LEXSEE

UNITED PARCEL SERVICE, INC., et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; MICHAEL GNESDA, Real Party in Interest.

B176183

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

2004 Cal. App. Unpub. LEXIS 11333

December 15, 2004, Filed

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PRIOR HISTORY: ORIGINAL PROCEEDING; petition for a writ of mandate. Los Angeles County Super. Ct. No. VC039590. Brian F. Gasdia, Judge.

DISPOSITION: Petition denied.

COUNSEL: Gibson, Dunn & Crutcher, William D. Claster, T. Kevin Roosevelt and Lori Ginex-Orinion for Petitioners.

No appearance for Respondent.

Bienert & Krongold, Thomas H. Bienert, Jr., and Steven L. Krongold; Law Offices of David W. Wiechert and David W. Wiechert for Real Party in Interest.

JUDGES: MALLANO, J.; SPENCER, P. J., VOGEL,J. concurred.

OPINION BY: MALLANO

OPINION

Michael Gnesda filed a lawsuit claiming that he was fired by United Parcel Service, Inc. (UPS), because he would not go along with UPS's defrauding clients by advertising one price and systematically overcharging them. UPS here petitions for a writ of mandate from the denial of summary adjudication of Gnesda's cause of action for wrongful discharge [*2] in violation of public policy, asserting that UPS's alleged conduct does not support a tort claim for wrongful discharge in violation of public policy. [1] We disagree and deny the petition.

1 Gnesda's complaint contained other causes of action which are not pertinent to this opinion.

BACKGROUND

Gnesda alleges in his complaint that while working as a supervisor in UPS's "Business Development group" he learned that UPS was "illegally" and regularly overcharging customers for irregular and oversized items to the tune of "tens of millions of dollars per year . . . ." Although UPS "falsely" published tariffs, it charged higher fees than those on the tariffs, in order to generate more income. When Gnesda reported this to senior management officials, "in order to preclude him from

working with customers to ensure they were not improperly billed, [he] was transferred from 'Business Development' to 'Operations,'" where they gave him "punitive job assignments" to induce him to quit his job. When he did not [*3] quit, UPS fired him on a pretext.

As stated in UPS's petition, "For the purposes of the [summary adjudication] motion, UPS assumed the truth of all of [Gnesda's] allegations and the motion presented a pure issue of law." That issue is whether UPS's alleged conduct supports a tort claim for wrongful discharge in violation of public policy. Accordingly, we assume Gnesda's allegations are truthful.

DISCUSSION

In support of his tort claim for wrongful discharge, Gnesda points to several statutory provisions that he claims UPS has violated, including *Business & Professions Code section 17200 et seq.* (unfair competition) and *Penal Code section 532* (false pretenses). [2] He contends these violations are of public policy that supports his tort claim for wrongful discharge.

> 2 Although Gnesda also cites other statutes and, in passing, briefly mentions published tariffs (". . . UPS cannot charge rates that differ from published tariffs (*49 U.S.C. § 14101 (b)(1)*)") as supporting his tort claim for wrongful discharge, the main thrust of his claim is that he was discharged because he challenged UPS's "Fraudulent Billing Practices." Because we agree with this claim, we need not, and do not, discuss the other cited statutes and the tariffs as a basis for establishing a violation of public policy.

[*4] We agree with Gnesda for the reasons set forth in *Haney v. Aramark Uniform Services, Inc. (2004) 121 Cal.App.4th 623*. In that case, Haney was a route sales representative for Aramark, which was in the business of renting towels, mats, uniforms and garments. He alleged that he was fired for reporting fraudulent billing practices to Aramark's management. In concluding that "the public policy of discouraging fraud constitutes a fundamental public policy of California and is sufficient to support [Haney's] wrongful discharge claim" (*id. at p. 629*), the court explained as follows:

"Haney has alleged that he was terminated because he objected to Aramark's practice of overcharging and misleading customers, and he refused to follow Aramark's practice of defrauding them. Haney further alleged that his termination was in violation of public policy, and he supported that allegation with references to *Civil Code sections 1572*, *1709* and *1710*, as well as *Penal Code sections 484*[3] and 536. In his appellant's reply brief, Haney also asserts that Aramark's practice of [*5] defrauding its customers constitutes an unfair business practice under *Business and Professions Code section 17200*.[4] Furthermore, in response to Aramark's contention that the activity complained of by Haney is, at most, a simple breach of contract, Haney contends that Aramark instructed route sales representatives to charge customers for one-way items they did not require or receive and not to inform the customers of this practice.

> 3 "'(a) Every person . . . who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money . . . is guilty of theft.' (*Pen. Code, § 484*.)"
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> 4 "'As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with *Section 17500*) of Part 3 of Division 7 of the Business and Professions Code.' (*Bus. & Prof. Code, § 17200*.) Any person who violates the chapter addressing unfair trade practices is guilty of a misdemeanor. (*Bus. & Prof. Code, § 17100*.)"

[*6] "The California Supreme Court has recognized common law protection from certain types of retaliatory discharge. (See *Gantt v. Sentry Insurance (1992) 1 Cal.4th 1083, 1097* [] [retaliation for testifying truthfully regarding a coworker's sexual harassment claim] [overruled on another point in *Green v. Ralee Engineering Co.* (1998) 19 Call.4th 66, 80, fn. 6]; *Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167, 178, 164 Cal. Rptr. 839* [] (*Tameny*) [retaliation for refusal to participate in an illegal price-fixing scheme].) To support a common law wrongful discharge claim, the public 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.' (*Stevenson v. Superior Court (1997) 16 Cal.4th 880, 894* [].)

"Where the policy is reflected in a provision of the Penal Code, the first, second[5] and fourth elements are easily met because the Supreme Court has stated that 'an employer's [*7] obligation to refrain from discharging an employee who refuses to commit a criminal act . . . reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes. As such, a wrongful discharge suit exhibits the classic elements of a tort cause of action.' (*Tameny, supra, 27 Cal.3d at p. 176*.) In light of *Tameny* and the fact that theft through fraudulent representation or pretense has long been defined as a crime by statute in California, we conclude that when an employer discharges an employee who refuses to defraud a customer, the employer has violated a fundamental public policy and may be liable in tort for wrongful discharge.

> 5 "Although not essential to the outcome of this appeal, we note the public interest in the integrity of the securities markets and the concern that might arise where fraudulent billings are used by a company to boost its income and that increased level of income is then publicly reported by the company to the investing public. In this case, ARAMARK Corporation, which is traded on the New York Stock Exchange under the symbol RMK, reported income from its fiscal years for 1998 and 1999 as part of the financial statements it filed with the Securities and Exchange Commission. (See ARAMARK, Investor Relations-SEC Filings <http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=RMK&script=1901> [as of June 23, 2004].)"

[*8] "Although we have not found a California case involving fraudulent billing practices that did not involve a public entity,[6] other jurisdictions have held that an employee should not be forced to choose between his or her livelihood and committing fraud or other crimes. (*Brown v. Hammond (E.D.Pa.1993) 810 F. Supp. 644*.) In the *Brown* case, a paralegal-secretary stated a viable cause of action by alleging that she was terminated for refusing to directly participate in a fraudulent billing practice of her law firm employer. The practice to which she objected involved billing clients for time she spent on client matters, as attorney time, without any notice to the client that the work was being done by a nonlawyer. (*Brown v. Hammond, supra, at p. 646*; see *Jones v. Stevinson's Golden Ford (Colo.App. 2001) 36 P.3d 129* [employee refused to 'upsell' fuel injector flushes on vehicles that did not need this maintenance; 'upselling' of that type violated Colorado's Motor Vehicle Repair Act and Consumer Protection Act].)

> 6 "*Southern Cal. Rapid Transit Dist. v. Superior Court (1994) 30 Cal.App.4th 713* [] (discharge of employees by transportation district in retaliation for reporting fraud in connection with certification of minority contractor violated public policy)."

[*9] "Accordingly, Haney's allegations that he was terminated for complaining about and refusing to engage in fraudulent billing practices are sufficient to state a claim for retaliatory discharge in violation of a public policy.[7] Furthermore, triable issues of material fact exist as to Aramark's motive in discharging Haney. Therefore, Aramark is not entitled to summary adjudication of Haney's second cause of action." (*Haney v. Aramark Uniform Services, Inc., supra, 121 Cal.App.4th at pp. 641*?643.)

> 7 "This opinion does not hold, and should not be read to imply, that an employee who is discharged for complaining about breaches of contract committed by the employer is able to state a wrongful discharge claim based on a violation of a substantial and fundamental public policy."

Similarly, "[Gnesda's] allegations that he was terminated for complaining about and refusing to engage in fraudulent billing practices are sufficient to state a claim for retaliatory discharge in violation of public [*10] policy." (*Haney v. Aramark Uniform Services, Inc., supra, 121 Cal.App.4th at p. 643*.) Finally, the billing practices such as those alleged here go beyond any breach of contract because they are fraudulent. And we reject the notion stated by UPS in its petition that it would not have "known that its [fraudulent business practices], as alleged by Gnesda, [were] prohibited by a public policy that is so fundamental that it could not terminate any of its employees for complaining about such conduct." Surely the morals of the marketplace have not sunk that low.

DISPOSITION

The petition is denied. The order to show cause is discharged. Michael Gnesda is to recover his costs of this proceeding.

MALLANO, J.

I concur:

SPENCER, P. J.

VOGEL, J.

DISSENT BY: VOGEL

DISSENT

VOGEL, J.

I dissent.

First, the majority's opinion ignores the gist of the claim asserted by Michael Gnesda, ignores the evidence, ignores Gnesda's admissions, and bestows upon Gnesda the benefits of a claim he never asserted.

Second, the majority hides its manipulations behind the screen of an unpublished opinion. This case differs substantially from the case relied on by the majority and, [*11] whatever the result, ought to be published.

As will be obvious to even the most casual reader, that which follows was drafted as a proposed opinion for the panel hearing this case, and I have amended it only to change "we" to "I," and to otherwise show this is now a dissent rather than the opinion of this court. If nothing else, I hope the following paragraphs will show the basis for my disagreement with the majority's reasoning and conclusions.

INTRODUCTION

Michael Gnesda worked for United Parcel Services, Inc. from 1986 to 2002, first as a "pre-loader" and later in a supervisory capacity. According to Gnesda, he was fired based on a "trumped up" charge that he had "'authorized the falsification of a company record'" concerning a subordinate employee's hours. [1] In fact, claims Gnesda, he was terminated because he brought to the attention of UPS management facts demonstrating that UPS was "illegally charging customers 'oversize' and 'irregular' shipping fees" despite the fact that their packages qualified for the regular-size fees set out in UPS's tariffs. Gnesda sued UPS for damages on theories of wrongful discharge in violation of public policy, breach of contract, [*12] defamation, and unfair competition.

1 Gnesda also alleges that as part of its "subterfuge, UPS coerced the subordinate employee into providing false information that would support UPS's pretextual firing."

UPS answered, then moved for summary adjudication of Gnesda's wrongful discharge cause of action on the ground that UPS's alleged violation of its fee tariffs, if true, would not constitute the kind of public policy violation required to support this tort -- because the alleged conduct does not violate a public policy delineated in a specific statute or constitutional provision, and because the conduct does not implicate a fundamental policy that inures to the benefit of the public. Gnesda opposed the motion on the ground that UPS's failure to adhere to its tariffs, if proved, would constitute unfair competition within the meaning of *Business and Professions Code sections 17200, 17202, 17203,* and *17205* [*13] . [2] The trial court denied UPS's motion.

2 Subsequent undesignated section references are to the Business and Professions Code. *Section 17200* defines "unfair competition" as any unlawful, unfair or fraudulent business act or practice. *Sections 17202* and *17203* address the types of relief available when a violation of *section 17200* is proved. *Section 17500* prohibits false advertising. When it denied UPS's motion, the trial court also cited *15 U.S.C. § 45(a)*, the federal counterpart of *section 17200*. Our subsequent references to the unfair competition statutes are to these laws.

UPS then filed the petition for a writ of mandate, asking us to decide the issue as a matter of law. We issued an order to show cause, set a briefing schedule, and set the matter for hearing. Unlike the majority, I would now conclude that Gnesda's inability to point to a specific statute violated by UPS's alleged conduct defeats his claim for wrongful discharge, and that UPS's motion for summary adjudication should [*14] have been granted.

DISCUSSION

A.

Gnesda's allegations, *assumed* true for purposes of discussion, relate the following scenario.

UPS "purports to bill customers based on guidelines set forth in a 'tariff' submitted to the United States Department of Transportation . . . and published to the general public. The tariff set forth detailed instructions for the proper method to package 'irregular' and 'oversized' items. UPS represented that following these procedures would allow customers to avoid additional charges. Conversely, the failure to follow the procedures resulted in the package being designated an 'irregular' or 'oversize' package, in which case UPS would charge an additional cost of up to $ 50 per package. In reality, regardless of whether customers followed the tariff procedures, UPS regularly charged clients the additional irregular or oversize cost. These overcharges resulted, and continue to result, in tens of millions of dollars per year to UPS . . . ."

While working in UPS's Business Development group during 1999 and 2000, Gnesda learned of UPS's "problems" and reported these "illegal billing practices to UPS senior management officials . . . . UPS [*15] retaliated against [Gnesda] for daring to speak up for UPS customers about the illegal billing practices" by first transferring him to a different department, then embarking "on a pattern of punitive job assignments and sanctions, intended to induce [him] to quit his job" and, ultimately, terminating his employment without good cause. [3]

> 3 Gnesda does *not* allege that *he* was ever asked or required to "commit[] fraud or other crimes," or that he was fired because he refused "to directly participate in a fraudulent billing practice" as claimed by the plaintiff in *Haney v. Aramark Uniform Services, Inc. (2004) 121 Cal.App.4th 623, 643*. Gnesda's claim of wrongful termination in violation of public policy, in form and substance, relies on the unfair competition statute, not on the fraud statute, and I emphasize that my opinion in this case addresses the nature of the underlying wrong alleged by a discharged employee, not by the third person directly affected. In short, I express no view about the merits of any unfair competition or fraud claim that might be alleged against UPS by a customer or competitor. The majority simply ignores this distinction between *Haney* and the case presented by Gnesda.

[*16] **B.**

In the absence of a contract providing otherwise, an employment relationship may generally be terminated by either party "at will." The exception to this rule is that an employer may not discharge an at will employee for a reason that violates fundamental public policy, and this "exception is enforced through tort law by permitting the discharged employee to assert against the employer a cause of action for wrongful discharge in violation of fundamental public policy." (*Stevenson v. Superior Court (1997) 16 Cal.4th 880, 889-890*.) In refining the elements of the tort of wrongful discharge, the Supreme Court has "established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.'" (*Ibid.;* see also *Esberg v. Union Oil Co. (2002) 28 Cal.4th 262, 271-272*.) [*17]

C.

Before 1995, public tariffs ensured that common carriers such as UPS offered services for reasonable and non-discriminatory rates, but the 1995 deregulation of the shipping industry changed the system by eliminating the tariff filing requirement, leaving the tariffs as part of the common carriers' "standard contractual terms" with their customers, "which some call 'tariffs' out of habit, but which have no effect apart from their status as [a part of such] contracts." (*Tempel Steel Corp. v. Landstar Inway, Inc. (7th Cir. 2000) 211 F.3d 1029, 1030*; see also *Great American Ins. Agency v. United Parcel (2004) 3 Misc. 3d 301, 772 N.Y.S.2d 486, 487-488*.) Although UPS continued voluntarily to publish its tariffs at its website and to make them available to its customers on request, it was not required to do so by any statute or regulation.

Quite plainly, UPS's "tariffs" do not qualify as either a constitutional or a statutory provision.

D.

To avoid the conclusion that follows from his inability to point to a specific statute governing UPS's alleged conduct, Gnesda points to the general unfair competition statutes, contending [*18] that UPS violated those statutes and that he has thereby met the requirements of the wrongful discharge tort. The cases do

not support Gnesda's conclusion.

1.

In *Esberg v. Union Oil Co., supra, 28 Cal.4th 262*, an employee sued his employer, alleging the employer had refused to reimburse him for educational expenses because (at 56) he was "'too old to invest in,'" and asserting claims for breach of contract, age discrimination in violation of the FEHA, and denial of benefits in violation of a "fundamental public policy." (*Id. at p. 266*.) A jury awarded the plaintiff $ 35,000 in noneconomic damages and $ 51,000 in economic damages, but the trial court vacated the award of noneconomic damages on the ground that the employer's denial of education benefits did not constitute either a violation of the FEHA or of the fundamental policy against age discrimination. The Court of Appeal affirmed, as did the Supreme Court, rejecting the plaintiff's claim that the denial of educational assistance to an employee over the age of 40 violates a fundamental public policy and thus constitutes a tort for which damages are recoverable under *Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167, 164 Cal. Rptr. 839*, [*19] and *Rojo v. Kliger (1990) 52 Cal.3d 65, 276 Cal. Rptr. 130*. In this context, the Supreme Court summarized the rule this way:

"In *Tameny*, the plaintiff alleged that his employer had fired him for refusing to participate in an illegal price-fixing scheme. We held that 'an employer's obligation to refrain from discharging an employee who refuses to commit a criminal act . . . *reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes.*' (*Tameny, supra, 27 Cal.3d at p. 176*, italics added.) We concluded that such a violation of public policy would support a common law cause of action in tort. (*Ibid.*)

"In *Rojo*, we held that the two plaintiffs had suffered tortious constructive discharge because their employer's sexual harassment forced them to leave their employment. (*Rojo, supra, 52 Cal.3d at pp. 70-71*.) Our holding in *Rojo* was grounded in the determination that our state Constitution (*Cal. Const., art. I, § 8*) declared a fundamental public policy against sex discrimination in employment (*Rojo, supra, at pp. 89-90*), [*20] and that this fundamental public policy '"inured to the benefit of the public at large"' and was firmly established at the time of the plaintiffs' discharge (*id. at pp. 90-91*).

"Some two years after *Rojo*,. . . this court refined the scope of the common law tortious discharge claim in *Gantt v. Sentry Insurance (1992) 1 Cal.4th 1083* . . . . There, the plaintiff was constructively discharged for resisting an employer's pressure to lie during the investigation of a coworker's sexual harassment claim. This court held that there was direct statutory support for the jury's express finding that the employer violated a fundamental public policy when it constructively discharged the . . . employee, in view of section 12975 [of the Government Code], which specifically prohibited any obstruction of an investigation by the DFEH. Distinguishing between matters genuinely involving public policy and those that concern merely ordinary disputes between employer and employee, we observed that '[a] public policy exception carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions strikes the [*21] proper balance among the interests of employers, employees and the public.' (*Gantt, supra, at p. 1095*.)

"As we later explained in *Stevenson v. Superior Court (1997) 16 Cal.4th 880, 889* . . ., 'in the context of a tort claim for wrongful discharge, tethering public policy to ***specific constitutional or statutory provisions*** serves not only to *avoid judicial interference with the legislative domain*, but also to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees they discharge.' . . .

"In *Stevenson*, an employee who had been discharged at the age of 60 after 30 years of employment alleged that her former employer wrongfully terminated her employment in violation of the public policy against age discrimination. (*Stevenson, supra, 16 Cal.4th at pp. 885-886*.) We recognized that the FEHA establishes a ***general*** public policy against age discrimination in employment, but we acknowledged the limitations of allowing common law tort claims based on public policy articulated in a statute. We said: 'When a plaintiff relies upon a statutory prohibition to support [*22] a common law cause of action for wrongful termination in violation of public policy, *the common law claim is subject to statutory limitations affecting the nature and scope of the statutory prohibition*, but the common law claim is not subject to statutory procedural limitations affecting only the availability and scope of nonexclusive statutory remedies.' (*Stevenson, supra, at p. 904*, italics added.) . . ." (*Esberg v. Union Oil Co, supra, 28 Cal.4th at pp. 271-272*, some emphasis added [because no statute or

constitutional provisions support a claim for the wrongful denial of educational benefits to workers over the age of 40, the plaintiff had no common law tort claim].)

The essence of *Esberg*, I think, is a distinction between a specific law and a general public policy. Thus, the general public policy against age discrimination is insufficient to support a wrongful discharge claim when the specific conduct (such as a refusal to pay for educational benefits) is not expressly prohibited by a constitutional provision or by a statute. Similarly, the general public policy against unfair competition is insufficient to support a wrongful discharge [*23] claim when the specific conduct (failing to follow contractual obligations) is not expressly prohibited by a constitutional provision or by statute, and it is not enough that the general notion of unfair competition is condemned by *sections 17200* and *17500*. [4] (*Green v. Ralee Engineering Co. (1998) 19 Cal.4th 66, 75* [not all statutes will support a wrongful discharge claim; many simply regulate conduct between private individuals, or impose requirements whose fulfillment does not implicate fundamental public policy concerns]; *Sequoia Ins. Co. v. Superior Court (1993) 13 Cal.App.4th 1472, 1480* [where an employee claimed his insurance company employer fired him because he refused to artificially inflate reserves on pending cases, the employee could not pursue a claim of wrongful discharge because he was unable to "point to a specific statement" in a statute restricting the amount of reserves an insurer may set aside for a pending claim].)

> 4 The fact that a breach of contract subjects the breaching party to liability for damages does not make a breach unlawful -- because a contracting party almost always has an option to perform as required by the contract, or breach and pay damages. (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 705, 791-792, 797, pp. 640, 715-716, 719-721.)

[*24] As UPS aptly notes, it "could not have read [the unfair competition statutes] and known that its conduct, as alleged by Gnesda, was prohibited by a public policy that is so fundamental that it could not terminate any of its employees for complaining about such conduct. [P] More to the point, the broad statute does not prohibit the specific conduct complained of here -- UPS charging its customers amounts that vary from those set forth in its tariffs." From my perspective, I note that a rule allowing the use of the unfair competition statutes to support a wrongful discharge claim would mean that virtually every business decision by every employer could support a wrongful discharge claim.

2.

The cases relied on by Gnesda and the majority do not support a different conclusion. [5]

> 5 The statutes cited by Gnesda in opposition to UPS's petition are equally inapposite. *Civil Code section 2175* does no more than prevent a common carrier from using its contracts to exonerate itself from liability for the gross negligence, fraud, or willful wrong of itself or its servants. *Civil Code section 1668* does no more than state the established rule that a contract which has for its "object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." Whatever relevance these statutes would have to contracts made for the prohibited purposes, they are plainly inapposite where, as here, the claim is that UPS's conduct constituted a breach of its lawful contracts with its customers. The Motor Carrier Act (*49 U.S.C. § 13101 et seq.*) does not, as Gnesda claims, prohibit overcharging by UPS; in fact, the only specific prohibitions in the Motor Carrier Act are the two that prohibit overcharging by water carriers engaging in noncontiguous domestic trade, and by carriers for the movement of household goods. (*49 U.S.C. §§ 13702(a), 13102(15), 13102(10).*) As for Gnesda's reference to *18 U.S.C. § 1514A* and his screed about recent corporate scandals, he ignores the fact that the Sarbanes-Oxley Act of 2002 did not become the law until three months after he was fired by UPS.

[*25] *Haney v. Aramark Uniform Services, Inc., supra, 121 Cal.App.4th 623* (the hook on which the majority hangs its hat), holds that allegations by a former employee "that he was terminated for complaining about and refusing to engage in fraudulent billing practices are sufficient to state a claim for retaliatory discharge in violation of a public policy." (*Id. at p. 643.*) ***But as Haney itself makes clear, the "opinion does not hold, and should not be read to imply, that an employee who is discharged for complaining about breaches of***

contract committed by the employer is able to state a wrongful discharge claim based on a violation of a substantial and fundamental public policy." (*Ibid.* at fn. 15, emphasis added.) And that, of course, is precisely what Gnesda has presented here -- because his inability to hold UPS to the old tariffs (Part C., *ante*) leaves him with nothing more than an allegation that UPS breached its contracts with its customers. Since there is nothing in the fraud statutes (*Civ. Code, § 1709*; *Pen. Code, § 532*) to prohibit UPS from breaching its customer contracts, it follows [*26] necessarily that there is nothing in *Haney* to support Gnesda's claim.

Green v. Ralee Engineering Co., supra, 19 Cal.4th 66, holds that statutorily authorized administrative regulations can support a wrongful discharge claim, but there is nothing in that opinion to support Gnesda's assertion that a *general* statute or regulation can support such a claim. To the contrary, the employee in *Green*, a quality control inspector of aircraft parts who was fired after he reported his employer's shipment of defective parts, established that he was conducting FAA-required inspections as specifically required by a federal regulation to ensure that each article produced conformed to its design and was in a condition for safe operation. (*Id. at p. 82*.)

The plaintiff in *Collier v. Superior Court (1991) 228 Cal. App. 3d 1117, 279 Cal. Rptr. 453*, complained that his employer was engaging in bribery, tax evasion, drug trafficking, and money laundering, and taking kickbacks in violation of the antitrust laws. (*Id. at pp. 1122-1123*.) As Division Four of our court specifically noted, the employer's conduct may have violated [*27] a host of statutes, including *Penal Code sections 504* (embezzlement) and 641.3 (bribery and kickbacks), *Revenue and Taxation Code section 7152*, and *26 U.S.C. §§ 7201* and *7202* (tax evasion). (*Collier v. Superior Court, supra*, 228 Cal. App. 3d at p. 1112.) It was by no means the sort of generalized breach of contract claim advanced by Gnesda. The same is true of *Holmes v. General Dynamics Corp. (1993) 17 Cal.App.4th 1418, 1426*, where the employee claimed (and proved to the satisfaction of a jury) that he had been fired because he disclosed conduct that constituted violations of the False Statements Act (*18 U.S.C. § 1001*).

E.

To sum up, I would hold that a claim of wrongful discharge in violation of public policy fails if its sole support is a reference to the general laws prohibiting unfair competition and false advertising, and the facts alleged, if true, could at most establish a breach of contract, not actionable fraud. It follows that, in my view, UPS's motion for summary adjudication of Gnesda's wrongful discharge claim should have been [*28] granted.

MALLANO, J.

We concur:

SPENCER, P. J.

VOGEL,J.