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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KENDALL SAPP, Plaintiff and Appellant, v. GOVERNMENT EMPLOYEES INSURANCE COMPANY et al., Defendants and Respondents.	D056603 (Super. Ct. No. 37-2008-00095919-CU-WT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Steven R. Denton, Judge. Affirmed.

Kendall Sapp was employed by Government Employees Insurance Company (GEICO) as a supervisor of telephone claims representatives. GEICO terminated her for what they claimed were deficiencies in her performance. Sapp in turn asserted she was fired for complaining about her unit's excessive workload, which she alleged violated state requirements for fair claims processing.

Sapp sued GEICO and two of her supervisors, Rick Hoagland and April Warford, for wrongful termination in violation of public policy, breach of contract not to terminate without good cause, defamation, failure to pay profit sharing, and intentional infliction of emotional distress. GEICO moved for summary judgment and the court granted the motion.

On appeal Sapp asserts the court erred in granting summary judgment because (1) the wrongful termination in violation of public policy claim is supported by Sapp's complaints GEICO was violating statutes and regulations enacted to benefit the general public; (2) the claim for breach of contract not to terminate without good cause is supported by substantial evidence; (3) there are material disputed facts on her defamation claim; (4) she is entitled to her vested profit-sharing bonus for work in 2007; and (5) she suffered severe emotional distress.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Sapp's Employment with GEICO*

Sapp began working for GEICO on March 17, 2003 as a supervisor of what GEICO calls "TCR-1s," telephone claims representatives. Sapp signed an employment application and specifically initialed a provision which stated the following: "I understand that the GEICO Companies are at will employers . . . ." Both at the beginning of her employment and thereafter, Sapp signed receipts of policies and handbooks that also included language that her employment was at will.

One handbook had a section entitled "At-Will Employment Agreement." In that section, it states: "I UNDERSTAND AND ACKNOWLEDGE THAT MY EMPLOYMENT AT THE COMPANY IS NOT FOR A FIXED PERIOD OF TIME, AND THAT MY EMPLOYMENT CAN BE TERMINATED AT THE WILL OF EITHER MYSELF OR THE COMPANY AT ANY TIME, WITH OR WITHOUT NOTICE, AND WITH OR WITHOUT CAUSE." That clause goes on to state, "I further understand and agree that no manager, supervisor, employee or agent of the Company is authorized to alter my at-will status, except for the CEO of the Company, and then only in a writing signed by both the CEO of the Company and me. I understand and acknowledge that I should neither assume nor imply any promise of employment for any specified period of time except through such a writing." The clause concludes: "THIS AT-WILL STATEMENT SETS FORTH THE ENTIRE AGREEMENT BETWEEN THE COMPANY AND ME REGARING THE CIRCUMSTANCES UNDER WHICH MY EMPLOYMENT MAY BE TERMINATED." The beginning of the document states, "Please read each policy carefully and make sure that you understand each policy before signing the acknowledgement form." Sapp signed an acknowledgement form acknowledging she had received a copy of the "At-Will Employment Agreement," among other policies, and that she "received and read each of these Policies and agree[d] to abide by their terms, requirements & conditions."

According to Sapp, however, during her interview process GEICO told her they were looking for "long-term," "career" employees. They explained to Sapp that the company could "only fire you for good cause," requiring substantial wrongdoing.

Defendants similarly told Sapp that as long as she did a "good job" she would have a job with them.

Sapp also presented evidence that GEICO's practice was to terminate employment only for cause. Assistant vice president Geri Lanier testified that she had never seen defendants discharge any employee without cause. Other managers and executives, including a veteran of defendants' human resources department, confirmed that defendants have a long-standing practice of terminating only for "good cause." As both policy and practice, defendants used progressive discipline before firing employees. Defendants told Sapp about their "progressive discipline process." This progressive process included specific "performance improvement plans" that defendants called "PIPs" that set explicit goals for employees performing inadequately to help them improve in alleged deficiencies.

Warford, the TCR-1 manager, was Sapp's direct supervisor throughout Sapp's employment. Warford reported to Hoagland, who was then the regional liability director for Region IV. Hoagland, in turn, reported at the relevant times to Margaret Rogers, the assistant vice-president of claims for GEICO's Region IV.

Sapp's job was to supervise TCR-1s, which included reviewing their files and work for compliance with GEICO' s claims handling policies and procedures, coaching and recommending corrective action to improve service, and preparing reports on work volume. Sapp asserted that she was also responsible to ensure that her unit and the employees she supervised complied with California and Oregon claims practices regulations.

B. *Sapp's Complaints About Excessive Workload*

Sapp told Warford and supervisors at Sapp' s level that she believed her unit was understaffed and that her TCR-1s were burdened with too many claims. She told Warford that her unit received more claims than any other unit. Sapp testified that Warford told her to "make a decision" about raising the work load issue, which Sapp took to mean that Warford would not act on Sapp's complaints.

Sapp testified that each of her TCR-1s handled 175 to 230 claims, and in 18 years of case handling she had never seen such a heavy work load. She testified that she told Warford that the overload was resulting in regulatory violations and complaints to the Department of Insurance (DOI). She testified that her complaints about workload included that claims representatives were sometimes failing to comply with the time rules of GEICO's internal claims management guidelines and that those guidelines were based on unfair claims practices rules of various states.

Because of the claims overload, Sapp stated, beginning in 2006, "it was simply impossible to get everything done on time" in handling defendants' claims. Sapp's adjusters were doing "all they could do to keep up with the workload."

Sapp became concerned because the "workload was causing problems with handling claims fairly." Sapp complained internally to management about this an estimated 15 times in the following months. Sapp did not want to be personally responsible as a supervisor for the regulatory violations.

Starting in mid-2007, Sapp complained to defendant Warford that the chronically high claims levels were causing defendants to violate state DOI regulations. Sapp states:

"I told her on numerous occasions that my— especially my people were absolutely swamped. They were drowning. They were doing the best they could. And that if we didn't get some help for them, that we could—that the insurance complaints I believe were increasing. I think we probably could have been committing actually more DOI violations on not getting things taken care of timely, whether it was liability or making payments on claims."

Sapp raised to defendants protests that their "overload of work was resulting in DOI regulatory violations and complaints." Sapp made "numerous" complaints, estimated at somewhere between "six" and "ten times."

Sapp identified the California regulations being violated as part of the "unfair claims practices regulations." Sapp specified that, because of defendants' business practices, "payments [were] not being made timely," in violation of the regulations. Sapp explained that defendants were violating the regulations that mandated both timely payment of bills and timely resolution of liability issues. Specifically, she complained about regulations that required claims to be addressed within 30 days. Sapp's complaints involving defendants' regulatory violations concerned the timely resolution of issues affecting property damage and medical bill payments. Sapp complained to defendant Warford "on those six to ten occasions . . . in regards to med bills, liability, and partial denials."

Warford dismissed Sapp's complaints. Moreover, when Sapp raised concerns to defendant Warford that the work overload resulted in DOl regulatory complaints and violations, Warford responded negatively. Warford would "roll her eyes and just kind of

sigh," dismissing Sapp's complaints. Not only was Warford dismissive of Sapp's complaints, she explicitly told Sapp to stop raising the issue with her. Warford told Sapp "not to complain about the situation."

During November of 2007, Sapp told Warford that defendants should tell the DOI the truth concerning what was causing defendants' regulatory violations. Sapp asked Warford, "Why don't we just let the DOI know that it was the claim volume that caused the complaint?" In Sapp's words, she did not want to participate in continued violations or a cover-up of violations "because I know that I could get in trouble. I could be fined by the DOI, and I didn't want that to happen." Warford told Sapp "never [to] say that again," adding, "You're crazy." Warford told Sapp that such "comments were not good for business" and could result in "GEICO's being fined." Warford gave Sapp the following ultimatum: "That's just the way it is. You either deal with it or you leave."

Before Sapp's complaints, she and Warford had a positive work relationship. After Sapp starting making complaints to her, Warford was distant and dismissive and often appeared irritated with Sapp. Their relationship became even more strained after Sapp suggested disclosing the real reason for the DOI violations to the Department of Insurance. Sapp describes Warford's changed attitude as follows: "In the last 3-4 months I felt I stopped receiving 'support' from [Warford]. She was short with me, she avoided me, she shunned me and would only communicate with me the minimum she had to and appeared irritated when she was forced to talk to me."

Similarly, Sapp originally had a positive relationship with defendant Hoagland, defendants' director of claims. That changed in late 2007, when Hoagland stopped

speaking to Sapp. Likewise, Rogers treated Sapp noticeably worse toward the end of 2007, after Sapp complained about the excessive workload: "I almost felt like she kind of gave me a dirty look when she walked by. . . . It wasn't a really nice-feeling look. Kind of one of more disgust."

Warford is the only manager to whom Sapp made complaints of understaffing and heavy workload. Hoagland had no recollection of ever hearing about Sapp's complaints. Rogers had no recollection of ever hearing about Sapp's complaints.

GEICO had an express policy delineating the procedure for reporting suspected violations of laws and regulations, which included an anonymous ethics hotline. GEICO's Code of Conduct stated that "[a]ll associates are obligated to bring to the attention of the appropriate departmental or company authority any information that may indicate that a policy is being violated [or] a law or regulation is not being followed appropriately . . . ." The Code of Conduct concludes with a letter from GEICO' s chief executive officer reminding employees of their obligation to report suspect behavior and encouraging use of a 24-hour whistleblower hotline. Sapp acknowledged being trained in the Code of Conduct. She never availed herself of any reporting option.

C. *Sapp's Alleged Deficient Performance*

Starting in June 2007, Warford documented alleged problems with Sapp's performance.

By the beginning of October 2007, GEICO had received four letters from the Oregon Department of Insurance (ODOI) about a liability claim called "the Westerfield claim." Rogers assumed responsibility for responding to the ODOI, with goals of

avoiding penalties or a formal complaint. In reviewing the file, Rogers observed that in June 2007, TCR-1 Connie Rhea had worked diligently on the file but did not make the right decision, while Sapp failed to review the file timely under GEICO's internal guidelines and then failed to direct payment of the claim when liability was clear. Rogers wrote an October 17, 2007 memorandum critical of Sapp and Rhea and delivered it to Warford. Rogers instructed Warford to counsel Sapp about the file and making claims decisions as a supervisor.

Rogers represented to the ODOI that defendants "have taken disciplinary action" against Sapp for her role in the Westerfield claim and that they would "remove her from her position if we see any similar occurrences." Warford was, in fact, admonishing Sapp about her performance, including on the Westerfield claim.

Rogers continued working with the ODOI on the Westerfield claim and by the beginning of December 2007 was close to a resolution in which the ODOI would close the complaint with no disciplinary action or penalty. As part of that resolution, Rogers told the ODOI investigator in an e-mail that "Sapp, who supervises Connie Rhea, is in the process of completing a 100% review of Connie's files and giving instructions on how to bring the file to resolution . . . ."

On either December 4 or December 5, 2007, Rogers assigned Sapp to perform the review of Rhea's claims files.

Sapp received a written warning from Warford on December 5, 2007. The warning covered failures to assure her representatives' responsiveness and failures to provide timely reviews of and guidance on claims, including Westerfield. Sapp asserted

disagreement with it and later provided a written statement stating that her deficiencies resulted from overwork and inadequate staffing. Sapp asserts that the timing policies stated in the warning became effective after the events discussed in the warning. Immediately after the warning, Sapp felt sick, and she called in sick the next day. When she came to work the next day, Warford told Sapp that Warford was glad to see Sapp back, did not want Sapp to quit, and wanted to make sure Sapp received her profit sharing.

According to Sapp, Warford, Rogers, and Hoagland never talked to her about the review of Rhea's files at any time prior to January 10, 2009. She also claimed she was never given a deadline for completing the review.

On January 4, 2008, Sapp met with Warford about her response to the written warning. Sapp tried to explain that her unit had more claims than any other. Warford's written response to Sapp's rebuttal acknowledged some of the rebuttal was accurate. For example, Sapp's unit had more claims that some other units.

D. *GEICO Terminates Sapp's Employment*

On January 10, 2008, Rogers asked Warford to check with Sapp to make sure the review of Rhea's files had been completed. Warford responded that Sapp had not made much progress on the review. A team was immediately assembled to review the files, and the review was completed that day.

On January 10, 2008, Warford told Rogers that the review of Rhea's files was not showing problems with Rhea's handling of claims, but it revealed instances where Sapp either had not reviewed files as soon as she should have or had reviewed files and failed

to take appropriate action. Rogers decided that Sapp could not be relied upon to exercise good judgment in performing her duties and that her employment should be terminated.

Rogers went to Hoagland on January 10, 2008, to initiate the termination, telling him about the review not being completed and other issues that were coming to light regarding Sapp's lack of judgment. Hoagland, Warford and Rogers then met to discuss terminating Sapp's employment. Rogers asked for input from Warford, who was initially reluctant to terminate. But, after discussing the failure to complete a task assigned by Rogers, the fact that the file review showed Sapp continued to improperly supervise her TCR-1s, and that Sapp had received a warning regarding her failure to exercise good judgment and sound decision making, a consensus was reached that Sapp's employment should be terminated. Rogers then made the ultimate decision to terminate Sapp's employment. According to Rogers, he had no knowledge of staffing or workload complaints by Sapp, and nothing on that subject was mentioned during the January 10, 2008 discussion of termination.

Sapp's employment was terminated January 11, 2008. Sapp was told that she could resign in lieu of termination if she notified human resources by the end of the day on January 11, 2008. She tendered her resignation by e-mail on January 11, 2008.

E. *Defamatory Statements*

Sapp's former coworkers consistently testified that they were informed by GEICO management that Sapp was "no longer with [GEICO]" and that no reason was given, although Rhea may have associated the separation with the review. GEICO has a strictly

enforced policy of only giving out a former employee's dates of employment, positions held and, with written consent from the employee, salary.

According to Sapp, during interviews she felt she had to disclose that GEICO claimed her employment had been terminated for performance issues. After she disclosed this, the prospective employers and headhunters did not want to talk to her, and she was not offered a single job.

F. *Profit Sharing Payments*

GEICO's profit sharing award is comprised of two components, first a contribution to the employee's 401(k) plan, and second a cash payout of any award in excess of 10 percent of the employee's eligible earnings. GEICO makes the 401(k) contribution only for eligible employees who were employed as of December 31 of the year in question. GEICO typically makes the cash payout in February and requires that the payee be a GEICO employee at the date of distribution.

For 2007 profit sharing, GEICO deposited the first 10 percent of the award as a contribution into Region IV employee 401(k) accounts, including Sapp's, on February 21, 2008. GEICO distributed a 14.5 percent cash payout for 2007 profit sharing to eligible employees on February 22, 2008.

G. *The Instant Action*

Sapp sued GEICO, Hoagland, and Warford. After the defendants answered, the parties stipulated that Sapp could file an amended complaint and the defendants' answers would apply to it. Sapp filed a first amended complaint, which was the operative pleading when defendants moved for summary judgment and summary adjudication.

The complaint alleged that the corporate defendants employed Sapp and that the individual defendants acted as GEICO's agents. It alleged Sapp's terms of employment, that she performed "in an exemplary manner," and that "defendants were chronically understaffed, in violation of Department of Insurance regulatory laws, a fact that plaintiff complained about and was fired for complaining about, in part." It alleged five cause of action: for wrongful termination in violation of public policy, for termination in breach of contract, for defamation, for unpaid wages (the cash profit sharing distribution), and for intentional infliction of emotional distress.

Defendants moved for summary judgment or, in the alternative, for summary adjudication that each of the five causes of action in the complaint failed. Sapp opposed the motion.

The superior court granted summary judgment, finding as to the public policy claim: "[P]laintiff presents her own deposition testimony and her own declaration regarding her repeated complaints to defendant [Warford] regarding understaffing of the claims department. Plaintiff's separate statement cites several statutes and regulations from both California and Oregon . . . . Plaintiff contends that the cited authority constitutes public policy on which to base this claim, and that her complaints to defendant Warford encompassed violations of this authority. However, there is no evidence plaintiff complained about specific violations of the time constraints set forth in [those regulations]. In addition, the authority requiring defendant to promptly and fairly address claims is not specific, substantial, well established or sufficiently delineated such that the public policy is not well articulated."

As to the second cause of action for breach of contract, the court found that the signed employment application contained an express agreement that her employment was at-will and controlled over any alleged implied agreement only to terminate for good cause.

On the defamation claim, the court found that there was no evidence that GEICO's employees made any untrue statement as to the reason for Sapp's termination. The court found that Sapp had no "strong compulsion" to inform potential employers she had been terminated based upon performance issues because she was permitted to resign.

On the claim for unpaid bonus, the court found conditioning payment of a bonus on continued employment at the time the bonus is paid was permissible and did not violate applicable wage laws. On the emotional distress claim, the court found there was no "outrageous conduct" by defendants because there was no wrongful termination.

DISCUSSION

I. *STANDARDS GOVERNING SUMMARY JUDGMENT MOTIONS*

A defendant moving for summary judgment bears the burden of persuasion to show either (1) one or more elements of the plaintiff's cause of action cannot be established or (2) there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subds. (o), (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) When the motion is based on the assertion of an affirmative defense, the defendant has the initial burden to demonstrate that undisputed facts support each element of the affirmative defense. (*Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 289.) "The

defendant must demonstrate that under no hypothesis is there a material factual issue requiring trial. [Citation.] If the defendant does not meet this burden, the motion must be denied. Only if the defendant meets this burden does 'the burden shift[] to plaintiff to show an issue of fact concerning at least one element of the defense.' " (*Id.* at pp. 289-290.)

On appeal, we independently review the trial court's decision, considering all of the evidence in the supporting and opposing papers and apply the same standard as the trial court. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037; *Guz v. Bechtel National Inc., supra,* 24 Cal.4th at p. 334.) We liberally construe the evidence in support of the opposing party, resolving doubts concerning the evidence in its favor (*Yanowitz,* at p. 1037; *Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142) and assess whether the evidence would, if credited, permit the trier of fact to find in its favor under the applicable legal standards. (Cf. *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.) We do not weigh the evidence and inferences, but merely determine whether a reasonable trier of fact could find in the opposing party's favor, and we must reverse the order granting summary judgment when there is some evidence that, if believed, would support judgment in its favor. (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 139.)

II. *TERMINATION IN VIOLATION OF PUBLIC POLICY*

A. *Applicable Legal Principles*

The tort of wrongful termination in violation of public policy is an exception to the rule that an at-will employee may be terminated for no reason or for a reason that is

arbitrary or irrational. (*Silo v. CHW Med. Found.* (2002) 27 Cal.4th 1097, 1104.) Typically, the tort arises in circumstances where the employer retaliates against an employee who (1) refused to violate a statute; (2) performed a statutory obligation; (3) exercised a statutory right or privilege; or (4) reported an alleged violation of a statute of public importance. (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090-1091 (*Gantt*), overruled on another point in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6 (*Green*).)

Because the concept of a "public policy" defies precise definition and courts are loath to venture into this arena to avoid judicial policymaking, the policies encompassed by the exception have been limited to those which are "carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions . . . ." (*Gantt, supra,* 1 Cal.4th at p. 1095.) Administrative regulations may also serve as a fundamental public policy touchstone where they are promulgated under and support important policies delineated in the enabling statute, and the regulations themselves inure to the benefit of the public and advance a fundamental policy interest. (*Green, supra,* 19 Cal.4th at pp. 84-85.)

In *Sequoia Ins. Co. v. Superior Court* (1993) 13 Cal.App.4th 1472, 1480, the Court of Appeal explained: "A requirement that a policy be 'delineated' [in a statute or constitutional provision] entails more specificity than merely being 'derived from' or 'based' on its source. To 'delineate' means ' . . . to describe in detail, esp. with sharpness or vividness' [citation]; ' . . . to describe, portray, or set forth with accuracy or in detail' [citation]." Because employers are deemed to have knowledge of the fundamental public

policies expressed in state and federal Constitutions and statutes, the constraint of delineation in a given provision ensures that employers are on notice of the policies which, if contravened in discharging an employee, will subject them to tort liability. (*Silo v. CHW Med. Found., supra,* 27 Cal.4th at p. 1104.) And, although the employer's precise wrongful act, such as firing an employee for refusing to commit a crime, need not be specifically prohibited in order for the public policy exception to apply, the provision in question must sufficiently describe the kind of conduct that is prohibited to enable an employer to know the fundamental public policies that are expressed in that particular law. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1256, fn. 9 (*Turner*); *Sequoia, supra,* 13 Cal.App.4th at p. 1480.)

The "public" aspect of the "public policy" exception means that the policy at issue must affect our society at large, not just "a purely personal or proprietary interest of the plaintiff or employer . . . ." (*Gantt, supra,* 1 Cal.4th at p. 1090.) For example, in *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, the plaintiff employee asserted he was fired because he reported to upper management that his supervisor was under investigation for embezzlement from another company. Further, he charged that the firing was in derogation of the public policy imposing a duty on an employee to disclose information pertinent to the employer's business interests. This policy impacted only the employer's private interests, not the greater public interest, and the plaintiff could state no public policy claim. (*Id.* at pp. 664, 669-671.) So, too, allegations that an employee had been discharged after complaining that the company was not following its own internal policies and collective bargaining agreements did not implicate a fundamental policy

enshrined in a statutory or constitutional provision: "The tort of wrongful discharge is not a vehicle for enforcement of an employer's internal policies or the provisions of its agreements with others." (*Turner, supra,* 7 Cal.4th at p. 1257.)

Finally, the policy must be well established at the time of the employee's discharge and must be fundamental and substantial. (*Gantt, supra,* 1 Cal.4th at p. 1090; *Green, supra,* 19 Cal.4th at p. 76.) Similarities, if any, between the policy in question and other policies declared to be substantial and fundamental will be a significant factor in deciding whether a given public policy is substantial and fundamental. (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 895-896.) So, too, broad, consistent and abiding legislative and statutory support can support an inference that the policy has substantial and enduring value. (*Id.* at p. 896; *Sullivan v. Delta Air Lines* (1997) 58 Cal.App.4th 938, 944.)

B. *Analysis*

The insurance regulations and statutes on which Sapp relies generally promote good faith and timely settlement of claims. (See Ins. Code, § 790.03 [prohibiting unfair or deceptive acts and practices]; 10 Cal. Code Regs., § 2695.1, 2695.2, 2695.3, 2695.5, 2695.7, 2695.12 [promoting good faith, prompt, efficient and nondiscriminatory equitable settlement of claims]; Or. Rev. Stat. § 746.230 [prohibiting unfair claim settlement practices]; Or. Admin. R. § 836-080-0225, 836-080-0230, 836-080-0235, 836-080-0240 [setting standards for claim communication practices, prompt claim investigations, and prompt and fair settlements].) These statutes and their derivative regulations do not mention staffing or workload requirements. Sapp has identified no statute or regulation

that requirs a particular level of staffing or a certain ratio between claims adjusters and claims. Thus, Sapp does not identify a specific law or statute that GEICO violated. (*Green , supra,* 19 Cal.4th at p. 79 [complaint for wrongful discharge must be based on the violation of a specific constitutional or statutory provision].)

Moreover, vague allegations of regulatory violations cannot state a public policy claim. (*Turner, supra,* 7 Cal.4th at p. 1257 [plaintiff complained that certain company practices violated federal Alcohol, Tobacco and Firearms laws, and even cited statutes, but failed to state how the practices violated the specified laws].) As in *Turner*, Sapp's vague comments to Warford failed to state how GEICO's staffing practices violate the law.

Sapp's disagreement with GEICO's decisions how to staff and assign claims was not the type of complaint that raised an issue of fundamental public policy. GEICO's internal staffing practices were not illegal and Sapp did not complain about any occurrence that violated any statutory or constitutional provision. (See *Turner, supra,* 7 Cal.4th at p. 1257.) As the California Supreme Court stated in *Turner*: "Most of Turner's complaints pertained to [defendant's] alleged violations of its own internal practices or its collective bargaining agreements . . . . [¶] . . . [¶] . . . [N]one of [these claims] implicates a fundamental public policy embodied in a statute or constitutional provision. The tort of wrongful discharge is not a vehicle for enforcement of an employer's internal policies or the provisions of its agreements with others. Turner's failure to identify a statutory or constitutional policy that would be thwarted by his alleged discharge dooms his cause of action." (*Id.* at pp. 1256-1257.)

Similarly, Sapp's claim that her employment was terminated for complaining about heavy workload, vaguely connected with unfair claims practices statutes, does not state a claim for termination in violation of public policy.

Indeed, the lack of merit to Sapp's public policy claim is demonstrated when compared to cases where a public policy violation was found. These cases involve such matters as forcing the employee to participate in illegal activity or discharging the employee for reporting illegal conduct that directly affects the public. (*Green, supra*, 19 Cal.4th at p. 75 [employee discharged for complaining to management that defendant was shipping airline parts that failed inspections in violation of the Federal Aviation Act]; *Gantt, supra,* 1 Cal.4th at p. 1097 [employee discharged for refusing to give false testimony]; *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 169 [employer forced an employee to participate in an illegal price fixing scheme]; *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1149 [employee fired for reporting violations of overtime laws to management]; *Collier v. Superior Court* (1991) 228 Cal.App.3d 1117, 1123 [employee discharged after reporting to management that company executives were violating bribery, embezzlement, and tax laws]; *Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 298 [employee was discharged for protesting unsafe work conditions]; *Petermann v. International Brotherhood of Teamsters* (1959) 174 Cal.App.2d 184, 188-189 [employer insisted an employee perjure himself].)

None of Sapp's testimony supports an inference that she reasonably suspected GEICO's staffing policies and practices were by themselves illegal. Rather, Sapp complained because GEICO imposed a heavy workload on Sapp's unit that required her

and the TCR-1s she supervised to work hard to comply with guidelines. That Sapp took no action under GEICO's Code of Conduct—not even using an anonymous hotline—demonstrates that her complaints were about the personal burden of a workload that merely risked missing deadlines, not about an illegal practice.

In support of her public policy claim Sapp relies on a case from the Ninth Circuit, *Eisenberg v. Insurance Co. of N. Am.* (9th Cir. 1987) 815 F.2d 1285 (*Eisenberg*). There, the Ninth Circuit held that an asserted insurance department regulation regarding claims managers' caseloads could support a public policy claim, and reversed a grant of summary judgment. (*Id.* at p. 1290.) However, Sapp here can point to no such insurance department regulation or statute that limits the size of claims managers' caseloads. Indeed, on remand in *Eisenberg,* it was undisputed that no such regulation existed, and the district court's second grant of summary judgment was affirmed on this basis. (*Eisenberg v. Insurance Co. of N. Am.* (9th Cir. 1991) 945 F.2d 408 [table case, reported in full at 1991 U.S. App. LEXIS 24463].)

III. *IMPLIED IN FACT CONTRACT*

Employment in California is presumed to be at will, meaning that the employer or the employee can terminate the relationship at any time with or without notice and with or without good cause. (Lab. Code, § 2922; *Stevenson v. Superior Court, supra*, 16 Cal.4th at p. 887.) An at-will provision in an express written agreement, such as those signed by Sapp, cannot be overcome by proof of an implied contrary understanding. (*Halvorsen v. Aramark Unif. Servs.* (1998) 65 Cal.App.4th 1383, 1388; *Cruey v. Gannett*

Co. (1998) 64 Cal.App.4th 356, 362; see also *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 629-630.

"Although the California courts will under some circumstances imply an agreement contrary to the statutorily presumed at-will status, the courts will not imply an agreement if doing so necessarily varies the terms of an express at-will employment agreement signed by the employee." (*Tomlinson v. Qualcomm* (2002) 97 Cal.App.4th 934, 944.) " ' "There cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results." [Citation.] The express term is controlling even if it is not contained in an integrated employment contract.' " (*Id*. at p. 945 [finding that an express at-will agreement precluded the existence of an implied contract requiring good cause for termination].) Nor does it matter if Sapp never read the at-will term or understood the nature of at-will employment. (See, e.g., *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc*. (1971) 20 Cal.App.3d 668, 671 [failure to read or understand an employment agreement does not affect the binding quality of its terms].)

Sapp signed an employment application and specifically initialed a provision stating: "I understand that the Geico Companies are at will employers and this application is for information purposes only, and does not create a contract between the companies and myself." Further, she was provided with a book of GEICO's policies which contained an at-will employment agreement. Sap signed an acknowledgement that she agreed to be bound by its terms. That agreement provided that it was an integrated agreement, and there could be no implied agreement to the contrary. Because there was

an explicit agreement that Sapp's employment was at will, she cannot state a claim for an implied agreement contrary to its terms.

In support of her claim for an implied-in-fact agreement not to terminate without good cause, Sapp relies on *Guz v. Bechtel National Inc*., *supra,* 24 Cal.4th at pages 339-340, which held that mere disclaimers in employee handbooks that employment is at-will do not necessarily bar an implied agreement not to terminate without good cause. However, the California Supreme Court in that case was presented with disclaimer language in an *unintegrated, unsigned,* policy manual. (*Id.* at p. 340.) The high court distinguished such manuals from signed, written employment agreements, holding "an at-will provision in an *express written agreement*, signed by the employee, *cannot* be overcome by proof of an implied contrary understanding." (*Id*. at p. 340, fn. 10). Here, we have an express agreement, that states it is an integrated agreement, and Sapp signed an acknowledgement agreeing to be bound by its terms. Thus, *Guz* is not controlling.

IV. *DEFAMATION*

Sapp's defamation claim requires a showing that GEICO, Hoagland, and Warford made "a false and unprivileged publication" about Sapp. (Civ. Code, § 46.)

Sapp asserts that she was compelled to publish the statement that her employment was terminated for cause. The "self-publication" of a defamatory statement may be imputed to the originator of the statement only if there is a "strong compulsion" to publish the defamatory statement and the publication is foreseeable. (*Davis v. Consolidated Freightways* (1994) 29 Cal.App.4th 354, 373 (*Davis*).) If the person

defamed voluntarily discloses the defamatory statement, the originator is not responsible for any resulting damage. (*Ibid.*)

In *Davis, supra*, 29 Cal.App.4th 354, the court upheld summary judgment on a defamation claim in favor of an employer that discharged the plaintiff for alleged theft. The court concluded that "[p]laintiff failed to establish . . . any fact or triable issue of fact that there was any 'strong compulsion' to republish the alleged defamatory matter to prospective employers, because he failed to show there was ever any 'negative job reference' attributable to [defendant] that plaintiff had to explain." (*Id.* at p. 373.) The court reasoned that, since the employer had a "strictly enforced policy against giving out any information to prospective employers about former employees except their dates of employment," the plaintiff failed to show a strong compulsion to explain his discharge. (*Ibid.*)

Likewise, in this case, GEICO has a strictly enforced policy of only giving out a former employee's dates of employment, positions held and, with written consent from the employee, salary. As in *Davis*, Sapp cannot show that she was under a strong compulsion to explain her separation from GEICO to prospective employers. This is particularly so because GEICO offered, and Sapp accepted, the opportunity to resign instead of being terminated. Sapp thus had the ability to tell head hunters and potential employers truthfully that she had resigned, and was under no "strong compulsion" to tell them she was terminated for cause. Defendants thus cannot be held liable for any statements she volunteered to others. (*Davis, supra,* 29 Cal.App.4th at p. 373.)

V. *PROFIT SHARING*

" '[A] bonus plan whereby bonus payments are made only to employees employed as of the date of payment is not invalid as an improper forfeiture or penalty imposed on employees discharged prior to the payment date.' " (*Neisendorf v. Levi Strauss & Co*. (2006) 143 Cal.App.4th 509, 523.) In so holding, the Court of Appeal *Neisendorf* approved authority in which the " 'offer was to pay a bonus to those still in the employ on December 31, 1918. That offer could be accepted only by performing the act requested, namely, remaining in the employ until that date. The employee was fired before that date, so the act required was never performed. The unilateral contract never came into existence.' " (*Id*. at p. 524, citing *Hunter v. Sparling* (1948) 87 Cal.App.2d 711, 724.)

GEICO's benefits handbook explicitly states: "Your share of any Company contribution is deposited directly to your Associate Savings Plan account held by Vanguard. However, any profit sharing award in excess of 10% of eligible earnings normally is paid to you by check (subject to taxes), provided you meet all of the eligibility requirements for a Company contribution AND you are employed on the date the check is distributed." GEICO typically makes the cash payout in February and requires that the payee be a GEICO employee at the date of distribution.

Sapp asserts that the handbook is dated November 7, 2007, three months before she was fired, and she worked throughout 2007; GEICO submitted no evidence she was ever shown the handbook or agreed to its terms; and the declaration of GEICO's human resources director does not state that the policy was in effect when Sapp was hired. On the other hand, Sapp has not submitted any evidence that the bonus portion of the

handbook submitted in support of GEICO's motion was a new policy that first originated on that date. Based upon the clear terms of the bonus plan, and the fact that Sapp was not employed on the date bonuses for 2007 were paid, she has no claim to additional money under the 2007 profit sharing plan.

VI. *EMOTIONAL DISTRESS*

The elements of intentional infliction of emotional distress are "(1) outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering and (4) actual and proximate causation of the emotional distress." (*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 155, fn. 7.) A defendant's conduct must have "been so outrageous in character and so extreme in degree as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (Rest.2d Torts, § 46, com. (d); see also *Melorich Builders v. Superior Court* (1984) 160 Cal.App.3d 931, 936.)

A. *Sapp's Claim Is Preempted by Workers' Compensation Exclusivity*

The workers' compensation statutes, set forth in Labor Code section 3200 et seq., provide the full remedy, "in lieu of any other liability whatsoever," for injuries "arising out of and in the course of . . . employment." (Lab. Code, § 3600, subd. (a).) Moreover, the California Supreme Court has held that "claims for intentional or negligent infliction of emotional distress are preempted by the exclusivity provisions of the workers' compensation law . . . ." (*Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 747; *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 15; *Cole v. Fair Oaks Fire Protection Dist.,*

supra, 43 Cal.3d at p. 160.) Such claims are preempted even if they result from allegedly wrongful termination, unless they are based upon violation of a statute or fundamental public policy. (*Shoemaker*, 52 Cal.3d at p. 25.) An employee "may not avoid the exclusive remedy provisions of the Labor Code by characterizing the employer's decisions as manifestly unfair, outrageous, harassment or intended to cause emotional disturbance resulting in disability." (*Cole*, 43 Cal.3d at p. 160.)

Sapp's emotional distress claim is based upon conduct that falls within the employment relationship, and it is therefore preempted.

B. *No Outrageous Conduct*

"Managing personnel is not outrageous conduct beyond the bounds of human decency, but rather conduct essential to the welfare and prosperity of society. A simple pleading of personnel management activity is insufficient to support a claim of intentional infliction of emotional distress, even if improper motivation is alleged. If personnel management decisions are improperly motivated, the remedy is a suit against the employer for discrimination." (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 80.) The conduct and comments Sapp seeks to attribute to defendants do not give rise to a claim for infliction of emotional distress. (*Buscemi v. McDonnell Douglas Corp*. (9th Cir. 1984) 736 F.2d 1348, 1352 [no such claim where plaintiff discharged in a callous and insensitive manner because anyone who believes he or she was discharged wrongly will suffer distress—this is not outrageous].)

Moreover, as a matter of law, termination of employment alone does not constitute extreme and outrageous conduct, even if the termination was without cause. (*Buscemi v.*

McDonnell Douglas Corp., supra, 736 F.2d at p. 1352 [applying California law and holding that despite allegations that plaintiff was fired on a pretext, and in a "'callous and insensitive manner,'" plaintiff could not sustain a cause of action for emotional distress]; *Trerice v. Blue Cross of Cal.* (1989) 209 Cal.App.3d 878, 882-884 [claim could not be sustained despite the fact that the plaintiff was asked to perform menial tasks and discharged shortly after she was told that she would not be discharged and a more generous offer of severance was withdrawn].) Likewise, discipline and criticism do not constitute outrageous conduct even where the criticism is particularly harsh. (*Shoemaker v. Myers, supra*, 52 Cal.3d at p. 25) Because we have held there is no wrongful termination in violation of public policy, the defendants' conduct, as a matter of law, does not rise to the level of extreme and outrageous conduct, and Sapp's infliction of emotional distress claim is barred as a matter of law.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.