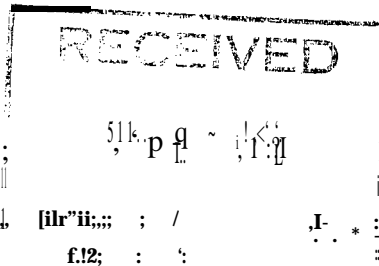


4/27/96
DISK

Opinion

Cite as 96 C.D.O.S. 1303



JOAN STEVENSON, Petitioner,;

v.

SupERIoR COURT OF CALIFoffmr;l\ -Paa%&C&&F%&F LOS ANGELES,
Respondent;
HUNTINGTON MEMORIAL HOSPITAL, Real Party in Interest.

No. B089375

Second Appellate District

Division Three

Super. Ct. No. GCO11606

Petition for Writ of Mandate/Prohibition. Hon. Coleman A. Swart, Judge.
Denied.

COUNSEL

Antonio M. Lawson, for Petitioner.

No appearance by Respondent.

Fonda Garrard Hilberman & Davis, Peter M. Fonda and Laurie DeYoung;
O!Flaherty & Belgum, and Todd E. Crutch, for Real Party in Interest.

Joseph Posner; Cathy Ventrell-Monsees and Laurie A. McCann, as Amici Curiae
on behalf of Petitioner.

Filed February 27,1996

KLEIN, P. J.:

Petitioner Joan Stevenson (Stevenson) seeks a writ of mandate directing the trial court to set aside its order sustaining the demurrer interposed by real party in interest Huntington Memorial Hospital (the Hospital) to her second and third causes of action and to enter an order overruling the demurrer.

The essential issue presented is whether wrongful termination based on age discrimination contravenes the fundamental public policy of this state so as to support an action for tortious wrongful discharge under *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167.[FOOTNOTE 1]

Under the compulsion of *Jennings v. Marralle* (1994) 8 Cal.4th 121, we conclude that regardless of the number of persons in a defendant's employ, there is no fundamental public policy against age discrimination in employment which would serve as the basis of a Tameny action, and therefore deny the petition. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450,455.)

FACTUAL AND PROCEDURAL BACKGROUND

On December 30, 1993, Stevenson filed a wrongful termination action against the Hospital. The operative first amended complaint alleged the following:

Stevenson was employed by the Hospital under a written, oral and implied contract for over 30 years until terminated sometime after December 31, 1992, at the age of 60. Her performance at all times was satisfactory and she received commendations and pay increases from her employer. During 1992 and prior to her termination, Stevenson was on an approved medical leave of absence.

Stevenson's written employment contract as set forth in the Hospital's personnel policies and procedures manual provided: "An employee is guaranteed reinstatement to the same job classification and shift held prior to the commencement of a disability leave caused either by an occupational or non-occupational illness or injury or a family care leave. If it is not possible for business reasons to guarantee reinstatement to the same job classification and shift, an employee will be reinstated to any available job (regardless of department, classification or shift) which, in the judgment of the hospital, the employee is qualified to perform. If an employee is reinstated other than to the same job classification and shift held prior to start of the disability leave, that employee will be given the opportunity to be reassigned to that same job classification and shift when next available."

By the terms of the written employment contract Stevenson was entitled to reinstatement, and by letter dated November 6, 1992, the Hospital informed Stevenson her right to reinstatement was guaranteed until December 31, 1992.

In November 1992, Stevenson notified the Hospital she was ready, willing and able to return to her position. The Hospital advised her she would not be allowed to return to her job classification or shift. Stevenson was further denied her contractual right to reinstatement to another job classification and shift with the opportunity for later reassignment to her original job classification and shift. After being denied reinstatement, Stevenson was terminated.

Stevenson's first cause of action alleged breach of contract. The second cause of action pled wrongful termination in violation of the public policy prohibiting retaliation against an employee for exercising the right to take an approved medical leave of absence. The third cause of action asserted wrongful termination in violation of the public policy against age discrimination. The fourth cause of action alleged breach of the implied covenant of good faith and fair dealing.

The Hospital demurred to the complaint in its entirety. With respect to the second and third causes of action, which are the focus of this petition, the Hospital argued those causes of action were deficient because Stevenson had not alleged an exhaustion of administrative remedies through the Department of Fair Employment and Housing. Additionally, the second cause of action was defective because termination motivated by an employee's exercise of medical leave does not amount to violation of a fundamental constitutional or statutory policy.

The Hospital concurrently filed a motion to strike Stevenson's punitive damages allegations, as well as her prayer for attorney fees and reinstatement.

On October 14, 1994, the trial court overruled the demurrers with respect to the first and fourth causes of action and sustained the demurrers to the second and third causes of action without leave to amend. With respect to the latter claims, it ruled "these are strictly statutory causes of action. Discrimination based upon disability and upon age come within the [Fair Employment and Housing Act (FEHA) (Gov. Code, section 12900 et seq.)], [FOOTNOTE 213 and the administrative remedies were not exhausted. Therefore, those demurrers are sustained."

The trial court also granted the motion to strike with respect to the request for punitive damages and attorney fees.

On January 3, 1995, Stevenson filed the instant petition. [FOOTNOTE 31 We issued an alternative writ in order to review thoroughly the impact of Jennings v. Marralle, supra, 8 Cal4th 121, on Stevenson's cause of action against the Hospital for tortious wrongful discharge in violation of the public policy against age discrimination.

CONTENTIONS

Stevenson contends the FEHA does not bar her claims of wrongful discharge in violation of public policy.

DISCUSSION

1. Age discrimination in employment does not violate the fundamental public

policy of this state for purposes of stating a Tameny claim.

Stevenson contends the FEHA does not bar her claim for wrongful discharge in violation of the fundamental public policy against age discrimination because the FEHA does not supplant other state laws relating to employment discrimination, and therefore she was not required to exhaust the administrative remedy under the FEHA before resorting to the judicial process for nonstatutory relief (*Rojo v. Kliger* (1990) 52 Cal.3d 65,70.)

Stevenson's contention begs the question because the threshold issue is whether age discrimination in employment contravenes the fundamental public policy of this state. Only if such discrimination is violative of fundamental public policy can Stevenson bring a cause of action for tortious wrongful discharge. That is the focus of our inquiry.

a. General principles re the tort of wrongful discharge in violation of public policy.

An action in tort seeking damages for discharge from employment in contravention of public policy is an exception to the general rule, codified in Labor Code section 2922, that unless otherwise agreed by the parties, an employment is terminable at will. (*Jennings*, supra, 8 Cal.4th at p. 129.) That exception was established in *Tameny*, supra, 27 Cal.3d at page 170, which held an employee whose termination violates fundamental public policy may maintain a tort action for wrongful discharge against the employer. In *Tameny*, an employee, who alleged he was discharged for refusing to participate in an illegal scheme to fix retail gasoline prices, was permitted to maintain a tort action for wrongful discharge. (*Id.*, at pp. 169-170.)

The public policy asserted in a Tameny tort action "must be 'fundamental,' 'substantial' and 'well established' at the time of the discharge. [Citation.]" (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090.) The discharge has to involve a matter which affects society at large rather than a purely personal or proprietary interest of the employer or employee. (*Ibid.*) Also, the public policy needs to be grounded in a statutory or constitutional provision. (*Id.*, at p. 1095.) Pursuant to these principles, *Gantt* held "a termination in retaliation for testifying truthfully concerning a coworker's sexual harassment claim in the context of an administrative investigation is actionable under Tameny[.]" (*Gantt*, supra, 1 Cal.4th at pp. 1086-1087.)

The obligation not to discharge an employee from an animus that violates the fundamental public policy of this state "is a 'duty imposed by law upon all employers to implement the fundamental public policies' of the state (*Tameny*, supra, 27 Cal.3d at p. 176); it cannot be bargained away (*Foley v. Interactive Data Corp.*, supra, 47 Cal.3d at p. 670, m. 12); [and] it is

not preempted by other statutory remedies (Rojo v. Kliger, supra, 52 Cal3d 65)[.]” (Gantt, supra, 1 Cal.4th at p. 1100.)

The rationale for a fundamental public policy claim is that in addition to protecting employees from employer conduct which contravenes the public policy of this state, “society’s interests are served through a more stable job market, in which its most important policies are safeguarded.” (Gantt, supra, 1 Cal.4th at p. 1095.)

b. Legislative expressions of the public policy against age discrimination in employment.

The public policy against age discrimination is not the product of judicial policymaking. (See Gantt, supra, 1 Cal.4th at p. 1095.) The Legislature unambiguously proclaimed this policy 35 years ago when it adopted chapter 9.5 of the Unemployment Insurance Code entitled “Employment for Older Workers.” (Stats. 1961, ch. 1623, section 1, p. 3517; Jennings, supra, 8 Cal.4th at pp. 130-131.) Thus, age discrimination in employment has been subject to statutory limitations since 1961. (Jennings, supra, at p. 130.)

Said legislation declared an age-related public policy in Unemployment Insurance Code section 2070, which since its inception has proclaimed: “It is the policy of the State of California that [the labor force] should be used to its fullest extent. This statement of policy compels the further conclusion that human beings seeking employment, or retention thereof, should be judged fairly and without resort to rigid and unsound rules that operate to disqualify significant portions of the population from gainful and useful employment. Accordingly, use by employers, employment agencies, and labor organizations of arbitrary and unreasonable rules which bar or terminate employment on the ground of age offend the public policy of this State.” (Stats. 1961, ch. 1623, section 1, p. 3517, italics added.)

Unemployment Insurance Code section 2072, part of the same statutory scheme, made it “unlawful for an employer to refuse to hire or employ; or to discharge, dismiss, reduce, suspend, or demote any individual between the ages of 40 and 64 solely on the ground of age, except in cases where the law compels or provides for such action.” (Stats. 1961, ch. 1623, section 1, p. 3518.)

In 1972, the Legislature repealed Unemployment Insurance Code section 2072 and enacted former section 1420.1 of the Labor Code, a part of the Fair Employment Practices Act, or FEPA (Lab. Code, former section 1410 et seq.). (Stats. 1972, ch. 1144, section 1, p. 2211.) Former section 1420.1 of the Labor Code made it an unlawful employment practice “for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual between the ages of 40 and 64 solely on the ground of age, except in cases where the law compels or provides for such

action.” (Jennings, supra, 8 Cal.4th at p. 13 1.)

When the Fair Employment and Housing Act (FEHA) (section 12900 et seq.) was enacted in 1980, the FEPA, including former section 1420.1 of the Labor Code, was repealed. (Jennings, supra, 8 Cal.4th at p. 13 1.)

The FEHA’s statement of policy provides in relevant part: “It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age.” (section 12920, italics added.)[FOOTNOTE 41 Despite the FEHA’s broad statement of public policy, the FEHA does not apply to employers not “regularly employing five or more persons.” (section 12926, subd. (d).)

The FEHA recognizes and declares the right to seek, obtain and hold employment without discrimination because of age “to be a civil right.” (section 12921.) The FEHA also makes it an unlawful employment practice for an employer to “refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action.” (section 1294 1 .)[FOOTNOTE 51

c. Public policy against age discrimination undeniably inures to the benefit of the public at large.

As indicated, a fundamental public policy for purposes of a Tameny claim is one involving a duty which inures to the benefit of the public at large, rather than to a particular employer or employee. (Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654,669.) In Rojo v. Kliger, supra, 52 Cal.3d at pages 88 to 91, the Supreme Court applied the Tameny concept to an employment discrimination claim, holding a wrongful discharge based on sex discrimination violates the fundamental public policy of this state as expressed in article I, section 8 of the California Constitution. [FOOTNOTE 6]

Rojo reasoned: “The public policy against sex discrimination and sexual harassment in employment, . . . is plainly one that ‘inures to the benefit of the public at large rather than to a particular employer or employee.’ (Foley, supra, 47 Cal.3d at p. 669.) No extensive discussion is needed to establish the fundamental public interest in a workplace free from the pernicious influence of sexism. So long as it exists, we are all demeaned. As section 12920 states: ‘It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment. . . foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and

substantially and adversely affects the interests of employees, employers, and the public in general.” (Rojo v. Kliger, supra, 52 Cal.3d at p. 90.)

By a parity of reasoning, the public policy against age discrimination in employment, like the public policy against other types of discrimination, inures to the benefit of the public at large, rather than merely to a particular employer or employee. (Rojo, supra, 52 Cal.3d at p. 90.) We observe age discrimination has a broader demographic reach than all other prohibited categories of discrimination, including the constitutionally prohibited categories of race and sex (Cal. Const., art. I, section 8), in that barring a premature demise, old age is a universal inevitability. Further, certain realities soon must find their way into the law. Today’s aging population enjoys mental acuity and physical vitality, and the Information Age requires intellectual rather than physical endeavor. [FOOTNOTE 71 It behooves our society to utilize fully the talents of this group, lest they become a burden on younger taxpayers. Not only does such discrimination deprive individuals of the right to be evaluated fairly and without resort to irrelevant criteria, but it also denies the state of the fullest talents of its people. (section 12920.)

d. Supreme Court in Jennings held age discrimination by a small employer does not violate the fundamental public policy of this state.

The latest California Supreme Court case in the evolving area of age discrimination is Jennings, supra, 8 Cal.4th 121. There, the plaintiff allegedly was terminated on account of her age and she sought “to state a common law cause of action for wrongful termination in violation of public policy” (Id., at p. 126.) The plaintiff claimed the termination of her employment violated the public policy of this state against age discrimination in employment. (Ibid.) However, the plaintiff’s employer employed fewer than five persons and thus was exempt from the FEHA under section 12926, subdivision (d). (Id., at p. 126.)

Jennings held the plaintiff could not state a claim for tortious wrongful discharge in violation of public policy. It concluded an employee for whom FEHA remedies are unavailable because the employer did not “regularly employ[] five or more persons” (section 12926, subd. (d)), cannot maintain an action for tortious discharge in violation of the public policy against age discrimination expressed in section 12920 of the FEHA. (Jennings, supra, 8 Cal.4th at pp. 124-125.) Jennings observed that permitting such an action would be inconsistent with the legislative intent reflected in the FEHA to restrict employer liability for violations of the FEHA age provision to employers subject to the FEHA. (Id., at pp. 124-125.) Jennings explained: “It would be unreasonable to expect employers who are expressly exempted from the FEHA ban on age discrimination to nonetheless realize that they must comply with the law from which they are exempted under pain of possible tort liability.” (Id., at pp. 135-136.)

While Jennings concluded “there presently exists no ‘fundamental policy’ which precludes age discrimination by a small employer” (Jennings, *supra*, 8 Cal.4th at p. 125, italics added), it purported to leave open for another day the broader issue of whether age discrimination by other employers contravenes California public policy. Jennings stated: “Whether discrimination in employment on the basis of age violates a ‘fundamental public policy has not been resolved by this court. We need not decide that question here since the ‘public policy’ on which plaintiff relies is not applicable to defendant. He is not an ‘employer’ subject to the age discrimination provisions of the FEHA.” (Jennings, *supra*, 8 Cal.4th at p. 130, italics added.)

The issue purportedly left open by Jennings is squarely presented in the instant case because, as the Hospital admits, it is an employer subject to the FEHA, and Stevenson alleges she was discharged on account of her age. Therefore, this court is called upon to resolve the question allegedly unanswered by Jennings, namely, whether a cause of action for wrongful discharge in contravention of the public policy against age discrimination may be stated against an employer which is subject to the FEHA.

e. Jennings precludes a Tameny claim arising from age discrimination in employment, even if the employer is not exempt from the FEHA.

Despite Jennings’s proclaimed avoidance of the larger issue, Jennings flatly foreclosed any possibility of a Tameny cause of action being stated for wrongful termination based on age discrimination in employment. Given the sweeping language in that decision, this court is bound to conclude age discrimination in employment does not violate fundamental public policy for purposes of a Tameny claim, even if the employer is subject to the FEHA.

With respect to existing law pertaining to age discrimination in employment, Jennings stated “there is presently no law of this state other than the FEHA which proscribes discrimination on the basis of age. Thus, while the FEHA is cumulative to preexisting common law and statutory rights (Rojo v. Kliger, *supra*, 52 Cal.3d 65,79), it is not so with respect to a cause of action for age discrimination in employment.” (Jennings, *supra*, 8 Cal.4th at p. 132, second italics ours.)

Thus, Jennings held there is no common law remedy for age discrimination in employment and the FEHA’s statutory remedy is exclusive.

In this regard, Jennings further stated: “We agree with plaintiff that the public policy declared by the Legislature in section 12920 applies to all employers. It does not follow, however, that in declaring that policy the Legislature intended to create the basis for a common law tort action” (Jennings, *supra*, 8 Cal.4th at p. 134.) The Legislature intended “to

create new rights within the FEHA statutory scheme while leaving existing rights intact, not . . . to create new common law rights.” (Jd., at p. 135, italics added.) Jennings made it “clear that the inclusion of age in the policy statement of the FEHA alone is not sufficient to establish a ‘fundamental’ public policy for the violation of which an employer may be held liable in a common law tort action.” (Ibid.)

Consequently, Jennings precludes a common law cause of action for age discrimination in employment predicated on the public policy expressed in the FEHA.

Not only does Jennings eliminate resort to the FEHA as the basis of a Tameny claim alleging age discrimination, but it also disposes of a non-FEHA source of public policy regarding age discrimination in employment. Jennings acknowledged Unemployment Insurance Code section 2070, which has been on the books without amendment since 1961, and which states “use by employers, . . . of arbitrary and unreasonable rules which bar or terminate employment on the ground of age offend the public policy of this state.” (Jennings, supra, 8 Cal.4th at p. 131, italics added.) However, Jennings was unmoved by this statutory declaration of public policy, stating “while the Legislature declared its intent that the FEHA not repeal other state laws governing discrimination in employment, it expressly repealed the former statutory bar to age discrimination. At the time subdivision (a) of [Government Code] section 12993 was enacted although Unemployment Insurance Code section 2070 declared arbitrary age discrimination in employment to be contrary to public policy, there was no statutory prohibition of age discrimination in employment[.]” (Id., at pp. 131-132, italics added.) Jennings goes on to observe “there is presently no law of this state other than the FEHA which proscribes discrimination on the basis of age.” (Id., at p. 132, italics added.)

However, we emphasize there was no repeal of the policy statement in Unemployment Insurance Code section 2070 declaring age discrimination in employment to be contrary to the public policy of this state.

In support of its conclusion that the plaintiff could not state a Tameny claim, Jennings stated: “We explained in *Gantt* that ‘[a] public policy exception carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions strikes the proper balance among the interests of employers, employees and the public. The employer is bound, at a minimum, to know the fundamental public policies of the state and nation as expressed in their constitutions and statutes; so limited, the public policy exception presents no impediment to employers that operate within the bounds of law. Employees are protected against employer actions that contravene fundamental state policy. And society’s interests are served through a more stable job market, in which its most important policies are safeguarded.’ (*Gantt v. Sentry Insurance*, supra, 1 Cal.4th at p. 1095, . . .

)’I (Jennings, supra, 8 Cal.4th at p. 135, italics ours, original italics deleted.)

However, it appears Jennings went far beyond what is required by Gantt in terms of a constitutional or statutory expression of public policy. Gantt simply held “courts in wrongful discharge actions may not declare public policy without a basis in either constitutional or statutory provisions.” (Gantt, supra, 1 Cal.4th at p. 1095, italics deleted.) In overturning the decision of the appellate court, Jennings sub silentio grafted another requirement onto Gantt, by requiring not only that the public policy be expressed in a statutory or constitutional provision but also that the statutory or constitutional provision explicitly proscribe the violation of the public policy in issue. Thus, Jennings treated Unemployment Insurance Code section 2070 as an insufficient declaration of public policy because the statute merely proclaims a public policy against age discrimination without expressly proscribing such discrimination. (Jennings, supra, 8 Cal.4th at pp. 131-132.)

In view of Gantt, we are uncertain as to why the unambiguous and longstanding statement of public policy in Unemployment Insurance Code section 2070 is inadequate to support a Tameny cause of action, but are constrained by Jennings to conclude this statute cannot serve as the basis of a Tameny claim. (Auto Equity Sales, Inc., supra, 57 Cal.3d at p. 455.) While we recognize appellate courts do not reach issues not directly before them (see *Busick v. Workmen’s Comp. Appeals Bd.* (1972) 7 Cal.3d 967,980), Jennings effectively foreclosed future lawsuits based on age discrimination under Tameny even against employers who are not exempt from the FEHA, and even if the public policy is enunciated in a source outside the FEHA.

Strong arguments can be justified in opposition to applying Jennings in this fact situation. Jennings understandably held there is no Tameny cause of action for age discrimination against small employers, a result consistent with the Legislature’s repeated determination that small employers should be exempted from what may be onerous statutory requirements. (See, e.g. section 12926, subd. (d) [law applies to employer of five or more persons]; Unemp. Ins. Code, section 2071, subd. (b) [employer of six or more]; Lab. Code, section 1102.1, subd. (b)(1) [employer of five or more].) Jennings reasoned that small employers who are exempt from a statutory scheme should not be subject to tort liability based on a statute from which they are exempt. (Jennings, supra, 8 Cal.4th at pp. 135-136.)

However, where, as here, the employer is not exempt from the statutory scheme, Jennings’s rationale for exempting the employer from a Tameny action does not apply. Nonetheless, because Jennings precludes resort either to the FEHA or to Unemployment Insurance Code section 2070 as the basis of a Tameny claim for age discrimination in employment, there is no

statutory basis here to support such a Tameny claim, even against an employer which is not exempt from the FEHA. While we are compelled by Jennings to hold Stevenson cannot state a Tameny claim for age discrimination, we respectfully urge a reexamination of this timely issue by the Supreme Court.

f. Recent cases permitting Tameny claims for employment discrimination are distinguishable.

Appellate courts recently have held wrongful discharges based on pregnancy and on sexual orientation violate the fundamental public policy of this state, so as to give rise to Tameny claims. However, as discussed below, those cases are inapposite.

In *Badih v. Myers* (1995) 36 Cal.App.4th 1289, review denied, the employer discharged the plaintiff after she told him she was pregnant. (*Id.*, at p. 1292.) The plaintiff brought an action for tortious wrongful discharge, alleging her employer had terminated her because of the pregnancy. The jury agreed and the plaintiff thus prevailed on her cause of action for wrongful discharge in contravention of public policy. (*Id.*, at pp. 1291 - 1292.) Although the FEHA specifically prohibits discharge of an employee “because of [her] pregnancy” (section 12945, subd. (a)), the employer in *Badih* was not subject to the FEHA’s statutory ban on pregnancy discrimination because he did not regularly employ five or more persons. (section 12926, subd. (d); *Badih*, supra, at p. 1291, th. 1.)

On appeal, the employer contended “the judgment must be reversed because there is no fundamental public policy prohibiting discrimination on the basis of pregnancy by employers who are not subject to the [FEHA]. . . .” (*Badih*, supra, 36 Cal.App.4th at p. 1291.) The employer relied on *Jennings*, supra, 8 Cal.4th 121, for the proposition that an employee for whom FEHA remedies are not available because her employer does not regularly employ five or more persons, cannot maintain a common law tort action for damages for wrongful discharge in violation of the public policy set forth in the FEHA because the FEHA’s statement of policy is inseparable from its exemption of small employers from the FEHA ban on employment discrimination. (*Badih*, supra, 36 Cal.App.4th at p. 1293.)

The reviewing court rejected the employer’s argument and affirmed. It held a basis existed for an action for tortious discharge in violation of public policy, independent of the FEHA’s limited ban on pregnancy discrimination. (*Badih*, supra, 36 Cal.App.4th at p. 1293.) *Badih* found “pregnancy discrimination is a form of sex discrimination under article I, section 8 of the California Constitution[, which] expresses a fundamental public policy against sex discrimination in employment (*Rojo v. Kliger*, supra, 52 Cal.3d at pp. 90-91), . . .” (*Badih*, supra, 36 Cal.App.4th at p. 1296, italics added.)

However, unlike categories such as race or gender, age “does not enjoy constitutional protection.” (Jennings, *supra*, 8 Cal.4th at p. 134.) Therefore, Badih’s recognition of a fundamental public policy against pregnancy discrimination is unavailing to Stevenson.

It also has been held that employment discrimination on the basis of sexual orientation violates the fundamental public policy of this state for purposes of pleading a Tameny claim. (Leibert v. Transworld Systems, Inc. (1995) 32 Cal.App.4th 1693, 1702-1704.) In Leibert, an employee who pled he was discharged on account of his sexual orientation [company vice-president allegedly stated, “I do not need a fag working for me in this office”] (id., at p. 1697) was able to state a Tameny claim, based on violation of Labor Code sections 1101, 1102 and 1102.1. Labor Code section 1102.1 states in relevant part: “(a) [Labor Code] Sections 1101 and 1102 prohibit discrimination or different treatment in any aspect of employment or opportunity for employment based on actual or perceived sexual orientation.” (Italics added.)

Unlike these Labor Code provisions prohibiting sexual orientation discrimination, Unemployment Insurance Code section 2070 merely proclaims a public policy against age discrimination without actually proscribing such discrimination. Therefore, Leibert similarly is unavailing to Stevenson.

Consequently, and somewhat anomalously, unlike the categories of pregnancy and sexual orientation, at this juncture there is no fundamental public policy in California against age-based employment discrimination which would give rise to a Tameny claim.

2. Stevenson failed to state a public policy claim based on a violation of her right to medical leave.

As indicated, the second cause of action pled wrongful termination in violation of the public policy prohibiting retaliation against an employee for exercising the right to take medical leave.

The issue of whether this cause of action asserted violation of a fundamental public policy does not detain us. The provisions in section 12945.2 of the FEHA pertaining to medical leave required due to an employee’s own health condition did not become effective until October 5, 1993. (Stats. 1993, ch. 827, section 1; see Hist. & Stat. Notes foll. section 12945.2, 32D West’s Ann. Gov. Code, 1996 pocket part, pp. 64-65; Ely v. Wal-Mart, Inc. (C.D. Cal. 1995) 875 F.Supp. 1422, 1426.) In view of Stevenson’s allegation she was terminated “sometime after December 3 1, 1992,” said policy clearly was not “well established” at the time of her discharge. (Gantt, *supra*, 1 Cal.4th at p. 1090.)

Therefore, Stevenson cannot state a Tameny claim based on the right to medical leave.[FOOTNOTE 81

It is unnecessary to reach any remaining issues raised by the petition.

CONCLUSION

We observe age discrimination has a broader societal reach than all other prohibited categories of discrimination, including the constitutionally prohibited categories of race and sex (Cal. Const., art. I, section 8), in that barring an early demise, old age is a universal and inevitable human condition. In that sense, the potential for employment discrimination based on age is greater than for employment discrimination based on gender, pregnancy or sexual orientation, each of which has been held to support a Tameny claim. (Rojo, supra, 52 Cal.3d at pp. 88-91; Badih, supra, 36 Cal.App.4th at p. 1296; Leibert, supra, 32 Cal.App.Qth at pp. 1703-1704.)

In addition we live in a time of rising life expectancy, a rapidly expanding older population, and the desire, necessity and practice of many older individuals to remain active in the work force due to economic need, personal fulfillment, a sense of duty to serve one's country, or for other reasons. Public policy in a civilized society, to support a common law cause of action for tortious wrongful discharge in violation of public policy, certainly should flow from the recognition of these truisms.

While we are compelled by Jennings, supra, 8 Cal.4th 121, to hold there is no cause of action for tortious wrongful discharge in violation of the public policy against age discrimination, we respectfully urge the Supreme Court to explore further this troubling area of the law at its next opportunity.

DISPOSITION

The alternative writ having served its purpose is discharged. The petition for writ of mandate is denied.

CROSKEY, J. and KITCHING, J., concurring.

FOOTNOTES

FN1 . The American Association of Retired Persons and the California Employment Lawyers Association have filed amicus curiae briefs in support of Stevenson.

FN2. All further statutory references are to the Government Code, unless otherwise indicated.

FN3. We exercise our discretion to entertain the petition even though it was filed slightly beyond the usual 60-day period for seeking such review. The 60-day period is not jurisdictional and counsel's medical emergency constitutes good cause for the delay. (*Peterson v. Superior Court* (1982) 31 Cal.3d 147, 163; *People v. Superior Court (Brent)* (1992) 2 Cal.App.4th 675, 682.)

FN4. "Age," as defined in the FEHA, means 40 or over. (section 12926, subd. (b).)

FN5. Other statutes pertaining to age discrimination in employment, but which operate in more limited domains, include Education Code sections 44100 [public schools] and 87100 [community colleges]; Government Code sections 18932, 19700, 19706 and 19793 [state employment]; Labor Code section 1777.6 [public works]; and Public Utilities Code section 3542 [highway carriers].

FN6. California Constitution, article I, section 8, provides: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."

FN7. The author Betty Friedan observes "Supreme Court Justices are among the longest-lived of all Americans They must continue to respond to new challenges in their work, they continue to be needed and to participate in the mainstream of society; they continue to be nourished by support and bonds of peers and younger men and women who respect them. And they are valued for the wisdom of their age, for their integrity and authenticity, for their sense of the true and the good. They are protected from rigidity and self-contempt by the ever-evolving demands of their work, and the respect it engenders." (Friedan, *The Fountain of Age* (1993) p. 216.)

FN8. In *Ely*, a federal district court held a wrongful discharge claim based on a violation of section 12945.2, which provides for family care and medical leave, is a violation of fundamental California public policy. (*Ely*, supra, 875 F.Supp. at pp. 1425-1429.) However, in view of the timing of Stevenson's termination, we do not reach that issue.