

1985

Kit C. Larson v. Sysco Incorporated, Robert Jenson and Robert Wagner : Brief of Respondent

Utah Supreme Court

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20682

IN THE SUPREME COURT OF THE STATE OF UTAH

KIT C. LARSON,

Plaintiff/Appellant,

vs.

Case No 20682

SYSCO CORPORATION, ROBERT
JENSON and ROBERT WAGNER,

Defendants/Respondents.

BRIEF OF DEFENDANTS/RESPONDENTS

Appeal from the Second Judicial District Court of Weber County,
The Honorable David E. Roth, District Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

KIT C. LARSON,

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vs.

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SYSKO CORPORATION, ROBERT
JENSON and ROBERT WAGNER,

Defendants/Respondents.

BRIEF OF DEFENDANTS/RESPONDENTS

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I

Was summary judgment properly granted against plaintiff on his causes of action for breach of contract, defamation and intentional infliction of emotional distress as alleged in his original complaint?

II

Were any issues other than breach of contract, defamation and intentional infliction of emotional distress properly before the court at the time defendants' motion for summary judgment was granted or did the court commit reversible error in denying plaintiff's motion to amend his complaint?

III

If plaintiff's claims for abusive discharge and wrongful discharge were properly before the lower court, was there any evidence to factually support those claims and to what extent are they recognized by Utah law?

STATEMENT OF THE CASE

Plaintiff filed five separate claims against defendant claiming breach of contract, defamation and intentional infliction of emotional distress arising out of the 1984 termination of his employment. After substantial discovery by both sides, defendants moved for summary judgment against plaintiff on all five causes of action. The lower court granted defendants' motion for summary judgment dismissing plaintiff's complaint with prejudice.

STATEMENT OF FACTS

Plaintiff was a commissioned sales representative for defendant Sysco Corporation and was terminated from defendant's employment in April of 1984. (R 43). Plaintiff's employment with defendant was pursuant to an agreement which had no fixed termination date. Under that agreement, plaintiff did not promise to work for any specific term and the defendant company did not guarantee employment for any specified period. (R 43)

Plaintiff's termination from defendant's employment took place in a polite exit interview which was conducted only between

himself and his immediate supervisor wherein he was simply told that he would have to be let go. (R 43) No further discussion took place and no reason was given for the decision. Defendants made no statements to any persons regarding the reasons for plaintiff's termination. The only indication for plaintiff's termination ever given by defendants was a statement contained on the "blue slip" submitted by defendants to the Utah Department of Employment Security whereon the explanation for termination was stated as "poor performance". (R 43)

Plaintiff's performance as a sales representative for defendant dropped drastically during the seven-month period immediately preceeding his termination. In addition, for the last four months of plaintiff's employment with defendants, he was substantially below the budgeted amount of sales which he had agreed to. (R 44). To make up for lost income as a result of decreasing sales, plaintiff increased the costs of products to his customers, thereby increasing the amount of commission he earned off of each account. This practice upset defendants' customers and resulted in the loss of several of them. (R 44). Although plaintiff had experienced problems with drinking and had appeared on the job while intoxicated, defendants, nevertheless, refrained from so noting on plaintiff's separation notice. (R 44).

Upon the termination of plaintiff from defendant's employment in April of 1984, defendant paid to plaintiff all commissions due him at that time and, in addition, paid him severance pay for a two-week period. In calculating the

severance pay, defendant remitted to plaintiff approximately 30% per week more than plaintiff had earned on a commission basis for the a period of time immediately prior to his discharge. (R 151).

At the time of plaintiff's termination and for several years prior thereto, the policy of defendant with respect to termination of sales representatives was to give them severance pay in lieu of written notice of termination. (R 151). This policy was necessitated because defendant's sales representatives were compensated on a commission basis. Accordingly, the performance of such an employee in the face of imminent termination typically dropped so drastically that both the employee and the company would be adversely affected. It was in accordance with this policy of providing pay in lieu of notice that plaintiff was given two weeks severance pay. (R 151).

Plaintiff's original complaint alleged causes of action against defendant Sysco Corporation for breach of the employment contract between it and plaintiff, (R 3); against defendants Robert Jenson and Robert Wagner for inducing defendant Sysco Corporation to breach its employment contract with plaintiff, (R 5); against defendant Sysco Corporation for defamation, (R 6 - 7); against defendant Sysco Corporation for defamation per se (R 9); and against all defendants for intentional infliction of emotional distress, (R 9). Although plaintiff did file a "Motion to Amend [his] Complaint" (R 103), he never offered a proposed amended complaint and never asserted any additional facts or otherwise described the nature and scope of the amendment sought.

SUMMARY OF ARGUMENTS

The only causes of action before the lower court at the time defendants' Motion for Summary Judgment was heard were two common law breach of contract claims, two claims for defamation and a cause of action for intentional infliction of emotional distress. Plaintiff was an employee hired under a contract of indefinite duration, and was, therefore, terminable at will. When an individual is hired for an indefinite time, he has no right of action against his employer for breach of the employment contract upon being discharged. Since no other breaches of contract were alleged or proved by plaintiff, entry of judgment against him was appropriate.

Plaintiff's claims for defamation and intentional infliction of emotional distress were not factually supported by the record and their dismissal was entirely within the proper exercise of the lower court's discretion.

Although plaintiff did file a motion to amend his complaint, no proposed amended complaint was submitted in conjunction with that motion. Plaintiff proffered no additional facts which would define the precise nature and scope of the amendment he sought. Accordingly, plaintiff's Motion to Amend was denied and the court's granting of defendant's Motion for Summary Judgment was properly based only upon the causes of action alleged in the original complaint.

Finally, even if plaintiff had been allowed to amend his complaint to include a cause of action for wrongful discharge, it was never indicated what type of wrongful discharge theory

plaintiff desired to assert and no facts which would support any such claim were ever offered. Consequently, the lower court's granting of defendant's Motion for Summary Judgment was proper and should be upheld.

ARGUMENT

POINT I

PLAINTIFF'S CLAIMS FOR BREACH OF CONTRACT WERE PROPERLY DISMISSED BECAUSE AS AN EMPLOYEE EMPLOYED UNDER A CONTRACT OF INDEFINITE DURATION, PLAINTIFF HAS NO CAUSE OF ACTION BASED UPON HIS TERMINATION.

The question raised by plaintiff's appeal is whether an employee who is hired and works under a contract of indefinite duration and is never promised employment for a specified period may still recover damages for termination of his employment. In his first cause of action, plaintiff alleges that

"On April 13, 1984, Defendant broke the contract and wrongfully discharged the Plaintiff and refused to continue the Plaintiff in its employ or to pay him any part of the compensation hereinbefore set out ..."

Plaintiff's original Complaint paragraph 9; (R 3).

Plaintiff's second cause of action alleges that the individual defendants wrongfully "induced, persuaded and caused defendant corporation to violate, repudiate, and break the agreement with plaintiff and to refuse to proceed further thereunder." (Plaintiff's original Complaint paragraph 16; R 5). Thus, it is evident that the first and second causes of action of

plaintiff's original Complaint raise only claims for common law breach of contract.

In a long line of cases, this Court has consistently declared that employment contracts of indefinite duration are terminable at the will of either party. See, Held v. American Linen Supply Co., 6 Utah 2d 106, 307 P.2d 210 (1957); Bullock v. Deseret Dodge Truck Center Inc., 11 Utah 2d 1, 354 P.2d 559 (1960); Crane Co. v. Dahle, 576 P.2d 870 (Utah 1970); and Mann v. American Western Life Insurance Co., 586 P.2d 461 (Utah 1978).

Most recently, in Bihlmaier v. Carson, 603 P.2d 790 (Utah 1979), this Court again emphasized this general rule declaring:

"In the absence of some further express or implied stipulation as to the duration of the employment or of a good consideration in addition to the services contracted to be rendered, the contract is no more than an indefinite general hiring which is terminable at the will of either party.

When an individual is hired for an indefinite time, he has no right of action against his employer for breach of the employment contract upon being discharged."

603 P.2d at 792. Plaintiff acknowledges the existence of the "at will" employment rule and it is undisputed that plaintiff was employed under a contract of indefinite duration. Consequently, it is evident that plaintiff's first two causes of action fail to state a claim upon which relief can be granted.

Plaintiff, however, contends that Idaho rather than Utah law should be applied. In support of this contention, plaintiff refers to paragraph 8 of the Sales Representative Employment Agreement between plaintiff and defendant Sysco. That provision provides

"In the event of any dispute arising under this agreement, it is agreed between the parties that the law of the State of Idaho will govern the interpretation, validity and effect of this agreement without regard to the place of execution or the place of performance thereof." (R 148)

Thus, the provision relied on by plaintiff pertains only to the interpretation and validity of disputes arising under the terms of the agreement. However, in this case, there is no issue concerning the interpretation of the agreement between the parties.

Rather, as stated by plaintiff in his brief in this appeal "the plaintiff's claims arise not out of the employment but out of the termination of that employment." (Appellant's Brief page 39). Accordingly, the provision providing for Idaho law to be used in governing the interpretation of the terms of the contract is inapplicable. Thus, Utah law is the appropriate guide for decision.

However, in the event Idaho law were to be applied, it is still evident that plaintiff's claims for breach of contract were properly dismissed. In Jackson v. Minidoka Irrigation District, 563 P.2d 54 (Idaho 1977) the court held:

"The threshold issue presented is whether an employee who has not been hired for a definite period of time may bring a claim against his employer for damages for wrongful discharge. An employee who is hired for an indeterminate period of time is known as an employee at will and it is well established that if he is not hired for some definite period of time he has no right of action upon being discharged."

553 P.2d at 57. It is, therefore, evident that whether Utah law or Idaho law is applied, plaintiff has not stated a cause of

action for breach of contract arising out of the termination of his employment with defendant.

Although not alleged in his original Complaint and, thus, not before the trial court at the time of the granting of defendant's Motion for Summary Judgment, plaintiff, on appeal, now contends that the original contract was breached by defendants' alleged failure to give him two weeks notice prior to termination. This contention, however, is also without merit. It was undisputed at the trial court that the policy of defendant Sysco Corporation with respect to the termination of sales representatives was to give them severance pay in lieu of written notice of termination. That policy was implemented long before plaintiff's termination and was in full force and effect at the time of his discharge.

In accordance with that policy, plaintiff was given two weeks severance pay at the time of his termination. Perhaps more importantly, is the fact that the two weeks severance pay given to plaintiff by defendant was far in excess of the average commissions which plaintiff was earning at the time of his discharge. Accordingly, it is evident that there was no breach of the sales representative agreement between plaintiff and defendant.

Moreover, even if there had been a breach of that agreement, it is clear that plaintiff suffered no damages as a result thereof. It is undisputed that he was fully compensated for the entire period of time in which notice of his termination would have been given. The compensation which he received was approximately 30% per week in excess of that which he had been

earning at the time of his termination.

Based upon the foregoing and with the evidence which the trial court had before it, it is evident that defendants' Motion for Summary Judgment against plaintiff on his two causes of action for breach of contract was properly granted and should be upheld.

POINT II

PLAINTIFF'S CAUSES OF ACTION BASED
ON DEFAMATION WERE PROPERLY
DISMISSED BECAUSE THEY DO NOT STATE
A CAUSE OF ACTION UNDER UTAH LAW.

Plaintiff, in his third and fourth causes of action, alleges claims against defendants based on defamation. However, the allegations of plaintiff's Complaint and the undisputed facts of this case clearly establish that these causes of action fail to state claims for relief under Utah law.

It must be observed at the outset, that no defamatory statement was ever made by defendants or any of them to any persons with respect to plaintiff. Plaintiff's basis for contending that he has been defamed stems solely from the fact of his termination from defendant's employ. (See Appellant's Brief page 27). However, it is undisputed that at the time plaintiff was notified of his termination, he was simply told that it would be necessary to "let him go".

Plaintiff was notified of his termination at a polite exit interview between himself and his immediate supervisor with no other persons being present. No statements were ever made to any

other persons regarding plaintiff's termination. Thus, the only statement upon which plaintiff relies as a foundation for his defamation claim is the notation on his "blue slip" that he was terminated for "poor performance." Such a notification falls far short of the level required to support a claim of defamation. This statement does no more than to convey one's subjective opinion about an individual.

Moreover, even if the notation "poor performance" on plaintiff's blue slip did rise to the level of outrageousness necessary to support a defamation claim, there are additional considerations which clearly support the trial court in its dismissal of that claim.

Plaintiff's third cause of action alleges a conventional defamation claim without alleging any special damages. (R 88 - 89). As stated by this court in Allred v. Cook, 590 P.2d 318 (Utah 1979):

"In order to constitute slander per se, without a showing of special harm, it is necessary that the defamatory words fall into one of four categories: (1) charge of criminal conduct, (2) charge of a loathesome disease, (3) charge of conduct that is incompatible with the exercise of a lawful business, trade, profession, or office; and (4) charge of the unchastity of a woman. If the words spoken do not apply to one of the foregoing classifications, special harm must be alleged." (emphasis added)

590 P.2d at 320. Inasmuch as no special damages are alleged and count three does not purport to allege defamation per se, it is clear that its dismissal was proper.

Plaintiff contends that his fourth cause of action asserts defamation per se and, therefore, does not require an allegation

of special damages. In addressing the issue of what constitutes defamation per se, this Court in Baum v. Gillman, 667 P.2d 41 (Utah 1983) stated:

"When language is used concerning a person or his affairs which from its nature necessarily must, or presumably will, as its natural and proximate consequence, occasion him pecuniary loss, its publication is libelous per se. (citations omitted). The nature of the writing must be such that the court can legally presume that the plaintiff has been damaged." (citations omitted).

667 P.2d at 43. In the instant case, the statement attributed to defendants as defamatory falls far short of the test set forth in Baum.

A statement on a blue slip filed with the Utah Employment Security Office pursuant to State law which reads merely "poor performance" does not rise to the level where "the Court can legally presume that the plaintiff has been damaged" as a result. (Id.). The damages alleged by plaintiff (if there are any) arise out of his termination from defendant's employment. If they have, in fact, occurred, they have occurred because plaintiff was terminated and those damages would exist regardless of the statement which appeared on his blue slip as the reason for his termination.

Accordingly, the statement made by defendants on plaintiff's blue slip does not amount to defamation per se and special damages must be alleged. This, however, plaintiff has failed to do and, in fact, cannot do. Accordingly, plaintiff's complaint for defamation fails to state a cause of action against defendants and its dismissal was, therefore, proper.

Moreover, even if plaintiff had alleged a defamatory

statement and accompanying special damages, or had alleged a statement which was defamatory per se, his claim would still have been properly dismissed inasmuch as the statement in this case was conditionally privileged.

In Combes v. Montgomery Ward & Co. 223 P.2d 272 (Utah 1951) this Court was faced with an action for slander arising out of the events surrounding the discharge of plaintiff from his job with defendant. The trial court had ruled that the statements complained of were privileged communications and therefore directed a verdict for the defendants. Plaintiff appealed. This court noted that "the existence of a conditional privilege is a question for the court" (Id. at 275), and then discussed the elements of a conditional privilege in the following language:

"An occasion is conditionally privileged when the circumstances induce a correct or reasonable belief that

"(a) facts exist which affect a sufficiently important interest of the publisher, and

"(b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest."

A case quite similar to the instant one involving employer and employee is Harrison v. Garrett, 132 N.C. 172, 43 S.E. 594, 596, wherein the court, referring to a situation of conditional privilege factually like ours, said as follows: "* * * any communication between employer and employee is protected by this privilege, provided it is made bona fide about something in which (1) the speaker or writer has an interest or duty; (2) the hearer or person addressed has a corresponding interest or duty; and provided (3) the statement is made in protection of that interest or in the performance of that duty. There must also be

an honest belief in the truth of the statement. When these facts are found to exist, the communication is protected by the law, unless the plaintiff can show malice on the defendant's part; the burden in this respect being upon the plaintiff."

228 P.2d at 275.

The statement upon which plaintiff relies in support of his defamation claims is the indication of "poor performance" on his "blue slip". When the elements of the conditional privilege referred to in Coombes are applied to this statement, it is clear that it is, in fact, privileged. As plaintiff's employers, defendants had a duty established by law to prepare and submit a "blue slip" to the Department of Employment Security. Thus, the first element is met.

It is equally evident that the Department of Employment Security, who is the "hearer" in this case has a corresponding duty to receive and process "blue slips". Accordingly, the second element is also established.

In preparing a "blue slip" the employer is required to give an explanation for the termination of its employee. That explanation is required so that the Department of Employment Security may make a determination as to the eligibility of the ex-employee for unemployment compensation benefits. Hence, it is evident that the statement on plaintiff's "blue slip" was made in the performance of the duty imposed upon defendants to submit "blue slips" to the Department of Employment Security. Consequently, the third and final element necessary to establish a conditional privilege is also met.

As noted by this Court in Coombes "when these facts are

found to exist, the communication is protected by the law, unless the plaintiff can show malice on the defendant's part" 228 P.2d at 275. The facts of this case clearly do not support a finding of malice. Thus, plaintiff's claim fails to state a cause of action under Utah law.

Moreover, even if the statement were defamatory per se, and was not privileged, it is well established that:

"The truth of a defamatory statement of fact is a complete defense to an action for defamation."

Ogden Bus Lines v. KSL Inc. 551 P.2d 222, 224 (Utah 1976). It is undisputed that plaintiff's performance as a sales representative for defendant Sysco Corporation dropped drastically during the period immediately preceeding his termination. The total dollar sales per month made by plaintiff dropped approximately \$57,000.00 per month between September of 1983 and February of 1984, (R 38). During the last four months of plaintiff's employment he was below the budgeted amount of sales for every month. In addition, plaintiff had appeared on the job while intoxicated and had increased prices to defendant's customers without authorization, resulting in loss of business to defendant. Such performance on the part plaintiff is not only poor but was and is completely unacceptable to defendant Sysco Corporation.

As a result, it is evident that defendants had an honest belief that the statement was true because it accurately described the circumstances of plaintiff's performance at the time of his discharge. Accordingly, it is clear that the lower court had sufficient evidence before it to justify dismissal of

plaintiff's claims for defamation and that the order should be upheld.

POINT III

PLAINTIFF'S CLAIM FOR INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS DOES NOT STATE A CLAIM AND WAS PROPERLY DISMISSED.

Plaintiff also asserts a tort claim for intentional infliction of emotional distress. (R 9). In support of the validity of that claim, plaintiff contends that "the courts of other jurisdictions have recognized that a cause of action for the infliction of emotional distress may be stated by the employee in a wrongful discharge case." (Appellant's Brief page 36). However, the cases cited by plaintiff in support of that contention are plainly inapposite. Those cases deal with the scope of damages available to an aggrieved employee who has successfully asserted a tort claim for abusive or wrongful discharge. The awarding of damages for emotional distress in those cases was nothing more than a determination by the court that the scope of damages under such a cause of action would include compensation for emotional distress. The cases did not hold that the circumstances therein supported a cause of action for intentional infliction of emotional distress.

In Rieser v. Lohner, 641 P.2d 93 (Utah 1982), this Court discussed the conditions under which emotional distress is actionable, declaring:

"Our study of the authorities, and of the arguments advanced convinces us that . . . the best considered view recognizes an action for severe emotional distress, though not accompanied by bodily impact or physical injury, where the defendant intentionally engaged in some conduct toward plaintiff. . . and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality.

641 P.2d at 100, quoting Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344, 346-47 (1961). Rieser relied on Section 46 of the Restatement (Second) of Torts to define the elements of a cause of action for emotional distress. Section 46 provides:

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Id. (emphasis supplied). The two key phrases in that definition are the subject of further explanation in the Comments to Section 46. Comment (d) describes the kind of outrageous conduct which will give rise to liability:

The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community.

Id. (emphasis supplied). Comment (j) to Section 46 describes the "severe emotional distress" which is required in this tort:

[C]omplete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so sever that no reasonable man could be expected to endure it.

Id. (emphasis supplied). It is undisputed that the basis of plaintiff's claim for emotional distress is the fact of his termination. A study of the authorities reveals, however, that mere termination from employment is not a sufficient basis for a claim of intentional infliction of emotional distress.

In Viestenz v. Fleming Companies, Inc., 681 F.2d 699 (10th Cir.), cert. denied, 459 U.S. 972 (1982), for example, the Tenth Circuit Court of Appeals sustained the dismissal of a terminated employee's claim for intentional infliction of emotional distress even though plaintiff alleged that he had been threatened, was allegedly told that he could be blackballed by the union, and that he could lose his job unless he admitted stealing from his employer. Id. at 701. While that case involved issues of labor law preemption, the legal standard the court used in ruling against the plaintiff is virtually identical to that articulated in Rieser, and the Restatement. Compare Vientenz at 701-03 with Restatement, comments (d) and (j), supra.

In Brenimer v Great Western Sugar Co., 567 F. Supp. 218 (D. Colo. 1983), Judge Kerr also held that termination from employment is not sufficient to state a claim for intentional infliction of emotional distress. In Brenimer, plaintiff brought an action for wrongful termination of employment under the Age discrimination in Employment Act and asserted a pendent cause of

action for intentional infliction of emotional distress. Plaintiff claimed to have suffered humiliation, stress, depression, and frustration as a result of his termination. The court noted that, even assuming the truth of the emotional distress, it would dismiss plaintiff's claim, declaring:

"While it is possible for a single, isolated activity to be a sufficient basis for a cause of action, it will only be so where . . . a private individual has blatantly and severely harrassed another.

567 F. Supp. at 223, quoting Rawson v. Sears, Roebuck & Co., 530 F. Supp. 776, 780 (D. Colo. 1982). Judge Kerr noted that plaintiff had been fired only once, and that plaintiff had not established a pattern of outrageous conduct sufficient to support a cause of action.

Finally, dismissal of plaintiff's claim for infliction of emotional distress should also be upheld because the court lacked jurisdiction over that claim. Utah's Workmen's Compensation Act, Utah Code Ann. Sections 35-1-1 - 35-1-106, provides the exclusive remedy for employment-related injuries. In particular, Section 35-1-60 provides that "no action at law may be maintained against an employer" for injuries sustained by an employee "in the course of or because of or arising out of his employment ...". This Court has held that the Act's displacement or preemption of common law tort actions against employers applies to intentional torts as well as to claims of negligence. See Bryan v. Utah International, 533 P.2d 892 (Utah 1975).

Other state courts have held specifically that common law tort claims for intentional infliction of emotional distress are

foreclosed by the exclusivity provisions of the state's workmen's compensation law. See, e.g., Kandt v. Evans, 645 P.2d 1300 (Colo. 1982); Foley v. Polaroid Corp., 413 N.E. 2d 711 (Mass. 1980); Battista v. Chrysler Corporation, 454 A.2d 286 (Del. Super. 1982); Belanoff v. Grayson, 471 N.Y.S. 2d 91 (N.Y.App.Div. 1984). Accordingly, plaintiff's tort claim for intentional infliction of emotional distress is barred by the exclusivity provisions of Utah's Workmen's Compensation Act.

For the foregoing reasons, plaintiff's fifth cause of action for infliction of emotional distress fails to state a cause of action under Utah law and its dismissal was proper and should be upheld.

POINT IV

DENIAL OF PLAINTIFF'S MOTION FOR
LEAVE TO AMEND HIS COMPLAINT WAS
PROPER.

As a preliminary matter, it must be pointed out that no proposed amended complaint was submitted in conjunction with plaintiff's Motion to Amend and no additional facts were proffered. Accordingly, the precise nature and extent of the amendment which plaintiff sought was not capable of ascertainment. Although plaintiff argued what he call a "wrongful discharge" theory in opposition to defendants' Motion for Summary Judgment, he never clearly identified whether he based that theory on violation of public policy or breach of an implied covenant of good faith and fair dealing or some other theory. Moreover, plaintiff never identified any public policy

to have been violated and he never alleged any bad faith on the part of defendants in terminating his employment.

Consequently, the effect of plaintiff's motion was to ask the lower court to give him free license to file an amended complaint containing any allegations he may chose. Such unmitigated license would be clearly prejudicial to defendants since it would allow plaintiff, after the hearing on defendants' Motion for Summary Judgment, to submit an amended complaint raising new issues of law which were beyond the scope of the summary judgment thereby resurrecting his case, and necessitating the preparation, refiling and rehearing of defendants' motion for summary judgment.

Thus, plaintiff's request for leave to amend his complaint amounted to little more than an attempt to buttress his position against summary judgment. In general, courts are less willing to grant leave to amend a complaint after the opposing party has moved for summary judgment, particularly where the plaintiff's situation has not changed since the filing of the original complaint or where the amendment represents an effort to avoid an adverse summary judgment. Layfield v. Bill Heard Chevrolet Co., 607 F.2d 1097, 1099 (5th Cir. 1979); Local 492, Etc. v. Georgia Power Co., 684 F.2d 721, 724 (11th Cir. 1982).

Moreover, where a plaintiff does not state the nature of the proposed amendment or the reason for his request for leave to amend, leave to amend should not be granted. Jordan v. County of Los Angeles, 669 F.2d 1311, 1324 (9th Cir. 1982).

In the instant case, not only did plaintiff interpose his Motion to Amend in order to buttress his position against summary

judgment, but he also completely failed to indicate the nature and scope of his proposed amendment. Accordingly, it is evident that his motion was properly denied.

In addition, it is well settled that leave to file an amended complaint must be denied where allowance of the amended complaint would prove a fruitless act or where the claim asserted lacks merit. Foman v. Davis 371 U.S. 178, 182 (1962); Hall v. Pennsylvania State Police, 433 F. Supp. 385, 388 (E.D. Penn. 1976).

In his Motion to Amend, plaintiff stated:

"The purpose [sic] the plaintiff seeks to amend the complaint is to amplify the allegations set forth in the first and second causes of action, more specifically to include language indicating that there is an implied covenant of good faith and fair dealing between employer and employee." (R 103)

This position is reiterated by plaintiff in his "Memorandum of Facts and Law" which he submitted in support of his Motion to Amend wherein he stated:

"The plaintiff desires to amplify the allegations set forth in his first two causes of action by asserting that there is an implied covenant of good faith and fair dealing between an employer and employee." (r 106-107).

If plaintiff had been allowed to amend his complaint to include an allegation that there existed an implied covenant of good faith and fair dealing, it would still add nothing to his complaint beyond what was originally contained in it. Plaintiff never alleged that any such covenant was not complied with and he did not indicate in his Motion to Amend that he desired to

include an allegation that the covenant was violated.

Accordingly, if the amendment which he requested in his motion had been granted, it would have proved fruitless and was therefore properly denied. Moreover, even had the breach of the implied covenant of good faith and fair dealing also been alleged, facts supporting had been given and it were properly before the lower court, it is clear, as indicated in Point V below that there is no foundation, either in law or in fact, on which such a claim can be supported. Accordingly, plaintiff's Motion to Amend was properly denied.

POINT V

EVEN IF PLAINTIFF'S CLAIMS FOR
WRONGFUL TERMINATION HAD BEEN
BEFORE THE LOWER COURT, THE
GRANTING OF DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT WOULD STILL HAVE
BEEN PROPER.

As pointed out in Points I through IV above, no cause of action for wrongful discharge was even before the lower court at the time it granted defendants' Motion for Summary Judgment. Although plaintiff did file a document entitled "Motion to Amend Complaint", no such amendment was authorized by the lower court and, in fact, no proposed amended complaint raising any additional issues was ever proffered by plaintiff. That the lower court was correct in denying plaintiff's Motion to Amend is more fully addressed in Point IV above.

Although plaintiff argued various wrongful discharge theories in his Amended Memorandum in Objection to Motion for

Summary Judgment (R 174 - 210) defendants specifically objected to the presentation of those issues. As stated in defendants' Reply Memorandum:

"Accordingly, the issues relating to wrongful discharge which are raised by plaintiff in his Memorandum in Objection to Defendants' Motion for Summary Judgment are not properly before the Court at this point, and cannot preclude the granting of defendants' Motion for Summary Judgment. Nevertheless, in order to allow the Court to completely and finally dispose of plaintiff's claims and without in any way acquiescing in or accepting plaintiff's additional causes of action as being before the Court, the following discussions of the issues argued by plaintiff is presented." (R 162)

Notwithstanding his failure to present the issue to the lower court, plaintiff on appeal now argues what he calls a wrongful discharge theory which is actually three separate causes of action. In Appellant's Brief it is first contended that a cause of action exists in tort when an employee is terminated in violation of a recognized public policy. Second, it is claimed that when an employee gives independent consideration in addition to the services contracted for, the employment at will doctrine may be modified. Finally, it is alleged that when an employee is terminated in violation of the implied covenant of good faith and fair dealing, he may assert a cause of action for wrongful discharge.

With respect to the public policy and additional consideration theories asserted by plaintiff on appeal, it is clear such claims were never before the lower and were not part of plaintiff's Motion to Amend. Consequently, it is evident that

those theories cannot justify a reversal of the lower court's decision.

The question raised by this portion of plaintiff's appeal is whether an employee who is hired and works under a contract of indefinite duration and is never promised employment for a specified period and who alleges only breach of contract, defamation and intentional infliction of emotional distress may still recover damages for wrongful termination.

As stated in Point I above, this Court has consistently held that contracts of indefinite duration are terminable at the will of either party and that no right of action against an employer for breach of the employment contract can be maintained upon being discharged. This line of cases and, in particular, this Court's unequivocal reliance upon the "at will" rule have led federal judges interpreting Utah law recently, to dismiss claims for wrongful termination brought by persons formerly employed under contracts of indefinite duration. See, e.g., Heward v. Western Electric Co., 116 L.R.R.M. (BNA) 3423, 3425 (10th Cir. 1984); Amos v. Corp. or Presiding Bishop, 117 L.R.R.M. (BNA) 2744, 2769-70 (D.Utah 1984).

In Amos, Judge Winder rejected the contention that the Utah Supreme Court had never actually decided whether a cause of action for wrongful termination exists in Utah, observing:

Although this Court has the duty and power to mold the laws of this state when applying uncertain state law, it may not change existing state law. The plaintiffs argue that none of the Utah cases that defendants cite is dispositive because in none of the cases was the Utah Supreme Court asked to recognize a wrongful discharge cause of action. However, the long history of the

Utah Supreme Court's recognition of the terminable-at-will doctrine, the language the Court has used in dismissing those cases and the failure of the Court to even suggest that it might recognize an exception to that rule lead this Court to the conclusion that the recognition of an exception to the terminable-at-will doctrine would be a change in Utah law.

Id. (footnote and citation omitted). It is undisputed that plaintiff was employed under a contract of indefinite duration. Nevertheless, he asserts a wrongful termination cause of action which is based on three separate theories.

A. Additional Consideration.

Point III of Appellant's Brief contends that "an exception to the at-will doctrine is created where the employee gives consideration independent of his labors for wage." (Appellant's Brief page 17). This contention, however, fails both legally and factually.

Plaintiff's position is not legally sound because he has not identified the nature and scope of the modification of the "at will" employment doctrine which would be created if plaintiff had provided additional consideration. In order to do so, plaintiff would have to identify the precise nature of the additional consideration he contends was offered and describe specifically the effect the giving of such additional consideration would have upon his employment relationship. Plaintiff's failure to do so not only renders his claim legally unsupportable but factually as well.

Plaintiff's position is also factually unsupportable in that there is no allegation in any of the pleadings before the Court that plaintiff did, in fact, provide any additional consideration

to defendant Sysco. In fact, the only reference made to giving additional consideration appears on page 7 of Plaintiff's Memorandum in Objection to Motion for Summary Judgment. (R 117). That reference simply cites to paragraph 2 of the Sales Representative's Employment Agreement. (R 146). Paragraph 2 of that agreement enumerates certain covenants made to Sysco Corporation by all sales representatives.

Those covenants can basically be divided into three categories. First, the sales representative agrees to devote his best efforts to advance the interests of the company and to refrain from engaging in any solicitation of orders for any product or service other than that of the company. Second, the sales representative agrees that for a period of one year following the termination of his relationship with the company, he will not directly compete with the company or its business. Finally, the employee agrees to maintain the confidentiality of the company's trade secrets.

All of these covenants, on the part of the sales representative, are part of the original consideration given to defendant for its agreement to employ plaintiff. Nothing contained in those covenants even approaches the giving of additional consideration which could support plaintiff's contention, even if it were recognized by Utah law.

The only other potential additional consideration identified by plaintiff is at page 18 of his brief where he contends he rendered extensive efforts on the "touch tone system" (Appellant's Brief page 18). That system, however, was never

adopted by defendant, and plaintiff was instructed on numerous occasions to discontinue any use of company time to promote the system. (Deposition of Robert Jenson, page 61).

Accordingly, it is evident that the position taken by plaintiff with respect to the giving of additional consideration is unsupported by the facts and inadequate under the current status of law. Consequently, even if the allegations raised by plaintiff had been properly before the lower court and were factually supportable, they would still not preclude the granting of defendants' Motion for Summary Judgment.

B. Public Policy.

Again, plaintiff, without any basis in the pleadings, asserts that his termination is actionable because various courts across the country have recognized a public policy limitation to the employment at will doctrine. He contends that those decisions entitle him to proceed under such a theory whether or not he can factually support it or has even alleged it. Thus, plaintiff asks this Court to create new law in the state of Utah and then to fashion a remedy for violations thereof without any factual basis for doing so.

Making new law, however, and the recognition of public policy to promote or protect it are matters best accomplished by the legislature. In particular, the legislature is surely the appropriate forum to consider and accommodate the competing interests that would be affected by a change in the at-will employment doctrine. The New York Court of Appeals had recent occasion to discuss this issue in Murphy v. American Home Products Corp., 58 N.Y. 2d 293, 461 N.Y.S. 2d 232 (1983).

In Murphy, the plaintiff alleged that he had been terminated because of his "disclosure to top management of alleged accounting improprieties on the part of corporate personnel..." 461 N.Y.S. 2d at 233. Based upon this allegation, the plaintiff asserted causes of action for wrongful termination of employment.

In affirming dismissal of those claims, the New York Court emphasized that it could recognize the plaintiff's cause of action only by altering the traditional at-will doctrine. Id. at 235. The Court declined to do so without an express mandate from the legislature, explaining that both the question of liability itself and "the definition of its configuration if it is to be recognized" are appropriate for legislative inquiry. Id. The Court also eloquently explained the reasons why it should decline to create a new cause of action for wrongful termination in the absence of a legislative mandate:

The Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and in any event critically interested, and to investigate and anticipate the impact of imposition of such liability. Standards should doubtless be established applicable to the multifarious types of employment and various circumstances of discharge. If the rule of nonliability for termination of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants.

Additionally, if the rights and obligations under a relationship forged, perhaps some time ago, between employer and employee in reliance on existing legal principles are to

be significantly altered, a fitting accommodation of the competing interests to be affected may well dictate that any change should be given prospective effect only; or at least so the legislature might conclude.

Id. at 235-236. Cf. S.D.C.L. Paragraphs 60-1-3 and 60-1-4 (1977) (South Dakota statute establishing presumptions as to term of employment contracts).

These considerations should be given controlling weight here. The Utah Legislature has already expressly prohibited the denial of employment opportunities for a number of reasons. See Utah Code Ann. Section 34-35-1 et seq. (Anti-Discrimination Act, forbidding employment decisions made on the basis of race, color, religion, sex, ancestry, age, national origin, or handicap.) See also Utah Code Ann. Section 34-37-16 (forbidding employers to deny or terminate employment because of refusal to submit to polygraph examination); Utah Code Ann. Section 34-20-8(f) (prohibiting termination for filing charges or giving testimony in unfair labor practice proceeding).

All of these limitations on the employer's right to discharge employees were adopted in light of the existence of the employment at will doctrine. Current Utah law thus reflects the fact that the Legislature has already seen fit to limit an employer's right to terminate employees for certain limited reasons and no others. In view of the Legislature's ability and inclination to limit the employment at will doctrine in specific instances, this Court should decline to adopt the extremely broad exception to the at will employment rule which plaintiff urges.

Moreover, even if Utah law were broadly enough construed to recognize the exception which plaintiff argues, there is still no

basis for denying defendants' motion. Plaintiff has neither alleged nor identified any public policy which he contends has been violated in the instant case. Thus, it is again evident that plaintiff's position is unsupported by the facts and not founded in the law. Accordingly, defendants' Motion for Summary Judgment was properly granted.

C. Implied Covenant of Good Faith and Fair Dealing

Plaintiff also argues in his brief that his termination violated an implied covenant of good faith and fair dealing inherent in his employment contract. This contention, however, also fails both legally and factually.

Plaintiff's position is legally unsupportable inasmuch as he has cited no Utah case for the proposition that persons employed under contracts of indefinite duration may still recover damages by alleging that their employment contracts contained such an implied covenant.

In this connection, the Supreme Court of Hawaii has recently declared, in upholding summary dismissal of a former employee's claim that her termination was in bad faith, that such a broad exception to the at-will rule is unnecessary:

"[T]o imply into each employment contract a duty to terminate in good faith would seem to subject each termination to judicial incursions into the amorphous concept of bad faith. We are not persuaded that protection of employees requires such an intrusion on the employment relationship or such an imposition on the courts.

Parner v. Americana Hotels, Inc., 652 P.2d 625, 629 (Haw.1982).

A number of recent decisions have also correctly pointed out that an implied covenant of good faith and fair dealing does not

create an independent cause of action for employees terminated at-will. Rather, it is a derivative principle which comes into play only in "defining and modifying duties which grow out of specific contract terms and obligations." Gordon v. Mathew Bender & Co., Inc., 562 F.Supp. 1286, 1289 (N.D. Ill. 1983) (rejecting at-will employees' wrongful termination claim based upon implied covenant); Murphy v. American Home Products Corp., supra, 58 N.Y.2d 293, 461 N.Y.S. 2d 232, 237 (1983) (implied covenant "is in aid and furtherance of other terms of the agreement of the parties"; claim by at-will employee based upon implied covenant dismissed).

Plaintiff's claim is also factually unsupportable inasmuch as he made no allegation and offered no facts tending to support or show that his termination was in bad faith or that it breached the implied covenant he alleges. In his motion to amend his complaint, plaintiff sought only to add an allegation to the effect that there was inherent or implied in the employment relationship a covenant of good faith and fair dealing. He did not, however, at any point, allege or seek to allege that that covenant was violated or breached by his discharge.

The undisputed evidence before the Court established that defendants terminated plaintiff because they felt that his performance had declined substantially. (See Point II above). Rather than to offer evidence rebutting that position, plaintiff merely seeks to explain it by contending that his decline in performance was due to seasonal fluctuations. However, any such fluctuations would

be taken into account in establishing the projected budget for plaintiff's performance and it is undisputed that plaintiff's performance was substantially below his budgeted amount for the four-month period immediately preceeding his termination. Consequently, there was ample undisputed evidence to support defendants' position that they acted in good faith in making a legitimate business decision to protect their best interests as a going business concern.

Accordingly, it is clear that plaintiff's cause(s) of action for wrongful discharge were never properly before the lower court. Even had they been so, it is equally evident that they are both actually and legally unsupportable and that the granting of defendants' Motion for Summary Judgment under the facts of this case was entirely appropriate and should be upheld.

CONCLUSION

It is evident from the foregoing discussion and the undisputed facts which were before the trial court that each of plaintiff's claims based upon termination of his employment were properly dismissed and that the lower court's ruling should be affirmed.

RESPECTFULLY SUBMITTED this 25th day of October, 1985

SUTHERLAND & NIELSON

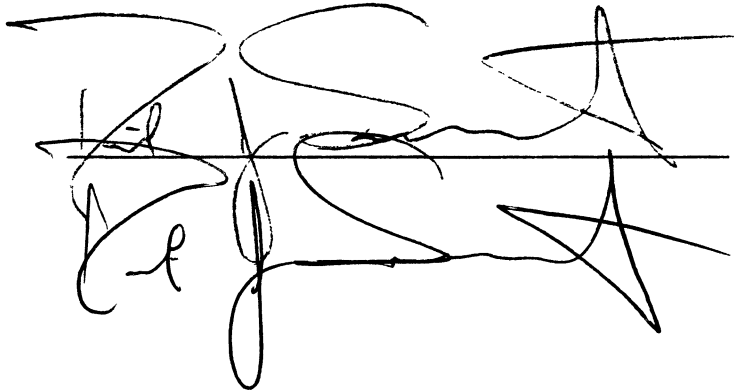
By: 

RICK J. SUTHERLAND
Attorneys for Defendants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 25th day of October, 1985, I caused four true and correct copies of the foregoing REPLY BRIEF OF DEFENDANTS-RESPONDENTS SYSCO CORPORATION to be mailed, postage prepaid, to:

David R. Hamilton
Michael G. Belnap
of and for
FARR, KAUFMAN & HAMILTON
Bamberger Square, Building 2
205 26th Street, Suite 34
Ogden, Utah 84401

A handwritten signature in black ink, appearing to read "Michael G. Belnap", written over a horizontal line. The signature is stylized with large, sweeping loops and a prominent star-like flourish at the end.