Comments

Employees Getting Lost in the Trees: *Tameny* Claims and the Public Policy Behind Preventing Termination on the Basis of Medical Marijuana Use

By KELCEY PHILLIPS*

SHELBY CLAYTON,[1] born and raised in Madison, Wisconsin, suffers from an extreme case of epilepsy. As a common side effect of epilepsy, Shelby suffers from frequent seizures. With the assistance of her primary caregiver and other medical specialists, Shelby has been prescribed both standard and experimental medications to help manage her seizure reoccurrence. However, these treatments have largely been unsuccessful.

In search of some relief, Shelby enquires about the use of medical marijuana with her doctor. Her doctor informs her that there is growing research in the medical community of the successes of medical marijuana to treat uncontrollable epilepsy symptoms. However, Wisconsin has not yet legalized the use or prescription of medical marijuana, and her doctor did not feel comfortable prescribing it and subjecting himself to criminal liability.

Shelby decides to relocate to California, a state that has legalized the use of medical marijuana since 1996, to take advantage of the reported medical benefits. Her new doctor prescribed the medically recommended dose of medical marijuana, and the frequency of her seizures instantly decreased. Shelby was also hired in a new position at an advertising agency, a field in which she had much experience. During her onboarding meeting with Human Resources, Shelby was informed that all employees are required to undergo a standard drug

* J.D., University of San Francisco School of Law (2017), B.A., Sonoma State University (2014). Thank you to Professor Maria Ontiveros for her assistance with this article through the Advanced Labor & Employment Law Seminar.

1. Shelby Clayton is a fictional character for the purposes of this article.

test, which would be administered in about a week. Shelby informed Human Resources of her condition and her status as a qualified patient cardholder under the Compassionate Use Act ("CUA").

Shelby began work, and within two weeks Human Resources informed her that she tested positive for tetrahydrocannabinol, THC, the chemical found in marijuana. Shelby again informed Human Resources and her employer of her status as a qualified patient under the CUA, as well as provided them with her doctor's recommendations. After deliberation, Shelby's employer communicated to her that she was terminated because of her medical marijuana use. Shelby was never reprimanded for poor performance during her employment with the advertising agency and was fully qualified for her position.

Notions of federalism support states' independent power to determine what is within public policy. California's overwhelming recognition of the importance of access to medical marijuana for qualifying patients and recent trends in legislation render medical marijuana use a fundamental public policy of the state, where employees should not be terminated on the basis of their use. It is in the best interest of society as a whole to find that barring termination on the basis of medical marijuana use is within public policy to support a wrongful termination in violation of public policy state tort claim.

This article argues that medical marijuana use as the Compassionate Use Act prescribes is a public policy for the purposes of a wrongful discharge in violation of public policy claim. Long-standing protections codified in statutes, support from medical professionals, and overall public impact shows there is a public policy in support of medical marijuana use analogous to public policies courts have previously determined. Part I of this article gives a timeline of medical marijuana use in California and the greater United States, highlighting its deep roots in the state's policy and its context in workplace regulation. Part II discusses the origin of the *Tameny* claim, wrongful discharge in violation of public policy, and the factors that courts consider to determine whether a policy can serve as the basis for the claim. Part III applies the judicially recognized factors of the claim to medical marijuana use to demonstrate that this right is unequivocally the state's public policy. Recent court decisions that held contrary have gone down the wrong path; instead, employees should be protected from termination when exercising their statutory right to partake in medical marijuana. Lastly, Part IV of this article addresses the federalism concerns behind medical marijuana use that arise from the

conflict between state laws authorizing its use, and the federal laws that still prohibit it.

I. Status of Medical Marijuana in America and the State Today

A. Beginning of Medical Marijuana in General

People have been cultivating and trading marijuana in America since the 17th century.[2] In 1870, cannabis made its debut in U.S. pharmacopeia and was prescribed by doctors and dispensed by pharmacies.[3] While divided public opinions still exist on the medical use and benefits of marijuana,[4] scientific investigations over the years support its use, specifically when used for pain management of a variety of conditions and diseases.[5] The more restrictive opinions on marijuana's benefits led to federal prohibitions on its possession, use, and medical prescription. The states have enacted their own laws that authorize medical marijuana use to push back on those federal prohibitions and restore its original purpose in America.

1. 1937 Marihuana Tax Act

The first federal regulation of marijuana occurred in 1937 when Congress passed the 1937 Marihuana Tax Act.[6] Arguably motivated by racial prejudice,[7] this Act mandated a tax on all "buyers, sellers, importers, growers, physicians, veterinarians" and all others involved with commercial, professional, and personal possession of marijuana.[8] Specifically, the Marihuana Tax Act imposed a $1 per year tax on physicians, dentists, and other practitioners who administered or prescribed marijuana to patients, as well as on persons who obtained

2. PBS FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html (last visited Nov. 13, 2016) [https://perma.cc/3JTC-Q8KP].

3. ALISON HOLCOMB, MARIJUANA: IT'S TIME FOR A CONVERSATION 4 (Am. Civil Liberties Union Wash. Found., 4th ed. 2010), https://www.aclu-wa.org/sites/default/files/media-legacy/attachments/Marijuana%20Booklet2010reading%20copy.pdf [https://perma.cc/LYG2-S77W].

4. MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE (Janet E. Joy, Stanley J. Watson, Jr. & John A. Benson, Jr. eds., 1999) [hereinafter MARIJUANA AND MEDICINE].

5. *Id.* at viii; Jay M. Zitter, Annotation, *Construction and Application of Medical Marijuana Laws and Medical Necessity Defense to Marijuana Laws*, 50 A.L.R. 6th 353 (2009).

6. Marijuana Tax Act, 26 U.S.C. § 4742(a) (1937).

7. HOLCOMB, *supra* note 3, at 4.

8. David Solomon, *The Marijuana Tax Act of 1937*, SCHAFFER LIBR. DRUG POL'Y http://www.druglibrary.org/schaffer/hemp/taxact/mjtaxact.htm (last visited Nov. 17, 2017) [https://perma.cc/UBA7-LK9T]; 26 U.S.C. § 4742(a).

marijuana for the purposes of lab research and analysis.[9] The Act did not make the medical use of marijuana illegal, but the taxes did make it more inaccessible and more expensive.[10] The Act's regulations also caused marijuana to no longer be regarded as a federally permissible medicine.[11]

The 1937 Marihuana Tax Act was the first major restriction on marijuana seen in the country since its introduction. While at first glance it can be seen as Congress applying a uniformed regulation on marijuana given its increased presence in the trade, medical, and recreational realm,[12] it had the effect of limiting the research on marijuana's medical benefits. The American Medical Association disapproved the passage of the Marihuana Tax Act, stating that Congress was attempting to inhibit the research of medical marijuana without any scientific evidence for doing so.[13] The AMA's dissent to this Act reflected the importance of allowing uninhibited access to the research, and the use, of medical marijuana.

2. Controlled Substance Act

In 1970, marijuana became the subject of further federal regulation with the enactment of the Controlled Substance Act ("CSA").[14] The purpose of the CSA was to counter drug abuse, provide officials with the means for drug abuse prevention, and establish uniformed criminal offenses and penalties.[15] The CSA established five schedules and classified substances to a respective schedule.[16] The CSA classified marijuana as a Schedule I substance, defining it as a drug with a "high potential for abuse," no accepted medical use in the U.S., and a lack of safe use.[17] The CSA criminalized the distribution, possession, manufacturing, and dispensing of marijuana.[18]

9. 26 U.S.C. § 4742(a).

10. *See* MARIJUANA AND MEDICINE, *supra* note 4, at 16.

11. *See id.* stating that "[i]n 1942, marijuana was removed from the U.S. Pharmacopeia because it was believed to be a harmful and addictive drug that cause psychoses, mental deterioration, and violent behavior."; *see also* Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 82 (2015).

12. Marijuana became a popular ingredient in medicinal products. America saw an influx of recreational use of medical marijuana following the increase of Mexican immigrants as a result of the Mexican Revolution of 1910. PBS FRONTLINE, *supra* note 2.

13. *See* HOLCOMB, *supra* note 3, at 2.

14. 21 U.S.C. § 812 (2012).

15. H.R. REP. NO. 91-1444, at 4567 (1970).

16. 21 U.S.C.A. § 812(a) (2012).

17. 21 U.S.C.A. § 812 (2012).

18. 21 U.S.C. § 841(a) (2012).

At the time of the CSA's passage, there was debate over whether marijuana should be classified under such strict scheduling. Opinions ranged from advocating for the legalization of marijuana to the death penalty as the punishment for marijuana distribution to minors.[19] Dr. Stanley Yolles, Director of the National Institute of Mental Health, testified that marijuana was not medically a narcotic and was not addictive.[20] Since the passage of the CSA, the American Medical Association, the American College of Physicians, the Institute of Medicine, and patient advocates criticize marijuana's classification as a Schedule I drug and urge the federal government to reclassify it in order to facilitate medical use and research.[21] Medical associations such as these have conducted research on the health benefits of medical marijuana, and federal law has simply failed to keep up with these scientific advances in support of medical marijuana.[22] Those scientific advances largely provide that marijuana is medically accepted as a preventative option for those individuals who suffer from persisting, unbearable pain.[23]

3. States' Exceptions for Medical Marijuana Use

States have chosen not to enforce the CSA's absolute prohibition on marijuana by creating an exception through state law that decriminalizes the use and prescription of medical marijuana in order for individuals to take advantage of its medical benefits. Today, twenty-eight states and Washington D.C. have legalized patient use and physician prescription of medical marijuana.[24] A small minority of states have enacted full legislation that legalize both medical and recreational marijuana use.[25]

19. H.R. REP. NO. 91-1444, at 4577.

20. Dr. Yolles also recognized that at that time, in 1970, more research should have been conducted to fully understand the benefits and repercussions of marijuana use. *See* H.R. REP. NO. 91-1444, at 4577–78.

21. Diane E. Hoffmann & Ellen Weber, *Medical Marijuana and the Law*, 362 NEW ENG. J. MED. 1453, 1453–54 (2010).

22. J. Michael Bostwick, *Clinical Decisions: Medicinal Use of Marijuana*, 368 NEW ENG. J. MED. 866, 866 (2013) (recommending the medicinal use of marijuana to a given clinical issue).

23. Zitter, *supra* note 5, at § 2.

24. *29 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last visited Dec. 3, 2016) [https://perma.cc/8NHS-W5RW].

25. *State Marijuana Laws in 2017 Map*, GOVERNING: STS. & LOCALITIES, http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html (last visited Oct. 1, 2017) [https://perma.cc/6NGY-KG9H].

California was the first state to pass such a statute.[26] The CUA or Proposition 215 was enacted as an initiative state statute in 1996.[27] The CUA shielded patients and primary caregivers from criminal prosecution and sanction for the possession, cultivation, use, and prescription of marijuana.[28] The CUA was enacted with fifty-six percent of the vote, one of the highest percentages in favor of a proposition.[29] The CUA is still good law in California today.

The purpose of the CUA is both to remove criminal liability for patients who possess or grow marijuana, and increase the access to medical marijuana for those qualified patients. The introductory text of the CUA states, in part, that the purpose of the Act was to ensure that patients "have the right to obtain and use marijuana for medical purposes" when "deemed appropriate" by their physician that such use would benefit their health in the treatment of debilitating diseases such as cancer, glaucoma, and AIDS.[30] The legislative analysis of Proposition 215 as it appeared on the 1996 California ballot further corroborates this purpose and states that the measure would "[provide] for the use of marijuana when a physician has determined that the person's health would benefit from its use . . . ."[31] The CUA explicitly states that nonmedical marijuana uses are still prohibited, combatting the arguments that the Act would essentially legalize recreational and unregulated marijuana use.[32] However, on November 8, 2016, voters

26. Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 211 (2008) (noting that the "Compassionate Use Act was the first law of its kind in the nation").

27. An initiated state statute is law that is adopted by way of the ballot initiative process. Passed laws are commonly referred to as propositions. *See* BALLOTPEDIA, https://ballotpedia.org/Initiated_state_statute (last visited Dec. 3, 2016) [https://perma.cc/T4EG-A2VW]; Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

28. HEALTH & SAFETY § 11362.5(b)(1)(B).

29. *California Proposition 215, the Medical Marijuana Initiative*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_215,_the_Medical_Marijuana_Initiative (last visited Dec. 3, 2016) [https://perma.cc/5Y47-2L9Y].

30. HEALTH & SAFETY § 11362.5(b)(1)(A).

31. Medical Use of Marijuana. Initiative Statute, Official Title and Summary Prepared by the Attorney General.

32. HEALTH & SAFETY § 11362.5(b)(2). In response to opponents of the proposition, San Francisco District Attorney Terence Hallinan stated that "Proposition 215 does not allow 'unlimited quantities of marijuana to be grown anywhere.' It only allows marijuana to be grown for a patient's personal use." RECS. OF CITY OF SACRAMENTO, *Title & Summary and Analysis of Proposition 215: Medical Use of Marijuana. Initiative Statute*, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cad=rja&uact=8&ved=0ahUKEwi4jZW00sfXAhVJ0FQKHfnSDXAQFghQMAg&url=http%3A%2F%2Fwww.records.cityofsacramento.org%2FViewDoc.aspx%3FID%3Ds6tFBnt4W%2BJo1vpbox6B0XNnDkEOdiC4&usg=AOvVaw05pGYxEAMBpIkmq17a5jQU (last visited Nov. 18, 2017) [https://perma.cc/P9UL-

approved the legalization of nonmedical marijuana uses through Proposition 64, which authorized the recreational use of marijuana.[33]

The CUA shifts regulation related to marijuana to better reflect its long-standing use as medicine in the country.[34] More importantly, as a voter-enacted law, it shows the California people's intent to protect those individuals who seek marijuana use as a necessity for comfort and relief. However, this change in regulation is not fully reflected in all areas of law, most specifically in employment law.

B. History of Medical Marijuana Regulation in the Workplace

Shelby Clayton, and other employees terminated based on their medical marijuana use, cannot rely on federal laws as a basis for their wrongful termination claim. Courts have held that such medical marijuana use must be analyzed "against the backdrop" of federal laws.[35] This includes the CSA, Title VII, and the Americans with Disabilities Act, which all exclude any protections for employees engaging in medical marijuana use. However, the conflict between federal prohibitions and states' authorization of medical marijuana use creates conflicts with enforcement of these laws in the workplace.

1. No Federal Protection

Legislatures recognize the compelling interests to protect employees in the workplace and to ensure their equal opportunity for employment. Various federal statutes have been enacted over the years to further those interests. However, Congress has failed to recognize that same interest when applied to those employees who use medical marijuana. Federal law currently provides no protections for employees in the workplace who are deemed to be qualified patients in respect to medical marijuana use. This gives employers the unfettered right to discharge and "discriminate" against those employees who rely on medical marijuana for relief from diseases, and their symptoms, that cause intractable pain.

4NEP]. Hallinan further clarified that "Proposition 215 [does not] give kids the okay to use marijuana, either." *Id.*

33. *California Proposition 64, Marijuana Legalization,* BALLOTPEDIA, https://ballotpedia.org/California_Proposition_64,_Marijuana_Legalization_(2016) (last visited Dec. 5, 2017) [https://perma.cc/9QH5-YP74].

34. Zitter, *supra* note 5 ("While the cultivation, sale, and use of marijuana is often completely restricted by state and federal laws, these prohibitions go against the long-standing traditional use of cannabis as medicine.").

35. Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 215 (2008).

Title VII of the Civil Rights Act, enacted in 1964, codifies unlawful employment practices and prohibits an employer from discriminating against an employee in the workplace.[36] The statute identifies an enumerated list of protected classes that fall under the scope of the statute's protections.[37] These protected classes include "race, color, religion, sex, or national origin," and employers are prohibited from making employment decisions on the basis of any of these attributes.[38] Medical marijuana users, patients, or those suffering from debilitating diseases do not fit within the protected classes enumerated by Title VII. Consequently, employees discharged on the basis of their reliance on medical marijuana for relief could not state a cause of action or seek remedy based on an employer's violation of Title VII.

The Americans with Disabilities Act of 1990 ("ADA") provides protections for "qualified individuals" against discrimination in the workplace.[39] An employee is considered a qualified individual under the ADA if the employee can establish that they can perform the "essential functions" of the position with or without the employer providing a reasonable accommodation.[40] If the employee can perform the essential functions of the employment position, then an employer is prohibited from discriminating against said employee on the basis of their disability.[41] The ADA delineates what constitutes discrimination on the basis of the qualified individual's disability, which includes the employer's refusal to make a "reasonable accommodation" for known physical and mental impairments.[42]

The ADA ostensibly protects employees who use medical marijuana as a reasonable accommodation for their mental or physical impairments.[43] However, employees have been largely unsuccessful in establishing a cause of action for discrimination under the ADA for

36. 42 U.S.C. § 2000e-2(a) (1964).

37. *Id.*

38. 42 U.S.C. § 2000e-2(b) (1964).

39. 42 U.S.C. § 12112(a) (2009).

40. 42 U.S.C. § 12111(8) (2009).

41. *See* 42 U.S.C. § 12111(8) (2009); *see also* Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 806 (1999).

42. 42 U.S.C. § 12112(b)(5)(A) (2009).

43. *See* Kathleen Harvey, *Protecting Medical Marijuana Users in the Workplace*, 66 CASE W. RES. L. REV. 209, 210 (2009) (For employees bringing a claim for discrimination under the ADA in states that have authorized the use of medical marijuana under the law, it seems as though "the federal Americans with Disabilities Act (ADA) would protect disabled persons that use legally prescribed drugs from employment discrimination that stems from that drug use."); *see also* Ari Lieberman & Aaron Solomon, *A Cruel Choice: Patients Forced to Decide Between Medical Marijuana and Employment*, 26 HOFSTRA LAB. & EMP. L.J. 619, 637 (2009) ("'[N]ot making reasonable accommodations' is included within the statute's defi-

medical marijuana use, largely because the ADA exempts those "engaging in the illegal use of drugs" from the ADA's scope of protections for qualified individuals.[44] At the federal level, medical marijuana is classified as a Schedule I drug, rendering it illegal for the purposes of the federal ADA. Similar to Title VII, employees cannot rely on the ADA for remedy after being terminated for their medical marijuana use.

2. State Employment Protections

Many state statutes are modeled off of the federal statutes and provide similar protections for employees in the workplace against types of discrimination. Some states, having been granted sovereignty through the Constitution,[45] have taken it upon themselves to extend the protections federal law provides and explicitly prohibit employment discrimination on the basis of medical marijuana use. Arizona, Connecticut, Delaware, Illinois, Maine, Nevada, New York and Minnesota enacted medical marijuana statutes that contain anti-discrimination or reasonable accommodation provisions with regard to employers.[46] As a whole, these statutes prohibit an employer from terminating, penalizing, or otherwise discriminating against employees on the basis of their status as a qualified patient for medical marijuana.[47] These laws reflect the states' continuing divergence from the strict prohibitions against marijuana that are apparent in the CSA and other federal laws. While these statutes further obscure the applica-

nition of the term 'discriminate.' Employers may be concerned that they may have to accommodate an employee's use of marijuana at the workplace.").

44. 42 U.S.C. § 12114(a) (2009); Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518 (2010) (An employee in Oregon, a state that legalized the use of medical marijuana, sought to establish a cause of action under the ADA for discrimination. The Oregon Supreme Court held that the CSA controls for the purposes of defining an illegal drug under a federal discrimination statute.); James v. City of Costa Mesa, 700 F.3d 394, 397 (9th Cir. 2012) (holding that, despite California's general acceptance of marijuana as effective medical treatment, plaintiff's medical marijuana use not protected under the ADA because "Congress had made clear . . . that the ADA defines 'illegal drug use' by reference to federal, rather than state[ ]law").

45. U.S. CONST. amend. X.

46. Hunton & Williams, LLP, *Anti-Discrimination Provisions in State Medical Marijuana Laws Raise Additional Considerations for Workplace Drug Testing*, HUNTON EMP. & LAB. L. PERSPS. (Jan. 22, 2015), http://www.huntonlaborblog.com/2015/01/articles/criminal-background-checks/antidiscrimination-provisions-in-state-medical-marijuana-laws-raise-additional-considerations-for-workplace-drug-testing/ [https://perma.cc/737D-8X42].

47. ARIZ. REV. STAT. ANN. § 36-2813(B); CONN. GEN. STAT. ANN. § 21a-408p(b)(3) (West 2012); 16 DEL. CODE ANN. tit. 16, § 4905A(a)(3)(a) (West 2011); 410 ILL. COMP. STAT. ANN. 130/40 (West 2016); ME. REV. STAT. ANN. tit. 22 § 2423-E(2) (2017); MINN. STAT. ANN. § 152.32(3)(c) (West 2014); NEV. REV. STAT. ANN. § 453A.800(2) (West 2015).

tion of adverse employment actions as applied to positive drug tests, these protections reinforce the original purpose of medical marijuana that has been apparent in the country for centuries.[48]

The inconsistencies surrounding medical marijuana regulation create a hazy middle ground: Are there any protections available for employees who are terminated or discriminated against because of their medical marijuana use in states that have legalized the use of medical marijuana, but have not enacted statutes that decidedly prohibit such discrimination? Courts have made clear that employees cannot seek protection through federal employment statutes. State-based statutes of states that authorize the use of medical marijuana for qualifying patients, such as California, should offer some type of protections for their employees. One law that meets these criteria is the wrongful discharge in violation of public policy claim, detailed below.

II. Claim of Wrongful Discharge in Violation of Public Policy

A. History of the Wrongful Discharge in Violation of Public Policy Claim

At-will employment is a widely established doctrine recognized by states across the U.S.[49] In California, an employee is considered to be at-will when their employment is for an unspecified term.[50] Absent this express contractual term of employment, the employee or the employer may terminate such employment relationship at his or her own will.[51] This principle allows an employer to lawfully discharge an employee at any time and for whatever reason without incurring liability.[52] The employer's absolute right to terminate at-will employees dates back to the 19th century laissez-faire policy that protects an individual's freedom to contract.[53]

The claim of wrongful discharge in violation of public policy serves as an exception to the long-standing doctrine of at-will employ-

48. For an explanation of adverse employment actions, see generally *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000).

49. *See The At-Will Presumption and Exceptions to the Rule,* NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx (last visited Nov. 18, 2017) [https://perma.cc/92RN-52ML].

50. CAL. LAB. CODE § 2922 (1971).

51. *Id.*

52. *See generally* 27 AM. JUR. 2D *Employment Relationship* § 9 (2017).

53. Theresa Ludwig Kruk, Annotation, *Right to Discharge Allegedly "At-Will" Employee as Affected by Employer's Promulgation of Employment Policies as to Discharge*, 33 A.L.R. 4th 120 (1984).

ment.[54] In 1959, the courts explicitly recognized for the first time that employees should not be terminated based on reasons that are contrary to what society believes to be public policy.[55] The right of an employer to terminate an employee for whatever cause is restricted.[56] Employees can bring a cause of action against their employer when they are terminated for reasons that are contrary to a public policy of the state, exposing employers to liability.[57]

The California courts first identified an employee's right to recourse after termination for reasons in violation of public policy in 1959 in the seminal case *Petermann v. International Brotherhood of Teamsters*.[58] In *Petermann*, the employee alleged that the defendant, his employer, instructed him to make false and untrue statements in the testimony he was subpoenaed to give before the Assembly Interim Committee on Governmental Efficiency and Economy of the California Legislature.[59] The employee instead gave all truthful answers before the committee and was terminated the day following his testimony.[60] The employee alleged that he was wrongfully discharged for his failure to commit perjury against the instruction of his employer.[61]

The California Second District Court of Appeal recognized in *Petermann* that employers should not have the unlimited right to discharge an employee for reasons against the state's declared public policy.[62] The court reasoned that an employer should not be able to instruct an employee to commit perjury, and then terminate the employee for refusing those instructions without being subject to liability.[63] Beyond an instruction to commit perjury, an employee's termination based on a reason that has a tendency to be injurious to the public or a reason that goes against the public good is recognized as a state's public policy that cannot be violated.[64] *Petermann* instructs us that such an act would be "obnoxious to the interests of the state" and would "contaminate the honest administration of public affairs."[65]

54. Stevenson v. Superior Court, 941 P.2d 1157, 1160 (1997).
55. Petermann v. Int'l Bhd. of Teamsters, Local 396, 344 P.2d 25, 27 (1959).
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 26.
60. *Id.*
61. *Petermann*, 344 P.2d at 26.
62. *Id.* at 28.
63. *Id.* at 27.
64. *Id.*
65. *Id.* at 27–28.

Tameny v. Atlantic Richfield Company solidified the groundwork of the wrongful discharge in violation of public policy claim.[66] The California Supreme Court in *Tameny* affirmed the decision of *Petermann* and the notion that an employer does not enjoy the totally unfettered right to discharge an employee.[67] The employee, Gordon Tameny, held the position of retail sales representative with Arco.[68] Arco allegedly engaged in retail gasoline price fixing and continuously pressured Tameny to threaten gas service stations in his territory to participate in the price fixing.[69] Soon after Tameny refused to succumb to his employer's demands to participate in the price fixing, he was terminated from his position, supposedly because of "unsatisfactory performance."[70] Tameny sought relief on five theories, with his only surviving claim being "[a]n employee discharged for refusing to engage in illegal conduct at his employer's request may bring a tort action for wrongful discharge."[71]

The California Supreme Court began by recognizing past California judicial decisions that have established that discharges in violation of public policy are an exception to at-will employment.[72] Applied to these facts, the court held that it would be a blatant violation of public policy to permit an employer to discharge an employee for refusing to participate in criminal conduct, such as price fixing.[73] Although the court did not discuss whether a statutory basis for this policy existed, the court did recognize that the public policy behind employment not being conditioned on conducting criminal acts is fundamental and public in California.[74] The court analogized *Tameny* to *Petermann*, stating that both employees alleged that their employer instructed them to engage in a criminal activity, and after refusing to participate, were terminated because of their refusal.[75] Based on continuous judicial recognition ending the master-servant employment relationship, the court held that "the employer is not so absolute a sovereign of the job

66. 610 P.2d 1330 (1980).

67. *Id.* at 1332.

68. *Id.* at 1331.

69. *Id.* at 1332.

70. *Id.*

71. *Id.*

72. *Tameny*, 610 P.2d at 1332–33.

73. *Id.* at 1336–37.

74. *Id.*; *see also* Rojo v. Kliger, 801 P.2d 373, 388 (1990) (California Supreme Court "reaffirmed the viability of a tort action where an employer's discharge of an employee contravenes the dictates of fundamental public policy.").

75. *Tameny*, 610 P.2d at 1334.

that there are not limits to his prerogative."[76] Following this decision, a tort claim arising out of a breach of an employer's duty in the employer-employee relationship, where that breach resulted in a wrongful discharge and damages to the employee, became known as a "*Tameny* claim."[77]

The *Tameny* decision also solidified the claim's roots in tort law. The employer, Arco, argued that the employer-employee relationship is of a contractual nature.[78] Therefore, Arco contended, wrongful discharge remedies are only available to an employee when an employer commits misconduct under contract law, rather than tort law.[79] The court refused to adopt Arco's classification of wrongful discharge as a contract claim.[80] Instead, the court relied on decisions over the past eighty years to illustrate the long-standing principle that wrongful discharge constitutes a breach of an employer's duty arising out of the contract, subjecting the employer to tort liability.[81] The court's holding that the *Tameny* claim is rooted in tort law is necessary for the interests of justice. Relying on a breach of contract to establish employer liability for wrongful discharge would essentially eliminate recovery for at-will employees, since at-will employment is implied from the absence of a contract, and either party can terminate the employee-employer relationship at any time.[82] All employees deserve to not be subject to an employer's unfettered right to termination, in alignment with the purpose of the *Tameny* claim. This is protected through tort liability.

The recognition that an employer is subjected to tort liability strengthens the connection between the claim and the state. State law is the source of tort law.[83] Tort law is based on social policy.[84] There-

76. *Id.* at 1336.

77. *See id.*; MING W. CHIN ET AL., CAL. PRAC. GUIDE: EMPLOYMENT LITIGATION ¶ 5:55 (2016) ("A *Tameny* claim depends upon the existence of an employer-employee relationship: '[T]he duty on which the tort is based is a creature of the employer-employee relationship, and the breach of that duty is the employer's improper discharge of an employee otherwise terminable at the will or whim of the employer.'").

78. *Tameny*, 610 P.2d at 1331.

79. *Id.*

80. *Id.* at 1335.

81. *Id.* at 1334 (quoting Eads v. Marks, 249 P.2d 257, 260 (1952)).

82. Kruk, *supra* note 53; Foley v. Interactive Data Corp., 765 P.2d 373, 376 (1988).

83. Barbara Kritchevsky, *Tort Law is State Law: Why Courts Should Distinguish State and Federal Law in Negligence-Per-Se Litigation*, 60 AM. U. L. REV. 71, 74 (2010) ("Tort law is state Law."); 1 DAN B. DOBBS, THE LAW OF TORTS 39 (2000) ("The common law of torts is almost exclusively state law."); Rains v. Criterion Sys., Inc., 80 F.3d 339, 343 (9th Cir. 1996) ("It is state, not federal, law that creates the cause of action for wrongful discharge in violation of fundamental public policy.").

fore, tortious liability arises from violations of social policy as established by the state. Employers have a duty to act within, and implement, the "fundamental public policies" that are derived from the state's statutes.[85] This inseparable entanglement with state law is confirmed by ensuing California court decisions that further clarify the elements of a wrongful discharge in violation of public policy claim.

B. Elements of a *Tameny* Claim

The greatest difficulty for employees in pleading a cause of action for wrongful discharge in violation of public policy is distinguishing the reason for discharge from regular employer-employee disputes.[86] As stated above, the claim must arise from a violation of the employer's duty to act according to the state's public policy.[87] To determine this, employees must sufficiently prove two things: that there was an established public policy, and the employer violated that policy as a result of their termination.[88] Courts determine whether the reason behind an employee's termination is a public policy of the state through a four-part analysis, detailed below.

1. Definition of "Public Policy"

In order for a *Tameny* claim to stand, there must be an underlying policy that was violated.[89] Although there is no debate that public policy is necessary for the claim, there is considerable debate when it comes to defining a public policy. Courts have not provided an exhaustive list for what qualifies as a public policy. For many years, decisions on these matters simply heeded that courts should proceed with caution and great care when characterizing something as a public policy of the state.[90] Public policy is inherently a broad issue.[91] Therefore,

84. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 316 (West Publishing Co., 4th ed. 1971) ("The duties that give rise to [torts] are imposed by the law, and are primarily based on social policy . . . .").

85. *Foley*, 765 P.2d 373 at 378.

86. Gantt v. Sentry Ins., 824 P.2d 680, 684 (1992).

87. PROSSER, *supra* note 84.

88. Tameny v. Atl. Richfield Co., 610 P.2d 1330, 1336 (1980) (quoting Harless v. First Nat'l Bank, 162 W. Va. 116 (1978), where the court held that "where the employer's motivation for [a] discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge.").

89. CHIN ET AL., *supra* note 77, ¶ 5:50.

90. *See generally* Hentzel v. Singer Co., 188 Cal. Rptr. 159, 163 (Ct. App. 1982) ("We are mindful of the restraint which courts must exercise in this arena, lest they mistake their own predelictions [sic] for public policy which deserves recognition at law.").

to define public policy in the context of the claim requires constant analysis of an extensive range of possibilities, despite the courts' attempts to delineate a specific answer.

One court has been successful in providing guidance for the litigation of this topic. In 1997, the California Supreme Court in *Stevenson v. Superior Court* established four qualifying elements a public policy must satisfy in order to serve as the basis for the claim.[92] The court held that the policy must be: (1) delineated in constitutional or statutory provisions; (2) public; (3) well established at the time of the employee's discharge; and (4) substantial and fundamental.[93] Establishing these elements ensures that the interests of the employer, employee, and the public are preserved.[94]

a. Delineated in Constitutional and Statutory Provisions

The *Stevenson* court initially determined that the first requirement is that the public policy must be delineated in a constitutional or statutory provision. At the time the requirement was developed, courts held that a policy is delineated in a constitutional or statutory provision if the policy is "carefully tethered" to the specified provisions.[95] Courts that adopted this narrow determination of policy often required that the provisions do more than simply provide a basis for the policy or employers' behaviors: To find that a policy is delineated from a provision requires more specificity.[96] However, this requirement has since evolved and courts have found that the public policy an employee relies on can be implied from a constitutional or statutory provision of the state.[97] The court has the discretion to determine whether the employee's discharge was in violation of "a right implicit in a statute."[98] Courts have held that it is not necessary for the provision to "prohibit the employer's precise act" as long as the provision allows an employer to reasonably know the policies the law supports.[99]

91. Petermann v. Int'l Bhd. of Teamsters, Local 396, 344 P.2d 25, 27 (1959) ("[P]ublic policy . . . is as broad as the question of what is fraud.").

92. Stevenson v. Superior Court, 941 P.2d 1157, 1165 (1997).

93. *Id.*

94. *See* Gantt v. Sentry Ins., 824 P.2d 680, 680 (1992).

95. *Id.* at 687–88.

96. Sequoia Ins. Co. v. Superior Court, 16 Cal. Rptr. 2d 888, 893 (Ct. App. 1993).

97. *See Gantt*, 824 P.2d at 687 ("[C]ourts in *wrongful discharge actions* may not declare public policy without a basis in either constitutional or statutory provisions.").

98. *See id.* ("[T]here can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy. Any other conclusion would sanction lawlessness, which courts by their very nature are bound to oppose.").

99. Grinzi v. San Diego Hospice Corp., 14 Cal. Rptr. 3d 893, 898–99 (Ct. App. 2004).

The main concern is that the statutory provisions reflect the public policy the employee is trying to protect or assert.[100] A state's general policy that protects an act or bestows the right of an act on an employee is sufficient to imply a public policy as the basis of the claim.[101]

In *Greene v. Hawaiian Dredging Co.*, the plaintiff employee protested a new "check in-check out" work procedure implemented by the employer.[102] Plaintiff, along with other colleagues, drafted and signed a petition in opposition to the procedure, expressing their concerns and also asking for clarification.[103] The employee was subsequently fired for his protest.[104] The court held that the employee's actions were within his right as an employee to protest working conditions, as long as such actions were not disloyal or insubordinate.[105] The obligations that served as the basis for this claim were "implied in law because [they are] considered wise policy."[106] This case reflects that it has long been established that a policy as the basis of an employee's claim can be implied from existing law in alignment with the state's policies.[107] Similarly, in *Dabbs v. Cardiopulmonary Management Services*, an employee was wrongfully discharged as a result of protesting hospital work conditions.[108] The court looked to the general societal concerns and California's interest in protecting its hospital patients to infer that an employee could not be terminated for protesting conditions that affect the welfare of the patients.[109] The employee relied on the Respiratory Care Practice Act[110] as the statutory

100. Dabbs v. Cardiopulmonary Mgmt. Servs., 234 Cal. Rptr. 129, 131–32 (Ct. App. 1987) (citing Petermann v. Int'l Bhd. of Teamsters, 344 P.2d 25, 27 (1959)).

101. Hentzel v. Singer Co., 188 Cal. Rptr. 159, 167–68 (Ct. App. 1982).

102. Greene v. Hawaiian Dredging Co., 157 P.2d 367, 368 (1945).

103. *Id.* at 368.

104. *Id.* at 369.

105. *Id.* at 370.

106. *Id.*

107. Although the plaintiff in *Greene v. Hawaiian Dredging Co.* did not bring a wrongful discharge in violation of public policy claim, the court's analysis is still instructive for public policies that can be implied from existing law. The plaintiff sought damages arising from a breach of employment contract, but as courts have recognized, an employer's breach of duty from a contractual relationship can give rise to tort and contractual remedies. *See* Tameny v. Atl. Richfield Co., 610 P.2d 1330, 1331 (1980).

108. Dabbs v. Cardiopulmonary Mgmt. Servs., 234 Cal. Rptr. 129, 130 (Ct. App. 1987).

109. *Id.* at 133–34.

110. CAL. BUS. & PROF. CODE § 3701(a) (2016) ("[T]he practice of respiratory care in California affects the public health, safety, and welfare and is to be subject to regulation and control in the public interest to protect the public from the unauthorized and unqualified practice of respiratory care and from unprofessional conduct by persons certified to practice respiratory care.").

provision for the claim.[111] While the Act did not specifically address the employer's behavior and prohibit termination based on an employee's protest of work conditions, it embodied California's concern for the welfare of the ill.[112] The determination of public policy in *Dabbs* reached beyond the statutory provision and, instead, looked at the historic interests of the state.[113]

b. Public

The second requirement of a public policy is that it must be public. More specifically, the public policy must serve beyond the interests of the individual employee in a way that "inures to the benefit of the public."[114] Courts traditionally decline to find a public policy from statutes that only serve to regulate the actions or conduct that arise between private individuals.[115] Rather than benefiting the public or furthering public policy interests, statutes that regulate the conduct of private individuals would only benefit, or further the interests of, the employee or the employer. Consequently, courts have determined that this limited individual interest is not public enough to serve as the basis of a public policy for the claim.[116] Rather, if the existence of the public policy violation causes the public at large to be at a loss, courts have considered the public requirement to be satisfied.[117] Additionally, if the public policy that the employee alleged has been violated can be bargained away, courts do not consider that policy to be public for the purposes of the claim.[118]

When an employee's discharge simply serves the private interests of the employer, the employee is forbidden from using that reason as the basis for their wrongful discharge in violation of public policy claim.[119] For example, an employee is discharged after reporting information of suspected criminal conduct of a co-worker to manage-

111. *Dabbs*, 234 Cal. Rptr. at 133.

112. *Id.*

113. *See id.* at 134 ("But we need not look to the Respiratory Care Practice Act alone. We find support for our decision in general societal concerns for qualified patient care.").

114. Stevenson v. Superior Court, 941 P.2d 1157, 1161 (1997).

115. *See* Foley v. Interactive Data Corp., 765 P.2d 373, 379 (1988).

116. *Id.*; Am. Comput. Corp. v. Superior Court, 261 Cal. Rptr. 796, 799 (Ct. App. 1989); Lagatree v. Luce, Forward, Hamilton & Scripps L.L.P., 88 Cal. Rptr. 2d 664, 681 (Ct. App. 1999).

117. *See* Rojo v. Kliger, 801 P.2d 373, 389 (1990) ("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.").

118. *See* Gantt v. Sentry Ins., 824 P.2d 680, 691 (1992).

119. *Foley*, 765 P.2d at 379–80.

ment.[120] The employee asserted that his actions were rooted in the public policy to report wrongdoing in the workplace.[121] Notwithstanding the issue of whether the public policy was delineated in a constitutional or statutory provision, the court held that the policy that the employee relied only benefitted the interest of the individual employer; only that employer would benefit from the employee's disclosure of potential illegalities.[122] Similarly, an employee bringing a claim of fraud against his prior employer also alleged that the employer's fraudulent actions vindicated a public policy.[123] The California Supreme Court held that the claim of fraud is a private dispute, and the remedy for such claim is monetary.[124] A monetary remedy only benefits the individual interest of the employee and therefore does not inure to the benefit of the public.

In *Lagatree v. Luce Forward Hamilton & Scripps*, an employee was offered a full-time position at a law firm.[125] In his "Letter of Employment," the employer required the employee to agree to arbitration under the Federal Arbitration Act to settle any disputes or claims arising out of the employment.[126] The employee disagreed with the arbitration dispute agreement; however, the employer informed him that this was non-negotiable.[127] The employee was discharged after he refused to sign the arbitration agreement and subsequently brought a claim against his employer for wrongful discharge in violation of public policy.[128] In contrast to perjury before a legislative committee, the protest of working conditions, sex discrimination, or making defective aircraft parts, allowing a *Tameny* claim on the basis of an arbitration agreement between employer and employee does not advance any general social policies.[129] Further, because arbitration agreements only regulate the actions between the employee and the employer, it also is not public for the purposes of the claim.[130] The court noted

120. *Id.* at 379.

121. *Id.*

122. *Id.* at 380 ("When the duty of an employee to disclose information to his employer serves only the private interest of the employer, the rationale underlying the *Tameny* cause of action is not implicated.").

123. *See* Hunter v. Up-Right, Inc., 864 P.2d 88, 94–95 (1993).

124. *Id.*

125. Lagatree v. Luce, Forward, Hamilton & Scripps L.L.P., 88 Cal. Rptr. 2d 664, 664 (Ct. App. 1999).

126. *Id.* at 667–68.

127. *Id.*

128. *Id.*

129. *Id.* at 681.

130. *Id.* at 669–73.

that allowing arbitration agreements would actually further California's policies because arbitration is a favored dispute resolution method.[131]

c. Well-Established at the Time of Discharge

The third requirement is that the public policy the employee relies on for their wrongful discharge claim must be articulated at the time of discharge. The *Stevenson* court stated that the policy is well-established if it is "firmly established" in that a reasonable person would have little disagreement about the violated policy.[132] The length of time the statute providing the source of policy has been enacted is persuasive when determining whether the policy is well-established.[133] Because wrongful discharge in violation of public policy claims arise under whether the policy is public or delineated from a provision, this requirement is the easiest to interpret.

d. "Substantial" and "Fundamental"

The final requirement for a policy to be recognized as a public policy for the basis of a wrongful discharge claim is that the policy must be "substantial" and "fundamental." There is no test for determining whether the policy is substantial and fundamental.[134] The analysis of whether a policy is substantial and fundamental is a circular one, as courts tend to rely on whether there is statutory or constitutional support for the policy.[135] A policy explicitly delineated in a statute is essentially binding evidence that the policy is substantial and fundamental for the purposes of this claim.[136] This is the strongest

131. *Lagatree*, 88 Cal. Rptr. 2d at 669-73.

132. CHIN ET AL., *supra* note 77.

133. City of Moorpark v. Superior Court, 959 P.2d 752, 763 (1998) (Employee alleging protection against disability discrimination is a public policy of the state. "[D]isability discrimination has been included in the FEHA since July 1, 1974, and therefore is well established.").

134. Stevenson v. Superior Court, 941 P.2d 1157, 1165 (1997).

135. Gantt v. Sentry Ins., 824 P.2d 680, 693 (1992) (Kennard, J., dissenting) ("It may be somewhat easier to characterize as 'fundamental' a public policy that is plainly based on the terms of a statute or constitutional provision than to so characterize one that is not so based. But it is a mistake to assume that only those policies based on statutes or constitutional provisions are firmly established and important."). *See generally* Shapiro v. Wells Fargo Realty Advisors, 199 Cal. Rptr. 613 (Ct. App. 1984) (holding that an employee failed to plead that his discharge contravened a "substantial public policy principle" when he could not allege his discharge was a result of asserting a statutory right or that the discharge directly violated a statute).

136. One consideration courts make to determine whether a public policy is substantial and fundamental is "whether an employer and employee could circumvent the policy

evidence an employee can provide when establishing that the policy is substantial and fundamental, but not the only evidence.[137]

Evidence of similar protections afforded through statutes in other realms and jurisdictions provides additional assurance for courts to characterize the policy as fundamental and substantial. In *Stevenson*, the court analyzed whether age discrimination was fundamental for the purposes of the wrongful discharge claim.[138] A general prohibition on age discrimination is delineated in the Fair and Equal Housing Act ("FEHA"); this general prohibition supplied the court with persuasive evidence of a fundamental policy.[139] Further, protections against age discrimination are seen throughout other areas such as housing, health care, and education.[140] These protections evince California's interest in protecting individuals from age discrimination, as well as California's general policy to prevent this discrimination.[141] Lastly, the court looked at the fact that over forty-five other states had adopted similar statutes prohibiting age discrimination.[142] A policy that is so widely accepted surely satisfies the fundamental and substantial element to support the claim.

Another basis for courts' determination of whether a policy is fundamental and substantial is through a comparison of the alleged public policy of the instant case, and the public policies where courts previously established were sufficiently substantial and fundamental. In *Foley v. Interactive Data Corp.*, the duty of an employee to disclose information to management was not equivalent to established public policies and, therefore, was insufficient to implicate the wrongful discharge cause of action.[143] Compared to employees who refused to commit a crime, protested unsafe working conditions, or reported criminal activity, the court determined that protecting an employee who disclosed internal information to management simply did not

by way of agreement; the fact that a duty or right can be modified or waived by agreement suggests that it does not confer a substantial benefit on the public." 29 CAL. JUR. 3D *Employer & Employee* § 116 (2017). A public policy delineated in a constitutional or statutory provision cannot be waived by agreement, therefore such provision presents strong evidence of a substantial and fundamental public policy.

137. Steven H. Winterbauer, *Wrongful Discharge in Violation of Public Policy: A Brief Overview of an Evolving Claim*, 13 INDUS. REL. L.J. 386, 397 (1992) ("First, as a general rule, the strongest statements of public policy are found in statutes or regulations.").

138. *Stevenson*, 941 P.2d at 1167.

139. *Id.* at 1175.

140. *Id.* at 1167.

141. *Id.* at 1167.

142. *Id.*

143. Foley v. Interactive Data Corp., 765 P.2d 373, 380 (1988).

equate to the precedential fundamental and substantial public policies.[144]

2 Policy Has to Be Violated

Employees have surmounted the largest hurdle once they successfully establish a public policy. However, to fully plead a wrongful discharge in violation of public policy, the aggrieved must prove that the discharge violated that public policy. These violations generally arise from four different scenarios: (1) when an employee refuses to violate a statute; (2) when an employee is performing a statutory obligation; (3) when an employee is exercising a statutory right or privilege; and lastly (4) when an employee reports an alleged violation of a statute of public importance.[145]

III. Why Medical Marijuana Should Be Within the Definition of Public Policy for the Claim

In 2008, the California Supreme Court confronted the issue of whether an employee was wrongfully terminated in violation of public policy after testing positive to a drug test as the result of medically recommended medical marijuana use.[146] In *Ross v. RagingWire Telecommunications Inc.*, the employee alleged that his off-duty medical marijuana use could not be the basis of termination without the employer violating a public policy of the state.[147] The employee suffered from back spasms and chronic back pain, which led to a physician recommendation for medical marijuana to ease the discomfort and pain.[148] The employee relied on the Compassionate Use Act, the Fair Employment and Housing Act, and the privacy clause in the California Constitution as the statutory provisions for the basis of his public policy.[149]

Relying on the first requirement for defining a public policy, the court held that the CUA did not provide the employer notice that his actions would violate a public policy.[150] The court reasoned that the alleged policy of employee medical marijuana use was not delineated

144. *Id.*

145. Gantt v. Sentry Ins., 824 P.2d 680, 684 (1992).

146. *See* Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 200 (2008).

147. *Id.* at 207. (The employee also alleged discrimination in violation of the Fair and Equal Housing Act for the employer's failure to accommodate his medical marijuana use. The court ultimately held that the employee could not state a cause of action for this claim.).

148. *Id.* at 202.

149. *Id.* at 208.

150. *Id.*

from the Compassionate Use Act because the statute fails to mention employment law.[151] The statute's failure to regulate actions in the employment law area reflects the voters' intentions not to provide protections for employees in the workplace who rely on the assistance of medical marijuana.[152] Further, the court stated that the employer's interests articulated in *Stevenson* would be disregarded because the statute would not provide adequate notice that the Compassionate Use Act requires an accommodation of an employee's medical marijuana use.[153] Therefore, medical marijuana use in this context is not a fundamental public policy of the state.

Justice Kennard's concurring opinion addressed whether the policy implied from the CUA is substantial and fundamental.[154] A provision of the CUA states that cooperation of the federal and state governments are needed to achieve the Act's goals of providing qualified patients treatment through medical marijuana.[155] The court reasoned that this goal has not been met because marijuana remains illegal under federal law, and, therefore, the policy is not substantial and fundamental.[156] Although noting that the majority's opinion was "conspicuously lacking in compassion,"[157] the employee's claim for wrongful termination in violation of public policy ultimately was not supported.

Few other decisions have addressed the issue of protecting medical marijuana use in the context of wrongful discharge in violation of public policy claims. In 2011, the Washington Supreme Court decided whether a public policy for the claim could be delineated from the Washington State Medical Use of Marijuana Act ("MUMA")[158] in the case *Roe v. TeleTech Customer Care Management (Colorado) LLC.*[159] The employee suffered debilitating side effects from migraines, including nausea, blurred vision, chronic pain, and sensitivity to light.[160] Unable

151. *Id.*

152. *Ross*, 174 P.3d at 208.

153. Stevenson v. Superior Court, 941 P.2d 1157, 1160 (1997) ("In the context of a tort claim for wrongful discharge, tethering public policy to specific constitutional or statutory provisions serves not only to avoid judicial interference with the legislative domain, but also to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees the discharge . . .").

154. *Ross*, 174 P.3d at 215.

155. *Id.*

156. *Id.*

157. *Id.* at 209.

158. WASH. REV. CODE § 69.51A.040 (2007).

159. Roe v. TeleTech Customer Care Mgmt. L.L.C., 257 P.3d 586 (2011).

160. *Id.* at 588.

to achieve relief, the employee's physician prescribed medical marijuana pursuant to MUMA.[161] After testing positive to an entry-level screening drug test, the employee was terminated.[162] The employee brought a cause of action for wrongful discharge in violation of public policy alleging that her termination was contrary to the public policy within MUMA.[163] Again, the court referenced the plain language of the statute to conclude that because the statute fails to explicitly mention employment, employers are not required to accommodate on-site medical marijuana use.[164] The court stated that the general purpose of MUMA does not give rise to the "unimpeded right to use medical marijuana," or to prohibiting employers from terminating an employee on the basis of medical marijuana use.[165]

Justice Chamber's dissenting opinion argued that discharge based on medical marijuana should be prohibited when such accommodation would not impose an undue hardship on the employer.[166] First, because MUMA prohibits on-site use of medical marijuana, it is within the state's policy to allow and accommodate off-site medical marijuana use.[167] Second, Justice Chambers argued that the majority "undermines the people's will" by holding that the broad language of MUMA is merely decorative, concluding that the absence of employment law in the language does not render the policy insufficient to stand as the basis of the claim.[168] Furthermore, employees would be discouraged from seeking relief and treatment through medical marijuana if it meant termination from employment.[169] This result would jeopardize the policy of the act, which is to permit qualified patients to use medical marijuana without penalty under state law.[170] These arguments show that a finding of public policy in employee medical marijuana use is not so far afield from the purpose of the tortious claim, and could be established under the law.

The above decisions have incorrectly declined to find a public policy in an employee's medical marijuana use to support a *Tameny* claim. A systematic analysis of medical marijuana use under the judi-

161. *Id.*
162. *Id.* at 589.
163. *Id.*
164. *Id.* at 591.
165. *Roe*, 257 P.3d at 596.
166. *Id.* at 599 (Chamber, J., dissenting).
167. *Id.*
168. *Id.* at 598.
169. *Id.* at 599.
170. *Id.* at 598–99.

cially construed elements of the claim will in fact demonstrate that medical marijuana use aligns with both the intent of the wrongful discharge claim, as well as California's policies. Using the analysis courts continuously apply, the below attacks each of the four elements identified in *Stevenson* and applies the arguments courts have employed to establish public policies. This analysis proves that medical marijuana use is a protectable policy under California law, and courts are going down the wrong path when holding otherwise.

A. Policy For Medical Marijuana Use is Impliedly Delineated in a Statutory Provision

As stated above, the alleged violated policy as a result of the employee's discharge must be carefully tethered to policies within a statutory provision.[171] Courts have primarily failed to recognize the right to use medical marijuana codified in the CUA as a public policy for two reasons: first, because the CUA does not speak to the area of employment law, and second, because the employer would not have notice of their duty to accommodate their employee's medical marijuana use.[172]

Time and time again, courts have reminded parties in their analysis that the policy need not be explicitly stated in the statute in which the employee relies.[173] This was the case in *Dabbs*, where the court implied the employee's right to protest working conditions, without relying on a statute that explicitly prohibited an employer's behavior.[174] To then hold that the Compassionate Use Act must specifically speak to the area of employment directly contradicts courts' recognition that a policy can be implied from the statute. The CUA first seeks to "ensure that seriously ill Californians have the right to obtain and use marijuana" when determined their health would benefit from such treatment.[175] The CUA also provides an affirmative defense against criminal prosecution for both treating physicians and patients receiving the recommendation of a physician for medical marijuana use.[176] The provisions do not prohibit employers' behavior, but as pre-

171. Gantt v. Sentry Ins., 824 P.2d 680, 687–88 (1992).

172. Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 208 (2008).

173. Grinzi v. San Diego Hospice Corp., 14 Cal. Rptr. 3d 893, 898 (Ct. App. 2004) ("The provision does not have to specifically prohibit the employer's precise act . . . ."); *Gantt*, 824 P.2d at 685. ("[I]t is a question of law for the court to decide whether the reason for discharge is unlawful because of . . . a right *implicit* in a statute.") (emphasis added).

174. *See* Dabbs v. Cardiopulmonary Mgmt. Servs., 234 Cal. Rptr. 129 (Ct. App. 1987).

175. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A).

176. *Id.* § 11362.5(b)(1)(B).

cedent has established, that is not necessary to satisfy the claim. The underlying policy implicit in the CUA is a protection for employees against termination on the basis of medical marijuana use.

The CUA was enacted as an initiated state statute. Therefore, one way this public policy is implied from the CUA is through the intent of the California voters. The first listed purpose of the CUA is to ensure that qualified patients in California are able to obtain medical marijuana in the treatment and relief of diseases such as cancer, AIDS, arthritis, and other debilitating and persisting diseases.[177] This is listed separately from the provision that shields patients and physicians from criminal liability, which suggests, based off the Act's plain language, that voters intended a protection beyond just criminal liability.[178]

The fact that the CUA does not mention employment law in its operative provisions is not dispositive for finding that the California people did not intend the scope of the Act to extend to employment protections. It is unimaginable that voters intended for qualified patients to use medical marijuana, but have to choose between relief from pain and employment. Justice Kennard in his concurring and dissenting opinion in *Ross v. RagingWire* stated that the will of California voters is disrespected if individuals who took advantage of the purposes of the CUA would "thereby disqualify [themselves] from employment."[179] Holding otherwise would contradict the purposes of the CUA by instead limiting qualified patients' access to medical marijuana when it is recommended for their health. Similar to the analysis in *Roe v. TeleTech* discussed above, determining that all other provisions of the Act besides the operative sections are decorative would "undermine the people's will."[180] Surely, courts do not intend to undermine the California people's will, and simultaneously hinder the purpose of the CUA. Protecting employees from termination on the basis of their medical marijuana use is implicit within the Act.

B. The Policy Behind Medical Marijuana Use Is Public

Qualified patients are individuals, just like anyone else, who make up the workforce of the state. Prohibiting termination based on medical marijuana use, therefore, has a widespread effect that goes beyond the interests of the individual employer and employee. In *City of Moor-*

177. *Id.* § 11362.5(b)(1)(A).

178. Alexis Gabrielson, *The "Right to Use" Takes Its First Hit: Marijuana Legalization and the Future of Employee Drug Testing*, 18 EMP. RTS. & EMP. POL'Y J. 241, 276 (2014).

179. Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 209 (2008).

180. Roe v. TeleTech Customer Care Mgmt. L.L.C., 257 P.3d 586, 598 (2011).

park v. Superior Court, the California Supreme Court decided that disability discrimination is a public policy that can serve as the basis for a *Tameny* claim.[181] The court held that disability discrimination inured to the benefit of the public for three reasons: "because (1) any member of the public may develop a disability and become the victim of disability discrimination, (2) the public at large benefits from the productivity of disabled employees, and (3) any type of invidious discrimination 'foments . . . strife and unrest.' "[182]

Medical marijuana use is not limited to an obscure portion of society and, therefore, an employee's use "inures to the benefit of the public" in the same way the court found disability discrimination to be public. Any member of the public can develop a persisting and debilitating disease. Even further, any person who develops such a disease can require medical marijuana use when traditional treatment methods fail to relieve the pain and symptoms resulting from these diseases. Second, the public at large benefits from those qualified patients' productivity. Employees, such as Shelby Clayton, are contributing members to the workplace just as much as the next healthy individual. Third, terminating employees on the basis of their medical marijuana use or their status as a cardholder is discrimination. The cases where employees have brought claims for wrongful discharge were not terminated for poor performance in the workplace.[183] Rather, employers simply discriminated against them because of their status as a disabled individual who requires relief from medical marijuana.

The CUA also does not simply regulate conduct between individuals. Nor does the CUA only benefit the interests of the employer or the employee. Barring termination based on medical marijuana use is not violating the internal policies of an employer. In contrast to an agreement between parties that prohibits an employee from discussing internal affairs,[184] or requiring an employee to agree to arbitration agreements,[185] the benefit from a public policy in medical

181. 959 P.2d 752, 763 (1998).

182. *Id.* at 762–63 (quoting Stevenson v. Superior Court, 941 P.2d 1157 (1997)).

183. *See Ross*, 174 P.3d 200 (Plaintiff had not received complaints about job performance prior to termination, and use of medical marijuana did not affect his ability to perform the essential job functions of his position); *see also* Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 431–32 (6th Cir. 2012) (Plaintiff's drug test was administered in response to an on-site workplace injury. Court made no mention of any disciplinary concerns).

184. *See* Foley v. Interactive Data Corp., 765 P.2d 373, 375–76(1988).

185. Lagatree v. Luce, Forward, Hamilton & Scripps L.L.P., 88 Cal. Rptr. 2d 664, 681 (Ct. App. 1999).

marijuana reaches all individuals in the workplace. Therefore, the policy of not terminating employees based on their medical marijuana use is public for the purposes of supporting the claim.

C. The Policy for Medical Marijuana Use is Well-Established

This element is simply satisfied by the duration of time that the CUA has been enacted. California voters enacted the CUA in 1996.[186] Employers have been given twenty years to be on notice of the Act and their obligations under it. Therefore, it is likely that this requirement would be satisfied for the purpose of the claim.

D. The Policy for Medical Marijuana Use is "Substantial" and "Fundamental"

A protection for employees against termination on the basis of medical marijuana use is evident in California through the enactment of the CUA, the continuous shift of public opinion towards pro-marijuana use, and the other states that have enacted similar laws. One factor that courts consider when determining whether a policy is substantial and fundamental is the uniqueness of the policy the employee is asking the court to consider.[187] When there are no statutes that offer the same protections, the court is skeptical to find that the policy is fundamental. In the case of medical marijuana, the CUA is not unique. Although it was the first statute of its kind, twenty-seven other states and Washington D.C. have since enacted similar statutes providing protections for medical marijuana use.[188] This widespread protection throughout the nation provides additional assurance that an employee medical marijuana use public policy is substantial and fundamental.[189]

Medical marijuana regulation is a fast-growing area, and the public policies themselves have shifted since the decisions in *Ross* and *Roe*. As stated above, a total of twenty-eight states and Washington D.C. have enacted laws that protect medical marijuana use. Seven states

186. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

187. Sullivan v. Delta Air Lines, Inc., 68 Cal. Rptr. 2d 584, 589–90 (Ct. App. 1997) (Employee sought to establish a public policy in alcohol and drug rehabilitation. The court noted the statute the employee relied on was unique in the protections it provided for employees who chose to participate in rehabilitation programs.).

188. PROCON.ORG, *supra* note 24.

189. Stevenson v. Superior Court, 941 P.2d 1157, 1166 (1997) ("[A]dditional assurance that the policy . . . is substantial and fundamental may be found in the laws of other jurisdictions.").

and Washington D.C. have enacted laws that legalize the recreational use of marijuana.[190] As of November 8, 2016, California has joined the states that have legalized the recreational use of marijuana through an initiated statute, Proposition 64.[191] The growing pro-marijuana legislation is persuasive to the fact that medical marijuana, and marijuana as a whole, is becoming more fundamental in the country's, and California's, public policy.[192] The changing public opinion, which differs drastically from when the California and Washington supreme courts rendered their decisions, could today convince a court to find more liberally for employees' rights with regard to medical marijuana.[193]

Courts have held that establishing a public policy in employee medical marijuana use would create a new "protected category" of individuals and, therefore, the policy is not substantial and fundamental.[194] A major employer concern argued in decisions is that establishing this public policy would prohibit employers from ever issuing any disciplinary actions against employees who use medical marijuana.[195] This is simply not the case. Employers would still be empowered to terminate those employees who are unable to perform their essential job functions. Both the ADA and FEHA contain similar provisions that protect the employer's right to maintain a productive workforce.[196] FEHA is California's anti-discrimination statute, which prevents employers from discriminating against employees on the basis of protected classes in the hiring or firing of employment.[197] Employers are not subject to liability for hiring or firing an individual of a protected class if that employee is "unable to perform his or her essential duties," or "cannot perform those duties in a manner that would not endanger his or her health or safety."[198] Similarly, the ADA allows employers to screen out or deny a job to a disabled employee who does not meet a job-related standard that is a business necessity.[199]

190. GOVERNING: STS. & LOCALITIES, *supra* note 25.

191. Peter Fimrite & David Downs, *Eager to shop, Would-be Weed Buyers Have to Wait*, S.F. CHRON. (Nov. 9, 2016, 4:13 PM), http://www.sfchronicle.com/bayarea/article/Eager-to-shop-would-be-weed-buyers-have-to-wait-10605104.php [https://perma.cc/J4JU-U2Y6].

192. Gabrielson, *supra* note 178, at 271.

193. *Id.*

194. Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 437 (6th Cir. 2012) ("We agree with the district court that accepting Plaintiff's public policy interpretation could potentially prohibit any Michigan business from issuing any disciplinary action against a qualifying patient who uses marijuana in accordance with the Act.").

195. *Id.*

196. CAL. GOV'T CODE § 12940(a)(1) (2016); 42 U.S.C. § 12113(a) (2009).

197. GOV'T § 12940(a).

198. *Id.* § 12940(a)(1).

199. 42 U.S.C. § 12113(a) (2009).

If a qualified patient under the CUA could not perform the essential duties of the job, this would constitute a valid reason for differential treatment and issuing disciplinary sanctions. However, if an employee who relies on medical marijuana for pain management demonstrates that they can perform the job functions as efficiently as an employee who does not use medical marijuana, this is probative evidence that the public policy is substantial and fundamental.[200]

Another employer concern expressed in the cases is that finding a public policy behind medical marijuana would require them to accommodate "on-site" use by employees. Employers contend that accommodating such use would cause them to violate federal law, and potentially lose funding under the Drug Free Workplace Act.[201] Although not explicitly required under the Drug Free Workplace Act, employers require drug tests to ensure compliance with this law.[202] This article is not arguing that courts should find a public policy behind *on-site* medical marijuana use. This would violate clear and long-established laws, including the Drug Free Workplace Act. However, this federal drug-free workplace law, and other similar state laws, is only concerned with conduct on-site at the workplace.[203] Instead, this article is arguing that there is a public policy behind prohibiting termination on the basis of an employee engaging in at-home medical marijuana treatment.[204] This policy would not cause the employer to violate the federal drug-free workplace law.

Protecting employee medical marijuana use is a public policy implied from the CUA. It was enacted by voters in a state where the views on marijuana use have been destigmatized and generally accepted by California voters. The CUA has been enacted since 1996, and is therefore well established in California. Furthermore, it represents a policy that is substantial and fundamental based on a majority of the states in

200. *See* City of Moorpark v. Superior Court, 959 P.2d 752, 763–64 (1998).

201. The Drug Free Workplace Act conditions the receipt of federal contracts and grants on conditions that the employer promote drug-free awareness programs, and inform employees that "the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's or organization's workplace." *See* CAL. GOV'T CODE § 8355(a)(1)–(2) (2006).

202. Harvey, *supra* note 43, at 216.

203. Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 213 (2008).

204. Similar to the recognition that employees could be terminated if such at-home medical marijuana use prevented them from being able to perform the essential functions of their position, individuals employed in positions that are highly dangerous or accident prone that cannot have any impairment whatsoever, such as commercial vehicle operators or school bus drivers, can be terminated for their marijuana use. *See* Harvey, *supra* note 43, at 216–17.

the country having similar laws and is not encroaching on employers' interests. A public policy in employee medical marijuana use is aligned with the purpose of the *Stevenson* requirements, which is to protect the interests of all parties. The employee's interest is protected by taking advantage of effective pain management, while maintaining employment and earning a living. The employer's interests are protected through upholding a safe and productive work environment and a steady workforce. Finally, the public's interests are protected because protecting those qualified individuals from termination furthers the public interest of avoiding unemployment and welfare among California's population.[205]

IV. Federalism Concerns

Despite medical marijuana use perfectly framing to the *Stevenson* requirements for public policy under the *Tameny* claim, there still remains the issue of the federal scheduling that prohibits use of both recreational and medical marijuana. Courts use the fact that marijuana is still federally illegal to serve as a catchall argument to deny employees a wrongful discharge in violation of public policy claim.[206] However, as outlined before, the history of this claim is deeply rooted in the state's policies and the state's statutes. The federal government has primarily used a hands-off approach when it comes to enforcing medical marijuana use of this kind. Therefore, notwithstanding the federal scheduling of medical marijuana, states are inherently empowered to regulate these claims and courts should not default back to this argument as another way to deny employees their public policy rights.

A. Marijuana Is Still Federally Prohibited

The Supremacy Clause of the United States Constitution renders federal law the "supreme law of the land," and requires all states to be bound by that law.[207] Marijuana remains classified as a Schedule I drug, meaning that possession, use, and distribution are illegal and

205. 1 KEVIN B. ZEESE, DRUG TESTING LEGAL MANUAL § 5:7 (2d ed. 2016) (Noting the public policy of avoiding unemployment and welfare status among individuals and families, as well as the public interest in the decriminalization of marijuana offenses).

206. *Ross*, 174 P.3d at 204 ("No state law could completely legalize marijuana for medical purposes[ ] because the drug remains illegal under federal law . . . ."); Roe v. TeleTech Customer Care Mgmt. L.L.C., 257 P.3d 586, 597 (2011) ("Holding that a broad public policy exists . . . would require an employer to allow an employee to engage in illegal activity . . . .").

207. U.S. CONST. art. VI, cl. 2.

can be criminalized under federal law. California's authorization of medical marijuana use would appear to be a state law in direct conflict of the federal CSA law. A conflict such as this would generally allow for federal preemption of the state law.[208]

In the context of medical marijuana, the federal government exercised its federal preemption power in the Supreme Court case *Gonzales v. Raich*.[209] Through the Commerce Clause,[210] the federal government used its supreme power to regulate individuals' home grown medical marijuana in accordance with California law that authorized it.[211] The Court held that the individual cultivation of marijuana constitutes an economic activity.[212] Cultivation regulation was necessary to effectuate the purpose of the CSA and ensure that marijuana did not enter commerce through illicit channels.[213] The Court also relied on the Supremacy Clause to hold that federal law prevails over state law, which allows for the congressional regulation of commerce.[214] Seemingly, the same scenario would occur were a public policy to be found for an employee's use of medical marijuana.

B. States' Power Governs

For over twenty years, state laws authorizing the use of medical and recreational marijuana have co-existed with the much narrower federal CSA. State governments are granted sovereignty through the Tenth Amendment of the United States Constitution.[215] The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[216] This clause respects the notions of federalism our country is founded on, and allows

208. Six scenarios of federal preemption: (1) Congress enacts federal statute that expresses its clear intent to preempt state law; (2) there is conflict between federal and state law; (3) compliance with both federal and state law is in effect physically impossible; (4) federal law contains implicit barrier to state regulation; (5) comprehensive congressional legislation occupies entire filed of regulation; or (6) state law is obstacle to accomplishment and execution of full objectives of Congress. *See* Daniel E. Troy & Rebecca K. Wood, *Federal Preemption at the Supreme Court*, 9 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 7, (2008).

209. 545 U.S. 1 (2005).

210. U.S. CONST. art. I, § 8, cl. 3.

211. *Gonzales*, 545 U.S.

212. *Id.* at 18–22.

213. *Id.* at 22.

214. *Id.* at 29.

215. U.S. CONST. amend X.

216. U.S. CONST. amend X.

states to run their respective governments and enact laws as they see fit.

California's medical marijuana laws, similar to those of other states, are not subject to federal law preemption as many opponents to finding a public policy in medical marijuana use contend. As stated above, federal preemption can occur when a state law is in direct conflict with a federal law. Arguably, the CUA is not in direct conflict with the CSA. In fact, no court has held that this is the case.[217] The CUA does not positively require individuals to use medical marijuana, as this would create a direct conflict with the federal CSA ban.[218] Instead, the states exercised their Tenth Amendment powers to choose not to criminally prosecute the use or prescription of medical marijuana.[219] Similarly, recognizing the public policy behind not terminating employees who use medical marijuana would not be legalizing marijuana in the workplace. Instead it would be a choice not to terminate, or to take adverse action against, an employee acting within his or her rights under state law, and furthering the apparent interests of the states to ensure that treatment is available. Unless an employer adopts a provision in their employment policy that affirmatively requires employees to partake in medical marijuana, this recognition would not be in direct conflict of federal law.

In recent years, the federal government has communicated a more hands-off approach to marijuana enforcement.[220] In a memorandum issued in 2013 by Deputy Attorney General James Cole, the U.S. Department of Justice identified eight enforcement priorities important to the federal government in response to the influx of states enacting medical marijuana laws.[221] These priorities include prevent-

217. Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1, 12 (2013).

218. *Id.*

219. *Id.* at 13.

220. As of January 4, 2018, Attorney General Jeff Sessions rescinded previous guidance from the Attorney General's Office with regards to deprioritizing specific marijuana related crimes. Memorandum from Jefferson B. Sessions III, Att'y Gen., U.S. Dep't of Justice, to all U.S. Att'ys on Marijuana Enforcement (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download [https://perma.cc/6JJ2-UF79]. This memorandum now leaves enforcement of federal marijuana statutes in the hands of district U.S. Attorneys' offices. As of this article's publication, it is yet unknown whether this memo will have a cataclysmic impact on the legal cannabis markets; however, it is likely that as the economic force behind legal cannabis grows, so too will its political clout and ability to garner support among the communities that have economically benefitted from legalization.

221. Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, on Guidance Regarding Marijuana Enf't (Aug. 29, 2013), http://www.dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf [https://perma.cc/FFY3-QBVR].

ing marijuana distribution to minors, preventing sale revenue from going to gangs and cartels, preventing the diversion of marijuana from legal states to non-legal states, preventing medical marijuana use from being used as pretext for other illegal activities, preventing the use of firearms in conjunction with distribution of marijuana, preventing driving under the influence, preventing growing marijuana on public land that can pose environmental dangers, and preventing marijuana possession or use on federal property.[222] This letter serves as a guide to states and U.S. Department of Justice Attorneys that the federal government's resources and efforts will only be directed towards actions that interfere with any of the identified priorities.[223] Preventing an employee's authorized off-site use of medical marijuana for pain management does not fall within any of the federal government's enforcement priorities. Not only does this shed light on a fundamental and substantial policy behind medical marijuana use, it also rebuts employers' arguments that oppose recognizing this policy. The memorandum states that the Department has left lower-level activity to state authorities, and will step in to enforce the CSA only when a threat to the priorities is posed.[224]

Even further, Congress passed a bill that prevented the Department of Justice from using funds to prevent states from implementing their own laws that authorize marijuana's medical use, possession, and distribution.[225] This is additional evidence to support the logical inference that the federal government is not taking a role in enforcement against individual medical marijuana use. The continued hands-off approach "sends the message that Congress does not think the CSA should be enforced against medical marijuana users."[226]

This federalism idea is strengthened because the *Tameny* claim is tort law. Tort law is considered to be an area of "traditional state concern."[227] Moving forward, courts should base the public policies and corresponding statutory provisions for the *Tameny* claim in state law.

222. *Id.* at 1–2.

223. *Id.* at 2.

224. *Id.*

225. Harvey, *supra* note 43 at 214–15.

226. *Id.* at 215.

227. Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1504 (2009) ("Along with public health and safety, tort law is seen as a classic area of 'traditional state concern' even as Congress and federal agencies play an ever-increasing role in regulating drugs, consumer products, the environment, and many other substantive areas that frequently are the subject of state tort law claims.").

This will acknowledge states' sovereignty and respect the notion that certain areas, specifically tort law, are left to the states to regulate.

Under state law, the CUA authorizes medical marijuana use for pain management for those suffering from debilitating diseases. For these purposes, this state law should be recognized as the basis for establishing a policy for the *Tameny* claim. A public policy in prohibiting termination on the basis of medical marijuana use is distinguishable from an absolute legalization of marijuana. This policy is similarly distinguishable from the cultivation scenario in *Gonzales*, because such individual use does not pose a threat to commerce by facilitating the diversion of marijuana into illicit channels. Finding a public policy in medical marijuana use permitted under CUA does not create a "physical impossibility" for compliance with both federal and state law.[228] Therefore, the federal scheduling of marijuana pursuant to the CSA does not stand as a bar to an employee establishing a public policy under the CUA.

V. Conclusion

The weakening federal regulation over state authorized medical marijuana rebuts the attempted catch-all argument that employers and courts have relied on in their decisions to decline to find a public policy for the purpose of the tortious wrongful discharge claim. The trends of both state and federal governments reflect that this is no longer a viable argument. Courts deciding on this issue from here on out should steer down a new path and find that employees, such as Shelby Clayton, can assert *Tameny* claims because prohibiting termination on the basis of off-site medical marijuana use is a fundamental and substantial public policy that benefits the public as a whole, as reflected by the Compassionate Use Act.

228. Chemerinsky et al., *supra* note 11, at 105–06 (Noting that federal preemption would require a positive conflict that is established when there is a physical impossibility to comply with state and federal regulatory law, therefore the preemption reach through the CSA is modest. "It is not physically impossible to comply with both the CSA and state marijuana laws; nothing in the more liberal state laws requires anyone to act contrary to the CSA.").