Author: David Jung
Source: Labor Lawyer
Citation: 5 Lab. Law. 667 (1989).
Title: Life After Foley: The Bottom Line

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Life After Foley: The Bottom Line

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In Foley v. Interactive Data Corporation, the California Supreme Court rewrote the law of wrongful discharge by limiting the kinds of damages employees can recover when their employers, acting in bad faith, fire them. Refusing to follow a line of authority that had developed in the courts of appeal, the supreme court held that while an employee who is fired in bad faith may sue his employer for breach of the covenant of good faith and fair dealing, the employee's suit sounds in contract, not tort. Accordingly, tort damages—that is, punitive damages and, probably, emotional distress damages—may not be recovered.

Because Foley's main significance is in changing the rules of...
damages that will apply to wrongful discharge cases, its impact ultimately will turn on the bottom line: How much of a difference, in dollars, will the switch from tort to contract make? To appraise the difference, we return to the data we examined in an earlier study, *The Facts of Wrongful Discharge.* 4

**The Facts of Wrongful Discharge**

In *The Facts of Wrongful Discharge,* we described the results of a study of 223 California wrongful discharge cases decided between January 1979 and May 1987. In that study, we concluded that selective reports of landmark verdicts, haphazardly reported surveys, and anecdotal evidence had combined to present a misleading picture of wrongful discharge litigation. While certain types of wrongful discharge cases indeed presented an alarming risk of liability, in ordinary cases the risk was also ordinary. Further, by avoiding retaliation against employees who exercise their statutory rights, and by regularizing the personnel process to minimize arbitrariness and bad faith, employers could bring their liability exposure within acceptable limits.

Since the publication of *The Facts of Wrongful Discharge,* the database has grown to include all cases reported in *Jury Verdicts Weekly* between January 1979 and December 1988, as well as all the published California wrongful discharge opinions for the same period, for a total of 326 cases. These data provide a sound basis for an appraisal of *Foley*'s effects.

**Before Foley: A Baseline**

Wrongful discharge has always been newsworthy. Million dollar verdicts have made headlines, as have studies reporting average verdicts of $500,000 or $600,000 or more. 5 There can be little doubt that this publicity had an impact, even on the California Supreme Court, which noted in *Foley* that "the cost of lawsuits that respond

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Table One—Total Awards in California Wrongful Discharge Cases 1979–88

<table>
<thead>
<tr>
<th></th>
<th>Average Award</th>
<th>Median Award</th>
<th>Expected Award</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Wrongful Discharge Cases</td>
<td>$452,570</td>
<td>$133,700</td>
<td>$317,686</td>
</tr>
<tr>
<td>Retaliation</td>
<td>579,974</td>
<td>215,000</td>
<td>434,980</td>
</tr>
<tr>
<td>Breach of Contract</td>
<td>193,898</td>
<td>100,000</td>
<td>109,594</td>
</tr>
<tr>
<td>Bad Faith</td>
<td>426,929</td>
<td>150,000</td>
<td>333,304</td>
</tr>
</tbody>
</table>

1 The median award is, simply, the middle award: half of the jury awards in the sample are larger than the median, half are smaller.

2 The expected award is an average of the awards in all of the cases in the sample, including defense verdicts.

to a discharge, as measured by jury awards and settlements, has \ldots increased geometrically and is beginning to draw concern from the business community."

As Table One shows, however, the extraordinary numbers that were bandied about in the wrongful discharge debate before Foley were misleading. The average award when plaintiffs won indeed exceeded $450,000. But not all plaintiffs won, and even when they did, the landmark verdicts that drove up the average awards were few and far between. A more accurate picture of wrongful discharge awards might have been this: More than half the plaintiffs in ligated wrongful discharge cases lost outright,7 and among those who won, half won less than $135,000.

The reports of astronomically high average awards that abounded before Foley were also misleading because they ignored the fact that the awards in wrongful discharge cases varied widely according to the legal theory underlying the employee's case. Thus, the average award in cases in which the employer's actions violated an important public policy, or were in bad faith, were over twice as large as the average award when the discharge was simply a breach of a promise not to fire without cause.

The difference between the awards in retaliation and bad faith cases, on the one hand, and contract cases on the other can be explained very simply. Punitive damages cannot be recovered in contract cases; neither as a rule, can damages for emotional distress. As Table Two shows, if punitive damage awards were eliminated, the average award in wrongful discharge cases would have dropped by over half, from $579,974 in retaliation cases, for example, to

6. Foley, 47 Cal. 3d at 696 n.33, 254 Cal. Rptr. at 237 n.33 (1988) (quoting Gould, supra note 5 at 405-06).

### Table Two—Compensatory and Punitive Damage Awards by Cause of Action

<table>
<thead>
<tr>
<th></th>
<th>Average Award</th>
<th>Median Award</th>
<th>Expected Award</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Compensatory Damage Awards</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>All Cases</td>
<td>$236,376</td>
<td>$100,000</td>
<td>$165,926</td>
</tr>
<tr>
<td>Retaliation</td>
<td>271,090</td>
<td>103,900</td>
<td>203,317</td>
</tr>
<tr>
<td>Breach of Contract</td>
<td>193,888</td>
<td>100,000</td>
<td>109,594</td>
</tr>
<tr>
<td>Bad Faith</td>
<td>252,859</td>
<td>100,000</td>
<td>197,407</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Average Award</th>
<th>Median Award</th>
<th>Expected Award</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Punitive Damage Awards</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>All Cases</td>
<td>$476,589</td>
<td>$111,500</td>
<td>$151,759</td>
</tr>
<tr>
<td>Retaliation</td>
<td>641,527</td>
<td>272,860</td>
<td>231,662</td>
</tr>
<tr>
<td>Breach of Contract</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Bad Faith</td>
<td>407,691</td>
<td>100,000</td>
<td>135,897</td>
</tr>
</tbody>
</table>

$271,090. At the same time, the difference in compensatory damage awards should not be underestimated: average compensatory damage awards in retaliation and bad faith cases were about 50 percent greater than those in breach of contract cases. Because the chief effect of the decision in *Foley* is to limit plaintiffs in bad faith cases to contract damages, these figures are critical in understanding *Foley*'s impact.

### Bad Faith After *Foley*: From Tort to Contract

Usually, when a party to a contract breaches, he is liable for the economic losses that were foreseeable when the contract was formed, and that is all. Even if the breach is malicious, even if it causes the other party to the contract great inconvenience and worry, contract damages are limited to economic losses, lest too great a burden be placed on the world of commerce, where, after all, breach of contract is an economic fact of life.

The pre-*Foley* cases that imposed tort damages for deliberate, bad faith breach of an employment contract were premised on a belief that employment contracts are not ordinary, commercial contracts. According to those cases, employment contracts were “special”: employees contracted primarily for security, not economic advantage; they had little bargaining power; and a public interest existed in seeing them treated fairly. The *Foley* court rejected that view, finding that employment is primarily a contractual, economic relationship, to which the ordinary rules of contract law apply. If an employer breaches, in good faith or bad, its liability is to be
measured by the rules applicable in contract cases, not by the law of torts.

Eliminating tort damages in bad faith cases will affect the size of wrongful discharge awards drastically just by eliminating punitive damage awards. Until Foley, the average punitive damages award in bad faith cases had been $407,691, and punitive damages were awarded in 43 percent of the cases in which plaintiffs prevailed. If punitive damage awards are eliminated from the sample, the average award in bad faith cases drops by 40 percent, from $426,929 to $252,859.

The opinion in Foley, however, did more than eliminate punitive damages awards. It also changed the rules that apply to compensatory damages, primarily by eliminating, or at least apparently eliminating, damages for emotional distress. It is difficult to measure the effect of eliminating emotional distress damages precisely, because jury verdicts in wrongful discharge cases are usually reported as lump sums, without distinguishing between damages for economic loss and emotional distress damages. A rough estimate can be garnered, however, from a number of sources. First, there are cases in the sample in which the employee prevailed only on a breach of contract theory. Because Foley limits the damages in wrongful discharge cases (other than retaliation cases) to contract damages, the awards in these routine breach of employment contract cases would provide a good picture of future wrongful discharge verdicts, if there were enough of them.

Unfortunately, there have been very few of these routine breach of employment contract cases, and, therefore, it is risky to generalize from them alone. Jury verdict reports do, however, sometimes describe what portion of the verdict was attributable to economic losses, and reports of jury verdicts in Jury Verdicts Weekly generally list the plaintiff's claimed economic losses, even when it is not clear whether those losses are reflected in the final award. Table Three, taking all these data together, makes a fair estimate of what jury awards in nonretaliation cases will look like after Foley.

According to these data, while Foley will substantially reduce the average compensatory damage award in nonretaliation, wrongful discharge cases, significant amounts of money will still be at stake. Currently, emotional distress damages account for between a quarter and a third of the total compensatory damages, on the average; in some cases, emotional distress awards account for as much as 60 percent to 80 percent of the award. Thus, one would expect

8. See supra note 3.
Table Three—Bad Faith Cases Before and After Foley

<table>
<thead>
<tr>
<th></th>
<th>Before Foley</th>
<th>After Foley</th>
<th>After Foley</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$407,691</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Punitive Damages</td>
<td>100,000</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Average Award:</td>
<td>$252,859</td>
<td>$252,859</td>
<td>$190,000</td>
</tr>
<tr>
<td>Median Award:</td>
<td>100,000</td>
<td>100,000</td>
<td>120,000</td>
</tr>
<tr>
<td>Compensatory Damages</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Average Award:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Median Award:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Damages</td>
<td>$429,929</td>
<td>$252,859</td>
<td>$190,000</td>
</tr>
<tr>
<td>Average Award:</td>
<td>150,000</td>
<td>100,000</td>
<td>120,000</td>
</tr>
<tr>
<td>Median Award:</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

1 The figures in this column assume that the only change made by Foley is the elimination of punitive damages, and that in a future case, the court will allow recovery of emotional distress damages for breach of an employment contract.

2 The figures in this column assume that Foley has eliminated both punitive and emotional distress damages. These figures are not precise; rather, they are an extrapolation from data from a number of different sources.

the elimination of emotional distress damages to reduce the average award by approximately 25 to 33 percent.9

Oddly, however, the data seem to suggest that the median award will not be greatly affected by Foley; in fact, it may increase. Thus, Table Two shows that the median award for bad faith cases and contract cases before Foley was the same, $100,000. And, a review of the cases where it is possible to separate the economic and non-economic losses suggests that the median economic loss in bad faith cases over the last two years has been around $125,000.

These figures, of course, are not definitive; the number of pure contract cases before Foley was very small, and, most likely, economic losses are reported separately only in those cases in which they are high. Nonetheless, the data are suggestive: The elimination of emotional distress damages will lower the average award significantly, because, like the elimination of punitive damage awards, its most obvious effect will be to eliminate the occasional landmark verdict.10 At the same time, the median award may actually increase,

9. Thus, in Table Two, where the compensatory awards in bad faith cases and contracts cases are juxtaposed, compensatory damages in contract cases average 23 percent lower than in bad faith cases. In verdicts where economic losses and emotional distress damages have been reported separately, emotional distress awards in bad faith cases have accounted for 36 percent of the damages, on the average.

10. The elimination of the occasional, very high emotional distress award will affect the average more than the median because these landmark verdicts have tended to occur in cases where the economic losses are already high. Thus, removing the emotional distress award lowers the average award, while leaving the median award unaffected. For example, the highest emotional distress award over the last two years
because only cases where a substantial economic loss has been sustained will be filed.

Thus, while the reduction in the average wrongful discharge verdict will no doubt be impressive, the risk of liability for employers may still be significant. For example, in bad faith cases where it was possible to determine the economic damages claimed and awarded, plaintiffs in wrongful discharge cases claimed an average of $334,724 in economic losses, and were awarded, on the average, $174,321.

**Defusing Wrongful Discharge**

Studies of the much-discussed litigation "explosion" have established that some types of litigation are more "explosive" than others. Explosive cases have the potential to generate occasional extraordinarily high verdicts that send the average verdict soaring, attract publicity, and, probably, generate more suits of the same kind. Until *Foley*, bad faith discharge cases were explosive. While most winning plaintiffs in bad faith cases recovered moderate awards, the availability of punitive damages and, to a lesser extent, emotional distress damages, made it possible for juries occasionally to express their extreme disapproval of an employer's actions with a landmark verdict.

By restricting plaintiffs to contract damages, *Foley* has defused bad faith. Because punitive damages and emotional distress damages are not available, contract damages lack the explosive potential of tort awards. Thus, while 20 percent of all bad faith cases resolved in the plaintiff's favor during the nine years before *Foley* resulted in awards over $300,000, and eight awards exceeded $1 million, only two verdicts in breach of contract cases during the same period exceeded $300,000.

So, what is to be expected from this kinder and gentler wrongful discharge litigation? First, there will certainly be less of it. Although well-placed observers differ as to whether *Foley* has resulted in an immediate decrease in wrongful discharge filings, it is inevitable that *Foley* will reduce the rate of wrongful discharge litigation sig-

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nificantly. 12 Foley left as many questions unanswered as it addressed, and it will take time and lawsuits to answer those questions. 13 But when the dust settles, Foley may reduce the average award in bad faith cases by 65 percent or more, and a reduction of that size undoubtedly will reduce dramatically the number of cases that are brought. 14

Notwithstanding the reduction in the number of cases, plaintiffs' attorneys will no doubt find ways to make the best of Foley. Following Justice Broussard's broad hint, they will argue that contract damages in the context of employment should include emotional distress damages. Further, most bad faith cases involve some kind of employer wrongdoing that is arguably itself tortious, allowing an independent tort to be pleaded in addition to the wrongful discharge cause of action, and resurrecting the hope of punitive and emotional distress damages. 15

The most likely response to Foley, however, will be a change in the kind of plaintiffs whose cases are brought. When emotional distress damages and punitive damages were in the picture, what made a good wrongful discharge case was the employer's behavior. If liability could be established, and if the conduct was egregious, the

12. Suits based on retaliation will, of course, continue; they may even increase because of the supreme court's reaffirmation of its commitment to that cause of action. But retaliation cases are a small part of wrongful discharge litigation. In this sample, they constituted only 14 percent of the cases. Bad faith cases, by contrast, made up 44 percent of the sample.
13. One of those questions has since been answered. In Newman v. Emerson Radio Corp., Cal. 3d ___, 258 Cal. Rptr. 522, 772 P.2d 1059 (1989), the court held that the decision in Foley is fully retroactive to cases that had not become final on January 30, 1989, the day Foley became final.
14. The Rand study mentioned earlier clearly confirms that eliminating tort damages in bad faith cases will markedly reduce the frequency of litigation. By comparing the rate of litigation in jurisdictions where no exceptions are recognized to the rule of at-will employment to the rate in jurisdictions where one or more exceptions are recognized, the authors of the Rand study come to a remarkable conclusion: Litigation rates in jurisdictions that recognize only implied contract causes of action are only marginally higher than litigation rates in jurisdictions that recognize no exceptions to the at-will doctrine at all. Dertouzos, et al., supra note 5 at 17. In at-will jurisdictions, the Rand study reported 1.3 court trials per 1 million employees. In jurisdictions recognizing only implied contract causes of action, they reported 2.2 court trials per 1 million employees. In jurisdictions recognizing a cause of action in tort for breach of the implied covenant of good faith and fair dealing, they reported 8.8 trials per 1 million employees. Thus, according to these figures, eliminating tort damages in bad faith cases may reduce the rate of litigation by as much as 75 percent.
15. Indeed, even before Foley, pleading an independent cause of action in tort was a common practice in wrongful discharge cases; in the sample, an independent tort cause of action was alleged in 70 percent of the bad faith and breach of contract cases. The most popular independent torts were intentional infliction of emotional distress and negligent infliction of emotional distress, which together were alleged as independent torts in 45 percent of the cases. Misrepresentation and defamation were well represented (11 percent), and intentional interference with contract, invasion of privacy, breach of fiduciary relationship, and even conversion also made appearances.
damages could be trusted to the jury's generosity. *Foley* changes the emphasis from the employer's behavior to the employee's loss, by creating an incentive to accept only cases in which evidence of substantial economic loss can be developed.\(^{16}\)

If it were true, as some have argued, that wrongful discharge suits have always primarily benefitted displaced executives and middle managers, *Foley*'s emphasis on economic losses would mean a change in strategy, and little more. With the right plaintiff—one with a relatively high salary, no equivalent employment available as a substitute, and substantial savings to support him through the litigation\(^{17}\)—*Foley* simply requires that proving economic losses be given a higher priority in the development of the case. With the benefit of expert economists, proof of substantial economic losses is not complicated.

Wrongful discharge litigation, however, has not been just a golden parachute for middle managers. In both our sample and in the Rand study, only half of the plaintiffs were middle managers or executives. The protection afforded to employees by the wrongful discharge cause of action reached every strata of the workplace, from salesmen and secretaries to day-care workers.

Moreover, wrongful discharge litigation has conferred important benefits on ordinary workers beyond simply the chance to sue their employers. There can be little doubt that the threat of liability for wrongful discharge has caused employers to adopt procedures to make employee terminations more fair and less arbitrary. Fear of liability is a powerful motivator, and that fear led employers, frequently on the advice of counsel, to devise elaborate personnel systems to reduce the chance of illegal action and, hence, the risk of liability.

Perhaps the most important question to ask about *Foley* is, will employers eliminate the personnel systems they had adopted under the pressure of wrongful discharge litigation, now that the pressure is off? The answer may be yes. By suggesting that liability for wrong-

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16. The elimination of emotional distress damages disproportionately affects employees whose economic losses are small. While the largest emotional distress awards have tended to occur in cases where the economic loss is also large, in smaller cases, emotional distress awards account for a much greater proportion of the award. Thus, in cases where the total award is less than the median award, emotional distress damages accounted for 42 percent of the award, on average. For cases above the median, the emotional distress award accounted for, on the average, 25 percent of the total award.

17. These characteristics are determined by the requirement that a discharged employee accept an equivalent job if one is available in order to mitigate his losses, and that whatever employment he actually accepts will reduce the damages he can recover. Thus, to maximize the damage award, the plaintiff must be able to show that no equivalent employment was available, and must be financially well off enough to avoid taking any less suitable job.
ful discharge, other than retaliatory discharge, is simply a matter of contract law, *Foley* effectively encourages employers to forgo the expense of personnel procedures and simply inform its employees that they are employed at-will, forestalling the obligation to fire only for cause.

There are countervailing pressures, however. For one, the *Foley* opinion is extremely vague in describing how the obligation to fire only with cause comes about. The opinion's only guidance is to look to the "totality of the circumstances," and if the totality of the circumstances are to be the guide, disclaimers and the like may not be effective in circumventing the obligation. More important, retaliation will still be actionable in tort, and a personnel system that avoids the risk of liability for retaliatory discharge would probably justify its cost. Finally, the cases that have resulted in landmark verdicts have been cases where the employer's actions are, in a word, malicious: they have involved employers who have retaliated against their employees in an unconscionable fashion, or who have fired people out of spite or pretextually, or who have fired people to rob them of commissions or pension benefits. Where this sort of wrongdoing is present, juries will find a way to sanction it. Thus, in the long run legal incentives for sound personnel procedures continue to exist, though no thanks to *Foley*.

**Conclusion**

The law of wrongful discharge developed in large part because of a felt need to limit employers' abusive exercise of the power to fire at-will. In those terms, *Foley* amounts to a decision that such abuses can be curbed by allowing employees to contract for job security and enforcing those contracts. In theory, the knowledge that liability for the worker's economic losses will follow on a breach, combined with the employer's self-interest in retaining good employees, will limit the employer's power without the devastating effect unpredictable tort damage awards have on commercial stability.

Unfortunately, this conclusion rests on a number of misconceptions about wrongful discharge litigation. Perhaps the most troubling of these is the assumption that "bad faith" or abusive discharges are rare, because rational employers do not undercut their own eco-

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18. See, e.g., *McLain v. Great American Ins.*, 208 Cal. App. 3d 1476, 256 Cal. Rptr. 863 (1989) (Although the application form the employee filled out expressly stated that he could be terminated with or without cause, the employer's actions after hiring the employee modified the employment contract, giving rise to an implied promise not to fire without cause.).

nomic interests by maliciously discharging good employees.20 According to the data, however, bad faith is in fact fairly common: well over half of the time, plaintiffs who prove they were fired without cause also successfully establish bad faith on the employer's part.

How is this to be explained? Prejudiced juries?21 Irrational, or at least shortsighted, employers?22 The explanation may lie in another common, but incorrect, assumption about wrongful discharge, the assumption that the usual wrongful discharge plaintiff is a highly paid executive or middle manager who deals more or less directly with his employer, and whose job performance directly impacts the employer's financial well-being. In fact, about half of all wrongful discharge plaintiffs are not managers fired by their employers, they are workers fired by their managers. Those managers may act to further the employer's economic well-being, but they may also act out of narrow self-interest, spite or personal animosity.

Thus, arbitrariness and bad faith creep into personnel decisions because the economic consequences of losing a good employee fall on the employer, not on the particular supervisor who makes the decision to fire. Employment is not a simple economic arrangement between two parties, in which economic self-interest will ordinarily protect the interests of each. It is, rather, a relationship between an individual with power in an organization, and nothing at stake—the supervisor—and an individual without power, and everything at stake—the employee. In this context, simple economic rationality will not deter bad faith.

Even acknowledging that the adverse economic consequences of bad faith are an inadequate deterrent, however, tort liability might still be a bad idea. Given that mistakes in personnel matters are inevitable, the risk of tort liability might impose an intolerable cost on employers, if tort judgments are as unpredictable and outrageous as the Foley court believed them to be. But again, the data suggest that tort liability for wrongful discharge is neither outrageous nor unpredictable. In most cases, liability is moderate and predictable.23

20. See Foley, 47 Cal. 3d at 693, 254 Cal. Rptr. at 234.
22. Foley, 47 Cal. 3d at 707, 254 Cal. Rptr. at 245 (Broussard, J., dissenting).
23. As evidence for the unpredictability of wrongful discharge litigation, the Foley court refers to an article in which it is claimed that awards in California wrongful discharge suits "actually exceeded settlement demands by ... 187 percent." Foley, 47 Cal. 3d at 696 n.33, 254 Cal. Rptr. at 237 n.33 (quoting Gould, supra note 5 at 405-06). It is not clear why it should be surprising that awards should exceed demands; indeed, one would expect demands to be less than awards, since a settlement avoids both the risk and the cost of a trial.

Indeed, the Rand study suggests that settlement practices in wrongful discharge cases are actually quite rational. Settlement demands "appear to be roughly consistent
Wrongful discharge litigation has always labored under a stereotype engendered by the publicity attendant on a handful of landmark verdicts. The stereotypical plaintiff is a highly paid executive or manager; the stereotypical issue, whether cause existed for the discharge; the stereotypical result, an unpredictable, high-stakes lottery. The stereotype is not entirely unfounded. Yet for every case that fits the stereotype, another involves an ordinary worker, injured by arbitrary and malicious acts, whose recovery is moderate and predictable. Unfortunately, the decision in Foley seems more responsive to the stereotype of wrongful discharge than to the facts of wrongful discharge.