

2008

Julie Ann Olson v. Utah Department of Health : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS

JULIE ANN OLSON,

Plaintiff/Respondent,

vs.

UTAH DEPARTMENT OF HEALTH,

Defendant/Petitioner.

Case No. 20080937

REPLY BRIEF OF PLAINTIFF/RESPONDENT

Gray

Interlocutory Appeal from an Order Denying a Motion for Summary
Judgment of the Third Judicial District Court, Salt Lake County, the
Honorable Joseph C. Fratto, Presiding

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UTAH COURT OF APPEALS

<p>JULIE ANN OLSON,</p> <p>Plaintiff/Respondent,</p> <p>vs.</p> <p>UTAH DEPARTMENT OF HEALTH,</p> <p>Defendant/Petitioner.</p>	<p>Case No. 20080937</p>
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TABLE OF CONTENTS

	<u>Page No.</u>
JURISDICTION	1
ISSUES PRESENTED, STANDARD OF REVIEW AND PRESERVATION	1
DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES	1
STATEMENT OF THE CASE	2
A. Nature of the Case and Disposition Below	2
B. Statement of Facts	4
SUMMARY OF ARGUMENTS	6
ARGUMENT	
I. THE TRIAL COURT PROPERLY RULED THAT THE REASSIGNMENT CONSTITUTES A DEMOTION EVEN AFTER THE MAY 2007 LETTER. THAT RULING SHOULD BE AFFIRMED	7
II. IF THE COURT DETERMINES TO GO BEYOND THE ISSUE OF “DISCIPLINARY” VS. “NON- DISCIPLINARY” TRANSFERS AND REVISIT DRAUGHON, THE COURT SHOULD AFFIRM THAT DECISION	11
CONCLUSION	15
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page No.</u>
<i>Arnold v. Grigsby</i> , 2008 UT App. 58, 180 P.3d 188, (Utah App. 2008)	8
<i>Draughon v. Dept. of Financial Institutes, State of Utah</i> , 1999 UT App. 42, 975 P.2d 935 (Utah App. 1999)	3, fn2; 11-12, 14-16
<i>Grappendorf v. Pleasant Grove City</i> , 2007 UT 84, 173 P.2d 166 (Utah 2007)	13
<i>Salt Lake City v. Salt Lake County</i> , 568 P.2d 738 (Utah 1977)	8
<i>Savage v. Utah Youth Vill.</i> , 2004 UT 102, 104 P.3d 1242 (Utah 2004)	14
<i>State v. Navaro</i> , 26 P.2d 955 (Utah 1933)	8
<i>State, ex rel. Z.C.</i> , 2004 UT 02, 104 P.3d 1242 (Utah 2004)	14
<u>Rules</u>	
Utah Rules of Appellate Procedure	
Rule 24(a)(7)	4, fn2

Statutes

Utah Code Annotated

Section 67-19-3.1(1) (Addendum A)	1, 9-10
Section 67-19-3.1 (2)	9
Section 67-19-3(7)(a)	3, 7, 13-14
Section 67-19-3(7)(b)(i)	8
Section 78A-4-103(2)(a) (2008)	1

JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(a) (2008), as well as an order granting petition for interlocutory appeal entered December 8, 2008. (R. 177).

ISSUE PRESENTED, STANDARD OF REVIEW AND PRESERVATION

Ms. Olson agrees that the standard of review for the issue presented on appeal is properly stated by the Utah Department of Health in its Appellate Brief. Ms. Olson also agrees that the issue presented for review was properly preserved. (Dept.'s App. Brf., pp. 2-3).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

In addition to the statutory provision identified by the Utah Department of Health and attached as Addendum “B” to its brief, the following provision is determinative:

Utah Code Ann. § 67-19-3.1(1) (Supp. 2008).

The full text of § 67-19-3.1 is attached as Addendum “A” to this brief.

STATEMENT OF THE CASE

A. Nature of the Case and Disposition below

This case arose from a disciplinary action, a demotion implemented against Ms. Olson by Appellant Utah Department of Health (“the Department”). The disciplinary action, effective September 25, 2006, demoted Ms. Olson from the Director of the Bureau of Managed Health Care to an assistant researcher.¹ On May 16, 2007, nearly 8 months later, and only four business days prior to an evidentiary hearing before the Career Services Review Board (“CSRB”) to which a grievant is entitled, the Department sent a letter to Ms. Olson purporting to rescind the demotion and simultaneously moved to dismiss the grievance. The CSRB therefore determined it no longer had jurisdiction to conduct the hearing, applying the Department’s reasoning that the reassignment no longer constituted a “demotion” grievable under the applicable rules. Ms. Olson appealed the CSRB decision to the Third District Court (“Trial Court”).

¹ The Department does not dispute that its action against Ms. Olson was a demotion, but argues that the action later evolved into something other than a demotion. Therefore, although Ms. Olson argues the transfer always was and still is a demotion, to avoid any unnecessary conflict in further briefing or oral argument, this brief will refer to the action as “the reassignment.”

The Department filed a motion for summary judgment before the Trial Court, arguing that the CSRB correctly determined it did not have jurisdiction over the grievance because the action taken pursuant to the May 16, 2007 letter no longer rendered the employment action a “demotion” under § 67-19-3(7)(a) of the Utah State Personnel Management Act (“the Act”). Utah Code Ann. § 67-19-3(7)(a), *et seq.* (Supp. 2008). In opposition to the Department’s motion, Ms. Olson argued that the reassignment still constituted a “demotion” even after the May 16 letter. The Trial Court properly adopted Ms. Olson’s argument and denied the motion for summary judgment. The case is now before this Court on an interlocutory appeal.

B. Statement of Facts ²

1. On July 27, 2006, Ms. Olson received a proposed disciplinary action in the form of a demotion (dated July 19, 2006) from the Department. (R. 96-97).

2. Prior to the July 27, 2006 letter, in more than 25 years of employment with the State of Utah, nearly 13 of which were for the Department, Ms. Olson had never so much as received a negative employee review. (R. 3).

3. On September 25, 2006, David Sundwall, M.D., Executive Director for the Department, issued a final decision formally instituting the demotion, demoting Ms. Olson from the Director of the Bureau of Managed

² Rule 24(a)(7) of the Utah Rules of Appellate Procedure provides that the facts section should include those facts “relevant to the issues presented for review.” U.R.A.P. 24(a)(7). The Department presents only one issue for review, whether the Trial Court properly determined that a “disciplinary” transfer is a demotion under the Act if it does not reduce the current wage. However, in the body of its brief, the Department also asks the Court to overturn its decision in *Draughon v. Dept. of Financial Institutions, State of Utah*, 1999 UT App. 42; 975 P.2d 935 (Utah App. 1999), which does not address the issue of whether a “disciplinary” transfer constitutes a demotion. (Briefed further *Infra*). Although it is outside the issue presented for review on appeal, in case this Court determines to address *Draughon*, Ms. Olson includes facts in her “statement of facts” relevant to that case.

Health Care to a Research Consultant, an assistant researcher, effective September 27, 2006. (R. 3).

4. Ms. Olson filed a Request for Agency Action as part of her grievance, pursuant to which an evidentiary hearing was ultimately scheduled for May 22 and 23, 2007. (R. 3-4).

5. On Wednesday, May 16, 2007, only four business days before her evidentiary hearing, the Department sent a letter purporting to rescind the demotion and simultaneously filed a Motion to Dismiss Ms. Olson's grievance, arguing that based on the letter, the CSRB no longer had jurisdiction to hear the grievance. (R. 30; 104-106).

6. The evidentiary hearing was cancelled and on June 7, 2007, Robert W. Thompson, CSRB Administrator, issued the final agency action underlying this case, adopting the Department's reasoning that the CSRB no longer had jurisdiction. (R. 8-16).

7. The action taken via the May 16, 2007 letter left Ms. Olson as an assistant researcher and did not restore her to the previous salary range that went along with the wage she earned in the position of Director of Bureau of Managed Health Care. (R. 119).

8. The salary range attached to the wage Ms. Olson earns in her current position both starts and ends at a lower salary than that attached to her previous position, which is the case even after the May 16, 2007 letter. (R. 120).

9. The disciplinary reasons for initiating the demotion remained intact even after the May 16 letter, as the sole reason for the Department's letter and related motion to dismiss was "based upon the cost to and disruption of [the] office involved in responding to [Ms. Olson's] grievance." (R. 30).

SUMMARY OF ARGUMENTS

- I. The Trial Court properly found that Ms. Olson's reassignment was a "demotion," even after the Department's alleged retraction of the demotion because even then, it remained the case that the reassignment was for disciplinary reasons. Therefore, the Trial Court's denial of the Department's summary judgment should be affirmed.
- II. Although it is irrelevant to the issue presented on appeal, the Department also raises the case of *Draughon v. Dept. of Financial Institutions, State of Utah*, 1999 UT App. 42; 975 P.2d 935 (Utah App. 1999). Nonetheless, if the Court chooses to address that case, it should be affirmed because that case serves the express legislative intent of, *inter alia*, providing for the fair administration of human resources.

ARGUMENT

I. THE TRIAL COURT PROPERLY RULED THAT THE REASSIGNMENT CONSTITUTES A DEMOTION EVEN AFTER THE MAY 2007 LETTER. THAT RULING SHOULD BE AFFIRMED.

The Trial Court properly ruled that because the disciplinary reasons for the reassignment remained in place even after the May 16 letter, the reassignment is still a “demotion” under the Act. The relevant provision reads:

- (a) “Demotion” means a disciplinary action resulting in a reduction of an employee’s current actual wage.
- (b) “Demotion” does not mean:
 - (i) a **nondisciplinary** movement of an employee to another position without a reduction in the current actual wage

U.C.A. § 67-19-3(7)(a) and (b)(i) (2006) (emphasis added).

Applying the plain language of subsection (b)(i), Julie’s reassignment is still a demotion in that it remains a “disciplinary,” as opposed to a “nondisciplinary” movement.³ Although the Department would have this Court ignore the term “nondisciplinary,” the Court must consider that term and presume the Legislature used it advisedly. *See Arnold v. Grigsby*, 2008 UT App. 58, ¶ 12; 180 P.3d 188, 191 (Utah App. 2008) (citations omitted) (court presumes Legislature used each word advisedly and each word is given effect). Moreover, the word “nondisciplinary” is a qualifying term, clearly qualifying the term “movement” and Courts give effect to qualifying terms when interpreting a statute. *See Salt Lake City v. Salt Lake County*, 568 P.2d 738, 741 (Utah 1977); *State v. Navaro*, 26 P.2d 955 (Utah 1933).

Here, Ms. Olson was reassigned for disciplinary reasons, which remains the case even after the May 16, 2007 letter. In fact, the May 16 letter makes clear that the discipline remained the basis of the

³ Should the Court determine that the plain language of the definition means what the Department contends it does, so as to include disciplinary transfers, exceptions to the plain language rule should be applied to adopt the definition as argued by Ms. Olson. Those exceptions are fleshed out under the second section of this brief. Therefore, although those exceptions are equally applicable to this section of the argument, if *arguendo* the Department’s definition was accepted as the “plain language,” to avoid duplicating arguments, they will not be briefed here.

reassignment and that the purported retraction of the demotion was done solely to avoid responding to her grievance. Specifically, the letter states: ***“This decision is based upon the cost to and disruption of our office involved in responding to your grievance.”*** R. 30 (emphasis added). Because the reassignment was a disciplinary, rather than a “nondisciplinary” movement, the reassignment is a “demotion” under the statute.

Moreover, the Department’s interpretation of “demotion” that would exclude disciplinary transfers from the definition fails to satisfy the Legislature’s specific goals set forth in § 67-19-3.1(2) of the Act, which require the definition to be interpreted according to identified principles including, but not limited to the ***“fair treatment of applicants and employees in all aspects of human resource administration.”*** U.C.A. § 67-19-3.1(1). The Legislature, through the Act, specifically requires courts to interpret all provisions of subsection (1) (which includes the provision that defines “demotion”) with this and other goals in mind, instructing: ***“[T]he principles in subsection (1) shall govern the***

interpretation and implementation of this chapter.” *Id.* (2) (emphasis added).

The Department’s proposed interpretation of “demotion” to exclude disciplinary transfers directly contradicts the principles specifically outlined by the Legislature. Specifically, defining “demotion” as the Department would define that term fails to provide for fair treatment of employees in the administration of human resources. Under the Department’s definition, an employee could be transferred as a means of discipline and as long as the hourly pay remained the same, the employee would have absolutely no avenue to grieve the discipline. In this case specifically, the Department’s definition of demotion, if accepted, will allow the Department to take an employee who has dedicated more than 25 years of her life to the State of Utah, stick her in a corner researching and essentially saying to her: You have no rights after all your years of dedication as a public employee. Just sit in your corner, do your research and keep to yourself.

Moreover, it can hardly be considered fair treatment in the administration of human resources if the definition of “demotion” can be used by the Department to cause a grievant to incur extensive time and

expense to no avail. On Wednesday, May 16, 2007, only four business days before her evidentiary hearing, the Department got the hearing cancelled by purportedly rescinding the demotion. By the time the hearing was cancelled, Ms. Olson had spent countless hours and incurred a significant amount of attorneys fees preparing for the hearing.⁴ Therefore, the Trial Court's ruling should be affirmed because determining that Ms. Olson's transfer was a demotion, even after the purported rescission, is consistent with express legislative intent, as well as the Legislatures instructions for construing the definition of "demotion."

II. IF THE COURT DETERMINES TO GO BEYOND THE ISSUE OF "DISCIPLINARY" VS. "NONDISCIPLINARY" TRANSFERS AND REVISIT *DRAUGHON*, THE COURT SHOULD AFFIRM THAT DECISION.

Draughon is inapplicable to the issue presented to this Court for review on appeal. *Draughon* does not address whether a transfer is a demotion if done for disciplinary, vs. nondisciplinary, reasons. Rather, that case addressed whether a transfer is a demotion if it strips the employee of

⁴ Ms. Olson is aware that attorneys fees are not recoverable in a grievance. However, there is no better example of the unfair administration of human resources. It is patently unfair to allow Ms. Olson to expend such extensive time and money only to pull the rug out from under her four days before the hearing.

more than immediate pay. *Draughon*, 1999 UT App. 42, ¶¶ 9-10; 975 P.2d at 938. Although that question was briefed below, the Court did not rule on it and the Department did not present that as an issue for review in its statement of the issue on appeal. (Dept.'s App. Brf., p. 2). In fact, the Trial Court specifically stated in its ruling that *Draughon* was not applicable to the case at hand. R. 170. However, should the Court choose to revisit *Draughon*, that case should be affirmed.

In *Draughon* this Court determined that a “demotion” of a public employee is an involuntary transfer to a position with less status, fewer responsibilities, a lower pay range and which results in commensurately less benefits. *Id.* That definition should be affirmed for two reasons. First, despite the Department’s contention to the contrary, the reassignment stripped Ms. Olson of the current actual wage she earned as a bureau director. The salary range attached to the wage Ms. Olson earns in her current position both starts and ends at a lower salary than that attached to her previous position, which is the case even after the May 16, 2007 letter. Julie’s maximum compensation as a Research Consultant is much

less than a bureau director, thus depriving her of the competitive compensation she had in the position.

Applying “current actual wage” as including aspects of an employee’s income other than just hourly pay, serves the legislative goal of providing for “equitable and competitive compensation.” The Department’s effort to separate what attaches with Ms. Olson’s wage fails to serve the Legislature’s express intent and further fails to consider the entire statutory scheme in harmony. *Grappendorf v. Pleasant Grove City*, 2007 UT 84, ¶ 9; 173 P.3d 166, 169 (Utah 2007) (language of any specific statutory provision should be read in harmony with other provisions in same statute) (citations omitted).

Second, even if, *arguendo*, the Department was correct that the plain language of current actual wage is synonymous with current hourly pay and nothing more, the Court should decline to apply the plain language rule. The Utah Supreme Court has made clear that there are exceptions to the plain language rule. Specifically, the Supreme Court has instructed:

Normally, where the language of a statute is clear and unambiguous, our analysis ends; our duty is to give effect to that plain meaning. However, “[a]n equally well-settled caveat to the plain meaning rule

states that a court should not follow the literal language of a statute if its plain meaning works an absurd result.”

State ex rel. Z.C., 2007 UT 54, ¶ 11; 165 P.3d 1206, 1209 (Utah 2007) (citations in original) (quoting *Savage v. Utah Youth Vill.*, 2004 UT 102, ¶ 18; 104 P.3d 1242, 1248 (Utah 2004)). Courts should also disregard the plain language of statutory provision if it is unreasonably confused, inoperable or in blatant contravention of the express purpose of a statute. *Id.* (citation omitted). As detailed above, the Department’s definition is in blatant contravention of the express purposes of the Act.

Moreover, applying the plain language rule to the definition of demotion as the Department argues it should be defined, would lead to absurd results. As detailed above, this would permit the Department to discipline an employee, in this case a bureau director, by sticking her in front of a computer to research, stripping her of everything she has worked for in the past 25 years, essentially telling her she has no rights and should just keep to herself.

In a further effort to get *Draughon* overturned, the Department argues that the Legislature drafted the current definition of “demotion” to overrule

that decision. The Department provides absolutely no legislative history or any other evidence to support that argument; it is mere speculation. Notably, the relevant provision was not even amended until 2006, seven years after *Draughon*. Therefore, there is no evidence that the definition was an attempt by the Legislature to overturn *Draughon*. In fact, to the contrary, the *Draughon* decision is consistent with the specific Legislative intent stated in the Act, so the Legislature would obviously not want that case overturned.

In sum, affirming the *Draughon* definition of “demotion” avoids the absurd results discussed above and serves the express Legislative purpose of the entire statutory scheme. Therefore, if the Court in fact revisits *Draughon*, it should affirm that decision.

CONCLUSION

Pursuant to the statutory definition, Ms. Olson’s reassignment was and still is a “demotion” because it was done for disciplinary reasons, which remained the case even after the May 16, 2007 letter. On that basis alone, the Trial Court’s ruling should be affirmed. In addition, if the Court determines to revisit *Draughon*, that decision should be affirmed.

Overturing *Draughon* would lead to absurd results and would fly in the face of specifically identified legislative goals. Therefore, the Trial Court's denial of the Department's Motion for Summary Judgment should be affirmed and the case remanded for entry of an order transferring the case back to the jurisdiction of the CSRB.

DATED this 6th day of March, 2009.

KIPP AND CHRISTIAN, P.C.

A handwritten signature in cursive script, reading "Nan T. Bassett", written over a horizontal line.

NAN T. BASSETT

Attorney for Julie Ann Olson

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of March, 2009, a true and correct copy of the foregoing **Reply Brief of Plaintiff/Respondent** was served, via hand delivery, upon the following:

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ADDENDUM A

Westlaw

Page 1

U.C.A. 1953 § 67-19-3.1

West's Utah Code Annotated Currentness

Title 67. State Officers and Employees

Chapter 19. Utah State Personnel Management Act (Refs & Annos)

→ § 67-19-3.1. Principles guiding interpretation of chapter and adoption of rules

(1) The department shall establish a career service system designed in a manner that will provide for the effective implementation of the following merit principles:

- (a) recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment;
- (b) providing for equitable and competitive compensation;
- (c) training employees as needed to assure high-quality performance;
- (d) retaining employees on the basis of the adequacy of their performance and separating employees whose inadequate performance cannot be corrected;
- (e) fair treatment of applicants and employees in all aspects of human resource administration without regard to race, color, religion, sex, national origin, political affiliation, age, or disability, and with proper regard for their privacy and constitutional rights as citizens;
- (f) providing information to employees regarding their political rights and the prohibited practices under the Hatch Act; [FN1] and
- (g) providing a formal procedure for processing the appeals and grievances of employees without discrimination, coercion, restraint, or reprisal.

(2) The principles in Subsection (1) shall govern interpretation and implementation of this chapter.

CREDIT(S)

Laws 2000, c. 322, § 1, eff. July 1, 2000; Laws 2005, c. 181, § 23, eff. July 1, 2006; Laws 2006, c. 139, § 25, eff. July 1, 2006.

[FN1] See 5 U.S.C.A. § 1501 et seq.

U.C.A. 1953 § 67-19-3.1, UT ST § 67-19-3.1

Current through 2008 Second Special Session, including results from the November

U.C.A. 1953 § 67-19-3.1

2008 General Election.

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