

2004

Vern L. Peterson v. Browning : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David B. Havas; Michelle E. Heward; David B. Havas and Associates; Attorneys for Respondent. William B. Bohling; Michael Patrick O'Brien; Jones, Waldo, Holbrook and McDonough; Attorneys for Petitioners.

Recommended Citation

Brief of Respondent, *Peterson v. Browning*, No. 400401.00 (Utah Supreme Court, 2004).
https://digitalcommons.law.byu.edu/byu_sc2/2492

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

DOCUMENT
FV
5.9
39
DOCKET NO.

BRIEF

400401

IN THE SUPREME COURT OF THE STATE OF UTAH

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

RESPONSE BRIEF OF RESPONDENT
TO PETITIONERS' REPLY BRIEF

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

Case Number 87-NC-121G

David Bert Havas, No. 1424
Michelle E. Heward, No. 5084
DAVID BERT HAVAS AND ASSOCIATES
Attorneys for Respondent
2604 Madison Avenue
Ogden, Utah 84401
Telephone: (801)399-9636

William B. Bohling, No. 0373
Michael Patrick O'Brien, No. 4894
JONES, WALDO, HOLBROOK &
MCDONOUGH
Attorneys for Petitioners
1500 First Interstate Plaza
Salt Lake City, Utah 84101
Telephone: (801) 521-3200

FILED

APR 25 1991

CLERK SUPREME COURT,
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

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

RESPONSE BRIEF OF RESPONDENT
TO PETITIONERS' REPLY BRIEF

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

Case Number 87-NC-121G

David Bert Havas, No. 1424
Michelle E. Heward, No. 5084
DAVID BERT HAVAS AND ASSOCIATES
Attorneys for Respondent
2604 Madison Avenue
Ogden, Utah 84401
Telephone: (801)399-9636

William B. Bohling, No. 0373
Michael Patrick O'Brien, No. 4894
JONES, WALDO, HOLBROOK &
MCDONOUGH
Attorneys for Petitioners
1500 First Interstate Plaza
Salt Lake City, Utah 84101
Telephone: (801) 521-3200

TABLE OF CONTENTS

I.	RESPONSE ARGUMENT: THE PUBLIC POLICY EXCEPTION SOUNDS IN CONTRACT	1
A.	UTAH HAS ADOPTED A PUBLIC POLICY BASED CAUSE OF ACTION AS AN EXCEPTION TO THE EMPLOYMENT AT WILL DOCTRINE SOUNDING IN TORT	1
B.	OTHER EXCEPTIONS TO THE EMPLOYMENT-AT-WILL DOCTRINE SHOULD NOT GOVERN THE NATURE OF THE PUBLIC POLICY EXCEPTION	1
C.	EMPLOYERS ARE OR SHOULD BE AWARE OF THE SUBSTANTIAL PUBLIC POLICIES OF THE STATE AND SHOULD NOT BE SURPRISED TO FIND THEMSELVES ANSWERING IN DAMAGES FOR VIOLATIONS	5
D.	CONTRACT AND OTHER TORT REMEDIES ARE INSUFFICIENT TO PROTECT THE INTERESTS OF THE PUBLIC POLICY EXCEPTION	6
E.	UTAH SHOULD FOLLOW THE MAJORITY OF THE STATES IN UPHOLDING A TORT CAUSE OF ACTION	9
	CONCLUSION	10
	ADDENDUM	12

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<u>Beck v. Farmers Insurance Exchange</u> 701 P.2d 795 (Utah, 1985)	7,8
<u>Behrens v. Raleigh Hills Hosp., Inc.</u> , 675 P.2d 1179, 1186 (Utah 1983)	6,7
<u>Berube v. Fashion Center, Ltd.</u> 771 P.2d 1033 (Utah 1989)	1,5
<u>Caldwell v. Ford, Bacon & Davis Utah, Inc.</u> , 777 P.2d 483 (Utah 1989)	1
<u>DCR Incorporated v. Peak Alarm Company</u> , 663 P.2d 433, 435 (Utah 1983)	2
<u>Kelsay v. Motorola, Inc.</u> , 384 N.E.2d 353 (Ill. 1979)	7
<u>Kessler v. Equity Management, Inc.</u> , 572 A.2d 1144 (Md.App. 1990)	9
<u>Malone v. University of Kansas Medical Center</u> , 220 Kan. 371, 374, 552 P.2d 885, 888 (1976).	3
<u>McClendon v. Ingersoll-Rand Company</u> 111 S.Ct. 478, 1990 US Lexis 6121, 112 L.Rd2d 474, 59 U.S.L.W. 4033 (December 3, 1990).	10
<u>Noye v. Hoffmann - La Roche, Inc.</u> 570 A.2d 12 (N.J. Super. A.D. 1990)	10
<u>Nye v. Department of Livestock</u> , 639 P.2d 503 (1982).	10
<u>Samms v. Eccles</u> , 11 Utah 2nd 289, 358 P.2d 344 (Utah 1961).	8
<u>Sheets v. Teddy's Frosted Foods, Inc.</u> , 427 A.2d 385, 389	9
<u>Sides v. Duke Hospital</u> , 328 S.E.2d 818 (N.C. App. 1985)	10
<u>Tameny v. Atlantic Richfield</u> 610 P.2d 1330 (1980)	2
<u>Vermillion v. AAA Pro Moving & Storage</u> , 704 P.2d 1360 (Ariz.App. 1985).	7,8

OTHER AUTHORITIES

A New Common Law of Employment Termination, 66 N.C. Law R. 631,
663-670 (1980)

Guidelines for a Public Exception to the Employment at Will
Rule: The Wrongful Discharge Tort, 13 Conn. L. Rev. 617. . . . 9

Mallor, Punitive Damages for Wrongful Discharge, 26 Wm and Mary
L.Rev. 449, 483 6,7

Mauk, Wrongful Discharge: The Erosion of 100 Years of Employer
Privilege, 21 Idaho L.Rev. 201, 209, 210 1,3

Law of Torts (4th ed. 1971) p. 613 2

M. Glazer & P. Glazer, The Whistleblowers: Exposing Corruption
in Government and Industry, (Basic Books, 1989) 7

I. RESPONSE ARGUMENT: THE PUBLIC POLICY EXCEPTION SOUNDS IN CONTRACT

A. UTAH HAS ADOPTED A PUBLIC POLICY BASED CAUSE OF ACTION AS AN EXCEPTION TO THE EMPLOYMENT AT WILL DOCTRINE SOUNDING IN TORT

Plaintiff has fully briefed the support in Utah cases for the adoption of a public policy based cause of action. Brief of Respondent, pp. 13-14. Although Plaintiff agrees that the Court has not had appropriate facts before it with which to set forth the exact parameters of the public policy exception, there is no question but that the public policy based exception to the at-will employment rule is viable in Utah. In Caldwell v. Ford, Bacon & Davis Utah, Inc., 777 P.2d 483 (Utah 1989) the Court simply indicated a limit to those parameters by stating that a majority of the Court in Berube would not adopt a broad public policy exception that would in essence make an other than "good cause" discharge actionable. Caldwell at 485 (emphasis supplied).

B. OTHER EXCEPTIONS TO THE EMPLOYMENT-AT-WILL DOCTRINE SHOULD NOT GOVERN THE NATURE OF THE PUBLIC POLICY EXCEPTION.

Defendants contend that since the other exceptions to the employment-at-will doctrine sound in contract, so should the public policy based exception. Petitioners' Reply Brief, pp 4-7. Plaintiff, however, asserts that the very nature of the public policy based exception distinguishes it from the other exceptions and requires that it be treated as a tort.

Plaintiff recognizes that even an at-will employment is a contractual relationship with the at-will feature indicating the limited nature of the contract. See Mauk, Wrongful Discharge: The Erosion of 100 Years of Employer Privilege, 21 Idaho L.Rev. 201, 210. (Provides excellent historical analysis of the contract and tort theories of the at-will exceptions). The analysis, however, should center not on the relationship of the parties, but upon the conduct of

the parties.

This Court has recognized that tort causes of action may arise out of a contractual relationship. In DCR Incorporated v. Peak Alarm Company, 663 P.2d 433, 435 (Utah 1983) this Court indicated that "[a] party who breaches his duty of due care toward another may be found liable to the other in tort, even where the relationship giving rise to such a duty originates in a contract between the parties." The Court goes on further to quote the case of Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980), a leading wrongful termination case based on a violation of public policy, in support of its position that a tort may arise out of a contractual relationship:

[A] wrongful act committed in the course of a contractual relationship may afford both tort and contractual relief, and in such circumstances the existence of the contractual relationship will not bar the injured party from pursuing redress in tort.

... [I]f the cause of action arises from a breach of a promise set forth in the contract, the action is ex contractu, but if it arises from the breach of duty growing out of the contract it is ex delicto.

... As Professor Prosser has explained: "[Whereas] [c]ontract actions are created to protect the interest in having promises performed, "[t]ort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties...." Prosser, Law of Torts (4th ed. 1971) p. 613. [Emphasis added; some bracketed language in original]

Peak Alarm, 663 P.2d at 435 (some citations omitted).

In the implied or express contract, or good faith and fair dealing exceptions, the exceptions help to define the expectations of the parties in performing the employment agreement. If an employee has the benefit of a manual or rules promulgated by the employer, he has a right to expect that if he follows them, that the employer will do likewise. Further, if he enters into an agreement he has the right

to expect that the other party will act in good faith and fairly in carrying out the covenants of the agreement. This is seen in the first party insurance contract as is set forth by Defendants in their Reply Brief, pp 11 and 12.

Unlike the other two exceptions, however, the public policy violation arises out of a duty imposed by law, independent of the employment agreement, the violation of which is unexpected when the agreement is entered into. In Malone v. University of Kansas Medical Center, 220 Kan. 371, 374, 552 P.2d 885, 888 (1976), the Kansas Supreme Court stated:

A breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement. A tort, on the other hand, is a violation of a duty imposed by law, a wrong independent of contract. Torts can, of course, be committed by parties to a contract. The question to be determined here is whether the actions or omissions complained of constitute a violation of duties imposed by law, or of duties arising by virtue of the alleged express agreement between the parties.

Cited by Mauk, 21 Idaho L.Rev. at 209. In the public policy violation it is clear that the public policy of the state, not the employment agreement, gives rise to duties imposed by law. The contractual employment is involved merely because it forms the basis of the relationship.

Contrary to Petitioners' position (Reply Brief, p. 6) the goal of the public policy exception is not just to establish certain circumstances under which the employment relationship cannot be terminated. The goal is to uphold the public policy of the state. It is to protect those employees who stand against their employers when the employer's desires do not reflect what is in the public good. It is to deter employers from using their unique position over an employee to coerce conduct against the public good. Finally, it is to encourage employees to engage in lawful conduct, that is in the public

good. These same concerns are not present in the other at-will exceptions because those exceptions deal with the parties' expectations only, not in deterrence or promotion of that which is in the public good.

There must be a strong deterrent to keep employers from coercing employees to engage in conduct that violates the substantial public policy of the state. Otherwise, a cost benefit analysis, often employed to determine the feasibility of a contract, may be employed. If the employer believes that it can coerce violations of public policy and 1) the chances of getting caught are slim because employees cannot take the chance of losing their jobs; and 2) if they are caught, their damages will be minimized by placing the employee where he was but for the breach, an employer may well take its chances in violating public policy through its employees. This does nothing to protect employees who stand and uphold the state's public policy, and encourages violations that are in the employer's (but not the public's) interest. Recognizing a public policy based cause of action for wrongful discharge that has the deterrent effect of tort damages will not only deter employers from improper conduct against the public good, but will also promote obedience to the public policy of the state by employees who otherwise have a very strong incentive (to keep their job) to violate them.

This is simply not analogous to the first party insurance context as is argued by Defendants at pages 11 and 12 of their Reply Brief. In the insurance context it is difficult to imagine an instance where the insurer would hold the power over the insured sufficient to compel an insured to actively take steps that were against the public good but in the insurer's best interest. In the employment context, however, employers commonly have coercive powers

over an employee.

Justice Zimmerman's concurring opinion in Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989) suggests that he would imply at law a covenant in every employment contract that an employee cannot be terminated in a manner that contravenes the public policy of the State. Id. at 1051 If the covenant of good faith and fair dealing is recognized in the employment area, as it has in all other contractual relationships, a breach of the covenant of good faith and fair dealing would occur where someone is discharged in violation of the state's public policy. If the public policy exception is read as narrowly as Justice Zimmerman proposes, it will be swallowed up and be of no use or effect, despite the fact that the public policy exception is the most widely recognized exception to the employment at will doctrine, and arguably has the most compelling reasons for its application. Employees who seek to act in accordance with the state's public policy would not be protected from losing their jobs for refusing to act against the public policy of the state, and employers who coerce employees to engage in the conduct against the public good and in the employer's self interest, would not be deterred.

C. EMPLOYERS ARE OR SHOULD BE AWARE OF THE
SUBSTANTIAL PUBLIC POLICIES OF THE STATE AND
SHOULD NOT BE SURPRISED TO FIND THEMSELVES
ANSWERING IN DAMAGES FOR VIOLATIONS

Defendants argue that the public policy exception should not be a tort because it is too difficult to define and that they have inadequate notice of what is expected of them. Defendants' Reply Brief, pp 7-10.

An employer would have a difficult time arguing that it was unaware of the public policy of the state, or that willful and malicious violations of that public policy may lead to damages. It

may be unhappy to find that its cost/benefit analysis under a contract theory did not actually limit its damages, but it cannot argue that it was not on notice. The real test to determine whether punitive damages should be awarded should be whether the employer had any means of appreciating that its conduct was wrongful. See Mallor, Punitive Damages for Wrongful Discharge, 26 Wm and Mary L. Rev. 449, 483 (excellent discussion on need for punitive damages to deter employers in wrongful dismissal actions). Mallor continues with this analysis:

A Court also might find that the employer had notice that a given discharge would be wrongful when the discharge interferes with a well-known and clearly established personal right or public interest. A Defendant who knows or has good reason to know of an established right held by Plaintiff (such as the right to claim worker's compensation benefits for on-the-job injuries) might expect that interference with that right is wrongful, regardless of whether a Court of that jurisdiction has expressly held it to constitute a tort.

Id. Defendants would have the cause of action sound in contract to avoid the imposition of punitive damages. This Court must not limit the availability of a necessary tort because of the damages that may be imposed when the punitive damages themselves have a built in mechanism to protect against abuse. See Behrens v. Raleigh Hills Hosp., Inc., 675 P.2d 1179, 1186 (Utah 1983) (Punitive damages require "proof of willful and malicious conduct, or...proof of conduct which manifests a knowing and reckless indifference toward and disregard of, the rights of others, especially where compensatory damages may be simply absorbed as a cost of business).

D. CONTRACT AND OTHER TORT REMEDIES ARE INSUFFICIENT
TO PROTECT THE INTERESTS OF THE PUBLIC POLICY
EXCEPTION

Plaintiff agrees that the purpose of punitive damages is to punish and deter conduct that is not likely to be deterred by other means. Petitioners' Reply Brief, pp. 10-11. This, however, supports

the need for the public policy cause of action to be a tort.

Without the possibility of punitive damages, employers are not likely to be deterred from conduct that is not only harmful to the employee but to the public good. The Illinois Supreme Court in Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1979) stated "[t]he imposition on the employer of that small additional obligation to pay a wrongfully discharged employee compensation would do little to discourage the practice of retaliatory discharge, which mocks the public policy of this State...." Kelsay at 359. See also Mallor, 26 Wm and Mary L. Rev. at 480. Our Court in Behrens v. Raleigh Hills Hosp., Inc., 675 P.2d at 1187, indicated that punitive damages may

be appropriate to take the profit out of wrongdoing where compensatory damages are small in relation to the financial resources of a defendant and can be subsumed as a cost of doing business. The intended deterrent effect must be clear and in proportion to the nature of the wrong and the possibility of recurrence.

Punitive damages, and therefore a tort cause of action, must be available for use in appropriate cases to deter employers from willful and malicious violations of public policy. For a good discussion on the need to encourage employees to uphold public policy without the threat of retaliation, see M. Glazer & P. Glazer, The Whistleblowers: Exposing Corruption in Government and Industry, (Basic Books, 1989).

Contract remedies are insufficient. This Court has recognized that in unusual cases, damages for mental anguish might be provable. Beck v. Farmers Insurance Exchange, 701 P.2d 795, 802 (Utah, 1985). Not only does this water down any deterrent effect that the public policy exception may have, but it also does nothing to compensate for the wrong to society, and gives well intentioned employees little incentive or protection in standing up against the employer where public policy is violated. In Vermillion v. AAA Pro

Moving & Storage, 704 P.2d 1360 (Ariz.App. 1985) the employee was ordered to conceal a theft. The employee notified the customer that his employer had stolen salvaged property, and he was fired. If only contract damages would have been available to him, the deterrent effect on the employer from doing this in the future would likely be minimal, i.e. lost wages. The mental anguish suffered by the employee may not rise to the level of "unusual" which would allow him to be compensated for his damages. The "outrageous" wrong was directed at society, the employee without whom the incident would not have been brought to light, is left having to find new employment and the employer left with little deterrent effect from hiring another employee whose circumstances are such that they cannot afford to lose their job and will cooperate in his illegal scheme. Contract damages, even under Beck would be insufficient to promote the public policy of this state and provide employees with needed protection from employers who are looking out only for their own self interest.

Finally, no other tortious cause of action covers the standard wrongful termination in violation of public policy. The closest tort is arguably intentional infliction of emotional distress Samms v. Eccles, 11 Utah 2nd 289, 358 P.2d 344 (Utah 1961). This tort, however, requires intentional or reckless, extreme and outrageous conduct toward Plaintiff, causing severe emotional distress. Many public policy based wrongful termination actions arise because the employer has violated some tenet of public policy directed at society. An employee deserving of the protection of the cause of action may be left with no cause of action because the intentional and outrageous conduct was not directed at him. In the Vermillion case cited supra,

the conduct of the employer was outrageous and something society should not tolerate, but it was not intentionally directed at the employee: his termination was simply a by-product of the employer's illegal scheme. A public policy based cause of action for wrongful termination must be present to promote the public policy of this state by employees and employers and to deter employers from acting with impunity to do what is in their self interest despite what is in the public interest.

E. UTAH SHOULD FOLLOW THE MAJORITY OF THE STATES IN UPHOLDING A TORT CAUSE OF ACTION

As has been argued above, the public policy exception is distinguishable from the other at-will exceptions and it would not be inconsistent for Utah to find the public policy exception is a tort. The strong majority of the states have found that the public policy based wrongful termination cause of action sounds in tort. 1/

1/ Petitioners attack several cases in Respondent's Addendum VII, through a footnote at pages 12 and 13 of their Reply Brief. The specific states challenged by Petitioners are responded to below. Not only has one more state, Ohio, joined the vast majority finding the public policy exception to be a tort, but those called into question by Defendants are firmly within the tort action. Attached as an Addendum to this Brief is a corrected state by state listing of how the states have treated the issue now before this court for consideration.

Connecticut--After referring to cases from several states which had found public policy based causes of action sounding in tort, the Supreme Court stated "In light of these recent cases, which evidence a growing judicial receptivity to the recognition of a tort claim for wrongful discharge, the trial court was in error in granting the defendant's motion to strike. ...For today, it is enough to decide that an employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment." Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 389. Also see the tort analysis of Sheets in Guidelines for a Public Exception to the Employment at Will Rule: The Wrongful Discharge Tort, 13 Conn. L. Rev. 617.

Maryland--Kessler v. Equity Management, Inc., 572 A.2d 1144 (Md.App. 1990) clarifies any prior ambiguity and here analyzes punitive damages for "a tort arising out of a contract."

Additionally, a majority of the states have determined that the other at-will exceptions sound in contract. In the recent case of Noye v. Hoffmana-La Roche, Inc., 570 A.2d 12 (N.J. Super. A.D. 1990) that court analyzed the differences between the public policy and good faith/fair dealing exceptions and held, as we urge here, that the public policy based claim is in tort even though the other at-will exceptions sound in contract. It cites a majority of states that have done likewise. Id. at 14, 15.

It is instructive to look to our sister state of Arizona which has analyzed this area more thoroughly than most. See Addendum for cases.

CONCLUSION: The public policy based exception to the employment-at-will doctrine should sound in tort, following the strong majority of states in our country. It is distinguishable in the manner in which it arises and the interests it seeks to protect, and should be treated differently than the other at-will exceptions. Such treatment would be totally consistent with the case law of our state, and would bring Utah into the majority of states that so hold.

(Footnote continued from previous page.)

Montana--Nye v. Department of Livestock, 639 P.2d 503 (1982) indicates "The District Court's order of dismissal appears to rest upon the fact that Nye's employment was 'at will.' However, the tort of wrongful discharge may apply to an at will employment situation." Id. at 501-502. For a thorough analysis of the Montana cases clearly setting forth their tort basis for both the public policy and good faith and fair dealing exceptions, see Leonard, A New Common Law of Employment Termination, 66 N.C. Law R. 631, 663-670 (1980).

North Carolina-- The language relied upon in Sides v. Duke Hospital, 328 S.E.2d 818 (N.C. App. 1985) was "[P]laintiff's plea for punitive damages in the claims for wrongful discharge and malicious interference with contract was appropriate, since both claims sound in tort...." Id. at 830 (emphasis supplied).

Texas--McClendon v. Ingersol-Rand Co., 779 S.W.2d 69 (1989), refers to the good faith and fair dealing action as a tort, see ftnt 1, and in ftnt 3, and without correcting him, acknowledges that the Plaintiff was, under the public policy exception, seeking damages for mental anguish and punitive damages.

DATED this 25 day of April, 1991.

B1

DAVID BERT HAVAS of
DAVID BERT HAVAS AND ASSOC.
Attorneys for Plaintiff

B1

MICHELLE E. HEWARD of
DAVID BERT HAVAS AND ASSOC.
Attorneys for Plaintiff

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be hand delivered four true and correct copies of the above and foregoing Response Brief of Respondent to Petitioners' Reply Brief to William B. Bohling and Michael Patrick O'Brien of Jones, Waldo, Holbrook & McDonough, Attorneys for Defendants, 1500 First Interstate Plaza, 170 South Main Street, Salt Lake City, Utah 84111, on this 25 day of April, 1991.

B1

ADDENDUM

Of the 40 states that have recognized a cause of action for a violation of public policy, 32 recognize the action as a tort, 3 as a contract, and in 5 states it is unclear.

The following states have expressly or impliedly recognized a wrongful termination or retaliatory discharge claim as a result of public policy violations, based in tort:

ARIZONA, Wagenseller v. Scottsdale Memorial Hospital, 710 P.2d 1025, 1036 (1985) (termination for refusal to commit act which might constitute indecent exposure), Wagner v. City of Globe, 722 P.2d 250 (1986) (good discussion re recognizing exceptions to at-will rule);

CALIFORNIA, Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1331 (1980);

COLORADO, Cronk v. Intermountain Rural Electric Assn, 765 P.2d 619, 622 (Ct.App. 1988) (employee discharged for exercising a specifically enacted right or duty), Winther v. DEC International, Inc., 625 F.Supp 100, 104 (D.Colo. 1985) (applying Colorado law, cause of action is a tort);

CONNECTICUT, Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 388-89 (1980) (termination for insisting employer comply with food and drug laws);

HAWAII, Parnar v. American Hotels, Inc., 652 P.2d 625, 631 (1982) (fired because testimony before federal grand jury might be damaging to employer);

ILLINOIS, Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 877 (1981) (termination for giving information to police in criminal investigation);

INDIANA, Frampton v. Central Indiana Gas Co., 297 N.E.2d 425, 428 (1973) (termination for filing worker's compensation claim), Scott v. Union Tank Car, 402 N.E.2d 992 (Ind. Ct. App. 1980) (wrongful discharge action is a tort);

IOWA, Springer v. Weeks & Leo Co., Inc., 429 N.W.2d 558, 560 (1988) (termination for filing worker's compensation claim);

KANSAS, Murphy v. City of Topeka, 630 P.2d 186, 193 (Kan. App. 1981) (retaliatory discharge);

KENTUCKY, Firestone Textile Co. v. Meadows, 666 S.W.2d 730, 733 (1984) (violation of fundamental and well defined public policy);

MARYLAND, Kessler v. Equity Management, Inc., 572 A.2d 1144 (Md.App. 1990) (termination for refusing to violate tenants' constitutional right to privacy by carrying out illegal entries to their property and searches of their belongings; Kern v. South Baltimore General Hospital, 504 A.2d 1154 (Ct.App. 1986) (recognizes public policy based cause of action, but not in facts of this case), Alder v. American Standard Corp., 538 F.Supp. 572, 579 & 580 (D.Md. 1982) (good discussion re federal law as source of public policy);

MINNESOTA, Phipps v. Clark Oil & Refining Corp., 396 N.W.2d 588, 592 (Ct.App. 1986) (violation of federal law basis for public policy);

MISSOURI, Boyle v. Vista Eyeware, Inc., 700 S.W.2d 859, 878 (Ct.App. 1985) (federal law FDA regulations were basis for public policy);

MONTANA, Nye v. Dept. of Livestock, 638 P.2d 498, 502 (1982) (But 1987 legislation requires employer to discharge only for good cause and not in retaliation for refusing to do an act violative of public policy or in violation of personnel policy);

NEVADA, Hanson v. Harrah's, 675 P.2d 394, 396 (1984) (termination for filing worker's compensation claim);

NEW HAMPSHIRE, Cloutier v. Great Atlantic & Pacific Tea Co., 436 A.2d 1140, 1143, 1146 (1981) (refers to prior cases as establishing tort based cause of action for violation of public policy);

NEW JERSEY, Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 512 (1980) see also Cerracchio v. Alden Leeds, Inc., 538 A.2d 1292 (1988) (tort and contract remedies available);

NEW MEXICO, Chavez v. Manville Products Corp., 777 P.2d 371 (1989) (Retaliatory discharge in violation of public policy is an intentional tort); see also Vigil v. Arzola, 699 P.2d 613, 619 (Ct.App. 1983) (revised on other grounds);

NORTH CAROLINA, Sides v. Duke Hospital, 328 S.E.2d 818, 830 (App. 1985), rev. denied, 333 S.E.2d 490 (1985) (terminated for refusal to testify untruthfully in Court), see also Coman v. Thomas Mfg. Co., 381 S.E.2d 445 (1989) (Supreme Ct. upholds Sides reasoning);

NORTH DAKOTA, Krein v. Morian Manor Nursing Home, 415 N.W.2d 793, 795 (1987) (termination for filing worker's compensation claim);

OHIO, Greeley v. Miami Valley Maintenance Contractors, Inc., 551 N.E.2d 981 (1990) (termination for implementing child support wage withholding order), see also Shaffer v. Frontrunner, Inc.,

566 N.E.2d 193 (1990) (two plaintiffs, one fired for attending jury duty and the other in retaliation for daughter attending jury duty)

OKLAHOMA, Burk v. K-Mart Corp., 770 P.2D 24, 28 (1989) (violation of public policy set in constitution, statutes or case law gives rise to tort);

OREGON, Delaney v. Taco Time Int'l, Inc., 681 P.2d 114, 116 (1984) (terminated for refusal to sign potentially defamatory statement);

PENNSYLVANIA, Reuther v. Fowler & Williams, Inc., 386 A.2d 119 (1978) (terminated for jury duty), Veno v. Meredith, 515 A.2d 571, 577 (1986) (public policy violation gives rise to a tort);

RHODE ISLAND, Cummins v. EG & G Sealol, Inc., 690 F.Supp 134 (D.R.I. 1988) (Concludes Rhode Island would recognize public policy based cause of action citing Volino v. General Dynamics, 539 A.2d 531 (1988));

SO. CAROLINA, Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213, 216 (1985) (terminated for honoring subpoena to grand jury investigation);

TENNESSEE, Clanton v. Cain-Sloan Co., 677 S.W.2d 441, 444-45 (1984);

TEXAS, Sabine v. Pilot Service, Inc. v. Hauck, 687 S.W.2d 733 (1985) (discharged for refusing to perform illegal act), McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, (1989) (Court acknowledges damages for mental anguish and punitive damages);

VIRGINIA, Bowman v. State Bank of Keysville, 331 S.E.2d 797, 801 (1985), Haigh v. Matsushita Elec. Corp. of America, 676 F.Supp 1332 (E.D. Va. 1987) (discusses and applies Va. law);

WASHINGTON, Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1089 (1984) (termination for complying with law);

WEST VIRGINIA, Harless v. First Nat'l Bank, 289 S.E.2d 692, 701 (1982) (refusal to violate consumer protection laws);

WYOMING, Griess v. Consolidated Freightways, 776 P.2d 752, 754 (1989) (terminated for filing worker's compensation claim).

Of those states recognizing a public policy exception, the following states provide contract remedies for such cause of action:

ALASKA, Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123 (1989) (violations of public policy considered breaches of implied covenant of good faith and fair dealing, implies contractual remedies);

ARKANSAS, Sterling Drug, Inc v. Oxford, 743 S.W.2d 380 (1988), reh den. 747 S.W.2d 579 (1988) (public policy violations predicated on breach of implied provision not to discharge for an act done in public interest);

WISCONSIN, Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834 (1983).

In the following states Plaintiff has been unable to ascertain whether the recognized public policy based cause of action sounds in tort or contract:

IDAHO, Staggier v. Idaho Falls Consolidated Hospitals, Inc., 715 P.2d 1019 (Ct.App. 1986);

MASSACHUSETTS, Hobson v. McLean Hospital Corp. 522 N.E.2d 975, 978-979 ftnt. 3 (Sup.Jud.Ct. 1988), DeRose v. Putnam Mgmt. Co., 496 N.E.2d 428 (1986) (good discussion re measure of damages tort no holding);

MICHIGAN, Goins v. Ford Motor Co., 347 N.W.2d 184, 191 (Ct. App. 1983) (termination for filing worker's compensation claim against employer) although a separate panel of the Court of Appeals ruled in a 1988 case that termination in retaliation for filing a worker's compensation claim sounds in contract, not tort. See Lopas v. L & L Shop-Rite, Inc., 430 N.W.2d 757 (1988); BUT SEE: Pratt v. Brown Machine Co., 3 IER Cases 1121, 1134 (6th Cir. 1988) (interpreting Michigan law upholds tort cause of action, but recognizes split in Michigan Court of Appeals);

NEBRASKA, Ambroz v. Cornhuskers Square, Ltd., 416 N.W.2d 510 (1987), Schriner v. Meginnis Ford Co., 421 N.W.2d 755 (1988);

VERMONT, Payne v. Rozendaal, 520 A.2d 586, 589 (1986);

The following states have not adopted a public policy exception to at-will rule:

ALABAMA, Reich v. Holiday Inn, 454 S.2d 982 (1984) (case did not present justification to modify at-will rule), but see Scholtes v. Signal Delivery Service, Inc., 548 F.Supp. 487 (W.D.Ark. 1982) (held Arkansas would recognize exception to at-will rule);

DELAWARE;

FLORIDA, Smith v. Piezo Technology & Professional Administrators, 427 S.2d 182 (1983) (but statutes already prohibit employer retaliation for voting, jury service, whistle blowing and filing worker's compensation claims);

GEORGIA;

LOUISIANA, Gil v. Metal Service Corp., 412 S.2d 706 (Ct.App. 1982);

MAINE;

MISSISSIPPI, Laws v. Aetna Finance Co., 667 F.Supp. 342, 348 (D.N. Miss. 1987) (Mississippi would adopt public policy exception to at-will rule);

NEW YORK, Murphy v. American Home Products Corp., 448 N.E.2d 86 (N.Y.App. 1983);

SOUTH DAKOTA, Abrogated employment at-will by statute;