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# Two California Appellate Decisions Expand the Scope of Tameny Claims Based on Whistleblower Laws

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In the most recent case, the employee, Linda Ferrick, worked for Santa Clara University as a senior administrator in the university's real estate department. Ferrick alleged that the director of the department, Nick Travis, engaged in extensive wrongdoing, including embezzling funds, engaging in kickback schemes, and evading taxes (among other misconduct). In August 2011, Ferrick allegedly reported Travis' wrongdoing to the university's director of finance, the risk manager, and the budget director.

Two significant decisions on whistleblower protections were recently issued by two districts of the California Court of Appeal. Both courts reversed trial court dismissals of claims for wrongful termination in violation of public policy.

***Ferrick v. Santa Clara University***, No. H040252 (December 1, 2014): In the most recent case, the employee, Linda Ferrick, worked for Santa Clara University as a senior administrator in the university's real estate department. Ferrick alleged that the director of the department, Nick Travis, engaged in extensive wrongdoing, including embezzling funds, engaging in kickback schemes, and evading taxes (among other misconduct). In August 2011, Ferrick allegedly reported Travis' wrongdoing to the university's director of finance, the risk manager, and the budget director. With regard to the allegation that Travis engaged in a kickback scheme, she alleged that a private landlord was paying Travis a three percent fee for placing tenants in the landlord's properties. The university conducted an investigation and, in October 2011, discharged Ferrick from employment for "questionable finance practices." Ferrick sued the university asserting that she was wrongfully discharged in violation of the public policy reflected in California Labor Code section 1102.5(b), which prohibits an employer from retaliating against an employee for reporting criminal or unlawful activity.

The trial court dismissed the case on the basis that Ferrick's allegations as to Travis' conduct involved injury only to the financial interests of a private university and "not the public at large." Ferrick appealed.

The Court of Appeal agreed with the trial court that Ferrick did not have factual support for many of her allegations. However, the Court of Appeal held that with regard to the allegations of kickbacks, Ferrick had a "reasonable basis to suspect commercial bribery and disclosed her 'reasonably based suspicions'" to the university's budget director. The appellate court noted that this alleged misconduct not only affected the university's private interest, but also "implicated the public policy embodied in [Labor Code] section 1102.5." Thus, the court concluded that Ferrick's complaint "does state a cause of action for wrongful termination in violation of public policy on a very narrow basis."

***Diego v. Pilgrim United Church of Christ***, No. D063734 (November 21, 2014): Cecilia Diego worked at the preschool for Pilgrim United Church of Christ since 2002 and eventually became the assistant director. In 2011, a Pilgrim United employee anonymously complained to the childcare licensing division of the California Department of Social Services about a foul odor in one of the classrooms and an inadequate amount of sand beneath the playground equipment. The state licensing division conducted an unannounced inspection of the school but found no violations. According to Diego, the preschool director suspected that she had filed the complaint. Several days later, the preschool discharged Diego from employment for insubordination when she declined to attend a meeting that was scheduled during her vacation. Diego sued Pilgrim United for wrongful termination in violation of public policy.

Pilgrim United argued that former California Labor Code section 1102.5(b)—in effect at the time of Diego's discharge—only protects employees who actually disclose a violation of a state regulation to a government agency. Pilgrim United argued that Diego was not "a protected employee" since she did not file the complaint. (Labor Code section 1102.5 was amended as of January 1, 2014, to prohibit employers from retaliating against employees based on the employer's belief that the employee disclosed a violation to a government agency.) The trial court dismissed the case and Diego appealed.

The California Court of Appeal disagreed with the trial court and held that the public policy behind former section 1102.5(b) was not limited to employees who actually reported violations, but also encompassed employees that the employer suspected of reporting such violations. The court noted that section 1102.5(b) was intended to "encourage employees to report suspected violations of law" and to exclude perceived whistleblowers from the protections of the statute would "discourage employees from reporting."

**Practical Impact**

California courts of appeal are showing reluctance to confirm dismissal or summary judgment on particular claims for wrongful termination in violation of public policy (*Tameny* claims) when the public policy at issue concerns a whistleblower statute. These two cases found the public policy behind the whistleblower statute should be broadly construed to protect employees who were not actually protected by the express terms of the statute.

The *Diego* court allowed an employee who never blew the whistle to pursue a *Tameny* claim even though the former version of 1102.5 only protected actual whistleblowers from adverse action. The court said the public policy behind the former statute provided protection to employees whom the employer believed had blown the whistle. Similarly, the *Ferrick* court allowed an employee to pursue a *Tameny* claim even though the employee only reported alleged wrongdoing internally to his direct supervisors. The former version of 1102.5 did not protect employees who only reported internally.

These cases should serve as a warning to California employers. When it comes to *Tameny* claims based on whistleblower laws, some California courts are not stopping at the express language of the statute. Instead, they are looking to the public policy behind the law and extending even greater protection to employees. The California legislature also has expanded whistleblower protection. It amended Labor Code section 1102.5 effective January 1, 2014, to protect perceived whistleblowers from adverse action. It also protects employees who blow the whistle *internally* to supervisors or persons who have the authority to investigate or correct the reported violation.

With California courts broadly construing the public policy behind whistleblower laws and the legislature expanding the scope of these laws, employers should take immediate action by training supervisors and human resources personnel on the expansion of the law.

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TOPICS

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