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Harold Fox v. J. K. Piercey : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

HAROLD FOX,
Plaintiff and Respondent,

vs.

J. K. PIERCEY, Chief of the Fire
Department of Salt Lake City,
SALT LAKE CITY, a municipal
corporation,

Defendants and Appellants.

Case No. 7533

APPELLANT'S BRIEF

STATEMENT OF FACTS

These same parties were before this court in an original proceeding to review the action of the Civil Service Commission of Salt Lake City in setting aside the resignation of plaintiff Harold Fox from the Fire Department of Salt Lake City. The decision of the court in that proceeding is reported in 208 P. 2d. 1123. After that decision was handed down, plaintiff brought the

present action in the District Court of Salt Lake County to set aside and avoid his resignation from the Salt Lake City Fire Department.

On August 6, 1948, plaintiff delivered to defendant J. K. Piercey, Chief of the Salt Lake City Fire Department, his resignation in writing, effective immediately (see Exhibit "A" received in evidence page 40), reading as follows:

"Effective this date I hereby tender my resignation from the Salt Lake City Fire Department."

The Next Day he mailed to Chief Piercey and Salt Lake City a letter purporting to withdraw his resignation, which letter was received August 9, 1948. This letter is Exhibit "B" (page.....), and reads as follows:

"On August 6th I tendered to you my resignation from the Salt Lake City Fire Department.

"This is to inform you that I hereby withdraw my resignation from the Salt Lake City Fire Department and request that you disregard my letter of resignation dated August 6, 1948."

No mention of duress or over reaching in the procurement of the resignation is mentioned in the letter of withdrawal. The resignation is referred to as being a regular resignation, otherwise affective unless withdrawn before acceptance.

In his amended complaint, plaintiff alleges, as the basis for setting this resignation aside as follows:

“That on the 6th day of August, 1948 defendant J. K. Piercey summoned plaintiff into his office and there stated to plaintiff that unless he resigned his position as a fireman first grade in the Salt Lake City Fire Department that he would blast and smear plaintiff in every newspaper in Salt Lake City; said defendant further stated to plaintiff that he would make it so miserable that plaintiff could not secure a job in said city and that if plaintiff did not resign his position said defendant would discharge him and give him more publicity than he had ever wanted in his life.”

In paragraph III of said complaint, plaintiff alleges:

“That the aforementioned threats by defendant J. K. Piercey created in plaintiff great fear for his own economic welfare and the economic welfare of his family, and plaintiff's fear was of such intensity that plaintiff involuntarily and while under the influence of the duress and threat of defendant J. K. Piercey signed a letter of resignation effective immediately, which had been prepared for his signature by said J. K. Piercey and delivered the same to J. K. Piercey.”

Plaintiff's complaint seeks to avoid the resignation because of specific threats made by Chief Piercey to blast plaintiff in every newspaper in Salt Lake City and to make it so miserable for him that he could not secure a job in said City. According to his complaint it was these threats of what Mr. Piercey would do that produced the

fear in plaintiff's mind, that overcame his will and made his act of resigning involuntary, under duress.

However, in its Findings of Fact, the Trial Court specifically found that defendant Piercey did not state to plaintiff that Piercey "would blast and smear plaintiff in every paper in Salt Lake City," nor did he state that he, Piercey, "would make it so plaintiff could not secure a job in Salt Lake City." It will thus be seen that the court finds that the very threats relied upon by plaintiff as the basic elements that produced the fear and duress that caused him to act involuntarily in submitting his resignation in fact were never made.

There is no dispute as to the fact that at about 11:00 A.M. on August 6, 1948, Fox was summoned by Chief Piercey to the latter's office. There were present Chief Piercey, Assistant Chiefs White, Smith, Thompson and Ward and the Plaintiff. Nor is there any substantial dispute as to the reason for Fox being summoned to appear (P. 52-53). He had been placed in jail the night of August 5, 1948, charged with being drunk. He had had an altercation at his home with a neighbor lady, slapping her, and his son had fired a 22-caliber gun in an attempt to stop the fracas. His wife had phoned for the police (P. 67), and he was taken to the jail. Because of this situation Chief Piercey asked him to report at his office. There his past record and the 30 demerits which had been given him previously were discussed with him as well

as the incidents of the night before. In detailing what was said there plaintiff's testimony is in harmony with the allegations of his complaint. He testified (P. 37) that Piercey asked if he was going to resign. He answered, "No, I wasn't going to resign." Piercey then said:

"He told me I had to work somewhere; that I wasn't going to work there no more, and if I didn't resign I was going to be discharged, and I told him I wouldn't resign." "He told me if I didn't resign he was going to blast me and make it miserable for me to find a job. I told him I wouldn't resign."

He persisted in his refusal to resign and was told to be back at 1:30 for his discharge. He came back and was handed a letter of discharge by Assistant Chief Ward at the request of Chief Piercey, after the latter had explained the rules of the Civil Service Commission relating to discharge (P. 38). Fox took the letter of discharge and left the office. After leaving the office Fox changed his mind. He testified:

"Rather than have Chief Piercey carry out his threats, the best thing to do was to resign and save face with the family." (P. 39). So Fox returned and asked if it was too late to resign and if he (Piercey) would retract his stories he was going to put in the newspapers if Fox resigned. Piercey said he would try and have his secretary draw up a resignation (Exhibit "A").

When asked by his counsel what the primary consideration was in signing the resignation, Fox replied (P. 40):

“I didn’t want him (Piercey) to carry out his threats on me.”

Q. “By ‘threats’ what do you mean Mr. Fox?

A. “He said he would blast me and smear me all over the newspapers and if he did, it would be difficult in obtaining employment.”

On cross-examination plaintiff testified that his will to resist was not overcome at the time he left the morning meeting on August 6th (P. 56), even though it was at that meeting that the so called threats were made, according to his testimony. He stated he would fight the case rather than resign. At the afternoon appointment he accepted the letter of discharge and then declared he would resist the discharge. A short time later he returned to the Chief’s office and told the Chief:

“If he wouldn’t put that story in the newspapers that he would resign.” (P. 57)

He further testified that it was fear of what might be published in the newspapers that prompted his resignation (P. 62), although anything defendant Piercey might cause to be published to smear him would be lies (P. 59). About 7 or 8 hours after submitting his resignation (P. 61) he decided to withdraw it. His fear of adverse publicity then was allayed. When asked what was

in his mind that convinced him he need not fear adverse publicity, he stated:

“He, (Piercey) withdrew his discharge and I had a perfect right to withdraw my resignation, which would give me a chance to have my job back.”

Q. “You figured that now, since you had resigned he wouldn’t publish anything, and you could then safely withdraw your resignation, is that what you mean?”

A. “That is right.”

It is apparent from this testimony that plaintiff was not afraid of the consequences of a mere discharge and that it was the threats which he claims Mr. Piercey made of smearing him and making it miserable for him to obtain employment that overpowered his will and made his resignation involuntary. As already pointed out, however, the Trial Court specifically found that the Chief made no such threats and so must have disbelieved all that Mr. Fox testified to on that subject.

Since Mr. Fox’s testimony was found to be unworthy of belief it becomes necessary to examine the testimony of Chief Piercey and the four Assistant Chiefs as to what was said at the morning meeting on August 6th relative to the effect a discharge would have on the matter of adverse publicity and Fox being unable to procure employment.

Chief Piercey testified (P. 69-70) that at the morning meeting he informed plaintiff that it was the decision

of the Board of Chief officers that plaintiff should be discharged; that plaintiff would have to work some place and if he resigned it would not be necessary to present the case to the Civil Service Commission. The procedure prescribed by the Civil Service rules on discharge was reviewed and the Chief stated he would have to specify and give charges upon which a discharge would be based. *The newspapers were never mentioned.* The Chief, and all 4 Assistant Chiefs (Thompson P. 107, Ward P. 124, Smith P. 136, White P. 147) denied that anything was said about blasting plaintiff in the newspapers or making it miserable for him to get a job. The Chief told Fox that if he were discharged the facts would be brought out and would be public property (P. 84). but the Chief himself would not inform anyone as to the reasons for discharge, except the Civil Service Commission. The record would be public and would be kept and persons could come and examine it if they decided to investigate the matter (P. 85-86). If he resigned the record would show he had resigned.

- Q. "In the discharge situation you would tell people he had been discharged for misconduct?"
- A. "No, I wouldn't tell them that unless they came and investigated it."
- Q. "Didn't you tell Mr. Fox that would be revealed to persons inquiring of his employability?"
- A. "No, I didn't. I told him that would be revealed to the Civil Service Commission."

This constitutes the testimony of Chief Piercey.

Assistant Chief Thompson testified (P. 106) that Chief Piercey “mentioned to him (Fox) the thought of resigning in preference to being discharged, because of the thought that being discharged, and if he took it to the Civil Service Commission, it would, of necessity, mean a public hearing, and the charges would be public and there would be a lot of mess about it. It was in a very kind way that it was put (P. 117), in a way of kindness; that the facts of the case would be public and Fox would have to answer to the charge, at a public hearing and we would have to prefer the charges. It would be difficult for him to get employment after discharge.”

Assistant Chief Ward testified (P. 124):

“Fox asked Chief Piercey what would happen if he didn’t resign and the Chief informed him that he would be discharged, and reviewed his rights with the Civil Service Commission if he was discharged. (P. 125-26) The Chief said he would have to prefer charges and if Harold elected to fight them in Civil Service he would have to substantiate his charges and it would be a public hearing, that the Civil Service hearing would be a public hearing. His decision was that he would not resign. (P. 129) He (Piercey) did say that when people would call he would have to say, of necessity, that he (Fox) was discharged; and then of course, maybe they would ask the reason why he was discharged and then he would have to tell them why he was discharged. The record was public property. If he resigned the record would show he resigned.”

Assistant Chief Smith testified, in reply to a question as to what was said concerning the effect of a discharge on plaintiff's ability to get a job in this community (P. 140):

“Harold asked the question, if he didn't resign and he was discharged what the difference would be, and the Chief explained to him that the department records are kept on each man and if he resigns the only information the card would carry is that he had resigned; but if he were discharged, then of course, the card would carry the record he was discharged and why he was discharged.

Q. “And Chief Piercey told him there would be a public hearing, and there would be publicity given to his action, isn't that true?

A. “I don't remember that, no sir. I remember he said if he resigned there would be no publicity attached to it, that is all there would be to it just a resignation.”

Assistant Chief Ward testified:

Piercey told Fox (P. 147-48): “Well, as far as dismissal was concerned that it would be pretty much a matter of public knowledge of what went on, especially if Harold wanted to fight a decision, that there would be a lot of court action. On the other hand, if he would resign, he would be spared all that. He made particular reference to the fact that Harold would have to have work of some kind and as he was seeking a position somewhere else these people would call the Chief's office for a recommendation, or his record on the Fire Department. That with the resignation he would

have a clear case that the Chief would simply tell them he had resigned from the Fire Department. On the other hand, if he was discharged, then he would probably have to answer the questions as to reason for dismissal. In other words, Chief Piercey told Mr. Fox if he resigned, his chances for getting employment were much better than if he were discharged as a result of the things Chief Piercey would have to tell the people when they called regarding Mr. Fox.”

It should be remembered that the alleged threats which plaintiff charges Chief Piercey made, and which, according to plaintiff's own testimony, were the controlling factors in overcoming his will and filling him with fear, were made, according to plaintiff's testimony, at the meeting of 11:00 A.M. Fox was told to come back at 1:30 and receive his discharge. At that time a letter of discharge was handed him and accepted by him. He shook hands with Assistant Chief Ward and White and departed. Sometime later he came back, and, according to his own testimony above referred to, asked if it was too late to resign. As to what was said and done at that time the testimony of Chief Piercey and the 2 Assistant Chiefs is pretty much in harmony with Fox's testimony. Chief Piercey testified (P. 73):

“He (Fox) was invited in and he said, ‘Is it too late to resign?’ I said, ‘No’ then he said that he would like to resign. I asked if he wanted any help, or if he wanted to write his resignation out. It was conveyed to me by Mr Fox that he would like some help. I asked the secretary to come in. They left the office and in a few moments

Fox returned with his letter of resignation. He handed me his resignation. I read the resignation. I tore up the discharge.”

Assistant Chief Ward testified (P. 127) that when Fox came back to the Office after receiving the letter of discharge, he said:

“Have you sent that letter to the Civil Service Commission yet?” The Chief said, ‘No.’ And he said, ‘Is it too late to resign?’ And the Chief said, ‘No.’ And at that time he offered to resign rather than to keep the discharge.”

The secretary assisted him at his request in writing up the letter of resignation. He handed it to Chief Piercey and the latter tore up the letter of discharge.

Assistant Chief White testified (P. 145):

“A short time later he (Fox) came back and wanted to know if it was too late to resign, if the papers had gone down. The Chief told him, ‘No.’ He then asked permission to resign.”

He was asked if he wanted help and upon his saying he would, the secretary was called and the 2 of them went into the outer room. A little later Fox came back with the resignation, which the Chief accepted. Then Fox asked about getting back his bail money at the City jail. The Chief sent White with Fox to the Prosecutor’s office and there Fox was released. Fox there excused himself and said, “Now I have decided to resign, I had better call my Attorney, I better let him know.” And he left Chief White and went to the phone.

The trial court in paragraph II of its Findings of Fact found:

“That at the time of the signing of said letter of resignation plaintiff was frightened and alarmed and under the influence of fear, duress and coercion caused and created by the statements of defendant Piercey concerning the detrimental effect that a discharge would have upon plaintiff’s opportunity for employment and the detrimental publicity that would probably result from such a discharge; that said letter was involuntarily given by plaintiff Fox while under the aforementioned influences and while frightened and in great fear for his own and the economic welfare of his family.”

The Trial Court made the following conclusion of law:

“That the letter of resignation of August 6, 1948, was obtained by duress and coercion from plaintiff and said letter of resignation was involuntarily signed by plaintiff while he was under the influence of coercive statements made by defendant J. K. Piercey, Chief of the Salt Lake City Fire Department.”

STATEMENT OF POINTS

The following are the points upon which appellants intend to rely for a reversal of the judgment of the Trial Court.

I

THE PLAINTIFF FAILED TO PROVE THE ELEMENTS ALLEGED AND RELIED UPON BY HIM IN HIS COMPLAINT AS CONSTITUTING THE DURESS AND COERCION THAT OVERCAME HIS FREEDOM OF MIND AND ACTION AND PRODUCED THE FEAR THAT RESULTED IN AN INVOLUNTARY RESIGNATION.

II

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE TRIAL COURT, RELATING TO DURESS PRACTICED UPON PLAINTIFF BY DEFENDANT PIERCEY, ARE NOT BASED UPON THE FACTORS THAT PLAINTIFF HIMSELF ASSERTED AND RELIED UPON, IN HIS COMPLAINT AND BY HIS EVIDENCE, AS PRODUCING LEGAL DURESS, BUT ARE FACTORS THAT THE COURT ITSELF INJECTED AS AMOUNTING TO LEGAL DURESS, WITHOUT THERE BEING ANY EVIDENCE THAT SUCH FACTORS DID, IN FACT, HAVE SUCH AN INFLUENCE, UPON PLAINTIFF'S MIND, AS TO DESTROY PLAINTIFF'S POWER OF INDEPENDENT VOLUNTARY ACTION IN SUBMITTING HIS RESIGNATION.

III

THE UNCONTRADICTED EVIDENCE DOES NOT SUPPORT THE FINDINGS OF FACT OR CONCLUSIONS OF LAW OR THE JUDGMENT.

ARGUMENT

I

THE PLAINTIFF FAILED TO PROVE THE ELEMENTS ALLEGED AND RELIED UPON BY HIM IN HIS COMPLAINT AS CONSTITUTING THE DURESS AND COERCION THAT OVERCAME HIS FREEDOM OF MIND AND ACTION AND PRODUCED THE FEAR THAT RESULTED IN AN INVOLUNTARY RESIGNATION.

In the statement of facts we quoted the allegations of plaintiff's complaint alleging the elements of duress relied upon by him to set aside his resignation. He alleged that Chief Piercey threatened, unless plaintiff resigned, "to blast and smear plaintiff in every newspaper in Salt Lake City," "and that he would make it so miserable that plaintiff could not secure a job in said City," "that if plaintiff did not resign his position defendant would discharge him and give him more publicity than he ever wanted in his life." He further alleged that these threats created in plaintiff such great fear for the economic welfare of himself and family that he involuntarily signed the letter of resignation while under the influence of the duress and threat of Piercey.

The court specifically found, however, contrary to the allegations of the complaint. It found that Piercey did not threaten to blast and smear plaintiff in every newspaper in Salt Lake City nor did he threaten to make it so plaintiff could not secure a job in Salt Lake City.

There is no evidence anywhere in the record that Piercey threatened to give plaintiff "more publicity than he had ever wanted in his life." It is apparent, therefore, that the plaintiff did not prove a single element relied upon by him as having produced the fear that overcame plaintiff's ability to act as a free agent such as would render his act of resignation involuntary.

With respect to these allegations, all that was proved, or found by the court, was that Piercey told him he would be discharged unless he resigned. And in this regard there is neither allegation nor proof, nor is it found by the court, that being given the alternative of resigning or being discharged had any effect to produce fear in plaintiff's mind. Instead the court found that Piercey "informed plaintiff that a discharge would be accompanied by detrimental publicity and would seriously and detrimentally affect plaintiff's opportunities for obtaining employment in Salt Lake City and vicinity . . . that at the time of signing said letter of resignation plaintiff was frightened and alarmed under the influence of fear, duress, and coercion caused and created by the statements of defendant Piercey concerning the detrimental effect that a discharge would have upon plaintiff's opportunities for employment and the detrimental publicity that would probably result from such a discharge."

In these Findings there is not the slightest implication of any threat by Piercey. Plaintiff would be, and was, as fully aware as Piercey concerning the natural effects that would flow from his being discharged in the

way of publicity and the effect of a discharge for cause on his opportunities for finding other employment. We reiterate, plaintiff himself clearly indicated, both in his pleading and in his evidence, his fear and its involuntary influence arose solely and entirely out of and because of the threats he alleged and testified defendant Piercey made, namely: to take personal action, to use the newspapers to blast and smear, to see to it that plaintiff did not secure employment elsewhere. Without those threats there could be no fear, no involuntary action. And the court finds there were no such threats. This is the equivalent of finding, to say the least, that plaintiff was mistaken about any such threats having been made and if the threats in fact were not made defendant Piercey could not be charged with having practiced duress, even though plaintiff mistakenly thought the threats had been made. This finding is also equivalent to a finding that plaintiff did not allege or testify to the truth on this most important issue. It hardly seems possible that plaintiff could have arrived at the conclusion that Piercey had made these threats by mistaking or misunderstanding what was said by Mr. Piercey. And yet the court finds the plaintiff was full of fear when he signed his resignation. This is only an assumption on the part of the court. It is not plaintiff's position either by allegation or proof. And to determine whether plaintiff was laboring under duress, the court is not at liberty to inter-

pose its ideas as to what might or did produce fear sufficient to produce duress in the plaintiff. It is bound to look to the effect on the plaintiff alone, even though the same circumstances might be sufficient, if relied upon, to produce duress over some other person and the facts indicate such duress in fact obtained.

The rule, in this regard, is well stated in 17 *Amer. Jur.* under Duress And Undue Influence, page 884, Section 11 as follows:

“There is no legal standard of resistance with which the person acted upon must comply at the peril of being remediless for a wrong done to him, and no general rule as to the sufficiency of facts to produce duress. The question in each case is, was the person so acted upon by threats of the person claiming the benefit of the contract, for the purpose of obtaining such contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract, thereby obtained? Hence, under this theory duress is to be tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim. The means used to produce that condition, the age, sex, state of health, and mental characteristics of the alleged injured party, are all evidentiary, merely, of the ultimate fact in issue, of whether such person was bereft of the free exercise of his will power. Obviously what will accomplish this result cannot justly be tested by any other standard than that of the particular person acted upon. His resisting power, under all the circumstances of the situation, and not any arbitrary standard, is to be considered in determining whether there was duress.”

II

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE TRIAL COURT, RELATING TO DURESS PRACTICED UPON PLAINTIFF BY DEFENDANT PIERCEY, ARE NOT BASED UPON THE FACTORS THAT PLAINTIFF HIMSELF ASSERTED AND RELIED UPON, IN HIS COMPLAINT AND BY HIS EVIDENCE, AS PRODUCING LEGAL DURESS, BUT ARE FACTORS THAT THE COURT ITSELF INJECTED AS AMOUNTING TO LEGAL DURESS, WITHOUT THERE BEING ANY EVIDENCE THAT SUCH FACTORS DID, IN FACT, HAVE SUCH AN INFLUENCE, UPON PLAINTIFF'S MIND, AS TO DESTROY PLAINTIFF'S POWER OF INDEPENDENT VOLUNTARY ACTION IN SUBMITTING HIS RESIGNATION.

The point relied on under this subdivision II is closely allied with point I just discussed, and much that is written under I is applicable here, including the excerpt from Amer. Jur. Before proceeding further we deem it advisable to determine what constitutes "duress". This court, in *Ellison v. Pingree*, 64 U. 468, 231 P. 827 stated: "What constitutes duress is so well and clearly stated in 12 C. J. P. 396, Section 310, that we here reproduce and adopt the statement as the law upon the subject. It is there said:

'Duress is that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind of a person of ordinary firmness. It consists not merely in the

act of imprisonment or other hardship to which the party was subjected, but in the state of mind produced by those circumstances, and in which the act sought to be avoided was done. Of course, the agreement must have been entered into because of the imprisonment, or of fear of the threatened injury or imprisonment, otherwise there is no duress. Hence duress will not ordinarily invalidate a contract entered into after opportunity for deliberate action. Duress by mere advice, direction influence, and persuasion is not recognized in law. Nor can a charge of legal duress be based on mere vexation and annoyance, mere pecuniary distress, a threat to injure one's credit, or the refusal to surrender property on which one has a lien.' "

The court goes on to quote with approval from 9 R. C. L. page 717, Section 7 as follows :

“ ‘It is generally held, however, that the threat must be of such a nature and made under such circumstances as to constitute a reasonable and adequate cause to control the will of the threatened person and must have that effect, and the act sought to be avoided must be performed by the person while in that condition; and that an act, such, for instance as the voluntary and free acknowledgment of a deed, subsequent to the time when the threats were employed, will not be considered as having been done under duress. If, however, the threats were long continued, and the act which it is sought to avoid was done such a short time thereafter as to indicate that the mind of the person was still under the influence of the threats, it has been held that this will constitute an act done under duress. The mere fact that a

person is in fear of some impending peril or injury, or in a state of mental perturbation at the time of doing any act, is not sufficient ground for holding that the act was done under duress; nor can there be duress per minas from mere advice, direction, influence or persuasion.' ”

We quote the following questions asked of plaintiff by his counsel and his answers thereto. (P. 40):

Q. “What was your primary consideration in the signing of this resignation on that occasion, in your mind? What was uppermost in your mind?”

A. “I didn’t want him to carry out his threats on me.

Q. “By ‘threats’ what do you mean, Mr Fox?”

A. “He said he would blast me and smear me all over the newspapers; and if he did, it would be difficult in obtaining employment.

Q. “Mr. Fox, did you have any other reason for signing this resignation, other than the threats and statements Chief Piercey had made to you there that morning?”

A. “I did not.”

The threats and statements of defendant Piercey, here referred to, could only mean the threats and statements plaintiff testified were made that morning. Those threats and statements are contained in the testimony just quoted and in testimony previously given as to what

this Piercey had said to him that morning. This latter testimony is as follows (P. 37-38):

Q. "What did he (Piercey) say to you, Mr. Fox?

A. "He told me to resign. He asked me if I was going to resign. I told him no, I wasn't going to resign.

Q. "Then what did he say to you?

A. "He told me I had to work somewhere; that I wasn't going to work there no more, and if I didn't resign I was going to be discharged and I told him I wasn't going to resign.

Q. "Was there any further conversation between you and Chief Piercey there at his office on this morning?

A. "Yes. He told me if I didn't resign, he was going to blast me and make it miserable for me to find a job. I told him I wouldn't resign.

Q. "Then, did any of the other chiefs, while you were there, make any comment to you, or enter into the conversation?

A. "I think he asked one of them — asked the chiefs if they didn't think it would be better if I didn't resign, and they said yes, it would be better if I resigned.

Q. "Then what occurred, Mr. Fox?

A. "I just told him I wouldn't resign.

Q. "What occurred in the office after that?

A. "He told me to be back at 1:30.

Q. "Did you then leave?

A. "I then left."

The foregoing is all of the testimony of plaintiff as to what was said by Chief Piercey or others. Plaintiff himself testified that there was no other reason for his signing the letter of resignation than the threats and statements above quoted. But the court found that defendant never made the threats. The only statement made by Piercey, not involving threats of publicity and difficulty in securing other employment, was that if plaintiff did not resign he would be discharged. But plaintiff neither claimed nor proved that that statement created any fear in him or overpowered his free will and judgment. Furthermore, the court did not find that the mere alternative of resigning or being discharged gave rise to such fear in plaintiff's mind as to amount to duress. It found, rather, that it was the statements of Piercey concerning the detrimental effect that a discharge would have upon plaintiff's opportunities for employment and the detrimental publicity that would probably result from a discharge that caused plaintiff to become so frightened and alarmed that he did not act as a free agent in signing his resignation. We submit that such a finding is wholly gratuitous. The plaintiff did not so allege, nor did he so testify, nor is there any evidence in the record that would justify such a conclusion. Plaintiff testified that his fear arose solely from the threat made by Piercey to smear and blast him in the newspaper and to make it so miserable that plaintiff could not get employment. We submit, therefore, that the court has attempted to interpolate a new and different source of fear unsustained by the testimony of Mr.

Fox, or any other testimony, and has used such new source of fear as the basis for concluding that plaintiff was acting under duress when he signed his resignation.

The statements found by the court to be the fear-producing statements made by defendant Piercey contained no threat; they contained nothing that plaintiff was not fully cognizant of. They were only defendant Piercey's conclusions as to what would result and fall within the category of mere advice, direction, influence or persuasion, as to which there can be no duress, as stated in the quotation from R.C.L. quoted in *Ellison v. Pingree, Supra*.

III

THE UNCONTRADICTED EVIDENCE DOES NOT SUPPORT THE FINDINGS OF FACT OR CONCLUSIONS OF LAW OR THE JUDGMENT.

We have demonstrated that plaintiff failed to prove the duress charged by him and that the court, to find duress, had to adopt a position not relied upon by plaintiff either in his pleading or in his testimony. We shall now consider whether the record as a whole sustained the court's findings of duress and its conclusion of law that plaintiff's resignation was not his voluntary act.

We submit that the Findings of Fact, on their face, show that no duress, such as would vitiate plaintiff's resignation, was practiced upon plaintiff by defendant Piercey. In the absence of any threatened action by

Piercey relative to influencing unfavorable publicity, whatever publicity would result would depend entirely upon what the newspapers might choose to publish. Fox was in as good a position as the Chief, or perhaps better, to guess what the newspapers would do. He would certainly be in possession of all of the facts concerning his misconduct while in the employ of the Fire Department. Certainly he could not assume falsehoods would be published or that the newspapers would take a position adverse and detrimental to his interests. There could be, therefore, no compulsion or duress arise out of a mere statement by Piercey that detrimental publicity would result from a discharge, a mere matter of opinion only, entirely relative, being without any specification as to the nature or extent of the source of the expected publicity. Under the definition of duress, heretofore quoted, we submit that the findings of the court show on their face that no duress was practiced by defendant Piercey and that he made no threats of doing anything detrimental to the plaintiff other than to inform plaintiff that he could no longer remain in the employ of the Fire department.

Looking at the record as a whole we further submit there is not sufficient evidence to sustain a finding of duress or a conclusion of law that plaintiff's resignation was not voluntarily given. The question here is not whether a threat of discharge would, as a matter of general application, be sufficient to produce duress. The question of duress here involved is to be determined by considering, not general principles, but the mind and resis-

tive power of the particular plaintiff and the evidence he himself produced to show the overcoming of his free agency and power to act voluntarily. If, in fact, he were not overcome by the statements of defendant Piercey, then there would be no duress, regardless of what might be considered duress in any other case.

The evidence is without dispute that it was at the 11:00 A.M. meeting that plaintiff was informed he would be discharged and was given the opportunity to resign. It was at this meeting that plaintiff said the threats that caused his fear were made. It was likewise at this meeting that defendant Piercey explained to plaintiff that if he were discharged and he resisted by an appeal, Piercey would then have to advise the Civil Service Commission of the specific charges; that a public hearing would be held and testimony would be given to substantiate the charges. It was at this meeting, also, that the Chief pointed out to plaintiff that if he were discharged and people should inquire as to plaintiff's former connection with the Fire Department, the record, being public, could be investigated by those interested. According to Mr. Fox, he stoutly and resolutely refused to resign and stated he would fight the case. He was told to be back at 1:30 and his discharge would be ready. He came back and received and accepted the letter of discharge after defendant Piercey had again explained his right to appeal and the procedure prescribed by the rules for service of a letter of discharge. After receiving the letter of discharge he asked them (Piercey and his 2 assistant chiefs) if that was all. And Chief Piercey said

that was all. "So I shook hands with Chief White and I think it was Chief Smith and said it had been nice working with them. And I walked out." (P. 39)

According to Piercey's testimony, which is not in any way contradicted by Fox (P. 73), before Fox left with the discharge he stated, "I will fight it." Up to this time Fox had, for all intents and purposes, been discharged. All that remained to be done was to transmit the record to the Civil Service Commission. Notwithstanding anything that had been said previously, Mr. Fox had not been overpowered and cowed into resigning. The matter seemed to be a closed incident and Fox was prepared to take it before the Civil Service Commission on appeal. He had had time, about 2½ hours after the supposed threats and statements had been made, in which to deliberate the course he would pursue notwithstanding such threats and statements. He still persisted in his decision to take a discharge and fight it. No new threats were made after the 11:00 meeting. No new intimidations occurred. The threats or statements of Piercey did not deter him from accepting the letter of discharge.

In about 10 minutes Fox returned and asked if the record of discharge had been sent in and if it was too late to resign. This was his own voluntary act. No one compelled him to return and trade his discharge for a resignation. That decision was his, and his alone.

What was the impelling motive for this change of attitude? The court finds it was because Fox was over-

come with fear because Piercey had told him “a discharge would be accompanied by detrimental publicity and would seriously and detrimentally affect plaintiff’s opportunities for obtaining employment,” merely Piercey’s opinion as to what the consequences might be, not any threat on the part of Piercey. But that isn’t Fox’s version. He states definitely that the prime consideration that impelled him to resign was the threat by Piercey, unless he resigned, Piercey would “blast and smear me all over the newspapers; *and if he did*, it would be difficult in obtaining employment,” and he had no other reason for signing the resignation other than such threat. (P. 40) It is clear from this that it was not the threat of discharge and the natural attendant consequences relative to publicity or future employment that impelled him to resign. It was the personal malignant interest, which Fox claims Chief Piercey threatened he would take to see that Fox was blasted and smeared in the newspapers and to see that he got no other employment, that impelled Fox to return with the letter of discharge after having once accepted it and to submit his resignation. But the court specifically found that Chief Piercey did not so threaten. There is, therefore, no evidence to sustain the finding that Fox’s resignation was involuntarily given while under the influence of duress and coercion.

What happened after signing the resignation is likewise definite proof against the court’s finding that Fox was filled and overcome with fear when he signed his resignation. After submitting his resignation and

the destruction of the letter of discharge, Fox asked the assistance of Chief Piercey in getting a return of the bail money he had posted at the City jail by being released on his own reconnaissance. Defendant Piercey dispatched Assistant Chief White to go with him to the City Prosecutor to see if this could be done. The bail money was returned to him. While at the Prosecutor's office Fox said, "now I have decided to resign, I had better call my attorney, I better let him know." (P. 146) Do these circumstances indicate a person overcome with fear and laboring under coercion from defendant Piercey?

While, as before indicated, each case involving duress must be decided upon its own peculiar facts and so decisions in other cases may not furnish much assistance, we desire to call the court's attention to the few cases which we have been able to find involving the resignation under a claim of duress from a public office.

That a resignation could be suggested and advised as an alternative to preferring charges, where there was no threat and the officer was not obliged to sign the resignation, and that a resignation under such conditions would be upheld it is clearly indicated in the following language from *Thompson vs. Civil Service Commission*, 103 Utah 162, 134 P. 2d 188 p. 192.

"It is common knowledge that when grounds are found, or believed to exist, which would justify formal charges against an officer for removal from office, or when such charges are preferred, the officer is oftentimes given the opportunity to

resign instead of facing publication with charges, a hearing, and removal.”

The precise question was decided in the case of *People ex rel Wallace vs. Diehl*, 63 N. Y. S. 367, affirmed in 60 N. E. 1118. In *State vs. Ness*, 139 Ohio St. 309, 39 N.E. 2nd 849, the rule of the Civil Service Commission provided that “acceptance by an appointing officer of the resignation of a person discharged before final action by the Civil Service Commission will be considered a withdrawal of the charges and the separation of the employee thus resigning shall be entered as a resignation and the proceedings shall be dismissed without judgment.” It was held in that case that a resignation submitted by a police officer while charges were pending against him was not null and void under this rule. This clearly shows that resigning as an alternative to standing trial upon charges for dismissal does not necessarily imply or involve duress. Certainly it is not to be supposed that the Civil Service Commission would make a rule permitting something to be done which would involve duress as a matter of law.

Kramer vs. Board of Police Commissioners, 39 Cal. App. 396, 179 P. 216. In this case plaintiff, a member of the police department, was given a three months’ leave of absence to go into business as a means of cutting down the cost of the police department, being assured that the leave could be extended for one year. He purchased a stock of merchandise and engaged in business. Within three months he was ordered to return to duty. Upon his requesting additional time he was

informed that he must either report for duty or resign. He protested this order but presented his resignation, which was accepted. He brought a suit for reinstatement claiming that his resignation was not voluntary but was induced by duress and coercion. The court holds that the resignation was not induced by duress or coercion but was voluntary, saying:

“In order for the action of the board of police commissioners in presenting to the plaintiff the alternative of either resigning from or returning to his post of duty in the police department to have savored of duress or coercion, such action must have been unlawful under the long accepted definitions of these terms.

“In the case of *State v. Laden*, 104 Minn. 252, 116 N. W. 486, 16 L. R. A. (N. S.) 1058, which involved a resignation from office, it was held that the coercion or duress which would render such resignation either void or voidable must be such as would exist where one by the unlawful conduct of another was induced to resign his office under circumstances which deprived him of his free will.

“Measured by these definitions it must be concluded that the plaintiff's resignation from the police department was not induced by either duress or coercion, but that the same was voluntary, and hence, upon its acceptance by the board of police commissioners, worked a final severance of the relation of the plaintiff as a police officer

with the police department of the city and county of San Francisco.”

Board of Education vs. Rose, 147 S. W. 2nd 83, 132 A.L.R. 969. Here the plaintiff resigned as a county superintendent of schools pursuant to a compromise agreement between two factions of the board of education whereby litigation over the right of a member of the board to hold office was discontinued and charges filed against plaintiff were to be dropped and he was to resign. Plaintiff claimed his resignation was obtained under duress under the law stated in 46 C. J. 980, as follows:

“A resignation signed as an alternative to having charges made against the signer cannot be said to be given by the party resigning of his own free will, and can be repudiated at any time.”

The court first points out that this text is based entirely upon the case of *People ex rel O'Connor vs. Hardy*, 224 Ill. App. 198, “in which a conditional resignation was obtained from a Civil Service employee by threat of a superior officer to file charges against him and the resignation was accepted three years after it was tendered under circumstances which did not justify a discharge of the employee.” The court held that the

facts of the case before it did not bring it within the rule from *Corpus Juris* saying:

“No member of the county board made any threat of any kind with reference to filing charges against the appellee or any statement that appellee would be removed as a result of the hearing on the charges.”

It seems that plaintiff was fearful of an adverse decision on the charges filed against him and thought the decision thereon would be against him. The court points out he could have appealed from an adverse decision, but he chose rather to resign. “No such duress was imposed upon him such as entitled him to withdraw his resignation which had been accepted.”

In 132 A. L. R. 975 is a note on the subject of duress as ground for withdrawing or avoiding resignation from public office. Some of the cases above cited are there cited. The other cases referred to in the note involved factors of duress which are not present in the instant case. The case of *People ex rel O'Connor vs. Hardy*, 224 Ill. App. 198, referred to in the case of *Board of Education vs. Rose*, supra, is referred to in said note. That case, however, is distinguishable from the instant case as is pointed out by the court in the case of *Board of Education vs. Rose*.

In the case of *State vs. Ladeen*, 104 Minn. 252, 116 N. W. 486, the evidence showed that the officer was threatened with personal violence and with the filing of charges of embezzlement against him and that his farm would be taken from him to cover his shortage unless he resigned.

In the case of *Kidd vs. State Civil Service Commission*, 55 P. 2nd 245, the resignation was obtained under false representations and promises as to reinstatement, the court saying that it appears "that appellant's signature to the resignation was obtained by false representations in that he signed the same to protect his civil service standing believing the doctor's statements to be true."

The other cases cited in the note do not disclose the facts out of which the duress arose.

CONCLUSION

We respectfully submit that plaintiff wholly failed to sustain the burden of proving the duress and coercion relied upon by him in his amended complaint. The court specifically found this to be a fact. Under such a condition of the record the court should have entered judgment against the plaintiff dismissing his complaint. Instead, it proceeded to find some other basis for making a finding of duress and coercion and concluded that such duress and coercion must have been in the mind of the

plaintiff although he did not so indicate and although he clearly indicated by his own testimony that he was not moved by the considerations found by the court in submitting his resignation. We further submit that the record as a whole fails to support even the theory adopted by the court and fails to sustain the legal conclusion arrived at by the court that plaintiff submitted his resignation while under the influence of fear and duress. We respectfully submit that the case should be reversed and the lower court directed to enter a judgment dismissing plaintiff's complaint.

Respectfully submitted,

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