

2016

Lori Ramsay and Dan Smalling, Appellants, vs. Utah State Retirement Board, and Kane County Human Resource Special Service District, Appellees

Utah Court of Appeals

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UTAH COURT OF APPEALS

LORI RAMSAY and DAN SMALLING,

Appellants,

VS.

UTAH STATE RETIREMENT BOARD,
and KANE COUNTY HUMAN
RESOURCE SPECIAL SERVICE
DISTRICT,

Appellees.

• • • • •

REPLY BRIEF OF APPELLANTS LORI RAMSAY and DAN SMALLING

Appeal No. ~~15-0574~~

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UTAH APPELLATE COURTS

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LORI RAMSAY and DAN SMALLING,

VS.

Appellees.

[illegible]

Appeal No. 15 0574

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TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	3
RESPONSE TO USRB'S AND KCH'S SEPARATE STATEMENTS OF FACT ...	4
ARGUMENT	4
I. FOR PURPOSES OF THIS APPEAL AND THE CONSIDERATION OF THE FUNDING OF RAMSAY AND SMALLING'S RETIREMENT BENEFITS, KCH SHOULD BE TREATED AS BEING SUBJECT TO THE REQUIREMENTS OF THE ACT	4
II. RAMSAY AND SMALLING ARE ENTITLED TO APPLICATION OF THE EQUITABLE DISCOVERY RULE BECAUSE THEY DID NOT BECOME AWARE OF FACTS THAT ALLOWED THEM TO PURSUE THEIR CLAIM AGAINST KCH UNTIL, AT EARLIEST, 2007	6
CERTIFICATE OF SERVICE	16
CERTIFICATE OF COMPLIANCE	16

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Dean Witter Reynolds</i> , 920 P.2d 575 (Utah App. 1996)	11
<i>Berneau v. Martino</i> , 2009 UT 87	6,8,14
<i>Colosimo v. Roman Catholic Bishop</i> , 2007 UT 25	8,9,10
<i>First Security Bank N.A. v. Banberry Development Corp.</i> , 786 P.2d 1326 (Utah 1990) .	12
<i>Garza v. Burnett</i> , 2013 UT 66	13
<i>Helfrich v. Adams</i> , 2013 UT App 37	12,14
<i>Highlands at Jordanelle, LLC v. Wasatch County</i> , 2015 UT App 173	8
<i>Myers v. McDonald</i> , 635 P.2d 84 (Utah 1981)	14
<i>Russell/Packard Development Inc. v. Carson</i> , 2003 UT App. 316	6

Statutes

U.C.A. §49-12-104	12
U.C.A. § 63G-7-401(1)(b)(i)	7

RESPONSE TO USRB'S AND KCH'S SEPARATE STATEMENTS OF FACT

Both USRB and KCH restate the stipulated facts that were provided to and formed the parameters of, the Hearing Officer's decision. Ramsay and Smalling have no objection to these restatements of the stipulated facts that provided the framework for his decision.

As to the statement of facts provided by Ramsay and Smalling, KCH provides no response. Consequently, to the extent the Record citations support the accuracy of the additional statements of fact provided by Ramsay and Smalling, they may be considered by this Court.

USRB responds to Ramsay and Smalling's statement of facts with clarifications to fact numbers 10 and 18 and with a "Statement of Additional Relevant Facts" numbering 1 through 6. USRB brief, pp. 10-12. Ramsay and Smalling do not object to any of USRB's clarifications or additional relevant facts.

ARGUMENT

I. FOR PURPOSES OF THIS APPEAL AND THE CONSIDERATION OF THE FUNDING OF RAMSAY AND SMALLING'S RETIREMENT BENEFITS, KCH SHOULD BE TREATED AS BEING SUBJECT TO THE REQUIREMENTS OF THE ACT

In their opening brief, pp. 18-20, Ramsay and Smalling argued that it is necessary and appropriate for this Court to address the issue sidestepped by the Hearing Officer in the proceeding before the USRB: whether KCH's actions in establishing a defined contribution 401(k) plan for its employees subjected it to the requirements of fully funding the retirement benefits required by the Act for all KCH employees. KCH's

actions in fully funding its employees' retirement benefits for the last three years under the requirements of the Act was certainly indicate that KCH felt it had a weak argument to say otherwise. In their opening brief, Ramsay and Smalling asked this Court to explicitly rule in favor of USRB and Ramsay and Smalling on this underlying issue that caused KCH to be brought before the USRB in the first place.

In response, KCH argues that, to the extent the issue needs to be addressed for the time frame before 2006-2009 KCH has now funded, whether KCH is subject to the requirements of the Act should first be addressed by the Hearing Officer. KCH brief, pp. 35-37. The USRB agrees in their brief, pp. 15-18. However, in its brief USRB goes on to argue that it is clear under the facts and law applicable to this situation that KCH was a participating employer under the Act and that it had liability for funding the service credits accrued by KCH employees.

Similarly, despite stating that the liability issue of KCH under the Act should be remanded to the Hearing Officer rather than decided by this Court, in its brief, KCH spends a number of pages arguing that it has no liability to comply with the Act despite the fact that it has paid retirement benefits as it owed under the Act from 2006 to 2009 for all but six of its employees who refused to accept its offer. KCH brief, pp. 37-43.

Whether considering the liability arguments presented by USRB and Ramsay and Smalling against KCH alone or considering them in connection with the actions of KCH in negotiating payment of full benefits under the Act from 2006 to 2009 for the great majority of KCH employees, there can be little question about this issue. There is simply no reason to remand this matter to the Hearing Officer after this Court rules in favor of

Ramsay and Smalling on the limitation of action issue. Rather, as outlined previously by USRB and Ramsay and Smalling in their briefs, it is appropriate for this Court to rule directly on the liability theory presented by USRB and supported by Ramsay and Smalling against KCH.

There may be other issues left to be considered on remand by the Hearing Officer. But the core liability question in this case, whether the actions of KCH in offering a 401(k) plan to its employees in 1993 triggered the requirement that KCH provide the complete package of retirement benefits to its employees thereafter as required by the Act, is not reasonably in dispute. This Court should dispose of that issue in favor of USRB and Ramsay and Smalling.

II. RAMSAY AND SMALLING ARE ENTITLED TO APPLICATION OF THE EQUITABLE DISCOVERY RULE BECAUSE THEY DID NOT BECOME AWARE OF FACTS THAT ALLOWED THEM TO PURSUE THEIR CLAIM AGAINST KCH UNTIL, AT EARLIEST, 2007

The core argument this case presents is whether the applicable three year limitation of action is tolled either because KCH's actions constituted concealment so as to justify tolling the running of the limitation of action or because this case present "exceptional circumstances" that make application of the three year limitation of action "irrational or unjust." KCH brief, p. 16 (citing *Russell/Packard Development Inc. v. Carson*, 2003 UT App. 316, ¶ 13 and *Berneau v. Martino*, 2009 UT 87, ¶ 23). Whether these provisions of the "equitable discovery" rule apply to this case is the focus of the parties arguments to this Court.

KCH asserts, wrongly, that Ramsay and Smalling have attempted to appeal but

failed to preserve an argument about “accrual” of their right to retirement benefits. KCH brief, pp. 32-34. KCH is confused. It is clear from Ramsay and Smalling’s opening brief, pp. 23-24, that they are not asserting the limitation of actions has not yet begun to run. Their reference to the fact that they have not retired and that it could be argued by KCH that their ability to even bring a claim has not accrued is not made by Ramsay and Smalling to present another appealable issue. It is to clarify the point that both the claimants and KCH agree Ramsay and Smalling have standing to present this issue to both the Hearing Officer and this Court. This paragraph at pp. 23-24 in Ramsay and Smalling’s opening brief is meant to dispose of an issue this Court may otherwise have felt was outstanding rather than raise a new appealable issue.

KCH and USRB also assert that Ramsay and Smalling’s reference to the language in Utah’s Governmental Immunity Act (“GIA”), U.C.A. § 63G-7-401(1)(b)(i), relating to the limitation of actions for bringing a claim under the GIA is irrelevant to this case or was waived because Ramsay and Smalling did not present or argue that specific statutory discovery rule before the Hearing Officer. However, Ramsay and Smalling acknowledged that they did not raise the statutory discovery rule found in the GIA in the arguments presented to the Hearing Officer. Opening brief, p. 22-23. Ramsay and Smalling do not seek to raise that statutory discovery rule now. There is no need to do so. This is because, as Ramsay and Smalling argued in their opening brief, the existence of the statutory discovery rule in the GIA simply reinforces the need for this Court to, “evaluate whether Ramsay and Smalling knew, or in the exercise of reasonable diligence, should have known of the existence of facts to justify a claim against KCH under the GIA

and to have the results of that evaluation guide the application of the discovery rule in this matter.” Opening brief, p. 23. This is, in fact, that standard the Supreme Court and all parties to this case have agreed is appropriate. *Berneau*, 2009 UT 82 at ¶ 22.

This question, whether Ramsay and Smalling knew or, in the exercise of reasonable diligence, should have known of the existence of facts to justify their claim against KCH before 2007, is what the parties agree forms the relevant inquiry. *Highlands at Jordanelle, LLC v. Wasatch County*, 2015 UT App 173, ¶ 42 (citing *Berneau*, ¶ 23). Ramsay and Smalling accept that the inquiry of this Court in this case is limited, as asserted by KCH at page 16-29, to the equitable discovery rule: whether KCH concealed information that would have led to the earlier discovery of facts by Ramsay and Smalling about their claim or whether “exceptional circumstances” exist to make the application of the three year limitation of action irrational or unjust. Ramsay and Smalling also accept that they must make an initial showing that they did not know and could not have reasonably discovered the facts underlying the cause of action in time to bring their claim within three years after they initially were entitled to do so. *Colosimo v. Roman Catholic Bishop*, 2007 UT 25, ¶ 19.

KCHs argument fails for a simple reason. It repeatedly asserts that the only fact that mattered in terms of Ramsay and Smalling having sufficient knowledge to more promptly bring their claim was their knowledge of the establishment and existence of their 401(k) plan at KCH. Over and over KCH repeat the argument that there was a “single fact,” “one fact,” or “sole fact” on which Ramsay and Smalling’s claim rests: the existence of the 401(k) plan at KCH. KCH brief, pp. 1, 13, 16, 18, 24. Of course, Ramsay

and Smalling did know that they were entitled to 401(k) benefits throughout their period of employment after 1993 when KCH implemented the 401(k) plan. But that is far different from knowing or having a reason to know that the existence of the 401(k) plan required KCH to provide full retirement benefits under the Act.

More than the simple knowledge that KCH had set up a 401(k) plan for its employees was necessary to give Ramsay and Smalling knowledge or a reason to know that they had a cause of action against KCH. They needed to be aware of the fact that establishment of a 401(k) plan KCH's triggered an obligation to provide the full range of retirement benefits before Ramsay and Smalling could bring their claims. They needed to be aware of the fact that KCH had provided no funding to the USRB for any service credits for any KCH employees in order to bring their claims. They needed to be aware of the fact that USRB was required to inform USRB that KCH had set up a 401(k) for its employees. It is undisputed that each of these facts was unknown to Ramsay and Smalling until, at earliest, 2007. And KCH has made no attempt to argue otherwise or that a reasonable person in Ramsay and Smalling's position would have been aware of this information. As such, the equitable discovery rule applies to toll Ramsay and Smalling's claim.

Ramsay and Smalling's knowledge of facts must have been sufficient to allow them to to recognize that a claim existed. Contrast the facts of *Colosimo*, where the Supreme Court ruled that the equitable discovery rule did not apply, with this case. In *Colosimo* the plaintiffs knew they had been sexually abused. *Colosimo*, 2007 UT 25, at ¶ 4. They knew the abuse came at the hands of a priest and teacher at their school. Yet they

took no action to move forward their legal claims. ¶ 5. The Supreme Court ruled that knowledge of these facts was sufficient to put the plaintiffs on inquiry notice of their potential claims. *Id.* at ¶ 13. The same conclusion cannot validly be made in this case. The knowledge of the fact that they were being provided with a 401(k) retirement plan at KCH did not give Ramsay and Smalling any reason to think they were entitled to the full panoply of retirement benefits under the Act.

As outlined in their opening brief, pp. 7-8, a defined contribution retirement plan, such as the 401(k) plan provided by KCH, is a very different animal than a defined benefit retirement plan such as was mandated for government employers under the Act. KCH makes no attempt to establish, either for Ramsay and Smalling or for a reasonable employee at KCH, that knowledge of the existence of KCH's 401(k) benefit plan was information that was sufficient to put a KCH employee on reasonable notice that they were entitled to the more extensive defined benefit retirement funds under the Act. KCH provides no persuasive analysis to establish that Ramsay or Smalling had knowledge of facts to put them on inquiry notice because it is self-evident that, without more information, the mere existence of the 401(k) plan, standing by itself as the "single fact" KCH touts, provides no reason for Ramsay or Smalling or any other employee in their position to know they were also entitled to be provided additional retirement benefits under the Act.

Instead, KCH jumps from Ramsay and Smalling's undisputed knowledge of the 401(k) plan to the unwarranted idea that this information, without more, required Ramsay and Smalling to exercise reasonable diligence to discover the existence of their right to

the full defined benefits provided by the Act. In fact, if the knowledge of the existence of the 401(k) plan alone would have put a reasonable KCH employee on notice to inquire about whether the full range of retirement benefits had to be provided, ruling against Ramsay and Smalling would be justified. *Anderson v. Dean Witter Reynolds*, 920 P.2d 575, 579 (Utah App. 1996). However, the 40(k) plan, without more, put KCH employees on inquiry notice that more retirement benefits were available under the Act. Indeed, KCH argues *it* had no reason to know that the mere existence of a 401(k) plan for its employees triggered any obligation to provide full benefits under the Act. If KCH had no reason to know the 401(k) plan created an obligation to provide full benefits under the Act, how can it argue with a straight face that Ramsay or Smalling knew or had a reason to know that was true?

Ramsay and Smalling had no reason to know about the effect the 401(k) had on their right to receive more extensive benefits. They had no reason to investigate further. KCH makes no plausible argument otherwise. And the absence of a credible argument on this point by KCH goes a long way toward establishing that pointing, aggressively though KCH might, at the “single fact” of which Ramsay and Smalling undisputedly had knowledge is simply insufficient to prevent the application of the equitable discovery rule.

As to the concealment element of the equitable discovery rule, KCH argues there is no evidence that it took any affirmative action to conceal anything and that Ramsay and Smalling have failed to provide any evidence otherwise. But KCH never denies that it occupied a position of superior knowledge and information, both factually and legally

as a government employer, relative to Ramsay and Smalling. KCH argues that Ramsay and Smalling had constructive notice, KCH brief, pp. 20-21, and that whether KCH's constructive knowledge was greater "is not relevant to the equitable tolling analysis." KCH brief, p. 21, n. 10. But this is not accurate. The weighing of factors this Court takes into account in evaluating whether to apply the equitable discovery rule weighs in favor of Ramsay and Smalling.

KCH cites *Helfrich v. Adams*, 2013 UT App 37, to support its argument that the disparity between the knowledge and legal duties of KCH versus Ramsay and Smalling is not something that matters to the analysis. One reasons *Helfrich* is distinguishable is because that court did not find that any fiduciary duty between the parties existed. This case is different. While KCH disclaims any fiduciary duty, KCH brief, p. 27, it cites no authority to support that argument. The fact sensitive inquiry identified in *First Security Bank N.A. v. Banberry Development Corp.*, 786 P.2d 1326, 1332 (Utah 1990), for evaluating whether a fiduciary relationship exists weighs in favor of Ramsay and Smalling under the circumstances of this case.

This case involves both statutory obligations established under the Act relating to the obligations of KCH to its employees and fiduciary obligations "implied in law" arising out of the nature of the relationship between the parties. *Id.* The statutory fiduciary relationship is established because retirement funding under the Act is in the nature of a "trust fund" for the benefit of employees of state government entities. U.C.A. §49-12-104. The implied in law fiduciary relationship arises out of the relative disparity between KCH and its employees in knowledge and sophistication regarding investment

and disposition of the retirement funds and the ability to safeguard those funds.

Highlands supports Ramsay and Smalling's argument that the status of KCH as a government employer creates greater equitable consideration in the employee's favor.

KCH's efforts to disavow any fiduciary relationship to its employees with regard to their retirement funds is half-hearted and unpersuasive.

Until 2007, at earliest, Ramsay and Smalling had no actual knowledge that they were entitled to any retirement benefits from KCH beyond their 401(k) benefits. It also clear that until 2007, at earliest, neither they nor any reasonable KCH employee had information to trigger notice to inquire further about that issue. The language of the Supreme Court in *Garza v. Burnett*, 2013 UT 66, ¶ 11-12, is appropriate: "the doctrine of equitable tolling should not be used simply to rescue litigants who have inexcusably and unreasonably slept on their rights, but rather to prevent the expiration of claims to litigants who, *through no fault of their own*, have been unable to assert their rights within the limitations period (emphasis in original)." As in *Garza*, Ramsay and Smalling should not be punished because they were not more prophetic. "The law does not penalize parties for prophetic inadequacy." *Id.* They did not have knowledge of facts that later came to light about their right to full retirement benefits under the Act. Those facts include the failure of KCH to report the existence of the 401(k) plan to USRB, the failure of KCH to report information allowing USRB to identify and calculate service credits for KCH employees, and the failure of KCH to fund those service credits. This factual information being in the hands of Ramsay and Smalling was necessary before the limitation of actions began to run on the cause of action against KCH.

The fact that the existence of the 401(k) plan, without more, gave Ramsay and Smalling no reason to investigate is an important element for this Court to consider in carrying out equitable balancing test outlined in *Myers v. McDonald*, 635 P.2d 84, 86-87 (Utah 1981) and discussed in subsequent cases such as *Berneau*, ¶s 21-30 and *Helfrich*, ¶ 18. Ramsay and Smalling provided a strong analysis of why the balancing of hardships favors application of the equitable discovery rule in their opening brief, pp. 30-32. In response, KCH simply asserts that Ramsay and Smalling should be thanking rather than suing KCH (“no good deed goes unpunished”). KCH brief, p. 28.

However, it is not the employees who have violated the Act, but KCH. It asks that even if the employees have a right to compensation for three years of their employment, that KCH not be required to be fully responsible for its statutory violation. As it is, it has escaped almost completely unscathed, obtaining taxpayer funds for the cost of remedying its error. While KCH asserts that there will be some hardship associated with faded memories and loss of documents, this is unavailing in light of the fact that it has made no effort to prove that this information is actually unavailable. In fact, it has already been provided to USRB and was used as the basis to calculate KCH’s exposure over the entire 16 year period from 1993 to 2009 for violating the Act. As to Ramsay and Smalling, KCH seeks to sweep the effect of its violation of the Act under the rug.

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Knowledge of the simple fact that KCH had a 401(k) plan did not trigger actual or constructive notice of the right Ramsay and Smalling had to full benefits under the Act. The equitable discovery rule should be applied to allow them the full payment of benefits under the Act from 1993 to 2009.

Respectfully submitted this 8th day of April, 2016.



Brian S. King
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been delivered via email on April 8, 2016, and by first class U.S. mail, postage prepaid, on April 11, 2016, to the following:

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DATED this 8th day of April, 2016.

Linda Bosen

CERTIFICATE OF COMPLIANCE

I certify that the appellant's brief is provided in 13-point text and contains 8,046 words.

DATED this 8th day of April, 2016.

Linda Bosen