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Joann Tsakolas v. Ogden City, Cowles Mallory, John Sampson, Stephen Denkers, Lynn Cottrall : Brief of Appellant

Utah Supreme Court

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STATE SUPREME COURT
BRIEF

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IN THE SUPREME COURT OF THE
STATE OF UTAH

JO ANN TSAKALOS,

Plaintiff and Appellant,

vs.

OGDEN CITY, a body politic, COWLES
MALLORY, Ogden City Manager, and
JOHN SAMPSON, STEPHEN DENKERS and
LYNN COTTRELL, Ogden City Civil
Service Commissioners,

Case No.
19656

Defendants and Respondents,

and

OGDEN CITY, a Municipal Corporation,
Third-Party Plaintiff,

vs.

STATE OF UTAH,

Third-Party Defendant.

BRIEF OF APPELLANT

APPEAL FROM A FINAL JUDGMENT OF THE SECOND JUDICIAL
DISTRICT COURT, HONORABLE OMER J. CALL PRESIDING

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BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an appeal from the Honorable Omer J. Call's decision regarding appellant's employment rights with Ogden City.

DISPOSITION IN LOWER COURT

The trial court sustained the decision of the Ogden

City Civil Service Commission effectively terminating the appellant's employment with the Circuit Court and Ogden City.

RELIEF SOUGHT ON APPEAL

Appellant requests this Court to reverse the decision of the trial court and remand for the appropriate reinstatement of her employment with Ogden City or damages.

STATEMENT OF FACTS

Appellant became employed by Ogden City on September 10, 1975 as a clerk in Court Records with the Ogden City Court. (T 18) She continued in that employment through the creation of the Circuit Court system and at the time her employment difficulties started, she was Lead Clerk in the Civil Division. (T 19) The Circuit Court Clerk's office was divided into three divisions and she was the supervisor over the Civil Division with five employees under her direction. (T 20)

On February 28, 1983 she received a memo from K. D. Miller, Director of Community Services for Ogden City, and Margaret Satterthwaite, Trial Court Executive.

(T 22, R 41) The memo recited various allegations of missing court records. (T 22) At a meeting in Mrs. Satterthwaite's office, she denied the allegations but admitted she was aware that "points" were not being sent to the Driver License Division on some traffic tickets. She

was told she could be charged with a Third Degree Felony.

(T 23) She was asked by Mrs. Satterthwaite to reveal the names of the people involved which she declined to do.

(T 23) That evening she talked with her lawyer who advised her that he was to be present if any future meetings were to occur and in the meantime to say nothing more. (T 24)

On March 4, 1983, she received a letter from the acting Ogden City Manager alleging various violations of the Ogden City Civil Service Rules and suspending her immediately from employment pending an investigation of the allegations. (T 25, R 41, Exhibit 2P)

On March 18, 1983, pursuant to the Ogden City Civil Service Rules and Regulations, a hearing was conducted in front of Cowles Mallory, the Ogden City Manager. (T 26) As a result of that hearing and Ogden City's investigation, Mr. Mallory entered his decision. (T 26, R 41, Exhibit 3P)

The decision disregarded some of the allegations against the appellant. Adverse findings were made that:

a. A traffic citation she received in the fall of 1980 and indexed by the Court showed "bail forfeited", but the case was missing from the court files and the Driver License Division showed no record of the conviction.

b. Her sister's traffic citation in 1979 was not reported to the Driver License Division and the case was missing from the court files.

c. Her sister's traffic citation in 1980 showed

bail being posted but the Driver License Division had no record of the conviction.

d. Her brother's traffic citation in 1982 was missing from the court files and no report of the conviction was received by the Driver License Division.

e. A Disposition Clerk in the Circuit Court stated that appellant asked her not to send a citation to the State. The citation was reported and the clerk claimed that the appellant then reprimanded her.

From these findings, the City Manager determined that the appellant had been involved in failing to notify the Driver License Division of traffic offenses, thereby keeping "points" from being assessed against the violators as required by law. He also found that she failed to cooperate with the City's investigation to the extent expected by a supervisory employee by initially refusing to reveal her complete knowledge of traffic fixing incidents.

The City Manager held that his findings constituted certain violations of the Ogden City Civil Service Rules and, accordingly, suspended the appellant from employment without pay for fifteen working days beginning March 4, 1983, and demoted her from her current position as Lead Clerk, Range 15, Step 4, to a Senior Clerk, Range 9, Step 7, effective with her return to work. She was also advised of her rights of appeal pursuant to the applicable Civil Service Rules and Regulations. (All of the above in

Exhibit 3P, R 41) [redacted]

Appellant denied knowing anything about the traffic citations missing from the court files. She admitted asking the senior clerk not to send points down on her ticket. (T 29) The so-called reprimand she said was just a friendly casual comment to the clerk for reporting her citation. (T 33) She denied any knowledge concerning the missing files or non-reporting of her sister's or brother's tickets. (T 30-33) She was aware that during the continuous period of her employment with Ogden City, various conversations occurred concerning the failure to report traffic citations by different employees including her former supervisor. (T 35) At a meeting with Mr. Blackburn, Ogden City Attorney, and Mr. Frazier, Ogden City Personnel Manager, she revealed the names of those individuals she believed were involved. (T 35) Appellant claimed she initially refused to reveal these names because of her fear of the threatened felony and until the meeting with Mr. Blackburn and Frazier, did not volunteer this information at the advice of her lawyer. (T 39)

On March 28, 1983, the day scheduled for appellant's return to work, she was advised that the Circuit Court judges had entered an ex parte order preventing her from doing so. (T 40) The Order, signed by Stanton M. Taylor as presiding judge, was directed to the Third Circuit Court Clerk instructing him that under no

circumstances was appellant to be allowed to perform any function in the Circuit Court Clerk's Office. (R 41, Exhibit 4P)

On April 7, 1983, she received a letter from the Ogden City Manager placing her on an unpaid, inactive status with Ogden City until the impediment of the Judge's order was removed or until June 30, 1983. (T 42, R 41, Exhibit 5P). The June 30th date was given because on July 1st the Circuit Court employees were to be absorbed by the State and become State employees. This letter also advised appellant that she still had the benefit of civil service status and could apply for any job for which she qualified that opened in the City. As of the date of her trial, she had applied for six or seven City jobs but had received none and was still unemployed. (T 44)

The City Manager's decision was appealed to the Ogden City Civil Service Commission who, on May 25, 1983, sustained the Manager's decision and also the Order of the Third Circuit Judges. (T 45, R 41, Exhibit 6P)

The City's investigation into this matter after appellant's suspension revealed that other Circuit Court employees were involved in "ticket fixing". Five others received some disciplinary action. The most severe was a ten day, paid-by-leave suspension from work and a one step level demotion. The least severe was a three day, paid-by-leave suspension with a one step level demotion.

(T 100, 101) While the City Manager believed these substantial differences in punishment were justified, he did not believe the appellant should be dismissed from her employment. (T 108) One of the employees so disciplined was soon thereafter promoted to the appellant's position by the Court Clerk (T 102, 103), although it was subsequently vetoed by the City Manager.

Judge Taylor admitted that the Third Circuit Court Judges had requested the State Court Administrator to obtain legal representation for them in the appeal to the Civil Service Commission, but only by way of special appearance and not for the purpose of submitting their Order to the jurisdiction of the Commission. (T 143, R 41, Exhibit 9P). He also admitted that had the Civil Service Commission's ruling been adverse to their Order, they would have continued to ban the appellant from employment in the Clerk's office. (T145)

ARGUMENT

THE THIRD CIRCUIT COURT JUDGES' EX PARTE ORDER VIOLATED APPELLANT'S STATUTORY AND CIVIL SERVICE EMPLOYMENT RIGHTS

Appellant was at all times an employee of Ogden City. At the time the city courts of the State merged into the Circuit Court system, the Circuit Court Act provided for absorbtion of all existing employees of the various city courts and further provided:

They shall likewise continue as employees of the municipalities constituting primary circuit court locations without loss of tenure or other benefits and shall be subject to the civil service rules and regulations of these municipalities. 78-4-23(2), Utah Code Ann.

The Civil Service Rules and Regulations for Ogden

City provides:

The appointing authority may for cause reduce the salary of an employee within the range provided in the compensation plan or demote the employee. Such cause may be based upon the facts justifying disciplinary action, or inaptness, insufficient performance, or facts which disclose that such action is for the good of the service. A written statement of the reasons for such action shall be furnished to the employee and a copy filed with the Director. No demotion shall be made as a disciplinary action unless the employee demoted is eligible for employment in a lower class and shall not be made if any regular employee in a lower class would be laid off by reason of this action. Chapter 9 Section 4 (Exhibit 8P)

Had the statutory provision and Civil Service Rules been followed, appellant would have retained her employment with Ogden City in the Circuit Court, although at a demoted level. Appellant urged at trial that her demotion, when compared with other disciplined Circuit Court employees, was unduly harsh. While that issue is not raised in this appeal, the substantial disparity in disciplinary action should be considered in viewing the legality of the Judges' "Order".

Judge Taylor contended that the Judges had the inherent power to prevent the appellant's return to the Circuit Court. He did not feel the other employees' actions to be as culpable and did not, therefore, warrant similar banning orders. (T 133) He claimed that it was not their intent to have her fired, only to prevent her return to the Clerk's office. (T 132)

The effect of all of this, however, was to violate the appellant's statutorily protected Civil Service rights. The City Manager, pursuant to the Civil Service Rules, made his decision retaining her employment, but at a demoted level. Assuming arguendo that the Judges' inherent power allowed them to ban appellant's return, the Civil Service Rules prohibit any demotion as disciplinary action unless the employee is eligible for employment in a lower class. Despite several attempts by appellant for other City employment, she had been effectively fired.

Appellant admits the inherent power of the judiciary may appropriately involve some disciplinary action of Court employees, but not without certain due process rights. At a minimum, those due process rights should include an adherence to the Civil Service Rules governing the appellant and statutorily protecting her employment with Ogden City. Judge Taylor argued that she was provided her Civil Service rights by the hearing with the City Manager, but acknowledged that the Judges did not

feel bound by the decision. (T 140,145) If the rights have any value, then the decision given after exercising those rights should have meaning. It is impossible to argue that the statutory retention of appellant's Civil Service rights are valid and then justify her unemployment with Ogden City.

In Gabe v. County of Clark, 701 F. 2d 102 (9th Circuit, 1983), a Clark County Court Clerk employee filed a federal action alleging a denial of due process in the termination of her employment. After employment for several years in the clerk's office, Mrs. Gabe transferred her job to become legal secretary for a District Court Judge. It was acknowledged that she was entitled to all of the normal rights of a merit employee which included the due process protection of notice and hearing upon employment termination. Under Nevada law, terminated employees were entitled to priority consideration for lateral transfer to another County job. It was also agreed that at the time she became the Judges secretary, her status as a full County employee remained unchanged.

After Mrs. Gabe assumed her new employment, the Personnel Manual of the District Court was amended and a new provision inserted that members of a judge's personal staff served at the pleasure of the judge and were not entitled to the hearing accorded regular County employees. Mrs. Gabe had no notice of the adoption of this rule and

was subsequently fired by the Judge, purportedly for cause. Despite her request, she was given no written notice of the discharge or a hearing.

The County Personnel office provided her with eight to ten interviews for a lateral transfer to other County employment, but none was obtained. The trial court granted Clark County's motion for summary judgment on her claim for damages from wrongful termination.

On appeal, the Circuit Court held that the Nevada State Judiciary had the inherent authority to adopt their personnel provision eliminating any protectable interest in a judge's secretary job. The Court further held, however, that the enactment of the personnel change could not terminate Gabe's protectable job security by changing the status of her employment without her knowledge and consent. Accordingly, the Court held that Mrs. Gabe was entitled to notice of the effect of the personnel change and a reasonable time within which to make her decision whether to continue in her current position as the Judge's secretary, despite the removal of the job security safeguards, or seek to return to the Clerk's office, accept a lateral transfer to other County employment, or look for a position elsewhere. Not having been accorded such notice or opportunity, she was entitled to damages.

In appellant Tsakalos' case, she had every reason to believe that her continued employment with the newly

the created Circuit Court system would retain her civil service security since it was statutorily mandated. In exercising those rights she believed she had, she retained her employment at a demoted level by the City Manager's decision. Those rights are meaningless if they can be disregarded by a judicial ex parte order issued without notice to her or an opportunity for hearing with the judges. (T 140)

The Ogden City Civil Service Rules, much like Nevada's, provide for continued employment rights with Ogden City if a demotion is to occur. Much like Mrs. Gabe, appellant was unable to obtain any such employment.

It is acknowledged that in absence of a statute, court personnel are typically considered to be outside the application of civil service laws. 15A Am Jur 2d §16. By statute, Utah has specifically retained civil service applicability to municipal employees absorbed into the Circuit Court system.

Every case cited by defendants in their pre-trial brief in support of their position (R 30) involved court employees or officers not protected by statute. In defendants' post-trial brief (R 20), they attempt to distinguish appellant's situation from the Gabe case by asserting that unlike Mrs. Gabe, appellant had notice and a hearing. They miss the point. Appellant had notice and a hearing, the result of which was supposed to

be retention of her employment at a demoted level. The Judges' order was issued in total disregard of the City Manager's decision, apparently based on the "inherent power" concept of the judiciary to the exclusion of appellant's statutory grant of civil service protection.

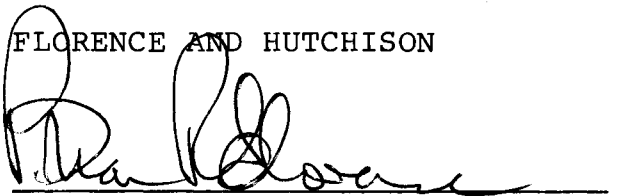
CONCLUSION

The ex parte order issued by the Third Circuit Court Judges violated the statutorily protected civil service rights of the appellant by effectively terminating her from any continued employment with Ogden City.

DATED this 22nd day of February, 1984.

Respectfully submitted,

FLORENCE AND HUTCHISON

A handwritten signature in black ink, appearing to read 'Brian R. Florence', is written over a horizontal line.

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MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Appellant, postage prepaid, to each of the following individuals at the addresses listed below on this 22nd day of February, 1984.

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