov't Code § 12960.

16 Cal. Civ. Proc. Code § 335.1; Barton v. New United Motor Mfg., 43 Cal. App. 4th 1200, 1208 (1996); Turner v. Anheuser-Busch, Inc., 7 Cal. 4th 1238, 1254, fn. 7 (1994).

17 Phillips v. St. Mary Regional Medical Center, 96 Cal. App. 4th 218, 230-233 (2002); Badih v. Myers, 36 Cal. App. 4th 130, 145-46 (1995); Carmichael v. Alfano Temporary Personnel, 233 Cal. App. 3d 1126 (1991).

Failure to Take All Reasonable Steps to Prevent Discrimination

Another cause of action that is often helpful to add to a discrimination complaint is violation of Government Code section 12940(k). That subsection requires employers "to take all reasonable steps necessary to prevent discrimination and harassment from occurring." Pleading this additional claim can help focus attention on an employer's overall equal opportunity practices.

Traditional Torts

After *Hunter v. Up-Right, Inc.*[18] was decided, some practitioners thought that employees could no longer pursue traditional tort claims. Four years later, the California Supreme Court in *Lazar v. Superior Court*[19] rejected an employer's argument that "we restricted or abandoned traditional tort remedies in the employment context."

Despite the *Lazar* court's proclamation that traditional tort law is alive and well in employment cases, employee lawyers sometimes forget to plead traditional tort claims such as assault, battery, false imprisonment, defamation and invasion of privacy. These claims can generally be brought against both employers and the individual perpetrators.

There are at least three reasons to consider including traditional tort causes of action in an employment complaint. First, there may be no other remedy available for the wrong. Second, pleading a tort claim can help focus attention on that misconduct. Third, if an employer is not incorporated or headquartered in California, pleading a traditional tort claim may make it possible to name an individual California wrongdoer as a defendant to avoid complete diversity of citizenship. This would normally preclude removal of the lawsuit to federal court if the complaint includes no federal claims. California employees generally fare better in state court than federal court.

Battery is more common in the workplace than many employee lawyers realize. Intentional touching without consent is battery if the touching is harmful or offensive.[20] Supervisors have certainly been known to push, shove, or physically steer employees in an offensive way. Battery is also common in sexual harassment cases.

False imprisonment sometimes occurs when employers question employees about alleged misconduct. If an employer intentionally uses force or threat of force to stop an employee from leaving, even for fifteen minutes, that is false imprisonment.[21]

Defamation claims are often used to address falsehoods that cause an employee to be discharged or that prevent an employee from getting new employment. Employees must usually prove that the false statements were made with malice, because most employment-related defamation is protected by one of the qualified privileges established by California Civil Code section 47. The falsehood must be a statement of fact, *e.g.*, that an employee made a $100,000 mistake.[22] There is generally no remedy for statements of opinion, *e.g.*, that an employee was a "babbler."[23]

Treble damages are available under California Labor Code sections 1050 and 1054 for employer misrepresentations that prevent a former employee from getting new employment.

These and other useful causes of action are often overlooked when drafting employment complaints. Employee lawyers should always make it a point to brainstorm creatively about what causes of action they should include in the complaint. It will be time and effort well spent.

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18 6 Cal. 4th 1174 (1992).

19 12 Cal. 4th 631, 646 (1996).

20 Barouh v. Haberman, 26 Cal. App. 4th 40 (1994).

21 Fermino v. Fedco, Inc., 7 Cal. 4th 701, 715-16 (1994).

22 Gould v. Maryland Sound Indus., Inc., 31 Cal. App. 4th 1127, 1153-54 (1995).

23 Moyer v. Amador Valley Joint Union High Sch. Dist., 225 Cal. App. 3d 720, 725 (1990).

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