2017

Judith Pinborough Zimmerman, Ph. D., Plaintiff/ Appellant, vs. The University of Utah, and William McMahon, Defendants/ Appellees.

Utah Supreme Court

IN THE UTAH SUPREME COURT

JUDITH PINBOROUGH ZIMMERMAN, Ph. D., Plaintiff/Appellant, vs. **THE UNIVERSITY OF UTAH,** and **WILLIAM MCMAHON,** Defendants/Appellees.	**REPLY BRIEF OF APPELLANT** Appellate Case No. 20160572-SC Federal Case No. 2:13-cv-1131-JNP

Certification from the United States District Court for the District of Utah
The Honorable Jill N. Parrish

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ARGUMENT

This Court accepted three questions certified to it by the United States District Court for the District of Utah. As to the first one, the parties agree that the free speech clause of the Utah Constitution is self-executing, for essentially the same reasons. Therefore, this Reply responds to the arguments Defendants/Appellees ("University Defendants") made on the other two questions before this Court.

I. THE ELEMENTS OF A FREE SPEECH RETALIATION CLAIM UNDER THE UTAH CONSTITUTION SHOULD BE THE SAME AS THE ELEMENTS OF A WRONGFUL TERMINATION CLAIM

The University Defendants argue that this Court should not apply the elements it has already established for a wrongful termination claim to a free speech claim under the Utah Constitution; instead, they argue that this Court should apply the elements that have been developed in federal case law regarding federal free speech claims. This Court should disregard the University Defendants' argument because it is premised on the Defendants' incorrect position that the Utah Constitution "afford[s] no greater protection to speech by government employees than the First Amendment affords." Appellees' Brief at 9.

The University Defendants maintain that the "liberty and responsibility clause" of the Utah Constitution "constrains the free speech right in ways that the

First Amendment does not." Appellees' Brief at 10. The Defendants argue that because this case arises in the context of a government employees' speech, there is a legitimate government interest to be protected against "an 'abuse' of the employee's speech right." *Id.* at 11-12. But the Defendants' arguments are not founded on the language of the Utah Constitution or the interpretations of it based on the intent of the founders as discussed in Utah common law, and therefore their arguments are not persuasive.

As this Court has explained, "In reviewing the history of Utah constitutional provisions protecting the freedom of speech, 'we [have] look[ed] for guidance to the common law, our state's particular . . . traditions, and the intent of our constitution's drafters.'" *American Bush v. City of South Salt Lake*, 2006 UT 40, ¶ 11, 140 P.3d 1235 (Utah 2006). Based on Utah common law, the "liberty and responsibility clause" of the Utah Constitution is *not* more restrictive of the right to free speech than the First Amendment. The clause states, "All men have the inherent and inalienable right to . . . protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right." Utah Const., art. 1, § 1. This Court has explained that that this clause "provides a constitutional right to express one's opinion," and that the caveat that one is "responsible for the abuse of that right" "was intended to preserve liability for defamation." *West v. Thomson Newspapers*,

872 P.2d 999, 1015 (Utah 1994). This Court has also held that the "liberty and responsibility" provision "prohibits government from infringing upon citizens' 'inherent and inalienable' rights" and has noted that it is "mandatory and prohibitory." *Jensen ex rel. Jensen v. Cunningham*, 250 P.3d 465, 481-82 (Utah 2011).

The University Defendants correctly point out that this Court has stated that the "liberty and responsibility clause" "articulates a conservative limitation upon the constitutionally granted freedom of speech right," but it is important to put the Court's interpretation in context. *American Bush*, 2006 UT 40, ¶ 40. In *American Bush*, this Court explained that the limitation "specifically preserve[s] the capacity of the state to restrict 'immoral' speech," and relied on this restriction to find that "nude dancing does not fall within the scope of constitutionally protected communication." *Id.*, at ¶¶ 40, 57-58. This limitation is not applicable to this case, and in fact, there appears to be no case law from this Court interpreting the Utah Constitution as restricting a government employee's speech based on the government's interest in regulating such speech, as the University Defendants propose.

In contrast to the language in the Utah Constitution, the United States Constitution does not state that people have "an inalienable right" to free speech. Rather, the federal Constitution's guarantee of free speech comes from the text of

the First Amendment, which provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const., Amendment 1. The Utah Constitution's guarantee of the inherent and inalienable right to "protest against wrongs," "petition for redress of grievances," and "communicate freely their thoughts and opinions" is broader than the federal Constitution's guarantees, and therefore cases based on the Utah Constitution's protections against retaliation for exercising one's right to free speech should not be analyzed under the same framework as federal free speech cases. Rather, for the reasons explained in Dr. Zimmerman's Opening Brief, this Court should apply the framework it has previously applied to cases involving wrongful termination in violation of public policy.

II. AN ADVERSE ACTION UNDER THE UPPEA INCLUDES AN EMPLOYEE'S ACTUAL TERMINATION

In her Opening Brief, Dr. Zimmerman argued that this Court must find that a claim under the UPPEA accrues when her employment actually ended, in light of the plain language of the statute, this Court's precedent, and public policy. In their Response Brief, the University Defendants did not address any of these arguments. Instead, they argue that the statute of limitations in this case should run from December 2012 because that is when Dr. Zimmerman "knew her terms and conditions of employment had changed." Appellees' Brief at 17-18. Defendants

base their argument on inapplicable case law, minimize Dr. Zimmerman's allegations, and ignore Dr. Zimmerman's arguments that the UPPEA specifically prohibits and provides redress for retaliatory acts, including "discharge," that "affect[] the employee's employment, including compensation, terms, conditions, location, rights, immunities, promotions, or privileges." Utah Code Ann. § 67-21-2(2).

The University Defendants rely on the decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980). But in *Ricks*, the Supreme Court determined when the last discriminatory act in violation of Title VII and § 1981 occurred, and noted that the plaintiff did not even allege that he was complaining of a "discriminatory discharge." *Ricks*, 449 U.S. at 257-258. But here, Dr. Zimmerman complains of many acts that occurred between in the months leading up to her termination on June 30, 2013, including many acts that occurred after December 2012 (in fact, her Complaint does not mention the date that she was informed that she would be terminated). R. 23-33. Further, the UPPEA contains specific language about what is actionable – including discharge and other acts that affect compensation, which distinguishes this case under the UPPEA from one brought under Title VII, particularly with the UPPEA's very short statute of limitation. Finally, unlike the federal discrimination cases the University Defendants rely on, this Court has clearly stated, "Until a plaintiff suffers actual harm or damages, the limitations

period will not accrue." *Seale v. Gowans*, 923 P.2d 1361, 1364 (Utah 1996). Because Dr. Zimmerman did not experience economic harm until her termination was effective, under Utah law, her claim was not ripe until her termination.

The Defendants also relied on a Utah Court of Appeals case, *Clark v. Living Scriptures, Inc.*, 2005 UT App 225, ¶ 16, 114 P.3d 602, which they claim also supports their argument that in the context of employment cases, the statute of limitations should run from the date of termination. In *Clark*, this Court determined that a claim for breach of an employment contract was untimely when it was brought six years after the plaintiff employee was terminated, but outside the six-year period following the employer's notice to him that it was terminating the contract. 2005 UT App 225, ¶¶ 4-5. Although *Clark* relied on the *Ricks* decision, *Clark* is distinguishable from this case because it is a breach of contract case, which the language of the decision makes clear: "Generally, a cause of action accrues and the relevant statute of limitations begins to run upon the happening of the last event necessary to complete the cause of action. However, in a breach of contract action the statute of limitations ordinarily begins to run when the breach occurs." *Id.* at ¶ 9 (internal cites omitted). This Court then looked at the language in the termination letter at issue in *Clark* and determined that the breach occurred at the time the plaintiff received the letter. *Id.* at ¶ 13. Further, in reasoning that is significant to this case, the Court noted, "[T]he statute of limitations for an action

for breach of a written contract is six years, which is one of the longest available for any cause of action in Utah." *Id.* at ¶ 18. The Court discussed the fact that the plaintiff "chose to wait six years and fourteen days" after his claim had accrued to file suit. *Id.* Unlike the 60 days for a Notice of Claim in a Utah Whistleblower action, the Court stated, "This is not a situation in which a plaintiff has a very limited amount of time in which to file an action against his employer." *Id.* Here, because the UPPEA and GIA, when read together, allow a plaintiff only "a very limited amount of time in which to file an action against his employer," the reasoning of *Clark* should not be applied because it would require an employee in Dr. Zimmerman's circumstances to be in litigation with her employer before she has even suffered any economic damages.

It must be pointed out that the University Defendants suggest that the Court interpret the Utah Constitution and the UPPEA in such a way as to leave Dr. Zimmerman without a remedy for her claim that the Defendants retaliated against her for complaining of government misconduct. Specifically, the Defendants argue that this Court should apply the criteria set forth in *Spackman* and find that Dr. Zimmerman cannot seek damages for a constitutional violation because the Whistleblower Act provides a remedy. Appellees' Brief at 15, citing *Spackman ex rel. Spackman v. Board of Educ. of Box Elder County School Dist.*, 2000 UT 87, 16 P.3d 533. On the other hand, they suggest that Dr. Zimmerman's Whistleblower

Act claim should be time-barred because they argue that the 60 days to file a Notice of Claim and 180 days to file suit begin to run from the date Dr. Zimmerman was informed her contract would not be renewed rather than from the date her employment terminated. Appellees' Response Brief at 16-20. It serves no legitimate purpose for this Court to interpret Utah law in a way that leaves Utah people who speak out against government misconduct without a remedy.

CONCLUSION

For the reasons set forth herein and in her Opening Brief, Dr. Zimmerman respectfully requests that this Court find the free speech provisions of the Utah Constitution to be self-executing, and the elements of such a claim in the employment context to be the elements this Court has already established for claims for wrongful termination in violation of public policy. Finally, she requests that this Court determine that an actionable "adverse action" under the UPPEA includes the employee's actual termination, when her compensation is actually affected and her economic damages begin.

Dated this 13th day of April, 2017.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains less than 2,300 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman style, font size 14.

DATED this 13th day of April, 2017.

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CERTIFICATE OF SERVICE

I certify that on this 13th day of April, 2017, I caused two true and correct hard copies of the foregoing **REPLY BRIEF OF THE APPELLANT**, along with a copy on disk, to be served via first-class U.S. Mail, postage prepaid, on the following:

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