

2005

MARILYN TOUCHARD, THOMAS  
AMMONS, FELIX BARELA, OSCAR GARCIA,  
DENNIS NELSON, WADE PETERSON,  
FRANK ROSS, HEIDI SCOTT v. La-Z-Boy  
Incorporated : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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DENNIS NELSON, WADE  
PETERSON, FRANK ROSS, HEIDI  
SCOTT,

Plaintiffs,

vs.

LA-Z-BOY INCORPORATED,

Defendant.

PLAINTIFFS' REPLY BRIEF

Appeal No. 20050361-SC

BEFORE THE COURT PURSUANT TO UTAH RULE OF APPELLATE  
PROCEDURE 41 ON AN ORDER OF CERTIFICATION ISSUED BY  
THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF  
UTAH, THE HONORABLE JUDGE TENA CAMPBELL PRESIDING.

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FILED  
UTAH APPELLATE COURTS

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## INTRODUCTION

In their opening briefs, both Plaintiffs Marilyn Touchard (“Ms. Touchard”), Thomas Ammons, Felix Barela, Oscar Garcia, Dennis Nelson, Wade Peterson, Frank Ross and Heidi Scott (collectively “Plaintiffs”) and Defendant La-Z-Boy, Inc. (“La-Z-Boy”) spent considerable space outlining the position of other states on the certified questions. Plaintiffs’ intent was simply to demonstrate that the vast majority of states have determined, either by way of legislation or judicial decision, that preventing the erosion of rights arising under workers’ compensation statutes, by providing terminated employees a cause of action for wrongful termination reflects an important public policy. Plaintiffs also cited cases from other jurisdictions to demonstrate that this Court would be joining the vast majority of states if it recognizes the claims raised by the Plaintiffs.

Of course, the issue presented in this case is whether Utah’s Workers’ Compensation statute, Utah Code Ann. § 34A-2-101, *et. seq.*, (“UWCA”), embodies a clear and substantial public policy of the state of Utah. As outlined below, this Court’s analysis of what constitutes a clear and substantial public policy demonstrates that the UWCA is a clear and substantial Utah policy. Based upon this Court’s prior decisions, terminating, either actually or constructively, harassing or otherwise taking adverse employment actions against an employee who exercises, or assists others in exercising, rights under the UWCA violates Utah’s public policy and provides the affected employee with a cause of action. Accordingly, the Court should answer “yes” to both of the certified questions and their sub-

parts by recognizing the clear and substantial nature of the public policy contained in the UWCA.

## ARGUMENT

### I. THE LEGISLATURE'S FAILURE TO PROVIDE A CAUSE OF ACTION IS NOT FATAL TO PLAINTIFFS' CLAIMS.

La-Z-Boy asserts that because the Utah Legislature has not provided a statutory right to recover damages based upon Plaintiffs' allegations in support of their claims that the Court should answer "no" to the certified questions. *See* La-Z-Boy's Opening Brief, pages 21-27. This position flies in the face of the Court's numerous decisions discussing the public policy exception to at-will employment. Rejecting Plaintiffs' claims because the Utah Legislature has not created a statutory cause of action would effectively overturn every case which has recognized the public policy exception to at-will employment. While the Court has consistently regarded legislative enactments as *one* source of Utah's public policy, it has never indicated that those enactments are the *sole* source of Utah's public policy. In fact, the Court has squarely rejected this position:

Limiting the scope of public policy to legislative enactments would necessarily eliminate aspects of the public interest which deserve protection but have limited access to the political process. Judicial decisions can also enunciate substantial principles of public policy in areas which the legislature has not treated. Therefore, although it is not by any means a foregone conclusion that the public interest will be implicated in cases of employee termination, public policy on this question generally may be derived from both legislative and judicial pronouncements.

*Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1043 (Utah 1989).



Further, the Court has recognized that the very nature of the claim does not require a legislative pronouncement. The Court's entire analysis of the public policy exception is based upon the *absence* of a statute providing a specific remedy. Indeed, if only the Legislature could create a cause of action, the whole concept of a wrongful termination in violation of public policy would cease to exist and there would not have been any reason for the Court to repeatedly analyze the exception.<sup>1</sup>

La-Z-Boy's position that the Legislature's failure to provide a statutory right to recover precludes this Court from answering "yes" to each part of the certified question would require the Court to overturn the Court's historical reasoning outlined first in *Berube*, and reaffirmed in, *Caldwell v. Ford, Bacon & Davis Utah, Inc.*, 777 P.2d 483 (Utah 1989), *Hodges v. Gibson Products, Co.*, 811 P.2d 151 (Utah 1991), *Winter v. Northwest Pipeline Corp.*, 820 P.2d 916 (Utah 1991), *Peterson, Heslop v. Bank of Utah*, 839 P.2d 828 (Utah 1992), *Retherford v. AT&T*, 844 P.2d 949 (Utah 1991), *Fox v. MCI Communications Corp.*, 931 P.2d 857 (Utah 1997), *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395 (Utah 1998), *Dixon v. Pro Image, Inc.*, 987 P.2d 48 (Utah 1999), *Burton v. Exam Center Industrial & General Medical Clinic, Inc.*, 994 P.2d 1261 (Utah 2000), *Hansen v. America Online, Inc.*, 96 P.3d 950 (Utah 2004) and *Buckner v. Kennard*, 99 P.3d 842 (Utah 2004). Each of these

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<sup>1</sup>Further, the Court's decisions make clear that it has merely been *recognizing* an existing right, not *creating* a new right. In *Peterson v. Browning*, 832 P.2d 1280, 1284 (Utah 1992), the Court noted that "the duty at issue in actions for wrongful termination in violations of public policy does not arise out of the employment contract. It is imposed by law . . . ." *Id.* at 1285.



cases recognized that employees terminated in violation of a public policy can state a claim for wrongful discharge in the absence of a statutory provision. If the Court were to adopt, for the first time, La-Z-Boy's position that only the Legislature can, or should, provide a cause of action, the Court would have to disavow its reasoning of the last seventeen years.

However, the Court has made clear that it will:

not overturn precedent "unless clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent."

*Laney v. Fairview City*, 57 P.3d 1007, 1021 (Utah 2002). La-Z-Boy has not even attempted to demonstrate that the Court's rule was "originally erroneous" or that "changing conditions" warrant a new rule. Indeed, that is because the Court's jurisprudence is well-reasoned. There is no reason to allow employers to terminate employees in violation of Utah's clear and substantial public policies.

## **II. THE COURT'S DECISIONS ON THE EXCEPTION DEMONSTRATE THAT THE UWCA IS A "CLEAR AND SUBSTANTIAL POLICY" OF THE STATE OF UTAH.**

As outlined in Plaintiffs' Opening Brief, this Court has repeatedly recognized that certain terminations violate Utah's public policy allowing an employee to recover tort damages for the termination. While the contour and reach of an employee's right to recover for such terminations requires a case by case analysis, a review of the Court's decisions reveals that the cause of action is limited to those situations where the alleged public policy violation implicates a significant number of Utah's citizens. The Court's development of the

“clear and substantial” standard to determine the breadth and clarity of Utah’s public policy in the context of at-will employment ensures that the exception only applies in those limited instances which impact a large portion of the population as opposed to one individual’s rights. Each time the Court has rejected the application of the public policy exception, it did so because the claim involved only that individual, or a small number of individuals and not society as a whole.

The Court first recognized the potential for such a claim in *Berube*, 771 P.2d at 1042. There, the Court recognized, “[w]here an employee is discharged for a reason or in a manner that contravenes sound principles of established and substantial public policy, the employee may typically bring a tort cause of action against his employer.” Despite the fact that the Court determined there was no reason to apply the exception to the claims presented in *Berube*, the Court recognized the importance of the exception, but stressed:

that actions for wrongful termination based on this exception must involve *substantial* and *important* public policies. To this end, we will construe public policies narrowly and will generally utilize those based on prior legislative pronouncements or judicial decisions, applying only those principles which are so substantial and fundamental that there can be virtually not question as to their importance for promotion of the public good.

*Id.* at 1043, *emphasis in original*.

In *Hodges*, 811 P.2d 151,<sup>2</sup> the Court outlined the contours of a public policy claim. The Court noted that, “the term ‘public policy’ is a vague and elastic term in need of limitation so as not to provide an arguable basis for a lawsuit every time an indefinite-term employee is discharged.” *Id.* at 165. The Court stated that Utah’s public policy can be found in “legislative enactments” and “judicial decisions.” *Id.* at 166. The Court held that, “[t]he declared policy of this state is that it is imperative to keep the criminal law inviolate and that it may not be used for achieving purposes other than bringing an offender to justice.” *Id.* at 167. Terminating an employee for refusing to engage in a criminal act, or using a criminal statute for improper purposes, harms more than the individual employee by impacting society as a whole.<sup>3</sup>

The Court discussed the exception more fully in *Peterson*, 832 P.2d 1280. In *Peterson*, the Court held that the allegation that Browning terminated Mr. Peterson “because he would not falsify tax and customs documents” was “actionable under the public policy limitation.” *Id.* at 1283. The Court also noted three types of terminations which “typically”

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<sup>2</sup>The Court mentioned the doctrine in two cases prior to *Hodges*. However, in neither case did the Court expand *Berube*. See *Laron v. Sysco Corp.*, 767 P.2d 557, 559 (Utah 1989) (applying Idaho law); *Caldwell*, 777 P.2d at 485, n. 2.

<sup>3</sup>The Court reaffirmed the existence of a public policy claim in *Winter*, 820 P.2d 916. Mr. Winter claimed that his internal complaints about unsafe conditions led to his termination and that termination violated public policy. *Id.* at 917. However, given Mr. Winter’s failure to adequately raise the issue, the Court did not address his claim. However, the Court did note that, “[t]he area of the law he invokes is clearly in a state of development, and at this time, there are no established fundamental rules of law in this jurisdiction that support his claims.” *Id.* at 918, n. 2.



lead to claims that an employee's termination violates public policy. Those three instances involve situations where an employee is terminated for: "(1) refusing to commit an illegal or wrongful act, (2) performing a public obligation, or (3) exercising a legal right or privilege." *Id.* at 1281. The Court made clear that, "the term 'public policy' is open-ended and varies from court to court and from case to case." *Id.* at 1282, *citation omitted*.

However, the Court did hold:

that the public policy exception applies in this state when the statutory language expressing the public conscience is clear and when the affected interests of society are substantial. The identification of clear and substantial public policies will require case-by-case development.

*Id.* The Court reiterated its prior holding that, "[t]o provide a basis for an action under the public policy exception, a violation of state or federal law must contravene the clear and substantial public policy of the state of Utah." *Id.* at 1283.

Shortly after *Peterson*, the Court decided the case of *Heslop*, 839 P.2d 828. In *Heslop*, the Court again recognized the limited nature of a public policy claim, but recognized that the Utah Financial Institutions Act, Utah Code Ann. § 7-1-318, contained a substantial public policy. The Court explained that the Act "serves a substantial public policy because it protects the public as well as regulates institutions themselves. The Act, therefore, does not merely regulate the relationship between private individuals such as employer and employee." *Id.* at 837.

In *Retherford*, 844 P.2d 949, the Court again made the distinction between conduct affecting only the parties and conduct which potentially affects the public as a whole.



Although the Court found that Ms. Retherford did not state a claim for discharge in violation of public policy because the statute she cited preempted her claim, the Court provided guidance on the types of public policy which would support such a claim:

In determining whether a public policy is sufficiently “clear and substantial” to support a cause of action for discharge in violation of public policy, *one must examine the strength of the policy as well as the extent to which it affects the public as a whole. . . .* As the majority of this court recognized in *Peterson*, all statements made in a statute are not expressions of public policy. *Many statutes merely regulate conduct between private individuals or “impose requirements whose fulfillment does not implicate fundamental public policy concerns.”* The following questions are relevant to determining whether a statute embodies a clear and substantial public policy. *First, one must ask whether the policy in question is one of overarching importance to the public, as opposed to the parties only.* Second, one must inquire whether the public interest is so strong and the policy so clear and weighty that we should place the policy beyond the reach of contract, thereby constituting a bar to discharge that parties cannot modify, even when freely willing and of equal bargaining power.

*Id.* at 966, n.9, *emphasis added, citations omitted.*<sup>4</sup>

The Court again applied the “private” conduct as opposed to “public” interest standard in *Fox*, 931 P.2d 857. In *Fox*, the plaintiff claimed she was terminated after she reported that fellow employees were engaged in “churning—making existing customer accounts appear new on the corporate records so that they could meet sales quotas and earn higher commissions.” *Id.* at 858. The Court rejected her claim and held that “the termination of a private sector employee in retaliation for the good faith reporting to company

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<sup>4</sup>The Utah Legislature has already mandated that an employee and employer *cannot* contract away the rights and obligations contained in the UWCA. Utah Code Ann. § 34A-2-108.

management of alleged violations by co-workers does not implicate a clear and substantial public policy of the state of Utah.” *Id.* at 859. The Court reaffirmed that the alleged public policy must affect a large segment of the public:

Nothing in this case affects the public interest in any significant way. The conduct of plaintiff’s co-workers may have resulted in increased costs of the corporation’s products and services and thereby adversely affected the corporate shareholders to some minor degree, but that does not violate a clear and substantial public policy. Nor would the effect of the increased costs on the corporation’s prices result in a violation of a clear and substantial public policy. There are, no doubt, many instances of avoidable inefficiencies that produce higher costs and affect an employer’s profits, but, for the most part, those are matters that involve private policy that is more or less regulated by forces in the marketplace, not matters that rise to a level that implicates a clear and substantial public interest.

*Id.* at 861.<sup>5</sup>

A year after the Court’s decision in *Fox*, the Court decided *Ryan*, 972 P.2d 395. In *Ryan*, the Court provided the following guidance on the exception:

Courts may determine whether the policy at issue is “substantial” by “examining the strength of the policy as well as the extent to which it affects the public as a whole” and by determining whether we would allow an employer and an employee to nullify the policy by express agreement.

*Id.* quoting *Retherford*, 844 P.2d at 966, n.9. The Court further stated:

In our previous cases we have already outlined certain conduct that typically brings into play a clear and substantial public policy: (i) refusing to commit an illegal or wrongful act, such as refusing to violate the antitrust laws; (ii) performing a public obligation, such as accepting jury duty; (iii) exercising a

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<sup>5</sup>Of course, in the post-Enron world, the application of the exception to the facts presented in *Fox* might lead to a different result.



legal right or privilege, *such as filing a workers' compensation claim*; or (iv) reporting to a public authority criminal activity of the employer.

*Citations omitted, emphasis added.* By listing “filing a workers’ compensation claim,” the Court provided the prototypical example of the legal right which represents a clear and substantial public policy by affecting the public as a whole.

Further emphasizing the requirement that the public policy implicated must be of a broad nature, the Court determined in *Dixon*, 987 P.2d 48, that an individual’s claim for severance pay pursuant to a written employment agreement does not implicate a clear and substantial public policy. The Court held that summary judgment in the defendant’s favor was proper. *Id.* at 55.<sup>6</sup>

In 2004, while recognizing the continued vitality of the public policy exception, the Court reiterated the limited nature of the exception. In *Hansen*, the Court concluded that “public policy does not implicate an employer’s right to restrict firearms in a parking lot leased by the employer and to terminate an at-will employee for violating that prohibition.”

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<sup>6</sup>The Court has refused to expand statutory prohibitions on age and sex discrimination based upon the public policy exception where the Legislature has already provided employees with a means of recovery. In *Burton*, 994 P.2d 1261, the Court found that the Legislature’s decision to limit recovery for discrimination to those employees who are employed by employers having fifteen or more employees precluded a finding that Utah’s public policy provided a cause of action for employees whose employer employs fewer than fifteen employees. *Id.* at 1265. Similarly, in *Gottling v. P.R. Incorporated*, 61 P.3d 989 (Utah 2002), the Court found that the Utah Anti-Discrimination Act preempted a claim that there was a public policy against sex discrimination when the Legislature had already provided a remedy. *Id.* at 997. None of these cases called into question the Court’s prior analysis of how to determine if a public policy is sufficiently clear and substantial to provide the basis for a wrongful termination claim.

*Id.* at 955. *Hansen* again emphasized that any claim for wrongful termination in violation of public policy must implicate more than private rights.<sup>7</sup> Similarly, in its most recent case addressing the public policy exception, *Buckner*, 99 P.3d 842, the Court rejected a claim that a pay inequity amongst Salt Lake County Deputy Sheriffs caused by factoring prior law enforcement outside of the Salt Lake County Sheriff's Office violated public policy: "[t]he deputies' claim of pay inequity does not implicate either fundamental rights or a protected class." *Id.* at 856.

This is not a case seeking to recover damages which impact one individual and one company. The UWCA impacts *every* Utah worker and *every* Utah employer. It provides the sole remedy for an employee injured on the job and eliminates all common law tort claims against employers. As such, the UWCA is a "clear and substantial" public policy because it impacts a large portion of the population. Irrefutably, the UWCA is "one of overarching importance to the public, as opposed to the parties only." *Retherford*, 844 P.2d at 966, n.9. Indeed, it is difficult to imagine a statutory scheme which impacts a broader segment of Utah's workers and employers. The UWCA is the prototypical "clear and substantial" public policy necessary to support a claim for wrongful termination. Presumably, this is why the

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<sup>7</sup>In *Hansen*, the employees' termination did not significantly impact their right to have firearms. At most, it only affected their right to display firearms at work. This is in direct contrast to this case, where La-Z-Boy's actions directly, significantly and adversely impacted Plaintiffs' right to benefits under the UWCA when they were injured.



Court has repeatedly used the UWCA as an example of a type of clear and substantial public policy which supports a claim for wrongful termination.

### **III. THE COURT SHOULD ANSWER “YES” TO EACH PART OF THE SECOND CERTIFIED QUESTION.**

As outlined in Plaintiffs’ Opening Brief, an employer who terminates an employee for assisting fellow employees exercise rights under the UWCA, or who constructively discharges or harasses its employees who exercise rights under the UWCA, also violates a clear and substantial public policy.

First, terminating an employee for assisting fellow employees to exercise rights under the UWCA as Ms. Touchard did, does not merely implicate a “private” right. Ms. Touchard’s conduct is exactly the type of activity Utah’s public policy encourages. If La-Z-Boy can terminate Ms. Touchard, or others who assist in the exercise of legal rights, with impunity, an employer can thoroughly chill an employee’s right to benefits under the UWCA. As noted by the Court in *Peterson*, employers should “refrain from using their unique economic position to coerce employee conduct that contravenes clear and substantial policies.” *Peterson*, 832 P.2d at 1285. A self-insured employer, like La-Z-Boy, would best serve its economic interest by ensuring that its employees never learn about their rights under the UWCA. Such action, while serving the employer’s own economic interests, would clearly interfere with the balance between an employer’s rights and responsibilities under the UWCA.

Second, a constructive discharge is the legal equivalent of a discharge. The very concept of constructive discharge is based upon the idea that an employer has made the terms and conditions of employment so intolerable that any reasonable person would quit. *Sheikh v. Department of Public Safety*, 904 P.2d 1103, 1107 (Utah App. 1995); *Pennsylvania State Police v. Suders*, 542 U.S. 129, 139 (2004). This Court has distinguished between an actual and a constructive discharge in analyzing a wrongful termination claim. In fact, if there were such a distinction, it seems the Court would have noted the distinction in *Peterson* where the claim was “*constructive termination* in violation of Utah public policy.” *Peterson*, 832 P.2d at 1280 *emphasis added*.

Finally, because a constructive discharge is legally equivalent to an actual discharge, an employer should not be allowed to escape liability for harassing employees (but who for one reason or another do not quit) who exercise rights under the UWCA. To prove a constructive discharge, an employee must demonstrate a series of harassing acts sufficient to change the terms and conditions of employment so dramatically that the only option is to quit. Allowing an employer to stop short of that standard and avoid liability would frustrate the balance of employee rights and responsibilities outlined in the UWCA by allowing an employer to chill the exercise of an employee’s rights.

## CONCLUSION

The Court should hold that Utah’s public policy prohibits an employer from interfering with an employee’s exercise of rights guaranteed by the UWCA by either

constructively or actually terminating that employee, that the same public policy prohibits an employer from harassing an employee who assists employees to exercise rights under the UWCA and also prohibits the harassment of an employee for seeking benefits under the UWCA.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of January, 2006.

**STRINDBERG SCHOLNICK & CHAMNESS, LLC**



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## CERTIFICATE OF MAILING

I hereby certify that on this 20<sup>th</sup> day of January, 2006, two true and accurate copies of the foregoing brief were mailed by prepaid first class mail to:

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A handwritten signature in black ink, appearing to be "J. Janove", written over a horizontal line.