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REPORT

JURY VERDICTS IN WRONGFUL TERMINATION CASES

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Jury Verdicts in Wrongful Termination Cases

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JURY VERDICTS IN WRONGFUL TERMINATION CASES

by David J. Jung¹

I. Introduction

At the request of the Senate Office of Research, the Public Law Research Institute has conducted a study of jury verdicts in California wrongful termination cases from 1992 to 1996. Wrongful termination cases are lawsuits in which an employee seeks damages from his employer for firing him without cause. Recently, concerns about the economic burden wrongful termination suits impose on California employers have led to proposals for legislative reform. To evaluate the need for and possible effects of these reforms, this study reviews a sample of 639 jury verdicts in California wrongful termination cases over the last five years. For purposes of comparison, the study also examines 396 verdicts in Texas wrongful termination cases.

Wrongful termination lawsuits first became controversial in the late 1980's, because a series of California court of appeals decisions had permitted some employees to recover damages for emotional distress and punitive damages from employers who fired them in bad faith. Verdicts in some wrongful termination cases reached into the millions of dollars; credible estimates of average verdicts ranged from \$452,570² to \$646,855.³

These developments sparked a number of studies, including one by the RAND Institute for Civil Justice, focusing on the costs of these new liability rules for employers.⁴ The RAND study suggested that the direct legal costs of wrongful termination were quite small, particularly per employee. The indirect costs of changing personnel and employment practices, however, could be significant, and the RAND study argued that the effects of these costs could be seen in the economies of states with liberal rules. While the RAND study acknowledged that the kind of job security the developing law of wrongful termination provided generated benefits as well as costs, the costs of wrongful termination attracted the public's and the media's attention.

The indirect costs the RAND study identified had largely to do with personnel and employment practices employers might adopt under the perceived threat of large compensatory and punitive damage awards. Shortly after the RAND study was published, however, the California Supreme court changed the ground rules for damages in wrongful termination cases. In *Foley v. Interactive Data Corporation*⁵ the Court reaffirmed the rule of at-will employment in California. That is, employers may fire an



employee for any reason or no reason at all, unless the employer has expressly or implicitly agreed only to fire the employee for cause. If an employer has agreed only to fire for cause, wrongfully terminated employees may recover damages for the economic loss -- lost wages, and the like -- caused by their dismissal. Punitive damages and damages for emotional distress cannot be recovered.

On the other hand, while employers are free to fire at-will employees for any reason or no reason, some "bad" reasons can result in liability. If firing the employee violates a fundamental, public policy, or if the employer negligently or intentionally causes the employee some kind of personal injury, the employer may be liable for damages for emotional distress or punitive damages, in addition to being liable for the employee's economic losses.

Thus, since the RAND study, the ground rules for wrongful termination have changed. The kind of damage awards the RAND study was concerned with are now limited to cases in which the employer violates a fundamental public policy by firing the employee, or commits some independent wrong, like defamation, or assault. Once it became clear that employers would not be liable for punitive damages simply because they lacked good cause to terminate an employee, the controversy over wrongful termination seemed to abate.⁶

Recently, however, the controversy has been renewed. Employers have expressed concern over "surging"⁷ and unpredictable verdicts that create a disincentive to hiring, and Governor Wilson has responded by including wrongful termination in his package of tort reform proposals.⁸ Legislation that would restrict recoveries in wrongful termination cases has been introduced in both the Senate⁹ and the Assembly.¹⁰



II. Methodology

Tdatabases. Searches his study is based on reports of jury verdicts found in Lexis[®]-Nexis[®]'s jury verdicts were run in the LexisCAJURY combines reports[®]-Nexis[®] ALLVER, CAJURY and TXJURY databases. from several local jury reporters, including Jury Verdicts Weekly, Verdictum Juris Press, Inc., O'Brien's Evaluator and Tri-Service. TXJURY combines reports from North Texas Reports and Soele's Trial Reporter. The ALLVER database combines these local jury reports with two national reporters, Jury Verdicts Research, and Confidential Report for Attorneys.

Jury verdict reporters typically rely for their data on reports attorneys file voluntarily when a case is concluded. Because jury verdict reporters rely on self-reporting, they are not comprehensive, and it is always possible that certain categories of cases or cases from certain cities and counties are over represented. Yet, there seems to be a consensus among researchers that local jury verdict reporters are a useful source of information about the civil justice system.¹¹

All cases in which the injury complained of was identified as "wrongful termination" were examined. Cases described as involving "retaliatory discharge," "employment discrimination" and "breach of employment contract" were also examined. Cases involving other adverse, employment decisions, such as failures to hire or promote, were

not included. A complete description of the search terms used can be obtained by contacting the Public Law Research Institute.



III. The Types of Wrongful Termination

Some background information about the law of wrongful termination is necessary in order to understand the study's results. According to the California Labor Code, unless an employee is hired for a specific term, the employee is an "at-will" employee, and can be fired for any reason or no reason at all.¹² He cannot be fired, however, for a bad reason, like discrimination, and he cannot be fired in a way that violates his right to be free from personal injury.

Thus, an employee who wishes to sue for wrongful termination must show either,

- 1) that his employment contract, either expressly or implicitly, included a promise that he would not be fired without cause (*contract cases*); or,
- 2) that his employer fired him for a reason that violates a fundamental policy expressed in California's statutes or constitution (*public policy cases*), including laws against unlawful discrimination (*discrimination cases*), or
- 3) that the employer committed a tort, like defamation, invasion of privacy, or intentional infliction of emotional distress (*independent tort cases*).

Since the decision in *Foley v. Interactive Data Corporation*, damages for emotional distress and punitive damages can only be recovered in public policy cases, discrimination cases and independent tort cases. In contract cases, the employee can only recover compensation for economic losses, like lost wages.

Many federal and state statutes also limit the right of employers to terminate employees. For example, the California Fair Employment and Housing Act, prohibits discrimination in employment on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age.¹³ Generally speaking, actions brought under such a statute are not thought of as part of the common law of wrongful termination, and current proposals to reform wrongful termination law have largely been tailored to avoid affecting them.

There is, however, some overlap between statutory discrimination claims and the law of wrongful termination. As mentioned above, California courts have held that discrimination in employment violates a fundamental public policy. Thus, an employee who has been fired as a result of discrimination actually has two separate grounds for a law suit. He or she can pursue a statutory remedy, under the Fair Employment and Housing Act, and a common law, wrongful termination action.¹⁴

More information is available about the number of discrimination complaints than about wrongful termination lawsuits generally. Employees who wish to sue under the Fair Employment and Housing Act must first file a complaint with the Department of Fair Employment and Housing. If a complaint is not resolved by the Department, the employee is issued a right to sue letter, and can go to court.

The Department compiles statistics on the number of employment cases filed each fiscal year, broken down according to the nature of the act alleged and the basis for the complaint. Looking at the five-year period from 1992 to 1997, complaints alleging unlawful termination of employment filed with the department increased by an average of 7.8% each year, for a total increase of 31.3%.¹⁵

Focusing solely on the last five years may give a misleading picture, however, because between FY 1989 and FY 1990 alone, the number of termination complaints increased by 31.4%. The number jumped again in FY 1991 by 19.4%. Thus, the Department's statistics suggest that so far as discrimination complaints are concerned, the number of complaints alleging an unlawful termination surged sharply at the beginning of the decade, and has increased much more modestly since then.

While the statistics kept by the Department are a useful barometer for changes in the number of discrimination complaints, they are of limited use in assessing the need for reform of wrongful termination law, for several reasons. Obviously, the Department only compiles information on discrimination cases, not on cases alleging a violation of public policy nor on breach of contract cases. Further, even with regard to discrimination cases, the Department's statistics are under inclusive, because wrongful termination lawsuits can be filed without first filing a complaint with the Department. Finally, with respect to complaints filed with the Department, the Department has not routinely reported on how many lawsuits are actually filed after a right to sue letter is issued, or how those lawsuits come out.¹⁶



IV. The Facts of Wrongful Termination, Revisited

A. How many lawsuits?

In a word, no one knows. While there is a widespread perception that employment related litigation in both the state and federal courts has increased, hard data are elusive. While state and federal courts routinely compile statistics on the total number of cases filed, they do not routinely report on specific types of cases like wrongful termination or discrimination.

As a result, most studies of wrongful termination litigation have focused on jury verdicts, rather than on total filings. It is important, however, to understand the limitations of jury verdict reporters as a source of information about the civil justice system. Jury verdicts are only the tip of the litigation iceberg: according to the National Center for the State Courts, of all the civil cases filed, only 3% ever reach a jury.¹⁷ Another 1% are resolved by a judge trial. Thus, something like 96% of all civil cases are resolved by some means short of a full trial.

There are several reasons why so few civil cases reach a jury. Chief among them is that many cases settle. Unfortunately, there is no easily accessible, reliable source of information about these settlements. Jury verdict reporters report settlements in just a handful of cases, typically those that settle right before or during a trial.¹⁸

The lack of information about the actual number of wrongful termination cases filed and

settled, or the number of settlements reached before a suit is even filed, is particularly troubling because employers rest their case for reform in part on arguments that the number of complaints and threatened lawsuits is overwhelming. Conversely, advocates for employees argue that many employees are wrongfully terminated and never challenge the decision. Unfortunately, nothing but anecdotal evidence has been offered to support either of these claims.¹⁹ Given that data about wrongful termination filings or settlements short of litigation are not routinely collected, evidence to confirm or refute these claims is not available.

Thus, some of the information that is critical to the policy debate simply cannot be provided by jury verdict reporters. To assess whether the tort system is accomplishing its goals of compensating injuries and deterring carelessness and wrongdoing, policy-makers would need to know how often people are injured through these forms of unlawful behavior, how many of those people actually seek legal redress, and how the compensation they are awarded relates to their actual injuries. For example, studies of accidental injuries generally,²⁰ and medical malpractice in particular,²¹ suggest that only 5% to 10% of those who have suffered an injury that might lead to a tort claim actually pursue it. Further, these studies show that when injured parties do ultimately recover, they recover much less than the full value of their claim.

In the context of wrongful termination, to know whether lawsuits are burdening employers to no good end, policy makers would need to know how many people are fired each year for reasons that violate their legal rights, how many of those people sue, and whether the courts do a good job of distinguishing between meritorious and frivolous suits. No study of jury verdicts, standing alone, can provide the baseline of information about rates of injuries that is needed to fully evaluate the role of wrongful termination litigation in resolving disputes over lost jobs.

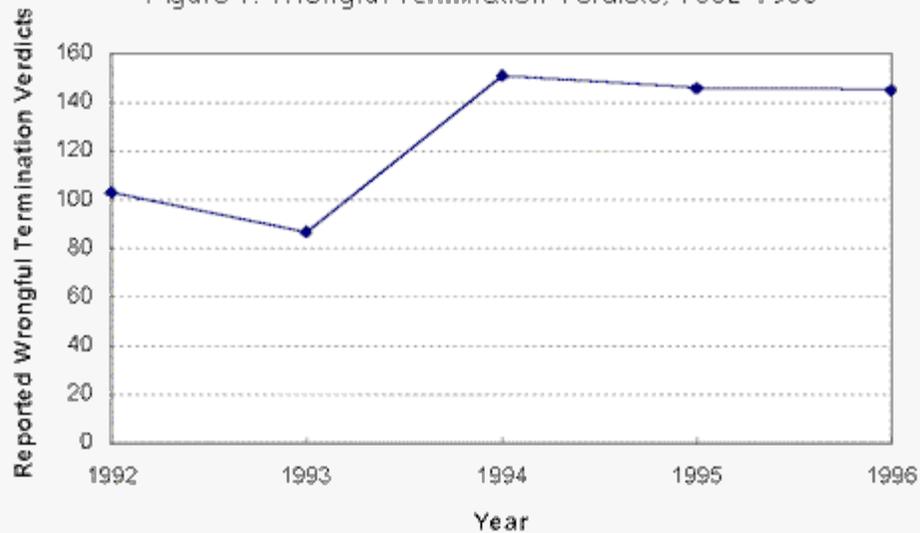
Still, accurate information about jury verdicts is important to the policy debate. Whether juries are out of control has always been a central issue in the debate about reforming wrongful termination law, and rightly so. Even if only a small percentage of cases result in a verdict, those few jury verdicts cast a shadow over conduct outside the courtroom, and the thought of “what a jury might do” powerfully shapes the way employers and employees go about their business.



B. How many verdicts?

Figure One shows how the number of jury verdicts in California wrongful termination cases reported in the Lexis®-Nexis® database changed between 1992 and 1996. As the figure shows, the number of verdicts reported increased by almost 75% between 1993 and 1994. Since then, the number of verdicts has declined only slightly, from a high of 154 reported verdicts in 1994 to 144 reported verdicts in 1996.²² While the number of jury verdicts over a particular period of time is not a reliable indicator of the number of lawsuits that were filed,²³ it is a fair inference that an increase of this magnitude indicates that the number of cases filed also increased.

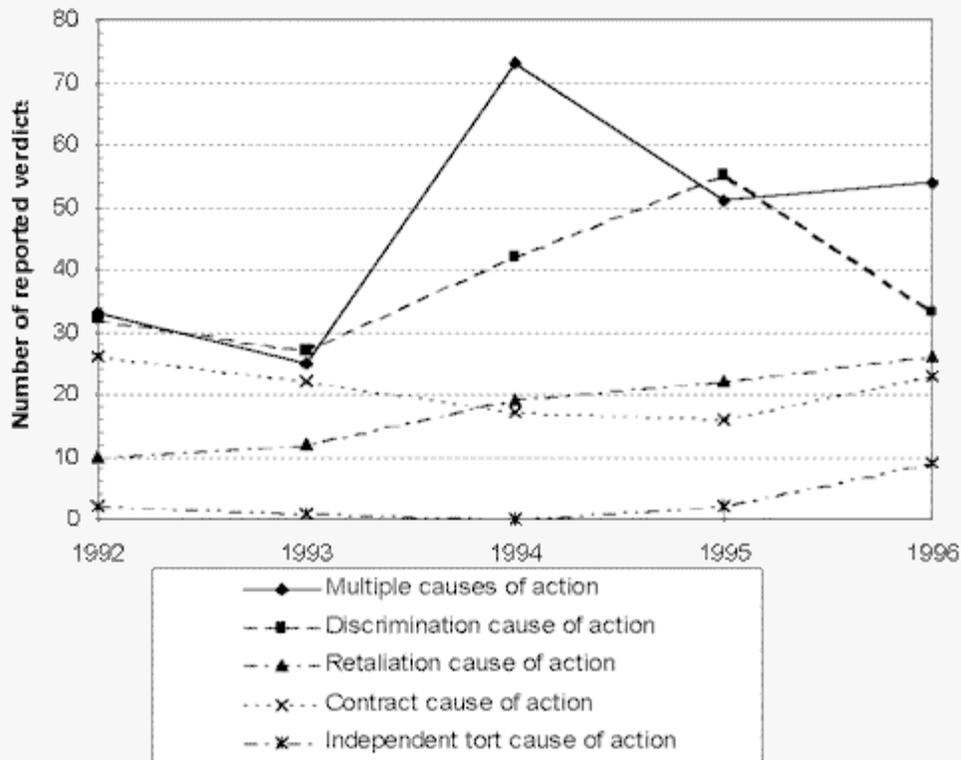
Figure 1: Wrongful Termination Verdicts, 1992-1996



Of course, fluctuations in the number of cases brought over time do not necessarily indicate an increase in litigiousness, because so many other variables affect the number of suits filed. An increase in the absolute number of cases filed might simply indicate that more workers lost their jobs during that period because of a weak economy, rather than an increasingly litigious workforce. For example, according to Bureau of Labor Statistics, unemployment in California crossed the 8% threshold in 1991 for only the sixth time since 1940, and remained at that level through 1994. Based on a random sample of the cases we studied, 35 months pass, on average, between the day an employee is fired and the date of the verdict. This suggests that the increase in cases observed from 1994 to 1996 might be in part a function of an increase in the number of unemployed workers between 1991 and 1993.

What is interesting, however, is that not all types of wrongful termination verdicts increased proportionately between 1993 and 1994. Figure Two shows how the increases were distributed among the various types of wrongful termination cases. The increase in verdicts that began in 1994 was almost entirely attributable to an increase in the number of discrimination cases, and in the number of cases alleging multiple causes of action. Further, 60% of the 1994 cases with multiple causes of action involved allegations of discrimination. In all, the number of reported verdicts involving alleged discrimination more than doubled between 1993 and 1994.²⁴

Figure 2: Type of Case, 1992-1996



C. Who wins?

While the number of verdicts reported each year has fluctuated over the five years studied, the outcomes of wrongful termination cases have been surprisingly predictable. Table One shows the outcomes in reported wrongful termination verdicts between 1992 and 1996. Over this five-year period, both the rate at which plaintiffs won, and the rate at which punitive damages were awarded remained fairly constant. Plaintiffs prevailed at trial between 47% and 57% of the time, and punitive damages were awarded in between 7% and 10% of the cases.

These figures, however, do not take into account that weak cases are often disposed of short of a jury trial. Because the plaintiff must almost always reach the jury to win, at least to establish damages, these early dismissals tend to favor defendants. For example, in two thirds of the wrongful termination cases that have reached the California courts of appeals since 1990, the defendant had won in the lower court before the case was even ready for trial.²⁵ Thus, while jury verdict reporters can provide a useful estimate of how often each side wins in the small number of cases that go to trial, they provide no information about whether employees or employers win in most wrongful termination cases. If anything, reports based on jury verdicts significantly overstate the probability that the employee will win a contested case.



TABLE ONE
Wrongful Termination Verdicts, 1992-1996

	Year				
	1992	1993	1994	1995	1996 ²⁶
Total verdicts ²⁷	103	87	151	146	144
Number of cases in which plaintiff prevailed ²⁸	54 (52.4%)	50 (57.5%)	83 (55%)	82 (56.2%)	67 (46.5%)
Number of punitive damage awards	11	9	15	10	13
Punitive damage awards, as a percentage of all cases.	10.7%	10.3%	9.9%	6.8%	9.1%
Punitive damage awards, as a percentage of jury verdicts in plaintiff's favor. ²⁹	20%	18%	18.1%	12.2%	19.4%

To put these figures in perspective, a recent study of jury verdicts in civil cases generally found that plaintiffs in tort cases in selected California counties won between 45.7% and 73.3% of the time in cases involving financial harm.³⁰ Successful plaintiffs recovered punitive damages in between 11% and 40% of those cases, depending on the county in which they sued.³¹ Judging from this evidence, neither the rate of plaintiffs' success generally nor the rate of recovery of punitive damages is out of line with the experience in other cases involving financial harm.



D. How much?

Average compensatory and punitive damage awards³² in wrongful termination cases have been volatile over the past five years, as Table Two shows.

TABLE TWO
Average and Median Wrongful Termination Verdicts, 1992-1996

	1992	1993	1994	1995	1996
Average compensatory damages	\$615,625	\$473,142	\$359,991	\$321,509	\$475,483
Median compensatory damages	\$270,951	\$210,000	\$250,000	\$152,750	\$233,100
Average punitive damages	\$643,681	\$1,169,944	\$441,966	\$301,500	\$817,122
[Number of awards]	[11]	[9]	[15]	[10]	[13]
Median punitive damages	\$225,000	\$560,000	\$212,500	\$297,500	\$150,058

While these figures suggest that verdicts in wrongful termination cases vary tremendously from year to year, the suggestion may be misleading. In a small sample, average awards can be strongly affected by even a single, very high verdict. For example, in 1993 and again in 1996, single awards of punitive damages exceeding \$5,000,000 account for almost all the variation in the average punitive damage award for those years. Even the median award,³³ which is generally a better measure of a sample's central tendency, can mislead when the sample is very small. For example, with only nine reported punitive damage awards in 1993, a single \$5,000,000 punitive damage award raised the median award from \$380,000 to \$560,000.

Understanding damage awards in wrongful termination cases requires that distinctions be made among the three different, legal theories that are included within the category of wrongful termination. Tables Three and Four, which follow, summarize the outcomes in contract, retaliation, discrimination and independent tort cases.



1. Contract cases

In a contract case, the employee argues that the employer expressly or implicitly promised not to terminate him without cause. Express contracts are based on a written or verbal agreement between the employer and the employee that the employment will not be terminated without cause. Implied contracts are based on a pattern of behavior that

shows that the employer and employee agreed that the employment could not be terminated without cause, although the agreement was never made explicit. To decide whether an implied contract requires the employer to have good cause to terminate an employee, courts look to a number of factors, including the employer's personnel policies and past practices, the employee's length of service, statements the employer may have made assuring the employee continued employment, and the practices of the industry.³⁴

Damages for violating an express or an implied contract are limited by *Foley* to contract damages. They include wages and benefits the employee lost between the time he was terminated and the time he found, or reasonably could have found, equivalent employment.³⁵ Emotional distress damages, and punitive damages, cannot be recovered, unless the cause of action for breach of contract is combined with one of the tort causes of action described below.

When a contract case gets to the jury, employees win about 54% of the time.³⁶ Even though damages are limited to economic losses, those losses can be substantial. In our sample, the average verdict in contract cases won by the employee was \$571,853; the median verdict was \$261,000. Both the median and average compensatory damage awards for contract cases were higher than for any other kind of case, considered alone.

A closer look at who brings contract cases explains the size of the awards. Almost half (49%) of the plaintiffs who alleged an implied contract cause of action were executives, middle managers, or professionals. When these plaintiffs won, the damages they recovered were substantial: the average award was \$724,721. By contrast, when non-managerial employees pursued implied contract claims, their recoveries were much lower, averaging \$172,865. Moreover, among non-managerial employees, half the awards were less than \$100,000. Given that attorney fees are not recovered by the prevailing party, a recovery of \$100,000 is modest, at best.



2. Public policy cases: retaliation and discrimination

In a public policy case, the employee claims that the employer fired him or her for reasons that violate some fundamental public policy. Public policy cases fall into two categories, retaliation cases and discrimination cases. A retaliation case arises when an employee is fired in retaliation for conduct that is protected by California law, such as reporting illegal activity, refusing to engage in illegal activity, or exercising a statutory right such as the right to serve on a jury. In recent years, the California Supreme Court has narrowed the availability of this cause of action, first by holding that the asserted policy must be public and not private in character,³⁷ and then by holding that the asserted public policies must be "tethered to" a specific statutory or constitutional provision.³⁸

Courts have also held that certain forms of discrimination violate a fundamental public policy, and give rise to a wrongful termination claim. The California Supreme Court has held that sex discrimination³⁹ and age discrimination⁴⁰ violate fundamental public policies, and lower courts have recognized claims based on disability discrimination, sexual harassment, and other forms of unlawful discrimination.⁴¹ Again, however, the Supreme Court's most recent decisions have narrowed this cause of action, finding, for

example, that age discrimination does not violate any fundamental public policies unless it is also prohibited by the Fair Employment Act.⁴²

The difference between a contract-based wrongful termination claim and a claim based on a violation of public policy is significant. Damage awards in retaliation and discrimination cases can include compensation for economic losses, as in an implied contract case, but they also can include compensation for emotional distress caused by the employer's acts, and punitive damages, if the employer has behaved with malice, fraud, or oppression.⁴³

The vast majority of the wrongful termination verdicts in our sample involved retaliation or discrimination claims, or both. Discrimination was alleged in 56% of the cases; retaliation was alleged in 31%. In all, only 24% of the cases in our sample involved neither a claim of discrimination nor a claim of retaliation.

Plaintiffs were generally much less successful in retaliation cases (winning jury verdicts in only 35% of the cases) and in discrimination cases (winning only 29% of the time) than in contract cases. Average compensatory awards were also lower, despite the availability of emotional distress damages, as Table Three shows. The lower compensatory damage awards may again be explained by who is suing. Only 32% of the plaintiffs alleging discrimination, and 36% of those alleging retaliation were executives, professionals or middle managers.



3. Independent torts

A wrongful termination plaintiff can also recover emotional distress and punitive damages if she proves that the employer engaged in conduct that was independently tortious, in addition to firing her. For example, an employee might claim that in addition to firing her, the employer made statements that were defamatory or violated her right to privacy. Again, however, recent case law limits these claims. If the employer's conduct causes a physical injury connected to the job, workers' compensation may provide the sole relief.⁴⁴ Further, if the tortious conduct occurs in connection with the termination itself -- for example, if an employer were to lie about the reasons for a termination -- only an action based on the termination can be pursued.⁴⁵

As with retaliation and discrimination claims, independent tort claims are more difficult to prove than contract claims. Plaintiffs prevailed in 45% of the cases, and average compensatory damage recoveries were the lowest among the three causes of action.



TABLE THREE
Verdicts in Contract, Retaliation, Discrimination,
and Independent Tort Cases, 1992-1996

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Cause of Action	Jury Award			
	Average (A) and Median (M) Compensatory Damage Award	Average (A) and Median (M) Punitive Damage Award	Number of cases in which punitive damages were awarded	Total number of plaintiff verdicts
Breach of Express or Implied Contract	\$571,853 (A) \$261,000 (M)			128
Violation of Public Policy: Retaliation	\$425,656 (A) \$200,000 (M)	\$287,300 (A) \$ 42,000 (M)	15	66
Violation of Public Policy: Discrimination	\$395,197 (A) \$184,000 (M)	\$895,863 (A) \$366,000 (M)	25	101
Independent Tort (Fraud, Defamation, and so on)	\$297,795 (A) \$103,369 (M)	\$466,875 (A) \$175,000 (M)	13	54



TABLE FOUR
Rates of Success, 1992-1996

Cause of Action		Outcome		
	Verdict for Defendant ⁴⁶	Verdict for Plaintiff	Settled	Total verdicts ⁴⁷
Breach of Express or Implied Employment Contract	44.5%	51.8%	3.6%	247
Violation of Public Policy: Retaliation	58.8%	35.3%	5.9%	187
Violation of Public Policy: Discrimination	61.9%	29.0%	9.1%	373

Independent Tort (Fraud, Defamation, and so on)	54.5%	44.7%	0.8%	123
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V. Wrongful termination elsewhere

One critical claim in the debate over wrongful termination is that liberal recoveries in wrongful termination cases create a negative business climate in California. To some extent, that claim derives from a 1988 RAND study based on data collected before the *Foley* decision limited employers' liability in cases based on breach of contract. Moreover, the RAND study was based on a multiple regression analysis based on various measures of the "legal climate" in each state and the state's economic health, rather than on any detailed data about filings or verdicts in other jurisdictions.

Unfortunately, the kind of comparative data needed to evaluate claims that wrongful termination lawsuits make California less hospitable to employers are not readily available. Not every state has a system of jury verdict reporters comparable to California's, and where reliable jury verdict reporters do exist, they may not be accessible to out of state researchers.

Some limited comparisons, however, can be made. Texas, for example, recognizes the same three forms of liability for wrongful termination -- breach of contract, retaliatory discharge, and discrimination -- as California, and has several jury verdict reporters that researchers have found reliable in other studies. Using those reporters, as compiled in the Lexis-Nexis databases, we were able to identify 396 jury verdicts in Texas wrongful termination cases between 1992 and 1996.

Several important points emerge from a comparison of reported wrongful termination verdicts in Texas and California. For one, contract cases, which are an important part California's wrongful termination law, are much less important in Texas; in more than 90% of Texas's wrongful termination verdicts, the primary legal theory advanced was retaliation or discrimination. In both retaliation and discrimination cases, Texas employees are slightly more likely to win than California employees. Although the difference is probably not statistically significant, it suggests that the popular perception that California juries are more pro-employee than juries in other states may be mistaken.

In terms of compensatory damages, when Texas employees win, they tend to recover smaller compensatory damage awards than their California counterparts. That does not mean, however, that Texas employers hire and fire free of risk. When Texas employers lose, they are much more likely to be assessed punitive damages than are California employers, and the average punitive damage awards are higher, at least for some categories of cases.



A. Contract cases in Texas

While a breach of contract was at least alleged in 40% of the California wrongful termination cases, breach of contract cases make up only 8.3% of the Texas verdicts.

Contract cases play less of a role in Texas primarily because Texas contract law is more restrictive than California law. While California allows employees to recover if they can show an implied promise to terminate only for cause, Texas law seems to insist that any modification of an at-will employment relationship be express, and preferably in writing.

Express contract cases are brought in California, of course; 7% of the reported wrongful termination verdicts in the study involved express contracts. Intriguingly, in fact, verdicts in California express contract cases were among the highest in our study. The average verdict in express contract cases in California was \$569,339, as compared to an average verdict of \$128,127 in the Texas cases.

What the Texas sample is missing are the million dollar verdicts: 10% of the California verdicts exceeded \$1,000,000, while none of the Texas verdicts did. Of course, that can change very rapidly. The study was limited to cases decided through 1996; in 1997, a Texas jury awarded \$2,622,881, plus \$1,536,175 in interest and attorney fees to a doctor whose employment contract was breached when she was denied a partnership in a lucrative medical practice.



B. Retaliation cases in Texas

Public policy cases -- particularly retaliation cases -- dominate Texas wrongful termination verdicts. More than half of the Texas verdicts came in retaliation cases, as compared to less than a third of the California verdicts. The average compensatory damage award in retaliation cases in our study was \$822,578, and the average punitive damage award was \$1,199,393.36. These figures, of course, include the Triton Energy case mentioned earlier, but even taking it out of consideration, the average compensatory damage verdict (\$267,175) and punitive damages verdict (\$368,801) are high.

Here again, however, comparisons with California would be misleading. The majority of the Texas retaliation cases -- 63% -- were brought by employees who alleged they were terminated for filing workers compensation claims, or because they were injured on the job. In California, workers compensation is the exclusive remedy for this sort of retaliation.

Taking the workers compensation cases out of the picture, Texas employees win about 44% of the time in retaliation cases that reach a jury; California employees win about 35% of the time. On the average, however, compensatory damage awards in Texas are somewhat smaller; \$334,761, as compared to a California average of \$425,656.

The most intriguing difference between the Texas and California verdicts is in the frequency and size of punitive damage awards. While punitive damages were awarded in only 25 of the 101 retaliation cases won by California plaintiffs, Texas juries awarded punitive damages to 16 of the 32 prevailing plaintiffs. Although the samples are small, this difference, 25% versus 50%, is dramatic. Moreover, the average Texas punitive damage award -- \$514,192 -- was substantially higher than the California average of \$287,300.



C. Discrimination cases in Texas

As in California, discrimination cases account for a large number of Texas's wrongful termination verdicts. After retaliation cases involving workers compensation cases are eliminated from the sample, discrimination cases made up 38% of the Texas wrongful termination verdicts. Again, Texas and California appear to be similar in terms of who wins, although Texas plaintiffs win substantially smaller compensatory damage awards. Texas plaintiffs prevailed in 32% of the cases, and recovered an average of \$175,419 in compensatory damages. California plaintiffs prevailed in 29% of the cases, but recovered, almost twice as much on average, or \$395,197.

With regard to punitive damages, again, Texas juries awarded punitive damages more frequently than California juries, and they awarded substantially more. Successful plaintiffs recovered punitive damages in Texas discrimination cases 53% of the time; in California, 29%. The average punitive damage award was \$1,718,275. Juries, of course, do not have the last word. In Texas, five of the six highest punitive damage awards were reduced by the trial judge as excessive, and each plaintiff rejected the reduced award and opted for a new trial. With those awards eliminated, the average punitive damage award in Texas was reduced to \$600,889.



VI. Implications for pending legislation

Bills are currently pending in both the Assembly (A.B. 1171) and Senate (S.B. 1278) that would change the law of wrongful termination. These bills would: 1) limit the amount of damages for future lost earnings to a period of one year (the Assembly bill) or five years (the Senate bill) after termination; 2) eliminate the cause of action for breach of an implied promise to fire only for cause by requiring that an action be based on a written employment policy; and 3) require employees to sue only under a statute, if a statutory cause of action is available to them. The legislation has been linked with concerns that wrongful discharge claims are unpredictable, and increasing in number. It has also been linked with concerns that the specter of wrongful termination litigation harms the state's economy and will impede welfare reform by discouraging employers from expanding their work forces.

The effect that requiring contract cases to be based on written employment policies would have is unclear. In Texas, only 8.3% of wrongful termination cases are brought on a contract theory, as opposed to 40% of the California cases. This would seem to suggest that requiring a written employment policy would reduce the volume of wrongful termination litigation substantially. The comparison may be misleading, however. Very few of the California verdicts -- just 16% -- are in cases where *only* a breach of contract was alleged. Presumably, cases in which an allegation of an implied contract was combined with other allegations of wrongdoing would still be brought even if the implied contract cause of action were eliminated. Further, the legislation would not affect the number of express contract cases, and recoveries in express contract cases were higher, on average, than recoveries under any other legal theory.

Discrimination cases and retaliation cases account for three quarters of California's wrongful termination verdicts, so it is there that the proposed legislation would have its greatest effect. Requiring plaintiffs to sue under existing statutes when a statutory remedy is available would primarily affect discrimination cases, by forcing plaintiffs to sue under existing civil rights statutes, rather than relying on the common law of wrongful termination.

Again, however, the end result is unclear. Basically, plaintiffs can recover the same types of damages under existing California statutes as can be recovered in a common law wrongful termination suit. The major effect of the legislation would be to require plaintiffs to comply with the statutes' procedural requirements before bringing a lawsuit. Whether imposing these procedural requirements would affect the overall pattern of awards is a topic for further study.

Finally, the data do shed some light on the question of whether employers should reasonably fear increased exposure to wrongful termination litigation when their payrolls expand. The average plaintiff in the cases encompassed by this study had been employed for 9.9 years before termination; the median length of employment was seven years. Eighty-three per cent of the plaintiffs had been employed for more than one year before they were fired. In discrimination cases -- excluding age discrimination cases, for obvious reasons -- the average employee had been employed for 8.4 years, and 82% had been employed for more than one year. In breach of contract cases, the average employee had been employed 11.5 years, and in retaliation cases, 7.1 years. These data would suggest that the risk of liability from new employees is relatively low.



VII. Conclusion

One impetus for reforming wrongful termination law has been a belief that wrongful discharge verdicts are growing out of control. Although a study of jury verdicts cannot conclusively confirm nor refute claims about increased numbers of filings, the number of reported jury verdicts has indeed increased substantially -- almost 40% since 1992. The increase, however, is almost entirely accounted for by an increase in the number of discrimination lawsuits, a trend that seems to be operating nationwide. Further, after reaching a peak in 1994, the number of reported verdicts now seems to be holding steady.

So far as unpredictability is concerned, there is undoubtedly a great deal of volatility in wrongful termination verdicts. Average and median verdicts can vary by 20% or more from year to year, sometimes in opposite directions! The explanation for this volatility, however, is probably mundane. Given the small number of verdicts in any one year, the averages and medians are being skewed by a handful of million dollar awards. By contrast, the rate at which plaintiffs win and the frequency of punitive damage awards have been quite consistent, at least over the last five years.

The movement to reform the law of wrongful termination has also grown from a perception that wrongful discharge claims impose a substantial economic burden on California employers. Compensatory damage awards in wrongful termination cases have clearly grown over the past decade. For example, one 1988 study of wrongful termination

cases found that the average verdict in a wrongful termination case based on a violation of public policy was \$269,792; the average from 1992 to 1996, by contrast, was more than \$425,000.

The perception that wrongful termination verdicts put California employers at an economic disadvantage has been shaped in large part by a RAND study of wrongful termination verdicts done in 1988. The RAND study argued that while the cost of paying damages in wrongful termination cases was insignificant, the threat of unpredictable, million dollar punitive damage awards would cause employers to take costly precautions against liability.

The law of wrongful termination has changed significantly, however, since the RAND study. Arguably, the California employers now live a milder legal climate than they did in 1988. The California courts have made it harder for employees to recover damages in wrongful termination cases, particularly by completely eliminating punitive damages in cases based on a breach of contract.

Further, where punitive damages are still available, juries appear to be less inclined to award them than they were in 1988. That is, according to one 1988 study, 65% of the verdicts in public policy cases involved an award of punitive damages, and the average award was \$372,800. From 1992 to 1996, only 22% of the public policy verdicts included punitive damages, and the average award was \$406,619. Thus, the average punitive damage award grew at a slower rate than the average compensatory award, and the frequency of punitive damage awards decreased by two thirds. If the threat of liability did inspire California employers to take precautions to avoid punitive damages, the data suggest that those precautions have met with some success.



Footnotes

1. David J. Jung is Professor of Law and Director of the Public Law Research Institute at UC Hastings College of the Law. Lisa Pau, Hastings Class of 1998, and Sean Berberian and Jean Kim, Hastings Class of 1999, provided research assistance for this report. [back to text](#)
2. David J. Jung and Richard Harkness, The Facts of Wrongful Discharge, 4 The Labor Lawyer 257 (1988). [back to text](#)
3. James N. Dertouzos, The End of Employment-at-Will: Legal and Economic Costs, P-7441 (RAND Corporation, May, 1988). [back to text](#)
4. James N. Dertouzos, Elaine Holland and Patricia Ebener, The Legal and Economic Consequences of Wrongful Termination, R-3602-ICJ (RAND Institute for Civil Justice 1988). [back to text](#)
5. 47 Cal.3d 654, 765 P.2d 373, 254 Cal.Rptr. 211 (1988) [back to text](#)
6. David J. Jung and Richard Harkness, "Life after *Foley*: The Future of Wrongful Discharge Litigation," 41 Hastings L. J. 131 (1989). [back to text](#)
7. John H. Sullivan, "Tort Reform: Unfinished Sacramento Business", The Business Press, January 20, 1997 at 23 ("Jury Verdict Research reported that median jury awards in wrongful termination cases surged to an all-time high of \$204,310 in 1995."). Jury Verdicts Research reported a 40% increase in wrongful termination verdicts nationally between 1994 and 1995. Henry J. Reske, Tort Awards Increasing, ABA

Journal (May, 1996). The data in this report suggest that these figures are inaccurate, at least so far as California verdicts are concerned. [back to text](#)

8. Robert B. Gunnison, "Now Wilson Has to Put Welfare Recipients to Work," The San Francisco Chronicle, January 19, 1997 at p. 7Z1. [back to text](#)

9. S.B. 1278 (Leslie). [back to text](#)

10. A.B. 1171 (Kaloogian). [back to text](#)

11. See Stephen Daniels and Joanne Martin, *Civil Juries and the Politics of Reform 66-68* (Northwestern University Press: 1995). [back to text](#)

12. Cal. Labor Code [◆](#) 2922. [back to text](#)

13. Cal. Government Code [◆](#) 12921. Other examples abound. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment, the National Labor Relations Act prohibits discrimination the basis of union involvement, and so on. [back to text](#)

14. Jury verdict reports, however, frequently do not distinguish between a claim that a discriminatory discharge violates public policy and a claim that it violates California statutory law. For that reason, any jury verdict in which an employee sought recovery for a wrongful termination was included in the database. [back to text](#)

15. "Department of Fair Employment & Housing Filed Cases: Alleged Acts*- Employment Cases," on file with PLRI. [back to text](#)

16. In order to evaluate the effect of amendments to the Fair Employment and Housing Act that granted the Commission the authority to award damages and civil penalties, the Legislature has required the Department to file a report on or before January 1, 1998 that "shall include, but not be limited to, a showing of how many respondents elected to transfer the proceedings to court pursuant to [[◆](#) 12970 (a)(3)] in lieu of having the accusation heard by the Fair Employment and Housing Commission." Stats. 1992 Ch.9 [◆](#) 9. That report may contain information of relevance to this topic. [back to text](#)

17. Brian Ostrom and Neil Kauder, *Examining the Work of State Courts, 1994* (National Center for State Courts, 1994). [back to text](#)

18. From 1992-1996, the Lexis[◆](#)-Nexis[◆](#) database reported settlements before trial in 45 California cases. In another 18 cases, settlements after trial were reported. [back to text](#)

19. The Society for Human Resource Management recently released the results of a survey in which 57% of the human resource professionals polled indicated that the employer for whom they worked had been involved in employment related litigation at some time in the past five years. The survey is of limited value in understanding wrongful termination litigation, because it defined employment related litigation as including, for example, workers compensation and wrongful death suits, in addition to disputes over employment per se, and because the employers covered by the survey were not selected as a representative sample. Further, the survey did not attempt to determine how many times each employer had been sued during the five year period covered by the survey. [back to text](#)

20. Miller and Sarat, *Grievances, Claims and Disputes: Addressing the Adversary Culture*, 15 Law & Soc'y Rev. 823 (1980-81); Deborah Hensler et al. *Compensation for Accidental Injuries in the United States*, RAND Corporation, Santa Monica (R-39990HHS/ICJ 1991). [back to text](#)

21. Patricia Danzon, *Medical Malpractice: Theory, Evidence and Public Policy* (1985). [back to text](#)

22. Reporting for 1996 may not be complete. The data reflect cases added through July 1, 1997. [back to text](#)

23. Fluctuations in the number of reported jury verdicts can be due to changes in the attorneys' reporting habits, changes in the scope of the reporter's coverage, and many other variables. There is currently no direct, central source of information about the number of civil suits filed in California that breaks filings down into categories like "wrongful termination." See David J. Jung, Kenyette Jones and Cyril Yu, Collecting Data on the Civil Justice System (PLRI Working Paper Series, #s97-2, 1997). [back to text](#)
24. By contrast, verdicts involving a contract cause of action increased by just over 50%. The entire increase, however, was attributable to cases in which discrimination was also alleged. Verdicts in cases involving only a contract cause of action actually decreased between 1993 and 1994. [back to text](#)
25. That is to say, the defendant prevailed on a demurrer, a motion to dismiss, or on summary judgment in 83 of 125 cases, or 66.4% of the time. [back to text](#)
26. Figures for 1996 are incomplete, as verdicts are still being added to the database. These figures represent all verdicts added through July 25, 1997. [back to text](#)
27. Because of hung juries and mistrials, totals may not add to 100%. [back to text](#)
28. This figure includes cases in which the plaintiff received a monetary settlement. [back to text](#)
29. This figure does not include settlements. [back to text](#)
30. Stephen Daniels and Joanne Martin, Civil Juries and the Politics of Reform (Northwest University Press: 1995). [back to text](#)
31. Id. at 220. [back to text](#)
32. Once again, because the study does not include settlements, it gives only a limited picture of how much money is actually changing hands. [back to text](#)
33. The median of a sample is the point at which half of the data are larger, and half smaller. [back to text](#)
34. Douglas A. Farmer and Margaret J. Grover, Discipline and Termination, in Advising California Employers at 17.17 (1996.) [back to text](#)
35. Some advocates of reform have suggested that wrongful termination plaintiffs are entitled to front pay based on what they could have earned until retirement. See, Robert B. Gunnison, "Now Wilson has to Put Welfare Recipients to Work," The San Francisco Chronicle, January 19, 1997 at p. 7Z1. That is an inaccurate statement of California law, except in the unusual case in which the employer reasonably should have foreseen that the employee would not find substitute employment before retirement age. [back to text](#)
36. This figure excludes settlements. [back to text](#)
37. Hunter v. Upright, Inc., 6 Cal.4th 1174, 26 Cal.Rptr. 8 (1993). [back to text](#)
38. Gantt v. Sentry Insurance, 1 Cal.4th 1083, 4 Cal.Rptr.2d 874 (1992). [back to text](#)
39. Rojo v. Kliger, 52 Cal.3d 65, 276 Cal.Rptr. 130 (1990). [back to text](#)
40. Stevenson v. Superior Court, 16 Cal. 4th 880, 66 Cal.Rptr.2d 888(1997). [back to text](#)
41. See Douglas A. Farmer and Margaret J. Grover, Discipline and Termination, in Advising California Employers at 17.51 (1996). [back to text](#)
42. Jennings v. Marralle, 8 Cal. 4th 121, 32 Cal. Rptr. 2d 275 (1994). [back to text](#)

43. Recovery of punitive damages is governed by Civil Code section 3294, which was amended to define "malice, fraud or oppression" as "despicable" conduct carried on with a conscious awareness that it will violate the plaintiff's rights. The procedural hurdles section 3294 raises to the recovery of punitive damages apply in wrongful termination/ public policy cases, as well as in independent tort cases, discussed below. [back to text](#)
44. Shoemaker v. Myers, 52 Cal.3d 1 (1990). [back to text](#)
45. Hunter v. Upright Inc. 6 Cal.4th 1174, 26 Cal.Rptr. 8 (1993). [back to text](#)
46. Includes cases in which the defendant prevailed in a motion for nonsuit, or judgment notwithstanding the verdict. [back to text](#)
47. The total does not include cases in which the result could not be determined from the report, or in which a new trial was granted. The total for all four causes of action exceeds the total number of cases in the study because many cases involved more than one cause of action. [back to text](#)
48. James N. Dertouzos, Elaine Holland and Patricia Ebener, The Legal and Economic Consequences of Wrongful Termination, R-3602-ICJ (RAND Institute for Civil Justice 1988). [back to text](#)
49. Research for this study was limited to sources available over the two main on-line legal data retrieval sources, LEXIS-NEXIS and Westlaw. [back to text](#)
50. Steven Daniels and Joanne Martin, Civil Juries and the Politics of Reform (Northwestern Press, 1995). [back to text](#)
51. City of Odessa v. Barton, 939 S.W.2d 707 (1997) ("In Texas, either party may terminate the employment relationship at will unless the employer, acting through an agent authorized to bind it, expressly agreed to modify the at-will employment relationship.") Similarly, Texas courts will enforce the provisions of personnel manuals as part of the contract only if the handbook "specifically and expressly curtails the employer's right to terminate the employee." Id. [back to text](#)
52. California law on this point is complicated. If an employer retaliates against an employee for filing a claim, the employee has a remedy under the workers compensation statute, and that remedy is exclusive. If the employer discriminates against an employee because of the employee's disabling injuries, one court of appeal has held that the workers compensation remedy is still exclusive. Cammack v. GTE, 48 Cal.App.4th 207 (1996). Another court of appeal has reached the opposite conclusion, finding that the Fair Employment Housing Act allows the disabled worker to avoid the workers compensation process and sue directly for discrimination. City of Moorpark v. Superior Court, 49 Cal.App.4th 973 (1996). The California Supreme Court has granted review in both cases. If the court allows the FEHA action to proceed, the Texas experience suggests that there will be a substantial increase in the number wrongful termination suits filed. [back to text](#)
53. Average compensatory and punitive damage verdicts here were calculated without the Janacek v. Triton Energy case, mentioned earlier. [back to text](#)
54. Median punitive damage awards in retaliation cases show the same disparity: Texas, \$188,000; California, \$42,000. [back to text](#)
55. The duration of the plaintiff's employment could be determined in 226 of the cases in the database. [back to text](#)
56. Kirstin Downey Grimsley, "Civil-rights cases by workers surge," Washington Post, May 21 1997 at p.A01. [back to text](#)
57. One commentary on the *Foley* case suggested that *Foley*, paradoxically, might cause average awards in contract cases to increase, because only plaintiffs with significant economic losses would have the incentive to sue. David J. Jung and Richard Harkness, Life after *Foley*: The Future of Wrongful Discharge

Litigation, 41 Hastings L. J. 131 (1989). This study suggests that may indeed be the case, as average awards in contract cases have increased from \$125,886 according to a 1988 study to \$571,853 according to this study. [back to text](#)

58. David J. Jung and Richard Harkness, The Facts of Wrongful Discharge, 4 The Labor Lawyer 257, 265 (1988). [back to text](#)

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