

1987

Walter K. Gilmore v. Salt Lake Area Community
Action Program, Hal J. Schultz, Robert E. Philbrick,
Fred Geter, Richard Fields, Ann O'Connell, John
Does 1-30 : Petition for Rehearing

Utah Court of Appeals

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John K. Rice; Stephen W. Cook; Cook & Wilde, P.C.; Attorneys for Respondents.

Nann Novinski-Durando; Mark S. Miner; Attorneys for Appellant.

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BRIEF IN APPEALS

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DOCKET NO.

870395-CA

IN THE UTAH COURT OF APPEALS

WALTER K. GILMORE,

Plaintiff/Appellant,

vs.

SALT LAKE AREA COMMUNITY
ACTION PROGRAM,

HAL J. SCHULTZ,
ROBERT E. PHILBRICK,
FRED GETER,
RICHARD FIELDS,
ANN O'CONNELL,
JOHN DOES 1-30,

Defendants/Respondents.

Case No. 870395-CA

RESPONDENTS' PETITION FOR REHEARING

Appeal from a Summary Judgment
Third Judicial District Court
The Honorable Homer F. Wilkinson

NANN NOVINSKI-DURANDO
4348 South Jupiter Drive
Salt Lake City, Utah 84124
Telephone: (801) 277-8853

MARK S. MINER
525 Newhouse Building
Salt Lake City, Utah 84111
Telephone: (801) 363-1449

Attorneys for Appellant

JOHN K. RICE, USB # 4397
STEPHEN W. COOK, USB #0720
COOK & WILDE, P.C.
6925 Union Park Center
Suite 490
Midvale, Utah 84047
Telephone: (801) 255-6000

Attorneys for Respondents

FILED

JUN 21 1989

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

WALTER K. GILMORE,)	
)	
Plaintiff/Appellant,)	
)	
vs.)	
)	
SALT LAKE AREA COMMUNITY)	Case No. 870395-CA
ACTION PROGRAM,)	
HAL J. SCHULTZ,)	
ROBERT E. PHILBRICK,)	
FRED GETER,)	
RICHARD FIELDS,)	
ANN O'CONNELL,)	
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525 Newhouse Building
Salt Lake City, Utah 84111
Telephone: (801) 363-1449

Attorneys for Appellant

JOHN K. RICE, USB # 4397
STEPHEN W. COOK, USB #0720
COOK & WILDE, P.C.
6925 Union Park Center
Suite 490
Midvale, Utah 84047
Telephone: (801) 255-6000

Attorneys for Respondents

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NATURE OF THE PROCEEDINGS

This lawsuit arises out of the termination of Gilmore's employment with the Salt Lake Area Community Action Program (Program). It was instituted in the Third Judicial District Court for Salt Lake County. The Honorable Judge Homer Wilkinson presided. On June 26, 1987, the Court granted petitioners' motion for summary judgment and entered its order dismissing Gilmore's complaint in its entirety.

Gilmore appealed the summary judgment only as it pertained to his claim that the Program's written policy manual constituted an implied-in-fact contract that altered his status as an employee-at-will. The appeal was originally taken to the Utah Supreme Court where it was then poured over to the Utah Court of Appeals for disposition. On July 8, 1989, the Court of Appeals entered its decision reversing the lower court's summary judgment and remanding for further proceedings.

This matter is a petition for rehearing pursuant to Rule 35, R. Utah Ct. App. The petitioners are the Program and its employees and officers who are co-defendants/respondents.

STANDARD OF REVIEW

The purpose behind Rule 35, R. Utah Ct. App., is to insure that the appellate court has properly considered all relevant information in rendering its decision. Armster v. United States District Court for Cent. Dist., 806 F.2d 1347 (9th Cir. 1986).¹ If the court has overlooked or misapprehended authority or some other matter material to its decision, a rehearing is appropriate. Rule 35(a), R. Utah Ct. App. See also, Matter of Estate of Herrman, 679 P.2d 246, (Nev. 1984). The decision to permit a rehearing rests within the sound discretion of the Court. Rule 35(c), R. Utah Ct. App.

STATEMENT OF THE POINTS OF LAW OR FACT WHICH PETITIONERS' CLAIM SHOULD BE REHEARD.

Pursuant to Rule 35, R. Utah Ct. App., Petitioners suggest that rehearing is appropriate in this case because the Court of Appeals overlooked facts and authority material to its decision, and also overlooked one issue

¹ Rule 35, R. Utah Ct. App. is identical to Rule 35, R. Utah S. Ct., which was drawn, in part, from Rule 40(a) FRAP. Advisory Committee Note to Rule 35, R. Utah S. Ct.

that was pending on appeal. Specifically, Petitioners suggest that the following issues should be reheard:

1. Whether the case Berube v. Fashion Centre, Inc., Ltd., 104 Utah Adv. Rep. 4 (1989), decided by the Utah Supreme Court after the Court of Appeals heard oral argument in this case but before its decision, should apply retroactively to this case.

2. Whether summary judgment dismissing Gilmore's breach of contract claim against the individual employees and officers was proper because they are not personally liable even if the Program committed a breach.

In deciding to reverse the lower court's summary judgment, the Court of Appeals relied exclusively on the Utah Supreme Court's decision in Berube v. Fashion Centre, Inc., Ltd., 104 Utah Adv. Rep 4. The Berube case was decided after the Court of Appeals heard argument in this case but before its decision. Material to the Court of Appeals' decision is whether the Berube case should apply retroactively to this case. This was overlooked or not considered when the Court of Appeals issued its decision. It is the opinion of petitioners' counsel, based upon the applicable law, that the Berube case should not apply retroactively.

In addition, Gilmore sued not only the Program, but its individual employees and officers as well. One issue on appeal was whether the summary judgment dismissing Gilmore's breach of contract claim against these individual employees and officers was proper. It is apparent from the Court of Appeals' decision that this issue was not considered and was overlooked. Even if the Berube case should apply retroactively to this case, viewing the facts in a light favorable to Gilmore, the individual officers and employees are not liable for any breach of contract that the Program may have committed.

ARGUMENT

POINT I. THE BERUBE CASE SHOULD NOT APPLY RETROACTIVELY TO THIS CASE.

In McFarland v. Skaggs Companies, Inc., 678 P.2d 298 (Utah 1984) the Utah Supreme Court set forth the general rule concerning the retroactive or prospective application of its decisions:

This Court has held that "[o]rdinarily an overruling decision has retroactive operation." We have also recognized, however, that under some circumstances

"an overruling decision will operate in the future only." The leading case establishing such a doctrine is a United States Supreme Court decision entitled Great Northern Railway v. Sunburst Oil & Refining Co. The rule established in that case, known as the Sunburst Doctrine, has been summarized previously by this Court as follows:

The rule is based upon the proposition that where persons had entered into contracts and other business relationships based upon justifiable reliance on the prior decisions of courts, those persons would be substantially harmed if retroactive effect were given to overruling decisions. An additional factor was that retroactive operations might greatly burden the administration of justice.

An example of the Utah Supreme Court's application of the Sunburst Doctrine is the case Timpanogos Planning & Central Utah Water, 690 P.2d 562 (Utah 1984). That case involved a statute directing the district courts to appoint the water conservancy districts' boards of directors. This statute was declared unconstitutional because it violated the separation of powers doctrine. The statute was subsequently amended giving the power of appointment to the executive branch of government. However, this case involved six directors appointed by the district court under the unconstitutional statute. The

Utah Supreme Court ruled that its decision declaring the statute unconstitutional would operate prospectively only because: 1) The water conservancy districts, and perhaps others, have conducted their businesses for several decades in good faith reliance in the court's prior decisions; and, 2) It would work an injustice to cast a cloud upon the legality of the districts' operations for those years.

For the same reasons, the Utah Supreme Court's decision in Berube should not apply retroactively to this case. In the Berube case, the Utah Supreme Court substantially and significantly changed the at-will employment doctrine. Justice Durham, in the majority opinion stated:

We now consider the general status of the at-will rule and whether it is appropriate for this court to extend or adopt further exceptions to the rule . . . Although in the past the presumption in favor of at-will employment has been difficult to overcome, rigid adherence to the at-will rule is no longer justified or advisable. 104 Utah Adv. Rep. at 9 & 10.

Justice Zimmerman in his concurring opinion further emphasized the overruling effect of the decision and its impact on employers. He stated:

Because the law in this area is in a state of flux, and because the at-will doctrine has become well entrenched in our law and any change in it has the potential to affect the practices of almost every employer in Utah, we must proceed with care in recognizing exceptions to that doctrine. . . . All that being said, we are reversing and remanding this matter for trial and are signaling a change in the employment-at-will law of Utah. 104 Utah Adv. Rep. at 16.

Employers in the State of Utah, including the Program, have relied for many years on the employment at-will doctrine in hiring and firing employees. The court's previous rigid adherence to this doctrine is described in the Berube case. The Court notes: "This same general rule was utilized in a number of Utah cases. See Bullock v. Deseret Dodge Truck Center, Inc., 11 Utah 2d 1, 5, 354 P. 2d 559, 562 (1960); Crane Co. v. Dahle, 576 p. 2d 870, 872-73 (Utah, 1978) (citing no authority for the rule). Bihlmaier v. Carson, 603 P.2d 790, 792 (Utah 1979)." 104 Utah Adv. Rep. Ct. 8. As noted by Justice Zimmerman, a change in this law by which employers have operated, "will affect the practices of almost every employer in Utah." 104 Utah Adv. Rep. Ct. 16.

In fact, there is no dispute in this case that when the Program hired Gilmore he was hired as an employee-at-will. See this court's opinion at 3. The program, in entering into this at-will relationship, had no reason to believe that twelve years later it would face the possibility that Gilmore's 30 months of employment would evolve into something more than what the parties intended or have since admitted the relationship to be. Moreover, under no circumstances could the program have expected that twelve years later it would face the possibility of paying Gilmore substantial damages, based on a theory of an implied in-fact contract, which was not recognized as an exception to at-will employment until 1989. Of particular interest is the fact that Gilmore was hired 15 years and fired 12 years before the decision in the Berube case.

As a result, applying Berube retroactively to the case will work a severe injustice and substantially threaten the Program's existence. If this new law is applied retroactively, the program faces the possibility of judgment for Gilmore's back pay in a catastrophic amount.

In other jurisdictions, where the employment-at-will doctrine has been modified, the courts have ruled that such changes will operate prospectively only. For example, in the case Bimbo v. Burdette Tomlin Memorial Hospital, 644 F. Supp. 1033 (D.N.J. 1986), a nurse alleged, in one cause of action, that the hospital's personnel policies manual constituted an implied employment contract. During the pendency of the Bimbo case the New Jersey Supreme Court recognized, for the first time, an exception to the traditional employment-at-will doctrine based on a contract implied from a personnel policy manual. Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, 49 A.2d 1257 (1985). The Federal District Court in Bimbo held:

In so holding, the Woolley court, to the extent it went beyond ruling only that fundamental principles of basic fairness must be adhered to in employment relationships clearly broke new ground in New Jersey employment law. As such, the Woolley decision, in our opinion, should not be applied retroactively. To apply such a significant change in the law retroactively would be distinctly unfair to those effected thereby who had previously acted in reliance upon the prior state of the law. 644 F. Supp. Ct. 1039.

The court went on to note that the facts giving rise to plaintiff's complaint arose more than three years before the New Jersey Supreme Court's decision in Woolley. See also: Garcia v. San Antonio Metropolitan Transit Authority, 838 F.2d 1411 (5th Cir. 1988); Austin v. City of Bisbee, Arizona, 855 F.2d 1429 (9th Cir. 1988); Vigil v. Arzola, 699 P.2d 613 (N.M. App. 1983); Ramey v. Harber, 589 F.2d 753 (4th Cir. 1978); Adkins v. Sky Blue, Inc. 701 P.2d 549 (Wyo. 1985).

The Utah Supreme Court clearly broke new ground in Utah employment law by its decision in Berube. Before Berube, the at-will employment doctrine was "well entrenched in our law." 104 Utah Adv. Rep. Ct. 16. Now employers face new liability in its relationships with employees. For several decades prior to Berube, the program and other employers acted in accordance with the state of the law at that time. It is distinctly unfair to now subject the program to potentially catastrophic liability based on a change in the law that occurred at least twelve years after the facts. This court therefore should rule that the Berube case does not apply retroactively to this case.

POINT II THE SUMMARY JUDGMENT DISMISSING
GILMORE'S BREACH OF CONTRACT
CLAIM AGAINST THE INDIVIDUAL
EMPLOYEES AND OFFICERS IS PROPER
BECAUSE THEY ARE NOT PERSONALLY
LIABLE EVEN IF THE PROGRAM
COMMITTED A BREACH.

The well-established rule of law is that individual employees and officers of a corporation, who act within the course and scope of their employment, act under a privilege and cannot be held individually liable for the corporation's breach of contract. Wise v. Southern Pacific Co., 223 Cal. App. 2d 50, 35 Cal. Rptr. 659 (1953), aff'd on other grounds, 1 Cal. 3d 600, 83 Cal. Rptr. 202 (1970). Also see Golden v. Anderson, 256 Cal. App. 2d 714, 64 Cal. Rptr. 404 (1967).

In the Wise case the plaintiff sued his former employer for wrongful discharge and also sued his former co-employees for conspiracy to obtain his discharge. The Court of Appeal upheld demurrers to the complaint as to the individual defendants and stated:

Agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage. [Citations omitted.] This rule derives from the principle that ordinarily corporate agents and

employees acting for and on behalf of the corporation cannot be held liable for inducing a breach of the corporation's contract since being in a confidential relationship to the corporation their action in this respect is privileged. The inducement of the breach to be actionable must be both wrongful and unprivileged. (Citations omitted; emphasis added.)
Wise, 223 Cal App. 2d at 72-73.

In Gilmore's claim for breach of contract he has not made any allegation that the employees and officers, individually named in this suit, acted beyond the scope of their employment. The undisputed facts show clearly that these individuals acted only in the course of their employment, for and on behalf of the Program. Therefore, their actions were privileged and they cannot be held personally liable for any purported breach of the employment contract. Because Gilmore has not alleged that these individual defendants acted other than in the course and scope of their employment, nor set forth any facts showing otherwise, the trial Court's summary dismissal of his breach of contract claims against the defendants is proper.

RELIEF SOUGHT
and respectfully urge the Court of
rehearing in this case and grant the

affirmance of the lower Court's summary
judgment dismissing the breach of contract claims
of respondents, with prejudice, and an award of
costs pursuant to Rule 34, R. Utah Ct. App.
as the alternative, affirmance of the lower
summary judgment dismissing the breach of contract
claims against the respondents Hal J. Schultz, Robert E.
Black, Fred Geter, Richard Fields and Ann O'Connell,
and an award of their costs, pursuant to Rule 34, R. Utah
Ct. App.

CERTIFICATION

John K. Rice and Stephen W. Cook certify that this
petition for rehearing is presented in good faith and not
for delay.

DATED this 20 day of June, 1989.

John K. Rice
JOHN K. RICE
Attorney for Respondents

Stephen W. Cook
STEPHEN W. COOK
Attorney for Respondents

CERTIFICATE OF SERVICE

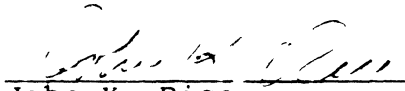
STATE OF UTAH)
 : ss.
County of Salt Lake)

JOHN K. RICE, being duly sworn, says:

That he served the attached RESPONDENTS' PETITION FOR
REHEARING upon:

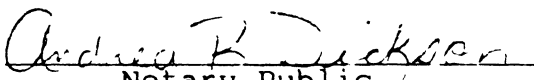
Nann Novinski-Durando
Mark S. Miner
4348 South Jupiter Drive
Salt Lake City, UT 84124

by placing a true and correct copy thereof in an envelope
and depositing the same, sealed, with first-class postage
prepaid thereon, in the United States Mail at Midvale,
Utah, on the 20th day of June, 1989.



John K. Rice

Subscribed and sworn to before me this 20th day of
June, 1989.



Notary Public

My Commission Expires:
January 28, 1991

Residing at Salt Lake County