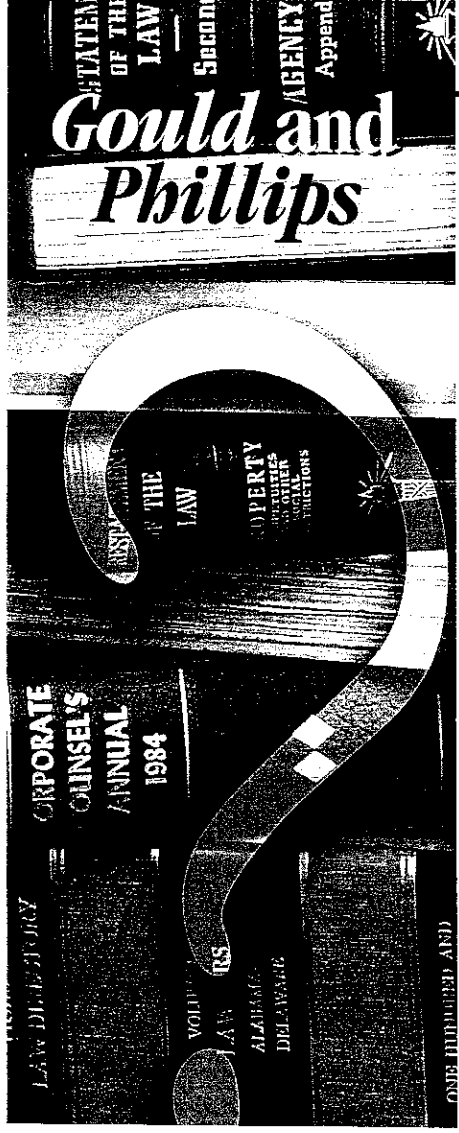
by Christopher W. Arledge

Gould and Phillips



Plaintiffs are motivated to turn every contract dispute into a tort action. But the California Supreme Court has made clear that contract and tort are "different branches of the law" and exist for two different reasons. *See, e.g., Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 514 (1994). Contract law exists to protect the expectations of the parties, and its goal is to ensure that the non-breaching party gets the benefit of its expectations under the contract. *Id.* at 514-15. Tort law, by contrast, exists to protect the "interest in freedom from various types of harm" and its duties are generally independent of any agreement. *Id.* This article explores how two California Courts of Appeal have ignored the distinction between contract and tort in the wrongful termination context and, in the process, have both subverted California Supreme Court authority and confused an important area of employment law.

The California Supreme Court has carved an exception to the at-will doctrine in order to protect the public interest. Under California law, there is a presumption that employment with no set term is at-will. That is, both the employer and employee can end the employment relationship for any reason or no reason at all. *See, e.g., Turner v. Anheuser-Busch, Inc.*, 7 Cal.4th 1238, 1251 (1994). There are exceptions, of course, the most obvious of which is the prohibition on terminating an employee because of unlawful bias, such as age, sex or race discrimination. California courts have also articulated an exception for terminations in violation of public policy.

The California Supreme Court first recognized the public policy exception to the at-will doctrine in *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167 (1980). There, the court allowed a fired employee to proceed with a tort claim against his former employer for wrongful discharge—despite the fact that the employment was at-will—because the plaintiff alleged that he was fired simply because he refused his employer's command to engage in an illegal scheme to fix gasoline prices. The court held that an employee who is discharged because of his or her refusal to commit a criminal act "may maintain a tort action for wrongful discharge against the employer." *Id.* at 178.

In subsequent cases, the California Supreme Court has made clear that the *Tameny* rule is a limited one, in that the purpose of the public policy exception is to protect the public, not the individual employee. "[T]he employer's right to discharge an 'at will' employee is still subject to limits imposed by public policy, since otherwise the threat of discharge could be used to coerce employees into committing crimes, concealing wrongdoing or taking other action harmful to the public weal." *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 665 (1988). In other words, the public policy exception exists to discourage conduct that is injurious to the public as a whole.

This is why termination in violation of public policy gives rise to tort damages rather than merely contract damages. The *Foley* court said so directly, as it distinguished the *Tameny* rule from a similar rule in Wisconsin, where the law allows an employee to sue for discharge in violation of public policy but only allows the employee to recover contract damages. "[T]he Wisconsin court focused on contract remedies on the assumption that the underlying interest was to compensate the employee, whereas California cases have focused on the general social policies being advanced by recognition of the public-policy-based cause of action." *Id.* at 668.

Hence, the fundamental question for purposes of a *Tameny* claim is whether the discharge implicates truly public rather than merely private concerns. "[A]lleged violations of internal practices that affect only the employer's or employee's interest, and not the general public's interest, will not give rise to tort damages. In other words, courts must focus not on compensation to employees, but rather on the 'general social policies being advanced.'" *Green v. Ralee Eng'g Co.*, 19 Cal.4th 66, 75 (1998) (citing to and quoting *Foley*, 47 Cal.3d at 668-71.) For that reason, the *Foley* court rejected an employee's *Tameny* claim where the employee's "whistle blowing" activities would have inured only to the benefit of the (apparently ungrateful) employer. "When the duty of an employee to disclose information to an employer serves only the private interest of the employer, the rationale underlying the *Tameny* cause of action is not implicated." *Id.* at 670-71.

This means that a *Tameny* claim exists independently of the contractual expectations of the parties. A *Tameny* claim "is not based on the terms and conditions of the contract, but rather arises out of a duty implied in law on the part of the employer to conduct its affairs in compliance with public policy. . . . The tort is independent of the term of employment." *Id.* at 667 (*quoting Koehrer v. Superior Court*, 181 Cal.App.3d 1155, 1166 (1986)). If the employer violates the employee's contractual expectations, the employee must pursue a contract action. Only where the public's independent interests have been implicated may the employee seek a *Tameny* claim.

And *Tameny* claims are not a vehicle through which courts should engage in unbridled policymaking. To the contrary, "courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch in order to avoid judicial policymaking." *Green*, 19 Cal.4th at 76 (quoting *Gantt v. Sentry Ins.*, 1 Cal.4th 1083, 1095 (1992)). To ensure that courts are not engaged in improper policymaking, "wrongful termination cases involving a *Tameny* cause of action are limited to those claims finding support in an important public policy based on a statutory or constitutional provision[,]" or administrative regulations promulgated under a statute. *Id.* at 79-80.

Not just any statute or regulation will do, however. The statute or regulation in question must concern a substantial *public* interest: "Even where, as here, a statutory touchstone has been asserted, we must still inquire whether the discharge is against public policy and affects a duty which inures to the benefit of the public at large rather than a particular employer or employee. For example, many statutes simply regulate conduct between private individuals, or impose requirements whose fulfillment does not implicate fundamental public policy concerns." *Foley*, 47 Cal.3d at 669. The *Tameny* concerns are not implicated where an employee is fired so the employer can avoid paying the employee's earned wages.

Gould and *Phillips* Extend the *Tameny* Rule

In *Gould v. Maryland Sound Indus., Inc.*,

31 Cal.App.4th 1137 (2nd Dist. 1995), the California Court of Appeal was asked to extend the *Tameny* doctrine to a new circumstance. Gould sued his former employer because, according to Gould, the employer had fired him to avoid paying him earned commissions and in retaliation for informing company management that the company was improperly failing to pay overtime wages. Gould asserted claims for, among other things, wrongful discharge in violation of public policy. The trial court sustained the employer's demurrer as to all of Gould's claims. Gould appealed.

The California Court of Appeal reversed in part the trial court's order and reinstated Gould's *Tameny* claim. The court first noted that Gould's situation did not fit neatly into any of the typical *Tameny* categories. *Tameny* claims "typically arise when an employer retaliates against an employee for refusing to violate a statute, performing a statutory obligation, exercising a statutory right, or reporting an alleged violation of a statute of public importance." *Id.* at 1147 (citing *Turner v. Anheuser-Busch, Inc.*, 7 Cal.4th 1238, 1256 (1994)). Nonetheless, the court believed that *Tameny* claims could lie "'wherever the basis of the discharge contravenes a fundamental public policy.'" *Id.* (quoting *Soules v. Cadam, Inc.*, 2 Cal.App.4th 390, 401 (1991)). The court then found that "the prompt payment of wages due an employee is a fundamental public policy of this state[,]" citing to various Labor Code provisions and some case law discussing the importance of paying an employee's wages in a timely fashion. *Id.* at 1147.

A later appellate panel (in the same district) followed *Gould* in *Phillips v. Gemini Moving Specialists*, 63 Cal.App.4th 563 (2nd Dist. 1998). There, as in *Gould*, the plaintiff asserted a *Tameny* claim against his former employee, alleging that the employer fired him in order to avoid paying him compensation. The *Phillips* court, like the *Gould* court, set forth the correct standard: a *Tameny* claim will lie only where the policy in question is truly about protecting the public. "In deciding whether an employee's cause of action for wrongful termination in violation of public policy has merit, courts seek to distinguish between 'claims that genuinely involve matters of public policy, and those that concern merely ordinary disputes between employer and employee.'" *Id.* at 570 (*quoting Gantt*, 1 Cal.4th at 1090). The policy in question must "affect[] society at large" and must be "'fundamental,' 'substantial' and 'well established' at the time of discharge." *Id.* Thus, courts must determine whether the discharge of the employee 'affects a duty which inures to the benefit of the public at large rather than to a particular employer or employee.'" *Id.*

The *Phillips* court then proceeded, much like the *Gould* court, to lay out various statutes to show "that an employee's wages are highly important." *Id.* at 571. Most importantly, the court concluded that the prompt payment of wages is of substantial interest not only to the employee, but to the public at large. The court supported its conclusion by pointing out that willfully refusing to pay earned compensation can be a misdemeanor, and that it is impermissible to attach an employee's wages except in limited circumstances. *Id.* at 571-72. Thus, the court agreed with Gould that "wages are highly significant not only to the employee who earns them, but also to his or her family, and to society in general which will be burdened with supporting said persons if the employee is denied his or her wages." *Id.* at 574.

Gould and *Phillips* Got it Wrong

Gould and *Phillips* created a new tort action where none had previously existed. They did so despite the California Supreme Court's instruction that "the employment relationship is fundamentally contractual" and that "expansion of tort remedies in the employment context has potentially enormous consequences for the stability of the business community." *Foley*, 47 Cal.3d at 698, 699. They did so because, in their estimation, the laws requiring prompt payment of earned wages constitute "fundamental public policy" that affects the public at large.

But that conclusion is difficult to square with the Supreme Court precedent and, frankly, common sense. Whether a policy is "fundamental" and able to support a *Tameny* claim does not depend upon whether the court can find statutes that articulate the policy. Instead, as *Foley* made clear, courts must inquire whether the statute inures to the benefit of the public at large, as there are many statutes that "simply regulate conduct between private individuals, or impose requirements whose fulfillment does not implicate fundamental public policy concerns." *Foley*, 47 Cal.3d at 669. *Foley* even gives courts a practical test to determine whether a policy concerns public or private interests: if the interest at stake is one that the parties could lawfully contract around, it is a private interest; if the interest is one that the parties could not lawfully contract around, it is likely a public interest. *See Foley*, 47 Cal.3d at 670 n.12; *Green*, 19 Cal.4th at 75. Thus, because the parties could not contract around the antitrust laws, the *Tameny* court held that a public interest was at issue. *Green*, 19 Cal.4th at 75. By contrast, the parties in *Foley* could lawfully have agreed that an employee has no obligation to report wrongdoing against the company by a co-worker. Because the parties could have contracted around the interest at issue, a *Tameny* claim was unavailable. *Id.*

Gould and *Phillips* fare poorly under this public-versus-private test. As important as wages may be

to an employee, an employee is certainly free to waive his or her right to them. That is, if the employee told the employer that he or she had been sleeping on the job for two weeks, had not earned his pay, and does not want it, the employee would be free to part company with the employer and leave the wages behind. Under the Supreme Court's test, then, the interest at stake is private, not public.

Phillips tries to salvage its rationale by pointing out that society has an interest in the employee's wages because, if he or she does not get paid, the burden will fall on the rest of society to support the employee and the employee's family. *Phillips*, 63 Cal.App.4th at 574. The strength of this justification is certainly questionable, and courts in other jurisdictions have rejected it. *See McGrath v. CCC Information Services, Inc.*, 314 Ill.App.3d 431, 440 (2000) (The court held that the Illinois statute requiring employers to pay employees all earned benefits when the employees leave is not clearly mandated public policy. "[T]he effect of plaintiff's dispute and subsequent termination on the citizenry collectively is incidental at best. Rather, plaintiff's claim is more in the nature of a private and individual grievance insufficient to justify a claim of wrongful discharge.").

The court's argument also proves too much. *Gould* and *Phillips* created a limited exception to the at-will doctrine. To justify such an exception,

the courts needed to explain why this particular type of termination—that is, termination to avoid paying earned wages—impacts the public interest in a way that other terminations do not. But *Phillips'* public-interest argument fails to carry that burden. Does society suffer when an employee is unable to support his or her family? Sure. But the cost to society of supporting a terminated employee is the same whether the employee was fired for a good reason or an unlawful reason. In either case, the employee has no job and needs to eat. Thus, the public interest impacted where an employee is fired so the employer can avoid paying earned wages is no different than the public interest where an employee is fired for countless other foolish reasons that do not give rise to a tort—for example, because the boss is stupid, or jealous of the employee's success, or where the employee has bad breath. Because *Phillips'* asserted justification applies equally to all of these situations, it fails miserably in explaining why the courts should single out one type of termination for special treatment.

Put another way, *Phillips* did not provide a reason for creating a limited exception to the at-will doctrine for this specific circumstance; it merely articulated an argument for abolishing the at-will doctrine. And that is a different issue entirely—one left to the legislature not an intermediate court of appeal. Moreover, by focusing on the importance of compensation to the employee, *Phillips* ignored the Supreme Court's instruction that the purpose of the public policy exception is not to compensate employees: "[C]ourts must focus not on compensation to employees, but rather on the 'general social policies being advanced.'" *Green,* 19 Cal.4th at 75.

Not only is the *Gould* and *Phillips* rule inconsistent with the governing authority, it is completely unnecessary. The courts had no reason to fabricate a new tort for employees. Any employee who is denied wages he or she has earned has both contract remedies and remedies under the Labor Code. *Gould* and *Phillips* no doubt recognized this fact, since those courts relied on the Labor Code sections in inventing their new cause of action. There is also no reason to expect a rash of firings by employers who are trying to avoid paying their employees earned wages. "[A]s a general rule it is to the employer's economic benefit to retain good employees. The interests of employer and employee are most frequently in alignment. If there is a job to be done, the employer must still pay someone to do it." *Foley,* 47 Cal.3d, at 692. Moreover, firing an employee does not allow an employer to avoid paying him or her. That is, the law need not worry that employers will begin firing employees to avoid paying them, because employers are still obligated by law to pay them, and there are even additional legal incentives (sticks, not carrots) to encourage them to do so promptly. *See, e.g., Gould* at 1147-48 and n.3.

Remarkably, the *Gould* court seemed to recognize that contract law and the statutory scheme make the new tort unnecessary: "We recognize the motivation attributed to MSI seems illogical because discharging Gould would not relieve MSI of the duty to pay the wages and benefits due him. To the contrary, discharging him caused his compensation to be payable 'immediately.'" *Id.* at 1148 n.3. But the *Gould* court ignored this issue and proceeded to create the new tort action anyway, apparently because the court believed the standard for reviewing a demurrer required it. "Nevertheless, for purposes of demurrer we accept the truth of *Gould's* material allegations." *Id.* Fair enough; parties are entitled to allege "illogical" facts in their complaints. But the court is not required to create new tort claims out of whole cloth simply so a plaintiff can proceed to trial on an "illogical" legal theory—especially when the very "illogic" of the employer's alleged conduct means that very few employers are likely to engage in it, and especially where legal remedies already exist to make the injured employee whole even if an employer does. Illogic may not matter to the standard of reviewing a demurrer, but it should certainly count when injecting a new tort theory into California employment law.

Gould and *Phillips* Must Go

The *Gould* and *Phillips* rule is untenable. These courts have created a new tort action in a field that the California Supreme Court says is better left to contract law. They have created the new tort action under the theory that the rule inures to public and not private interests, even though that conclusion is logically suspect and inconsistent with the Supreme Court's test for deciding what is public and what is private. And the courts have created the new tort action despite the fact that it is completely unnecessary. There is no reason to believe that employers are firing employees left-and-right to avoid paying them, and employees have existing, adequate legal remedies even if employers were doing so. The Courts of Appeal in other districts and, eventually, the California Supreme Court should reject *Gould* and *Phillips*.

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