#39 12/17/70

Memorandum 71-3

Subject: Study 39 - Attachment, Garnishment, Execution (Discharge From Employment Because of Garnishment)

The staff recommends that the California provisions relating to discharge from employment because of wage garnishment be conformed to the federal prohibition and that this change be recommended for enactment at the 1971 session.

The present California statute deals only with prejudgment garnishment of earnings. Because of a recent California Supreme Court case and a 1970 legislative enactment, it is a dead letter.

We attach two copies of a tentative recommendation dealing with this problem. We hope to send it to the printer immediately after the January meeting if it is approved for submission to the 1971 session. Accordingly, please mark your editorial changes on one copy to turn in to the staff at the January meeting.

We have distributed the tentative recommendation for comment and hope to have comments from interested persons and organizations in time for the January meeting. At that time, the Commission can determine whether the recommendation should be submitted to the 1971 Legislature and, if so, what changes are needed.

We believe that the provisions relating to wrongful discharge for garnishment are more appropriately compiled in the Labor Code than in an Earnings Protection Act. That is where the provisions are now compiled. Moreover, the Labor Code is the logical place to compile the provisions since their real significance is the civil penalty they provide. That penalty, for all practical purposes, is enforced by the Labor Commissioner.

We believe that the amendment is of benefit both to employers and to employees. It is one we will recommend eventually. We see no reason to defer the recommendation since we believe that the discharge provisions are more appropriately compiled in the Labor Code than in the Earnings Protection Act (which probably will be compiled in the Code of Civil Procedure).

Respectfully submitted,

John H. DeMoully
Executive Secretary

#39 December 16, 1970

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

ATTACHMENT, GARNISHMENT, EXEMPTIONS FROM EXECUTION

Discharge From Employment

PRELIMINARY STAFF DRAFT

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

WARNING: This tentative recommendation has been prepared by the staff of the Law Revision Commission to effectuate the Commission's tentative decision to revise the statutes relating to attachment, garnishment, and exemptions from execution. The draft has not been considered by the Commission and therefore may not reflect the views of the Commission.

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

ATTACHMENT, GARNISHMENT, EXEMPTIONS FROM EXECUTION

Discharge From Employment

On July 1, 1970, Title III of the Federal Consumer Credit Protection Act of 1968 (Truth in Lending Act)[1] went into effect throughout the United States imposing restrictions on the amounts creditors could garnish from debtor's earnings and prohibiting discharge from employment under certain circumstances. In California, legislation enacted at the 1970 legislative session[2] attempts to conform the California law to the federal restrictions on the amount of earnings which a creditor can garnish,[3] but the California provisions restricting discharge from employment because of garnishment have not been conformed to the federal restriction.

The federal act provides that any employer subject to the act who willfully discharges an employee because his wages have been subjected to garnishment for a single indebtedness may be fined up to $1,000, or imprisoned for one year, or both.[4] This criminal sanction is the only penalty provided for violation.

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1. 15 U.S.C. §§ 1601-1677.

2. Cal. Stats. 1970, Ch. 1523.

3. The 1970 legislation does not deal with some difficult problems such as prejudgment garnishment of checking accounts. These problems are under study by the Law Revision Commission, and separate recommendations will be prepared to deal with them.

4. 15 U.S.C. § 1674.

In 1969, the California Legislature also enacted a measure[5] to protect an employee from summary discharge for garnishment for a single indebtedness. Labor Code Sections 2922 and 2924 were amended to provide: "No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness, prior to a final order or judgment of a court." This prohibition is the same as the Federal Consumer Credit Protection Act except for the underlined phrase. However, the latter phrase appears to restrict the prohibition against discharge only to discharge for a prejudgment attachment of earnings.[6] Also, under California law, an employer who violates the prohibition against discharge is liable for the wages of a wrongfully discharged employee,[7] but the period of liability ends when the employee is reinstated or at the end of 30 days following discharge, whichever occurs first. Unlike the federal act, no criminal penalty is provided.

The same 1969 act amended Labor Code Section 96[8] to permit the Division of Labor Law Enforcement to take assignment of the discharged employee's wage claim.[9]

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5. Cal. Stats. 1969, Ch. 1529.

6. See Review of Selected 1969 Code Legislation 146-148 (Cal. Cont. Ed. Bar 1969).

7. The prohibition applies to employments at will (Labor Code § 2922) as well as for a specified term (Labor Code § 2924).

8. Labor Code § 96(k).

9. In cases of discharge from employments terminable at will, Labor Code Section 2922 provides that the commissioner "shall take assignment of wage claims." By contrast, Section 2924 provides that he "may take assignment of wage claims" filed by employees discharged from specified-term employments. For further discussion, see Review of Selected 1969 Code Legislation 147 (Cal. Cont. Ed. Bar 1969).

An employee has 30 days following the wrongful termination to notify the employer of his intent to make the claim and 60 days after discharge to file the claim with the Labor Commissioner.[10] This statutory requirement apparently is intended to prescribe a mandatory time limit on claims the employee may but is not required to file.

The 1969 California legislation appears subsequently to have been rendered meaningless: first, by the decision of the California Supreme Court in McCallop v. Carberry,[11] and, then, by the enactment in 1970 of Code of Civil Procedure Section 690.6,[12] both of which bar any prejudgment garnishment of earnings in California. Since there now can be no prejudgment wage garnishment, there necessarily will be no discharge for such garnishment.

On July 1, 1970, the broader federal provision which bars discharge for postjudgment levies against earnings for any one indebtedness became applicable in California. Conforming the California statutory provisions to the federal prohibition--by deleting the phrase "prior to a final order or judgment of a court" from Labor Code Sections 96, 2922, and 2924--is recommended so that the California statutes will state the prohibition as it has in fact applied to California employers since July 1, 1970. This change would also be of benefit both to employers and employees by making applicable the California civil remedy for wrongful discharge.[13] This would protect employees by

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10. Labor Code §§ 2922, 2924.

11. 1 Cal.3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970).

12. Cal. Stats. 1970, Ch. 1523.

13. The Commission has reviewed the "not more than 30 days' wages" penalty now provided in Labor Code Sections 2922 and 2924 and has concluded that it is a fair and desirable provision.

providing a more effective method of securing compliance with the present law than the criminal sanction provided by the federal law; it would also help protect employers by providing a reasonable alternative means of enforcement, thus making the possibility of a criminal action for wrongful discharge under the federal law extremely remote.

Although the Commission believes that the criminal penalty imposed by the federal law is an ineffective and undesirable sanction, the inclusion of a comparable provision in the California law is essential if California is to qualify eventually for exemption from enforcement of federal garnishment restrictions.[14] Accordingly, the Commission recommends that such a provision be included in the California law. The Commission makes this recommendation only because it believes that the inclusion of a criminal penalty in the California law would have no undesirable effect. It is unlikely that any California employer would ever be subjected to the criminal penalty under the

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14. The Consumer Credit Protection Act of 1968 invites each state to enact its own restrictions on earnings garnishments and to undertake its own enforcement of these provisions. See 15 U.S.C. § 1675 (C.C.P.A. § 305); 29 Code Fed. Reg. §§ 870.50-870.56 (May 1970). Nothing is gained by having two separate garnishment restriction laws, one state and one federal. Garnishments seem to be particularly suitable for state enforcement. The Wages and Hours Division of the Department of Labor--the federal agency that administers Title III of the Consumer Credit Protection Act--is a remote and inaccessible source of enforcement and information regarding wage garnishments. It appears to the Commission that it will be to California's interest to provide her citizens--whether they are employers, creditors, or debtors--with an authoritative local source of information upon which they can rely. This will be possible only if California can qualify for exemption from federal garnishment provisions. To obtain such an exemption, California law must provide restrictions on garnishment which are substantially similar to those provided in the federal law.

The Commission is reviewing the California statutes relating to attachment, garnishment, and exemptions from execution with a view to recommending the enactment of a comprehensive revision of this body of law at a future session of the Legislature. Not the least of the benefits hoped to be accomplished by enactment of a comprehensive statute will be to permit California to qualify for exemption from the federal garnishment restrictions.

state law--or, for that matter, under the federal law--since the recommended legislation provides a more reasonable and appropriate civil penalty.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Sections 96, 2922, and 2924 of, and to add Section 2926 to, the Labor Code, relating to termination of employment.

The people of the State of California do enact as follows:

Section 1. Section 96 of the Labor Code is amended to read:

96. The Labor Commissioner and his deputies and representatives authorized by him in writing may take assignments of:

(a) Wage claims and incidental expense accounts and advances.

(b) Mechanics' and other liens of employees.

(c) Claims based on "stop orders" for wages and on bonds for labor.

(d) Claims for damages for misrepresentations of conditions of employment.

(e) Claims for unreturned bond money of employees.

(f) Claims for penalties for nonpayment of wages.

(g) Claims for the return of workmen's tools in the illegal possession of another person.

(h) Claims for vacation pay, severance pay, or other compensation supplemental to a wage agreement.

(i) Awards for workmen's compensation benefits in which the Workmen's Compensation Appeals Board has found that the employer has failed to secure payment of compensation and where the award remains unpaid more than 10 days after having become final.

(j) Claims for loss of wages as the result of discharge from employment for ~~one~~ the garnishment of wages ~~prior to a final order or judgment of a court~~ for any one indebtedness .

Sec. 2. Section 2922 of the Labor Code is amended to read:

2922. An employment, having no specified term, may be terminated at the will of either party on notice to the other. No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness ~~, prior to a final order or judgment of a court~~ . The wages of an individual whose employment has been so terminated shall continue until reinstatement if such termination is found to be in violation of this section; but such wages shall not continue for more than 30 days. The employee shall give notice to his employer of his intention to make such a wage claim within 30 days after being laid off or discharged and shall file a wage claim with the Labor Commissioner within 60 days of being laid off or discharged. The Labor Commissioner shall take assignment of wage claims under this section as provided for in Section 96. Employment for a specified term means an employment for a period greater than one month.

Sec. 3. Section 2924 of the Labor Code is amended to read:

2924. An employment for a specified term may be terminated at any time by the employer in case of any willful breach of duty by the employee in the course of his employment, or in case of his habitual neglect of his duty or continued incapacity to perform it. No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness ~~,-prior to-a-final-order-or-judgment-of-a-court~~ . The wages of an individual whose employment has been so terminated shall continue until reinstatement if such termination is found to be in violation of this section; but such wages shall not continue for more than 30 days. The employee shall give notice to his employer of his intention to make such a wage claim within 30 days after being laid off or discharged and shall file a wage claim with the Labor Commissioner within 60 days of being laid off or discharged. The Labor Commissioner may take assignment of wage claims under this section as provided for in Section 96.

Sec. 4. Section 2926 is added to the Labor Code, to read:

2926. Any person, or the agent, manager, superintendent, or officer thereof, who willfully discharges an employee in violation of Section 2922 or 2924 is guilty of a misdemeanor punishable by a fine of not more than $1,000, or by imprisonment in the county jail not exceeding one year, or both.

Comment. Section 2926 makes no change in the law presently applicable in California. In form, Section 2926 is modeled after Labor Code Section 215. In substance, the penalty prescribed is the same as that prescribed by Section 304(b) of the Federal Consumer Credit Protection Act of 1968 which now applies in California. 15 U.S.C. § 1674(b).

Although the criminal penalty imposed by the federal law is an ineffective and undesirable sanction, the inclusion of a comparable provision in the California law is essential if California is to qualify eventually for exemption from enforcement of federal garnishment restrictions. See Recommendation Relating to Attachment, Garnishment, Exemptions From Execution: Discharge From Employment, 10 Cal. L. Revision Comm'n Reports (supra)(1971). Section 2926 has been added to the Labor Code for this reason and only because it is unlikely that its criminal penalty will ever be used. It is difficult to conceive of a case where a prosecutor would seek to impose on a California employer the criminal sanction under Section 2926--or, for that matter, the criminal sanction under the federal law--since Labor Code Sections 96(k), 2922, and 2924 provide a more reasonable and appropriate civil sanction.