

1998

Hubert Burton v. Exam Center Industrial and General Medical Clinic, Inc., Howard Boulter : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

HUBERT BURTON, M.D.,**Appellant,****vs.****EXAM CENTER INDUSTRIAL &
GENERAL MEDICAL CLINIC, INC., &
HOWARD BOULTER,****Docket No. 980040****940905746****Appellees.**

REPLY OF APPELLEES TO AMICUS CURIAE BRIEFS

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UTAH**

IN THE UTAH SUPREME COURT

HUBERT RUPTON, M.D.,

Appellant,

vs

EXAM CENTER INDUSTRIAL &
GENERAL MEDICAL CLINIC, INC., &
HOWARD BOULTER,

Docket No. 980040

940905746

Appellees.

REPLY OF APPELLEES TO AMICUS CURIAE BRIEFS

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TABLE OF CONTENTS

STATEMENT OF THE ISSUE	4
PRESENTED BY THE COURT	4
TO AMICUS CURIAE.....	4
SUMMARY OF ARGUMENTS.....	4
ARGUMENT.....	5
I. CLARIFICATION OF THE POSTURE OF THIS CASE	5
II. THE JUDICIAL STANDARD OF REVIEW IS WHETHER TO INCLUDE DISCRIMINATION BASED UPON AGE AS A CLEAR AND SUBSTANTIAL DECLARATION OF PUBLIC POLICY.....	6
A. The well established law in the State of Utah is that employees for an indeterminate term are considered to be “at will”	6
B. The burden of establishing an exception to the “at will” employment doctrine is upon the Appellant.....	6
C. Statutes should be liberally construed with a view to effect the objects of the statute and to promote justice.....	7
D. No common law or constitutional standard prohibits discrimination based upon age	8
III. THE UADA AND A REPEALED PROVISION OF THE UTAH STATE PERSONNEL MANAGEMENT ACT DO NOT CREATE A PUBLIC POLICY CLAIM AGAINST EMPLOYERS OR IN FAVOR OF EMPLOYEES NOT COVERED BY THE STATUTES.....	10
IV. THIS COURT HAS CONSISTENTLY RECOGNIZED THAT THE LEGISLATURE REGULARLY IS CALLED UPON TO RECONCILE IMPORTANT AND SOMETIMES CONFLICTING CONCERNS AND HAS DEFERRED TO THE STATUTORY LIMITATIONS PROVIDED BY THE LEGISLATURE	13
V. CONCLUSION.....	14

TABLE OF AUTHORITIES

CASES

<i>Berube v. Fashion Centre, Ltd.</i> , 771 P.2d 1033 (Utah 1989)	6, 7, 9
<i>Heslop v. Bank of Utah</i> , 839 P.2d 828 (Utah 1992)	7
<i>Hodges v. Gibson Products Co.</i> , 811 P.2d 151 (Utah 1991)	6, 7
<i>Jennings v. Marralle</i> , 876 P.2d 1074 (Cal. 1994).	12
<i>Kelson v. Salt Lake City</i> , 784 P.2d 1152, 1157 (Utah 1989).	13
<i>Molesworth v. Brandon</i> , 672 A.2d 608 (Md. 1996).	12
<i>Parmley v. Pleasant Valley Coal Co.</i> , 64 Utah 125, 228 P. 557, 560 (1924).	13
<i>Peterson v. Browning</i> , 832 P.2d 1280, 1281 (Utah 1992)	6, 9
<i>Reno v. Baird</i> , 957 P.2d 1333 (Cal. 1998).	11
<i>State Farm Mutual Auto. Ins. Co. v. Clyde</i> , 920 P.2d 1183, 1185 (Utah 1996).	13
<i>Retherford v. AT&T Communications</i> , 844 P.2d 949 (Utah 1992)	9
<i>Warren v. Melville</i> , 937 P.2d 556 (Utah App. 1997)	14

STATUTES

U.C.A § 31a-22-309(1)	13
U.C.A § 34A-5-101	5, 8, 9, 11, 14
U.C.A. § 34A-5-102(7)(a)	11
U.C.A. § 34A-5-103	11
U.C.A. § 34A-5-106	10
U.C.A. § 67-19-1	10
U.C.A. § 68-3-2	7, 8
U.C.A. § 78-11-6.	13

**STATEMENT OF THE ISSUE
PRESENTED BY THE COURT
TO AMICUS CURIAE**

**CAN AN AT-WILL EMPLOYEE BRING AN ACTION FOR
WRONGFUL TERMINATION BASED ON A VIOLATION
OF PUBLIC POLICY WHERE THE EMPLOYEE WAS
TERMINATED BECAUSE OF HIS AGE, BUT WHERE THE
EMPLOYER HAS FEWER THAN FIFTEEN EMPLOYEES
AND THUS HAS NO RIGHT TO BRING HIS CLAIM
BEFORE THE UTAH ANTIDISCRIMINATION AND
LABOR DIVISION BECAUSE THAT AGENCY LACKS
JURISDICTION?**

SUMMARY OF ARGUMENTS

Appellant has not met his burden of persuasion to establish a public policy exception to the “at will” employment doctrine. In order to rise to the level of a declaration of a clear and substantial public policy, the strength of the policy as well as the extent to which it affects the public as a whole must be examined. No common law or constitutional standard exists in Utah prohibiting discrimination based upon age. The legislative enactments of the federal government and the State of Utah are self-limiting in their effect, and not applicable to the public as a whole.

The Utah Antidiscrimination Act and a repealed provision that existed under the Utah State Personnel Management Act do not create a public policy that can provide a basis for a wrongful termination in violation of public policy against employers or in favor of employees not covered by those statutes. This Court has consistently recognized that the legislature regularly is called upon to balance important and sometimes conflicting policy concerns and has deferred to the statutory limitations provided by the legislature.

ARGUMENT

I. CLARIFICATION OF THE POSTURE OF THIS CASE

The issue presented to the *amicus curia* representing that “the employee was terminated because of his age”, does not accurately describe the established facts in this case. This is an interlocutory appeal from the order of the lower court dismissing appellant’s cause of action for tortious wrongful termination. No finding of fact or determination has been made by the lower court regarding facts in dispute. It is disputed that Burton was an “employee”. It is disputed that the “old guys” statement was made.

Because of the natural tendency of “buzz words” to inflame rather than inform, reference to the facts which were not in dispute in the lower court is appropriate for the sake of perspective:

1. It is undisputed that Exam Center had a policy regarding contracting with doctors to perform medical services for Exam Center’s customers on an “as needed” basis. It is undisputed that a pool of eight (8) doctors was available.
2. It is undisputed that all of the doctors with whom Exam Center contracted were within the “protected class” of over the age of 40, and all but one was of the age of 65 through 74.
3. It is undisputed that Exam Center employed no full-time doctors of any age prior to July, 1994.
4. It is undisputed that the pool of eight (8) available doctors was reduced when Burton was told that his services were no longer required.
5. It is undisputed that a doctor was hired as a full-time employee by Exam Center in July, 1994.

The sad irony of this case is that had Appellee been an employer with more than 15 employees, thus within the jurisdiction of the U.C.A § 34A-5-101, *et. seq.*, Utah Anti Discriminatory Act (hereinafter “UADA”), the merits of Appellant’s claim would have been

evaluated and determined by the employees of the UADA with the specialized expertise in employment law. Appellee would not have been required to expend its resources in defending this litigation and appeal.

II. THE JUDICIAL STANDARD OF REVIEW IS WHETHER TO INCLUDE DISCRIMINATION BASED UPON AGE AS A CLEAR AND SUBSTANTIAL DECLARATION OF PUBLIC POLICY

A. The well established law in the State of Utah is that employees for an indeterminate term are considered to be “at will”.

It is firmly established law that employment in the State of Utah is considered to be “at-will”. The burden of establishing any exception to the “at-will” doctrine is on the proponent.

Berube v. Fashion Centre Ltd., 771 P.2d 1033 (Utah 1989).

B. The burden of establishing an exception to the “at will” employment doctrine is upon the Appellant.

Case law has established that the strict “at will” doctrine is subject to a “public policy exception”. *Berube* at 1043; *Hodges v. Gibson Products Co.*, 811 P.2d 151 (Utah 1991). An individual claiming to have been wrongfully terminated from employment in contravention of a clear and substantial public policy may bring an action sounding in tort. *Peterson v. Browning*, 832 P.2d 1280 (Utah 1992). The proponent must establish that a public policy exists which is clear and substantial, rooted in statute or the constitution, and clearly recognized in the State of Utah.

. . . . [I]t is not the purpose of public policy restrictions on the at-will employment doctrine to deprive employers of all discretion in discharging an indefinite-term employee. At this point, it is sufficient to declare that the public policy that may be the basis for a wrongful discharge action should be defined in the first instance

by legislative enactments and constitutional standards which "protect the public or promote public interest."

Berube, 771 P.2d at 1043; *Hodges* at 165-66.

The burden to establish that the discharge of the employee violated public policy was met by the plaintiffs in *Peterson*, (the wrongful termination of an employee after he refused to falsify tax and customs documents); *Hodges*, (the wrongful termination of an employee based upon a false criminal accusation known to the employer to be false); and *Heslop v. Bank of Utah*, 839 P.2d 828 (Utah 1992) (a wrongful discharge of an employee after he insisted that his bank employer adhere to the Utah Financial Institutions Act).

Appellant sidesteps this burden by claiming that freedom from age discrimination already is an established exception to the employment "at will" doctrine, separate and distinct from the UADA, without identifying any constitutional standard, legislative enactment, or judicial decision which carves out that exception.

C. Statutes should be liberally construed with a view to effect the objects of the statute and to promote justice.

Utah Code Ann. § 68-3-2 states: "The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statute and to promote justice."

In its review of the legislative enactments of the Utah Legislature, the court should review a statute as a whole, including all limitations of application and jurisdiction. *Utah Code Ann.* § 68-3-2. The legislative intent behind the statute can be discerned by its definitions of to whom it pertains, and the restrictions contained therein as to whom it is applicable.

It would be inequitable and unjust to surgically extract from the UADA and the Utah State Personnel Management Act the portions which would effectively grant each citizen the right to be free from age discrimination and make a small employer liable under a tortious wrongful termination lawsuit yet deny the small employer the protections and procedures available under those statutes. Such a result would be in contravention of *Utah Code Ann.* § 68-3-2 as it would not effect the objects of the statute and would result in injustice.

D. No common law or constitutional standard prohibits discrimination based upon age

None of the arguments of the Appellant and the *amici curia* claim that any common law right exists in the State of Utah to be free from discrimination based upon age, neither do they claim protection against age discrimination based in the Utah Constitution. Instead Appellant and the *amici curia* briefs have engaged in circuitous and somewhat confusing logic in support of their contention that a “clear and substantial declaration of public policy” exists which has risen like the Phoenix to generally prohibit age discrimination in the State of Utah. This tortured theory mightily tries to avoid the application and limitations of the UADA but simultaneously seeks to bootstrap the UADA definition of discrimination based upon age as an unlawful employment practice as a declaration of public policy applicable to the public as a whole. The argument presented in the *amicus curiae* ACLU brief at pp. 7-11, is as follows:

Appellant is not making a claim under the provisions of the UADA and is not required to seek redress through the administrative procedures of the UADA,

Because

The action of employment termination allegedly committed by Appellee was not a “discriminatory or prohibited employment practice” as defined by UADA

Because

Appellee was not an “employer” as defined by the act.

And

Appellant’s claim was not pre-empted by the UADA, and the UADA his not his exclusive remedy,

Because:

The UADA, and the provision of the Utah State Personnel Management Act (now repealed), plus Federal statutes, include a prohibition against discrimination based upon age,

Therefore:

Appellant is entitled to point to those legislative provisions as a “clear and substantial declaration of public policy” prohibiting discrimination based upon age, and allowing him to bring a tort claim against Appellee for wrongful termination.

This approach, which tries to construe the inapplicability of the UADA to the small employer as a “license to discriminate”, *amicus curiae* ACLU brief at p. 5, turns the burden of persuasion on its head.

This Court has prescribed the test for determining whether any public policy is sufficiently “clear and substantial” to support a cause of action for discharge in violation of public policy¹. *Retherford v. AT & T Communications of Mountain States, Inc.*, 844 P.2d 949, 966 (Utah 1992); *Peterson*, 832 P.2d at 1281; *Berube*, 771 P.2d at 1051.

¹ In determining whether a public policy is sufficiently “clear and substantial” to support a cause of action for discharge in violation of public policy, one must examine the strength of the policy as well as the extent to which it affects the public as a whole. The very words “clear and substantial” require a lack of ambiguity on both points. As the majority of this court recognized in *Peterson*, all statements made in a statute are not expressions of public policy. Many statutes merely regulate conduct between private individuals or “impose requirements whose fulfillment does not implicate fundamental public policy concerns.” *Id.* at 1282 (quoting *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 254 Cal.Rptr. 211, 217, 765 P.2d 373, 379 (1988)). The following questions are relevant to determining whether a statute embodies a clear and substantial public policy. First, one must ask whether the policy in question is one of overarching importance to the public, as opposed to the parties only. Second, one must inquire whether the public interest is so strong and the policy so clear and weighty that we should place the policy beyond the reach of contract, thereby constituting a bar to discharge that parties cannot modify, even when freely willing and of equal bargaining power. Since these are the consequences of qualifying a policy as a basis for the tort action,

Appellant has the burden of persuading this Court to include this theory as an exception to the “at will” employment doctrine by showing the strength of the declaration of public policy and its application to the public as a whole.

III. THE UADA AND A REPEALED PROVISION OF THE UTAH STATE PERSONNEL MANAGEMENT ACT DO NOT CREATE A PUBLIC POLICY CLAIM AGAINST EMPLOYERS OR IN FAVOR OF EMPLOYEES NOT COVERED BY THE STATUTES

Contrary to the arguments made by *amici curiae* ACLU and AFL-CIO, a provision of the Utah State Personnel Management Act that has been repealed never did, and does not now, create a clear and substantial public policy in favor of an employee not covered by the statute. The Utah State Personnel Management Act, *Utah Code Ann.* § 67-19-1 *et seq.*, by its own terms, applies only to the State of Utah as an employer and State employees. The appellant has never alleged that he is an employee of the State and there is no basis for claiming that Utah State government policies with respect to its employees should be superimposed on private sector employers.

Moreover, the antidiscrimination provision contained in the Act was repealed in 1995. The provision now in place states that the “state, its officers, and employees shall be governed by the provisions of § 34A-5-106 of the Utah Antidiscrimination Act concerning discriminatory or unfair employment practices.” *Utah Code Ann.* § 67-19-4. *Id.* In sum, a repealed provision of the Utah State personnel statute cannot be deemed to be a separate declaration of the State’s public policy regarding age discrimination for purposes of providing foundation to a wrongful discharge claim.

these considerations should inform the evaluation of the policy itself. See *id.* at 1288 (Zimmerman, J., concurring and dissenting, joined by Hall, C.J.); see also *Foley*, 765 P.2d at 379-80 & n. 12.

Amici curiae ACLU and AFL-CIO add no support to appellant's argument that the UADA is a clear and substantial policy statement that should be applied to an employee specifically exempted from its provisions. The ACLU's proposition that the Labor Commission somehow has jurisdiction over claims against employers with fewer than fifteen employees is mistaken. The jurisdiction of the Commission is set out under the statute as limited to "the subject of employment practices and discrimination made unlawful by *this chapter*." *Utah Code Ann.* § 34A-5-103 (emphasis added). Thus, the power of the Commission is, by statute, limited to the employment practices of those covered by the UADA. Under those terms, the Commission does not have jurisdiction over employers with fewer than fifteen employees. *See, Utah Code Ann.* § 34A-5-102(7)(a).

The California Supreme Court rejected just such an attempt to parse the state fair employment practices statute to avoid its restrictions. In *Reno v. Baird*, 957 P.2d 1333 (Cal. 1998), a plaintiff attempted to sue her individual supervisor under a wrongful termination in violation of public policy claim based on the public policy contained in California's Fair Employment and Housing Act. The court held:

It would be absurd to forbid a plaintiff to sue a supervisor under the FEHA, then allow essentially the same action under a different rubric. Because plaintiff may not sue Baird as an individual supervisor under the FEHA, she may not sue her individually for wrongful discharge in violation of public policy.

957 P.2d at 1348. Similarly, the UADA, which does not provide the appellant with a cause of action against an employer of fewer than fifteen employees cannot give rise to a claim against the very same employer under a different rubric.

Reliance by the ACLU and the AFL-CIO on *Molesworth v. Brandon*, 672 A.2d 608 (Md. 1996), is also misplaced. The *Molesworth* plaintiff attempted to bring a common law cause of action for wrongful discharge in violation of public policy based on sex discrimination. The Maryland court ruled that Maryland's public policy against sex discrimination was "ubiquitous," since the Maryland Fair employment Practices Act was but "one of at least thirty-four statutes, one executive order, and one constitutional amendment in Maryland that prohibits discrimination based on sex in certain circumstances." 672 A.2d at 613. Neither the ACLU, the AFL-CIO or the appellant has pointed to a Utah constitutional provision, an executive order, or any other statutory provisions, with the exception of the repealed Utah State employment provision, that sets forth a public policy statement on age discrimination.

The California Supreme Court's ruling in *Jennings v. Marralle*, 876 P.2d 1074 (Cal. 1994), not the decision in *Molesworth*, is clearly applicable here. The *Jennings* court rejected a wrongful termination in violation of public policy action involving age discrimination against an employer not covered under the California FEHA because the employer in question had too few employees to be covered by the statute. The court held that the exception of small employers from the FEHA ban on age discrimination "was enacted simultaneously to and is inseparable from the legislative statement of policy." 876 P.2d at 1076.

In sum, there is no Utah statute or constitutional provision that can provide a basis for a common law claim of discharge in violation of public policy involving age discrimination. The only provisions presented to this court, by their own terms, do not provide claims against employers or in favor of employees within the statutory provisions and in the case of the state government employee statute, the provision has, in addition, been repealed.

IV. THIS COURT HAS CONSISTENTLY RECOGNIZED THAT THE LEGISLATURE REGULARLY IS CALLED UPON TO RECONCILE IMPORTANT AND SOMETIMES CONFLICTING CONCERNS AND HAS DEFERRED TO THE STATUTORY LIMITATIONS PROVIDED BY THE LEGISLATURE

The Legislature is constantly called upon to reconcile important, yet sometimes conflicting, public policies. This Court has consistently, and appropriately, deferred to the Legislature's balancing of public policies. Two examples are illustrative.

Grandparents who had acted as parents of a deceased child sued to recover for losses they suffered upon the death of the child under Utah's wrongful death statute, which provides for suit by a "parent or guardian" only. *Utah Code Ann.* § 78-11-6. This Court rejected their claim, relying on the express statutory coverage to exclude a claim by grandparents, holding that "the law creating the right can also prescribe the *conditions of its enforcement*. *State Farm Mutual Auto. Ins. Co. v. Clyde*, 920 P.2d 1183, 1185 (Utah 1996) (emphasis added) (quoting *Parmley v. Pleasant Valley Coal Co.*, 64 Utah 125, 228 P. 557, 560 (1924)). This Court recognized the unfortunate result but stated that "[t]he fact that the result in some circumstances may be to unreasonably restrict the class of persons who can bring a wrongful death action is an argument for amendment of the statute, not for ignoring its words." *Id.* at 1187 (quoting *Kelson v. Salt Lake City*, 784 P.2d 1152, 1157 (Utah 1989)).

A second example involves the right of an automobile accident victim to collect general damages resulting from injuries, a common law right that had long been recognized by Utah courts. By passing statutory provisions limiting personal injury protection, *Utah Code Ann.* § 31a-22-309(1), the legislature limited the recovery of general damages to a very specific category—those whose accident-related medical expenses exceed \$3,000.00 or those who have suffered death, permanent disability, dismemberment or permanent disfigurement. Thus, a right

that an individual enjoyed at common law was actually abrogated by statute, yet, Utah courts have continued to uphold this decision of the Legislature. *See, e.g., Warren v. Melville*, 937 P.2d 556 (Utah App. 1997) (court deferred to legislature in limiting general damages where plaintiff not included in exceptions under statute).

Similarly, an action based on age discrimination against an employer with fifteen or more employees was created by statute, the Utah Antidiscrimination Act, and its application should be limited to the statutory provisions. The Legislature's decision to balance the needs of small employers with those of individuals is the decision that this Court should uphold. Any unfortunate result that ensues may be an argument for amendment of the UADA but not for ignoring its plain language.

V. CONCLUSION

This Court has not been directed to any common law, constitutional standard, applicable federal statute, or any persuasive enactments of the Utah Legislature upon which this Court should rely for the extraordinary action of including a claim of discrimination based upon age among the clear and substantial public policies previously recognized as an exception to the 'at will' employment doctrine of the State of Utah.

Neither the UADA nor the provision of the Utah State Personnel Management Act (now repealed) rise to the level of a "clear and substantial declaration of public policy" because each of those statutes, by their respective terms, limits its application to those persons it specifically defines. Clearly the Legislature did not intend thereby to make a public policy statement regarding age discrimination applicable to the public at large. Had the Legislature truly intended to make a public policy declaration prohibiting age discrimination universally, it could have done

so. The Legislature defined employers subject to the UADA as those with 15 or more employees.

According to the Department of Workforce Services more than 60 percent of employers in Utah have fewer than 15 people on staff, but their employees comprise only about 9 percent of the state's total employee positions. Utah's small employers have justifiably relied upon being exempt from the jurisdiction of the UADA and its applicability. It would patently unfair and have catastrophic results to have a judicial determination that the UADA and the Utah State Personnel Management Act state a clear and substantial public policy against age discrimination for all employees in the State of Utah. Small employers, who are least able to afford it, would then be exposed to the expense and burden of defending against claims, meritorious or not, of age discrimination in a tort action rather than in the administrative procedure afforded larger employees under the UADA.

Expansion of age discrimination as an unlawful employment practice applicable against all employers and employees in the State of Utah should be a decision of the Legislature, made after due investigation, hearings, debates, and a vote by legislators answerable to their constituents.

Respectfully submitted this 30th day of July, 1999


RICHMAN & RICHMAN, L.L.C.

BART J. JOHNSEN
Attorney for Appellees

CERTIFICATE OF MAILING

STATE OF UTAH :
:SS
COUNTY OF SALT LAKE :

Leora Loy, being first duly sworn, deposes and says as follows:

She is employed by the firm of RICHMAN & RICHMAN, L.L.C., attorneys for Appellees herein.

That she served the attached REPLY OF APPELLEES TO AMICUS CURIAE BRIEFS on Appellant and other interested parties by placing a copy in an envelope addressed to:

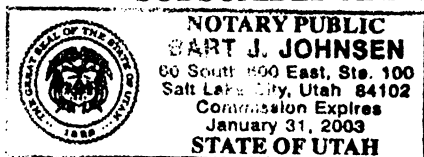
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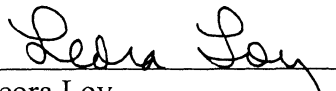
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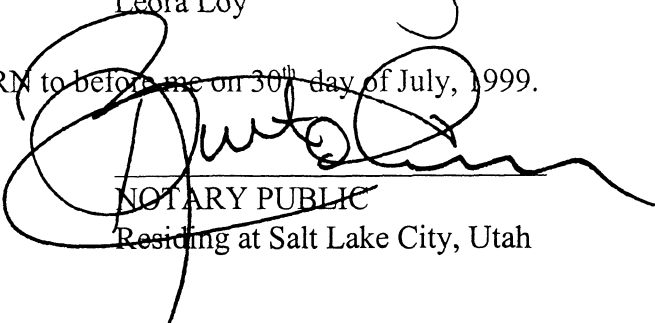
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~~October 15, 2000~~
Jan 31,



Leora Loy

SUBSCRIBED AND SWORN to before me on 30th day of July, 1999.



NOTARY PUBLIC
Residing at Salt Lake City, Utah