

No. H020770

IN THE COURT OF APPEAL OF CALIFORNIA
SIXTH APPELLATE DISTRICT

CYNTHIA GINA GONZALEZ,

Plaintiff/Appellant

vs.

ARCOM ELECTRONICS, INC. et. al.,

Defendant/Respondent.

Appeal from the Superior Court for Santa Clara County
Hon. Leslie C. Nichols
Case No. CV 781821

RESPONDENT'S BRIEF

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INTRODUCTION

Plaintiff alleges that her privacy was invaded when she was demoted and ostracized after her employer disapproved of a personal relationship she maintained with an employee of a competitor. Plaintiff allegedly found the situation so intolerable that she quit the job and brought this action. Her employment was presumptively at-will and the only damages she claims are loss of wages and benefits and personal injury damages for emotional distress, medical care and counseling.

This case thus potentially leads into a legal quagmire created by the confluence of an undefined (and perhaps undefinable) right of privacy with the complexities of employment law. Every employment relationship necessarily infringes upon the private life of the employee. An at-will employee who quits the job ordinarily has no claim for lost wages or benefits and the exclusivity provisions of workers' compensation prohibit a suit for personal injury damages.

Appellant's opening brief offers no guidelines for determining when employment actions allegedly made on the basis the employee's private life and not involving rights clearly defined by existing law will justify quitting the job or bringing a lawsuit. Appellant's approach is contrary to proper appellate practice and presents a serious threat to the stability of employment law.

In *Sequoia Insurance Co. v. Superior Court* (1993) 13 Cal.App.4th 1472, 1480, this district stated a principle quoted and cited in later Supreme Court decisions¹, that before the courts will invoke a public policy exception to the at-will provisions of Labor Code § 2922, "a constitutional or statutory provision must sufficiently describe the type of prohibited conduct to enable an employer to know the fundamental public policies that are expressed in that law."

Respondent submits that the rule of *Sequoia Insurance* should be adapted to the facts presented here, that there was no rule of law sufficiently descriptive of any fundamental public policy supporting plaintiff's claim as to give "employers ... adequate notice of the conduct that will subject them to tort liability" (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889) and that, therefore, the judgment against plaintiff should be affirmed.

STATEMENT OF THE CASE

Plaintiff's complaint purported to allege causes of action for: (1) invasion of privacy, (2) breach of employment contract, (3) constructive wrongful discharge and (4) intentional infliction of emotional distress.

¹ *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1256, n. 9; *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 84.

(CT 1-8) Defendant Arcom Electronics demurred to all causes of action. (CT 9-10) The trial court sustained the demurrer to the first cause of action for invasion of privacy without leave to amend and sustained the demurrers to the other three causes of action with leave to amend. (CT 39-40) Plaintiff failed to amend and, on application by defendant Arcom Electronics, the action was dismissed and judgment entered in favor of defendant. (CT 42-43) Plaintiff appealed. (CT 44)

STATEMENT OF FACTS

For purposes of this proceeding, the allegations in plaintiff's complaint are presumed to be true.

Plaintiff Cynthia Gina Gonzalez ("Gonzales") was employed by defendant Arcom Electronics, Inc. ("Arcom") as a sales representative. (CT 2, ¶ 6) Although Gonzales generally alleges an employment agreement evidenced by a letter of hire and written personnel policies and modified by verbal promises and commitments, the only provision specifically alleged is the implied covenant of good faith and fair dealing imposed by law. (CT 5, ¶ 14). Gonzales alleges that "**By way of** verbal communications, awards, raises and good performance appraisals, Plaintiff **was led to believe** her employment was appreciated and that she would be employed indefinitely and given responsibilities commensurate

with her capacities so long as she continued to perform well on the job." (CT 2-3, ¶ 6, emphasis added) Although she sought and obtained leave to amend her complaint, she never alleged a provision that she could not be terminated or disciplined except for cause.

Plaintiff had a "private and personal relationship with an individual who was a former employee of Defendants and was afterwards employed by one of their competitors." (CT 3, ¶ 7) "Defendants insisted Plaintiff terminate said relationship." (*Id.*)

When plaintiff refused to terminate the relationship, defendants retaliated against plaintiff, "demoting Plaintiff to position [sic] in which she could not earn a salary comparable to that she was earning in her previous position, unfairly criticizing Plaintiff's work performance, ostracizing Plaintiff, failing to inform Plaintiff of meetings and creating an aura of nonverbal hostility toward Plaintiff which was manifested in the body language of those with whom she worked." (CT 3, ¶ 8) "Such behavior created a hostile environment in which plaintiff was unable to work and resulted in her constructive termination." (*Id.*)

As a result of the invasion of privacy and retaliation, plaintiff incurred expenses for medical care and counseling, (CT 3, ¶ 9) lost wages and benefits (CT 4, ¶ 10) and suffered severe emotional distress. (CT 4, ¶11)

LEGAL DISCUSSION

I. LEGAL STANDARD

A. As to the First Cause of Action Where the Demurrer Was Sustained Without Leave to Amend, the Court Assumes the Truth of All Facts Properly Pleaded by the Plaintiff.

It is well settled that, on appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, appellate courts assume the truth of all facts properly pleaded by the plaintiff-appellant, but not contentions, deductions or conclusions of fact or law. *Leibert v.*

Transworld Systems, Inc. (1995) 32 Cal.App.4th 1693, 1701. While the court will consider whether the complaint might state a cause of action if defects could reasonably be cured by amendment, the plaintiff bears the burden of demonstrating a reasonable possibility of cure, and where the plaintiff has not shown any such possibility, the discretion of the trial court in sustaining the demurrer without leave to amend has not been abused, and the trial court's order must be affirmed. *Id.*

Here, Gonzales has never shown any possibility of curing the defects in her complaint. The critical defects appear, not only in the first cause of action for invasion of privacy, but also in the second and third causes of action that involve employment law, where she was given an opportunity to amend but declined to do so.

B. As to the Second, Third and Fourth Causes of Action Where Plaintiff Elected Not to Amend Her Complaint, It Is Presumed That The Complaint States as Strong A Case As Is Possible.

It is also well settled that, when a plaintiff elects not to amend the complaint, it is presumed that the complaint states as strong a case as is possible and the judgment of dismissal must be affirmed if the unamended complaint is objectionable on any ground raised by the demurrer. *Soliz v. Williams* (1999) 74 Cal.App.4th 577, 585.

C. Where, As Here, Appellant Has Not Addressed the Major Issues Involved in the Case in Her Opening Brief, the Court Should Not Consider Such Issues Presented in the Reply.

This is expressly an *employment case* (see the first sentence in Gonzalez's opening brief, p. 1), but Gonzalez does not address the important employment issues, all of which were raised in memoranda submitted to the trial court below. (CT 14-21, 22-31, 33-38) The only employment case cited by Gonzales, *Semore v. Pool* (1990) 217 Cal.App.3d 1987, is mentioned as a tail to her principal argument at pp. 7-8 of her opening brief, and *Semore* has "been superseded by the analytical framework announced in *Hill [v. National Collegiate Athletic Association]* (1994) 7 Cal.4th 1]." *Feminist Women's Health Center v. Superior Court* (1997) 52 Cal.App.4th 1234, 1245, n. 3 (writ issued

compelling summary adjudication of invasion of privacy claim against employee terminated because she refused to demonstrate cervical self-examination, part of her job duties).

Decisions of the Supreme Court involving the right to privacy in connection with drug testing of collegiate athletes, *Hill*, supra, and *Loder v. City of Glendale* (1997) 14 Cal.4th 846, an employment-related drug-testing case, are lengthy because the issues are fraught with serious implications. In *Loder*, at 14 Cal.4th 922, Justice Chin, in a concurring and dissenting opinion, noted that, as a result of the fragmented status of the varying opinions therein, **five** members of the court found that the distinction on which the court's decision was based was "legally unsound." Other employment cases involving the right to privacy are equally complex, e.g. *Pettus v. Cole* (1996) 49 Cal.App.4th 402 (unauthorized disclosure to employer of psychiatric evaluations of employee on disability leave).

Similarly, cases stating major principles of employment law state fact-sensitive standards that must be carefully elucidated and analyzed because the intimate and often emotionally intense employment relationship is the beating heart of our modern society where legislatively-mandated restrictions, e.g. on racial or sexually-based discrimination, must be carefully administered to balance the competing

interests, to maintain the flexibility of managers to deal with problems in the workplace and to avoid unnecessary litigation.

Despite the complexities involved in this appeal, Gonzalez has filed an opening brief that fails to address any of the important employment issues. Respondent is compelled to "shoot in the dark" at targets that may not even be present. This court is not given the guidance that it needs to consider the case efficiently and judiciously.

In *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 763, this district admonished an appellant whose "reply brief reads like an entirely new opening brief rather than as a response to [respondents'] briefs." At 52 Cal.App.4th 764, the court quoted from *Neighbors v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8:

"Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for the first time will not be considered unless good reason is shown for failure to present them before."

Arcom submits that the rule against consideration of points raised in the reply brief for the first time should be applied here.

II

THE DEMURRER TO THE FIRST CAUSE OF ACTION FOR INVASION OF PRIVACY WAS PROPERLY SUSTAINED.

A. The Problem and a Proposed, Limited Solution.

The gravamen of the complaint is that: Arcom attempted to interfere with Gonzalez's private life; Gonzalez repulsed the attempt; Arcom then retaliated with a demotion, loss of pay, criticism, ostracism and a negative attitude; and Gonzalez quit her job. The only damages Gonzales claims are loss of wages and benefits from the demotion and unemployment and personal injury losses in the way of expenses for medical care and counseling, plus emotional distress. (CT 2-3, ¶¶ 8-11)

This case thus presents four sets of limiting facts that are important in evaluating Gonzalez's invasion of privacy claim in the context of employment litigation: (1) the alleged invasion was of "autonomy privacy" and not the stronger "informational privacy;" (2) the only alleged wrongful acts of the employer are ordinary incidents of the employment relationship, although potentially colored by retaliation; (3) Gonzales quit the job and was not terminated; and (4) the only damages alleged are loss of employment income and benefits and personal injury damages.

These considerations are important because it is necessary for this court to state a rule of decision that adapts the "legally amorphous character of a tort" of invasion of privacy (*Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 25) to the inalterable fact that employment necessarily interferes with an employee's private life. The considerations thus serve as limiting predicates for a rule that will properly resolve this case without staking out too much ground. We shall argue that the appropriate rule of decision is as follows: when, as

here, the invasion of privacy only involves an attempt to interfere with an employee's private life (invasion of "autonomy privacy"), when the only wrongful acts are normal incidents of employment (except for potential coloration from the attempted interference), when the employee quits and is not terminated and when the only damages claimed would (except for potential coloration from the attempted interference) be barred by established principles of employment law, before a cause of action for invasion of privacy can be pursued, there must be a pre-existing rule of law protecting the employee's interest (whether based on constitution, statute or judicial decision) that "sufficiently describe[s] the type of prohibited conduct to enable an employer to know the fundamental public policies that are expressed in that law." *Sequoia Insurance Co. v. Superior Court* (1993) 13 Cal.App.4th 1472, 1480. Because, here, there is no rule of law sufficiently descriptive to put the employer on notice, the judgment should be affirmed.

This proposed rule harmonizes the authorities and constitutes a practical and workable standard.

We submit that any less carefully crafted rule will overturn established principles of employment law. Under a vague and broad standard, such as would follow from the argument of Gonzalez in her opening brief, an at-will employee who senses that the employment relationship is deteriorating could declare a conflict or interference with his or her private life ("I won't work overtime tonight because I have go to my daughter's basketball game" or "I root for the Broncos, not those losing Forty-Niners"), interpret subsequent negative job consequences as "retaliation," quit, and bring suit, contrary to the rules stated in *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1246 and 1247:

"Under the cases, an employee cannot simply 'quit and sue,' claiming he or she was constructively discharged. The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonably employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee."

.....

"...a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge. ...the adverse working conditions must be so intolerable that any reasonable employee would resign rather than endure such conditions" (citation and inner quotation marks omitted)

B. Judicial Interpretation of the Right to Privacy.

The "right to privacy" was added to the California State Constitution by a 1972 initiative. *Hill*, supra, 7 Cal.4th at 15. Remarkably few published cases have interpreted it, and no more than a half-dozen in the employment context. Except for drug-testing in connection with employment, there is only scattered authority.

In *Hill*, the Supreme Court held that the right to privacy did not prevent drug-testing of college athletes. The court reviewed ballot arguments in favor of the Privacy Initiative, which were primarily concerned with "information-amassing practices of both 'government' and 'business.'" (*Id.* at 16-17) The court held that: "Informational privacy is the core value furthered by the Privacy Initiative." *Id.* at 35. The court also stated:

"Autonomy privacy is also a concern of the Privacy Initiative. The ballot arguments refer to the federal constitutional tradition of safeguarding certain intimate and personal decisions from governmental interference in the form of penal and regulatory laws. (Ballot argument, *supra*, at p. 27) ***But they do not purport to create any unbridled right of personal freedom of action that may be vindicated in lawsuits against either government agencies or private persons or entities.***" *Id.* at 36 (emphasis added).

At 7 Cal.4th 55, the court noted the problem of defining "requirements ... imposed on private employers by the California constitutional right to privacy" and stated: "We are not called upon to decide any such issues here."

The *Hill* court held: "Whether a legally recognized privacy interest is present in a given case is a **question of law** to be decided by the court." *Id.* at 40 (emphasis added). In defining a legally protected privacy interest: "Whatever their common denominator, privacy interests are best assessed separately and in context." *Id.* at 35.

Loder v. City of Glendale (1997) 14 Cal.4th 846 held that employers could test newly hired employees for drugs but not those who applied for internal promotion. The results were the same under the federal and state constitutions. In *Kraslawsky v. Upper Deck Co.* (1997) 56 Cal.App.4th 179, following *Loder*, the court held that a current employee, fired after refusing a drug test, could go forward on her claim that the accusation of drug use was retaliation for having resisted the imposition of overtime without pay. In *Feminist Women's Health Center v. Superior Court* (1997), 52 Cal.App.4th 1234, 1257, the court held that a requirement that employees demonstrate cervical self-examination to clients could be assimilated to the circumstances of *Hill* because such public performance "is at least as serious as observing urination [during drug-testing]," but that plaintiff "agreed to demonstrate cervical self-examination as a job requirement" and thereby consented to the practice.

The case closest to that presented here is *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, where plaintiff was harassed and terminated on the basis of his homosexual orientation. The primary

ruling was that plaintiff could go forward on his claim for wrongful discharge in violation of public policy: "discrimination on the basis of sexual orientation is outlawed under the prohibitions on discrimination on the basis of political activities or affiliations found in [Labor Code] sections 1101 and 1102." 32 Cal.App.4th at 1703.

The *Leibert* court also held that a demurrer had properly been sustained without leave to amend as to plaintiff's cause of action based on invasion of privacy. *Id.* at 1700-1702. Because plaintiff's sexual orientation was not confidential, he "as a matter of law, cannot state a claim for infringement of a legally protected *informational* privacy interest." *Id.* at 1702 (emphasis in original). The same rationale applies here. Gonzalez's relationship was not confidential and Arcom did not infringe on her information privacy interest. See Gonzalez's opening brief at 4: "information about whom she was dating was not in and of itself confidential."

In response to plaintiff's claim of infringement on his autonomy privacy, the *Leibert* court also quoted from *Hill*, supra:

"our Supreme Court has specifically recognized that the state constitutional right of personal freedom of action was not intended 'to create any unbridled right of personal freedom of action that may be vindicated in lawsuits either against government agencies or private persons or entities.' (*Hill, supra*, 7 Cal.4th at p. 36)." 32 Cal.App.4th at 1702.

The *Leibert* court held that harassment and discharge because of plaintiff's status as a homosexual did not amount to an intrusion, observation or interference with the making of intimate personal decisions or the conduct of personal activities of a the type protected by the state constitution. *Id.*

C. **Bringing Alleged Invasion of Privacy in the Course of Employment into the Context of Employment Law**

The quoted extract from *Leibert*, supra, highlights one factor in this case. Arcom did not **directly** infringe on Gonzalez's privacy rights. What is alleged is that Arcom **attempted to infringe**, i.e. "Defendants insisted Plaintiff terminate said relationship." [CT 3, ¶ 7] But "Plaintiff ...refus[ed] to terminate said relationship." [*Id.*, ¶ 8] Then, Arcom allegedly acted **indirectly** by demoting plaintiff, causing a reduction in salary, unfairly criticizing her work performance, ostracizing her, failing to inform her of meetings and "creating an aura of nonverbal hostility." [*Id.*] Gonzalez was not terminated, but quit the job.

Everything that Arcom allegedly did was a normal incident of employment. Damages allegedly suffered by Gonzalez were damages normally suffered by a demoted employer who quits the job. Because of these facts, because of the lesser strength of "autonomy privacy" that is necessarily subordinated to the interests of the employer and because "privacy rights are best assessed separately and in context," (*Hill*, supra, at 7 Cal.4th 35), it is appropriate to bring an alleged tort of invasion of privacy in the course of employment into the context of employment law.

As shown in point IV below, dealing with constructive termination, the alleged acts of retaliation did **not** create an "adverse working conditions ... so intolerable that any reasonable employee would resign." *Turner*, supra, 7 Cal.4th at 1247.

In addition, the only damages claims are loss of wages and benefits [CT 4, ¶ 10] and personal injury damages by way of emotional distress and expenses for medical care and counseling. [CT 3, ¶ 9;

CT 4, ¶ 11] As shown in point III below, plaintiff was presumptively an at-will employee and not entitled to wages and benefits after quitting her job. As shown in point V below, her claim for personal injury damages is barred by the exclusivity provisions of workers' compensation. *Litvisanos v. Superior Court* (1992) 2 Cal.4th 744.

There is an exception to both preclusion of damages claims by an at-will employee and also the bar against personal injury damages by the exclusivity provisions of workers' compensation: the "public policy" exception that applies when the employer has violated a public policy. As shown in point IV below, the public policy exception is "limited to those claims finding support in an important public policy based on a statutory or constitutional provision." *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 79. "[T]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.***" *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889 (emphasis added).

When only "autonomy privacy" is involved, when the alleged adverse employment actions and damages are all ordinary incidents of employment and when the employee has the quit the job, a claim of "invasion of privacy" should not supersede the requirements of employment law. If the public policy exception would otherwise support a claim, there is a cause of action for invasion of privacy. *Kraslawsky, supra; Pettus v. Cole*(1996) 49 Cal.App.4th 402, 440-443 (right of informational privacy invaded when company psychiatrists disclosed details of employee's confidences to company managers in violation of Civil Code § 56.10 protecting such information from

exposure). When, however, there is no sufficiently specific rule of law for the tethering of a public policy exception and notice to the employer, there can not be a "legally recognized privacy interest" and "the question of law to be decided by the court" must be in favor of the employer. *Hill*, supra, 7 Cal.4th at 40. Otherwise, the "legally amorphous character of a tort [for invasion of privacy] based on social custom and psychological well-being" (*Id.* at 25) will undermine and overthrow the delicate balance of considerations that presently govern employment law.

From this perspective, the court below acted properly and its judgment should be affirmed. Plaintiff's causes of action for breach of contract, constructive wrongful termination and intentional infliction of emotional distress were all defective; she was given leave to amend her causes of action but did not do so. In the absence of any showing that she could save her cause under principles of employment law, and under the facts and circumstances alleged, a bare cause of action for invasion of privacy would have imposed on the employer unforeseeable liability for actions for which there was not and could not have been notice. Employees disappointed in their careers could quit the job, search their memories for some alleged infringement of private life about which they complained, claim "retaliation" and bring an action that would otherwise have been found meritless. Opening the door to such results is unwarranted. The judgment should be affirmed.

III

THE DEMURRER TO THE SECOND CAUSE OF ACTION FOR BREACH OF CONTRACT WAS PROPERLY SUSTAINED BECAUSE PLAINTIFF ALLEGED NOTHING TO OVERCOME THE PRESUMPTION OF AT-WILL EMPLOYMENT.

In her complaint, Gonzalez alleged various sources for her contract of employment, including a letter of hire, written personnel policies, written performance appraisals and verbal promises and commitments. (CT 5, ¶ 14) The only promise actually alleged was the implied covenant of good faith and fair dealing. (*Id.*)

Arcom demurred both for failure to state a cause of action and for uncertainty. (CT 10) In its opening memorandum in support of the demurrers, Arcom cited the at-will provision of Labor Code § 2922 and quoted *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1094 for the principle that, absent a public policy exception, "an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason." (CT 17) With no term of employment, there could not be any claim for wage loss or benefits. See *Mayer v. Multistate Legal Studies, Inc.* (1997) 52 Cal.App.4th 1428, 1433.

Gonzales did not respond to the demurrer, but stated: "Plaintiff respectfully seeks leave of court to amend this cause of action." (CT 25) The demurrer was sustained with leave to amend, but plaintiff did not amend, and the complaint was dismissed.

This case should be contrasted with *Rulon-Miller v. International Business Machines Corp.* (1984) 162 Cal.App.3^d 241, on which plaintiff relied below. (CT 26, 30) In *Rulon-Miller*, plaintiff was terminated after management accused her of dating a man who had been an account manager at IBM, but left to join a competitor, facts similar

to those presented here. See 162 Cal.App.3d at 245-246. The court of appeal affirmed plaintiff's trial court judgment. *Rulon-Miller* was, however, a case entirely different from that presented here.

Rulon-Miller relied on *Seamen's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752 and stated that Labor Code § 2922 had been "considerably altered" by that decision. 162 Cal.App.3d at 247. In *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 688, the court identified a series of cases, including *Rulon-Miller*, that "suffer from ... failures comprehensively to consider the implications of their holdings" and that "relied uncritically on *Cleary* or the dicta in *Tameny* and *Seamen's*." *Seamen's* was later overruled in *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85.

Rulon-Miller was also different from this case in that plaintiff invoked, not the constitutional right to privacy, but "her right to privacy in her personal life [stated in] existing IBM policies." 162 Cal.App.3d at 247. A memorandum promulgated by IBM's famous chairman, Tom Watson, Jr., explicitly restricted IBM's power to take action on the basis of an employee's private life and announced "IBM's first basic belief is respect for the individual, and the essence of this belief is a strict regard for his right to personal policy." *Id.* at 249.

Hence, in *Rulon-Miller*, a *Seamen's* tort for bad faith breach of contract was premised on both law now obsolete and on facts entirely absent here. Gonzalez has not stated any basis for disregarding the at-will provisions of Labor Code § 2922. She was given an opportunity to amend her complaint to state such a cause of action, but failed to do so. The judgment should be affirmed.

IV

THE DEMURRER TO THE THIRD CAUSE OF ACTION WAS PROPERLY SUSTAINED BECAUSE PLAINTIFF DID NOT ALLEGE INTOLERABLE WORKING CONDITIONS OR A BASIS FOR A VIOLATION OF PUBLIC POLICY.

The only alleged acts of Arcom in "retaliation" for the refusal of Gonzalez to terminate her private relationship were demotion, loss of pay, unfair job criticism, ostracism, failing to inform plaintiff of meetings and "nonverbal hostility ... manifested in the body language of those with whom she worked." (CT 3, ¶ 8) Cases have repeatedly held that these alleged acts, separately or in combination, are not sufficiently "intolerable" as to justify an employee in quitting the job. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1246 and 1247, quoted at the end of point II.B, supra. See also cases cited at 7 Cal.4th 1247, n. 4 plus *Gibson v. ARO Corp.* (1995) 32 Cal.App.4th 1628, and *Casenas v. Fujisawa USA, Inc.* (1997) 58 Cal.App.4th 101.

There is an exception to the foregoing rule, based on the "violations of public policy." Indeed, plaintiff attempted to invoke such an exception and titled her third cause of action "Constructive Wrongful Discharge." (CT 5) The "public policy exception," must be supported by "set of requirements" that are not met here. *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889. The court further held (889-890):

"First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than merely serving the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.'⁴"

⁴This court has not articulated any distinction between 'substantial' and 'fundamental' as use in this context; accordingly, we treat them as constituting a single requirement.

Here, a claim of public policy exception fails as to the second, third and fourth requirements set forth in *Stevenson*. The requirements overlap and lead to a single conclusion. The alleged violation of public policy is too amorphous and undefined to support a cause of action.

As to the second requirement, any policy of prohibiting interference with a "personal and private relationship" (Plaintiff's complaint, CT 3, ¶ 7), would serve merely the interests of the individual. It is comparable to the statutory prohibition against fraud and deceit that was found insufficient to support a public policy exception in *Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1186: "A claim of fraud and deceit is essentially a private dispute seeking a monetary remedy, not an action to vindicate a broader public interest." The *Hunter* court also held, in language applicable here:

"Recognition of a fraud cause of action in the context of wrongful termination of employment not only would contravene the logic of *Foley* [*v. Interactive Data Corp.* (1988) 47 Cal.3d 654], but also potentially would cause adverse consequences for industry in general. Fraud is easily pleaded, and in all likelihood it would be a rare wrongful termination complaint that omitted to do so. Much harder, however, is the defense of such claims and their resolution at the summary judgment or demurrer stage of litigation. The resultant costs and inhibition of employment decisionmaking are precisely the sort of consequences we cited in *Foley* in disapproving tort damages for breaches of the implied covenant of good faith and fair dealing." 6 Cal.4th at 1185.

The third *Stevenson* requirement is that "the policy must have been articulated at the time of the discharge." There is a complete absence of such articulation here. This requirement is in keeping with the standard defined in *Sequoia Insurance Co.*, supra, at 13 Cal.App.4th 1480 ("sufficiently describe the type of prohibited conduct to enable an employer to know the fundamental policies..") the admonition in *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090 ("whether the public

policy alleged is sufficiently clear to provide the basis for such a potent remedy") and *Stevenson* itself, *supra*, at 16 Cal.4th 889 ("employers [must] have adequate notice of the conduct that will subject them to tort liability").

The fourth *Stevenson* requirement is that the policy must be "fundamental" and "substantial." Here, there is nothing fundamental or substantial in the way of public policy: it concerns an isolated incident that is not capable of generalization. *Cf.* drug-testing and other matters involving otherwise private bodily functions discussed in part II.B above. Nor has the legislature spoken on these matters as it has in Civil Code § 56.10 (disclosure of medical information) and enforced in *Pettus v. Cole* (1996) 49 Cal.App.4th 402.

There are numerous matters on which the legislature *has* spoken and which would support a cause of action for wrongful discharge in violation of public policy. See, e.g., Labor Code § 432.2 (no use of polygraph as condition of employment), Labor Code § 432.7 (prohibiting use of arrest records in determining employability), Labor Code § 1051 (regulating use of employee fingerprints or photographs), Health & Safety Code §§ 12115, 120980(f) and 121025(f) (banning use of confidential health records concerning HIV or AIDS to determine employability), Civil Code §§ 1785.11(a)(3)(B) and 1786 *et. seq.* (regulating collection of consumer information for employment purposes). In addition, there are privacy laws applicable to all which could support a public policy exception in an employment case, e.g. Penal Code §§ 630 *et. seq.* dealing with wiretapping, eavesdropping and interception of cellular radio telephone and cordless telephone communications.

All of the considerations point to a single conclusion: the "legally amorphous character" of a tort of invasion of privacy is too indefinite to support a cause of action for wrongful discharge or wrongful constructive discharge except where it has crystallized into a clear rule of law stated by either the courts (as in drug-testing) or the legislature. No such clear rule of law having been articulated prior to the time Gonzalez quit her job at Arcom, the trial court properly sustained the demurrer to the third cause of action and the judgment should be affirmed.

V

THE DEMURRER TO THE FOURTH CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS WAS PROPERLY SUSTAINED BECAUSE THE ALLEGED ACTS OF DEFENDANT EMPLOYER WERE WITHIN THE NORMAL SCOPE OF EMPLOYMENT AND WORKERS COMPENSATION PRECLUSIVITY APPLIED.

In *Cole v. Fair Oaks Fire Protection District* (1987) 43 Cal.3d 148, the court considered a fire captain's claims against a fire department and its chief for intentional infliction of emotional distress. Plaintiff alleged that he had been unfairly demoted, that the demotion proceedings were a "kangaroo" court, and that as the result of the demotion he was compelled to perform "humiliating and menial duties." (*Id.* at 152-153.)

The court held that plaintiff's claim was barred by workers' compensation. A supervisor's conduct is inherently intentional. "In order to properly manage its business, every employer must on occasion review, criticize, demote, transfer and discipline employees. Employers are

necessarily aware that their employees ... may consider any such adverse action to be improper and outrageous." *Id.* at p. 160.

In *Litvisanos v. Superior Court* (1992) 2 Cal.4th 744,, 756, the court held that "there is no merit to plaintiff's assertions that merely emotional injuries lie outside the scope of the workers' compensation system."

When, however, the employer's actions result "from an animus that violates the fundamental policy of this state," workers' compensation preclusivity does not apply. *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1100. As shown above, there was no violation of fundamental public policy in this case.

Nor can plaintiff escape preclusivity by alleging "retaliation."

"If characterization of conduct normally occurring in the workplace as unfair or outrageous were sufficient to avoid the exclusive remedy provisions of the Labor Code, the exception would permit the employee to allege a cause of action in every case where he suffered mental disability merely by alleging an ulterior purpose of causing injury." *Cole*, supra, at 43 Cal.3d 160.

Here, Gonzalez's personal injury claims — emotional distress, medical care and counseling — were of a kind suffered by many employees who are separated from employment. She does not and cannot state a cause of action for constructive discharge based on violation of public policy and her cause of action for intentional infliction of emotional distress must likewise fail.

CONCLUSION

Legislative and judicial decisions have established in employment law a delicately balanced structure of permissions and prohibition. That structure should not be dismantled on the strength of allegations of retaliation for an exercise of "personal autonomy." Rather, privacy rights should be integrated into the structure where a clear rule of law provides a definite basis. When, however, as here, no clear rule of law provides adequate notice to an employer of conduct that may result in exposure to tort liability, the balance of the employment law structure must be preserved. The trial court properly found that plaintiff had failed to allege a proper basis for her causes of action. She was given an opportunity to amend, but declined to do so. The action was then properly dismissed. The decision of the trial court should be affirmed.

Respectfully submitted,
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