

December 31, 2013

Chief Justice Tani Gorre Cantil-Sakauye and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Vasquez v. Franklin Management Real Estate Fund, Inc.*
Court of Appeal Case No.: 245735
Los Angeles Superior Court Case No. BC449064
Request for Depublication

To the Chief Justice and Associate Justices:

Pursuant to the California Rules of Court, Rule 8.1125, Appellant respectfully requests that the Court partially publish its opinion on the above entitled case and depublish Section D - Intentional Infliction of Emotional Distress portion of the opinion a copy of which is attached hereto as "Exhibit A." An important question here is: *Does the court want to create the public policy that no outrageous act and intent related to an employer can ever be a tort?*

Appellant agrees with the opinion of the Court regarding the cause of action for Constructive Wrongful termination in Violation of Public Policy. Appellant respectfully requests that Section D of the Discussion portion (the last subsection of the opinion) regarding Intentional Infliction of Emotional Distress (hereinafter "IIED") is depublished.

Appellant respectfully requests that the opinion is not published as to the part regarding IIED because *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876 which the opinion relies on regarding Appellant's IIED claim does not apply the facts of the current case and does not abolish earlier case law holding IIED can exist if there is wrongful termination based on statutory violations. The outrageousness of the conduct giving rise to an IIED claim is a factual question based on outrageousness and whether Workers' Compensation is an exclusive remedy to Appellant's IIED claim was not briefed in the appeal and was not raised in the Respondent's brief.

If published, the IIED portion of the opinion of this Court can be misunderstood to hold that the Labor Code violations that give rise to constructive wrongful terminations can not be a basis for IIED claims and that they are always barred by the Workers' Compensation's exclusive remedy rule.

The court cited *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876. However, *Miklosy* is factually and legally distinguishable from the present case and inapplicable. In *Miklosy*, Government Claims Act barred Plaintiff's *Tameny* wrongful termination action against University. There was no public policy violation and no wrongful termination cause of action because the claimant lost these causes of action when claimant failed to file a timely claim with the government. It was meaningless to have an IIED cause of action without a wrongful termination cause of action. There was no valid underlying public policy violation for the IIED cause of action. *Miklosy* at 902-903. This is why in *Miklosy*, the court held that since there was no public policy violation by the employer, the only remedy plaintiff could get was in workers' compensation. *Miklosy* at 902. Because plaintiff could not sue for any wrongdoing of the employer, the court stated that the conduct occurred in the normal course of the employer-employee relationship. *Id.* The only reason the workers' compensation's exclusive remedy provision covered *Miklosy's* injury was that IIED was invalid when the underlying cause of action of wrongful termination was barred. An IIED cause of action based on the non-existent wrongful termination cause of action was barred. *Miklosy* at 902-903.

Unlike *Miklosy*, in the present case, the underlying cause of action of Constructive Wrongful Termination is not barred and the IIED cause of action is based on a violation of public policy. In the present case, the Court's opinion states that due to non-reimbursement of expenses under Labor Code Section 2802 Appellant was not paid minimum wages. Appellant's claim of failure to pay him minimum wages was a fundamental public policy which resulted in Appellant being constructively wrongfully terminated. Conduct violating public policy is outrageous, and allows for recovery under the tort of intentional infliction of emotional distress. *Cabesuela v. Browning-Ferris* (1998) 68 Cal.App.4th 101, 112. The present case does not involve simple humiliation or insults such as *Singh v. Southland Stone, U.S.A. Inc.* (2009) 186 Cal.App.4th 338, 366-367, and *Faretti v. Pfizer, Inc.* (N.D. Cal., Aug 22, 2012) 2012 U.S. Dist. LEXIS 119115 at *32-34. The present case involves non-reimbursement of business expenses which were so high that they had the effect of Appellant not receiving minimum wages which resulted in a Constructive Wrongful Termination and IIED causes of action.

Miklosy does not specifically overrule *Cabesuela v. Browning-Ferris Industries* (1998) 68 Cal. App. 4th 101, 112, -113, *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal. App. 4th 1693 and *Phillips v. Gemini Moving Specialists* (1998) 63 Cal.App.4th 563, 577 which held that terminations in violation of public policy can serve the basis for recovery under the theory of intentional infliction of emotional distress. Since the *Miklosy* reference on page 14, 15, and 16 of this Court's opinion under Section D-Intentional Infliction of Emotional Distress seems to be inapplicable to the present case, Appellant respectfully requests this section not to be published.

A. Whether Conduct Is Outrageous Is A Factual Question

In California, a party litigant may recover under an IIED theory where: 1) the defendant's conduct was outrageous; 2) the defendant intended to engage in the outrageous conduct, or acted with reckless disregard of the probability that plaintiff would suffer resulting emotional distress; 3) the plaintiff suffered severe emotional distress; 4) the defendant's conduct was a substantial factor in causing emotional distress to the plaintiff. CACI Jury Instruction No. 1600; *Christensen v. Superior Court* (1991) 51 Cal.3d 868, 903.

For purposes of evaluating an IIED claim, where reasonable people may differ, the trier of fact determines the reasonableness of conduct causing the plaintiff severe emotional distress. *Molko v. Holy Spirit Assoc.*, 46 Cal.3d 1092, 1120 (1988). Determinations of whether conduct is extreme enough requires a fact finder to ask whether the conduct plead by the plaintiff would raise an average member of the community's resentment against the actor and lead her/him to exclaim "outrageous." *KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1028. Decisions about average community standards are usually questions of fact. *Miller* 36 Cal.4th 446. Pursuant to *Robinson v Hewlett-Packard Corp.* (1986) 183 Cal. App. 3d 1108, 1130, behavior may be considered outrageous if a defendant abuses a relationship or position which gives him power to damage the plaintiff's interest, knows the plaintiff is susceptible to injuries through mental distress, or acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress.

For purposes of evaluating a claim of intentional infliction of emotional distress, where reasonable people may differ, the trier of fact determines reasonableness of behavior creating plaintiff's distress. *Soldinger v. N.W. Air* (1996) 51 Cal.App.4th 345, 377, 766 citing to *Molko v. Holy Spirit Assoc.* (1988) 762 P.2d 46. It is a question of fact whether a defendant's conduct is outrageous, and whether the plaintiff's emotional distress is severe. *State Rubbish Assn. v. Siliznoff*, (1952) 240 P.2d 282; *Murphy v. Allstate*, 83 Cal.App.3d 38, 51, 147 Cal.Rptr. 565, 575-576 (4th App. Dist. 1978). " 'It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.' " *Fletcher v. Western National Life Insurance Co.* (1970) 10 Cal.App.3d 376, 397. "Severe emotional distress [is] emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it." *Id.* Emotional distress includes any highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, or worry. *Id.* Severe emotional distress means emotional distress of such substantial quality or enduring quality that no reasonable person in civilized society should be expected to endure it. *Girard v. Ball* (1981) 125 Cal.App.3d 772, 787-788; *Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762-763.

B. Workers Compensation Is Not An Exclusive Remedy To Intentional Infliction of Emotional Distress Claim

Emotional distress claims are not preempted by the Workers' Compensation Act where the alleged wrongful discharge violates fundamental public policy. *Gnatt* at 1097-1101, *Kirton v. Summit Medical Center* (1997) 982 F.Supp. 1381, 1387, (Hn 4). In *Smith v. International Brotherhood of Electrical Workers* (App. 2 Dist. 2003) 109 Cal.App.4th 1637, former union employee's causes of action for intentional and negligent infliction of emotional distress against union, which were based on employer's alleged violation of fundamental public policies, were not preempted by the Workers' Compensation Act.

In *Maynard v. City of San Jose* (9th Cir. 1994) 37 F.3d 1396, the Court held that California's Workers' Compensation law does not bar tort claims rooted in violations of public policy. The court also held that personal injury claims that implicate fundamental public policy considerations are not preempted by the Workers' Compensation Act. *Maynard v. City of San Jose* (9th Cir. 1994) 37 F.3d 1396, 1405 (citing *Gantt v. Sentry Ins.*, (1992) 1 Cal. 4th 1083, 1101, 824 P.2d 680, overruled on other grounds by *Green v. Ralee Eng'g Co.*, (1998) 19 Cal. 4th 66, 960 P.2d 1046). The Worker's Compensation Act is not the exclusive remedy for employment discrimination, defamation and the intentional infliction of emotional distress. *Meninga v. Raley's Inc* (1989) 216 Cal App3d 79.

It would not make sense to compensate emotional distress claims that arose from wrongful termination by the workers' compensation scheme. There is a difference between this impairment determination due to emotional distress in the workers' compensation legislation and emotional distress that one suffers due to wrongful termination in violation of public policy. The terms are not synonymous. Under workers compensation laws, Worker's compensation disability evaluation does not consider whether the defendant's conduct was outrageous and whether it was a substantial factor causing plaintiff emotional distress. CACI 1600, 1602.¹

"Emotional distress" includes any "highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, or worry." *Fletcher, supra*, 10 Cal.App.3d at p. 397. "One who has wrongfully and

¹ "Outrageous conduct" is conduct so extreme that it goes beyond all possible bounds of decency. In deciding whether Defendant's conduct was outrageous, jury may consider, whether Defendant abused a position of authority or a relationship that gave him real or apparent power to affect Plaintiff's interests; Whether Defendant knew that Plaintiff was particularly vulnerable to emotional distress; and whether Defendant knew that his conduct would likely result in harm due to mental distress. CACI 1602. "Behavior may be considered outrageous if a defendant (1) abuses a relation or position that gives him power to damage the plaintiff's interests; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress. . . ." *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1122. "[I]t is not essential to liability that a trier of fact find a malicious or evil purpose. It is enough that defendant 'devoted little or no thought' to probable consequences of his conduct." *KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1031-1032.

intentionally [suffered severe emotional distress] may recover compensatory damages even though he or she has suffered no physical injury,' and 'the right to compensation exists even though no monetary loss has been sustained.' ” *Grimes v. Carter* (1966) 241 Cal.App.2d 694, 699.

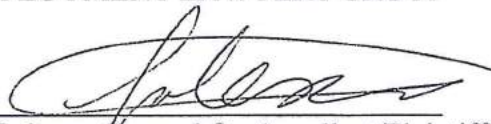
The purposes of the Workers' Compensation Act are: (1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society, (2) to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production, (3) to spur increased industrial safety, and (4) in return, to insulate the employer from tort liability for his employees' injuries. Cal.Labor Code §3200 et seq, *Matea v. Workers' Comp. Appeals Bd.* (2006) 51 Cal.Rptr.3d 314. The purpose of an award under the workers' compensation scheme is not to make the employee whole for the loss which he has suffered, but to prevent him and his dependents from becoming public charges during the period of his disability. *Id.*

Plaintiff does not claim he suffered a disability and impairment because of Defendant's negligence. Additionally Plaintiff did not suffer an industrial injury. Liability under the workers' compensation law is founded in neither tort nor contract law; instead, it is liability without fault to ensure that injured workers are quickly provided benefits to relieve the effects of the industrial injury. Cal. Const. Art. 14, §4; Cal.Labor Code § 3600, *Claxton v. Waters* (2004) 96 P.3d 496 Purposes of Workers' Compensation Act include ensuring that cost of industrial injuries will be part of cost of goods rather than burden on society; guaranteeing prompt, limited compensation for employee's work injuries, regardless of fault, as inevitable cost of production; spurring increased industrial safety; and in return, insulating employer from tort liability for his employees' injuries. *Woodline Furniture Mfg. Co. v. Department of Industrial Relations* (1994) 29 Cal.Rptr.2d 17. Workers compensation determines impairment and provides rehabilitation to enable injured employees to reenter work force as soon as practicable. Cal.Labor Code § 139.5, *Newton v. Workers' Comp. Appeals Bd.* (1993) 21 Cal.Rptr.2d 146.

For the reasons stated above, Appellant respectfully requests that the opinion of the Court of Appeal on this case is partially published and Section D of the Discussion portion regarding IIED cause of action should be depublished.

Very truly yours,

EMPLOYMENT LAWYERS GROUP


Ann Guleser, Counsel for Appellant/Plaintiff
Jorge Vasquez

PROOF OF SERVICE
LOS ANGELES SUPERIOR COURT CASE NUMBER BC449064
COURT OF APPEAL CASE NUMBER 245735

I am employed in the City of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 13418 Ventura Boulevard, Sherman Oaks, CA. 91423. On the below date I served the following documents:

REQUEST FOR DEPUBLICATION (PARTIAL PUBLICATION) OF THE OPINION IN
VASQUEZ V. FRANKLIN MANAGEMENT REAL ESTATE FUND, INC.

Attn: Karl Schlecht
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Attorney for FRANKLIN MANAGEMENT REAL ESTATE FUND, INC.

Court of Appeal, State of California
Second Appellate District
Division Four
Ronald Regan State Building
300 South Spring Street
Los Angeles, California 90013

Said documents were served in each of the following manners as indicated by an "(X)" before such mode of service:

(X) BY U.S. MAIL I caused each such envelope with postage thereon fully prepaid, to be placed in the United States mail at Sherman Oaks, California on December 31, 2013. I am familiar with the practice of my employer for collection and processing of the correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States mail the same day as it is place for collection.

(X) STATE I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 31, 2013, at Sherman Oaks, California.

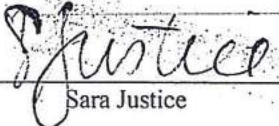

Sara Justice

Exhibit A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JORGE L. VASQUEZ,
Plaintiff and Appellant,

v.

FRANKLIN MANAGEMENT REAL
ESTATE FUND, INC.,

Defendant and Respondent.

B245735
(Los Angeles County
Super. Ct. No. BC449064)

COURT OF APPEAL - SECOND DISTRICT

FILED

DEC - 3 2013

JOSEPH A. LANE Clerk

Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles, Malcolm Mackey, Judge. Reversed and remanded.

Employment Lawyers Group, Karl Gerber and Ann Guleser for Plaintiff and Appellant.

Kimball, Tirey & St. John, Karl P. Schlecht and Michaelene H. Kapson for Defendant and Respondent.

Appellant Jorge L. Vasquez contends the trial court abused its discretion in sustaining respondent Franklin Management Real Estate Fund, Inc.'s demurrers to appellant's claims for constructive discharge in violation of public policy and intentional infliction of emotional distress. The trial court found appellant's allegation that respondent violated the Labor Code by assigning appellant tasks that required extensive use of his vehicle and refusing to reimburse him for mileage did not support either claim. The issue presented is whether the facts alleged supported claims for constructive discharge in violation of public policy or intentional infliction of emotional distress, or could be amended based on factual contentions made by appellant to state such causes of action. We agree with the trial court that appellant did not assert facts sufficient to support the intentional infliction of emotional distress claim. However, we conclude appellant should have been permitted leave to amend his claim of constructive discharge in violation of public policy and therefore reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. Original Complaint and Demurrer

Respondent employed appellant as a maintenance technician from May 2009 until August 2010. In November 2010, appellant brought suit against respondent. The complaint alleged that during appellant's term of employment, respondent paid him a wage of \$10 per hour for a 40-hour week. After the first month, appellant's supervisors began instructing him to drive his own truck for work-related errands, such as going to the hardware store to buy items needed for apartments owned or managed by respondent. Appellant estimated that he thereafter drove a minimum of 30 miles per day running errands related to his employment. According to the complaint, appellant told his supervisors nearly every week that he could not afford to pay for the gasoline and vehicle

maintenance, and he requested reimbursement. Despite his repeated requests, his supervisors continued to assign him tasks that required many miles of driving and consistently informed him he would not be reimbursed.

In August 2010, appellant informed a new supervisor that he could not afford to maintain his vehicle due to using his money to purchase gasoline for work-related errands. Appellant told the new supervisor he could not “tolerate the work environment of only being paid \$10.00 per hour, not being paid for gas and having to drive around town for work without being reimbursed for mileage.” When respondent continued to refuse to reimburse for mileage, appellant had “no choice but to resign.” Based on these allegations, appellant brought suit for violation of Labor Code section 2802.¹ He also asserted claims for constructive wrongful termination in violation of public policy and intentional infliction of emotional distress.² According to the complaint, the public policy respondent allegedly violated was embodied in Labor Code sections 2802 and California’s unfair competition law (Bus. & Prof. Code, § 17200, et seq.).³

¹ Labor Code section 2802 provides that “[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or for his or her obedience to the direction of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.” In *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, the Supreme Court held that an employer is obliged by this provision to indemnify employees for automobile expenses actually and necessarily incurred in performing employment-related tasks. (*Id.* at pp. 567-568.)

² A fourth claim for unfair competition in violation of California Business and Professions Code section 17200, et seq. was included in the complaint, but appellant subsequently voluntarily dismissed it, and that claim is not the subject of this appeal.

³ Appellant also claimed that respondent’s alleged actions violated the public policy embodied in Labor Code section 1103. Section 1103 provides that an employer who violates “this chapter” is “guilty of a misdemeanor,” punishable by a fine or imprisonment. The provision is contained in Chapter 5 of Part 3 of Division 2 of the Labor Code, which deals with employer attempts to prohibit or prevent employee
(Fn. continued on next page.)

Respondent demurred to the claims for constructive discharge and intentional infliction of emotional distress. Respondent contended that failure to reimburse for mileage was not sufficiently intolerable or aggravated to support a claim of constructive discharge. Respondent further contended that appellant failed to allege sufficiently outrageous and extreme conduct to support a claim for intentional infliction of emotional distress.

The trial court sustained the demurrer with leave to amend the claim for constructive discharge and without leave to amend the claim for intentional infliction of emotional distress. The court found that the complaint failed to allege facts sufficient to constitute a constructive discharge and failed to allege any outrageous conduct on the part of respondent.

B. FAC and Demurrer

Appellant filed a first amended complaint (FAC), adding more detail to the allegations of the original complaint. The FAC alleged that appellant should have been reimbursed \$330 per month based on driving 30 miles each workday and the standard mileage rate of 55 cents per mile, and that this represented a significant percentage of his \$1,600 monthly salary. Appellant contended that the failure to reimburse him for mileage resulted in his salary of \$10 per hour being effectively reduced to less than the minimum wage.⁴ However, in asserting his claim for constructive discharge in violation of public policy, appellant did not invoke the minimum wage statutes or claim that the public policy embodied in California's minimum wage laws had been violated.

political activities and whistleblowing. Appellant does not raise any issues pertaining to section 1103 or any other provision of Chapter 5 in this appeal.

⁴ The parties agree that the minimum wage at that time was \$8.00 per hour.

Respondent again demurred to the constructive discharge claim, contending that the facts alleged did not demonstrate that appellant had been constructively discharged. In his opposition, appellant asserted that the facts alleged showed that the amount he was forced to spend on gasoline and vehicle maintenance left him with insufficient money to sustain himself, thus making his working conditions intolerable. Specifically, he calculated that the amount of unreimbursed expenses left him earning less than the minimum wage.⁵

The court sustained the demurrer without leave to amend. The court found that “failing to pay mileage expenses of \$15/day is not conduct that is so intolerable or aggravated that a reasonable person in the employee’s position would have felt no choice but to resign.” It therefore appeared from the facts alleged that appellant’s decision to quit was “not a forced or coerced decision.”⁶

Following settlement of his mileage reimbursement claim, appellant dismissed the remaining causes of action with prejudice and filed this appeal.

DISCUSSION

A. *Standard of Review*

When a demurrer is sustained without leave to amend, an appellate court “first review[s] the complaint de novo to determine whether the complaint alleges facts sufficient to state a cause of action under any legal theory or to determine

⁵ Appellant’s opposition included additional factual allegations not set forth in his complaint or FAC, including that the daily tasks assigned to him required him to drive from Toluca Lake -- where he checked in for the day -- as far as Santa Monica, sometimes more than once a day.

⁶ Although respondent had not argued in its moving papers that no fundamental public policy was involved, the court further found that none was implicated by respondent’s failure to reimburse appellant for mileage because the failure to reimburse “relate[d] solely to [appellant’s] interests and not to the benefit of the public at large.”

whether the trial court erroneously sustained the demurrer as a matter of law.” (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.) “Second, we determine whether the trial court abused its discretion by sustaining the demurrer without leave to amend.” (*Ibid.*) We will conclude that the trial court abused its discretion by denying leave to amend if there is a reasonable probability that the complaint could have been amended to cure its defects. (*Barroso v. Ocwen Loan Servicing, LLC* (2012) 208 Cal.App.4th 1001, 1008.) “[T]he burden is on the plaintiff to show in what manner the complaint can be amended and how such an amendment would cure the defect.” (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1153 (*Gould*).

B. *Constructive Discharge*

There is no dispute that “employees discharged in violation of fundamental public policy may bring an action against their employer sounding in tort.” (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1098 (*Gantt*) overruled in part on another point in *Green v. Ralee Engineering Co.* (1998) 19 Cal.14th 66.) “[T]o establish a constructive discharge, an employee must plead and prove . . . that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee’s resignation that a reasonable employer would realize that a reasonable person in the employee’s position would be compelled to resign.” (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 (*Turner*), overruled in part on another ground in *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479.) Respondent contended and the trial court found that appellant was not discharged, but quit voluntarily. For the reasons discussed, we conclude that a cause of action for constructive discharge in violation of public policy could have been stated based on appellant’s factual

contentions as set forth in his FAC, opposition to the second demurrer, and brief on appeal.

As the Supreme Court explained in *Turner*, an employer may, in an attempt to avoid liability for a wrongful termination, “refrain from actually firing an employee, preferring instead to engage in conduct causing him or her to quit.” (*Turner, supra*, 7 Cal.4th at p. 1244.) If the employer’s conduct “effectively forces an employee to resign,” this is a constructive discharge, and is “legally regarded as a firing rather than a resignation.” (*Id.* at pp. 1244-1245.)

An employee may not simply “quit and sue,” claiming to have been constructively discharged. (*Turner, supra*, 7 Cal.4th at p. 1246.) The facts must support a finding that the resignation was “coerced,” rather than “simply one rational option for the employee.” (*Ibid.*) “The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer.” (*Ibid.*) Moreover, “the cases are in agreement that the standard by which a constructive discharge is determined is an objective one -- the question is ‘whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.’ [Citations.]” (*Id.* at p. 1248, quoting *Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201, 212.) In other words, the applicable standard is whether “‘the adverse working conditions [are] so intolerable’” or “‘unusually adverse’” that “‘any reasonable employee would resign rather than endure [them].’” (*Turner, supra*, at p. 1247, quoting *Slack v. Kanawha County Housing* (1992) 188 W.Va. 144 [423 S.E.2d 547, 556].)

Although situations may exist where the employee’s decision to resign is unreasonable as a matter of law, “[w]hether conditions were so intolerable as to justify a reasonable employee’s decision to resign is normally a question of fact.

[Citation.]” (*Valdez v. City of Los Angeles* (1991) 231 Cal.App.3d 1043, 1056; accord, *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1022.)

The complaint and FAC essentially described the intolerable working conditions which compelled appellant to resign as being assigned duties which required him to drive his own vehicle every day for many miles without being reimbursed for his expenses in violation of Labor Code section 2802. On appeal, appellant contends he could amend the complaint to allege violations of Labor Code section 1194, subdivision (a).⁷ Specifically, he claims the result of respondent’s failure to reimburse him for mileage was to force him to “spend his wages by paying back his employer for business expenses,” reducing his hourly pay to below the minimum wage.

The general rule is that the existence of a legal violation within the workplace does not, standing alone, establish that the working conditions are intolerable. (*Turner, supra*, 7 Cal.4th at p. 1254.) Nor do deprivations of salary or other economic benefits generally support a constructive discharge claim. (See *Turner, supra*, at p. 1247 [poor performance rating, accompanied by demotion and reduction in pay, did not constitute constructive discharge]; *Scotch v. Art Institute of California, supra*, 173 Cal.App.4th at p. 1023 [potential change in instructor’s employment status to part-time did not constitute constructive discharge]; *King v. AC & R Advertising, et al.* (9th Cir. 1995) 65 F.3d 764, 767-769 (applying California law) [reducing employee’s salary and changing annual bonus did not constitute constructive discharge].) Accordingly, in the typical case, an employer’s

⁷ Labor Code section 1194, subdivision (a) provides: “Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.”

failure to reimburse an employee for expenses that should have been borne by the employer would not create such intolerable working conditions that the employee would have no option but to resign.

Here, however, appellant alleged not only that respondent violated the Labor Code by failing to reimburse for mileage, but that the duties respondent assigned required such extensive driving that the reimbursement to which he was entitled represented a significant percentage of his already low salary. Appellant specifically alleged in the FAC that he drove a minimum of 30 miles per day. In his opposition to the demurrer, he asserted that he regularly drove as far as Santa Monica after checking in with his supervisor in Toluca Lake. As a result of paying for the gasoline and vehicle maintenance this schedule required, he was effectively being paid less than the minimum wage.⁸ This left appellant in an untenable position. Forced to divert so much of his salary to gasoline and vehicle maintenance, he was unable to pay basic living expenses. (See *Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1119 [section 1194 of the Labor Code reflects the Legislature's recognition that employees in this state are dependent on receiving a certain minimum salary to purchase the necessities of life].) Moreover, he was wearing out the very vehicle he needed to maintain his livelihood, either by retaining his employment with respondent or finding another job. Had he continued, he would soon have found himself with no job and no vehicle. According to his allegations, he repeatedly informed his supervisors of his dire situation, and implored them to reimburse him. But having effectively passed on a portion of its normal operating expenses to a low wage worker, respondent

⁸ At a salary of \$10 per hour, appellant earned \$80 per day. He claimed to have driven at least 30 miles per day for work-related purposes. Assuming a standard mileage rate of 55 cents per mile, he would have been owed \$16.50 per day. Subtracting \$16.50 from \$80 leaves an effective daily wage rate of \$63.50 or \$7.9375 per hour.

repeatedly refused. Should appellant present evidence establishing these facts at trial, a reasonable trier of fact could find that respondent “knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee’s resignation that a reasonable employer would realize that a reasonable person in the employee’s position would be compelled to resign.” (*Turner, supra*, 7 Cal.4th at p. 1251.)⁹ Accordingly, the trial court abused its discretion in sustaining the demurrer to this cause of action without leave to amend.

C. Public Policy

As explained in *Foley v. Interactive Data Corporation* (1988) 47 Cal.3d 654 (*Foley*), the public policy basis for a claim of discharge in violation of public policy must be “firmly established,” “fundamental,” and “substantial.” (47 Cal.3d at p. 671, fn. 11.) The public policy at issue must also be “tethered to fundamental polices that are delineated in constitutional or statutory provisions.” (*Gantt, supra*, 1 Cal.4th at p. 1095.) Although respondent’s demurrers did not raise the issue, the trial court found that no fundamental public policy was

⁹ The distinction between a reduction in salary which does not constitute a constructive discharge and one which leaves the employee with an unlivable wage and no choice but to resign has been recognized by several federal courts. (See, e.g., *Lit v. Infinity Broad. Corp. of Pa.* (E.D. Pa. 2005) 423 F.Supp.2d 485, 490-491 [proof of salary reduction from \$50,000 per year to \$900 per month would allow jury to reasonably find decision to retire “was not voluntary in any meaningful sense”]; *Gower v. IKON Office Solutions, Inc.* (D. Kan. 2001) 177 F.Supp.2d 1224, 1233-1234 [plaintiff’s claim “he could not make a living off his projected salary” supported finding of intolerable working conditions]; *Nolle v. Guitar Center* (W.D. Pa., Oct. 12, 2012) 2012 U.S. Dist. LEXIS 147229 at *3 [plaintiff who “went from earning a livable wage to earning almost nothing” raised cognizable claim of constructive discharge].) Although not dispositive, we find these authorities helpful in addressing what an employee must prove to establish a constructive discharge. (See *Turner, supra*, 7 Cal.4th at p. 1245 [doctrine of constructive discharge was first recognized in federal cases brought under the National Labor Relations Act].)

implicated by respondent's failure to reimburse appellant for mileage because the failure to reimburse "relate[d] solely to [appellant's] interests and not to the benefit of the public at large." (See *Foley, supra*, 47 Cal.3d at p. 671 [where policy at issue "serves only the private interest of the employer, the rationale underlying the [tortious wrongful discharge] cause of action is not implicated"]; *Gantt, supra*, at p. 1090 ["The policy in question must involve a matter that affects society at large rather than a purely personal or proprietary interest of the plaintiff or employer."].) To the extent appellant's claim is based on failure to pay him the minimum wage, we conclude the trial court erred in finding appellant's claim untethered to a fundamental public policy.

"California has long regarded the timely payment of employee wage claims as indispensable to the public welfare." (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 82.) "[W]ages are not ordinary debts[.] . . . [B]ecause of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due." (*In re Trombley* (1948) 31 Cal.2d 801, 809; accord, *Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831, 837.) "[T]he failure to timely pay wages injures not only the employee, but the public at large" (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1400.) ""Delay of payment or loss of wages results in deprivation of the necessities of life, suffering inability to meet just obligations to others, and, in many cases may make the wage-earner a charge upon the public."" (*Smith v. Superior Court, supra*, at p. 82, quoting *Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 326.)

In *Gould*, the court rejected the defendant's contention that payment of overtime wages was "not a duty affecting a fundamental public interest but a private matter between [the defendant] and its employees." (*Gould, supra*, 31

Cal.App.4th at p. 1148.) Prior to being terminated, the plaintiff had informed the defendant's management about an ongoing failure to pay overtime wages to employees working overtime hours, "conduct which was not only inimical to the public health and general welfare but also illegal." (*Id.* at p. 1149.) The court concluded that the plaintiff's assertion that his discharge followed in retaliation for his reporting violations of the overtime wage law implicated a fundamental public policy of this state and therefore stated a claim for wrongful discharge in violation of public policy. (*Id.* at p. 1150.) The court gave multiple reasons for its conclusion: (1) "[t]he duty to pay overtime wages is a duty imposed by the state; it is not a matter left to the private discretion of the employer [citations]"; (2) wage and hours laws concern not only "the health and welfare of the workers themselves" but also "the public health and general welfare[]" [citation]"; (3) the payment of overtime wages "spread[s] employment throughout the work force by putting financial pressure on the employer . . ." [citation]"; (4) overtime wages "foster[] society's interest in a stable job market"; and (5) the Legislature's decision to criminalize employer conduct in defalcation of Labor Code overtime provisions "reflects a determination the conduct affects a broad public interest." (*Gould, supra*, at pp. 1148-1149.)

Gould was followed in *Barbosa v. IMPCO Technologies, Inc.* (2009) 179 Cal.App.4th 1116, where the employee was terminated after making a good faith claim for overtime wages. The court found that "[t]he common law recognizes the right of an at-will employee to bring an action in tort against his employer for termination of employment that violates a fundamental public policy" and that "[t]he duty to pay overtime wages is a well-established fundamental public policy affecting the broad public interest." (*Id.* at pp. 1121-1122.)

An employer's violation of another compensation provision of the Labor Code was found to implicate a fundamental public policy in *Phillips v. Gemini*

Moving Specialists (1998) 63 Cal.App.4th 563 (*Phillips*), where the plaintiff was allegedly discharged from his employment for questioning his employer's right to take a deduction from his paycheck for damaging equipment and objecting to the manner in which the deduction was made. (63 Cal.App.4th at pp. 567-568.) Citing *Gould*, the court in *Phillips* agreed that "an employee's wages are highly important" and that "the prompt payment of wages due an employee is a fundamental public policy of this state." (*Id.* at p. 571, quoting *Gould, supra*, 31 Cal.App.4th at p. 1147.) Noting the Labor Code provisions making it a misdemeanor for an employer to willfully fail to pay wages due, the court stated: "[W]ages are highly significant not only to the employee who earns them, but also to his or her family, and to society in general which will be burdened with supporting said persons if the employee is denied his or her wages." (*Phillips, supra*, 63 Cal.App.4th at p. 574.) Observing that "there is in this state a fundamental and substantial public policy protecting an employee's wages," including "freedom from setoffs, such as the one plaintiff has alleged in his complaint," the court held that the demurrer to the plaintiff's claim of constructive discharge in violation of public policy should have been overruled. (*Ibid.*; accord, *Sciborski v. Pacific Bell Directory* (2012) 205 Cal.App.4th 1152, 1174 [employer who fails to pay employee his or her wages or takes unlawful wage deductions violates public policy]; see *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1429-1430 [recognizing the "clear public policy" embodied in Labor Code section 1194 "that is specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of workers"].)

The minimum wage provision at issue here is at least as firmly established, fundamental, and substantial as those at issue in *Gould* and *Phillips*. The minimum wage represents the Legislature's and the Industrial Welfare Commission's best estimate of the minimum an employee working a full time job must be paid to

sustain such employee as a resident of this state and pay for the necessities of life. Section 1199, subdivision (b) of the Labor Code makes it a misdemeanor punishable by fine or imprisonment to “[p]ay[] or cause[] to be paid to any employee a wage less than the minimum fixed by an order of the commission.” Accordingly, we conclude that California’s minimum wage law represents a fundamental policy for purposes of a claim for wrongful termination or constructive discharge in violation of public policy.¹⁰

D. Intentional Infliction of Emotional Distress

Appellant further contends that respondent’s failure to reimburse him for mileage as alleged in the complaint was sufficient to support a claim for intentional infliction of emotional distress. We conclude the trial court did not abuse its discretion in sustaining the demurrer to this cause of action without leave to amend.

“[T]o state a cause of action for intentional infliction of emotional distress a plaintiff must show: (1) outrageous conduct by the defendant; (2) the defendant’s intention of causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff’s suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.” (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1259, quoting *Trerice v. Blue Cross of America* (1989) 209 Cal.App.3d 878, 883.) “Conduct, to be “outrageous” must be so extreme as to exceed all bounds of that usually tolerated

¹⁰ Because we conclude that the minimum wage law represents a fundamental public policy, we need not consider appellant’s argument that the alleged violation of the unfair competition law (Bus. & Prof. Code, § 17200, et seq.) provided an alternate public policy basis for his tortious wrongful termination claim.

in a civilized society.” (*Huntingdon Life Sciences, supra*, at p. 1259.) In order to avoid a demurrer, the plaintiff must allege with “great[] specificity” the acts which he or she believes are so extreme as to exceed all bounds of that usually tolerated in a civilized community. (*Schlauch v. Hartford Accident & Indemnity Co.* (1983) 146 Cal.App.3d 926, 936.)

Appellant cites *Cabesuela v. Browning-Ferris Industries of California, Inc.* (1998) 68 Cal.App.4th 101, *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693 and *Phillips, supra*, 63 Cal.App.4th 563 for the proposition that termination in violation of public policy can serve as the basis for recovery under an intentional infliction of emotional distress theory. The cases cited all predate the Supreme Court’s decision in *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, in which the court held that ““severe emotional distress”” arising from ““outrageous”” conduct that occurred “at the worksite, in the normal course of the employer-employee relationship” is the type of injury that falls within the exclusive province of workers’ compensation. (*Id.* at p. 902.) “An employer’s intentional misconduct in connection with actions that are a normal part of the employment relationship . . . resulting in emotional injury is considered to be encompassed within the compensation bargain, even if the misconduct could be characterized as ‘manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance.’” (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 366-367 [worker’s compensation exclusivity rule barred intentional infliction of emotional distress claim where employer “berated and humiliated [plaintiff], criticized his job performance, and insulted him with profanities on a regular basis”]; see *Ferretti v. Pfizer, Inc.* (N.D. Cal., Aug. 22, 2012) 2012 U.S. Dist. LEXIS 119115 at *32-34 [finding employee’s reliance on *Cabesuela* to support intentional infliction of emotional distress claim based on wrongful termination “misplaced” in view of *Miklosy*].) Accordingly, the trial

court did not abuse its discretion in sustaining respondent's demurrer to appellant's claim for intentional infliction of emotional distress.

DISPOSITION

The judgment is reversed and remanded for further proceedings consistent with this opinion. Appellant is awarded his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.