

1989

Walter K. Gilmore v. Salt Lake Community Action Program; Hal J. Schultz, Robert E. Philbrick, Fred Geter, Richard Fields, Ann O'Connell, and John Does 1-30 : Brief in Opposition to Certiorari

Utah Supreme Court

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Recommended Citation

Response to Petition for Certiorari, *Gilmore v. Community Action*, No. 890362.00 (Utah Supreme Court, 1989).
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UTAH SUPREME COURT

BRIEF

8903624

IN THE SUPREME COURT FOR THE STATE OF UTAH

WALTER K. GILMORE,

Plaintiff/Appellant,

vs.

SALT LAKE COMMUNITY
ACTION PROGRAM,
HAL J. SCHULTZ,
ROBERT E. PHILBRICK,
FRED GETER,
RICHARD FIELDS,
ANN O'CONNELL,
JOHN DOES 1-30,

Defendants/Respondents.

Case No. 870395-CA

890362

PLAINTIFF'S RESPONSE TO
DEFENDANTS' PETITION FOR WRIT OF CERTIORARI

Appeal from a Summary Judgment
Third District Court
The Honorable Homer F. Wilkinson

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Plaintiff/Appellant,
vs.
SALT LAKE COMMUNITY
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FILING OF RESPONSE

Plaintiff's Response to Defendants' Petition for Writ of Certiorari is filed pursuant to Rule 47, R. Utah S. Ct.

REPLY TO DEFENDANTS' STATEMENT OF FACTS

Defendants' statement of facts is obviously not meant to be a comprehensive summary of the material facts on which this case is based. For purposes of determining whether Berube v. Fashion Centre Inc. Ltd., 771 P.2d 1033 (Utah 1989), should be given retroactive application, the factual details are probably not material. (The material facts are laid out in detail in Plaintiff's original appraisal brief to the Utah Court of Appeals.)

However, Fact No. 3 in Defendants' statement requires a response. The statement is incomplete and, therefore, inaccurate because it is misleading. Plaintiff Gilmore was hired by Defendant Salt Lake Community Action Program on March 6, 1974, in the temporary position of accountant. There is no question that at this point Gilmore was indeed an at-will employee. However, on or about September 9, 1974, he was promoted to the position of fiscal director in a probationary status. He became a permanent employee in the position of fiscal director on or about January 1, 1975. [These facts are uncontroverted. See R.53-54. See also Position & Salary Record and Requests for Salary Payroll Change documents, which are included in Schultz deposition

Exhibit P-36 and Gilmore deposition Exhibit D-3.] It was when Gilmore became a permanent employee that his employment relationship with Defendants began to be covered by the personnel policies manual. The fact that he was originally a temporary at-will employee does not affect the fact that when he became a permanent employee both he and the Defendants became bound by the terms of the policy manual.

SUMMARY OF PLAINTIFF'S ARGUMENT

The general rule is that the ruling of the court states the nature of the law both retroactively and prospectively. Utah departs from retroactive application only when it can be shown that parties would have justifiably relied on previous law or decisions or when retroactive application would unduly burden the administration of justice.

Defendants have made no claim that they ever relied on a belief that they did not have to comply with the personnel policies manual they voluntarily promulgated. Nor have they shown that a retroactive application of Berube would unduly burden the administration of justice. They have claimed that it would unduly burden them but that has never been recognized as a reason to refuse retroactive application of a ruling.

To deny retroactive application of Berube would penalize Gilmore for not getting to the courthouse first.

To apply Berube retroactively would do nothing more than hold the Defendants to the promises they made. Their only

argument against that would be that they never intended to be bound by their promises, an argument that obviously cannot be accepted.

REPLY TO DEFENDANTS' ARGUMENT

THE BERUBE CASE SHOULD APPLY RETROACTIVELY TO THE INSTANT CASE.

In reversing the lower court's summary judgment for Defendants, the Utah Court of Appeals relied on Berube v. Fashion Centre Inc. Ltd, supra, a case whose facts and course in the lower court are remarkably similar to the instant case. Defendants, in their petition to this court for writ of certiorari, argue that Berube should not be applied retroactively to the instant case. In so arguing, Defendants have quoted so selectively from among cases on the subject of retroactivity that the picture presented can at best be described as incomplete.

Defendants, for instance, ignore Malan v. Lewis, 693 P.2d 661 (Utah 1984), a significant Utah case on the question of retroactivity and a case similar to the instant case concerning that issue. In Malan, the lower court granted summary judgment to defendants on the grounds that the Utah Guest Statute (which had previously been held constitutional) precluded plaintiff's suit. On appeal, the Utah Supreme Court reversed earlier positions that the Guest Statute was constitutional, held the statute unconstitutional and ordered a trial for plaintiffs.

Defendants petitioned for a rehearing, contending that the ruling that the statute was now unconstitutional should be applied prospectively only. The court denied the petition for rehearing, defining the Utah position on retroactivity:

The general rule from time immemorial is that the ruling of a court is deemed to state the true nature of the law both retroactively and prospectively...in the vast majority of cases a decision is effective both prospectively and retrospectively, even an overruling decision...Whether the general rule should be departed from depends on whether a substantial injustice would occur...

We may, in our discretion, prohibit retroactive operation where the 'overruled law has been justifiably relied upon or where retroactive operation creates a burden.' Loyal Order of Moose, 657 P.2d at 265...

The defendants in this case do not argue that they justifiably relied on our prior decisions sustaining the constitutionality of the Guest Statute. There is no evidence that the defendants knew of the Guest Statute and relied upon it in offering a ride to the plaintiff. The bare assertion by defendants that our decision overrules prior cases sustaining the constitutionality of the Guest Statute is insufficient to prohibit its retroactive application. [At 676; emphasis added.]

Malan was quoted and followed in the later case of Belden v. Dalbo Inc., 752 P.2d 1317 (Uth App. 1988).

The Defendants rely on McFarland v. Skaggs Companies Inc., 678 P.2d 298 (Utah 1984), where the court discussed whether a new actual malice standard should be applied prospectively only. The court did discuss the general rule as quoted in Defendants' petition but Defendants failed to quote the *application* of the general rule in that case. The court declined to limit the application of the new standard to future cases only, pointing out: "There is no showing of

reliance upon the former standard or of any resulting burden to the administration of justice. We therefore hold that the Sunburst doctrine does not preclude application of the new 'actual malice' standard in the present case." [At 305.]

Likewise, in the instant case, Defendants have shown no reliance on the pre-Berube standard nor have they shown any great burden on the administration of justice that would result from a retroactive application of Berube. Under the Malan case, their bare assertions are insufficient to prohibit retroactive application. If Plaintiff Gilmore prevails, the fact that Defendants would face "the possibility of judgment for Gilmore's back pay in a catastrophic amount" (as they describe it in their petition) is not the type of burden on the administration of justice that a prospective-only-application is designed to avoid. It may be a burden on Defendants but it is not a burden on the administration of justice. Defendants could have avoided such a "catastrophic" burden simply by following the rules that they themselves promulgated and discharging Gilmore properly. See Timpanogos Planning & Water Management v. Central Utah Water Conservancy District, 690 P.2d 562 (Utah 1984), for a discussion on what constitutes a burden on the administration of justice.

In Timpanogos, members of certain boards had been appointed by a method later found unconstitutional. The court ruled that giving that determination retroactive application would call into question all of the actions

taken by the board and would unreasonably burden the administration of justice. That would not be the situation in the instant case. The Supreme Court in Malan specifically rejected Timpanogos as support for a prospective-only-application of the Guest Statute ruling, pointing out that the ruling in Timpanogos was prospective only because of the actual reliance on the statute by various entities.

The Supreme Court had earlier discussed the standards concerning retroactivity in criminal cases in Andrews v. Morris, 677 P.2d 81 (Utah 1983), and "explicitely adopted[ed] the following analytic standards for determining the retroactivity of new rules....:1) the purpose to be served by the new rule; 2) the extent of reliance on the old rule, and 3) the effect on the administration of justice of a retorative application of the new rule. " [At 91.]

Although these were the standards for examining the question in a criminal case, they can easily be adapted in the analysis of a civil case.

Defendants cite Bimbo v. Burdette Tomlin Memorial Hospital, 644 F.Supp. 1033 (D.N.J. 1986), as support for their claim that courts in other jurisdictions have ruled that modifications to the employment at will doctrine will operate prospectively only. In Bimbo, the federal court in New Jersey refused prospective application of a New Jersey Supreme Court case, Woolley v. Hoffman-LaRoche Inc., 491 A.2d 1257 (N.J. 1985), which had for the first time recognized an

exception to the at-will doctrine based on a contract implied from a policy manual (as Berube has done in Utah). However, the New Jersey state court specifically rejected this federal court interpretation of its law in Cole v. Carteret Savings Bank, 540 A.2d 923 (N.J.Super.L. 1988): "This court respectfully disagrees with that holding [in Bimbo] and concludes that the Supreme Court in Woolley intended to include all claimants." The court also pointed out that the New Jersey Supreme Court in Rutherford Education Assn. v. Board of Ed., 489 A.2d 1148 (N.J. 1985), had thoroughly analyzed the retroactive-prospective application of its decisions:

Not only is it made clear that retroactive application is presumed, but a review of the various factors the court listed to apply in such test, makes it abundantly clear that a *breach of an implied contract would be the type of justifiable claim that would be considered retroactively.* [At 927; emphasis added.]

The prospective application of the Woolley case was explored again in Grigoletti v. Ortho Pharmaceutical, 545 A.2d 185 (N.J.Super.A.D. 1988):

The theory underpinning prospective application of important changes in the law is that retroactivity is unfair to those who relied on the prior state of the law...Here, plaintiffs contend that Ortho voluntarily published a set of employment promises in the manual upon which the plaintiffs relied and that Ortho failed to live up to those promises. Assuming that these claims are established, Ortho's only unfairness defense to the retroactive application of Woolley would have to be that it never intended to live up to the promises contained in the manual it published, and upon which its employees allegedly relied. That argument will not wash. *If plaintiffs are proved, there would be*

nothing unfair about holding Ortho to workplace standards it voluntarily promulgated. [At 189; emphasis added.]

Defendants also cite Virgil v. Arzola, 699 P.2d 613 (N.M. App. 1983), for their prospective-only-application position. Two earlier New Mexico cases, Forrester v. Parker, 606 P.2d 648 (N.M. 1980), and Hernandez v. Home Educ. Livelihood Program, 645 P.2d 1381 (N.M. App. 1982), had recognized employee manuals as a basis for breach of employment contract claims (as Berube did). In neither of these cases did the courts refuse retroactive application of the ruling. In Virgil it was a new tort cause of action for retaliatory discharge based on public policy to which the court gave a "modified prospective application." What Defendants fail to point out to this court in their petition is that the New Mexico Supreme Court explained and expanded on what was meant by "modified prospective application" in the later case of Boudar v. E.G. & G. Inc., 742 P.2d 491 (N.M. 1987). The court ruled that the Virgil holding (recognizing the new public policy exception to the at-will doctrine) was to be applicable to all cases filed on or before the date of the Virgil opinion so long as trial of the case had not been completed before the date of the Virgil opinion. [At 492-493.] Therefore, even if this court were to adopt the Virgil position of modified prospective application, Berube would apply to the Gilmore case.

On page 11 of their petition Defendants cite four cases where rulings were given prospective application only. None shed any light on the instant question. Merely listing past cases where prospective-application-only was ordered is not support for prospective-only-application in a later case. It is the reasoning why prospective-only-application was denied or ordered that is significant and Defendants cannot show any reasoning in those cases cited that is applicable to the instant case.

It is also interesting to note that the federal district court in Utah has already been called upon to determine whether Berube should be applied retroactively in Howcroft v. Mountain States Telephone and Telegraph Co. 712 F.Supp. 1514 (D.Utah 1989). A hearing in that case was held prior to Berube and the court had drafted a tentative opinion. After Berube was entered, the court asked for briefs taking Berube into account. Defendants argued that Berube should not be applied retroactively but the court ruled:

In Berube, the Utah Supreme Court implicitly determined that the decision was to be applied retroactively. The court remanded the case for trial on the newly recognized theory instead of merely announcing that the theory would be recognized in future cases. [At 1519.]

Plaintiff recognizes that the Utah Supreme Court is not bound by the federal district court's interpretation of its rulings but submits that the federal district court correctly read the Berube ruling.

To refuse retroactive application of Berube to the Gilmore case would be to penalize Gilmore for not getting to the courthouse first. See Boudar v. E.G. & G. Inc., supra, at 492. If Gilmore proves his claims, Defendants will only be penalized for not living up to promises they voluntarily promulgated in their personnel manual. Grigoletti v. Ortho Pharmeceutical, supra, at 189.

RELIEF SOUGHT

Based on the foregoing, Plaintiff respectfully asks this court:

1. To deny Defendants' petition for writ of certiorari, or, if the petition is granted, to rule that the Berube case does have retroactive application;

2. To award Plaintiff costs pursuant to Rule 34, R. Utah S. Ct.

DATED: 9-27-89

Nann Novinski-Durando

Nann Novinski-Durando
Attorney for Plaintiff

DATED: 9-27-89

Mark S. Miner

Mark S. Miner
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 1989 I mailed by first class mail, postage pre-paid, four copies of Plaintiff's Response to Defendants' Petition for Writ of Certiorari to John K. Rice and Stephen W. Cook, Cook & Wilde, P.C., attorneys for Defendants, Suite 490, 6925, Union Park Center, Salt Lake City, Utah 84047.

Mark S. Miner