

1990

Vern L. Peterson v. Browning, a Utah corporation, and David W. Rich : Brief of Respondent

Utah Supreme Court

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DOCKET NO. 900401

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. :

BRIEF OF RESPONDENT

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

Case Number 87-NC-121G

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Clerk, Supreme Court, Utah

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Plaintiff/Respondent,	:	
vs.	:	Supreme Court Docket Number 400401
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I. JURISDICTION

This matter has been certified to this Court by the Honorable Judge Thomas Greene of the United States District Court for the District of Utah, Northern Division, pursuant to Utah Rules of Appellate Procedure, Rule 41. The matter is within the jurisdiction of the Utah Supreme Court pursuant to Article 8 Section 3 of the Utah Constitution and Utah Code Annotated Section 78-2-2(1).

II. ISSUES PRESENTED FOR REVIEW

Judge Greene has certified the following question to this Court for consideration:

Does an action for termination of employment based upon the public exception to the employment-at-will doctrine for violation of or refusal to violate federal, other state, or Utah law, sound in tort or contract.

Defendants have attempted to enlarge Judge Greene's certification issue and add their own issues for consideration. First, Defendants are essentially re-arguing a summary judgment motion previously rejected by Judge Greene, attempting to argue the facts before this Court. Judge Greene had specifically rejected Defendants attempts to include an extensive recitation of the facts in the Certification Order. He indicated that he could apply the law to the facts once enlightened with the law by this Court. To do otherwise would intrude upon the province of the federal court as the trier of fact. Nonetheless, and in light of the denial of Plaintiff's Motion to Strike Defendants' Brief, Plaintiff will address this issue below.

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Second, Defendants assert that the certified issue is mooted by recent case law from the United States Supreme Court. That issue has been briefed and is awaiting oral argument before the federal trial court and Plaintiff again asserts that it would be improper for this Court to consider that issue as it is not certified and is solely within the province of the federal court to determine.

III. NON-CASE LAW AUTHORITY

In light of Defendants' contention regarding the mootness issue, portions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1001 et seq., may require interpretation if the Court deems that is an appropriate issue for the Supreme Court to consider.

IV. STATEMENT OF THE CASE

A. COURSE OF THE PROCEEDINGS

Plaintiff was constructively discharged from his employment with Defendant Browning on October 31, 1984, after having worked for Browning since 1953. Verified Complaint, paragraphs 7, 11, a copy of which is attached as Addendum I.

As a result of the termination, Plaintiff filed a lawsuit against Defendant Browning and Defendant Rich, alleging 1) a violation of ERISA by manipulation of the Browning Pension Plan

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to coerce Plaintiff's early retirement as part of a scheme to terminate his employment; 2) a breach of an employment contract; and 3) termination of employment in violation of the public policy of the State of Utah. Verified Complaint attached.

On December 21, 1988, Judge Greene ruled on Defendants' September 27, 1988, Motions to Dismiss Plaintiff's Non-Federal Claims. The Court ruled that Plaintiff's claims were not preempted by ERISA, that the federal court had pendent jurisdiction, but dismissed the Third Cause of Action (public policy based claim) without prejudice. A copy of the Order Re Defendants' Motions to Dismiss Plaintiff's Non-Federal Claims is attached as Addendum II.

Defendants then filed a Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment on March 24, 1989, on the ERISA and contract causes of action.

On March 24, 1989, Plaintiff filed a Motion for Reconsideration and for Reinstatement of Plaintiff's Third Cause of Action in light of this Court's decision in Berube v. Fashion Center, Ltd., 771 P.2d 1033 (Utah 1989). Defendants responded and alternatively requested the summary judgment of Plaintiff's third cause of action. The Court ruled on August 16, 1989, (Order signed January 23, 1990) denying Defendants Motion for Summary Judgment or in the Alternative Partial Summary Judgment (Re ERISA and contractual causes of action), reinstating Plaintiff's public

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policy based cause of action, and denying summary judgment of that cause of action as well. A copy of that order is attached as Addendum III.

Defendants then moved for an interlocutory appeal to the Tenth Circuit Court of Appeals which was denied on January 23, 1990. A copy of that Memorandum Decision and Order is attached as Addendum IV.

Defendants finally moved the U.S. District Court to certify issues to the Utah Supreme Court which motion was, obviously, granted on August 22, 1990. Defendants attempted at that time to enlarge the issues for certification, and to have this Court review the facts of the public policy based cause of action. The U.S. District Court agreed that was not appropriate and certified one fairly narrow issue for appeal, setting forth the facts that it determined appropriate and necessary for this Court to consider. A copy of the Certification Order is attached as Addendum V.

B. FACTS RELEVANT TO THE ISSUE PRESENTED FOR REVIEW.

Plaintiff asserts that it is neither necessary nor appropriate for this Court to determine the issue that Defendants have articulated for review, i.e. whether Utah law would recognize the facts asserted by Plaintiff as sufficient for a finding of discharge in violation of public policy, as Utah law recognizes that doctrine. (Brief of Petitioners, p. 5). The issue that the

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federal court articulated, i.e. whether the public policy exception to the employment-at-will doctrine sounds in tort or contract, requires only legal argument and not a recitation of facts outside of those set forth by the federal Court in its Certification Order. Defendants have thoroughly argued these facts in Summary Judgment Motions and Motions to Dismiss and the trial court has refused to dismiss the causes of action. Defendants are using this forum to again try to argue what they were unsuccessful at before, and improperly using the Supreme Court by taking the fact finding duty away from the federal court. The federal trial court is amply able to apply the law handed down from this Court to the particular facts of this case, and Judge Greene has stated such.

In light of this Court's dismissal of Plaintiff's Motion to Strike Brief, however, Plaintiff will assert the following facts to respond to Defendants' factual issue determination.

1. Plaintiff began his employment with Browning in 1953. Plaintiff's Deposition, p. 18.

2. In 1982, Plaintiff became general manager of Browning's facility in Arnold, Missouri and moved to Missouri. Plaintiff's Deposition, p. 20.

3. Plaintiff objects to Defendants' characterization in paragraph 3 of its facts inasmuch as it suggests that Plaintiff's retirement from Browning was voluntary. Plaintiff did

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leave Defendant Browning's employ on October 31, 1984. Plaintiff has consistently maintained from the inception of this lawsuit, however, that he was constructively discharged from his employment. Verified Complaint, paragraph 11.

4. Plaintiff claims he was discharged because he opposed certain unlawful actions proposed by other officers and division managers of Defendant Browning and because he conscientiously carried out his duties as customs officer and as a corporate officer. Verified Complaint, paragraph 23.

5. Plaintiff further claims that Browning's "discharge of [him] for exercising his duty of loyalty and care in the affairs of the corporation and for conscientiously performing his duties as Customs Officer as required by the law of Utah and the law of the United States violates the public policy of Utah and constitutes wrongful termination." Verified Complaint, paragraph 24.

6. Plaintiff disputes paragraphs 6 and 7 of Defendants' facts as they are taken out of context, are misleading or mischaracterize the facts. In response to a question regarding the basis of paragraph 23 of Plaintiff's Complaint (regarding his contention that he was constructively discharged because of his opposition to unlawful actions proposed by Browning officials and because he conscientiously carried out his duties as customs and corporate officer) Plaintiff indicated from page 181 to page 206

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of his deposition that his opposition to falsification of customs documents regarding importation of firearms parts from Miroku Firearms of Japan; his opposition to falsification of inventory valuation for purposes of assessing the Merchants and Manufacturers Tax upon Defendant Browning's Arnold, Missouri plant inventory; his opposition to allow Berretta Firearms of Italy to use Browning's import permit to ship firearms into the United States; his refusal to short cut customs procedures in order to transfer Browning inventory from Montreal, Canada, to the United States; and his insistence on compliance with customs rules and regulations regarding the importation of golf clubs from Portugal, all contributed to the decision to force him out of his employment with Browning. Plaintiff's Deposition, pp. 162-64, 181-206.

7. Plaintiff admits paragraph 8 of Defendants' facts, but refers the court to the preceding fact paragraph 6, and to the actual text of Plaintiff's deposition for a more complete explanation of the basis for his allegations in paragraph 23 of his Complaint.

8. Plaintiff disputes Defendants' fact number 9 inasmuch as it excludes David Rich. Plaintiff believes that Don Gobel, perhaps the Board of Directors, or anyone acting with authority from them would have authority to terminate Plaintiff. Plaintiff's Affidavit in Support of Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, paragraph

34, attached hereto as Addendum VI.

9. Plaintiff testified concerning the issue of the importation of the pistols from Japan that he had a conflict with another Browning officer over the issue and believed that officer desired him to ignore the instructions given to him by Mr. Gobel that Plaintiff was to abide by the letter and the spirit of customs laws. Peterson Deposition, p. 162-166, 191-192.

10. Plaintiff disputes paragraph 11 of Defendants' facts as it is taken out of context, is misleading or mischaracterizes the facts. In response to an inquiry as to whether Mr. Peterson felt that he suffered any adverse repercussions because of his refusal to go along with Ray Allen, President of Browning Arms Corporation, regarding the illegal importation of pistols from Japan, the following testimony and questioning was given:

"A. (Mr. Peterson) Yes, I feel very strongly I did.

Q. (Mr. Money) What were those repercussions?

A. Bad-mouthing Peterson for just another example of his unwillingness to cooperate."

Peterson Deposition, p. 164.

11. Plaintiff had a telephone conversation with Ray Allen, President of Browning Arms Corporation, wherein Plaintiff refused to cheat with regard to the importation of illegal pistol parts from Japan which resulted in Mr. Allen becoming extremely

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angry with Plaintiff. Within a few days of this telephone conversation Plaintiff received a telephone call from Mr. Rich with regard to Plaintiff's retirement. These telephone conversations were recorded, transcribed and attached to Plaintiff's Affidavit in Support of his Memorandum in Opposition to Defendants' Motion for Summary Judgment. Peterson Deposition, p. 203.

12. Plaintiff admits that he had a conflict with a Browning officer when Mr. Peterson, as Customs Officer, indicated that certain Berretta pistols could not be imported under a Browning license, as set forth in paragraph 12 of Defendants' facts, and asserts that it was Ray Allen, the President of Browning Arms, the same person with whom he had a conflict regarding the importation of pistols from Japan and not another Browning officer.

13. Plaintiff admits that Mr. Gobel was a stickler for adherence to customs practices, but denies the characterization in paragraph 13 of Defendants' facts that this was Plaintiff's characterization of Mr. Gobel. A reading of the deposition reveals that Mr. Peterson merely agreed to this statement, it was not his description of Mr. Gobel. Plaintiff's Deposition, p. 192.

14. Plaintiff disputes paragraph 14 of Defendants' facts inasmuch as it is taken out of context, is misleading or mischaracterizes the facts. Plaintiff did believe that his

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insistence on strict adherence to customs practices played a part in the perception that he was uncooperative. In addition, however, Plaintiff stated that he thought that in Morgan there were people who felt whatever they gave Arnold was acceptable and that Arnold should go ahead and do it. As a result the reflection that came back to Arnold was that Arnold was extremely uncooperative in wanting to get the inventories transferred back and forth (in insisting that the customs laws be followed with regard to transporting inventories between the Montreal, Canada warehouse and Arnold). Plaintiff's Deposition, pp. 193-94.

15. Plaintiff has no reason to disbelieve Mr. Gobel when he says that he was unaware of the Montreal situation. Plaintiff's Deposition, pp. 192-194.

16. Plaintiff disputes paragraph 16 of Defendants' facts as it is taken out of context, is misleading or mischaracterizes the facts. What Mr. Peterson testified to in his deposition was that under a Generalized System of Preferences you can import a commodity from a country at less than the going rate of tariff if the State Department and the Treasury Department decide to honor the country with such treatment. Browning was attempting to get golf clubs made in Portugal to become qualified for that preferential treatment. Problems arose in Portugal and Don Gobel traveled to Portugal to, among other things, attempt to iron the problems out. He sent a memorandum to Plaintiff

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outlining the understanding which turned out to be wrong and more delays ensued. Plaintiff testified "Don's reaction to that [Plaintiff not going along with his memorandum] was not very happy. He did not tell me to cheat, but I knew he was not pleased that I didn't accept his memo and proceed accordingly." Plaintiff subsequently got the customs issue straightened out and Browning did accomplish the goal it wanted to accomplish. Plaintiff's Deposition, pp. 195-96.

17. Plaintiff disputes paragraphs 17 and 18 of Defendants' facts as they are taken out of context, are misleading or mischaracterize the facts. With regard to paragraph 17, Plaintiff actually testified that there was a problem with regard to the Missouri Merchants and Manufacturers tax which is more fully set forth above at paragraph 6, in Plaintiff's deposition and also in Defendants' fact paragraph 18. Plaintiff testified that he could not think of any other information at the moment that would support his allegations contained in paragraph 23 of his Complaint, although he doubted further reflection would provide more information. Additional discovery, however, may provide Plaintiff with additional information to which he has not yet been made aware.

18. Plaintiff disputes paragraph 19 of Defendants' facts as it is taken out of context, is misleading or mischaracterizes the facts. In addition to what is stated in fact

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paragraph 19, Plaintiff further testified that he was having a meeting with Mr. Gobel on an unrelated subject when Don Jones, another Browning officer, came in indicating that there was a serious problem with the tax form that had just come in from the Arnold plant. The plant was at that time still under the management of Bob Clark who had been handling the tax forms up to that time. Mr. Jones indicated that if he put down the right figures on the tax form it would cost the company several hundred thousand dollars. That was the first indication Plaintiff had that there were problems with regard to the Missouri tax and inventory valuations for purposes of the tax forms at Arnold. Plaintiff's Deposition, pp. 182-84.

19. Plaintiff discussed the problem of having inadequate information to accurately fill out the tax forms with Browning's counsel in Missouri. He was told to send the tax forms to Morgan to be filled out. Merchandise inventories were taken at Arnold, but by Morgan personnel, and the information was taken back to Morgan where the tax forms were filled out. Plaintiff believes that at least Don Jones wanted him to lie to the county officials about the amount of inventory that was subject to the tax. Mr. Jones indicated to Plaintiff that it was a pain in the neck for Morgan to do it and he didn't see why Arnold wouldn't go ahead and do it. Plaintiff's Deposition, pp. 182-88.

20. Plaintiff agrees with paragraph 20 of Defendants'

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facts, that Mr. Gobel asked Mr. Jones to look into the matter of under-evaluation of the merchants tax in Missouri and heard nothing further regarding the matter. Upon further inquiry, however, Mr. Gobel also testified that he never had another conversation with Mr. Jones concerning the problem, he gave no instructions as to what to do if the inventory was in fact under-evaluated, he did not tell Mr. Jones that the inventory was not to continue to be under-evaluated, and he did not check into the facts to determine whether or not the inventory continued to be under-evaluated. Gobel's Deposition, pp. 132-33.

V. SUMMARY OF ARGUMENTS.

- A. THE CAUSE OF ACTION FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY SOUNDS IN TORT.
- B. PLAINTIFF HAS SHOWN SUFFICIENT FACTS TO ESTABLISH A VIOLATION OF PUBLIC POLICY UNDER THE STANDARD SET FORTH IN BERUBE.
- C. ERISA DOES NOT PRE-EMPT PLAINTIFF'S PUBLIC POLICY CAUSE OF ACTION.

VI. ARGUMENT.

- A. THE CAUSE OF ACTION FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY SOUNDS IN TORT.

Contrary to Defendants' arguments, Utah has clearly and expressly recognized a public policy exception to the employment-at-will doctrine. In Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah, 1989), Justices Durham and Stewart clearly indicated

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that they would adopt such a cause of action. Berube, at 1042. Justice Zimmerman's concurring opinion indicates he would likewise recognize the cause of action, Berube, at 1051, providing a majority of the Court on this issue.

In post-Berube cases this Court has cited the two justice lead opinion as authority in those instances where Justice Zimmerman's concurring opinion agreed with the lead opinion. See, Arnold v. Titan Services Co., 783 P.2d 541, 544 (1989) (citing Berube as providing an implied and express contract exception to the at-will doctrine). If there was any question at all, this Court set the issue to rest in Loose v. Nature-All Corp., 785 P.2d 1096 where the Court states:

The post-Berube exceptions to the employment-at-will doctrine in Utah include termination in violation of public policy.

Loose at 1097. Public policy has been expressly recognized as an exception to the employment-at-will doctrine.

Having recognized a public policy based cause of action the more pressing issue is whether that cause of action sounds in tort or contract. The lead opinion in Berube refers to this exception as typically giving rise to an action in tort. A canvassing of the states on this issue shows that an overwhelming majority of states have recognized this cause of action as a tort. Of the thirty-nine (39) states that recognize a cause of action for violation of public policy in the employment setting, thirty-

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two (32) recognize the cause of action as a tort, only three (3) as a contract, and in four (4) states Plaintiff has not been able to ascertain the type of action provided. Appendix VII contains a complete state by state listing of the lead cases on this issue. There is strong reasoning behind the majority's position that the public policy cause of action is a tort.

The Arizona Supreme Court in Wagonseller v. Scottsdale Memorial Hospital, 710 P.2d 1025, 1036 (1985) stated:

Firing for bad cause - one against public policy articulated by constitutional, statutory or decisional law - is not a right inherent in the at-will contract, or in any other contract, even if expressly provided. See A. Corbin, Contracts Section 7; 6A a. Corbin, Contracts Sections 1373-75 (1962). Such a termination violates rights guaranteed to the employee by law and is tortious. See Prosser & Keeton on Torts Section 92 at 655 (5th ed. 1984).

The reasoning was similarly expressed by the California Supreme Court in Tameny v. Atlantic Richfield, 610 P.2d 1330, 1334 (1980), where it recognized that California decisions "have long recognized that 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. The contract itself may give rise to duties that, if broken, would be remedied as a tort.

Protecting the substantial and important public policy

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of the state requires the type of protection that a tort claim, with its potentially punitive measures, can provide. If left to contractual damages alone, employers may choose to take their chances and pay the damages if caught because the deterrent effect will simply not be present.

Defendants cite to Beck v. Farmers Insurance Exchange, 701 P.2d 795 (Utah, 1985) in support of their argument that any public policy based claim should sound in contract. Beck, however, is distinguishable in that it involved a breach of the covenant of good faith and fair dealing, not a termination that violated public policy as in the case at bar.

In Noye v. Hoffmann - La Roche, Inc., 570 A.2d 12 (N.J. Super. A.D. 1990) that court discussed the differences between their public policy based cause of action (a tort) and a cause of action for breach of the covenant of good faith and fair dealing (a contract). Referring to New Jersey's lead case for wrongful dismissal in violation of public policy, the Court analyzed:

'Although a cause of action lay in contract the employee had a right to maintain an action in tort "based on the duty of [the] employer not to discharge an employee who refused to perform an act that is a violation of a clear mandate of public policy.' Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72, 417 A.2d 505 (1980). It was not the breach of contract with the employee that gave rise to the tort but the underlying motivation of the employer which involved antisocial conduct detrimental to society in general. The tort lay not in the breach of contract but in the violation of valuable social norms - denominated by the

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Court as clear mandates of public policy.

Noye, 570 A.2d at 14.

Defendants further argue that it is inherently inequitable for the law to impose a burden that can be enforceable by the imposition of punitive damages in the absence of independently tortious conduct. The Missouri Court of Appeals responded to this argument eloquently:

The public policy exception is narrow enough in its scope and application to be no threat to employers who operate within the mandates of the law and clearly established public policy as set out in the duly adopted laws. Such employers will never be troubled by the public policy exception because their operations and practices will not violate public policy.

Accordingly, where an employer has discharged an at-will employee because that employee refused to violate the law or any well established and clear mandate of public policy as expressed in the constitution, statutes and regulations promulgated pursuant to statute, or because the employer reported to his superiors or to public authorities serious misconduct that constitutes violations of the law and of such well established and clearly mandated public policy, the employee has a cause of action in tort for damages for wrongful discharge.

Boyle v. Vista Eyeware, Inc., 700 S.W.2d 859 (Mo. App. 1985).

Defendant Browning or any other employer who conscientiously conducts its relationships with its employees will have no need for concern in being caught off guard by the recognition of a public policy based cause of action.

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Defendants cite Judge Anderson's decision in Howcroft v. Mountain States Telephone and Telegraph Co., 712 F.Supp. 1514 (D.Utah 1989) as somehow being determinative of the issue at bar. Judge Greene, after considering Howcroft and hearing argument, on this very point, concluded that "Howcroft...", cited by the Defendants is not inapposite. The public policy exception recognized in Berube was not at issue in Howcroft and Judge Anderson did not rule upon or even discuss it. (Memorandum Decision & Order, January 23, 1990, see Appendix) Defendants, however, inappropriately continue to use Howcroft as authority for the public policy issue.

Defendants' reliance on Lowe v. Sorenson Research Co., 779 P.2d 668 (Utah 1989) is likewise misplaced. As has been argued above, Berube and Loose clearly indicate the adoption of the public policy based cause of action in the employment arena. Lowe is not on point and makes no clear statements as were made in Berube and Loose.

This Court has clearly held that the termination of an employment relationship for a reason that violates substantial and important public policy is actionable in our state. The overwhelming majority of the states have found that such a cause of action sounds in tort, in order to provide sufficient protection of the "substantial and important" rights involved. No precedent of this state would require a different result.

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B. PLAINTIFF HAS SHOWN SUFFICIENT FACTS TO
ESTABLISH A VIOLATION OF PUBLIC POLICY
UNDER THE STANDARD SET FORTH IN BERUBE.

Plaintiff again protests to being required to respond to an issue that Defendants are placing before the Court. The argument that Defendants assert, and that of Plaintiff hereafter, are substantially the same as were presented to and ruled upon by Judge Greene in response to Defendants' Motion for Summary Judgment on this public policy cause of action. Defendants are here simply trying to take this case from the trial court, where their motion was unsuccessful. That notwithstanding, Plaintiff presents the following argument.

Defendants would have the Court shut its eyes to Defendant Browning's illegal conduct and the ultimate effect that Plaintiff's refusal to engage in such activity had on his employment. Defendants first argue that the lead opinion in Berube would find a public policy violation only in statute or judicial opinion and that Plaintiff has failed to articulate such a violation which led to Plaintiff's termination. The examples of public policy given in the lead opinion strongly support Plaintiff's cause of action. The violations Plaintiff complains of are analogous of those found in Tameny v. Atlantic Richfield, 610 P.2d 1330 (1980) (cause of action for employee terminated for refusing to engage in an illegal price fixing scheme) and Petermann v. International Brotherhood of Teamsters, 344 P.2d 25

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(1959) (cause of action for employee terminated for refusing to commit perjury) cases cited in the Berube lead opinion. Plaintiff's allegations are not like those superficial and transitory public policies which Berube would not recognize, i.e., public policy to provide and promote job security and full employment for its citizens. Berube at 1043. Plaintiff has maintained from the beginning that he was terminated for refusing to engage in or condone illegal activity.

Defendants argue that Plaintiff has never claimed he was fired because he refused to violate any law. This is directly at odds with Defendants' own fact paragraphs 4 and 5 which state that Plaintiff indeed alleged in his Complaint that he was constructively discharged for opposing unlawful actions for conscientiously carrying out his duties as a customs and corporate officer as required by the law of Utah and the law of the United States. Plaintiff's Complaint, Third Cause of Action, paragraphs 23 and 24. Certainly this is adequate notice under our notice pleading rules.

Defendants then had an opportunity to question Plaintiff at his deposition regarding the basis of these allegations. Plaintiff indicated that the allegations were based upon Plaintiff's opposition to the falsification of customs documents regarding the importation of firearm parts from Miroku Firearms of Japan, his opposition to the falsification of inventory valuation

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for purposes of assessing the Merchant's and Manufacturer's Tax upon the Arnold, Missouri plant inventory, his opposition to allow Berretta Firearms of Italy to use Browning's import permit to ship firearms into the United States, his refusal to short cut customs procedures in order to transfer Browning inventory from Montreal, Canada to the United States, and his insistence on compliance with customs rules and regulations regarding the importation of golf clubs from Portugal. Plaintiff went into each instance in some detail, indicating the anger that was directed at him for not going along with the illegal practices, and the extra work and measures that others at Browning had to do in order to get around Plaintiff's refusals to condone or participate in the illegal conduct.

Plaintiff testified that in late 1983, he received a telephone call from Ray Allen, the president of Browning Arms, that Italian representatives of Berretta wanted to use Browning's import permit to ship a considerable number of Berretta pistols to Pennsylvania. When Plaintiff told Mr. Allen they could not do it because it was illegal, Mr. Allen got extremely angry. Plaintiff suggested some legal measures to get the shipment imported, although that was apparently not satisfactory to Mr. Allen who hung up on Plaintiff. Some time later Plaintiff received a pleading call from an Italian representative again to use Browning's permit. Plaintiff again refused the angered

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representative. Finally, Don Gobel contacted Plaintiff asking what the problem was with regard to importing the shipment. Mr. Gobel was not pleased, but Plaintiff believes he understood the reason for Plaintiff's decision. Peterson Deposition, pp. 188-92.

Plaintiff apparently further irritated Browning officials regarding the closing of the Browning plant in Montreal, Canada. The transfer of the inventories from Canada to the Arnold, Missouri plant required compliance with customs laws. Morgan personnel became irritated and upset with Plaintiff because of his insistence on strict compliance with customs procedures due to the increased time involved in doing so. Plaintiff did not agree with all directives regarding the transfers which came from Morgan and was therefore viewed as being extremely uncooperative, less than a team player. Plaintiff's Deposition, pp. 191-94.

There was another customs problem that arose regarding the importation of golf clubs from Portugal. Mr. Peterson testified that under a Generalized System of Preferences a company can import a commodity from a country at less than the going rate of tariff if the State Department and the Treasury Department decide to honor the country with such treatment. Browning was attempting to get golf clubs made in Portugal to become qualified for that preferential treatment. Problems arose in Portugal and Don Gobel traveled to Portugal to, among other things, attempt to iron the problems out. He sent a memorandum to Plaintiff

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outlining the understanding which turned out to be wrong and more delays ensued. Plaintiff testified "Don's reaction to that [not going along with his memorandum] was not very happy. He did not tell me to cheat, but I knew he was not pleased that I didn't accept his memo and proceed accordingly." Plaintiff subsequently got the customs issue straightened out and Browning did accomplish the goal it wanted to accomplish. Plaintiff's Deposition, pp. 195-96.

Plaintiff again met with opposition when he refused to falsify Jefferson County, Missouri tax documents. Plaintiff testified that he was having a meeting with Don Gobel on an unrelated subject when Don Jones, Browning's Treasurer, came in indicating that there was a serious problem with the tax form that had just come in from the Arnold plant. The plant was at that time still under the management of Bob Clark who had been handling the tax forms. Mr. Jones indicated that if he put down the right figures on the tax form it would cost the company several hundred thousand dollars. That was the first indication Plaintiff had that there were problems with regard to the Missouri tax and inventory valuations for purposes of the tax forms at Arnold.

Plaintiff was sent to run the Arnold, Missouri plant shortly thereafter and discussed the problem with Browning's counsel in Missouri. Plaintiff was told to send the tax forms to Morgan to be filled out. Merchandise inventories were taken at

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Arnold, but by Morgan personnel, and the information was taken back to Morgan. Plaintiff stated that he believes that at least Don Jones wanted him to lie to the county officials about the amount of inventory that was subject to the tax. Mr. Jones indicated to Plaintiff that it was a pain in the neck for Morgan to do it and he didn't see why Arnold wouldn't go ahead and do it. Plaintiff's Deposition, pp. 182-88.

Finally, Plaintiff testified that he and Ray Allen, President of Browning Arms Company, had gotten into an angry confrontation over the importation of pistol parts from Miroku, a Japanese corporation. Plaintiff objected to a Miroku shipment manifest of pistol parts because Browning did not have an import license for pistol parts from Japan. Plaintiff's Deposition, p. 162. In fact it was illegal to import pistol parts from Japan. Gobel Deposition, p. 65-66. Ray Allen was responsible for the shipment and a shouting match ensued when Plaintiff confronted Mr. Allen and refused to change the shipping documents to incorrectly reflect rifle parts which Browning could lawfully import from Miroku. This incident took place just days before Plaintiff began receiving telephone calls from Dave Rich which ultimately led to his forced resignation by the end of that month. Plaintiff's Deposition, pp. 162-63.

Plaintiff has given Defendants ample notice of the above conduct which is illegal and which he believes ultimately led to

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his termination from Browning. The conduct which Plaintiff refused to condone or engage in was illegal and Plaintiff should not be wrongfully terminated because of his refusal to go along with the illegal conduct. A more clear public policy violation is difficult to imagine. Defendants have failed and refused to provide Plaintiff with requested information regarding illegal customs practices and falsifying tax forms, yet Defendants attempt to argue that Plaintiff does not have sufficient facts to prove his allegations. This type of hide and seek game is clearly inappropriate and should not be tolerated.

Defendants next argue that since Don Gobel did not personally ask Plaintiff to violate any laws, and since Mr. Gobel and the Board of Directors were the only ones who could ultimately fire Plaintiff, Plaintiff cannot state a claim for relief. Defendant Browning must, of course, act through its agents and is ultimately responsible for the actions of those agents.

Plaintiff believes that there was animosity toward him and that the animosity was what led Mr. Gobel and Mr. Rich into forcing him out of his employment. Plaintiff believes that the basis of this animosity, however, was Plaintiff's refusal to condone and engage in the illegal activities of other Browning officers which conduct is more fully set forth above. Plaintiff had been a thorn in the side of various Browning officers who wanted to short cut customs and tax laws over the years. As custom's officer he refused to

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allow the illegal importation of pistol parts from Japan and golf clubs from Portugal, and to allow Browning's importation license to be used by Berretta of Italy. Plaintiff's refusals led to angry confrontations with Browning officials. Plaintiff further required additional work from Defendant Browning's Morgan personnel who were delayed in clearing the Montreal warehouse because of Plaintiff's insistence on complying with customs laws. Morgan personnel were also required to take merchandise inventories of the Arnold plant after Plaintiff took over as manager and to prepare the tax forms on the merchandise. This was previously done in Arnold under its prior management. A clear inference that Plaintiff's refusals precipitated the termination can be found in the timing of Plaintiff's last refusal to violate customs laws. It was only a few days after Plaintiff's angry confrontation with Browning Arms Company President Ray Allen, over the Miroku pistol importation, that Dave Rich called regarding termination/retirement. A logical inference can be made and should be left to the trier of fact to determine whether the animosity which led to Plaintiff's termination was as a result of Plaintiff's failure to "play ball" with other managers who were engaging in illegal activity.

It is untenable to argue that the State of Utah has no interest in upholding the principles of federal or other state law. When confronted with this issue in Alder v. American

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Standard Corp., 538 F.Supp. 572, 579 (1982) the federal District Court of Maryland analyzed:

This Court cannot agree that the State of Maryland should close its eyes and, as a matter of policy, not be concerned with violations of federal law.

...

Various courts have recognized that federal public policy may properly form the basis for an abusive discharge suit in a state contract. See McNulty v. Borden, Inc., 747 F.Supp. 1111 (E.D.Pa. 1979); Tameny v. Atlantic Richfield Co., 27 Cal.3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980); Harless v. First Nat'l Bank, 246 SE.2d 270 (W.Va. 1978); See also Pugh v. See's Candies, Inc., 116 Cal.App. 3d 311, 171 Cal. Rptr. 917 (1981). No cases have been cited to the Court holding to the contrary.

Utah citizens who are terminated from their employment because they refuse to engage in illegal activities, should be protected regardless of whether the law governing them arose from federal, state or other state statutes or regulations. The effect on the party of having to choose between keeping their job or following law that governs them, is the same regardless of where the law originates from, and the public policy of the State of Utah should not protect such conduct by an employer against its employee.

Judge Greene in his Memorandum Decision and Order, Addendum IV, ftnt. 1, indicates what he interprets the public policy exception to consist of: "This exception protects an at-will employee from being discharged for a reason or in a manner

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that contravenes sound principles of established and public policy." In Berube this Court indicated that public policy is most obviously, but not exclusively embodied in legislative enactments. Berube, 771 P.2d at 1043. The facts of Plaintiff's public policy based cause of action therefore, give rise to one of the clearest public policy based claims. Judge Greene, in ruling from the bench on the motions for reinstatement and summary judgments, agreed:

THE COURT: All right. On the motion for reinstatement, I'm going to grant that motion.

The third cause of action, I think we are driven by a lot of facts here. I'm satisfied that there is a direction in Utah law which would embrace, at least, this kind of a public policy. So Defendants' motion for summary judgment on the third cause of action is denied.

Transcript of August 16, 1989, bench ruling, p.3 (emphasis supplied). See attached Addendum VIII. There clearly are sufficient facts to support the cause of action.

C. ERISA DOES NOT PRE-EMPT PLAINTIFF'S
PUBLIC POLICY CAUSE OF ACTION.

Again, Defendants are improperly submitting issues for consideration of this Court that are more appropriately left to the trial Court. In fact, Defendants have briefed this issue before the federal trial court and it is awaiting oral argument there. In light of the denial of Plaintiff's Motion to Strike

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Defendants' Brief, however, Plaintiff will briefly respond to Defendants' arguments.

Plaintiff has successfully defended a Motion to Dismiss and Summary Judgment Motion on this very issue before the trial Court. The only new authority cited is Ingersoll-Rand Company v. McClendon, 111 S.Ct. 478, 1990 US Lexis 6121, 112 L.Rd2d 474, 59 U.S.L.W. 4033 (December 3, 1990). Ingersoll does not break new ground. The issue is still the same as it was before Ingersoll (and when previously decided by the federal trial court): Do Plaintiff's state law causes of action "relate to" the employee benefit plan sufficiently to require pre-emption by ERISA. The answer is also still the same: No.

In Ingersoll-Rand the Court had to determine whether a state law claim for wrongful termination "related to" an ERISA violation. The Texas court had held that under state law "a plaintiff could recover in a wrongful discharge action if he established that 'the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund.'" Ingersoll-Rand, 59 U.S.L.W. at 4034. Not surprisingly, the United State Supreme Court found that "the existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension plan itself." Id. at

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4035. The Court goes on to say that "The Texas cause of action makes specific reference to, and indeed is premised on, the existence of a pension plan." Id. That is clearly not the case at bar.

In the Texas case, "there simply is no cause of action if there is no plan." Id. In the case at bar, both state law causes of action can stand without the existence of a pension plan. Plaintiff's second cause of action basically alleges that Defendant discharged Plaintiff without notice of dissatisfaction, without opportunity to respond, without investigation of criticism, without notice of performance deficiencies and an opportunity to improve, all in breach of covenants of the employment contract. The third cause of action basically alleges that Plaintiff was discharged because he opposed unlawful actions proposed by Browning officials and because he conscientiously carried out his duties as customs officer and corporate officer. Neither state law causes of action rely upon the existence of a pension plan.

Defendants argue that the allegations supporting the second and third causes of action intermesh with the ERISA cause of action. Supposedly in support of that proposition they cite to paragraphs 14 and 15 of Plaintiff's Complaint. Both of these paragraphs, however, are contained in the First Cause of Action, refer to the ERISA violation, and have nothing to do with the

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second and third causes of action. If the Court followed the Defendants' argument to its logical conclusion, an employer could always protect itself from wrongful termination actions by simply maintaining a pension plan for the employer. ERISA does not attempt to pre-empt the entire range of cases, but only those where there is a logical "relation to" or dependence on the plan to support the cause of action.

Not only is the Ingersoll-Rand decision distinguishable as is set forth above, but it does not break new ground in the pre-emption area. It merely reiterates the prior case law which was before the federal court when it previously ruled on this issue denying Defendants the relief they request this Court grant them.

CONCLUSION

There is only one issue that is appropriately before this Court: that certified by the Federal District Court. Utah should follow the overwhelming majority of states and determine that the cause of action for wrongful termination from employment in violation of public policy sounds in tort.

It would invade the province of the trial court for this Court to apply the law to the facts of this case. Once enlightened as to the status of the state law, the Federal Court can apply the law to the facts. The Federal Court should likewise be allowed to rule on the ERISA issue and determine the effect, if

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any, of the Ingersoll-Rand case on the case at bar. That issue was not certified, does not and should not be addressed by the Supreme Court. In any event, Plaintiff concludes that there are sufficient facts to support the action, and that the Ingersoll case is distinguishable from this case and has no application whatsoever.

DATED this 13 day of March, 1991.

151

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

151

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 Brief of Respondent to William B. Bohling and Sharon E. Sonnenreich of Jones, Waldo, Holbrook & McDonough, Attorneys for Defendants, 1500 First Interstate Plaza, 170 South Main Street, Salt Lake City, Utah 84111, on this 13 day of March, 1991.

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ADDENDUM INDEX

- I. Verified Complaint, dated 10/30/87;
- II. Order Re Defendants' Motion to Dismiss Plaintiff's Non-Federal Claims, dated 12/21/88;
- III. Order Re Reinstatement of Third Cause of Action, Summary Judgement Motions, denials and other orders, dated 1/23/90;
- IV. Memorandum Decision and Order, dated 1/23/90;
- V. Certification Order, dated 8/22/90;
- VI. Affidavit in Support of Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, dated 4/26/89, except for attached transcriptions;
- VII. State by state case law of lead cases on public policy issue; and
- VIII. Bench Ruling, 8/16/89.

Elizabeth T. Dunning
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Salt Lake City, Utah 84101-2171
Telephone: (801) 363-3300

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

VERN L. PETERSON,	:	
	:	
Plaintiff,	:	VERIFIED COMPLAINT
	:	
vs.	:	
	:	
BROWNING, a Utah	:	Civil No. <u>87-NC-121G</u>
corporation, and	:	
DAVID W. RICH,	:	
	:	Jury Trial Demanded
Defendants.	:	

Vern L. Peterson alleges as follows:

PARTIES

1. Vern L. Peterson ("Peterson") is a resident of South Oaden, Utah.
2. Browning is a corporation organized under the laws of the State of Utah and having its principal place of business in Morgan, Utah.
3. David W. Rich is a resident of Weber County, Utah and at all times material to this Complaint was the Personnel Director of defendant Browning and a member of the Committee which is the Plan Administrator of the Employees' Pension Plan

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of Browning and other Adopting Companies ("Browning Pension Plan").

JURISDICTION AND VENUE

4. This Court has jurisdiction of this action pursuant to the Employee Retirement Income Security Act, 29 U.S.C. §1132, and the doctrine of pendent jurisdiction.

5. This Court has pendent jurisdiction over plaintiff's state law claims because the state and federal claims set forth arise from a common nucleus of operative facts.

6. Venue is proper in this Court because the breaches occurred in this district and the defendants are found in this district.

FACTS

7. In 1953 plaintiff Peterson began employment with Browning as a sales correspondent.

8. For the next 31 years Peterson continued to work for Browning and received numerous promotions. In 1981 Peterson was promoted to Vice President of Browning and was appointed Customs Officer and Corporate Secretary of Browning.

9. In August 1982 Peterson was transferred to the Arnold, Missouri facility of Browning as general manager. Prior to Peterson's transfer Browning agreed that it would continue to employ Peterson as general manager of the Arnold facility for six years until he reached age 60 and would pay the cost

of Peterson's relocation to Missouri and back to Utah.

10. At all times during his employment Peterson's performance was satisfactory. During the time he was a vice president, he exercised the duties of loyalty and care in the conduct of the affairs of Browning required of a corporate officer. During the time he was Customs Officer, Peterson fulfilled the duties of that position with diligence and care.

11. On October 31, 1984, Peterson was constructively discharged from his employment by Browning.

FIRST CLAIM FOR RELIEF

12. Plaintiff realleges paragraphs 1 through 11 above.

13. Defendant Rich failed to discharge his duties with respect to the Browning Pension Plan solely in the interest of participants and beneficiaries and instead manipulated the Plan to coerce Peterson's early retirement as part of a scheme to terminate Peterson's employment.

14. Defendant Rich's conduct in using the Browning Pension Plan as part of a scheme to terminate Peterson's employment in violation of defendant Browning's contract with Peterson and the public policy of the State of Utah constitutes a breach of defendant Rich's fiduciary duty as a member of the Committee which is the Plan Administrator of the Browning Pension Plan and a violation of the Employee Retirement Security Act, 29 U.S.C. §1001, et seq. (ERISA).

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15. Defendant Browning's knowing participation in defendant Rich's breach of fiduciary duty as part of its scheme to terminate Peterson's employment in violation of its contract with Peterson and the public policy of the State of Utah constitutes a violation of ERISA.

16. As a result of defendants' conduct as aforesaid, Peterson has lost salary, bonuses and fringe benefits, including contributions to his Browning Pension Plan account.

SECOND CLAIM FOR RELIEF

17. Plaintiff realleges paragraphs 1 through 16 above.

18. Defendant Browning's constructive discharge of plaintiff on October 31, 1984, constituted a breach of its six-year employment contract with Peterson.

19. Defendant Browning's constructive discharge of Peterson after 31 years of loyal and satisfactory service without any notice of dissatisfaction with his performance, without any opportunity for him to respond to criticism and without any investigation of the criticisms breached defendant Browning's duty of good faith and fair dealing in its contract of employment with Peterson.

20. Defendant Browning's constructive discharge of Peterson without notice of performance deficiencies and an opportunity to improve violated Browning's policy and practice of giving employees oral and written warnings and an opportunity to improve prior to termination and constituted a breach of

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its contract of employment with Peterson.

21. As a result of Browning's breaches as set forth above, Peterson has lost salary, bonuses and fringe benefits, including contributions to his Browning Pension Plan account.

THIRD CLAIM FOR RELIEF

22. Plaintiff realleges paragraphs 1 through 21 above.

23. Peterson was constructively discharged because he opposed certain unlawful actions proposed by other officers and division managers of defendant Browning and because he conscientiously carried out his duties as Customs Officer and as a corporate officer.

24. Defendant Browning's constructive discharge of Peterson for exercising his duty of loyalty and care in the affairs of the corporation and for conscientiously performing his duties as Customs Officer as required by the law of Utah and the law of the United States violates the public policy of Utah and constitutes wrongful termination.

25. Defendant Browning's wrongful termination of Peterson has caused Peterson to lose salary, bonuses and fringe benefits, including contributions to his Browning Pension Plan account, and to suffer mental anguish, embarrassment and humiliation.

WHEREFORE, plaintiff prays as follows:

1. On his first claim for relief, for lost salary,

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bonuses and fringe benefits, including contributions to his Browning Pension Plan account, with interest; for punitive damages and for attorneys fees;

2. On his second claim for relief, for lost salary, bonuses and fringe benefits, including contributions to his Browning Pension Plan account, with interest;

3. On his third claim for relief, for lost salary, bonuses and fringe benefits, including contributions to his Browning Pension Plan account, with interest; for general damages in an amount to be determined at trial and for punitive damages in an amount not less than \$500,000;

4. And for costs and for such other relief as the Court deems proper.

DATED this 30th day of October, 1987.

WATKISS & CAMPBELL

By Elizabeth T. Dunning
Elizabeth T. Dunning
310 South Main Street
Suite 1200
Salt Lake City, Utah 84101-21

Attorneys for Plaintiff

Plaintiff's Address:

813 E. 5750 S.
South Ogden, Utah 84405

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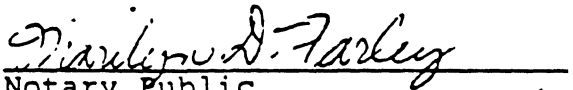
VERIFICATION

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

VERN L. PETERSON, being duly sworn, deposes and states that he resides at 813 E. 5750 S., South Ogden, Utah 84405; that he is the plaintiff named in the foregoing complaint; and that he has read the foregoing complaint and that the allegations therein are true and correct to the best of his knowledge and information and belief.


VERN L. PETERSON

SUBSCRIBED AND SWORN to before me this 30 day of
October, 1987.


Notary Public
Residing in Ogden, Utah

My commission expires:

9-27-91

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UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH
RECEIVED CLERK

DEC 23 10 45 AM '88
DEC 16 1988

MARKUS S. ZIMMER
CLERK, DISTRICT COURT

David R. Money (USB #3837)
Sharon E. Sonnenreich (USB #4918)
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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH, NORTHERN DIVISION

VERN L. PETERSON,	:	ORDER RE DEFENDANTS' MOTIONS
	:	TO DISMISS PLAINTIFF'S
Plaintiff,	:	NON-FEDERAL CLAIMS
	:	
vs.	:	
	:	
BROWNING, a Utah corporation,	:	
and DAVID W. RICH, an	:	
individual,	:	
	:	Civil No. 87-NC-121G
Defendants.	:	

Defendants' Motions to Dismiss Plaintiff's Non-Federal Claims were heard before the Honorable J. Thomas Greene, United States District Court Judge, on December 5, 1988. Plaintiff was represented by David Bert Havas and Michelle E. Heward of David Bert Havas & Associates. Defendants were represented by David R. Money and Sharon E. Sonnenreich of Jones, Waldo, Holbrook & McDonough.

The court, having considered the arguments of counsel, finds the following:

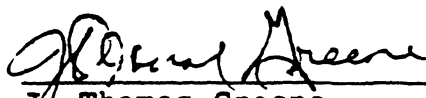
1. Defendants' Motion to Dismiss plaintiff's state law claims on the basis that they are pre-empted by the Employee Retirement Income Security Act, 29 U.S.C. 1001, et seq. is denied;

2. Defendants' Motion pursuant to Federal Rule of Civil Procedure 12(b)(1) to dismiss plaintiff's state law claims on the basis that this court lacks pendent jurisdiction is denied; and


3. Defendants' Motion to Dismiss plaintiff's Third Cause of Action (Wrongful Discharge) pursuant to Federal Rule of Civil Procedure 12(b)(6) is hereby granted and plaintiff's Third Cause of Action is dismissed without prejudice.

DATED this 21 day of December, 1988.

Copies mailed to counsel, 12-27-88jm BY THE COURT:
David B. Havas, Esq.
David R. Money, Esq.


J. Thomas Greene
United States District Court Judge

APPROVED AS TO FORM:


David Bert Havas

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH - NORTHERN DIVISION

VERN L. PETERSON,

Plaintiff,

Civil No. 87-NC-121G

v.

ORDER

BROWNING, a Utah Corporation,
and DAVID W. RICH,

Defendants.

The above matter came on regularly for hearing on August 16, 1989, upon numerous motions made by both parties. Plaintiff was represented by David Bert Havas and Michelle E. Heward. Defendants were represented by David R. Money and Sharon E. Sonnenreich. The court heard the oral arguments of counsel and examined extensive briefs from the parties, and now being fully advised makes, it is hereby

ORDERED:

Plaintiff's Motion for Reconsideration and Reinstatement of the Third Cause of Action is granted.

FURTHER ORDERED:

Defendant's Motion for Summary Judgment as to the Third Cause of Action is denied. Dispute concerning material facts precludes summary judgment.

FURTHER ORDERED:

Defendant's Motion for Summary Judgment or in the Alternative Partial Summary Judgment as to the First and Second Causes of Action is denied. Discovery concerning material issues of fact in dispute should be conducted, including ambiguity as to the meaning of "six years" in the contract sued upon.

FURTHER ORDERED:

Defendants' Motion to Strike Plaintiff's Motion to Compel is granted without prejudice to the bringing of further motions to compel and/or motions for protective orders as may be deemed necessary, after the parties have attempted to work out their disagreements. In this regard, the court directs counsel to meet together and do the following:

- Listen to the original tapes made of the telephone conversations prior to plaintiff's termination in order to determine and agree upon a fair and accurate transcript of said recordings.

- Try to agree upon an appropriate arrangement for production of documents and disclosure of bonus calculations and income information which shall include dollar amounts as well as percentages. However, identities of the individuals receiving such bonuses and income need not be disclosed. If defense counsel believes that the information requested or documents involved are privileged, and an arrangement for masking out

certain portions cannot be agreed upon, a privilege log identifying the matters and items claimed to be privileged shall be filed with the court and served upon counsel.

- Determine whether counsel can agree upon what additional information and documents should be provided in light of reinstatement of plaintiff's Third Cause of Action.

FURTHER ORDERED:

Defendant's Motion for Protective Order Regarding Customs and Tax Laws is denied.

FURTHER ORDERED:

Defendants' Motion to Strike Plaintiff's Designation of Expert Witness is denied. Defendants may depose the witness beyond the existing discovery cut off date.

FURTHER ORDERED:

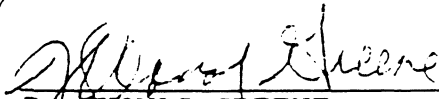
The court reserves ruling on the Motions in Limine.

FURTHER ORDERED:

An Amended Scheduling Order shall be prepared by counsel for defendants which shall provide for discovery with regard to the Third Cause of Action as well as such further discovery as may be agreed upon by the parties. The Amended Scheduling Order shall be lodged with the court after compliance with local Rule 13(e).

IT IS SO ORDERED.

DATED: January 23rd, 1990.



J. THOMAS GREENE
UNITED STATES DISTRICT JUDGE

COPIES TO: 1/24/90mp:
David Havas, Esq.
David Money, Esq.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - NORTHERN DIVISION

VERN L. PETERSON,

Plaintiff,

Civil No. 87-NC-121G

v.

MEMORANDUM DECISION
AND ORDER

BROWNING, a Utah Corporation,
and DAVID W. RICH,

Defendants.

The above matter came on regularly for hearing on December 7, 1989 on Defendants' Motion for Certification for Interlocutory Appeal and Stay. David Bert Havas and Michelle E. Heward represented plaintiff, and Sharon Sonnenreich represented defendants. The court heard oral arguments and reviewed extensive briefs. Being fully advised, the court now enters its Memorandum Decision and Order.

The Court denies defendants' Motion for Certification to the Tenth Circuit.

The issue before the Court is driven by Utah law. It is clear to this court that the Utah Supreme Court recognizes a

public policy exception to the at-will employment doctrine. Berube v. Fashion Center, Ltd., 771 P.2d 1033 (Utah 1989);² Loos v. Nature-All Corporation, 1989 Utah Lexis 146 (Utah Nov. 27, 1989). The majority in Loose said: "The post Berube exceptions to the employment at will doctrine in Utah include termination violation of public policy, . . ." Howcroft v. Mountain States Telephone & Telegraph Co., 712 F.Supp. 1514 (D. Utah April 28, 1989), cited by the defendants is not inapposite. The public policy exception recognized in Berube was not at issue in Howcroft and Judge Anderson did not rule upon or even discuss it

This Court rules that an action for wrongful termination based upon the public policy exception to the at-will employment doctrine is an action founded upon tort rather than contract. The general rule in states recognizing such an exception characterize it as the tort of wrongful discharge.³

¹ This exception protects an at-will employee from being discharged for a reason or in a manner that contravenes sound principles of established and substantial policy.

² Although there was no majority opinion in Berube, the Plurality opinion as well as Justice Zimmermann's concurrence indicated willingness to recognize a public policy exception.

³ Arthur S. Leonard in his law review article, A New Common Law of Employment Termination, North Carolina Law Review, Vol. 66 631 (1988) reviews reported cases and says: In Order to prevent an employer from acting contrary to an important public policy, some state courts have recognized a tort of "wrongful discharge" as an exception to the at will presumption. . . . Courts faced with public policy argument have searched for an existing label to place on the resulting legal action. They have most frequently describe

The clearest statement which appears to indicate the direction of Utah law on this matter is Justice Durham's plurality opinion in Berube: "Where an employee is discharged for a reason or in a manner that contravenes sound principles of established and substantial policy, the employee may typically bring a tort action against his employer" (emphasis added). Berube at 1042

The rulings set forth in this memorandum decision and order will become the law of this case unless within 30 days after the date hereof a party or the parties jointly, on motion supported by memorandum and necessary documentation, request this court to certify the issues to the Utah Supreme Court pursuant to Rule 41 of the Rules of the Utah Supreme Court. If such a motion is filed, the court will set the matter for argument.

IT IS SO ORDERED.

DATED: January 23, 1990.


J. THOMAS GREENE
UNITED STATES DISTRICT JUDGE

COPIES TO: cns1 1/24/90MP:
David Havas, Esq.
David R. Money, Esq.

it as a tort of wrongful discharge. ..." (emphasis added) Id. at 658-662.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - NORTHERN DIVISION

VERN L. PETERSON,

Plaintiff,

Civil No. 87-NC-12

v.

CERTIFICATION ORDER

BROWNING, a Utah Corporation,
and DAVID W. RICH,

Defendants.

TO THE UTAH SUPREME COURT:

This court hereby certifies the following question of law to the Utah Supreme Court pursuant to Rules of the Utah Supreme Court, Rule 41:

1. Does an action for termination of employment based upon the public policy exception to the employment-at-will doctrine, for violation of or refusal to violate federal, other state, or Utah law, sound in tort or contract?

PROCEDURAL BACKGROUND

On October 30, 1987, plaintiff Vern Peterson filed a complaint against his former employer, Browning, and its personnel director, David W. Rich (hereafter "Defendants"), alleging three causes of action related to the termination of his employment with Browning: (i) violations of the Employee

Retirement Income Security Act; (ii) breach of employment contract; and (iii) wrongful termination in violation of Utah public policy. In support of his public policy claim, plaintiff alleges, inter alia, that his employment was terminated because of his opposition to the falsification of inventory tax documents in violation of law, including the laws of the State of Missouri where he was employed by Browning at its Arnold, Missouri, plant; and because of his opposition to the falsification of customs documents in violation of federal customs laws in connection with his duties as customs officer for Browning.

Plaintiff's public policy claim was dismissed by this court on August 16, 1989 pursuant to a motion filed by Defendants under Federal Rule of Civil Procedure 12(b)(6). In light of the Utah Supreme Court's ruling in Berube v. Fashion Center, 777 P.2d 1033 (Utah 1989), plaintiff moved for restoration of the public policy cause of action, which motion was granted by this court after extensive briefing and oral argument. Defendants then filed a motion for certification of the issue for interlocutory appeal to the Tenth Circuit Court of Appeals which was denied. The actions of this court in reinstating the public policy cause of action and denying the request for an interlocutory appeal to the Court of Appeals are reflected in an Order dated January 23, 1990, attached hereto.

SIGNIFICANCE OF THE CERTIFIED QUESTION


The question certified to the Utah Supreme Court presents an issue of substance and controlling law in the pending federal case. Plaintiff claims to have been discharged because of his refusal to violate federal and state law in violation of Utah public policy. This claim has to do with alleged refusal to violate federal and foreign state law (Missouri), and possibly Utah law as well, as implicating Utah public policy. This claim enlarges this action from a contract and ERISA case that focuses on a discrete set of facts to such things as inquiry into Browning's customs and tax practices. Whether the claim sounds in contract or tort is important because the public policy claim is the only cause of action for which plaintiff seeks punitive damages.

This action, like many others brought in federal court involves a wrongful termination claim under Utah law which is independent to the basic federal jurisdictional claims. We are aware that the plurality opinion in Berube sets forth an explanation regarding the public policy exception to the employment-at-will doctrine. This court would be greatly aided by instructions from the Utah Supreme Court as to whether the public policy exception for violation of or refusal to violate law embraces federal and foreign state law, and whether it sounds in tort or contract.

Based on the foregoing, the above referenced issue is certified to the Utah Supreme Court for consideration.

IT IS SO ORDERED.

DATED: August 22, 1990.



J. THOMAS GREENE
UNITED STATES DISTRICT JUDGE

COPIES TO:

mr

United States District Court
for the
District of Utah
August 24, 1990

* * MAILING CERTIFICATE OF CLERK * *

Re: 1:87-cv-00121

True and correct copies of the attached were mailed by the clerk to the following:

David B Havas, Esq.
2604 Madison Avenue
Ogden,, UT 84401

David R Money, Esq.
170 South Main Suite 1500
Salt Lake City,, UT 84101

DAVID BERT HAVAS (1424) and
MICHELLE E. HEWARD (5084) of
DAVID BERT HAVAS AND ASSOCIATES
Attorneys for Plaintiff
2604 Madison Avenue
Ogden, Utah 84401
Telephone: (801)399-9636

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH, NORTHERN DIVISION

VERN L. PETERSON,	:	Civil No. 87-NC-121G
Plaintiff,	:	AFFIDAVIT IN SUPPORT OF
vs.	:	PLAINTIFF'S MEMORANDUM IN
	:	OPPOSITION TO DEFENDANTS'
	:	MOTION FOR SUMMARY JUDGMENT
BROWNING, a Utah corporation,	:	
and DAVID W. RICH,	:	
	:	
Defendants.	:	

STATE OF UTAH)
 : SS
COUNTY OF WEBER)

VERN L. PETERSON, being first duly sworn upon his oath
deposes and states as follows:

1. He is the Plaintiff in the above captioned case.
2. In 1982 he was informed by Defendant Browning that
he would be relocated to the Browning, Arnold, Missouri Plant and
became the General Manager of that facility.
3. As part of the agreement to move he and Defend....
Browning entered into a written employment contract dated 7/1/82,
entitled "Company Relocation Procedure and Agreement with Vern
Peterson in regard to his Transfer to the Arnold, Missouri
Plant", a copy of which is attached to Defendants' Statement of
Points and Authorities in Support of their Motion for Summary
Judgment or, In the Alternative, Partial Summary Judgment.

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4. In 1982 Plaintiff moved himself and his wife to Arnold, Missouri, under the terms of the employment contract.

5. Plaintiff entered into the employment contract believing that the employment contract provided for a period of employment of six years.

6. Plaintiff negotiated a six year contract of employment in order, amongst others, to complete enough years of service so as to allow him to retire with an adequate retirement program. Plaintiff made this fact known to Defendant Browning at the time he agreed to his reassignment to Arnold, Missouri.

7. Plaintiff worked for Browning at Arnold from 1982 until October, 1984 when he had several conversations with David Rich and Don Gobel which ultimately led to Plaintiff's termination from Browning.

8. From October 18, 1984, through October 30, 1984 Plaintiff taped eight telephone conversations held with David Rich and/or Don Gobel. Transcripts of those telephone conversations are attached to this document and marked as Exhibits A-1 through A-8.

9. Affiant has read the transcripts attached hereto and to the best of his knowledge they are true and correct transcriptions of the telephone conversations above referred to.

10. In the first telephone conversation Mr. Rich refers to a "moccasin telegraph" as causing a build up of bad feelings directed at Plaintiff by Ron Mosier. Plaintiff was

-3-

concerned over the influence that Mosier had over Don Gobel, the president of the company, and whether Gobel would rely upon Mosier's comments.

11. Mr. Rich indicated to Affiant that if Browning was going to get rid of Plaintiff, that "Early retirement is the way out," and that in "reading between the lines... this is the beginning of the end rather than just an incident." Rich went on to state that Plaintiff was in "a no-win situation back there [in Arnold] as well as a no win situation here."

12. Mr. Rich described Plaintiff's position as being "in a box", created by animosity directed at him by Mosier and others over the years. The situation, or box, was exacerbated by Mosier being Gobel's best friend.

13. Mr. Rich indicated that he saw the same type of trap being formed for Plaintiff that had led to the termination of two former Browning employees: Jim Butts and Peter Wilson. Rich had a "gut reaction something like that [was] about to happen." That early retirement was the best way out.

14. Plaintiff indicated to Rich that "you and I both know... I'm being forced out." To which Mr. Rich replied "Yeh. That's right."

15. Plaintiff believed that he was being forced out of his position with Browning and had no option but to accept the early retirement offer.

16. After discussing facets of the burden the

-4-

retirement would place on Plaintiff, he stated "if you feel that if I interpret from you correctly, ...I don't stand a prayer to make the offer. I'm just not going to fight it." Which was confirmed by Rich, "That's what I read between the lines."

17. Rich indicated that an offer should be made before the closed doors for Plaintiff to retire, and that Plaintiff should accept it. Plaintiff made it clear that he was being taken to his disadvantage and was on the "short end of the stick". "[A]t any time it is a fair fight, I'm willing to roll up my sleeves and take a shot at it, but when I'm outnumbered I feel like Custer at Little Big Horn."

18. The following day, Plaintiff called Mr. Rich where it was confirmed that Mr. Gobel had made up his mind to terminate Plaintiff, and that the "moccasin telegraph" had brought this to fruition. That the decision had been made for several weeks or months.

19. After Plaintiff returned from a vacation he again contacted Mr. Rich, who indicated that the retirement package Browning was offering was almost put together. (Trans. 5, p.

20. Mr. Rich indicated that Plaintiff did not have to take the retirement, but then added that from what he could "read" between the lines, and what [he'd] heard and what Gobel said, yes, offer it to him because he thinks it is the best thing for him too." The conversation continued with Mr. Rich acknowledging that the "handwriting" already indicated he would be terminated.

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and that Gobel indicated Plaintiff was in a no-win situation.
(Trans. 5, p. 2).

21. In the next phone conversation, after discussing the offer Browning was making to Plaintiff, Plaintiff asked if he would get fired if he refused to accept. Mr. Rich replied, "Well, I would not say that's the immediate alternative. No, but I read between the lines, I mean he [Gobel] has not said that directly to me, well, if he doesn't take it, then we'll terminate him. But that's what I read between the lines." (Trans. 6, pp. 11-12).

22. The final telephone conversation Plaintiff had with Browning management which he taped was initially with Don Gobel, Dave Rich was conferenced into the telephone conversation after a period of time.

23. Plaintiff had no plans for early retirement and was not ready to retire at the time that Defendants indicated he should accept early retirement or be fired.

24. Plaintiff recalls being told that the writing was on the wall, that if he challenged the early retirement he would be opening a can of worms, and that it would only be a matter of months before he was terminated if he failed to accept the early retirement offer.

25. Plaintiff expressed his concerns to Gobel that he didn't have a choice but to accept early retirement, that Plaintiff was being forced out and he didn't know why, and that

-6-

as he understood his options, he would be fired if he did accept early retirement.

26. Gobel's only criticism which were relayed Plaintiff was that his meetings were too long and he tended pontificate.

27. Plaintiff was sent to Arnold, Missouri, in the midst of a "cesspool of morale" problems which culminated in a week strike, the first strike the company ever had. Gobel admitted he did not expect to receive glowing reports from personnel in light of the Company problems in which Plaintiff was thrust.

28. Plaintiff expressed his concern again that he did not have a choice but to take early retirement. He was not, however, in a financial position to take early retirement.

29. After a lengthy discussion in which Plaintiff was advised of various rumors and bad feelings which had been leveled against him, Mr. Peterson expressed surprise that he had not been confronted with the allegations before so that he would have had an opportunity to respond and/or correct the problems if they existed.

30. After analogizing the swell of animosity toward Mr. Peterson to that which arose against former Secretary of the Interior James Watt, Mr. Rich indicated "The momentum is so much against you, like President Reagan said, no I don't want to fire you but the best alternative for you is early retirement.

-7-

31. Mr. Gobel indicated that the retirement they were offering Plaintiff was a "one-time deal" that had never been offered in the past and which he doubted would be offered in the future. Plaintiff then replied that he had no choice, he would have to take it.

32. After Plaintiff indicated he didn't believe it was fair but that he had no choice but to take early retirement, Mr. Gobel indicated he could essentially try to get to the bottom of the rumors and get everything on the table. He thought, however that would only make matters worse and not accomplish anything. He didn't see another alternative for Plaintiff.

33. Plaintiff believes, and therefore states, that Mr. Gobel's statement that he could essentially try to get to the bottom of the rumors and get everything on the table, was facetious in light of Mr. Gobel's prior attitude and statements, and further in light of his statement that it would not accomplish anything and he saw no other alternative but retirement for Plaintiff.

34. The information which was relayed to Plaintiff by Mr. Rich and Mr. Gobel regarding the animosity against him the backstabbing, rumors, lack of support and general attitude against him came as a surprise to Plaintiff since up until that time he was unaware of these circumstances. Plaintiff was made to feel and believed that these circumstances presented an intolerable working condition for him and he believed it was

-8-

impossible for him to continue to work for Defendant Browning under these conditions.

35. Plaintiff had not been advised by either Mr. Rich or Mr. Gobel of the general attitude towards him and the general conditions affecting Plaintiff, notwithstanding the fact that Plaintiff had a six year employment contract with Defendant Browning of which Mr. Rich and Gobel were aware.

36. Plaintiff believed that Don Gobel, perhaps the Board of Directors or anyone acting with authority from the Board would have authority to terminate him. Specifically, Plaintiff believed that Mr. Rich, as personnel manager, if acting with authority from Don Gobel, would have the authority to terminate Plaintiff.

37. When requested by Browning to provide his wife's signature on a single life annuity agreement, Plaintiff would not do so because that was not part of the early retirement package offered to him in October, 1984.

38. Plaintiff believed, based upon the conversation he had with David Rich and Don Gobel, that he would be terminated if he did not accept the early retirement package offered by Browning.

39. Prior to his telephone conversation with David Rich and Don Gobel which is reflected in transcript 8 attached hereto, Plaintiff believed he was functioning well in his job,

PETERSON v. BROWNING AND RICH
Affidavit in Support of Plaintiff's
Memorandum in Opposition to Defendants'
Motion for Summary Judgment

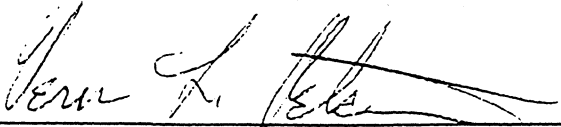
Civil No. 87-NC-121G

-9-

and that no major problems with regard to his job performance
existed.

Further, Affiant sayeth naught.


DATED this 26th day of April, 1989.


VERN L. PETERSON
Plaintiff/Affiant

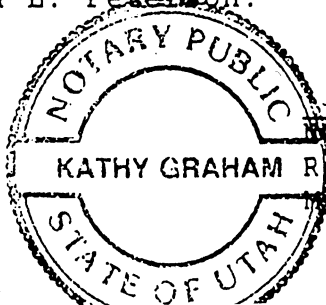
VERIFICATION

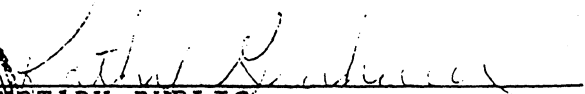
STATE OF UTAH)
 : SS.
COUNTY OF WEBER)

I, VERN L. PETERSON, being first duly sworn, say that I
have read the foregoing Affidavit in Support of Plaintiff's
Memorandum in Opposition to Defendants' Motion for Summary
Judgment and that the information set forth in the foregoing
Affidavit is true and correct to the best of my knowledge and
belief and for those items which are based upon belief, I believe
them to be true.


VERN L. PETERSON

SUBSCRIBED AND SWORN TO before me this 26th day of
April, 1989, by Vern L. Peterson.




KATHY GRAHAM
Residing at: Cedar, UT
Commission Expires: 10/3/91

PETERSON v. BROWNING AND RICH
Affidavit in Support of Plaintiff's
Memorandum in Opposition to Defendants'
Motion for Summary Judgment

Civil No. 87-NC-1210

-10-

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be hand delivered true and correct copy of the above and foregoing Affidavit in Support of Plaintiff's Memorandum in Opposition to Defendants Motion for Summary Judgment to David R. Money and Sharon E Sonnenreich of Jones, Waldo, Holbrook & McDonough, Attorneys for Defendants, 1500 First Interstate Plaza, 170 South Main Street Salt Lake City, Utah 84111, on this 26th day of April, 1989

IS/ MCH

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, 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);

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);

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, Vigil v. Arzola, 699 P.2d 613, 619 (Ct.App. 1983) (revised on other grounds), see also Chavez v. Manville Products Corp., 777 P.2d 371 (1989) (Court of Appeals may have been overly cautious in initial recognition of cause of action for retaliatory discharge);

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);

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);

MICHIGAN, Lopas v. L & L Shop Rite, Inc., 430 N.W.2d 757 (1988) (termination for filing a worker's compensation claim sounds in contract).

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);

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);

OHIO, Phung v. Waste Management, Inc., 491 N.E. 2d 1114 (1986) (refuses to recognize exception on these facts but see dissent analysis of tort vs. contract issue);

SOUTH DAKOTA, Abrogated employment at-will by statute;

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

In re:)	
)	
VERN L. PETERSON,)	
)	
Plaintiff,)	
)	
vs.)	87-NC-121G
)	
BROWNING, INC.,)	Court's Ruling
)	
Defendant.)	
)	

BEFORE THE HONORABLE J. THOMAS GREENE

August 16, 1989

Reported By
Karen Murakami, CSR, RPR
File No:
816-89K

ALPHA
Court Reporting Service
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1 APPEARANCES OF COUNSEL:

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5

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1 SALT LAKE CITY, UTAH, WEDNESDAY, AUGUST 16, 1989, 2:00 P.M.

2 * * *

3 THE COURT: All right. On the motion for reinstatement
4 I'm going to grant that motion.

5 The third cause of action, I think we are driven
6 by a lot of facts here. I'm satisfied that there is a
7 direction in Utah law which would embrace, at least, this
8 kind of a public policy. So Defendant's motion for summary
9 judgment on the third cause of action is denied.

10 Plaintiff's motion for reconsideration, reinstatement
11 is granted.

12 The Defendant's motion for summary judgment in
13 general is denied, and its motion as to the first cause of
14 action and second cause of action is denied. I believe
15 there are material issues of fact that need to be explored
16 and developed. I also consider the express contract to be
17 ambiguous on the issue of the meaning of the six years.
18 I am inclined to agree with Mr. Money that the weight of the
19 evidence may lean toward an explanation of that term as
20 related only to relocation, but I'm also convinced that there
21 are other plausible explanations. In any event, one of
22 those could be the position that's been taken here relating
23 to a term of art.

24 The Defendant's motion to strike Plaintiff's
25 motion to compel is granted with this understanding: I

1 think the parties should get together and talk about this
2 and see what's left, and now that we've got a ruling on the
3 third cause of action. Then in the spirit of getting things
4 together, you've got to sit down and listen to the original
5 tapes and quit trying to compare a reconstruction of a copy
6 of the original tape with a transcript in the possession of
7 Mr. Havas from the original tape. I do think that the
8 reconstructed transcript is, at least, in part, a work
9 product. So do that and see where you are with respect to
10 the matter of bonus calculations and things of that nature,
11 whether the documents need to be produced or maybe they
12 need to be excised so as to preserve identity, preserve
13 confidentiality. I would think counsel could work out
14 something in that regard. It isn't an answer to say they
15 can go with the percentages as well as they could with
16 dollar amounts because they have a right to do it the way
17 they want to do it. But I think that's all to be tempered
18 by the fact that there may well be confidential information
19 here and things that need to be protected, and if there is
20 something that is sought that counsel believes to be in the
21 category of privilege, work product or confidential informa-
22 tion that ought to be produced, you ought to create a
23 privilege log and we ought to talk about a new motion to
24 compel, if that's necessary.

25 The motion to compel the answer is denied.

1 The motion to strike is granted with the instr
2 tions that counsel get together and see what they can do
3 work out these discovery matters.

4 I suppose the motion with respect to the custo
5 and tax laws, except as to the motion in limine relative
6 it, is subsumed by these rulings.

7 As to the motion to strike Plaintiff's designa
8 of expert witness, I'm going to permit that expert witne
9 to be deposed and to stand as an expert witness.

10 I would like to know what remains. I would ra
11 not open discovery generally, but it looks to me like we
12 need to have a period of time for discovery as to the ma
13 raised in the third cause of action. We need to have an
14 opportunity for discovery with respect to this designate
15 expert.

16 Is there anything else as to which discovery w
17 be required by either side?

18 MR. MONEY: May I take it that our renewed motion f
19 ERISA pre-emption is denied as well?

20 THE COURT: Yes, it is.

21 MR. HAVAS: I believe as far as discovery, Your Hon
22 discovery has been reserved, and, then, the expert and t
23 third cause of action is all that I can see.

24 MR. MONEY: That's correct, Your Honor.

25 THE COURT: As to the third cause of action and the

1 expert, Chris Lewis, is that --

2 MR. HAVAS: No. And there is a couple -- a number of
3 depositions of stipulation we have reserved pending ruling
4 here, I believe three.

5 THE COURT: I think maybe what you ought to do is
6 to -- let's have two orders, one reflecting the rulings of
7 the Court on the pending motions, and another as an amended
8 scheduling order that will define the discovery that you
9 both have agreed may now be conducted. If you want to just
10 outright agree between you that it's to be extended
11 generally, that's fine. But I'm not suggesting that you do
12 that. The order of the Court is that it not be open
13 generally but that it go for the third cause of action and
14 this expert witness, and anything that you have already
15 agreed upon, that may be done. Now, if you want to make it
16 broader than that, put it in the order. If you want to
17 leave it at that, let's have an understanding what will be
18 done.

19 How much time do you want to complete that?

20 MR. HAVAS: Complete discovery or complete the order?

21 THE COURT: Well, with respect to completing the order,
22 I'll give you until 5:30.

23 MR. HAVAS: That's generous of the Court.

24 THE COURT: I was really thinking of completing
25 discovery. What do you need? Do you need more than 30 days?

1 MR. HAVAS: I believe we do.

2 MR. MONEY: We would agree with that.

3 MR. HAVAS: I would think three months is probably
4 time --

5 MR. MONEY: I would agree with that as well, Your
6 Honor. We're not as contentious as we seem with each oth

7 THE COURT: Do you want to take until the first of
8 December to complete discovery?

9 MR. HAVAS: I think we might be able to get it finis
10 before then, but that will be a good time.

11 THE COURT: Why don't we do that. If there's -- if y
12 can't work it out by your sitting down and talking on the
13 discovery matters, we'll need to have to, perhaps, talk
14 again about that. But we'll have a further status and
15 scheduling conference on December the 18th at 11:30. Now
16 at that time, we'll be in a position, I would presume, to
17 set a pre-trial and move this case into a trial posture.

18 In your amended scheduling order, I think you
19 ought to define what the main discovery is to be. You ca
20 prepare that, Mr. Money, and have Mr. Havas sign off on i

21 I'll ask Mr. Havas to prepare the general order
22 with respect to the rulings of the Court and have that
23 submitted to Mr. Money for his approval as to form. I th
24 that order you prepare, Mr. Havas, ought to make note of
25 a couple of reserved things that we haven't ruled on. I

1 | suppose there are motions in limine

2 | MR. HAVAS: Very well, Your Honor.

3 | THE COURT: Is there anything further now?

4 | MR. MONEY: No, not from us, Your Honor.

5 | MR. HAVAS: Nothing further. Thank you.

6 | THE COURT: Thank you.

7 | All right. We're in recess.

8 | (Whereupon, the matter was concluded.)

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1 STATE OF UTAH)
2) ss.
3 COUNTY OF SALT LAKE)
4

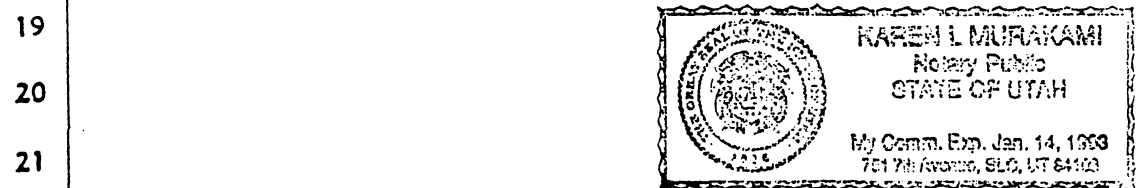
5 I, KAREN MURAKAMI, Certified Shorthand Report.
6 Registered Professional Reporter and Notary Public with.
7 and for the County of Salt Lake, State of Utah, do hereby
8 certify:

9 That the foregoing proceedings were taken before
10 me at the time and place set forth herein and were taken
11 down by me in shorthand and thereafter transcribed into
12 typewriting under my direction and supervision;

13 That the foregoing pages contain a true and
14 correct transcription of my said shorthand notes so taken

15 In witness whereof, I have subscribed my name
16 and affixed my seal this 30th day of August,

17 
18 KAREN MURAKAMI, CSR, RPR
19 Notary Public



23 MY COMMISSION EXPIRES:

24 January 14, 1993
25