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# CALIFORNIA

## EMPLOYMENT LAW LETTER

Part of your California Employment Law Service

Vol. 24, No. 18  
December 22, 2014

### WRONGFUL TERMINATION

## California court advances university whistleblower's termination claim

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*A private university terminated one of its administrators following a departmental audit. The administrator responded with a lawsuit claiming that she was fired for reporting her supervisor's real estate "kick-back" scheme to university management. Even though the alleged scheme primarily affected the university and not the general public, the California Court of Appeal held that the allegations implicated a fundamental public interest in encouraging employees to report illegal workplace practices. Therefore, the administrator could maintain her lawsuit for wrongful termination in violation of public policy.*

### **Accusations fly after administrator terminated**

Linda Ferrick worked as a senior administrator in Santa Clara University's real estate department. Nick Travis, the department's director and Ferrick's supervisor, asked Ferrick's son-in-law, a university construction supervisor, to procure a truck for the department. When processing an invoice for the truck, Ferrick allegedly made an error that resulted in an overpayment of \$6,000 to her son-in-law, which she promptly corrected. Shortly afterward, the university conducted a

departmental audit, placed Ferrick and her son-in-law on paid administrative leave, and ultimately terminated Ferrick for "questionable finance practices," characterized by Travis as fraud and embezzlement.

Ferrick accused Travis of extensive wrongdoing and sued the university for wrongful termination in violation of public policy. Two months before her termination, she allegedly reported her concerns about Travis to the university's budget director. She labeled Travis an unprofessional "playboy" who often sent inappropriate e-mails, arrived at work late or failed to show up, took long lunches, and drank alcohol at work. She also claimed to have witnessed and reported numerous instances of his illegal or improper schemes to the detriment of university students, parents, taxpayers, regulators, bond issuers, local businesses, and community members. In particular, she accused him of taking kickbacks from a landlord who owned commercial property near campus by placing university departments in private buildings so he could earn a three percent "fee" from the landlord.

The trial court dismissed Ferrick's complaint on the grounds that she failed to show the university terminated her in violation of a fundamental public policy because the alleged conduct she

reported injured only the private university, not the public. The court of appeal reversed the decision.

### ***Exception to at-will employment***

California employment generally can be terminated at will unless the parties agree otherwise. However, when an employee is terminated in violation of fundamental principles of public policy, she may sue the employer for damages. To prevail on a claim for wrongful termination in violation of public policy, otherwise known as a *Tameny* claim (named after the case *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167), the employee must prove that the termination was substantially motivated by the violation of a public policy that:

- (1) Is supported by constitutional or statutory provisions or administrative regulations;
- (2) Inures to the public's benefit rather than serving merely individual interests;
- (3) Was articulated at the time of the discharge; and
- (4) Is fundamental and substantial.

### ***Ferrick narrowly avoids dismissal of lawsuit***

California has a broad public policy interest in encouraging workplace whistleblowers to report unlawful acts without fear of retaliation. To that end, the California Labor Code prohibits an employer from retaliating against an employee for disclosing information to a government or law enforcement agency or to a person with authority over the employee when she reasonably believes the information evidences unlawful activity. The employee need not prove an actual violation of law; it is sufficient if the employer fires her for reporting reasonably based suspicions of illegal activity.

To be protected, an employee must convey the information in a form that would reasonably alert the employer of the nature of the problem and the need to take corrective action. The employee must be able to demonstrate a causal connection between the reporting and the termination or other adverse treatment. Violations of internal practices that affect only the employer or employee and not the general public will not give rise to liability.

Ferrick alleged that she was terminated because she complained to the university about Travis' kickback scheme, which she reasonably believed violated California's criminal laws against commercial bribery. The university retorted that the alleged misconduct affected only its private interests and did not implicate a policy protecting the public.

The court of appeal ruled for Ferrick, finding she could succeed on her *Tameny* claim because there is a fundamental public interest in keeping the workplace free of illegal practices. Specifically, she was able to articulate a "reasonably based suspicion" that Travis' acceptance of the three percent fee for every tenant placed in the commercial landlord's building amounted to potential acts of commercial bribery in violation of the Penal Code.

By contrast, Ferrick also sought to ground her *Tameny* claims in alleged violations of other public policies, including claims that Travis' alleged misconduct potentially contravened laws against embezzlement and tax evasion and a provision of the Motor Vehicle Code. The court rejected those claims because she could not demonstrate that she had a "reasonably based suspicion" that the laws had been violated. *Ferrick v. Santa Clara University*

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(California Court of Appeal, 6th Appellate District, 12/1/14).

### ***Bottom line***

As a best practice, you should evaluate potential exposure to legal claims before terminating or taking other adverse action against an employee. We call this process “looking for red flags.” Inquiring about potential “whistleblower” claims is an important part of this process because it can uncover whether proceeding with a termination decision might expose you to a claim for wrongful termination in violation of public policy. Asking questions before making the termination decision and ensuring that personnel files contain documentation establishing a legitimate nonretaliatory basis for the decision help minimize the risk of exposure to legal claims.

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