2009

David C. Juricic v. Autozone, Inc. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DAVID C. JURICIC,

Plaintiff/Appellant,

v.

AUTOZONE, INC.,

Defendant/Appellee.

Appellate Case No. 20090140-CA

Trial Court Case No. 070915977

Judge Kate Toomey

Appellant's Reply Brief

APPEAL FROM THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH, HON. KATE TOOMEY

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Plaintiff/Appellant,	Appellate Case No. 20090140-CA
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Appellant's Reply Brief

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STATEMENT AS TO PRIOR OR RELATED APPEAL

There are no prior or related appeals.

Appellant David C. Juricic (hereinafter "Mr. Juricic"), by and through his counsel of record, David J. Holdsworth, submits the following as his Reply Memorandum:

ISSUES PRESENTED FOR REVIEW

In reviewing the parties' respective formulations of the issues which Mr. Juricic's appeal presents for review, the Court should conclude that the parties are in agreement as to what the issues in the instant appeal are and what the standards of review are which the Court should apply in deciding those issues.

NATURE OF THE CASE

AutoZone's summary in its brief as to the nature of the instant case highlights the nature of the dispute between the parties:

1. Whereas Mr. Juricic contends that AutoZone requires its employees to wear clothing of a distinctive design and color, thus, mandating the wearing of what constitutes a uniform, AutoZone contends that even though it requires its employees to wear clothing of a designated style and a designated color, AutoZone permits its employees to wear normal street clothes to work, which does not translate to the wearing of a uniform.

2. Whereas Mr. Juricic contends that AutoZone's policy which required him to use accrued vacation hours/days within a given calendar year or lose

such hours/days violated Utah law, AutoZone contends promulgating and following such a policy is a legitimate exercise of business choice and management discretion, the content of which policy is not subject to government regulation.

3. Whereas Mr. Juricic contends that AutoZone's policy which restricted him from working after hours and off company premises for any entity which might pose a conflict of interest violated Utah law, AutoZone contends adopting and enforcing such a policy is a proper exercise of business choice and management discretion.

4. Whereas Mr. Juricic contends that his actions in continuing to work for AutoZone (even though he disagreed with some of its policies) did not constitute ratification of the same or deprive him of the ability to challenge the same, AutoZone contends that if Mr. Juricic did not like certain AutoZone policies, he could have left the company and gone to work for some other company and that because he did not do, he accepted AutoZone's policies and cannot challenge the same.

Mr. Juricic believes and asserts the trial court's declarations on each of these issues, via granting AutoZone's motion for summary judgment, were incorrect.

STATEMENT OF FACTS

In reviewing the parties' respective statements of the facts relevant to

the consideration of the issues present for review, the Court should conclude that the parties are in agreement as to the basic facts. The parties genuinely disagree as to the legal significance of some of those facts.

I. THE ISSUE OF WHETHER AUTOZONE'S POLICY ESTABLISHING A DRESS CODE AND THE DRESS CODE ITSELF MANDATES THE WEARING OF A UNIFORM.

In its discussion of the first issue in dispute, AutoZone refers to the Labor Commission regulation, found in the Utah Administrative Code at R610-3-21, which provides that if an employer requires an employee to wear any article of clothing, footwear or accessory "of a distinctive design or color," such mandates the wearing of a uniform and requires the employer to provide such clothing, free of charge, to the employee.

AutoZone admits its policies require employees to wear clothing of a specified type or design: namely, a shirt with a collar such as a golf shirt (but not a t-shirt or a tank top); pants (but not denim jeans or shorts or sweat pants); socks (as opposed to no socks); shoes (as opposed to tennis shoes or sandals); and so forth. AutoZone also admits that its policies require employees to wear clothing of a specific color: namely, a red shirt (as opposed to a white or blue shirt); pants which must be black (not blue or khaki); black socks (not blue or white); black shoes (not brown or any other color); a black belt, and so forth.

1. AutoZone's first argument is from the language of the regulation itself. AutoZone argues that its policies merely designate what style of clothing its employees must wear and what color of clothing its employees must wear, but such designation is not the same as requiring its employees to wear clothing of a "distinctive design or color." AutoZone argues that its dress code allows employees to wear "normal street clothes."

AutoZone's argument from the language of the regulation is a bit too simplistic. For one thing, assuming, arguendo, that AutoZone's dress code does allow employees to wear "normal street clothes" (whatever that term means in these days of free expression), Mr. Juricic's point is that AutoZone's dress code policy does require its employees to wear street clothes and a certain style and certain color of street clothes. They cannot wear clothes that change with the season or clothes which are more informal (or more formal) than normal street clothes. AutoZone's employees cannot wear whatever they want to wear or even whatever street clothes they want to wear.

Secondly, AutoZone's dress code does require its employees to wear clothing of a distinctive design and color. AutoZone tries to make an argument that there is a substantive difference between designating which style of clothing its employees must wear and which color of such clothing its employees must wear, with

requiring employees to wear clothing of a distinctive design or color. Mr. Juricic fails to see any difference between the two concepts.

2. In addition to its argument from the language of the regulation, AutoZone argues that the Utah Labor Commission has already issued a decision on this exact issue. By making such an argument, AutoZone perhaps intends to imply that such decision creates some sort of precedent which the Court is obligated to follow or at least obligated to consider.

AutoZone's argument misapprehends the procedural posture of the instant case. The instant action did not seek judicial review of the Labor Commission's earlier decision. The instant action was one seeking a declaratory judgment. That such was the nature of the relief Mr. Juricic was seeking was clear from the beginning of the litigation. Thus, the Labor Commission's prior decision has limited relevance.

If, however, the Labor Commission's prior decision were to have some precedential or res judicata effect, he would argue that the hearing officer did not correctly interpret the regulation at issue. The hearing officer[1] seemed to determine

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[1]Subsequent research by Mr. Juricic has uncovered that at the time the hearing officer conducted the hearing in early 2003, such hearing officer was not an attorney in good standing with the Utah State Bar, having had his license suspended. Mr. Juricic, however, did not raise such an issue in his prior action seeking judicial review or in the trial court below in the instant action or in his opening brief and, thus, the issue may not be open to consideration. *See* Brown v. Glover, 2000 UT 89, 16 P.3d 540 (2000).

that the regulation created a test to the effect of whether AutoZone's dress code requires the wearing of a uniform depends on whether a customer, or just a citizen at large, would conclude that the person wearing such clothing was an AutoZone employee. Using that test, the hearing officer decided that the specific design and color of clothing which AutoZone required its employees to wear (which he mischaracterized as "dark" clothing) was not sufficiently distinct from clothing employees of other businesses might wear, to qualify as a uniform.

Likewise, the Director of the UALD's decision seemed to be based on another test not specified in R610-3-21 –namely, that if an employee can purchase clothing of a specific design and color at any clothing store or if the employee can wear such clothing in a casual setting, such does not qualify as clothing of a distinctive design or color or uniform. Mr. Juricic asserts both decisions are contrary to the plain meaning of Rule 610-3-21. In Rule 610-3-21, the test is not whether an employee out in public on the street wearing clothing of the style and color which AutoZone requires him to wear might be recognized as an AutoZone employee or whether an employee can purchase the clothing at any clothing store or wear the clothing in a casual setting. The issue is whether the employer requires its employees to wear clothing of a distinctive design or color and in its policy, AutoZone requires both. But challenging the Labor Commission's earlier decision misses the point. The

issue is not whether the Labor Commission correctly interpreted its own regulation. It is whether the Court correctly interpreted and applied Rule 610-3-21 in declaring the rights and obligations of the parties to that part of the employment contract at issue.

So, after this brief foray into the prior Labor Commission decision to which AutoZone wants the Court to give the weight of precedent, AutoZone returns to its main argument that it simply "designates" colors to be worn at work but such designation does not rise to the level of requiring employees to wear clothing of a "distinctive design or color."

Mr. Juricic contends such is a distinction without a difference.

AutoZone requires its employees to wear clothing of a certain, specific design and a certain, specific color. Presumably, AutoZone's reason for doing so is to have a workplace where its employees are recognized (at least in its stores, which is the only place that counts) as AutoZone employees. Employees cannot wear anything else in the AutoZone workplace. If AutoZone only required its employees to wear a white collared shirt and dark pants, socks and shoes (as the hearing officer mistakenly assumed), then perhaps AutoZone's argument might have some persuasive force. Or, if Rule 610-3-21 provided that if such employees could also wear the same clothing in a casual setting, then such clothing would not be a uniform, then AutoZone's

argument might have some force. But those are not our facts. AutoZone has promulgated a policy which requires its employees to wear clothing of a certain, specific design and a certain, specific color. Such may be a perfectly reasonable business choice on the part of AutoZone. Mr. Juricic is not challenging whether AutoZone's policy is reasonable. He is contending that if such an otherwise reasonable policy requires employees working for AutoZone to purchase clothing of a certain style and a certain color in order to work there, such is tantamount to the requirement to wear clothing of a distinctive design or color and, thus, equates to a uniform and requires AutoZone to pay for (or reimburse the employee for) the cost of such clothing it requires its employees to wear. Accordingly, he contends the trial court's decision on this issue was incorrect.

II. THE ISSUE OF WHETHER OF AUTOZONE'S "USE IT OR LOSE IT" VACATION POLICY VIOLATES UTAH LAW.

In its discussion of the second issue in dispute, AutoZone refers to the Labor Commission rule on vacation pay, Utah Administrative Code at R610-3-4 (B) (1), which provides that a Utah employer need not provide vacations or vacation pay to its employees but that if a Utah employer does so, it is expected (obligated) to comply with its announced policy.

Arguing from the language of the regulation, AutoZone then contends that it has established its policy on vacation pay and has consistently followed it.

AutoZone argues that such facts mean that AutoZone can adopt a policy which, in content, specifies that if an employee works and earns vacation hours/days, AutoZone can take those earned benefits away from that employee and deprive that employee of what he has earned, unless the employee uses those vacation hours when AutoZone specifies he must use them–namely, in the same year he has earned them. Mr. Juricic disagrees–simply adopting and following a policy does not render the content of that policy consistent with the Utah statute on payment of wages, Utah Code § 34-28-1, et seq.

Although AutoZone's brief does not analyze this issue in great depth, AutoZone's brief does seem to make two arguments:

1. AutoZone seems to argue that because Utah law allows an employer the discretion to set benefits, the employer can anything it wants to. Surely, AutoZone does not really believe that its freedom to provide benefits to employees allows it to do whatever it pleases with the benefits it does choose to provide and upon which its employees may be relying. AutoZone would certainly agree that if it establishes a policy by which its employees can earn vacation hours/days and that it can then, whenever it wants to, take away those benefits, that such action would not be consistent with Utah law. So, there are some limits on how AutoZone may set and administer its policies on employee fringe benefits.

2. Secondly, AutoZone argues that Plaintiff has failed to cite any authority that a "use it or lose it" provision on vacation pay violates Utah law.

AutoZone's argument is a bit too simplistic.

Mr. Juricic readily admits that other than the Utah Labor Commission regulation cited above, which does not really address the issue as to the content of a vacation pay policy, there is no Utah law or regulation dealing directly with this particular issue. That is why Plaintiff has not cited to any Utah statute or case (and presumably that is also why Defendant has not cited to any such statute or case) as having determinative weight.

But Mr. Juricic did base his argument on an extrapolation from the Utah statute on payment of wages, Utah Code § 34-28-1, et. seq.– namely, that Utah Code § 34-28-1, et seq., provides that if an employee earns wages, the employer is obligated to pay him those wages, within a defined period of time, or face serious penalties and consequences. And Mr. Juricic has pointed to the section in the Utah Code which defines "wages" as including such fringe benefits as vacation hours/days. *See* Utah Code § 34-28-2 (4): "Wages" means all amounts due the employee for labor or services...." *See* also Utah Code § 34-26-4. Mr. Juricic's argument is that if such fringe benefits are considered as falling within the term "wages," and if an employee earns such "wages," then the employer is obligated to pay such "wages" (or at least

save such "wages") and cannot then take those "wages" away from the employee who has earned them, and that by requiring employees to "use them or lose them," the employer may be doing just that.

Mr. Juricic contends such is contrary to the Utah statutory scheme to protect employees by regulating how employers are to pay wages.

Mr. Juricic's argument may or may not be persuasive, but it is based on an argument flowing from existing law.[2] AutoZone's brief fails to grapple with the intricacies of his argument.

Mr. Juricic is not questioning whether AutoZone has adopted such a policy or consistently followed it. He was not asking the trial court to force AutoZone to adopt and follow a different policy on earning and paying vacation hours/days. He was simply asking the trial court to declare that the policy which was part of his overall employment contract with AutoZone which permits an employee to earn part of her wages as vacation hours/days and then gives the employer the exclusive ability to dictate how and when and under what circumstances it can take that part of the employee's wages away, without compensating the employee, is not consistent with Utah law.

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[2]*See* also an article entitled "Vacation Pay Suits on the Rise," in Lawyers USA, February 11, 2008, discussing litigation around the country on "use it or lose it" vacation policies.

Mr. Juricic is not arguing that the employer cannot have some discretion on when employees who choose to go on vacation can go on vacation and what type of advance notice or clearance the employee desiring to use such vacation hours may need to give to the employee to use such vacation hours. He is simply arguing that if an employee earns vacation hours/days and chooses not to go on vacation (or cannot afford to go on a vacation) according to the employer's time table, that such employee cannot be deprived of all of those wages which he has earned. The trial court's decision to the contrary was incorrect.

III. THE ISSUE OF WHETHER AUTOZONE'S POLICY ON MOONLIGHTING VIOLATES UTAH LAW.

In addressing the third issue in dispute, AutoZone refers to two basic concepts: (1) that Mr. Juricic was an at-will employee; and (2) that Utah law recognizes that an employee owes a duty of loyalty to his employer.

AutoZone argues that such legal propositions allow it to control and prohibit what its employees do off the clock and off premises in terms of working for a competitor. AutoZone also argues that AutoZone has a legitimate business interest in avoiding conflicts of interest and can adopt the policy it has adopted to avoid such conflicts of interest and confusion.

Mr. Juricic contends that whether he is an at-will employee is irrelevant to the issue at hand. What the trial court was supposed to declare was not whether

Mr. Juricic was an at-will employee, but whether AutoZone's conflict of interest policy which was part of his overall employment contract, was valid under Utah law. Whether AutoZone or Mr. Juricic could end the employment relationship when either party wanted to has no bearing on other parts of the overall employment contractual relationship.

And with respect to the duty of loyalty, Mr. Juricic does not challenge that an employer may have a legitimate interest in encouraging employee loyalty and discouraging confusion among its customers in the marketplace. But he is not convinced AutoZone made the showing it needed to in the trial court that its policy accomplishes either objective.

For example, AutoZone argues that its employees, by day, tout AutoZone's products as the best and most effective products in the marketplace, but does refer to any facts which support that proposition. It refers to no facts which indicate customers in the marketplace choose AutoZone's products because of being convinced by AutoZone sales clerks that such products are the best products in the marketplace, as opposed to any other possibly relevant reasons to patronize an AutoZone store, such as location, convenience, price and so forth. Perhaps there are customers who need to buy motor oil or spark plugs or wiper fluid who might be confused if they see an employee working in an AutoZone store by day (selling

Valvoline motor oil) and then see that same employee working in a PepBoys store at night (selling Valvoline motor oil). But AutoZone needed to submit some evidence to support its propositions and on this record, it did not do so.

AutoZone did not make the kind of evidentiary showing which would have supported enforcement of a post-employment non-competition covenant against Mr. Juricic or which would have established that he was involved in research and development for AutoZone or that he was a strategist of any kind for AutoZone. On the contrary, the limited evidence on this issue indicated that Mr. Juricic was a garden variety auto parts sales clerk.

Accordingly, Mr. Juricic contended that if he wanted to work for a competitor, after hours and off premises, that such would not jeopardize AutoZone's legitimate business interests or compromise his duty of loyalty. He wanted the trial court to declare that his time after hours and off premises was his time, to do with as he pleased, and that the AutoZone policy at issue which was part of his employment contractual relationship unduly abridged that freedom.

Mr. Juricic's argument may or may not ultimately prevail, but for the trial court to have determined (if that is indeed what it determined) in deciding AutoZone's motion for summary judgment that the Utah law on protecting legitimate employer interests outweighed the interest in protecting legitimate employee interests

(like making enough money to afford a somewhat comfortable lifestyle) without requiring AutoZone to produce some evidence that allowing an employee on the lowest level of the "food chain" to work at night or weekends for some other auto parts chain was going to imperil its good will or customer loyalty or any other legitimate business interest, was error.

IV. THE ISSUE OF WHETHER MR. JURICIC'S EMPLOYMENT WITH AND CONTINUED EMPLOYMENT WITH AUTOZONE CONSTITUTED ACCEPTANCE OF AUTOZONE'S VARIOUS TERMS OF EMPLOYMENT SO HE COULD NOT CHALLENGE THE SAME THROUGH AN ACTION FOR A DECLARATORY JUDGMENT.

As to the fourth issue in dispute, AutoZone argues that the employment relationship with Mr. Juricic was contractual in nature and that the provision in such contract which governed how long that employment relationship could last was "at will." AutoZone also argues that when AutoZone adopted its policies and Mr. Juricic began employment with it and/or continued employment with it, such policies became part of the employment contract and he accepted them.

Mr. Juricic does not challenge any of these propositions. He just asserts they are irrelevant to the issues at hand.

Mr. Juricic brought an action seeking a declaratory judgment as to certain terms and conditions of his employment contractual relationship with AutoZone. Mr. Juricic was not discharged and did not bring an action challenging a

discharge as constituting a breach of contract or a violation of public policy. He argued that because the employment relationship is fundamentally a contractual relationship, he could ask a court to declare the obligations and rights of a party to that contract.

Thus, whether he did not have to work for AutoZone and whether, after choosing to work for AutoZone, he could have left AutoZone anytime he wanted to leave, are basically irrelevant to the issues involved in the instant appeal. Similarly, even if his continuing employment with AutoZone had the legal effect of accepting employment subject to the employer's terms and conditions as to which he desired to seek declaratory relief, such is basically irrelevant. He did remain employed and acted in good faith compliance with AutoZone's policies. He purchased the clothing of a certain style and certain color which AutoZone required him to wear. He did use the vacation hours/days he had accrued rather than have AutoZone take them away from him. And he did refrain from working for a competitor after hours and off premises. But such acquiescence does not mean Mr. Juricic lost the right as a party to a contract to ask a court to declare the obligations and rights of the parties to such contract.

Any other decision would not make sense. If in order to seek declaratory relief as to his employment contract, Mr. Juricic had to end the contract

(by quitting or by intentionally doing some act which would motivate the company to discharge him), there would no longer be a contract the meaning and import of which a court could declare.

Mr. Juricic was not asking the trial court to excuse any non-compliance with the terms and conditions of his employment contract. He accepted them. That is what formed a contract. That type of acceptance occurs in one form or another in any contract. But acceptance does not bar a party to a contract from bringing an action for a declaratory judgment.

V. THE ISSUE OF WHETHER MR. JURICIC'S ACTION FOR DECLARATORY JUDGMENT IS BARRED BY APPLICABLE STATUTE OF LIMITATIONS OR IS MOOT.

AutoZone argues that Plaintiff's claims "arose" at lease eight years ago, when Mr. Juricic first became aware of the various policies as to which, in 2007, he sought declaratory relief.

Such an argument misapprehends the nature of Mr. Juricic's action.

Mr. Juricic brought an action seeking a declaratory judgment. At the time he brought such an action, he was working for AutoZone, pursuant to an employment contract. AutoZone cites the standard Utah cases on the presumption of at-will employment and spills much ink to characterize the durational term of such contract as "at will." But that concept is irrelevant to the issues at hand. Mr. Juricic

was in a contractual relationship, some of the terms and conditions of which he sought declaratory relief, for a long time. Thus, his claim for declaratory relief did not arise when he first entered into the contract or when it changed (if it ever did change); his claim "arose" when he decided to seek a declaratory relief as to the meaning of certain terms and conditions of the employment contractual relationship in which he was involved.

In other words, AutoZone's effort in trying to invoke the statute of limitations completely misses this point. Mr. Juricic was not seeking to enforce a liability, so the argument that the liability arose (if it arose at all) when Mr. Juricic first entered into or accepted the terms and conditions of the contract is not germane.

Likewise, AutoZone's argument that Mr. Juricic's retirement somehow renders the issues in the instant appeal moot, is not well taken.

At the time Mr. Juricic brought the action for declaratory relief (November 2007), he was still employed with AutoZone and still a party to a contract–the meaning of terms and conditions of which he was seeking the trial court to declare.

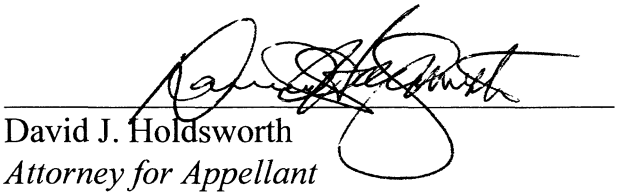
While it is true that none of the policies at issue apply to Mr. Juricic at the present time because he voluntarily retired from his job with AutoZone in mid-2008 and such might tempt the Court to dismiss this case as moot, Mr. Juricic hopes

the Court will resist that temptation and Defendant's invitation to do so. The instant appeal presents important issues at play in many employment relationships affecting perhaps thousands of employers and employees in the state.

CONCLUSION

For all of the foregoing reasons, the District Court's conclusions should be reversed in their entirety. In their place, this Court should declare (1) that AutoZone's requirement which mandates employees to wear clothing of a specific style and a specific color mandates the wearing of a uniform; (2) that a Utah employer which chooses to permit employees to earn vacation hours/days cannot take those hours/days away from an employee who chooses to use them (or not use them) on a schedule of his own choosing; and (3) that an employer cannot regulate the employee's lawful activities during non-working hours and off the premises absent a sufficient evidentiary showing that the employer's restrictions are necessary to achieve and further the employer's legitimate business objectives and do not unduly infringe on the freedom of the employee to pursue his legitimate business objectives.

DATED this 4th day of January, 2010.



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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2010, a true, correct and complete copy of the foregoing APPELLANT'S REPLY BRIEF was delivered upon the attorney(s) indicated below by the method(s):

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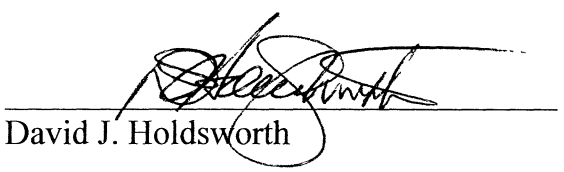

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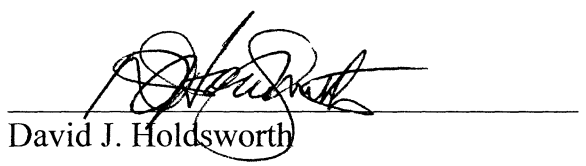

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