

2003

MACHELLE CANFIELD, Plaintiff and Appellant,
vs. LAYTON CITY, a Utah Municipality,
Defendant and Appellee. : Reply Brief

Utah Court of Appeals

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BEFORE THE UTAH COURT OF APPEALS

MACHELLE CANFIELD,

Plaintiff/Appellant,

vs.

LAYTON CITY, a Utah Municipality,

Defendant/Appellee.

Court of Appeals Case
No. 20030212-CA

On Appeal from the Judgment and Order of the Honorable Michael G. Allphin,
Second District Court for Davis County, State of Utah

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Clerk of the Court

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ARGUMENT

I. Plaintiff Is Not Subject to the Notice Requirements of the Utah Government Immunity Act.

A. Plaintiff's Claims Are Not Statutory in Nature.

Defendant argues that Plaintiff's claims are not contractual because they arise from a city's statutory powers. In support of this assertion, Defendants rely on Utah Code Ann. § 10-3-815 and the decision of this Court in Knight v. Salt Lake County, 2002 UT App 100, 46 P.3d 247. However, the decision in Knight arises from an entirely different statutory scheme.

In Knight, the plaintiffs were specifically employed pursuant to the County Personnel Management Act, Utah Code Ann. § 17-33-1, et seq. (1999). Knight, at ¶7, n. 6. The Knight court held that any contracts or written personnel policies and manuals were specifically required by statute, and so could not give rise to an employment contract. Id. at ¶¶ 11-13. Indeed, the County Personnel Management Act, which applies only to counties, and has no counterpart in the municipal code, provides specific employment guidelines for county employees. The act also provides reciprocal protections, which protect the employees and obviate the need to allow contractual claims.¹

¹For example, Utah Code Ann. § 17-33-10 requires establishment of a grievance procedure. Utah Code Ann. § 17-33-11.5 requires that counties act in compliance with the Utah Labor Code. The act also provides criminal punishments for violations. Utah Code Ann. § 17-33-14.

No such statute or protections was in place to reduce the contractual significance of the city's policies in this case. For the city to claim that Utah Code Ann. § 10-3-815 is something akin to the County Personnel Management Act, so as to make the instant claims statutory rather than contractual is an unreasonable stretch of the imagination. Section 10-3-815 states simply, "The governing body of each municipality shall prescribe rules and regulations which are not inconsistent with the laws of this state, as it deems best for the efficient administration, organization, operation, conduct and business of the municipality." This statute does not provide any regulation of specific employment practices as does the statutory scheme at issue in Knight, nor does it give rise to the contractual rights, which Plaintiff claims Defendant violated. Indeed, section 10-3-815 has no application to the case at bar.

B. Plaintiff's Claims Sound in Contract.

Plaintiff's complaint does not make a single reference to any statute as basis for its claims. Instead, the complaint clearly implicates a contractual dispute. The Complaint makes specific allegations regarding sick leave, accounting for hours, and other contract issues. (Br. of Appellant, Exhibit B, ¶¶ 4-11.) The Complaint also alleges violations of Defendant's written personnel policies, which have contractual importance. (Br. of Appellant, Exhibit B, ¶¶ 12-13, 17.) Given the Defendant's violation of its own policies, and unfair treatment

of Plaintiff, the contractual covenant of good faith and fair dealing also comes into play, again, a contract claim. Finally, the Complaint seeks remedies of a contractual nature,² i.e., general damages, reinstatement, and costs of court. (Br. of Appellant, Exhibit B, Prayer.)

Accordingly, there is an issue of fact as to whether the provisions of the city's policy manual created a contract, for which the notice requirements of the Utah Governmental Immunity Act are waived. In this case, the city's policy manual has not been made part of a record.³ Instead, because no discovery has yet commenced, all that is before this Court are the complaint's allegations that personnel policies existed, and that Defendant violated its own policies, which is insufficient basis to grant a Motion to Dismiss under Utah R. Civ. P. 12(b)(6).

Defendant seems to object that Plaintiff did not plead its case with sufficient specificity. (See, Br. of Appellee, at p. 15-16.) However, a cause of action based

²Defendant claims that Plaintiff request damages based in tort in response to interrogatories. However, those answers were provided in response to interrogatories in the previous lawsuit, which was removed to federal court, and subsequently dismissed. They were not given in conjunction with the instant case. Furthermore, even if there were contract and tort damages sought, the contract claims should still be allowed to proceed, even if the tort based claims are dismissed for failure to comply with statutory notice provisions. See, Koenig v. City of South Haven, 597 N.W.2d 99, 104 (Mich. 1999).

³While the Defendant has attached two portions of city employment policies to its appellate brief, as is discussed more fully in Section Part III, *infra*, these exhibits are not part of the trial court's record, and consequently should not be considered by this Court on appeal.

in contract is not subject to the pleading requirements of Utah R. Civ. P. 9. Indeed, in the context of a Motion to Dismiss under Rule 12(b)(6), the complaint should be construed in a light most favorable to the plaintiff, indulging all reasonable inferences in the plaintiff's favor. See, Munteer v. Utah Power & Light Co., 823 P.2d 1055, 1058 (Utah Ct. App. 1991). As such, if the factual allegations of the Complaint, standing alone, can be reasonably construed to allege claims sounding in contract, it was error for the trial court to grant Defendant Layton City's Motion to Dismiss. This is such a case.

In Utah, the elements of a prima facie for breach of contract are 1) a contract, 2) performance by the party seeking recovery, 3) breach of the contract by the other party, and 4) damages. See, Bair v. Axiom Design, LLC, 2001 UT 20, ¶14, 20 P.3d 388. As mentioned previously, Plaintiff clearly implicated the existence of a contract by reference to Defendant Layton City's written personnel policies and other contractual issues.⁴ The complaint also references a long history of Plaintiff performing under her employment contract with the city. (Br. of Appellant, Exh. B, ¶4.) Plaintiff alleges breach of the contract by reference to deviations from written city policies, disparate treatment, and a constructive termination from employment. (Br. of Appellant, Exh. B, ¶¶12-17.) The prayer for

⁴Plaintiff's initial brief also demonstrates that written policies of a governmental entity may give rise to contract claims. (Br. of Appellant, pp. 13-15.)

relief sets forth an allegation of damages. As such, the Complaint sets forth a prima facie case of breach of contract.

Given that the allegations of Plaintiff's complaint relate to contract issues, and that the relief sought is contractual in nature, Plaintiff was not subject to government immunity notice requirements under Utah Code Ann. §63-30-5. Plaintiff was entitled to forego the notice requirements applicable to tort claims and file her claims in state court. The district court's ruling to the contrary was in error, and should be reversed.

II. Defendant Layton City's Defense of Res Judicata Is Not Before This Court.

Defendant Layton City cannot properly raise the defense of res judicata at this stage of the proceedings. Under Utah R. Civ. P. 8(c), "In pleading to a preceding pleading, a party shall set forth affirmatively ... res judicata ..." Under Utah R. Civ. P. 12(h), with limited exceptions, "A party waives all defenses and objections not presented either by motion or by answer or reply..." If res judicata is not raised in the pleadings, the defense may not be raised at trial or on appeal. See, e.g., Merrilees v. Treasurer, State of Vermont, 618 A.2d 1314, 1315 (Vt. 1992).

In this case, Defendant did not raise the doctrine of res judicata as an

affirmative defense in its Motion to Dismiss. In its motion, Defendant relied solely on failure to comply with the notice requirements of the Governmental Immunity Act. Having never raised res judicata before the trial court, Defendant cannot raise the issue for the first time before this Court on appeal. Because the defense of res judicata was not raised in the Motion to Dismiss, nor at any other time in the lower court proceedings, this Court should not consider the issue now.

In addition, even if the issue of res judicata were properly before this Court, Plaintiff's action is not barred. Before the doctrine of res judicata applies, there must be a final judgment on the merits. See, Dennis v. Vasquez, 2003 UT App 168, ¶4, 72 P.3d 135. The federal court dismissal of Plaintiff's claim did not result in an adjudication on the merits. Plaintiffs claim that the case was dismissed with prejudice under Fed. R. Civ. P. 41. However, the very exhibits Defendant cites to support its defense disproves such an assertion. In their motion and memorandum to dismiss the complaint in federal court, while Defendant sought dismissal for failure to comply with a court order, no mention of Rule 41 was ever made. (See, Br. of Appellee, Exhibit 9.) Likewise, Judge Kimball's order did not refer to Rule 41, nor was the case dismissed with prejudice, but merely dismissed without specifics. (See, Br. of Appellee, Exhibit 10.) As such, dismissal of the case did not result in a final adjudication on the merits, and res judicata does not apply.

III. Defendant Layton City's Defense of Failure to Exhaust Administrative Remedies Lacks Evidentiary Support.

A. Defendant Layton City's Policy Manual Is Not Properly Before This Court.

Defendant Layton City argues that Plaintiff deprived the district court, and concomitantly this Court, of subject matter jurisdiction by failing to exhaust internal administrative remedies prior to bringing suit. In support of this assertion, Defendant attached two excerpts appearing to be from a city personnel policy, and argued that they created an absolute requirement for Plaintiff to appeal her constructive termination through the city's appeal procedures. No such evidence was ever presented to the trial court below, nor was it ever properly introduced into the record in this case.

An appellate court should not consider evidence outside of the record on appeal. For example, in Chapman v. Chapman, 728 P.2d 121, 122-23 (Utah 1986), the Defendants urged the Utah Supreme Court to overturn a summary judgment order based on responses to interrogatories and requests for admission, which were attached to the appellate brief to support the existence of factual issues. The court wrote, "Because these 'answers' are outside the record, we cannot consider them." *Id.* at 123.

In Cooper v. Foresters Underwriters, Inc., 257 P.2d 540 (Utah 1953), the Court was referred to an unsigned stipulation present to the lower court. It wrote:

The record in this case is extremely brief, and the facts presented therein so fragmentary and incomplete as to make it impossible for this court to render a decision without looking dehors the record,--a process we cannot indulge. ... We cannot consider facts stated in the briefs which may be true but absent in the official record.

These decisions are consistent with other Utah caselaw rejecting consideration of evidence outside the record. See, e.g., Pratt v. Hollow Irrigation Co., 813 P.2d 1169, 1172 (Utah 1991)(Court would not consider facts alleged in appellate brief, which had no substantiation in the record); Watkins v. Simonds, 385 P.2d 154, 155 (Utah 1963)(Court would not consider facts alleged in appellate brief, where facts before trial court were stipulated to in chambers without preservation of a record).

In the appeal before the Court, Defendant Layton City has attempted to circumvent its obligation to present evidence and establish any issues for appeal through the record. Indeed, it is attempting to create an ad hoc record on appeal, without basis for doing so. Given the improper inclusion of the policy manual excerpts in the Appellee's Brief, this Court should give the evidence no consideration. As such, there is no evidence in the record to suggest that Plaintiff should have exhausted administrative remedies, and this defense should not be used to uphold an otherwise improper dismissal of Plaintiff's claims.

B. Defendant Layton City's Policy Manual Does Not Create an Exhaustion Requirement.

Even assuming *arguendo* that the policy manual excerpts provided by Defendant are properly before this Court, they do not establish exhaustion as a prerequisite. First, exhaustion of administrative remedies in this case would have been futile and useless. In Beard v. Baum, 796 P.2d 1344 (Alaska 1990), the State of Alaska alleged that a constructively discharged employee could not sue absent exhausting contractual remedies, as is alleged by Defendant Layton City in the case at bar. The Beard Court found that because the grievance procedure required the cooperation of the plaintiff's supervisors, a constructively discharged employee could not be required to exhaust such remedies, as such an attempt would have been futile. *Id.* at 1349. Similarly, in Utah, exhaustion of administrative remedies may be excused when it would serve no useful purpose. See, Nebeker v. Utah State Tax Comm'n, 2001 UT 74, ¶14, 34 P.3d 180.

In this matter, Plaintiff's constructive discharge was the result of coercive threats by supervisors who would have had extensive influence over any contractual city appellate procedures. Under that policy, the very supervisors who coerced Plaintiff into resigning bore the responsibility of advising Plaintiff of her appeal rights. (Br. of Appellee, Exh. 13, p.1.) No evidence suggests Plaintiff's supervisors so advised her. Furthermore, those same supervisors who

forced Plaintiff into resigning would no doubt exert significant influence over the internal appellate procedure. Given these facts, requiring Plaintiff to exhaust these local contractual remedies would be futile, and would serve no useful purpose.

Furthermore, failure to exhaust administrative remedies does not deprive the courts of subject matter jurisdiction, when resort to the administrative remedies is not mandatory. In Heinecke v. Dep't. of Commerce, 810 P.2d 459 (Utah Ct. App. 1992), the Respondent claimed that the court lacked subject matter jurisdiction because of failure to exhaust administrative remedies. The Petitioner did not take an extra review step, which was permitted him, but not required, under the statute. The Heinecke court concluded that because the administrative remedy was not mandatory, failure to exhaust did not deprive the court of subject matter jurisdiction.

In the instant case, even though Defendant may have statutory authority to create rules and regulations, Defendant's rules do not make appeal with city appellate processes mandatory. Defendant's policy states, "In all cases where an appointive officer or regular full time employee, other than the City Manager and heads of departments, is discharged or transferred to a position with less remuneration for any reason, the officer or regular full-time employee ***shall have the right*** to appeal such discharge or transfer in accordance with this chapter."

(Br. of Appellee, Exh. 13, p.2.)(Emphasis added.) Defendant's policy does not state that the employee "shall" appeal the discharge, or that the employee "must" appeal the discharge prior to taking legal action. Instead, Defendant's policy makes an internal appeal an option, stating the "employee shall have the right to appeal" the termination. Because use of Defendant's appellate procedure was not mandatory under their own policies, Defendant cannot now complain that this Court and the trial court lack subject matter jurisdiction over the case at bar.

CONCLUSION

Plaintiff's complaint in this matter did not arise from any rights derived in state statute, nor was it based in any statutory scheme, as Defendant Layton City alleges. Plaintiff's complaint sets forth allegations establishing a prima facie case of breach of contract. Because claims sounding in contract are not subject to the notice requirements of the Utah Government Immunity Act, the district court's arbitrary dismissal of this matter was error. Furthermore, Defendant has waived the defense of res judicata, and Defendant's exhaustion defense is unsupported by the record or in law. As such, Plaintiff respectfully requests that this Court reverse the district court's dismissal of her contract claims.

DATED this 4 day of Nov, 2003.

STEVENSON & SMITH, P.C.

A handwritten signature in black ink, appearing to read 'BS' followed by a series of loops and a long horizontal stroke.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4 day of Nov, 2003, I mailed two true and correct copies of the foregoing Reply Brief of Appellant, postage prepaid, to the following:

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