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Marilyn Touchard, Thomas Ammons, Felix Barela, oscar Garcia, Dennis Nelson, Wade Peterson, Frank Ross, and Heidi Scott v. La-Z-Boy Inc : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

**MARILYN TOUCHARD, THOMAS
AMMONS, FELIX BARELA, OSCAR
GARCIA, DENNIS NELSON, WADE
PETERSON, FRANK ROSS and HEIDI
SCOTT,**

Plaintiffs and Respondents,

vs.

LA-Z-BOY INCORPORATED,

Defendant and Petitioner.

Case No. 20050361-SC

Civil No. 01-04-CV-67

REPLY BRIEF OF DEFENDANT/PETITIONER

Upon Certification of Questions from The United States District Court,
District of Utah, Central District
Honorable Tena Campbell

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FILED

UTAH APPELLATE COURTS

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I. INTRODUCTION

Plaintiffs make several arguments urging this Court to answer the Certified Questions in the affirmative. Defendant addresses most of them in the Opening Brief of Appellant (“Defendant’s Brief”). In this brief, it provides the following additional responses to points raised in Plaintiffs’ Brief:

(a) Plaintiffs’ discussion of Utah case law on the public policy cause of action, Section I(A), reinforces the fact that the Utah Workers’ Compensation Act “UWCA” is a comprehensive scheme that this Court should not effectively change through job guarantees and new rights of action.

(b) Plaintiffs’ “doomsday” prediction of what will happen if this Court fails to recognize a public policy cause of action consists of sheer speculation; moreover, it is undermined by their own statutory analysis which shows that adequate checks on Utah employers already exist.

(c) As set forth in Defendant’s Brief and updated in this brief, Plaintiffs’ state-by-state analysis, Section I(B), is inaccurate and misleading.

(d) Plaintiffs’ attempt to add an internal opposition cause of action, Section II(A), is not supported by the cases they cite and, as applied to the allegations of the Complaint, would go beyond both common and statutory law that have extended protections to employees who oppose unlawful treatment of other employees.

(e) Contrary to Plaintiffs’ assertion, Utah common law does not support extending the public policy cause of action to claims of constructive discharge; Utah should follow jurisdictions that have been unwilling to expand the claim to cases where

an employee resigns but alleges he reasonably believed conditions of employment to be intolerable.

(f) Plaintiffs offer no support for their most ambitious application of the public policy doctrine to claims of harassment and discrimination short of discharge; to Defendant's knowledge, no such support exists and Plaintiffs' position has consistently been rejected.

II. THE COURT SHOULD ANSWER "NO" TO THE FIRST CERTIFIED QUESTION

A. Plaintiffs' Arguments Regarding The Importance And Comprehensiveness Of The UWCA Do Not Support Recognizing A Common Law Wrongful Discharge Cause Of Action

Plaintiffs emphasize the importance and comprehensiveness of the UWCA's statutory scheme. They quote and emphasize this Court's description of the Act as "a comprehensive scheme enacted to provide speedy compensation to workers who are injured as a result of an accident occurring in the course and scope of their employment." *Sheppick v. Albertson's, Inc.*, 922 P.2d 769, 773 (Utah 1996) (quoted at p.5 of Plaintiffs' Brief). Plaintiffs go on to note the UWCA's exclusive remedy provision, UTAH CODE ANN. § 34A-2-105(1), which makes the right to recover compensation for injuries the "exclusive remedy against the employer," which "shall be in place of any and all other civil liability whatsoever, at common law and otherwise, to the employee." Plaintiffs' Brief, p.5.

Plaintiffs fail to explain why if the Legislature created an "exclusive and comprehensive" statutory scheme, and expressly limited employee rights of recovery

against employers, that an additional cause of action is necessary to preserve the “entire purpose” of this “whole regulatory scheme.” Plaintiffs’ Brief, p. 6. They offer no rationale for why this Court as opposed to the Legislature should decide if the Act is not comprehensive after all, or if a new provision prohibiting certain forms of employer behavior and giving employees a right of action needs to be added when it has long been understood that the UWCA guarantees a remedy from an employer for an on-the-job injury regardless of fault, but not continued employment. “While it may be generous and considerate of the employer to reemploy a man who has been injured, the law does not impose any such legal duty.” *Wilstead v. Industrial Commission of Utah*, 17 Utah 2d 214; 407 P.2d 692, 694 (1965) (“To accept the proposition plaintiff contends for would extend the Workmen's Compensation Act beyond its purpose and make it in effect an unemployment compensation act also”).

Plaintiffs conjure a doomsday scenario in which this “whole regulatory scheme” and “entire purpose” will be destroyed if employees cannot sue employers for retaliation, and that the failure to accord them such a cause of action would leave Utah workers “in a worse position than they were prior to the enactment of the UWCA.” Plaintiffs’ Brief, p. 6-7. This grim, but wholly speculative prognostication is not borne out by the continued legislative silence when the Legislature could easily remedy such a problem if it really existed. The right to terminate an at-will employee who sustains a

work-related injury has remained the same before and after the enactment of the UWCA; employees are no better or worse off in this respect.¹

Plaintiffs cite various criminal penalties to which employers are subject if they evade their UWCA obligations, Plaintiffs' Brief, p. 6, n. 4. These provisions, along with some others within and without the UWCA help explain the baselessness of Plaintiffs' fear that the Act will be destroyed without an anti-retaliation cause of action. As the provisions they cite demonstrate, there are real legal sanctions for employers that do not take their UWCA obligations seriously. *See* UTAH CODE ANN. §34A-2-407 (employers must promptly report all work-related injuries to the Division of Industrial Actions); §34A-2-405 (injured workers must be compensated whether or not they continue to be employed); §34A-2-301 (an employer may not "maintain any place of employment that is not safe"). Plaintiffs note that Defendant is self-funded, as allowed by UTAH CODE ANN. §34A-2-201.5. Plaintiffs' Brief, p. xvi. However, as can be seen in that detailed statutory section, self-insurers come under especially close regulatory

¹ Plaintiffs' worse-than-before-UWCA argument fails to take into account that prior to the UWCA, employees had to overcome almost insurmountable obstacles before they could obtain *any* remedy from an employer for an on-the-job injury. They not only had to prove that the employer was negligent but had to overcome the "unholy trinity" of common law defenses: fellow servant rule, assumption of the risk, and contributory negligence. *See Lukic v. Southern Pacific Co.*, 160 F. 135 (1908) (directing verdict for employer because the railroad laborer's injury was caused by the negligence of a fellow servant brakeman).

scrutiny and face costly consequences if regulators believe they are not properly discharging their UWCA obligations.

Plaintiffs' notion that absent a common law anti-retaliation cause of action, employers have an "unfettered" right to terminate injured workers also overlooks available federal remedies. Employers of fifty or more employees, such as Defendant, who allegedly make it a practice of firing injured workers would be subject to the remedies and relief provided by the Family Medical Leave Act, 29 U.S.C. § 2601 et seq., which guarantees qualified employees up to a twelve-week leave of absence while being kept on the employer's health care plan. Under the Americans With Disabilities Act ("ADA"), 42 U.S.C § 12131 et seq., workers whose injuries constitute an impairment "that substantially limits one or more of the major life activities" would be entitled to a reasonable accommodation allowing them to continue in their present job or, if this is not possible, transfer to a vacant job they can perform with or without a reasonable accommodation. An employer's failure to follow its ADA obligations, or any retaliation against an employee with a disability, would subject it to statutory remedies including reinstatement, back pay, attorneys' fees and compensatory and punitive damages. 42 USCS § 12205 (providing for attorney fees); 42 USCS § 12117(a) (2005) (incorporating Title VII remedies); 42 U.S.C. § 1981a(a)(2) (providing for compensatory and punitive damages); 42 U.S.C. § 2000E-5(G) (providing for various remedies, including reinstatement and backpay). Indeed, all of the named Plaintiffs have filed administrative claims against Defendant with the Equal Employment Opportunity Commission ("EEOC") and the Antidiscrimination and Labor Division of the Labor Commission of

Utah. One Plaintiff, Felix Barela, filed a lawsuit under the ADA against Defendant in the U.S. District Court for the District of Utah, *Barela v. La-Z-Boy Corporation*, Case No. 1:03CV0032.

The sense of urgency Plaintiffs attempt to generate simply does not exist. If the purposes of the UWCA might be enhanced or better effectuated with some form of anti-retaliation cause of action, the Legislature can spend the time and give the requisite attention to whether this is so and what the parameters of such action might be in order to balance properly the following "competing legitimate interests:" "The interests of the employer to regulate the environment to promote productivity, security, and similar lawful business objectives, and the interests of the employees to maximize access to their statutory and Constitutional rights within the workplace." *Hansen v. America Online, Inc.*, 96 P.3d 950, 953 (Utah 2004).

B. Plaintiffs' Multi-State Analysis Is Flawed

Both parties have analyzed cases and legislation from other jurisdictions in an attempt to persuade the Court to accept their positions.² Plaintiffs' analysis, however,

² Defendant has made three corrections to its own multi-state analysis that affect Exhibit B (which catalogues the states in which courts did not create a cause of action in the absence of an anti-retaliation or interference statute) and Exhibit C (which catalogues the states in which courts created a cause of action based on the general policies in the workers' compensation statute).

The state of Delaware has moved from Exhibit B, Category (1), to Exhibit B, Category (2), because the Delaware legislature did enact an anti-retaliation statute in 1997, 19 Del. C. § 2365, after the court in *Emory v. Nanticoke Homes, Inc.*, 1985 Del. Super. LEXIS 1063 (Del. 1985) had refused to create such a cause of action in

[Footnote continued on next page]

is flawed. The critical question is not how *many* states have created a wrongful discharge cause of action based on the exercise of workers' compensation rights, but *how they did it*. Of the 43 states that did create such a cause of action, 32 have relied on their legislatures to provide a specific basis for the cause of action, rather than have their courts create it based on the general policies in their workers' compensation statutes. While some of those legislatures enacted more specific statutes than others, all of them

[Continued from previous page]

the absence of such a statute. *See* Amended Exhibit B, attached to the Addendum of this Reply Memorandum.

The state of Arkansas has moved from Exhibit C to Exhibit B, because the court in *Wal-Mart v. Pam Baysinger*, 306 Ark. 239; 812 S.W.2d 463 (1991) recognized the existence of a retaliatory discharge cause of action based on a statute in the Workers' Compensation Act that provided a criminal penalty for any employer who "willfully discriminates" against "any individual on account of his claiming benefits. Although the Arkansas legislature later chastised the court for usurping its function by expanding the penalty for a violation to include civil remedies, *Tackett v. Crain Automotive d/b/a Car Pro*, 321 Ark. 36; 899 S.W.2d 839 (1995), that makes the contrast with Utah even more compelling. Unlike Utah there is no statute whatsoever that prohibits an employer from terminating the employment of an employee who has filed a workers' compensation claim.

The state of Kentucky has moved from Exhibit B to Exhibit C, because the court in *Firestone Textile Co. v. Meadows*, 666 S.W.2d 730 (Ky 1983), had created a wrongful discharge cause of action despite the absence of any provisions specifically restricting an employer from discharging an employee for the exercise of rights under the workers' compensation statutes. *But see id.* at 733 ("The statement that the Workers' Compensation Act was violated is pure sophistry. . . . The majority opinion is not based on reason, it is simply an expression of distaste for discharge of an employee for filing a claim of workers' compensation Violation of a right 'implicit' in a statute is so vague as to cover about any situation the majority determines in its wisdom is contrary to standards of justice.") (J. Stephenson, dissenting). Later, in 1987, the Kentucky legislature enacted KRS § 342.197, which prohibits discrimination against any employee who has filed and pursues a lawful workers' compensation claim. *See* Amended Exhibits B and C, attached to the Addendum of this Reply Memorandum.

gave their courts an express statutory hook on which to hang a wrongful discharge cause of action. The Utah legislature has not.

Although Plaintiffs assert that there are 25 states in which courts have recognized such a wrongful discharge cause of action, even without a specific statutory prohibition, that statement is incorrect. Only 11 states have done so (Amended Exhibit C). Plaintiffs have simply misclassified numerous cases. For example, in *Sorenson v. Comm Tek, Inc.*, 799 P.2d 70 (Id. 1990), there was no workers' compensation retaliation claim at issue. On the contrary, the issue was whether the court should apply the public policy exception to the at-will rule in situations where an employee is terminated for his religious beliefs or his efforts to negotiate employment conditions in good faith. The court decided "no." In *Judson v. Workers' Compensation Appeals Board*, 586 P.2d 564 (Cal. 1978), the court was enforcing CAL. LABOR CODE § 132a (prohibiting workers' compensation retaliation), which the California legislature had enacted in 1972. In *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682 (Iowa 1990), the court was enforcing the same statutory "other device" language that formed the basis for the wrongful discharge cause of action in *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E. 2d 425 (1973). The list goes on. Cf. Plaintiff's Brief, Section B, and Defendant's Amended Exhibits B and C, attached to the Addendum of this Reply Memorandum.

The fact that Plaintiffs have misclassified so many states that have relied on their legislatures to create a statutory basis for the cause of action underscores the weakness of their claim in Utah, which lacks any such statutory basis. It is also

significant that out of the 11 states in which courts have created such a tort based on the “general policies” existing in the penumbras of the workers’ compensation statute, rather than on a specific statutory provision, legislatures in five of those states later intervened to enact legislation (Arizona, Kentucky, Michigan, New Mexico, and North Dakota). At least one legislature “took express exception to the court’s indication that it rather than the legislature had the authority to define public policy.” *Galati v. America West Airlines, Inc.*, 205 Ariz. 290; 69 P.3d 1011 (2003). Another legislature made it clear that its “avowed purpose was to overrule our decisions” where the courts created retaliatory discharge tort based on a criminal statute. *Tackett v. Crain Automotive d/b/a Car Pro*, 321 Ark. 36, 38; 899 S.W.2d 839, 840 (1995).

In most states, courts and legislatures alike have recognized, sometimes explicitly, that it is not appropriate for courts to attempt to correct perceived legislative omissions by creating causes of action based on the “general policies” of their workers’ compensation law, despite the absence of any specific statutory basis for it. The same fundamental principles that animated those decisions apply in Utah. As Utah’s State Constitution makes clear, it is not the function of courts to correct perceived defects and omissions in legislation, or to “protect” perceived policies in legislative enactments by usurping the legislative function. Article V, Section 1 states: “The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or

permitted.” Article VIII, Section 22 provides that if the Supreme Court discerns “any seeming defect or omission in the law,” it shall report it in writing to the Governor. Thus, even if this Court considered the 88-year absence of such a cause of action to be a legislative omission or policy oversight, it would not be the function of the Court to create a cause of action, but at most to advise the Governor or the Legislature of any concerns. The Court should follow those states that have relied on their legislatures to provide a specific statutory basis for a workers’ compensation retaliation claim before recognizing such a cause of action.

III. THE COURT SHOULD ANSWER “NO” TO THE SUBPARTS OF THE SECOND CERTIFIED QUESTION

If the Court answers the First Certified Question in the negative, as it should, the Court need not address the three subparts of the Second Certified Question. Indeed, the need to address such detailed, policy-making subparts underscores why the Court should answer “no” to the First Certified Question. Nevertheless, to the extent that the Court sees fit to explore the various potential parameters of a retaliation claim, it should answer the subparts of the Second Certified Question in the negative.

A. There Is No Basis To Add An Internal Opposition Claim To The Retaliatory Discharge Tort

In Plaintiffs’ Brief, they make no attempt to fit the allegations of their Complaint regarding Ms. Touchard to any of the four categories of public policy wrongful discharge listed by this Court in *Hansen*, at 952. Moreover, they make no attempt to fit the allegations of the Complaint to the framework of Utah public policy case law developed over the past decade and a half. They cite no Utah cases, and the

cases cited from other jurisdictions do not help them since they all involve statutory construction or interpretation as opposed to judge-made common law exceptions to at-will employment. *See Jackson v. Birmingham Board of Education*, 125 S.Ct. 1497, 1504-05 (2005) (retaliation for internal complaint of sex discrimination included within “broad” statutory provision of Title IX prohibiting “discrimination” on the basis of sex). *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236-37 (1969) (both white lessor and African-American lessee protected by 42 U.S.C. §1982, which grants parties, regardless of race, the right to lease real and personal property). *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1446-47 (10th Cir. 1988) (white manager who was fired after refusing to discharge an African-American employee and after he stated his intention to support the employee’s EEOC claim protected under 42 U.S.C. § 1981, which preserves the rights of parties to make and enforce contracts without regard to race); *Wilkerson v. Standard Knitting Mills, Inc.*, 1989 Tenn. App. LEXIS 666, 115 Lab. Cas. (CCH) P 56,274 (1989) (employer’s order to company nurse to help evade its statutory obligations constituted a “device” under the Tennessee Workers Compensation Statute, TCA § 50-6-114, which prohibits any “device” which might operate to relieve employers of their obligations “created by this chapter”).

Contrast these statutory interpretation cases with the common law cases cited in Defendant’s Brief pp. 32-33, and with another case refusing to extend the common law cause of action to non-injured employees who assist others in filing for workers’ compensation: *Taylor v. Louisiana Pacific Corp.*, 1998 U.S. App. LEXIS 29533 (9th Cir. 1998) (although Nevada has adopted the public policy wrongful discharge claim

for employees fired in retaliation for seeking worker's compensation benefits, it would not extend it "to protect personnel employees whose duty it is to assist co-workers in processing [worker's compensation] claims," and noting that Nevada courts have required more than a "mere objection" to employer policies but an actual "refusal to comply with an employer's demand" that the employee engage in improper or unlawful behavior.)

In Plaintiffs' Brief, they note that Ms. Touchard worked as "the Environmental/Assistant Safety Manager," that "[o]ne of Ms. Touchard's responsibilities" related to investigating Defendant's workers' compensation costs, which led her to write the memorandum she attaches to the Complaint, and that "[a]s part of her job duties," she led an ergonomics team, which led her to criticize some of the company's safety policies and practices. Plaintiffs' Brief, p. xxxiii. They assert that despite her efforts to "compel" or "push" her employer to follow her recommendations, it would not do so and instead turned on her. Plaintiffs' Brief, pp. 14-15.

Extending the public policy cause of action to these circumstances would go beyond even what courts have allowed when applying statutes that expressly create anti-retaliation causes of action. In *McKenzie v. Renberg's, Inc.*, 94 F.3d 1478 (10th Cir. 1996), a personnel director, whose responsibilities included monitoring compliance with wage and hour laws, complained to the company attorney and president that a problem existed with complying with the Fair Labor Standards Act ("FLSA"). The employer fired her shortly thereafter. Despite the fact that the FLSA has an express cause of action

based on employer retaliation, 29 U.S.C. § 215(a)(3), the court dismissed her complaint because she never stepped outside of her role as personnel director:

“Here, McKenzie never crossed the line from being an employee merely performing her job as Personnel Director to an employee lodging a personal complaint against the wage and hour practices of her employer and asserting a right adverse to the company. McKenzie did not initiate a FLSA claim against the company on her own behalf or on behalf of anyone else. Rather, in her capacity as personnel manager, she informed the company that it was at risk of claims that might be instituted by others as a result of its alleged FLSA violations. In order to engage in protected activity under Section 215(a)(3), the employee must step outside his or her role of representing the company and either file (or threaten to file) an action adverse to the employer, actively assist other employees in asserting FLSA rights, or otherwise engage in activities that reasonably could be perceived as directed towards the assertion of rights protected by the FLSA. Here, McKenzie did none of these things.... McKenzie’s actions in connection with the overtime pay issue were completely consistent with her duties as Personnel Director for the company.” *Id.* at 1486-1487.

Other courts have reached the same conclusion: e.g., *Claudio-Gotay v. Becton Dickinson Caribe, LTD.*, 375 F.3d 99, 102 (1st Cir. 2004) (“when [plaintiff] first informed Becton of the potential overtime violations, he did so in furtherance of his job responsibilities”); *Robinson v. Wal-Mart Stores, Inc.*, 341 F. Supp. 2d 759, 763 (W.D. MI 2004) (“Plaintiffs’ expressions of concern, even if characterized as ‘complaints,’ were made in her capacity as Personnel Training Coordinator”); *Smith v. Language Analysis Systems, Inc.*, 41 Va. Cir. 375, 378 (1997) (“nothing [plaintiff] did extended beyond the scope of her position as Director of Human Resources.”) *Cf. EEOC v. HBE Corp.*, 153 F. 3d 543 554 (8th Cir. 1998) (approving the principle enunciated in *McKenzie* but distinguishing the case based on the fact that plaintiff “refused to implement a

discriminatory company policy” by firing an African-American; this refusal “placed him outside the normal managerial role.”)

B. Constructive Discharge Would Unduly Expand The Scope Of The Public Policy Cause Of Action

Contrary to Plaintiffs’ assertion in their brief, p. 18, this Court has neither explicitly nor implicitly recognized that constructive discharge is legally equivalent to an actual discharge. The parties could possibly have raised the issue in *Bihlmaier v. Carson*, 603 P. 2d 790 (Utah 1979), or *Heslop v. Bank of Utah*, 839 P. 2d 828 (Utah 1992).

However, they did not.

Defendant acknowledges that courts in Washington and Nevada have extended the public policy cause of action to claims of constructive discharge. However, it believes the more conservative approach enunciated by courts in Illinois and discussed in Defendants’ Brief, p. 33-34, would be more consistent with this Court’s approach to applying and potentially expanding the public policy cause of action.

In addition, Defendant believes that if this Court were to extend the cause of action to claims of constructive discharge, in keeping with its conservative approach, it should not adopt the more expansive definition enunciated in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), as Plaintiffs suggest. *Suders* construed Title VII of the Civil Rights Act of 1964 and was not addressing the more nuanced question of making judicial exceptions to at-will employment. The standard adopted by the U.S. Supreme Court: “Did working conditions become so intolerable that a reasonable person in the employee’s position would have felt compelled to resign?” *Id.* at 141, subjects employers

and the courts to myriad cases in which an employee quits but then asks a judge or jury to agree that his resignation was “reasonable” in light of how bad working conditions were. This open-ended standard could upset the balance of employer-employee interests this Court noted in *Hansen*, 96 P. 3d at 953.

Instead, the standard should be as described by Justice Thomas in his dissent in *Suders*, which tracked jurisprudence under the National Labor Relations Act and early cases under Title VII. Under this standard of constructive discharge, an employee would be required to show that the employer specifically intended to make him or her quit by deliberately rendering their working conditions intolerable, and thus effectively acting with the same purpose and effect as an actual discharge. 542 U.S. at 152-154. *See also Korslund v. Duincorp Tri-Cities Services, Inc.*, 121 Wn. App. 295, 88 P.3d 966 (Wash. App. 2004), cited by Plaintiffs, which allows the constructive discharge claim, but requires “a plaintiff to prove that an employer deliberately rendered working conditions intolerable and thus forced the employee to permanently ‘leave’ the employment.” 88 P.3d at 976.

C. Plaintiffs Provide No Basis To Extend The Cause Of Action Beyond Discharge

Plaintiffs cite no authority extending the public policy cause of action beyond discharge, whether constructive or actual, and Defendant is aware of none. Rather, to Defendant’s knowledge, when faced with the question, no court has been willing to extend the common law at-will exception to demotions, transfers, wage

reductions, mean-spiritedness, or any other allegedly retaliatory actions that stop short of discharge.³

Plaintiffs make an impassioned policy argument for such an extension at pages 20-21 of their brief. Defendant does not share their speculative assumptions; nor does it agree with the “logic” of morphing the constructive discharge standard into a standard applicable to employees who remain employed (which might be characterized as an “intolerable – but tolerated” standard). In any event, if there is any merit to such an argument, it ought to be directed to the Utah Legislature which can weigh the multitude of potential variations of such a claim while seeking to preserve the balance described in *Hansen*.

IV. CONCLUSION

For the foregoing reasons, La-Z-Boy respectfully requests that this Court answer “no” to the certified questions from the U.S. District Court for the District of Utah. The Court should rely on the Legislature to define the public policy of the State, and to determine what causes of action and remedies, if any, are needed to protect the rights and policies in the Workers’ Compensation Act. The Legislature has amended the Act numerous times in its 88-year history when it discerned a need to do so. It has fulfilled its constitutionally delegated function. The continued legislative silence

³ Defendant notes that even the Washington case cited by Plaintiffs joins others in rejecting the cause of action sought by Plaintiffs in this last Certified Question: “This tort applies only when an employee has been discharged.” *Korslund*, 88 P.3d at 975.

regarding an anti-retaliation cause of action should not be disturbed by this Court. The decision of whether, when, under what circumstances and with what remedies such a cause should be created should be left to that elected body.

RESPECTFULLY SUBMITTED this 20th day of January, 2006.

BULLARD SMITH JERNSTEDT WILSON

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ADDENDUM

Tab B

AMENDED EXHIBIT B

IN 36 STATES, COURTS DID NOT CREATE A CAUSE OF ACTION IN THE ABSENCE OF AN ANTI-RETALIATION OR INTERFERENCE STATUTE

1. IN 4 STATES, COURTS EXPRESSLY REFUSED TO CREATE A CAUSE OF ACTION, AND THE LEGISLATURE HAS CONTINUED NOT TO ENACT AN ANTI-RETALIATION OR INTERFERENCE STATUTE

- Georgia *Evans v. Bibb Company*, 178 Ga. App. 139; 342 S.E.2d 484 (1986) (“Courts may interpret laws, but may not change them”).
- Mississippi *J.C. Kelly v. Mississippi Valley Gas Company*, 397 So. 2d 874 (Miss. 1981) (“[t]he merits of his arguments are clearly for the Legislature to assess, not the judiciary. Our Workmen’s Compensation Law does not contain a provision making it a crime for an employer to discharge an employee for filing a claim”).
- Rhode Island *Pacheco v. Raytheon Company*, 623 A.2d 464 (R.I. 1993) (“It is not the role of the courts to create rights for persons whom the Legislature has not chosen to protect”).
- Wisconsin *Brown v. Pick’N Save Food Stores*, 138 F. Supp. 2d 1133 (Wis. 2001) (“[T]he Wisconsin legislature created forfeiture as the only remedy in this situation, and in 1975 it created a cause of action for a related kind of discrimination but not for this kind of discrimination”).

2. IN 7 STATES, COURTS EXPRESSLY REFUSED TO CREATE A CAUSE OF ACTION, BUT THE LEGISLATURE HAS SINCE CREATED A CAUSE OF ACTION BY ENACTING AN ANTI-RETALIATION OR INTERFERENCE STATUTE

- Alabama *Meeks v. Opp Cotton Mills, Inc.*, 459 So. 2d 814, 815 (Ala. 1984) (“Why then should we not leave it to the legislature to change the rule in this case, where the employee was discharged allegedly for seeking workmen’s compensation benefits, a legislatively created right?”), *superseded by statute*, ALA. CODE § 25-5-11.1 (prohibiting termination, *as recognized in Twilley v. Dauber & Coated Prods., Inc.*, 536 So. 2d 1364 (Ala. 1988)).

- Delaware *Emory v. Nanticoke Homes, Inc.*, 1985 Del. Super. LEXIS 1063 (Del. 1985) (“In Delaware, it is for the General Assembly, not the judiciary, to declare the public policy of the state”) *superseded by statute*, DEL. CODE ANN. tit. 19 § 2365 (prohibiting discharge, retaliation or discrimination).
- Florida *Segal v. Arrow Industries Corporation*, 364 So. 2d 89 (Fla. 1978) (“There is no statute for retaliatory discharge. The court declines to follow the reasoning of cases such as *Frampton*, *superseded by FLA. STAT. § 440.205* (prohibiting discharge, threatening discharge, intimidation or coercion).
- Missouri *Christy v. Paul Petrus, d/b/a South Side Auto Parts*, 365 Mo. 1187; 295 S.W.2d 122 (1956) (“We can hardly conceive of the legislature making such careful provision for the rights and compensation of injured employees covered by the Act and yet omitting a specific provision for recovery of damages for wrongful discharge if there had been any intent to create such a right”) *superseded by statute*, MO. REV. STAT. § 287.780 (prohibiting discharge or discrimination in any way) *as recognized in Kratzer v. Polar Custom Trailers, Inc., et al.*, 2003 U.S. Dist. LEXIS 16981 (Mo. 2003).
- New York N.Y. WORKERS’ COMP. LAW § 120 (prohibiting discharge or discrimination in any manner), *as recognized in Axel v. Duffy-Mott Company, Inc.*, 47 N.Y.2d 1; 389 N.E.2d 1075 (1979) (“This relatively recently enacted statute forbids employers to discharge or otherwise discriminate against employees who claim compensation for job-related injuries or who testify in proceedings to enforce such payment”); *cf. Murphy v. American Home Products Corporation*, 58 N.Y.2d 293; 448 N.E.2d 86 (1983) (“This court has not and does not now recognize a cause of action in tort for abusive or wrongful discharge of an employee; such recognition must await action of the Legislature”).
- North Carolina *Dockery v. Lampart Table Company and U.S. Furniture Industries*, 36 N.C. App. 293; 244 S.E.2d 272 (1978) (“If the General Assembly of North Carolina had intended a cause of action be created, surely, in a workmen’s compensation statute as comprehensive as ours, it would have specifically addressed the problem.”), *superseded by statute*, N.C. GEN. STAT. § 95-241 (prohibiting discrimination or retaliatory action), *as recognized in Abels v. Renfro Corporation*, 335 N.C. 209; 436 S.E.2d 822 (1993).

South Carolina *Raley v. Darling Shop of Greenville, Inc.*, 216 S.C. 536; 59 S.E.2d 148 (1950) (dismissing complaint because a retaliatory discharge for filing a worker's compensation claim fails to state a claim), *superseded by statute*, S.C. CODE ANN. § 41-1-80, as recognized in *Hinton v. Designer Ensembles, Inc.*, 343 S.C. 236; 540 S.E.2d 94 (2000) (prohibiting discharge or demotion).

3. IN 25 STATES, LEGISLATURES FILLED SILENCE BY ENACTING ANTI-RETALIATION OR INTERFERENCE STATUTES IN DEROGATION OF THE AT-WILL RULE

Alaska *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427 (Alas. 2004) (allowing a cause of action based on ALASKA STAT. § 23.30-247, which prohibits discrimination in hiring, "promotion, or retention policies or practices").

Arkansas *Wal-Mart v. Pam Baysinger*, 306 Ark. 239; 812 S.W.2d 463 (1991) (recognizing cause of action based on a criminal statute that expressly prohibited any employer from willfully discriminating against "any individual on account of his claiming benefits"), *amended and superseded by* ARK. CODE ANN. § 11-9-107 (prohibits discrimination in regard to hiring or employment and provides penalties as determined by the Workers' Compensation Commission; specifically annulling *Wal-Mart*) as recognized by *Tackett v. Crain Automotive d/b/a Car Pro*, 321 Ark. 36; 899 S.W.2d 839 (1995) ("There is no doubt that the legislature's intent in the passage of Act 796 of 1993 [amending Ark. Code Ann. § 11-9-107] in fact its avowed purpose was to overrule our decisions [in three cases, including *Wal-Mart*], where we" created retaliatory discharge tort based on the criminal statute) (J. Corbin dissenting opinion).

California *Portillo v. G. T. Price Productions, Inc., et al.*, 131 Cal. App. 3d 285; 182 Cal. Rptr. 291 (1982) (allowing a cause of action based on CAL. LABOR CODE § 132a, which prohibits discharge, threatening to discharge or discrimination in any manner).

Connecticut *Baldracchi v. Pratt & Whitney Aircraft Division, United Technologies Corporation*, 814 F.2d 102 (1987) (allowing a cause of action based on CONN. GEN. STAT. § 31-290a, which prohibits discharge or discriminating in any manner).

Hawaii	<i>Takaki v. Allied Machinery Corporation, et al.</i> , 87 Haw. 57; 951 P.2d 507 (1998) (allowing a cause of action based on <i>HAW. REV. STAT. § 378-32</i> which prohibits discharge and discrimination based “solely” the employee suffering a work injury).
Indiana	<i>Frampton v. Central Indiana Gas Company</i> , 260 Ind. 249; 297 N.E.2d 425 (1973) (“We believe the threat of discharge to be a ‘device’ within the framework of 22-3-2-15”) (allowing a cause of action based on <i>IND. CODE ANN. § 22-3-2-15</i> , which provides that “No contract or agreement, written or implied, no rule, regulation or other device shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by this act”).
Iowa	<i>Springer v. Weeks and Leo Company, Inc.</i> , 429 N.W.2d 558 (1988) (allowing a cause of action based on <i>IOWA CODE § 85.18</i> , which provides that “No contract, rule, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this chapter except as herein provided”).
Louisiana	<i>Robin v. Raoul “Skip” Galan, Clerk of the Court of Jefferson Parish</i> , 545 So. 2d 1129 (La. 1989) (allowing a cause of action based on <i>LA. REV. STAT. ANN. § 23:1361</i> , which prohibits discharge and refusal to hire).
Maine	<i>ME. REV. STAT. ANN. tit. 39-A § 353</i> (prohibits discrimination in any manner).
Maryland	<i>Ewing v. Koppers Company, Inc.</i> , 312 Md. 45; 537 A.2d 1173 (1988) (allowing a cause of action based on <i>MD. CODE ANN. LAB. & EMPL. § 9-1105</i> , which prohibits discharge, based “solely” on employee filing a claim).
Massachusetts	<i>Ourfalian v. Aro Manufacturing Company, Inc.</i> , 31 Mass. App. Ct. 294; 577 N.E.2d 6 (1991) (allowing a cause of action based on <i>MASS. ANN. LAWS. CH. 152 § 75B</i> , which prohibits discharge, discrimination in any manner or refusal to hire).
Minnesota	<i>Wojciak v. Northern Package Corporation</i> , 310 N.W.2d 675 (1981) (allowing a cause of action based on <i>MINN. STAT. § 176.82</i> , which prohibits discharge or threatening to discharge).

- Montana *Lueck v. United Parcel Service*, 258 Mont. 2; 851 P.2d 1041 (1993) (allowing a cause of action based on *MONT. CODE ANN. § 39-71-317*, which prohibits termination).
- New Jersey *Lally v. Copygraphics*, 85 N.J. 668; 428 A.2d 1317 (1981) (allowing a cause of action based on *N.J. Stat. Ann. § 34:15-39.1*, which prohibits retaliation).
- Ohio *Wilson v. Riverside Hospital*, 18 Ohio St. 3d 8; 479 N.E.2d 275 (1985) (allowing a cause of action based on *OHIO REV. CODE ANN. § 4123.90*, which prohibits discharge, demotion, reassignment or any punitive action).
- Oklahoma *Bishop v. Hale-Halsell Company, Inc.*, 1990 OK 95; 800 P.2d 232 (1990) (allowing a cause of action based on *OKLA. STAT. tit. 85 § 5*, which prohibits discharge).
- Oregon *Brown v. Transcon Lines et al.*, 284 Ore. 597; 588 P.2d 1087 (1978) (allowing a cause of action based on *OR. REV. STAT. § 659A.043*, which prohibits discharge, discrimination or refusal to hire).
- South Dakota *Niesent v. Homestake Mining Company of California*, 505 N.W.2d 781 (S.D. 1993) (allowing a cause of action based on *S.D. CODIFIED LAWS § 62-3-18*, which provides that “No contract or agreement, express or implied, no rule, regulation, or other device, shall in any manner operate to relieve any employer in whole or in part of any obligation created by this title except as herein provided”).
- Tennessee *Clanton v. Cain-Sloan Company*, 677 S.W.2d 441 (1984) (“In this regard, we agree with *Frampton* that a retaliatory discharge constitutes a device under § 50-6-114) (allowing a cause of action based on *TENN. CODE ANN. § 50-6-114*, which provides that “No contract or agreement, written or implied or rule, regulation or other device, shall in any manner operate to relieve any employer, in whole or in part, of any obligation”).
- Texas *Texas Steel Company v. Edward Douglas*, 533 S.W.2d 111 (1976) (allowing a cause of action based on *TEX. LAB. CODE § 451.001*, which prohibits discharge or discrimination in any manner).

- Vermont *Murray v. St. Michael's College and Donald Sutton*, 164 Vt. 205; 667 A.2d 294 (1995) (allowing a cause of action based on *VT. STAT. ANN. tit. 21 § 710*, which prohibits discharge or discrimination).
- Virginia *Cooley v. Tyson Foods, Inc.*, 257 Va. 518; 514 S.E.2d 770 (1999) (allowing a cause of action based on *VA. CODE ANN. § 65.2-308*, which prohibits discharge).
- Washington *Lins v. Children's Discovery Centers of American, Inc.*, 95 Wn. App. 486; 972 P.2d 168 (1999) (allowing a cause of action based on *WASH. REV. CODE § 51.48.025*, which prohibits discharge or discrimination in any manner).
- West Virginia *Skaggs v. Eastern Associated Coal Corp.*, 212 W. VA. 248; 569 S.E.2d 769 (2002) (allowing a cause of action based on *W. VA. CODE ANN. § 23-5A-1*, which prohibits discrimination in any manner).
- Wyoming *Griess v. Consolidated Freightways Corporation of Delaware*, 776 P.2d 752 (Wyo. 1989) (allowing a cause of action based on *WYO. STAT. ANN. § 27-14-104(b)*, which provides that "No contract, rule, regulation or device shall operate to relieve an employer from any liability created by this act except as otherwise provided by this act").

Tab C

AMENDED EXHIBIT C

IN 11 STATES, COURTS CREATED A CAUSE OF ACTION BASED ON THE GENERAL POLICIES IN THE WORKERS' COMPENSATION STATUTE, DESPITE THE ABSENCE OF A SPECIFIC ANTI-RETALIATION OR INTERFERENCE STATUTE

Arizona	Although the Arizona Supreme Court indicated in <i>Wagenseller v. Scottsdale Memorial Hospital et al</i> , 147 Ariz. 370, 710 P.2d 1025 (1985) (that an at-will employee could bring a wrongful termination in violation of public policy and that the court itself could determine the public policy from common law, the Arizona legislature rebuked the court for usurping its function by enacting <i>ARIZ. REV. STAT. § 23-1501</i> (prohibits retaliatory termination and provides the right to bring a tort claim for wrongful termination); <i>Galati v. America West Airlines, Inc.</i> , 205 Ariz. 290; 69 P.3d 1011 (2003) (“The legislature in enacting A.R.S. § 23-1501 took express exception to the court’s indication that it rather than the legislature had the authority to define public policy”).
Colorado	<i>Lathrop v. Entenmann’s Inc.</i> , 770 P.2d 1367; 1989 Colo. App. LEXIS 26 (1989).
Illinois	<i>Kelsay v. Motorola, Inc.</i> , 74 Ill. 2d; 384 N.E.2d 353 (1978) (creating a wrongful discharge tort based on “beneficent purpose” of the workers’ compensation law).
Kansas	<i>Murphy v. City of Topeka-Shawnee County Department of Labor Services et al.</i> , 6 Kan. App. 2d 488; 630 P.2d 186 (1981).
Kentucky	<i>Firestone v. Tom Meadows</i> , 666 S.W.2d 730 (1983) <i>superseded by statute</i> <i>KY. REV. STAT. ANN. § 342.197</i> (prohibiting discharge, refusal to hire, harassment, coercion or discrimination in any manner) as recognized in <i>Overnite Transportation Company v. Michael A. Gaddis, et al.</i> , 793 S.W.2d 129 (1990).
Michigan	<i>Svento v. The Kroger Company</i> , 69 Mich. App. 644; 245 N.W.2d 151 (1976) (retaliatory discharge contravenes public policy) This state now has a statute to enforce retaliatory discharge <i>MICH. COMP. LAWS § 418.301</i> (prohibiting discharge or discrimination in any manner).
Nebraska	<i>Jackson v. Morris Communications Corporation</i> , 265 Neb. 423; 657 N.W.2d 634 (2003).

- Nevada *Hansen v. Harrah's*, 100 Nev. 60; 675 P.2d 394 (1984).
- New Mexico *Michaels v. Anglo America Auto Auctions, Inc.*, 117 N.M. 91; 869 P.2d 279 (1994) (enforcing *N.M. STAT. ANN. § 52-1-28.2*) (prohibiting discharge, threatening to discharge or retaliating).
- North
Dakota *Krein v. Marian Manor Nursing Home and Rodney Auer*, 415 N.W.2d 793 (1987) (allowing a cause of action based on *N.D. CENT. CODE § 65-01-01*, which provides a cause of action based on language in the workers' compensation act providing for "sure and certain relief").
- Pennsylvania *Shick v. Donald L. Shirey T/D/B/A Donald L. Shirey Lumber*, 465 Pa. Super. 667; 691 A.2d 511 (1997).

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on January 20, 2006 I served the foregoing REPLY

BRIEF OF DEFENDANT/PETITIONER on:

Erik Strindberg
Strindberg, Scholnick & Chamness, LLC
426 North 300 West
Salt Lake City, UT 84103

by mailing by first class to each person listed above two (2) full and correct copies thereof.

I further certify that I filed the foregoing REPLY BRIEF OF

DEFENDANT/PETITIONER on:

Clerk of the Court
Utah Supreme Court
450 South State, Fifth Floor
P.O. Box 140210
Salt Lake City, Utah 84114-0210

by mailing by first class mail, the original and ten (10) true and correct copies thereof.

I further certify that said copies were contained in a sealed envelope addressed to each person at the addressed listed above and Administrator at the addresses listed above, said sealed envelopes were then deposited in the post office at Portland, Oregon.



Jathan Janove
Attorneys for Appellant
La-Z-Boy Incorporated