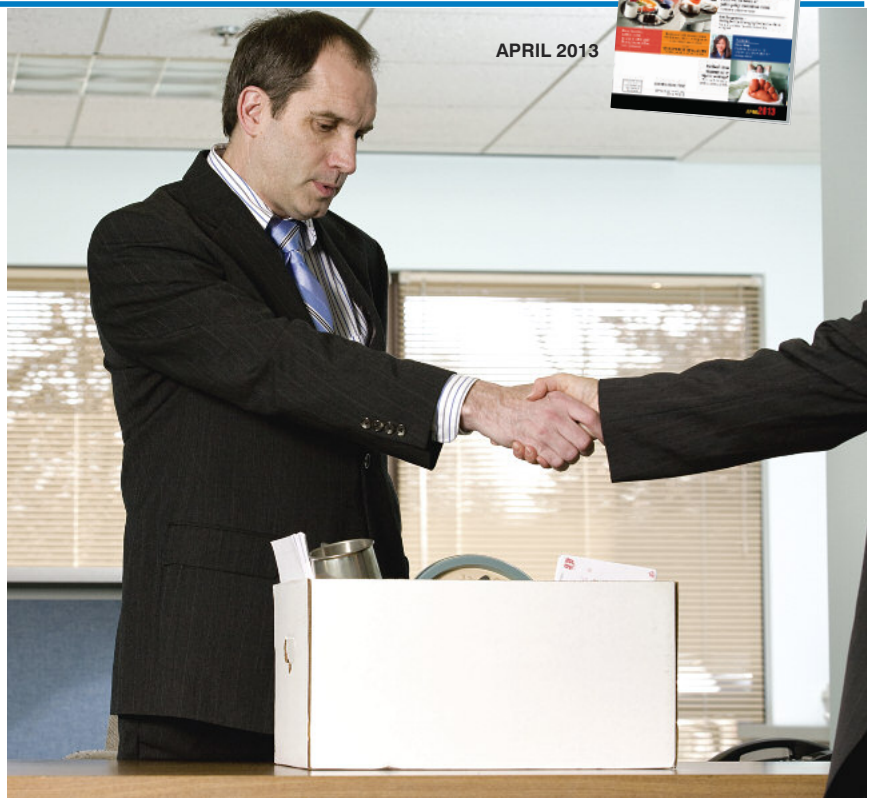
Please note:
The Labor Code section 132a as cited below is correct. In the magazine it was identified as 131(a). This was an error by the publisher, not the authors.



Dutra and the future of wrongful termination in violation of public-policy claims

How has Dutra *affected Labor Code section 132a cases?*

By Scott Stillman and Jeannette Vaccaro

It has long been the case in California that employees who are terminated in violation of public policy may bring a common law tort action against their employers. In particular, for over a decade plaintiffs' attorneys have successfully argued that Labor Code section 132a sets forth a public policy that provides the basis for a common law tort action. Section 132a prohibits employers from discharging or discriminating against an employee who has filed or made known the intent to file a workers' compensation claim. Yet, in *Dutra v. Mercy Medical Center Mt. Shasta* (2012) 209 Cal.App.4th 750, the California Court of Appeal, Third Appellate District held that section 132a cannot serve as the basis for a wrongful termination in violation of public-policy claim. As described below, the *Dutra* decision ignored and misinterpreted earlier precedent in reaching its flawed conclusions.

The *Dutra* decision

Michelle Dutra worked as a housekeeper for Mercy Medical Center. In late January 2008, she injured her back at work and filed a workers' compensation claim. She was terminated less than seven weeks later. Thereafter, she brought claims for defamation and wrongful termination in violation of public policy. Her wrongful termination claim was based on the public policy contained in Labor Code section 132a. (*Dutra*, 209 Cal.App.4th at 753.) The defamation claim was summarily adjudicated in Mercy's favor. At trial, the court dismissed the wrongful discharge claim on the grounds that the Workers' Compensation Appeals Board ("WCAB") had exclusive jurisdiction to adjudicate claims under Labor Code section 132a. (*Ibid.*)

Upon review, the Court of Appeal affirmed the trial court's determination, but for different reasons. Citing to *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, the appellate court rejected the trial court's assertion that Labor Code section 132a established an exclusive remedy for discrimination based on the filing of a workers' compensation claim. Rather, again relying on *City of Moorpark*, the court determined that the plaintiff's wrongful termination claim could not stand because "section 132a does not qualify under case authority as the type of policy that can support a

common law action for wrongful termination." (*Dutra*, 209 Cal.App.4th at 754.) In doing so, the Court of Appeal ignored key aspects of the *City of Moorpark* decision and misinterpreted other important reasoning in the California Supreme Court's decision.

Labor Code section 132a

Analyzing the Court's decision and the reasoning behind it is important to understanding the errors in *Dutra*. In *City of Moorpark*, the Court stated conclusively "we hold that section 132a does not provide an exclusive remedy and does not preclude an employee from pursuing FEHA and common law wrongful discharge remedies. We disapprove any cases that suggest otherwise." (18 Cal.4th at 1158 (emphasis added).) In reaching this conclusion, the Court thoroughly examined prior case law and importantly rejected *Portillo v. G.T. Price Products, Inc.* (1982) 131 Cal.App.3d 285, which held that section 132a provided an employee's exclusive remedy for violations of section 132a.

Portillo involved a single cause of action for common law wrongful discharge based on the plaintiff's allegation that her employer discharged her in retaliation for filing a workers' compensation claim. (*Portillo*, 131 Cal.App.3d at 286.) Looking to the text of the workers' compensation statutes, the *Portillo* court determined that a worker discriminated against for exercising workers' compensation rights could only pursue that claim in the workers' compensation forum. (*Id.* at 287.) The court found support for this position in Labor Code section 5300, which provides that workers' compensation proceedings for recovery of compensation "shall be instituted before the [WCAB] and not elsewhere . . ." (Lab. Code, § 5300(a) (emphasis added).) Therefore, the court reasoned that the Legislature must have balanced the burdens of limiting an employee to the workers' compensation forum and found "the fact that the exclusivity of remedy before the Workers' Compensation Appeals Board is for the benefit of workers generally outweighs any occasional disadvantage that could be argued." (*Ibid.*) Because the *Portillo* court found that section 132(a) claims had to be brought exclusively before the WCAB, the court rejected the notion that a violation of section 132(a) could support a claim for wrongful discharge.

But as discussed in *City of Moorpark*, the *Portillo* court missed the mark when it came to this conclusion. First, *City of Moorpark* noted that section 132(a) contains no exclusivity provision anywhere in the language of the statute. (18 Cal.4th at 1154.) Rather, the general exclusive remedy provisions of the workers' compensation laws are found in division 4 of the Labor Code. In contrast, section 132(a) is in division 1 of the Labor Code, meaning that the "[r]emedies that the Legislature placed in other divisions of the Labor Code are simply not subject to the workers' compensation exclusivity remedy provisions." (*Id.* at 1155.)

Next, the *City of Moorpark* court attacked *Portillo*'s reliance on what it dubbed the "compensation bargain"– the notion that section 132a provides an inexpensive and quick remedy for discrimination claims, but that in exchange the remedy is exclusive. (*City of Moorpark*, 18 Cal.4th at 1154.) Relying on *Shoemaker v. Myers* (1990) 52 Cal.3d 1 and *Gantt v. Sentry Ins.* (1992) 1 Cal.4th 1083, the Court again recognized that "certain employer conduct [such as sexual or racial discrimination] falls outside the compensation bargain." (*Id.* at 1155.) Along those same lines, the Court held that discrimination of the sort prohibited by section 132a also fell outside the compensation bargain. (*Ibid.*)

Finally, the Court rejected *Portillo*'s argument that because section 132a addresses the exact harm alleged, the Legislature must have meant to preclude common law remedies. Rather, *City of Moorpark* recognized that "the Legislature sometimes intends statutory remedies to supplement, not supplant, common law remedies." (*Id.* at 1156.) As such, the *City of Moorpark* court conclusively settled the matter when it held "section 132a does not provide an exclusive remedy and does not preclude an employee from pursuing FEHA and common law wrongful discharge remedies." (*Id.* at 1158 (emphasis added).)

Labor Code section 132a as public policy

Despite acknowledging *City of Moorpark*'s holding that section 132a did not provide an exclusive remedy or preclude an employee from pursuing common law wrongful termination remedies, the *Dutra* court proceeded to summarily determine that section 132a cannot be the basis of a tort action for wrongful termination. (*Dutra*, 209 Cal.App.4th at 755-756.) *Dutra*'s error is two-fold. First, a four-part test was established by the Court in *Stevenson v. Superior Court*, (1997) 16 Cal.4th 880, 894 to determine whether a particular policy can support a common law cause of action for wrongful termination; yet the *Dutra* court failed to do any analysis regarding whether section 132a met that test. Second, *Dutra* misinterpreted the reasoning behind the Court's decision in *City of Moorpark*.

The *Dutra* court correctly recognized that the four-factor test established in *Stevenson* governs the determination whether a particular policy can support a claim for wrongful termination. Specifically, "[t]he policy must be: (1) delineated in either constitutional or statutory provisions; (2) 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) substantial and fundamental." (*Dutra*, 209 Cal.App.4th at 755-756.) However, the court failed to work through the *Stevenson* test with respect to section 132a. Had it done so, section 132a certainly would qualify as a public policy that could serve as the basis of a tort action for wrongful termination.

With respect to the *Stevenson* test's first factor, section 132a explicitly

delineates that "[i]t is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment." The statute goes on to make it unlawful to discharge or discriminate against any employee who has filed a workers' compensation claim.

Regarding the second factor, the policy "inures to the benefit of the public" because (1) any member of the public may be injured at work and become the victim of discrimination for participation in the workers' compensation system, (2) the public at large benefits from the quick and cost-effective system of workers' compensation, and (3) any type of invidious discrimination causes strife and unrest. (See *City of Moorpark*, 18 Cal.4th at 1160.)

Third, section 132a became law in 1972 and even before section 132a, a similar statute existed that was passed in 1941. (See Stats 1941 ch. 401 § 1.) Thus, the policies behind section 132a are certainly well established.

Finally, with respect to the fourth factor, the policy prohibiting discrimination against workers who utilize the workers' compensation system is "substantial and fundamental." Just as the Court reasoned in *City of Moorpark* that disability discrimination is indistinguishable in many ways from race and sex discrimination and is therefore "substantial and fundamental," so too is "[t]ermination in violation of section 132a [ ] just as obnoxious to the interests of the state and contrary to public policy and sound morality as sexual or racial discrimination." (*City of Moorpark*, 18 Cal.4th at 1155, 1160-1161.) Thus, section 132a satisfies this fourth prong of the *Stevenson* test.

Although section 132a plainly meets all four elements needed for it to qualify as a policy that can support a wrongful termination claim, the *Dutra* court failed to do any of the above analysis, leading it to erroneously conclude section 132a could not support a wrongful termination claim.

In addition, *Dutra* erred when it interpreted *City of Moorpark* as precluding a common law wrongful discharge claim because doing so would provide "broader remedies and procedures than those provided by the statute." (*Dutra*, 209 Cal.App.4th at 756.) In *City of Moorpark*, the Court stated that "the common law cause of action cannot be broader than the constitutional provision or statute on which it depends, and therefore it presents no impediment to employers that operate within the bounds of the law." (*City of Moorpark*, 18 Cal.4th at 1159.) The Court's concern was that when a common law cause of action is broader than a statute, it leaves people wondering what conduct is prohibited. By way of example, the Court noted that in *Jennings v. Maralle* (1994) 8 Cal.4th 121, 135-136, it determined that the FEHA cannot form the basis of a wrongful termination claim for employers with less than five employees. It reasoned that because the FEHA only covers employers with five or more employees, expanding the common law cause of action for disability discrimination in employment beyond the scope of the statute (to apply to employers with fewer than five employees) would impede an employer's efforts to understand and comply with the law. Although the Court in *City of Moorpark* cautioned against permitting wrongful termination claims that expand the *scope of the cause of action*, *City of Moorpark* did not comment on wrongful termination claims that expand the *scope of the remedies and procedures* afforded. That's because expanding the scope of remedies and procedures "presents no impediment to employers that operate within the bounds of the law." (*City of Moorpark*, 18 Cal.4th at 1159.) In other words, there is no risk of confusion on the part of employers attempting to comply with statutory mandates; rather, the only risk is of a greater penalty for violations. And "[t]he California Supreme Court has made it clear that damages for wrongful discharge in violation of public policy are not limited to those specified in the underlying statute that was violated." *Freund v. Nycomed Amersham* (9th Cir. 2003) 347 F.3d 752, 759-760. Thus, the *Dutra* court wrongly applied the reasoning in *City of Moorpark* because a finding that section 132a could serve as the basis for a tort claim of wrongful discharge would not expand the scope of the cause of action.

Life after *Dutra*

No petition for review of *Dutra* was filed with the California Supreme Court, so the decision is now final. What should plaintiffs' attorneys do post-*Dutra* to vindicate the rights of employees discriminated against for filing workers' compensation claims?

A number of pathways exist for how best to move forward post-*Dutra*. As discussed earlier, there are compelling arguments for why *Dutra* was wrongly decided. Therefore, attorneys should continue bringing cases that use section 132a as the public policy basis to support a wrongful termination claim because other courts may rule differently than the *Dutra* court. Eventually, the issue may work its way to the California Supreme Court for determination.

In addition, there are two workarounds to *Dutra*. The first is to use the California Constitution as the public policy behind a wrongful termination claim for an employee who has been discharged for filing a workers' compensation claim. Article XIV, section 4 of the California Constitution makes it a constitutional right for employees to have access to a system of workers' compensation. This constitutional authority certainly meets each element of the four-part *Stevenson* test to determine whether a public policy can support a wrongful termination claim. Therefore, discharging a worker who exercised his/her constitutional right to workers' compensation is clearly a violation of established California public policy.

Second, if the employee's workplace injury constitutes a disability under the FEHA, a claim for wrongful termination based on the FEHA disability may be brought in court, as made clear by *Moorpark*. (*City of Moorpark*, 18 Cal.4th at 1158.)

Finally, plaintiffs' attorneys should pursue a legislative fix to section 132a. Obviously, even after *Dutra*, attorneys can still file section 132a claims before the WCAB. In theory, the WCAB is an adequate forum for section 132a claims, but in reality, pursuing these claims in the workers' compensation system does not lead to effective enforcement of an employee's section 132a rights. The workers' compensation system was designed as a no-fault system in order to facilitate the quick adjudication of claims. Yet, section 132a claims, like other discrimination claims, are fault-based claims, and require proving-up the elements of discrimination. Workers' compensation attorneys are unaccustomed to proving-up fault and workers' compensation judges are not used to evaluating this fault-based standard. Additionally, proving fault is a much more time-consuming process than a typical workers' compensation case. Indeed, section 132a claims can involve extensive investigation, prolonged discovery, potentially thousands of pages of documents, and the need to bring multiple witnesses to the hearing for testimony. Therefore, just as with a civil action for discrimination, the WCAB trial can take multiple days. But unlike in court, WCAB trials do not usually take place on consecutive days until the matter is concluded. Instead, if the trial is not concluded in one day (difficult to do for most 132a claims), then it may be months before the case gets back on calendar, resulting in a trial potentially stretching out over the course of a year. So from a practical standpoint, the workers' compensation arena is not an effective forum for adjudication of section 132a claims.

Furthermore, the remedies available for section 132a violations do not comport with the legislative intent behind other anti-discrimination statutes. Specifically, a section 132a plaintiff can only recover back pay, up to a $10,000 penalty and reinstatement; however, the employee cannot recover future wage loss, emotional distress damages or punitive damages. More importantly, attorneys bringing section 132a claims are not entitled to recover their attorney fees. The potential to recover attorney fee awards makes it more likely that attorneys will take such cases, thereby ensuring that workers of limited means can pursue meritorious claims and ensuring litigation of claims that are in the public interest. (See, *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 984.) Thus, due to the limited remedies available for section 132a claims, the lack of attorney fees and the difficulties involved in proving fault as described above, section 132a claims are often more trouble than they are worth for attorneys and their clients.

By amending section 132a to allow for civil actions to be brought, the Legislature can align the purpose of the statute with effective enforcement. Indeed, many other states, including Missouri, Oregon, South Carolina, South Dakota and Virginia, have statutes similar to 132a that make it clear that the statutory remedies are in addition to common law civil remedies. For instance, in Missouri, "[n]o employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under the Worker's Compensation Law. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer." (R.S. Mo. §287.780 (emphasis added).) Similarly, in South Dakota, "[a]n employer is civilly liable for wrongful discharge if it terminates an employee in retaliation for filing a lawful workers' compensation claim." (S.D. Codified Laws § 62-1-16 (emphasis added).) Bringing California in line with these other states will serve to finally put teeth behind the policy set forth in section 132a.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