

*Cox v. Resilient Flooring Division of Congoleum: An Attempt to Clarify Wrongful Termination Under California Law**

The Honorable J. Spencer Letts†

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INTRODUCTION

I came here for the purpose of discussing the alternate rationale that I presented in *Cox v. Resilient Flooring Division of Congoleum Corp.*¹ Prior to taking the bench, my experience as a corporate general counsel had convinced me that California decisions regarding wrongful termination, because of the lack of any unifying rationale, were producing an intolerably high degree of uncertainty in the business and legal communities concerning the facts necessary to constitute a triable lawsuit. It was my hope that development of a rationalizing principle would permit future wrongful termination cases to be evaluated more easily and consistently, and perhaps, by proper planning, avoided altogether. The alternate rationale of *Cox* attempted to provide a reconciling principle to wrongful termination cases decided under various theories of California law.

The *Cox* opinion, however, is not a model of clarity. Perhaps for that reason, while it has provoked considerable discussion, it has not been as effective for its purpose as I might have hoped.

Cox was intended to make three main points. First, oral contracts—or even written contracts which are unclear or ambiguous—should rarely

* This Article has been edited from the speech the author presented at the Symposium.

† Federal District Court Judge for the Central District of California; B.A., Yale University, 1956; LL.B., Harvard University, 1960; Member, State Bar of California. *Cox* was the author's first judicial opinion.

1. 638 F. Supp. 726 (C.D. Cal. 1986).

be construed to give an employee a right to be terminated *only* for objectively verifiable "cause."² Second, while the covenant of good faith and fair dealing should be deemed to inhere in the employment relation from the first day of employment, it should not be construed so as to give an employee a right to be terminated only for "cause." Instead, fair dealing ordinarily should be construed only to entitle a terminated employee to sufficient severance pay to provide for a normal transition between jobs.³ Finally, *Cox* was intended to make the point that the act of termination, whether or not in breach of contract, should not be considered a tort. In this regard, *Cox* suggests that the covenant of good faith and fair dealing should not be deemed to provide an appropriate basis for making tort damages recoverable in wrongful termination cases.⁴

I

ASSURANCES OF JOB SECURITY

At the time I wrote *Cox*, I was particularly concerned by the number of cases before me in which lawyers were arguing, in apparent good faith, that oral "promises" made to employees at the time of hiring or during the course of employment had been understood by the employees to be contractual in nature and enforceable as contracts. That such "promises" could have been understood as contractual simply did not square with my experience of corporate reality. As a result, decisional law requiring courts to determine, on a case-by-case basis, whether an alleged "promise" should be enforced as a contract seemed suspect.⁵

A primary thrust of *Cox* was to place these so-called "promises" of job security in the context of the general times and environments in which they were made.⁶ Promises were made, if at all, to employees who understood and accepted the full ramifications of the employment-at-will doctrine as a fact of corporate life.

This general corporate promise goes back to a time when the nature of the trade offered by corporate America was between opportunity and job security. As generally understood, the corporate promise could be paraphrased as follows: "Go to work for yourself or in a small business and you may have more freedom and opportunity, but you may also wind up out of a job for reasons that have nothing to do with how hard you work or how good a job you do. On the other hand, go to work for a corporation, do a decent job, and you will always have a job."

This promise was first made in the isolationist world of the 1920s

2. *Id.* at 735-37.

3. *Id.* at 738.

4. *Id.* at 737-39.

5. *Id.* at 735-36.

6. *Id.* at 735.

and 1930s, when foreign competition did not participate in the commercial market of the United States. The promise was repeated even more broadly by corporate America in the aftermath of the Second World War. During this period, as large corporations became the nation's dominant business form, the prospect of foreign competition still loomed, if at all, only on a distant horizon.

There is little question that most of the corporations which dominated the nation's basic industries attempted to keep these promises in the spirit in which they were made. However, railroads and other corporations which tried hardest to keep these promises tended to be the first to fail as new technology or competition invaded their previously safe domains.

But corporate efforts to keep these so-called promises do not suggest that the promise of job security was ever intended or understood to be contractual. The general corporate policy of promising and providing corporate employees with as much security as possible was adopted by corporate employers for their own benefit, and was so understood by corporate employees. The contemplated sanctions for frequent breach of this policy were the loss of corporate credibility, the decline of employee morale, and increased voluntary turnover—not enforcement by individual lawsuits.

Once it became known during the 1980s that promises or assurances of job security could be enforced as contracts, it turned out that many if not most corporate employees were in a position to argue that they had received such promises or assurances. As a result, virtually any terminated employee with any substantial corporate tenure can now make at least a colorable claim for wrongful termination.

This situation does not conform to any of the understandings or realities which existed in the corporate world outside the courthouse as I knew it before wrongful termination lawsuits became commonplace. When I went to work nearly thirty years ago, the belief that large corporations offered maximum job security had its highest level of acceptance. Job security was perhaps the single largest inducement for entering the corporate world. But those of us who made that choice understood clearly that you still had to please your boss, and that if your boss wanted to fire you—and, if necessary, could persuade his own boss to let him—you would be fired. And you would have no legal rights whatsoever.

While it is useful to understand the foregoing, it is not necessary to accept it or to adopt such a severe construction of the employment-at-will doctrine to accept the *Cox* alternate rationale. *Cox* merely suggests that oral promises or ambiguous written assurances of lifetime job security made by hiring or supervisory personnel should not be construed as binding contracts. Personnel employees are often low-level managers

who clearly have no actual authority to bind the corporation to these "promises." Furthermore, no prospective or newly-hired employee could reasonably believe that the person who hired him or her possessed the capability to enter a potentially long-term contract worth hundreds of thousands of dollars. Furthermore, such "corporate" assurances should not create individual rights to particular jobs such that, if violated, damages would be appropriately measured by the probable economic value of the job over the course of the employee's entire working life.

II

GOOD FAITH AND FAIR DEALING

Employees certainly have a right to fair treatment by their employers. An extreme construction of the employment-at-will doctrine would allow a thirty-year employee, having no hope of quickly finding a comparable job, to be terminated without any compensation, or with no more than that provided to a short-term employee who could find a fully comparable job within a matter of hours. But this is not a construction of corporate action that the law should adopt or uphold. Good faith and fair dealing should require better treatment for long-term employees.

Although not necessary to the decision, *Cox* suggests that good faith and fair dealing should ordinarily require that an employer provide a terminated employee with enough severance to tide him or her over during the normal period of employment transition for a person of his or her employment station.⁷ Obviously, terminations involving dishonesty, provable economic cause or willful nonperformance of employment duties require a different rule. For ordinary cases, however, the *Cox* proposal would require no more than what most forward-thinking corporations already do as a matter of policy.

Perhaps the entire area of employee rights which vest upon termination might have been better left to legislatures than to the courts. Unfortunately, it is too late for that. If judges are going to be obliged to continue to render decisions in this area, the suggestion of *Cox* is that the proper focus is upon the fairness of the severance terms, rather than on the termination itself.

III

WRONGFUL TERMINATION AND TORT LAW

Cox also advances the argument that termination itself, even if wrongful, should not be considered a tort and should not give rise to tort

7. *Id.* at 738.

damages.⁸ Perhaps the most pernicious aspect of construing the covenant of good faith and fair dealing as creating a right to a job is that if that right is violated by termination, damages not ordinarily measured by economic loss are potentially available.

The covenant of good faith and fair dealing should assure all corporate employees a minimum standard of severance treatment. Indeed, most corporations have an official or unofficial policy of providing such a minimum standard, even in the absence of contract or perceived legal duty. It is quite different, however, to conclude that breaches of this duty or violations of policies voluntarily adopted by corporations to assure maximum fairness and equality among employees should carry with them the potential for punitive or other damages not measured by economic loss. Exposure to such damages, particularly as to the alleged breach of policy, produces the unfortunate result of discouraging the adoption of such voluntary policies.

There is a critical distinction between an alleged wrongful termination of an employee's right to the job and alleged wrongful treatment of the employee on the job or in connection with his or her termination. Corporations, although they must refrain from mistreating terminated employees, do have the right to terminate employees unilaterally.

Unilateral termination is inherently unfair. It is unfair when an employee is fired for subjective reasons, such as that he or she is too difficult to deal with or that, in the opinion of his or her supervisor, someone else could do a better job. A different supervisor, however, might see things differently. Moreover, it is inevitable that an employee unilaterally terminated for subjective reasons will suffer emotional distress. As a result, the jump is easily made to the conclusion that if the termination is wrongful, the damages should include compensation for the emotional distress. The covenant of good faith and fair dealing provides an easy platform from which to launch this jump. Therefore, if wrongful termination claims can be couched in terms of the wrongful termination of the employee's *right* to the job, every colorable claim that a particular termination was improper must inevitably carry with it a colorable claim for damages resulting from emotional distress.

I do not mean to suggest that corporate employers should be freed from the responsibility for tortious acts directed to their employees.

8. *Id.* at 737-39. Subsequent to the presentation of this speech, the California Supreme Court decided *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988). *Foley* held that, absent a violation of public policy by the employer, an employee may only recover contractual damages for a breach of the covenant of good faith and fair dealing. *Id.* at 701, 765 P.2d at 402, 254 Cal. Rptr. at 240 (Broussard, J., dissenting). The court also discussed at length the inappropriateness of allowing tort damages for a breach of the covenant of good faith and fair dealing. *Id.* at 682-700, 765 P.2d at 389-401, 254 Cal. Rptr. at 227-39; *cf. id.* at 686-87 n.26, 765 P.2d at 391 n.26, 254 Cal. Rptr. at 229-30 n.26 (most courts outside of California reject any recovery for a breach of the covenant of good faith and fair dealing or limit recovery to contractual damages).

Nothing in the employment relation immunizes employers from tort responsibility. I do suggest, however, that corporate acts alleged to be the basis of liability for tort measures of damages must be divorced from the act of termination and considered separately.

Almost all breaches of contract cause emotional distress to the other party. Business planning simply cannot be conducted rationally if a right to compensation for emotional distress is an ordinary legal consequence for breach of an employment contract.

One of the primary practical difficulties with wrongful termination claims is that they are so difficult to value both for deciding whether they should be filed, and for settling the case. The existence of liability elements that are determinable only on a case-by-case basis, and of damage elements that inevitably are in the eye of the beholder, makes every wrongful termination case potentially dangerous and renders its actual value uncertain.⁹

The effort and expense sensibly undertaken to avoid future litigation and insure that future lawsuits will be defended successfully depends in large measure on the amount of potential liability. The inherent uncertainty as to the bases of liability and the amount potentially recoverable in wrongful termination litigation makes rational legal planning and even handed treatment of all employees virtually impossible.

Cox suggests that the issue of whether the particular acts surrounding a termination of employment will support an award for emotional distress or punitive damages should ordinarily be addressed to the court relatively early in the proceedings. Furthermore, the plaintiff should be required to allege facts surrounding his or her treatment at termination that, if proved, would shock the conscience of the court.¹⁰ If the court finds the treatment of the employee shocking to its conscience, I see no reason why a tort action should not proceed.

If such a test were to be applied, courts should not permit themselves to be shocked easily. Security measures, for example, no matter how traumatic to the terminated employee, should almost never be regarded as an outrageous corporate action. Requiring a terminated employee to accept pay in lieu of notice or to refrain from returning to his or her office is not shocking. Anyone who has been exposed to the deleterious effects of allowing an embittered employee to hang around the workplace can appreciate the importance of keeping such a person away from the job. Because the recently terminated employee will not work and

9. See also *id.* at 696, 765 P.2d at 398-99, 254 Cal. Rptr. at 236-37 ("Initially, predictability of the consequences of actions related to employment contracts is important to commercial stability. In order to achieve such stability, it is also important that employers not be duly deprived of discretion to dismiss an employee by the fear that doing so will give rise to potential tort recovery in every case.") (footnote omitted).

10. Cox, 638 F. Supp. at 738.

cannot be sanctioned for not working, his or her presence will only poison the atmosphere of the workplace. Alleged verbal abuse on the occasion of the termination should also almost never be considered shocking. Firing employees is difficult; few people can do it well, and even fewer people can take it well. The chance of heated exchange is too high to be considered shocking, except in the most egregious cases.

When alleged conduct does not shock the conscience of the court, judges must determine as a matter of law that no jury question is presented. Summary judgment must be used forcefully in this area to discourage lawsuits by employees who merely believe that their subjective feelings of outrage will be shared by a jury. If judges fail to accept this responsibility, then legislation is the only alternative.

If an employee is fired in good faith and for reasons that are arguably valid, such an employee should be entitled, but also limited, to fair severance pay. Only if an employee is treated outrageously, in termination or otherwise, should the employee be entitled to more.

CONCLUSION

I published the *Cox* opinion because wrongful termination is a developing area of the law. If we fail to develop a consensus as to what ought to happen, and perpetuate conflicting strands of "pigeonhole" law rather than developing reconciling principles, we will end up with even more of a hodgepodge than we currently have. This can only produce more work for lawyers.

In every major urban law firm, there are substantial numbers of lawyers whose job is to "paper" firings. Such activity, while valid from the lawyers' perspective, may be dangerous to society as a whole. For example, imagine a supervisor who has three marginal employees. The supervisor does not necessarily want to fire two of them, but does feel that the third should be fired, for any number of reasons. An attorney, in order to prevent one wrongful termination suit, may advise the supervisor to fire all three. In the real world, this can and does happen under the guise of workforce reductions. While this may be thought to be sound legal advice, it has devastating social consequences.

It cannot be the right answer that an employer should have to fire all three in order to be safe from liability. But that is the law we have produced. Now it is up to us to change it.