

2004

Vern L. Peterson v. Browning and David Rich : Reply Brief

Utah Supreme Court

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UTAH SUPREME
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IN THE SUPREME COURT OF THE STATE OF UTAH

VERN L. PETERSON,	:	
	:	
Plaintiff,	:	
Respondent,	:	Supreme Court Docket
	:	Number 400401
vs.	:	
	:	Priority 12
BROWNING and DAVID W. RICH,	:	
	:	
Defendants,	:	
Petitioners.	:	

REPLY BRIEF OF PETITIONERS

Certification from the United States District Court
in and for the District of Utah, Northern Division

Docket Number 87-NE-121G

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Clerk, Supreme Court, Utah

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I. INTRODUCTION

Defendants/Petitioners (hereafter "Defendants") Browning and David W. Rich hereby submit this Reply Brief in response to the arguments contained in the Brief of Plaintiff/Respondent (hereafter "Plaintiff") Vern L. Peterson, dated March 13, 1991 (hereafter "Plaintiff's Brief"). Defendants will not further address the issues raised regarding mootness related to preemption of this case by the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. On March 26, 1991, the United States District Court ruled that plaintiff's claims were not preempted by ERISA. Defendants also will not further address the factual matters, believing them to be fully before this Court without need for further elaboration.

II. REPLY ARGUMENT: THE PUBLIC POLICY EXCEPTION SOUNDS IN CONTRACT

A. Utah Has Not Yet Adopted a Public Policy Cause of Action as An Exception to the At-Will Employment Doctrine.

Plaintiff asserts that this Court has already recognized as a cause of action the public policy exception to the at-will employment doctrine. Plaintiff's Brief at pp. 13-14. This Court's own words and rulings contradict plaintiff's argument.

In Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989), this Court did not expressly recognize the public policy exception to the at-will doctrine. Justices Durham and Stewart stated in dicta that Utah law should recognize such an

exception. Id. at 1042-43. Yet, both conceded that the exception had "no application in this [Berube] case." Id. at 1043. Chief Justice Hall and Justice Howe, in a concurring opinion, found no need to comment on the matter. Id. at 1050. Justice Zimmerman, in a concurring and dissenting opinion, expressed a desire at some point to recognize such a cause of action, but declined to do so in Berube. Id. at 1051. Justice Zimmerman also acknowledged that the public policy exception was "not applicable to the present [Berube] case." Id. Thus, no public policy cause of action was at issue or recognized in Berube.

Subsequent decisions of this Court interpreting the language and meaning of Berube have also indicated that no public policy cause of action exists in Utah. In Caldwell v. Ford, Bacon & Davis Utah, Inc., 777 P.2d 483 (Utah 1989), this Court stated:

A majority of the Court [in Berube] also declined to adopt a broad public policy exception to the employment-at-will doctrine that would routinely make it a violation of public policy to discharge an employee in breach of an employment agreement for other than good cause.

Id. at 485. Again, the Court only acknowledged that on some future occasion under appropriately compelling facts, such a cause of action might be recognized. The Court stated:

Just as there was no occasion in Berube to describe any possible public policy exception in detail, so there is none here. However, a majority of the Court in Berube

did indicate that there are occasions when we might find a public policy exception to the employment-at-will doctrine.

Id. at 485, n.2 (emphasis added).

Accordingly, no cause of action predicated on a public policy exception to the at-will employment doctrine has ever been found to exist or been defined by any decisions of this Court.

B. Assuming Arguendo That Utah Has Recognized a Public Policy Exception, Such a Cause of Action Sounds in Contract, Not Tort.

Assuming arguendo that the public policy exception is a cause of action in Utah, this Court's decisions preclude a tort cause of action and establish only one sounding in contract.

In Lowe v. Sorensen Research Co. Inc., 779 P.2d 668 (Utah 1989), the plaintiff asserted tort causes of action for (i) a breach of the implied covenant of good faith and fair dealing; (ii) violation of employment policies and procedures contained in a policy manual and (iii) violation of public policy. Id. at 669. The Court's opinion stated that the plaintiff's allegations, construed in the light most favorable to the plaintiff, could give rise to a cause of action for contract damages. Id. at 670. Despite the presence of plaintiff's tort causes of action, the Court did not recognize any right to pursue tort claims or punitive damages. Indeed, Lowe declares that the Court in Berube "refused to recognize a

variety of wrongful discharge actions sounding in tort." Id. at 670. Lowe indicates that any Berube exceptions to the at-will doctrine sound in contract, not tort.

Defendants submit that the governing analyses for this matter was stated by Justice Zimmerman in his Berube concurring opinion:

I am of the view that any cause of action that may accrue to an employee discharged in violation of public policy would not ordinarily be in tort. I would imbed the public policy exception in the law by holding that every employment contract has an implied in law covenant that the employee will not be discharged in violation of public policy. Absent proof sufficient to show an independent tort, damages recoverable for a breach of that covenant will be measured by contract principles only.

771 P.2d at 1051 (emphasis added).

Accordingly, even if the Court has recognized the public policy cause of action, it has done so in contract, not tort.

C. Assuming Arguendo That This Court Has Not Yet Resolved the Question, the Public Policy Exception to the Employment At-Will Doctrine Should Sound Only in Contract, Consistent With the Other Exceptions to Employment At-Will.

Plaintiff argues that this Court should recognize the public policy exception as a tort cause of action. Plaintiff's Brief at pp. 14-18. Defendants contend that the reasoning adopted by this Court for employment cases and the very nature of the public policy exception mandates otherwise.

In Berube, Justice Durham noted, "The at-will rule, after all, is merely a rule of contract construction and not a

legal principle." Berube, supra, 771 P.2d at 1044. Thus, this Court has effectively recognized that even the at-will relationship is akin to a contractual relationship and must be analyzed within a contract framework. Consistent with this statement, the exceptions to the at-will doctrine established by this Court all sound in contract and provide only contract remedies.

The implied or express contract exception is analyzed under a contract theory. The exception for breach of an implied covenant of good faith and fair dealing, although not recognized in Utah, Caldwell, supra, 777 P.2d at 485, would also be analyzed as a contract. Justice Durham's Berube opinion states, "Utah has recognized that all contracts contain a covenant of good faith and fair dealing." Id. at 1046. Justice Zimmerman's concurring Berube opinion states, "The lead opinion recognizes, as we held in Beck, that a breach of the covenant of good faith and fair dealing in Utah yields a claim for contract damages only." Id. at 1051.

Accordingly, the other exceptions to the at-will doctrine in Utah sound only in contract. This Court has clearly demonstrated its preference for allowing only contract causes of action as exceptions to the at-will employment doctrine. This is because the Court has chosen to view the employment relationship as contractual, in reference to the injuries sustained from the loss of the bargain inherent in the relationship.

There is no reason to now change course or logic and classify the last at-will exception, public policy, as a tort. The goal of the public policy exception is the same as the other exceptions--to establish certain circumstances under which the employment relationship cannot be terminated. The public policy exception preserves the employment relationship by making certain aspects of it contractual. When the exception is violated the proper remedy is contract damages.

Plaintiff's argument for tort treatment is based on the assertion that the public policy exception really does not arise out of a contractual relationship but is imposed by law. Plaintiff's Brief at pp. 15-16. This is true only to the same extent as with the implied covenant of good faith, which allows only for contract damages. In either case, however, the requirement imposed by law depends on the existing underlying employment relationship which is usually contractual in nature.

The public policy exception must be viewed as part and parcel of the employment relationship. The duty to not terminate employment in violation of public policy is not a generalized duty. By necessity, it only exists by virtue of the underlying employment relationship.

Similar to the implied covenant of good faith, the prohibition on a termination in violation of public policy simply creates a condition of the employment relationship providing that employment cannot be terminated for certain reasons. When employment is nonetheless terminated for those certain reasons, an employee has lost the benefit of the

contract imposed by the public policy rule. Thus, the appropriate cause of action is in contract and the measure of damages is contractual--to put the employee back into the position of employment he or she would have occupied but for the breach of the imposed contract not to terminate employment in violation of public policy.

D. The Public Policy Exception Should Sound in Contract Because Punitive Damages Should Not Be Allowed For a Cause of Action Even This Court Finds Difficult to Define.

This Court should also decline to recognize a public policy exception sounding in tort because the term public policy is so vague and undefined that an employer will be put at risk for punitive damages for a tort of which it has no reasonable notice.

In Berube, this Court expressly conceded the ambiguous and uncertain nature of the public policy exception. Justice Durham's opinion states:

The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be excepted as the basis of the judicial determination, if at all, only with the utmost circumspection. Public policy in one generation may not, under changed circumstances, be the public policy of another.

771 P.2d at 1043, quoting Patton v. United States, 281 U.S. 276, 306 (1930). Similarly, Justice Zimmerman's Berube

concurring opinion referred to a study noting "there is a good deal of divergence among the courts as to what each of these exceptions [including public policy] means." *Id.* at 1050, n.1.

In short, it is obvious this Court is struggling to define the meaning of the public policy exception. Allowing the imposition of punitive damages for a cause of action that this Court has never defined, let alone recognized, is inappropriate.

In this connection, the United States Supreme Court has recently noted the constitutional problems inherent in allowing punitive damages to be awarded in circumstances of unlimited jury or judicial discretion. The Court has stated:

One must concede that unlimited jury discretion--or unlimited judicial discretion for that matter--in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities.

Pacific Mutual Life Insurance Co. v. Haslip, No. 89-1279, 59 U.S.L.W. 4157, 4161, 11 S.Ct. 1032 (March 4, 1991) (holding the punitive damages awarded in that case did not violate due process).

Thus, were the Court to hold that the public policy exception sounded in tort, rather than contract, a significant due process (or at least fundamental fairness) question could arise given the absence of meaningful standards to guide the application of the law. See e.g., Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (striking loitering statute as unconstitutionally vague).

In short, employers should not be subjected to punishment (punitive damages) absent notice about how to tailor their conduct to avoid such consequences. Plaintiff, on the other hand, argues that employers who are conscientious will not have to worry about liability under the public policy cause of action. Plaintiff's Brief at p. 17. Plaintiff's admonition to "be conscientious" offers even less guidance than this Court's cases concerning what conduct may or may not subject it to the articulated public policy exception and punitive damages.

Other courts recognizing the public policy exception as a contract have noted that such problems appear to be resolved by a contract approach. In Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834 (Wisc. 1983), the Wisconsin Supreme Court stated:

In tort actions, the only limitations are those of proximate cause or public policy considerations. Punitive damages are also allowed. In contract actions, damages are limited by the concept of foreseeability and mitigation. . . . Therefore, we conclude that a contract action is most appropriate for wrongful discharges. The contract action is essentially predicated on the breach of an implied provision that an employer will not discharge an employee for refusing to perform an act that violates a clear mandate of public policy. Tort actions cannot be maintained.

Id. at 841.

In Sterling Drug Inc. v. Oxford, 743 S.W.2d 380 (Ark. 1988), the Arkansas Supreme Court stated:

Since a public policy discharge action is essentially predicated on the breach of an

implied provision that an employer will not discharge an employee for an action done in the public interest, a contract cause of action is most appropriate. The exclusive contract approach strikes a fair balance in that it provides employees with protection from employer retaliation, while at the same time limiting recovery to contract remedies. If an employer's conduct in breaching a contract of employment is sufficiently egregious or extreme, the employee can still claim tort damages on a cause of action for outrage.

Id. at 385.

The purpose of punitive damages in Utah is to punish and deter conduct that is not likely to be deterred by other means. Atkin Wright & Miles v. Mountain States Tel., 709 P.2d 330, 337 (Utah 1985). No punishment should occur until the reason for punishment can be clearly articulated. Punitive damages have no place here even assuming the existence of a cause of action, since the cause has never been previously defined and defendants have had no notice of its parameters to allow them to conform their conduct accordingly.

E. This Court Has Specifically Found That Contract Remedies Sufficiently Protect Similar Interests to Those Protected by the Public Policy Exception.

Plaintiff argues that a tort claim and punitive damages must be allowed regarding the public policy exception because contract damages alone will not assure compliance with the dictates of public policy. Plaintiff's Brief at pp. 15-16. Defendants urge this Court to reject this argument for the same reasons it did so in the first party insurance

context--namely that contractual damages provide sufficient and appropriate relief.

Even if the public policy exception sounds in contract, employers still can seek tort punitive damages if the conduct at issue constitutes an independent tort. Thus, tort sanctions exist to deter improper conduct by employers. Nevertheless, contract damages serve this purpose equally as well.

In Beck v. Farmers Insurance Exchange, 701 P.2d 795 (Utah 1985), this Court held that in a first party insurance context, an insured could not recover tort damages against an insurer arising from alleged bad faith conduct. Id. at 800. In so concluding, the Court noted:

[T]he practical end of providing a strong incentive for insurers to fulfill their contractual obligations can be accomplished as well through a contract cause of action, without the analytical straining necessitated by the tort approach and with far less potential for unseen consequences to the law of contracts.

Beck at 799. The same rationale that prevailed in Beck also applies here.

The Court in Beck reasoned that the duties in a first party insurance relationship are contractual, not fiduciary. Id. at 800. As already noted above, this Court has also already classified the employment relationship, even when at-will, as contractual in nature. Similar to the first party insurance context, the employment relationship consists of

duties flowing solely between employer and employee. The employer has no fiduciary duty to represent the interests of an employee vis-a-vis third parties nor does an employment relationship possess any more of the vestiges of reliance and trust than does the first party insurance relationship.

In short, the employment relationship is analogous to the first party relationship discussed in Beck, the breach of which can only be remedied by contractual damages. If contractual damages are sufficient to assure that insurers comply with the strong public policy interest in fair claims practice recognized in Beck, they are equally adequate to assure that employers do not terminate employees in violation of similar public policy concerns.

F. The Fact That Other Jurisdictions Recognize the Public Policy Exception as a Tort Does Not Change the Logic or Result of the Foregoing Reasoning.

Plaintiff contends this Court should declare that the public policy exception sounds in tort because a number of other jurisdictions have done so. Plaintiff's Brief at pp. 14-15 and Addendum.^{1/} Defendants submit that these cases

^{1/} Respondent's Addendum VII attached to Respondent's Brief purports to summarize the position of each state regarding whether the public policy exception is a contract or a tort. Respondent lists the following cases as decisions concluding the cause of action is a tort. A closer reading of some of the cases cited, however, reveals that no such determination has been made:

North Carolina--Sides v. Duke Hospital, 328 S.E.2d 818 (N.C. App. 1985) (recognizes malicious interference with a contract but never actually says that wrongful discharge is a tort); Coman v. Thomas Mfg. Co., 381 S.E.2d 445 (N.C. 1989) (Footnote continued on next page.)

should not be followed in lockstep fashion because this Court has previously rejected their reasoning.

This Court has a well-deserved reputation for independently reviewing the legal reasoning concerning any proposition or cause of action prior to determining how the same will fare in Utah. This Court has rejected lockstep adherence to the conclusions of so-called majorities or trends.

For example, in Beck, the Court stated, "We recognize that a majority of states permit an insured to institute a tort action against an insurer who fails to bargain in good faith in a 'first party' situation." 701 P.2d at 798. Nevertheless, this Court took the full measure of the reasoning for both the

(Footnote continued from previous page.)

(follows Sides reasoning but only recognizes a cause of action for wrongful discharge).

Connecticut--Sheets v. Teddy Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980) (recognizes the trend towards torts but does not specifically recognize the public policy exception as a tort in Connecticut).

Maryland--Kearn v. South Baltimore General Hospital, 504 A.2d 1154 (Md. App. 1986), (recognizes a public policy cause of action but does not state whether it sounds in tort or contract).

Montana--Nye v. Department of Livestock, is incorrectly cited by Respondent. The correct cite is 639 P.2d 498 (Mont., 1982) (court never distinguishes between tort and contract).

Texas--Sabine v. Pilot Services, Inc. v. Hauck, 687 S.W.2d 733 (Tex., 1985) and McClendon v. Ingersol-Rand Co., 779 S.W.2d 69 (Tex., 1989) (neither case indicates whether it is recognizing a tort or contract cause of action.)

contract and tort causes of action and chose the contract analysis, despite the so-called majority view.

Notwithstanding plaintiff's claims of what is or is not a majority or a trend, defendants urge the Court to reach the identical result it did in Beck for the same rationale. For reasons of both policy and logic, should the Court recognize a public policy cause of action it should sound in contract, not tort.

CONCLUSION

Based on the foregoing analysis, defendants respectfully request this Court to rule that the public policy exception to the at-will doctrine, if it is to be recognized in Utah, sounds in contract and not in tort.

RESPECTFULLY SUBMITTED this 12th day of April, 1991.

JONES, WALDO, HOLBROOK & McDONOUGH


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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of April, 1991, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing REPLY BRIEF OF PETITIONERS, to the following:

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