

2005

# Marilyn Touchard v. La-Z-Boy : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Erik Strindberg, Lauren I. Scholnick, Ralph E. Chamness, April L. Hollingsworth; Strindberg, Scholnick & Chamness; attorneys for respondents.

Jathan Janove; Bullard, Smith, Jernstedt, Wilson; attorneys for petitioner.

---

## Recommended Citation

Brief of Appellant, *Marilyn Touchard v. La-Z-Boy*, No. 20050361 (Utah Court of Appeals, 2005).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/5753](https://digitalcommons.law.byu.edu/byu_ca2/5753)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

**IN THE UTAH SUPREME COURT**

---

**MARILYN TOUCHARD, THOMAS  
AMMONS, FELIX BARELA, OSCAR  
GARCIA, DENNIS NELSON, WADE  
PETERSON, FRANK ROSS and HEIDI  
SCOTT,**

Plaintiffs and Respondents,

vs.

**LA-Z-BOY INCORPORATED,**

Defendant and Petitioner.

Case No. No. 20050361-SC

Civil No. 01-04-CV-67

---

**OPENING BRIEF OF APPELLANT**

---

Upon Certification of Questions from The United States District Court,  
District of Utah, Central District  
Honorable Tena Campbell

Erik Strindberg, Bar No. 4154  
Lauren I. Scholnick, Bar No. 7776  
Ralph E. Chamness, Bar No. 6511  
April L. Hollingsworth, Bar No. 9391  
Strindberg, Scholnick & Chamness, LLC  
426 North 300 West  
Salt Lake City, UT 84103  
801-359-4169/Telephone  
801-359-4313/Facsimile

Attorneys for Plaintiffs and  
Respondents  
Marilyn Touchard, Thomas  
Ammons, Felix Barela, Oscar  
Garcia, Dennis Nelson, Wade  
Peterson, Frank Ross and Heidi  
Scott

Jathan Janove, Bar No. 3722  
Bullard Smith Jernstedt Wilson  
9 Exchange Place, Suite 1104  
Salt Lake City, UT 84111  
866-551-6938/Telephone  
503-224-8851/Facsimile

Attorneys for Defendant and  
Petitioner  
La-Z-Boy Incorporated

## Table of Contents

I.	STATEMENT OF JURISDICTION.....	1
II.	ISSUES PRESENTED.....	1
III.	STANDARD OF REVIEW .....	1
IV.	STATEMENT OF GROUNDS FOR SEEKING REVIEW .....	1
V.	STATEMENT OF THE CASE.....	2
VI.	SUMMARY OF ARGUMENT .....	3
VII.	ARGUMENT .....	5
A.	THE PUBLIC POLICY WRONGFUL DISCHARGE EXCEPTION TO THE AT-WILL RULE DOES NOT APPLY TO WORKERS’ COMPENSATION RETALIATION.....	5
1.	Utah’s Workers’ Compensation Act Constitutes A Comprehensive Statutory Scheme That Neither Expresses Nor Implies Any Intent To Create A Wrongful Discharge Cause Of Action Based On The Filing Of A Workers’ Compensation Claim.....	5
2.	The Vast Majority Of Jurisdictions That Have Recognized A Claim Of Wrongful Discharge Based On The Filing Of A Workers’ Compensation Claim Have Relied On Their Legislatures, Not their Courts, to Enact An Anti-Retaliation or Interference Statute Before Recognizing Such A Cause of Action.....	9
3.	Utah’s Conservative Approach And Deference To The Legislature Does Not Comport With Those Courts That Have Relied On The General Purpose Of Their Workers’ Compensation Statutes To Create A Retaliatory Discharge Tort.....	21
4.	Plaintiffs’ Attempt To Rely On Landlord-Tenant Cases Is Not Persuasive.....	27
B.	EVEN IF THE COURT ANSWERS THE FIRST CERTIFIED QUESTION IN THE AFFIRMATIVE, THE CAUSE OF ACTION SHOULD NOT BE EXPANDED BEYOND AN ACTUAL	

DISCHARGE IN RETALIATION FOR EXERCISING RIGHTS UNDER THE WCA.....	30
1. The Cause Of Action Should Not Be Extended To Non-Injured Employees Who Oppose The Treatment Of Injured Employees. ....	31
2. The Cause of Action Should Not Be Extended to Claims of Constructive Discharge. ....	33
3. The Cause of Action Should Not Be Extended to Other Alleged Forms of Discrimination or Harassment. ....	34
VIII. CONCLUSION .....	35
ADDENDUM.....	37
EXHIBIT “A” Order of Certification of U.S. District Judge Tena Campbell	
EXHIBIT “B” 36 States In Which Courts Did Not Create A Cause Of Action In The Absence of An Anti-Retaliation Or Interference Statute	
EXHIBIT “C” 11 States In Which Courts Created A Cause of Action Based On The General Policies In The Workers’ Compensation Statute	
EXHIBIT “D” 3 States In Which Courts Have Not Determined Whether A Cause Of Action Exists	

## Table of Authorities

### Cases

<i>Below v. Skarr</i> , 569 N.W.2d 510, 512, 1997 Ia. Supp. LEXIS 276 (1997).....	35
<i>Berube v. Fashion Centre, Ltd.</i> , 771 P.2d 1033, 1043 (Utah 1989) .....	5
<i>Brady v. Walter G. Slater</i> , 2004 UT App 292.....	28
<i>Buckner v. Kennard</i> , 2004 UT 78, 99 P.3d 842 .....	4, 24, 25, 26
<i>Building Monitoring Systems, Inc. v. Paxton</i> , 905 P.2d 1215 (Utah 1995) .....	27, 28
<i>Christy v. Petrus</i> , 365 Mo. 1187, 295 S.W.2d 122 (1956) .....	15
<i>Dixon v. Pro Image, Inc.</i> , 1999 UT 89, 987 P.2d 48 .....	28
<i>Dockery v. Lampert Table Co.</i> , 36 N.C. App. 293, 244 S.E.2d 272 (N.C. App. 1978) .....	12, 14, 16
<i>Emory v. Nanticoke Homes, Inc.</i> , 1985 Del. Super. LEXIS 1063 (1985).....	7, 9, 17
<i>Evans v. Bibb Co.</i> , 178 Ga. App. 139, 342 S.E. 2d 484 (Ga. App. 1986) .....	18
<i>Fox v. MCI Communications Corp.</i> , 931 P.2d 857 (Utah 1997) .....	29, 32
<i>Galati v. America West Airlines, Inc.</i> , 205 Ariz. 290; 69 P.3d 1011 (2003).....	20
<i>Gottling v. P.R. Inc.</i> , 2002 UT 95, 61 P.3d 989 .....	4, 26, 27
<i>Hansen v. America Online, Inc.</i> , 2004 UT 62, ¶ 9, 96 P.3d 950, 952 .....	passim

<i>Heslop v. Bank of Utah</i> , 839 P.2d 828 (Utah 1992) .....	3, 24
<i>Hines v. United Parcel Serv., Inc.</i> , 736 F. Supp. 675, 677 (D.S.C. 1990) .....	10
<i>Hinthorn v. Roland's of Bloomington, Inc.</i> , 119 Ill.2d 526, 530-31, 519 N.E.2d 909 (1988) .....	33
<i>Hodges v. Gibson Products Co.</i> , 811 P.2d 151, 165 (Utah 1991) .....	29
<i>In re Kunz</i> , 2004 UT 71, ¶ 6, 99 P.3d 793 .....	1
<i>Jackson v. Morris Communications Corp.</i> , 265 Neb. 423, 657 N.W. 2d 634, 640 (2003) .....	19
<i>Johnson v. E.A. Miller, Inc.</i> , 1999 U.S. App. LEXIS 3002 ¶ 12 (10 <sup>th</sup> Cir. 1999) .....	32
<i>Meeks v. Opp Cotton Mills, Inc.</i> , 459 So. 2d 814, 815 (Ala. 1984) .....	16
<i>Mintz v. Bell Atlantic Systems Leasing International</i> , 183 Ariz. 550, 553, 905 P.2d 559, 562 (Ct. App. 1995) .....	35
<i>Murphy v. American Home Products Corp.</i> , 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86, 89-90 (1983) .....	8
<i>Pacheco v. Raytheon Co.</i> , 623 A.2d 464 (R.I. 1993) .....	12, 17
<i>Price v. Western Loan and Savings Co.</i> , 35 Utah 379, 387, 100 P. 677 (1909) .....	5
<i>Rackley v. Fairview Care Centers, Inc.</i> , 2001 UT 32, 23 P.3d 1022 .....	29
<i>Raley v. Darling Shop</i> , 216 S.C. 536, 59 S.E.2d 148 (1950) .....	10
<i>Rice v. Grant County Ed. of Comm'rs</i> , 472 N.E.2d 213, 215 (Ind. App.2d Dist. 1984) .....	14

<i>Ryan v. Dan's Food Stores, Inc.</i> , 972 P.2d 395 (Utah 1998) .....	4, 21, 22, 32
<i>Scheller v. Health Care Service Corp.</i> , 138 Ill. App.3d 19, 485 N.E.2d 26 (1985) .....	34
<i>Shaw v. Railroad Co.</i> , 101 U.S. 557 (1879) .....	21
<i>Sheikh v. Department of Public Safety</i> , 904 P.2d 1103 (Ut. App. 1995) .....	33
<i>Spackman ex rel. Spackman v. Bd. of Educ.</i> , 2000 UT 87, P1 n.2, 16 P.3d 533 .....	1
<i>Springer v. Weeks and Leo Co.</i> , 429 N.W.2d 558 (Iowa 1988) .....	14
<i>Svento v. The Kroger Company</i> , 69 Mich. App. 644; 245 N.W.2d 151 (1976) .....	19
<i>Tackett v. Crain Automotive d/b/a Car Pro</i> , 321 Ark. 36, 38; 899 S.W.2d 839, 840 (1995) .....	20
<i>Twilley v. Dauber &amp; Coated Prods., Inc.</i> , 536 So. 2d 1364 (Ala. 1988) .....	16
<i>Wagenseller v. Scottsdale Memorial Hospital</i> , 147 Ariz. 370, 710 P.2d 1025 (1985) .....	20
<i>Wal-Mart v. Pam Baysinger</i> , 306 Ark. 239; 812 S.W.2d 463 (1991) .....	20
<i>Wior v. Anchor Industries, Inc.</i> , 669 N.E.2d 172 (Ind. 1996) .....	15, 32, 33
<i>Wright v. Fiber Indus., Inc.</i> , 60 N.C. App. 486, 299 S.E.2d 284 (N.C. App. 1983) .....	17
<i>Zimmerman v. Buchheit of Sparta, Inc.</i> , 164 Ill.2d 29, 645 N.E.2d 877, 880-82 (1994) .....	34, 35

## Statutes

<i>ALA. CODE</i> § 25-5-11.1 .....	16
<i>CONN. GEN. STAT.</i> § 31-290a .....	13

<i>CONN. GEN. STAT. § 31-290a</i> .....	13
<i>IND. ANN. STAT. § 40-1215</i> .....	13
<i>IND. CODE ANN. § 22-3-2-15</i> .....	13
<i>MASS. ANN. LAWS. ch. 152 § 75B</i> .....	12
<i>ME. REV. STAT. ANN. tit. 39-A § 353</i> .....	12
<i>MICH. COMP. LAWS § 418.301(11)</i> .....	19
<i>MO. ANN. STAT. § 287.78</i> .....	15
<i>N.C. GEN. STAT. § 95-24</i> .....	12
<i>N.C. GEN. STAT. § 97-6.1</i> .....	16
<i>S.C. CODE ANN. § 41-1-80</i> .....	10, 12
<i>S.C. CODE ANN. § 41-1-80 (1986)</i> .....	10
<i>UTAH CODE ANN. § 34-28-19</i> .....	8
<i>UTAH CODE ANN. § 34-35-6</i> .....	33
<i>UTAH CODE ANN. § 34A-2-105(1)</i> .....	2
<i>UTAH CODE ANN. § 34A-5-106</i> .....	8
<i>UTAH CODE ANN. § 34A-5-107(9)</i> .....	26
<i>UTAH CODE ANN. § 34A-6-203</i> .....	8, 26
<i>UTAH CODE ANN. § 57-22-3</i> .....	28
<i>UTAH CODE ANN. § 78-2-2</i> .....	1
<i>UTAH CODE ANN. §34-28-19(2)</i> .....	26
<i>UTAH CODE ANN. §78-12-25</i> .....	26

#### Other Authorities

Andrew P. Morriss, <i>Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will</i> , 59 Mo. L. Rev. 679 (1994) .....	5
Deborah A. Ballam, <i>The Development of the Employment At Will Rule Revisited: A Challenge to Its Origins as Based in the Development of Advanced Capitalism</i> , 13 Hofstra Lab. & Emp. L.J. 75 (1995) .....	5
Mayer G. Freed & Daniel D. Polsby, <i>Just Cause for Termination Rules and Economic Efficiency</i> , 38 Emory L.J. 1097 (1989) .....	29
Mayer G. Freed & Daniel D. Polsby, <i>The Doubtful Provenance of “Wood’s Rule” Revisited</i> , 22 Ariz. St. L.J. 351 (1990) .....	5
Richard A. Epstein, <i>In Defense of the Contract At Will</i> , 51 U. Chi. L. Rev. 947, 982 (1984) .....	29
Utah Labor Commission Frequently Asked Questions, available at <a href="http://www.laborcomission.utah.gov/FAQ.htm">http://www.laborcomission.utah.gov/FAQ.htm</a> (last visited Dec. 10, 2005) .....	6

#### Constitutional Provisions

Utah Const. Art. V., § 1 .....	21
--------------------------------	----



Utah Const. Art. VI., § 1 ..... 21

Utah Const. Art. VIII., § 22..... 21

## **I. STATEMENT OF JURISDICTION**

This Court has jurisdiction over this matter pursuant to *UTAH CODE ANN.* § 78-2-2; and Rule 41 of the Utah Rules of Appellate Procedure.

## **II. ISSUES PRESENTED**

The following questions are presented to this Court by Order of Certification of U.S. District Judge Tena Campbell, a copy of which is included as Exhibit “A” in the Addendum:

1. Whether the termination of an employee in retaliation for the exercise of rights under the Utah Workers’ Compensation Act, *UTAH CODE ANN.* § 34A-2-101, *et. seq.*, (“WCA”) implicates “a clear and substantial public policy” of the State of Utah?
2. If so, whether this cause of action applies in the following circumstances: (a) where the employee is not injured but is retaliated against for opposing an employer's treatment of other injured employees; (b) the employee is not fired but resigns under circumstances that constitute “constructive discharge;” and (c) the employee is neither fired nor constructively discharged, but experiences other discriminatory treatment or harassment from an employer in retaliation for exercise of rights under the WCA?

## **III. STANDARD OF REVIEW**

The questions certified by the United States District Court are questions of state law. “On certification, we ‘answer the legal questions presented’ without ‘resolving the underlying dispute.’” *In re Kunz*, 2004 UT 71, ¶ 6, 99 P.3d 793, 794, *quoting Spackman ex rel. Spackman v. Bd. of Educ.*, 2000 UT 87, P1 n.2, 16 P.3d 533.

## **IV. STATEMENT OF GROUNDS FOR SEEKING REVIEW**

Utah R. App. Proc. 41 authorizes the Court to answer a question of law certified to it by a court of the United States. The Order of Certification by the U.S.

District Court for the District of Utah was filed on April 14, 2005. This Court accepted review in its Order of Acceptance dated May 19, 2005.

## **V. STATEMENT OF THE CASE**

Eight former employees of La-Z-Boy Incorporated (“La-Z-Boy” or “Defendant”) brought an action based on how it allegedly treated employees who suffer on-the-job injuries.<sup>1</sup> Plaintiffs’ Complaint asserted three causes of action under Utah common law: wrongful discharge based on the public policy exception to the at-will rule of employment, intentional failure to maintain a safe workplace, and intentional infliction of emotional distress. La-Z-Boy subsequently filed a Motion for Judgment on the Pleadings and a Motion to Certify Questions of Law.

Following a hearing, the federal court dismissed the second and third causes of action, finding that both were barred by the exclusive remedy provision of the Utah Workers’ Compensation Act, *UTAH CODE ANN.* § 34A-2-105(1) (“WCA”). The court also found that the third cause of action failed to allege “outrageous conduct” under Utah law. With respect to the first cause of action, alleging retaliation for seeking benefits under the WCA, the court granted the Motion to Certify and reserved ruling on this portion of Defendant’s Motion for Judgment on the Pleadings pending this Court’s response to the Order of Certification.

---

<sup>1</sup> The matter was originally filed in the First Judicial District Court of Box Elder County, State of Utah, on April 12, 2004. It was subsequently removed to the U.S. District Court based on diversity of citizenship.

## VI. SUMMARY OF ARGUMENT

The Utah Supreme Court has listed four categories of discharge “eligible for consideration” under the public policy exception to the employment at-will rule: (1) refusing to commit an illegal act; (2) performing a public duty; (3) exercising a legal right; or (4) reporting an employee’s criminal activity to a public authority. *Hansen v. America Online, Inc.*, 2004 UT 62, ¶ 9, 96 P.3d 950, 952. The discharge must contravene “a clear and substantial public policy,” such as a right that is “essential to our way of life, the architecture of the institutions of government, or the distribution of government power.” *Id.* at ¶ 12.

Although the Court has referred to discharge for seeking workers’ compensation benefits as an example from other states of the third category, which would be eligible for consideration, it has never confronted the question. The only cases in which it has actually found the cause of action to apply involve employees fired for refusing to commit crimes, *Peterson v. Browning*, 832 P.2d 1280 (Utah 1992), or for opposing an employer’s criminal activity, *Heslop v. Bank of Utah*, 839 P.2d 828 (Utah 1992).

The Utah Supreme Court’s decisions since *Peterson* and *Heslop* evince a strong reluctance to create or extend causes of action to terminated employees in the absence of legislative direction. As this Court specifically noted in *Hansen*, exceptions to employment at-will “should be applied parsimoniously” and the third category “poses analytical challenges different from, and generally greater than the others” even when the statutory right or privilege “carries strong public policy credentials.” *Id.* at 952-53.

Recent decisions, including *Buckner v. Kennard*, 2004 UT 78, 99 P.3d 842, and *Gottling v. P.R. Inc.*, 2002 UT 95, 61 P.3d 989, show the Court's reluctance to add causes of action to legislative schemes when the Utah Legislature could have done so but did not.

A survey of the laws in all 50 states reveals that courts in 25 states recognized a cause of action only after their legislature had enacted an anti-retaliation or interference statute, courts in 11 states refused to create a workers' compensation retaliation cause of action without a specific legislative enactment, courts in three states have no court holdings or statute addressing the issue, and courts in 11 states have judicially created a tort based on the "general policies" in their workers' compensation statutes. The methodology used by the minority of courts that judicially created a tort does not comport with this Court's requirement that an exception to the at-will rule must be based on a specific statement of a "clear and substantial" policy, not a general statement of policy. *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395 (Utah 1998).

Even if the public policy wrongful discharge claim were applied to terminations for seeking WCA benefits, it should not be extended to claims of internal opposition to an employer's workers' compensation practice, constructive discharge, or other discriminatory or harassing conduct. Such an extension would constitute an even greater incursion on the Legislature's prerogatives. Even jurisdictions that have recognized a retaliatory discharge tort have drawn the line there, and refused to expand the common law exception as Plaintiffs advocate.

## VII. ARGUMENT

### A. THE PUBLIC POLICY WRONGFUL DISCHARGE EXCEPTION TO THE AT-WILL RULE DOES NOT APPLY TO WORKERS' COMPENSATION RETALIATION.

#### 1. Utah's Workers' Compensation Act Constitutes A Comprehensive Statutory Scheme That Neither Expresses Nor Implies Any Intent To Create A Wrongful Discharge Cause Of Action Based On The Filing Of A Workers' Compensation Claim.

Utah enacted the "Workmen's Compensation Act" ("WCA") in 1917.

Chapter 100, Sess. Laws Utah 1917. By that time, the at-will doctrine had been well-established. *C.S. Price v. Western Loan and Savings Co.*, 35 Utah 379, 387, 100 P. 677 (1909) (upholding the at-will doctrine and citing authorities).<sup>2</sup> Nevertheless, when the

---

<sup>2</sup> In *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1043 (Utah 1989), the Court indicated that "[t]he genesis of the at-will rule in its present form in America, however, can be traced to Horace G. Wood's 1877 treatise on the master-servant relationship." Recent scholarship on at-will employment indicates that the doctrine became the default rule for employment contracts in this country because of a severe labor shortage in the late eighteenth and throughout the nineteenth centuries. See Deborah A. Ballam, *The Development of the Employment At Will Rule Revisited: A Challenge to Its Origins as Based in the Development of Advanced Capitalism*, 13 Hofstra Lab. & Emp. L.J. 75 (1995) (observing that employment at-will was prevalent throughout the nineteenth century); Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 Ariz. St. L.J. 351 (1990) (noting that Wood's statement of the employee at-will rule was based on a well-established understanding of labor relations). This scholarship calls into question the view that employment at-will was created at the end of the nineteenth century to benefit employers. Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 Mo. L. Rev. 679 (1994) (disputing earlier scholarship on the employment at-will rule that had previously formed the basis for courts and commentators to advocate modification to the rule). "Laborers who could easily obtain free land wanted to work only long enough to accumulate enough capital to start their own farms and thus did not want to be bound to a long-term employment relationship." Ballam, *The Development of the Employment At Will Rule Revisited*, 13 Hofstra Lab. & Emp. L.J. at 88 n.86.

Legislature enacted the WCA, it did not create a right to sue for wrongful discharge in retaliation for exercising one's rights under the WCA. The Utah Labor Commission, which is responsible for administering the Workers' Compensation Act, has plainly stated that "there is nothing in the Utah Workers' Compensation Act that prohibits an employer from terminating an employee."<sup>3</sup> A review of the WCA shows that the Legislature has amended it over a dozen times since 1917, but it has not created a cause of action for retaliatory discharge. There is simply no language in the WCA from which any such right could be implied.

Before recognizing such a wrongful discharge cause of action, this Court should, like the majority of courts, require a "clear and substantial" statement of policy in the form of an anti-retaliation statute, rather than tease an inference of such policy out of a comprehensive scheme of legislation that contains no anti-retaliation language whatsoever. *See Peterson*, 832 P.2d at 1282 (the public policy exception applies only

---

<sup>3</sup>Utah Labor Commission Frequently Asked Questions, available at <http://www.laborcomission.utah.gov/FAQ.htm> (last visited Dec. 10, 2005).

## **RE-EMPLOYMENT - REHABILITATION**

### **Q 27. CAN MY EMPLOYER FIRE ME IF I CAN'T RETURN TO MY JOB DUE TO THE INJURY?**

A. It is considered poor judgment for an employer to terminate any employee without considering the possible consequences of such action. However, there is nothing in the Utah Workers' Compensation Act that prohibits an employer from terminating an employee. If the employer has 15 or more employees, the injured worker may want to look into the Americans With Disabilities Act and other employment laws.

“when the statutory language expressing the public conscience is clear and when the affected interests of society are substantial”).

Although one could speculate about whether the absence of such a cause of action might frustrate the policy of ensuring benefits to employees who sustain on-the-job injuries, Utah’s own experience has debunked such speculation. Employees in Utah have been collecting workers’ compensation benefits for over 78 years, yet there is no evidence that the absence of a retaliatory discharge tort has undermined the policies underlying the WCA.

If a court were to evaluate the need for such a tort, it would have to consider whether there is a need for an anti-retaliation law in light of the self-regulating nature of negative publicity and employee morale for engaging in such conduct, and whether any public benefit to be gained from creating such a cause of action would be outweighed by the harm that results from creating new uncertainties in the at-will employment relationship, weeding out meritless claims, and abrogating the freedom of contract. One would have to speculate about its impact without obtaining any data or input from the affected constituents, including what impact it would have on Utah’s employers (large and small), its economy, and its judicial resources. *Emory v. Nanticoke Homes, Inc.*, 1985 Del. Super. LEXIS 1063 (1985) (some of the legislative considerations that would be involved in creating such a tort would include whether damages should be limited, whether the remedy should include reinstatement as well as reimbursement, whether the remedy should be administrative in nature, whether the remedy should be



available to the employee who is refused a job as well as an existing employee, and what statute of limitations should apply.)

As the court in *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86, 89-90 (1983) observed:

The Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and in any event critically interested, and to investigate and anticipate the impact of imposition of such liability. Standards should doubtless be established applicable to the multifarious types of employment and the various circumstances of discharge. If the rule of non-liability for termination of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants.

Additionally, if the rights and obligations under a relationship forged, perhaps some time ago, between employer and employee in reliance on existing legal principles are to be significantly altered, a fitting accommodation of the competing interests to be affected may well dictate that any change should be given prospective effect only, or at least so the Legislature might conclude. [citations omitted]

The Utah Legislature has not been reluctant to enact legislation to protect employees from retaliation or interference with employee statutory rights when it discerns a need to do so. For example, the Legislature enacted statutes to protect employees from retaliation or interference with employee rights under the Utah Occupational Safety and Health Act, *UTAH CODE ANN.* § 34A-6-203, retaliation for asserting rights under the Utah Anti-Discrimination Act (“UADA”), *UTAH CODE ANN.* § 34A-5-106, and retaliation for the exercise of rights under the Utah Payment of Wages Act, *UTAH CODE ANN.* § 34-28-19. The Legislature, however, has so far chosen not to

create such a cause of action for retaliation or interference with rights granted by the WCA. *See Emory, supra*, (it is “significant that no discharge provision is included in the comprehensive Workmen’s Compensation Act when the General Assembly has precluded discharge in other contexts”). Whatever the reasons for this inaction, it cannot be said, as in some jurisdictions, that legislative silence is in recognition of an existing court-created cause of action, since this has not happened. Given the Legislature’s role as “the primary institutional source of public policy” in Utah, *Hansen*, 2004 UT at ¶ 24, this Court should not impose its policy choices onto a scheme of legislation where the Legislature itself has chosen not to act.

**2. The Vast Majority Of Jurisdictions That Have Recognized A Claim Of Wrongful Discharge Based On The Filing Of A Workers’ Compensation Claim Have Relied On Their Legislatures, Not their Courts, to Enact An Anti-Retaliation or Interference Statute Before Recognizing Such A Cause of Action.**

**a. Overview Of The Status of Workers’ Compensation Retaliation Law In 50 States.**

In the U.S. District Court for the District of Utah, Plaintiffs argued that because the majority of states have created such a cause of action either by statute or as a matter of common law, Utah should not remain behind as one of the unenlightened few. An analysis of the laws of other states, however, reveals that Utah would be in the majority of jurisdictions where, if the cause of action came about, it would be because the

legislature had expressly created it or prohibited retaliation or interference with workers' compensation rights and courts then recognized a cause of action.<sup>4</sup>

Most states, like Utah, have had workers' compensation laws on the books since the early part of the 20<sup>th</sup> century. Most did not include any anti-retaliation provisions in their original statutory scheme. Unlike Utah, however, many state Legislatures have since added anti-retaliation provisions to their workers' compensation statutes. Most of this legislation has occurred in the last few decades. *See, e.g., Raley v. Darling Shop*, 216 S.C. 536, 59 S.E.2d 148 (1950) (there is no wrongful discharge tort based on the filing of a workers' compensation claim), *superseded by statute*, S.C. CODE ANN. § 41-1-80 (1986) ("No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the South Carolina Worker's Compensation Law . . . ."), as recognized in *Hines v. United Parcel Serv., Inc.*, 736 F. Supp. 675, 677 (D.S.C. 1990).

The statutes, procedures, rights, and remedies vary widely from state to state. This diversity reflects not only the fact that states have diverse policies, but also the fact that this patchwork quilt of enactments is based on legislative policy-making, not

---

<sup>4</sup> Attached in the Addendum are three Exhibits that provide a survey of the status of workers' compensation retaliation laws in 50 states. Exhibit B identifies those jurisdictions in which courts did not recognize a cause of action at all, or did so only after their legislatures had enacted an anti-retaliation or interference statute. Exhibit C identifies those jurisdictions in which courts judicially created a tort based on the general policies in the workers' compensation statute. Exhibit D identifies those jurisdictions in which courts have not determined whether a cause of action exists and the legislature has not enacted an anti-retaliation or interference statute.

“common law.” This diversity is further underscored by the fact that some legislatures have refused to enact any anti-retaliation or interference legislation at all.

Most courts did not begin to recognize a cause of action for retaliatory discharge until their state legislatures added an anti-retaliation or interference provision to their workers’ compensation law. Indeed, the vast majority of jurisdictions that have created a wrongful discharge cause of action to protect the exercise workers’ compensation rights have relied on their state legislatures to provide the basis for creating the cause of action. Currently, the breakdown is as follows:

In 25 states, the legislature filled the silence by enacting an anti-retaliation or interference statute in derogation of the at-will rule.<sup>5</sup>

In 11 states, courts expressly refused to create a retaliatory discharge tort in the absence of an express directive from the legislature.

In 5 of those 11 states, courts refused to create a cause of action, and the legislature has continued not to enact an anti-retaliation or interference statute.<sup>6</sup>

In 6 of those 11 states, courts refused to create a cause of action, but the legislature responded by enacting an anti-retaliation or interference statute.<sup>7</sup>

In 11 other states, courts created a cause of action based on the general policies in the workers’ compensation statute, despite the absence of a specific anti-retaliation or interference statute.<sup>8</sup>

---

<sup>5</sup> Exhibit B(3).

<sup>6</sup> Exhibit B(1).

<sup>7</sup> Exhibit B(2).

<sup>8</sup> Exhibit C.

In 3 states, courts have not determined whether a cause of action exists and the legislature has not enacted an anti-retaliation or interference statute.<sup>9</sup>

Thus, of the 42 jurisdictions that have created a retaliatory discharge cause of action, 31 did not recognize a cause of action until after their legislatures had taken action. Only 11 courts have done what Plaintiffs are asking this Court to do, i.e., create such a cause of action in the absence of legislative action, while 11 other courts have expressly refused to do what Plaintiffs are asking this Court to do.

Following the judicial refusal to create a retaliatory discharge tort, legislatures in six states have enacted anti-retaliation statutes. *See, e.g., Dockery v. Lampart Table Company and U.S. Furniture Industries*, 36 N.C. App. 293, 244 S.E.2d 272 (1978) (refusing to create a retaliatory discharge tort), *superseded by N.C. GEN. STAT. § 95-24*. Some have not. *See, e.g., Pacheco v. Raytheon Co.*, 623 A.2d 464 (R.I. 1993) (refusing to create a cause of action for wrongful discharge without legislative action; since then, the Rhode Island legislature has not created a retaliatory discharge cause of action for filing a workers' compensation claim). In those states where the legislatures did create a cause of action, some created broad remedies. *See, e.g., MASS. ANN. LAWS. ch. 152 § 75B* (providing for reemployment, lost wages, attorney's fees and equitable relief). Some created limited remedies. *See, e.g., S.C. CODE ANN. § 41-1-80* (limits remedy to reinstatement and lost wages). Some relied on an administrative process to resolve claims. *See, e.g., ME. REV. STAT. ANN. tit. 39-A § 353* (providing only an

---

<sup>9</sup> Exhibit D.

administrative remedy). Some allowed claimants to seek remedies in the courts. *See, e.g., CONN. GEN. STAT. § 31-290a* (allows claimant to “[b]ring a civil action in the superior court” or “to file a complaint with the chairman of the Workers’ Compensation Commission”). Such diversity in the statutes shows that the creation of a workers’ compensation retaliation constitutes policy-making that is best suited for the legislatures, not the courts.

**b. In 25 States, Courts Recognized A Cause Of Action Only After The Legislature Had Enacted An Anti-Retaliation Or Interference Statute.**

Legislatures in 25 jurisdictions have enacted statutory restrictions on workers’ compensation retaliation without a prior judicial holding on the issue of whether a retaliatory discharge cause of action exists. Some of those legislatures have given their courts a more specific statement of policy than others, *cf. CONN. GEN. STAT. § 31-290a* (“No employer . . . shall discharge . . . any employee because the employee has filed a claim for worker’s compensation benefits”) with *IND. CODE ANN. § 22-3-2-15* (“No . . . device shall . . . relieve any employer . . . of any obligation created by this act.”).

In cases like *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E. 2d 425 (1973), and its progeny, however, courts have emphasized the importance of relying on specific statutory language, rather than on general policies in the workers’ compensation statutes, to recognize the existence of a cause of action. In *Frampton*, the court held that a retaliatory discharge for filing a workers’ compensation claim was actionable, because it violated *IND. ANN. STAT. § 40-1215*, which states:

No contract or agreement, written or implied, no rule, regulation or *other device* shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by this act. (court's emphasis)

The court interpreted “the threat of discharge to be a 'device' within the framework of [the statute] and hence, in clear contravention of public policy.” 260 Ind. at 252, 297 N.E.2d at 427-28.<sup>10</sup>

In 1984, the Indiana Court of Appeals acknowledged the statutory underpinnings of *Frampton*:

Although the court in *Frampton* spoke in terms of public policy, it did so in the sense of enforcing a specific statutory prohibition against the use of **any 'device'** to relieve an employer of its obligation under the Workmen's Compensation Act. An attempt to declare any discharge unlawful where the reason for discharge is contrary to general public policy was specifically rejected [by other cases]. Such a broad exception was left for legislative expression of what constitutes public policy or which of competing public policies should be given preference.

*Rice v. Grant County Ed. of Comm'rs*, 472 N.E.2d 213, 215 (Ind. App.2d Dist. 1984) (emphasis added).<sup>11</sup> The only other wrongful discharge tort that Indiana courts have

---

<sup>10</sup> Five other jurisdictions (Iowa, North Carolina, South Dakota, Tennessee, and Wyoming) with similar “other device” language in their workers’ compensation statute. Four of those states have followed *Frampton*, but one has not. *Cf. Springer v. Weeks and Leo Co.*, 429 N.W.2d 558 (Iowa 1988) (“We deem this [‘other device’ provision] to be a clear expression that it is the public policy of this state that an employee’s right to seek the compensation which is granted by law for work-related injuries should not be interfered with”); with *Dockery v. Lampert Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272 (N.C. App. 1978) (“We think complex problems such as 'devices' to defeat provisions of an act of the Legislature, are best left to the expertise and resources of that body”).

<sup>11</sup> “With such a specific statutory base the [1973 *Frampton*] decision did not have the appearance of a broad attack on the employment-at-will doctrine.” Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding The Development Of The Law Of Wrongful Discharge*, 66 Wash. L. Rev. 719, 724 (1991).

recognized is based on retaliation for refusing to violate the law. *Wior v. Anchor Industries, Inc.*, 669 N.E.2d 172 (Ind. 1996) (“we are disinclined to adopt generalized exceptions to the employment-at-will doctrine in the absence of a clear statutory expression of a right or duty that is contravened”). Thus, Utah and Indiana are similar, except that one legislature enacted “other device” language and the other did not.

**c. In 11 States, Courts Refused To Create A Retaliatory Discharge Tort In The Absence Of An Express Directive From The Legislature.**

Although 25 of the 32 legislatures that have enacted workers’ compensation retaliation statutes did so in the face of judicial silence, legislatures in six states acted only after their courts had refused to create a retaliatory discharge tort.<sup>12</sup> The experience of these states illustrates how the separation of powers between the legislative and judicial branches is supposed to work.

The first state to address the issue specifically was Missouri. In *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956), the Missouri Supreme Court rejected plaintiff’s wrongful discharge claim, because it could “hardly conceive of the Legislature making such careful provision for the rights and compensation of injured employees covered by the Act and yet omitting a specific provision for recovery of damages for wrongful discharge if there had been any intent to create such a right.” 365 Mo. at 1193; 295 S.W. 2d at 126. In 1973, however, the Missouri Legislature enacted *MO. ANN. STAT.* § 287.78, which authorizes a “civil action for damages.”

---

<sup>12</sup> Exhibit B(2).



In *Meeks v. Opp Cotton Mills, Inc.*, 459 So. 2d 814, 815 (Ala. 1984), the Alabama Supreme Court, in refusing to allow an employee to sue his former employer for dismissing him because he had filed a workers compensation claim, observed: “Why then should we not leave it to the Legislature to change the rule in this case, where the employee was discharged allegedly for seeking workmen’s compensation benefits, a legislatively created right?” Since then, the Alabama Legislature enacted *ALA. CODE* § 25-5-11.1, which states: “No employee shall be terminated by an employer solely because the employee has instituted or maintained any action against the employer to recover worker’s compensation benefits . . . .” *Twilley v. Dauber & Coated Prods., Inc.*, 536 So. 2d 1364 (Ala. 1988).

In *Dockery v. Lampert Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272 (Ct. App.), *cert. denied*, 246 S.E.2d 215 (1978), the court refused to recognize a tort of wrongful discharge based on the filing of a workers’ compensation claim. It observed: “If the General Assembly of North Carolina had intended a cause of action be created, surely, in a workmen’s compensation statute as comprehensive as ours, it would have specifically addressed the problem.” 36 N.C. at 297.

To attempt to redress this balance by judicial action without legislative authority appears to us a doubtful policy. . . . We believe the General Assembly is well equipped to weigh the various social and economic factors presented by the plaintiff’s allegations in this case and to take appropriate action promoting the public welfare.

Since then, the General Assembly enacted *N.C. GEN. STAT.* § 97-6.1, which provides that “No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the North

Carolina Worker's Compensation Act . . . ." *Wright v. Fiber Indus., Inc.*, 60 N.C. App. 486, 299 S.E.2d 284 (N.C. App. 1983).

Legislatures in five states have declined to create a cause of action even after their courts had refused to create one judicially.<sup>13</sup> In *Emory v. Nanticoke Homes, Inc.*, 1985 Del. Super. LEXIS 1063 (1985), the Delaware Supreme Court refused to create a retaliatory discharge tort based on the filing of a workers' compensation claim. The court observed:

Unlike a growing number of other jurisdictions, the Delaware Legislature has not seen fit to provide a statutory remedy for a claim of retaliatory discharge arising from a worker's compensation claim. Creation of a new cause of action in this complicated area raises a number of policy issues which require legislative consideration. While the time may be ripe for some limitation on an employer's right to discharge, **the proper balance between the right to contract for employment and rights under the worker's compensation statute should be struck by the Legislature.** (emphasis added)

To date, the Delaware Legislature has struck that balance against the creation of such a retaliatory discharge tort.

In *Pacheco v. Raytheon Co.*, 623 A.2d 464 (R.I. 1993), the Supreme Court of Rhode Island held that "there is no cause of action for wrongful discharge," observing that "it is not the role of the courts to create rights for persons whom the Legislature has chosen not to protect." To date, the Rhode Island General Assembly has not created a retaliatory discharge cause of action for employees who seek to recover workers' compensation benefits.

---

<sup>13</sup> Exhibit B(1).

In *Evans v. Bibb Co.*, 178 Ga. App. 139, 342 S.E. 2d 484 (Ga. App. 1986), the plaintiff argued that his employer had wrongfully discharged him for exercising his rights under the Georgia Workers' Compensation Act. The court held that "in the absence of any express statutory provision for such a civil remedy in the Act, we decline appellant's invitation to create judicially such a remedy. 'Courts may interpret laws, but may not change them.'" 178 Ga. App. at 139-40 (citation omitted). Since then, the Georgia Legislature has elected not to add an anti-retaliation provision to its workers' compensation statute.

As the foregoing case law demonstrates, numerous courts have resisted the temptation to impose a retaliatory discharge tort onto a statutory scheme that has been carefully crafted and refined by their legislatures for decades. Furthermore, these cases demonstrate that when courts rely on the legislature to define the public policy of the state, particularly in the context of a complex scheme of legislation like the workers' compensation statute, it allows legislators to carve the public policy with a scalpel, rather than a blunt instrument.

**d. In 11 States, Courts Created A Tort Based On The General Policies In The Workers' Compensation Statute, Despite The Absence Of A Specific Anti-Retaliation Or Interference Statute.**

Some jurisdictions have created a workers' compensation retaliatory discharge cause of action in the absence of any specific statutory prohibition,<sup>14</sup> but they

---

<sup>14</sup> Exhibit C.

generally do not explain why the court, rather than the legislature, should make the necessary policy choices to create such a tort, define its parameters, and determine the appropriate remedies. In *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W. 2d 634, 640 (2003), for example, the court created a retaliatory discharge tort based on “the general purpose and unique nature of the Nebraska Workers’ Compensation Act itself provides a mandate for public policy.”

Not surprisingly, dissenting judges in some of these cases have criticized the majority for invading the province of the legislature. For example, one judge observed, “The majority has in effect engaged in judicial legislation. . . . Under the guise of ‘public policy’ they have gone beyond judicial interpretation to create a new cause of action without express legislative authority.” *Svento v. The Kroger Company*, 69 Mich. App. 644; 245 N.W.2d 151 (1976) (Danhof, C. J.) (dissenting from the court’s 2-1 decision that created a retaliatory discharge tort based on the general policy of the worker’s compensation statute), *superseded by statute*, MICH. COMP. LAWS § 418.301(11). *as recognized in Wilson v. Acacia Park Cemetery Assoc.*, 162 Mich. App. 638, 413 N.W.2d 79 (1987) (refusing to create by “judicial fiat” a retaliatory discharge tort premised upon the employer's anticipation of a future claim, because the “workers’ compensation law is particularly within the province of the Legislature, which has chosen to occupy this field by its enactment of a comprehensive statutory scheme”).

Although legislatures in some states, like Michigan, have superseded such judicially created torts with statutes, such action indicates that courts should not invade the province of the legislature in the first place. Indeed, some legislatures have rebuked

their own courts for doing so. For example, although the Arizona Supreme Court held in *Wagenseller v. Scottsdale Memorial Hospital*, 147 Ariz. 370, 710 P.2d 1025 (1985), that an at-will employee could bring a wrongful termination in violation of public policy, the Arizona legislature rebuked the court for usurping its function. *Galati v. America West Airlines, Inc.*, 205 Ariz. 290; 69 P.3d 1011 (2003) (“The legislature in enacting A.R.S. § 23-1501 took express exception to the court’s indication that it rather than the legislature had the authority to define public policy”).

In *Wal-Mart v. Pam Baysinger*, 306 Ark. 239; 812 S.W.2d 463 (1991), the Arkansas Supreme Court created a wrongful discharge tort based on a criminal statute. The Arkansas legislature, however, specifically overruled *Wal-Mart* and two other cases by name in the text of the statute itself. “There is no doubt that the legislature’s intent in the passage of Act 796 of 1993 [amending Ark. Code Ann. § 11-9-107, which prohibits workers’ compensation discrimination and provides for a limited remedy], in fact its avowed purpose, was to overrule our decisions [in three cases, including *Wal-Mart*], where we” created retaliatory discharge tort based on the criminal statute. *Tackett v. Crain Automotive d/b/a Car Pro*, 321 Ark. 36, 38; 899 S.W.2d 839, 840 (1995) (J. Corbin dissenting opinion). Thus, even in some jurisdictions where courts have created a cause of action, judges and legislatures alike have expressed reservations about such incursions on the legislative function.

**3. Utah's Conservative Approach And Deference To The Legislature Does Not Comport With Those Courts That Have Relied On The General Purpose Of Their Workers' Compensation Statutes To Create A Retaliatory Discharge Tort.**

Utah has assigned the primary policy making function to the Legislature, not the courts. Utah Const. Art. V., § 1.<sup>15</sup> The Constitution directs the Supreme Court to “report in writing to the Governor any seeming defect or omission in the law,” Utah Const. Art. VIII., § 22, not to correct it. This Court has recognized not only that the Legislature is “the primary institutional source of public policy,” *Hansen*, 2004 UT at ¶ 24, but also that courts cannot rely on general policies in legislation, as opposed to a clear manifestation of policy in a specific statute, as a basis to create torts or to expand on the legislature’s work. *See Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395 (Utah 1998) (“a general public policy against the manufacturer, importation and distribution of drugs . . . is not the type of clear and substantial policy that will support Ryan’s wrongful discharge claim”); *Shaw v. Railroad Co.*, 101 U.S. 557 (1879) (“No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express”).

---

<sup>15</sup> “The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases expressly directed or permitted.” *See also* Utah Const. Art. VI., § 1 (“The Legislative Power shall be vested in a Senate and House of Representatives, which shall be designated The Legislature of the State of Utah”).

Although this Court has referred to workers' compensation retaliation as an example of an exception to the at-will rule that other states have recognized, it has never confronted the issue. In both *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395 (Utah 1998), and *Hansen v. America Online, Inc.*, 2004 UT 62, 96 P.3d 950, 952, the Court referred to workers' compensation retaliation as an *example* of what has been done in *other* jurisdictions under the third category of the public policy wrongful discharge claim--discharge for exercising legal rights or privileges--but it has never indicated that this example reflects the current state of Utah law, much less held that the cause of action exists.

On the contrary, in *Dan's Foods*, the Court stated that although "an employee's refusing to violate the law," would "almost always implicate a clear and substantial public policy;" all "other situations," however, have to be addressed "as they come before us." *Id.* at 408. It emphasized that a public policy would only be deemed clear "if plainly defined by legislative enactments," *Id.* at 405, and rejected plaintiff's claim that the statute reflected a broader public policy against distribution of unlawful drugs, stating: "[T]his general policy is not the type of clear and substantial policy that will support Ryan's wrongful discharge claim." *Id.* at 407.

In *Hansen*, the Court refused to create a cause of action for employees claiming to have been fired in retaliation for exercising rights under Utah law to bear firearms. It noted the four categories of wrongful discharge "eligible for consideration" under the public policy exception to the at-will rule: (1) refusing to commit an illegal act; (2) performing a public obligation; (3) exercising a legal right "such as filing a workers'

compensation claim;” or (4) reporting an employer’s criminal activity to a public authority. *Id.* at ¶ 9. However, the Court went on to say that the third category “poses analytical challenges different from, and generally greater than, the others,” because it requires courts to add a cause of action to a statutory scheme when the Legislature could have done so but did not. *Id.* at ¶ 10. The Court did not even grant status to the third category as being “typical,” but stated only that it is “eligible for consideration.” *Id.* at 952. The Court noted that these greater challenges exist even when the statutory right or privilege “carries strong public policy credentials.” *Id.* at ¶ 11. Moreover, when an aggrieved party asks a court to create a common law cause of action to help ensure that he or she enjoys the full exercise of their legislative rights or privileges, courts must necessarily engage in balancing both sides’ competing policy interests: the employee’s interest in maximizing enjoyment of workplace rights, and the employer’s interest in regulating “the workplace environment to promote productivity, security, and similar lawful business objectives.” *Id.* In such circumstances, “both employer and the employee may appeal to public policy in aid of their cause.” *Id.* In keeping with its view that the public policy exception to the at-will doctrine “should be applied parsimoniously and on a case-by-case basis,” the Court declined the opportunity to create a cause of action for employer interference with employee rights to keep and bear arms. *Id.* at ¶ 14 n.6.

This Court's sensitivity to these concerns explains why in the overwhelming majority of the cases it has addressed, and, indeed, in *all* of its more recent decisions, it has found against the public policy wrongful discharge exception to the employment at-



will rule and has continued to emphasize deference to the Legislature. To date, the only circumstances in which this Court has upheld application of the public policy wrongful discharge cause of action involved employees fired for refusing to commit crimes, *Peterson v. Browning*, 832 P.2d 1280 (Utah 1992), or for opposing an employer's criminal activity, *Heslop v. Bank of Utah*, 839 P.2d 828 (Utah 1992). In the thirteen years since *Peterson* and *Heslop*, the Court has not found in favor of this cause of action in any other circumstance. In a number of instances, it has rejected attempts to overcome the at-will rule based on the wrongful discharge theory. Although the Court's rationale has varied, it has consistently stressed the narrowness of this claim under Utah law. Wherever possible, the Court has deferred to the Legislature and has been loath to intrude on what it deems a legislative prerogative.

Although not a wrongful discharge case, *Buckner v. Kennard*, 2004 UT 78, 99 P.3d 842, demonstrates the Court's reluctance to create a cause of action based on a statute when the Legislature has not chosen to do so. In *Buckner*, a group of Salt Lake County employees sought to imply a private right of action for what they asserted was a violation of pay equity requirements under the County Personnel Management Act ("CPMA"). In rejecting their claim, the Court emphasized its narrow approach: "In Utah, '[i]n the absence of language expressly granting a private right of action[,]... the courts of this state are reluctant to imply a private right of action based on state law.'" *Id.* at ¶ 40 (citations omitted). The Court further noted "Utah courts have rarely, if ever, found a Utah statute to grant an implied private right of action," and observed that the Utah Court of Appeals had come to the exact opposite conclusion as the Tenth Circuit Court of

Appeals in regard to an identical Utah statute, with the former holding that no right of action existed. *Id.* at ¶ 43. The Court expressed an unwillingness to invade the province of the Legislature in order to create a new claim even if the claim furthered the statute's objectives: "The question before us is not simply whether employees may sue to enforce a pay equity requirement in the statutes, but whether the statutes authorize a remedy for noncompliance in the form of back pay for past periods of pay inequity." *Id.* at ¶ 44. Moreover, "[t]he Legislature's silence cannot be interpreted as revealing an intent that employees have a right to seek back pay as a remedy for a claim to pay equity under the CPMA." *Id.* at ¶ 48.

The implied private right of action analysis and the public policy wrongful discharge claim asserted in this lawsuit share an important similarity: Both rest on legislative enactments that Plaintiffs seek to use as a predicate for a personal cause of action even though the statute does not grant such right. Thus, the same rationale that led *Buckner* to refuse to create a new cause of action in the face of legislative silence should apply in this case where, in contrast to some of its fellow states, the Utah Legislature has continued to refrain from creating a cause of action based on retaliation for exercising WCA rights. Indeed, *Buckner* recognized the overlapping line between the implied private right and public policy wrongful discharge causes of action when it cited Utah precedent for the latter, and observed that there was no "clear and substantial" public policy involved in the plaintiffs' pay equity claims. It further observed that "there is no weighty rationale to overcome this court's normal reluctance to imply a cause of action from a statute. Even where there is a strong public policy, as in discrimination, the

legislative body retains the right to specify the remedies and course of action available for violations of a statute it has enacted to pursue such policy.” *Id.* at ¶ 52.

In the face of continuing of legislative silence, it would be anomalous for this Court to find the existence of a tort cause of action that permits Plaintiffs’ sought-for relief such as compensatory and punitive damages, *Complaint* at ¶¶ 268-69; as well as the advantage of a four-year statute of limitations. *UTAH CODE ANN.* §78-12-25. Such rights and remedies would vastly exceed the ones the Legislature has chosen when it has acted to create causes of action for aggrieved employees. The anti-retaliation provision of the Utah Anti-Discrimination Act requires employees to assert their claims within 180 days, *UTAH CODE ANN.* § 34A-5-107(1)(c), and limits relief to reinstatement, backpay and benefits, attorney fees and costs. *UTAH CODE ANN.* § 34A-5-107(9). Employees are not entitled to a bench or jury trial but must pursue their claims administratively. *UTAH CODE ANN.* § 34A-5-107. The anti-retaliation provision of Utah Occupational Safety and Health Act requires employees to bring their claims within 30 days before an administrative agency and limits relief to an injunction, reinstatement and back pay. *UTAH CODE ANN.* § 34A-6-203(2)(a). The anti-retaliation provision under the Utah Payment of Wages Act directs aggrieved employees to an administrative agency, *UTAH CODE ANN.* §34-28-19(2), and limits relief to an injunction, lost wages and benefits. *UTAH CODE ANN.* §34-28-19 (3).

The Utah Supreme Court has noted the inappropriateness of courts using legislative silence to create more powerful causes of action than the Legislature has chosen when it has acted in comparable circumstances. In *Gottling v. P.R. Inc.*, 2002 UT

95, 61 P.3d 989, the plaintiff asserted a wrongful discharge claim based on the public policy against sex discrimination. She attempted to use the common law claim to fill in the gap for employers with fewer than 15 employees, the UADA's statutory threshold. In rejecting this attempt, the Court said: "It would be illogical to suppose that the Legislature intended to provide the benefit of this timely and cost-effective procedure to large employers [referring to the UADA's administrative procedures] while, at the same time, intending to subject small employers to a civil tort action in which they would be vulnerable to a longer statute of limitations, damages, attorney fees and, possibly, a jury trial." *Id.* at ¶ 13. In response to the argument that the Court's failing to recognize a cause of action would open the door for small employers to discriminate in violation of public policy, it responded that to do otherwise would be to "ignore the reality that it is the Legislature that primarily holds the power to open and shut that door. . . . Simply put, we must not craft a remedy when the Legislature intends no remedy to exist. . . . Those who desire to effectuate a change in Utah employment law should center their efforts on the legislative branch, whose purpose and duty it is to represent the voice of the people in determining the law of this state." *Id.* at ¶ 23.

**4. Plaintiffs' Attempt To Rely On Landlord-Tenant Cases Is Not Persuasive.**

In the U.S. District Court for the District of Utah, Plaintiffs argued that a retaliatory eviction defense supports the creation of a retaliatory discharge claim. This argument illustrates the fallacy of the false analogy. In *Building Monitoring Systems, Inc. v. Paxton*, 905 P.2d 1215 (Utah 1995), the Court did not create a retaliatory eviction

cause of action, or give tenants a claim for damages. It merely recognized retaliatory eviction as a *defense* to an unlawful detainer action when a tenant reports housing code violations to the authorities. The Court linked the defense to a specific statute that required the landlord to “maintain that unit in a condition fit for human habitation,” *UTAH CODE ANN.* § 57-22-3(1). It did not treat the “general policies” in the housing code as a license to “create” a cause of action. In effect, it merely required the landlord to make the repairs and give the tenant a reasonable opportunity to relocate before an eviction could occur. *Paxton*, 905 P.2d at 1219; *Brady v. Walter G. Slater*, 2004 UT App 292. Thus, the Court did not “saddle the landlord with a perpetual tenant” or the burden of defending against a claim for damages that the Legislature itself did not create. *Paxton*, 905 P.2d at 1219.

Recognizing a defense against an eviction from an apartment does not support the creation of a cause of action that would permit an at-will employee to sue his or her employer for uncapped tort damages. In *Paxton*, the Court tied the retaliatory eviction defense to specific statute designed to ensure that rental properties remain safe and sanitary for members of the public who might inhabit them. By contrast, an employer who discharges a particular employee for seeking workers’ compensation benefits does not create an unsafe condition for the public or all employees. The matter is more like the private issues the Utah Supreme Court has said are not appropriate for carving out exceptions to the at-will rule based on the public policy wrongful discharge theory. See, e.g., *Dixon v. Pro Image, Inc.*, 1999 UT 89, 987 P.2d 48; *Rackley v.*

*Fairview Care Centers, Inc.*, 2001 UT 32, 23 P.3d 1022; *Fox v. MCI Communications Corp.*, 931 P.2d 857 (Utah 1997).

In the employment context, Utah courts have acknowledged the policy behind the at-will rule of employers being able to manage their workforces and the unique relationships between employers and employees, and the importance of balancing competing policy concerns when considering exceptions to the at-will doctrine. *Hansen*, 2004 UT at ¶ 9 (“Owing to the stability and predictability afforded employers and employees by that at-will rule, we have been justifiably wary of brushing broad public landscapes on the canvas of these cases, electing to limit the horizon of these cases by their facts”); *Hodges v. Gibson Products Co.*, 811 P.2d 151, 165 (Utah 1991) (there is a legitimate place “for broad employer discretion in terminating employment relationships, and there is also a legitimate correlative interest of employees in being able to quit for any or no reason at all”); see Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. Chi. L. Rev. 947, 982 (1984) (“the flexibility afforded by the contract at will permits the ceaseless marginal adjustments that are necessary in any ongoing productive activity conducted . . . in conditions of technological and business change”); Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 Emory L.J. 1097 (1989) (discussing the greater efficiency created by an at-will employment system, which serves both the worker and employer). There is no comparable policy for the landlord-tenant relationship. The creation of a temporary, limited defense to an unlawful detainer action based on a specific statute is simply not analogous to the

creation of a wrongful discharge tort based on the general policies in the workers' compensation law.

**B. EVEN IF THE COURT ANSWERS THE FIRST CERTIFIED QUESTION IN THE AFFIRMATIVE, THE CAUSE OF ACTION SHOULD NOT BE EXPANDED BEYOND AN ACTUAL DISCHARGE IN RETALIATION FOR EXERCISING RIGHTS UNDER THE WCA.**

As set forth by the Order of Certification, if this Court determines that a termination of an employee in retaliation for exercise of WCA rights implicates a clear and substantial public policy, it then needs to address whether the cause of action applies to one or more of the following:

- (a) An employee who is not injured but experiences retaliation for opposing an employer's treatment of other injured employees;
- (b) An employee who resigns under circumstances constituting "constructive discharge;" and
- (c) An employee who is neither fired nor constructively discharged but who experiences other discriminatory or harassing treatment in retaliation for exercising WCA rights.

Defendant addresses each of these three categories separately below. At the outset, however, it observes that the reasons the Court should answer "no" to the first Certified Question given its conservative, judicious, and even "parsimonious" approach to expanding the wrongful discharge tort, discussed in Section A above, apply even more strongly in rejecting the ambitiously expansive applications presented by these three categories.

**1. The Cause Of Action Should Not Be Extended To Non-Injured Employees Who Oppose The Treatment Of Injured Employees.**

The alleged “whistleblower” in this case is Plaintiff Marilyn Touchard. *See Complaint* ¶¶ 45-66. Summarizing her allegations, Ms. Touchard states that as assistant safety manager, she disagreed with a number of La-Z-Boy's policies and practices regarding treatment of injured workers; her complaints to management went unheeded, however, and she was ultimately terminated “because she opposed its practices of abusing employees who applied for Workers Compensation benefits and maintained an unsafe work place.” (*Complaint* ¶ 66). There are no allegations that she ever suffered an on-the-job injury, that she was otherwise entitled to Workers Compensation benefits or exercised any rights under the WCA, or even that she reported Defendant's alleged improper practices to an outside authority such as the Labor Commission of Utah that administers the WCA.

Harkening back to the four categories eligible for consideration under *Hansen v. America Online, supra*, and discussed in Section A, there is nothing in the Complaint about Ms. Touchard allegedly refusing to commit an illegal act. She does not assert that her carrying out her responsibilities as assistant safety manager in making recommendations about Defendant's policies or practices constituted the performance of a “public obligation” like jury duty. She does not say she exercised a legal right or privilege and acknowledges that she herself had no Workers Compensation claim. Finally, the Complaint contains no suggestion that she reported to “a public authority” alleged “criminal activity.” 2004 UT at ¶ 6.



Under Utah case law, a plaintiff must identify activity “in the public interest” that allegedly led to a retaliatory discharge. *Fox v. MCI Communications Corp.*, 931 P.2d 857, 861 (Utah 1997) (noting further: “If an employee reports a criminal violation to an employer, rather than to public authorities, and is fired for making such reports, that does not, in our view, contravene a clear and substantial public policy [because the disclosure] serves the private interest of the employer, not the public interest.”). Taken at face value, Ms. Touchard's alleged activity was not connected to a “public interest.” She simply did her job in recommending to management policies or practices she believed needed to be adopted or needed to be dropped. *See Ryan v. Dan's Food Stores*, 972 P.2d at 408-09 (“only internal reporting that furthers a clear and substantial public policy will satisfy the third element of a wrongful discharge claim” – Ryan's conduct in questioning prescriptions outside of what the law required him to question, and which did not involve reporting suspected criminal activity to the police, did not further public policy objectives. *See also Johnson v. E.A. Miller, Inc.*, 1999 U.S. App. LEXIS 3002 ¶ 12 (10<sup>th</sup> Cir. 1999) (unpublished): “To the extent that [plaintiffs'] claims are based upon retaliation for internal company complaints (not communicated to public authorities), they do not implicate a clear and substantial public policy.”

Several jurisdictions that have recognized the basic wrongful discharge tort for Workers Compensation retaliation, such as Indiana, have resisted extending the “public interest” rationale to employees who themselves were not injured. In *Wior v. Anchor Industries, Inc.*, 669 N.E.2d 172 (Ind. 1996), the court refused to extend the tort to an employee who alleged he was fired for refusing to fire an injured worker who had

filed a workers compensation claim. Since the plaintiff could not point to any particular “statutory right or duty,” the court was unwilling to stretch the public interest rationale of preserving workers compensation benefits for injured workers to someone who was not entitled to those benefits: “Generally, we are disinclined to adopt generalized exceptions to the employment-at-will doctrine in the absence of clear statutory expression of a right or duty that is contravened.” *Id.* at 178, n.5.

**2. The Cause of Action Should Not Be Extended to Claims of Constructive Discharge.**

In the Complaint, Plaintiff Frank Ross alleges he was “forced to resign” and experienced a “constructive discharge.” (*Complaint* ¶¶ 238-239). However, expanding the theory to this type of claim would constitute a further inroad on employment-at-will without legislative support or direction. Although the Utah Court of Appeals applied the doctrine of constructive discharge in *Sheikh v. Department of Public Safety*, 904 P.2d 1103 (Ut. App. 1995), it did so in construing an express statutory cause of action which itself was not limited to discharge but applied to various other forms of activity listed under *UTAH CODE ANN.* § 34-35-6, including hiring, promotion, demotion, retaliation, harassment, or discrimination “in matters of compensation or in terms, privileges, and conditions of employment.”

When the issue is whether to add a new limitation to employment-at-will in the absence of legislative action, even some courts that have applied it to actual discharge have drawn the line there and rejected constructive discharge. *See, e.g., Hinthorn v. Roland's of Bloomington, Inc.*, 119 Ill.2d 526, 530-31, 519 N.E.2d 909 (1988): “We

agree that plaintiff has sufficiently alleged that she was discharged, but wish to make abundantly clear that we are not now endorsing the constructive discharge concept rejected by the appellate court in [*Scheller v. Health Care Service Corp.*, 138 Ill. App.3d 19, 485 N.E.2d 26 (1985)].” Illinois courts have repeatedly emphasized that the Workers' Compensation retaliation exception to at-will employment is exceedingly narrow and that courts should not expand it without legislative direction.

**3. The Cause of Action Should Not Be Extended to Other Alleged Forms of Discrimination or Harassment.**

Although it is not clear from the Complaint what Plaintiffs allege regarding discriminatory treatment or harassment other than being fired or constructively discharged, the Order of Certification seeks guidance from this Court on this issue. The reasons given above for resisting Plaintiffs' desire to stretch the wrongful discharge tort into myriad new shapes and forms apply especially strongly here. None of the many Utah cases addressing the wrongful discharge theory have ever strayed beyond discharge and there is no indication in any of these various opinions of the Court's inclination to do so.

Even courts that have gone beyond Utah in applying the public policy theory to Workers' Compensation have rejected such expansionist urgings. *See Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill.2d 29, 645 N.E.2d 877, 880-82 (1994), in which the court rejected plaintiff's request:

to extend the existing law to circumstances in which an employee suffers a loss of employment status or income or both, but is not terminated from her employment altogether. . . . In our view, adoption of plaintiff's argument would replace the well developed element of discharge with a new,

ill-defined and potentially all-encompassing concept of retaliatory conduct or discrimination. The courts would then be called upon to become increasingly involved in the resolution of workplace disputes which center on employer conduct that heretofore has not been actionable at common law or by statute. *Id.* at 38-39.

*See also: Below v. Skarr*, 569 N.W.2d 510, 512, 1997 Ia. Supp. LEXIS 276 (1997), in which the court refused to recognize a cause of action based on threats and harassment short of discharge since by doing so, the court “would encourage a rash of common-law claims by any potential workers' compensation recipients who claim to have been threatened with termination or subjected to any other form of harassment in the work place by simply asserting that it was retaliatory in nature.” In *Mintz v. Bell Atlantic Systems Leasing International*, 183 Ariz. 550, 553, 905 P.2d 559, 562 (Ct. App. 1995), the court held that “the tort of wrongful failure-to-promote does not exist.”

Recognizing a retaliation tort for actions short of termination could subject employers to torrents of unwanted and vexatious suits filed by disgruntled employees at every juncture in the employment process. And why stop at demotions? If, as Ludwig argues, a demotion raises the same policy concerns as a termination, so too would transfers, alterations in job duties, and perhaps even disciplinary proceedings. The potential for expansion of this type of litigation is enormous. *Id.* quoting, *Ludwig v. C&A Wallcoverings, Inc.*, 960 F2d 40, 43 (7th Cir. 1992).

## VIII. CONCLUSION

The Court should not extend the public policy exception to the at-will doctrine to a situation in which an employee has filed a workers' compensation claim, because (1) the Legislature created the right to benefits and has seen fit not to enact any anti-retaliation statute; (2) there is no specific statement of a “clear and substantial” public policy in the workers' compensation statute to protect claimants from retaliation;

(3) if an employee sustains an injury, the statutory entitlement to workers' compensation benefits remains in effect regardless of whether the employment ends; and (4) the vast majority of jurisdictions that have recognized a workers' compensation retaliation claim have relied on their legislatures, not their courts, to enact an anti-retaliation statute before recognizing such cause of action. Furthermore, if the Court nevertheless chooses to judicially create a retaliatory discharge cause of action despite legislative silence, it should restrict the cause of action solely to employees who are fired in retaliation for seeking workers' compensation benefits in order to avoid further incursion on the legislative function.

DATED: December 12, 2005.

BULLARD SMITH JERNSTEDT WILSON

By 

Jathan Janove, USB No. 3722

Attorneys for Appellant

La-Z-Boy Incorporated

## ADDENDUM

Tab A

RECEIVED

FILED  
U.S. DISTRICT COURT APR 11 2005

JATHAN JANOVE (3722)  
LOIS A. BAAR (3761)  
JANOVE BAAR ASSOCIATES, L.C.  
9 Exchange Place, Suite 1112  
Salt Lake City, Utah 84111  
Telephone: (801) 530-0404  
Facsimile: (801) 530-0428  
Attorneys for Defendant

2005 APR 12 A.M. 10:15  
OFFICE OF  
JUDGE TENA CAMPBELL  
DISTRICT OF UTAH  
BY: \_\_\_\_\_  
DEPUTY CLERK

RECEIVED CLERK

APR 08 2005

U.S. DISTRICT COURT

---

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

---

MARILYN TOUCHARD, THOMAS  
AMMONS, FELIX BARELA, OSCAR  
GARCIA, DENNIS NELSON, WADE  
PETERSON, FRANK ROSS and HEIDI  
SCOTT,

Plaintiffs,

vs.

LA-Z-BOY INCORPORATED,

Defendant.

: Civil No. 1-04-CV-67

:

:

:

:

:

:

:

:

:

:

:

:

**ORDER OF CERTIFICATION**

Judge Tena Campbell

---

The United States District Court for the District of Utah, based upon the stipulation of the parties and the Court's concurrence, pursuant to Rule 41 of the Utah Rules of Appellate Procedure governing the certification of questions of law by United States courts, hereby submits to the Utah Supreme Court the following certified questions of law, which are determinative of certain of plaintiffs' claims in the above-captioned matter now pending before this court, but which do not appear to be clearly answered under Utah statutory law and controlling precedent:

Whether the exercise of rights under the Utah Workers' Compensation Act, Utah Code Ann. §34A-2-101, et. seq., ("UWCA") implicates "a clear and substantial public policy"

45



of the State of Utah that would provide a basis for a claim of wrongful termination in violation of public policy; and if so,

Whether this cause of action applies in the following circumstances: (a) where the employee has not filed for benefits under the UWCA but is retaliated against for opposing an employer's treatment of other injured employees who are entitled to file for benefits under the UWCA; (b) the employee is not fired but resigns under circumstances that constitute a "constructive discharge"; and (c) the employee who has filed for benefits under the UWCA is neither fired nor constructively discharged, but experiences other discriminatory treatment or harassment from an employer because the employee has exercised rights under the UWCA.

### **Background**

Eight former employees of defendant have brought an action against it based on how it allegedly treats employees who suffer on-the-job injuries. Plaintiffs' Complaint asserts three causes of action under Utah common law.<sup>1</sup> The cause of action relevant to this Order is plaintiffs' claim for wrongful discharge based on the public policy exception to the at-will rule of employment.

With respect to plaintiffs' cause of action, defendant asserts that it should be dismissed because the Utah Supreme Court would not recognize a cause of action for wrongful termination for an employee discharged in retaliation for seeking benefits under the UWCA. Defendant further asserts that even if such a claim were recognized, it would not be extended to claims of constructive discharge, to a non-injured employee who claims retaliation for opposing treatment of other injured workers (as alleged by plaintiff Touchard). This court has reserved ruling on this portion of defendant's Motion for Judgment on the Pleadings pending the Utah Supreme Court's response to this Order of Certification.

---

<sup>1</sup> The matter was originally filed in the First Judicial District Court of Box Elder County, State of Utah, on April 12, 2004. It was subsequently removed to this court based on diversity of citizenship.

### **Discussion**

The Utah Supreme Court has recognized four categories of discharge “eligible for consideration” under the public policy exception to the employment at-will rule: (1) refusing to commit an illegal act, (2) performing a public duty, (3) exercising a legal right; or (4) reporting an employee’s criminal activity to a public authority. Hansen v. American Online, Inc., 96 P.3d 950, 952 (Utah 2004). Although the Court has referred to discharge for seeking workers’ compensation benefits as an example of the third category, it has never directly ruled on the question.

Plaintiffs contend that the Utah Supreme Court would apply the cause of action to their claims. They note that the Court has twice used discharge for filing workers’ compensation claims as an example of the third category of the public policy wrongful discharge cause of action, Hansen v. American Online, Inc., 96 P.3d 950, 952 (Utah), and Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 408 (Utah 1998). Plaintiffs point to developments around the country and assert that most courts that have addressed the issue have recognized the cause of action in these circumstances. Plaintiffs contend that extending their claims to include protection for constructive discharge and internal opposition claims are consistent with the public policy rationale creating the exception to employment at-will and that Utah courts have previously adopted the doctrine of constructive discharge, e.g., Sheikh v. Department of Public Safety, 904 P.2d 1103 (Utah App. 1995).

Defendant argues that the Court’s decisions evince a strong reluctance to create or extend causes of action to terminated employees in the absence of legislative direction. It points to the Court’s language in Hansen that exceptions to employment at-will “should be applied

parsimoniously” and that the third category “poses analytical challenges different from, and generally greater than the others” even when the statutory right or privilege “carries strong public policy credentials.” *Id.* at 952-953. Defendant also points to other recent decisions, including Buckner v. Kennard, 99 P.3d 842 (Utah 2004), and Gottling v. P.R. Inc., 61 P.3d 989 (Utah 2002), as showing the Court’s reluctance to add causes of action to legislative schemes when the Utah Legislature could have done so but did not. Defendant further argues that even if the public policy wrongful discharge claim is applied to terminations for seeking UWCA benefits, it should not be extended to claims of constructive discharge, other forms of retaliation or internal opposition to an employer’s workers’ compensation practices, noting jurisdictions such as Illinois that have refused to expand the common law exception beyond retaliatory discharge, see, e.g., Zimmerman v. Buchheit of Sparta, Inc., 645 N.E. 2d 877 (Ill. 1995).

### Conclusion

This court concludes that the question outlined herein is unsettled under existing Utah law. Accordingly, the clerk of this court shall submit to the Utah Supreme Court a certified copy of this Certification, together with the briefs filed in this court and any portion of the record before this court that may be required by the Utah Supreme Court. Pursuant to Rule 41 of the Utah Rules of Appellate Procedure, this court orders that the fees and costs of this Certification shall be apportioned equally between the parties.

DATED this 11. day of April, 2005.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Tena Campbell", written in a cursive style.

TENA CAMPBELL  
United States District Judge

Approved as to form:



Ralph E. Chamness

alt

United States District Court  
for the  
District of Utah  
April 13, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 1:04-cv-00067

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Mr. Erik Strindberg, Esq.  
STRINDBERG SCHOLNICK & CHAMNESS LLC  
44 EXCHANGE PL 2ND FL  
SALT LAKE CITY, UT 84111  
EMAIL

Jathan W. Janove, Esq.  
JANOVE BAAR ASSOC  
9 EXCHANGE PL STE 1112  
SALT LAKE CITY, UT 84111  
EMAIL

Tab B

## EXHIBIT B

### IN 36 STATES, COURTS DID NOT CREATE A CAUSE OF ACTION IN THE ABSENCE OF AN ANTI-RETALIATION OR INTERFERENCE STATUTE

#### 1. IN 5 STATES, COURTS EXPRESSLY REFUSED TO CREATE A CAUSE OF ACTION, AND THE LEGISLATURE HAS CONTINUED NOT TO ENACT AN ANTI-RETALIATION OR INTERFERENCE STATUTE

- Delaware     *Emory v. Nanticoke Homes, Inc.*, 1985 Del. Super. LEXIS 1063 (Del. 1985) (“In Delaware, it is for the General Assembly, not the judiciary, to declare the public policy of the state”).
- Georgia     *Evans v. Bibb Company*, 178 Ga. App. 139; 342 S.E.2d 484 (1986) (“Courts may interpret laws, but may not change them”).
- Mississippi     *J.C. Kelly v. Mississippi Valley Gas Company*, 397 So. 2d 874 (Miss. 1981) (“[t]he merits of his arguments are clearly for the Legislature to assess, not the judiciary. Our Workmen’s Compensation Law does not contain a provision making it a crime for an employer to discharge an employee for filing a claim”).
- Rhode Island     *Pacheco v. Raytheon Company*, 623 A.2d 464 (R.I. 1993) (“It is not the role of the courts to create rights for persons whom the Legislature has not chosen to protect”).
- Wisconsin     *Brown v. Pick’N Save Food Stores*, 138 F. Supp. 2d 1133 (Wis. 2001) (“[T]he Wisconsin legislature created forfeiture as the only remedy in this situation, and in 1975 it created a cause of action for a related kind of discrimination but not for this kind of discrimination”).

#### 2. IN 6 STATES, COURTS EXPRESSLY REFUSED TO CREATE A CAUSE OF ACTION, BUT THE LEGISLATURE HAS SINCE CREATED A CAUSE OF ACTION BY ENACTING AN ANTI-RETALIATION OR INTERFERENCE STATUTE

- Alabama     *Meeks v. Opp Cotton Mills, Inc.*, 459 So. 2d 814, 815 (Ala. 1984) (“Why then should we not leave it to the legislature to change the rule in this case, where the employee was discharged allegedly for seeking workmen’s compensation benefits, a legislatively created right?”), *superseded by statute*, ALA. CODE § 25-5-11.1 (prohibiting termination,

as recognized in *Twilley v. Dauber & Coated Prods., Inc.*, 536 So. 2d 1364 (Ala. 1988).

- Florida *Segal v. Arrow Industries Corporation*, 364 So. 2d 89 (Fla. 1978) (“There is no statute for retaliatory discharge. The court declines to follow the reasoning of cases such as *Frampton*, superseded by *FLA. STAT. § 440.205* (prohibiting discharge, threatening discharge, intimidation or coercion).
- Missouri *Christy v. Paul Petrus, d/b/a South Side Auto Parts*, 365 Mo. 1187; 295 S.W.2d 122 (1956) (“We can hardly conceive of the legislature making such careful provision for the rights and compensation of injured employees covered by the Act and yet omitting a specific provision for recovery of damages for wrongful discharge if there had been any intent to create such a right”) superseded by statute, *MO. REV. STAT. § 287.780* (prohibiting discharge or discrimination in any way) as recognized in *Kratzer v. Polar Custom Trailers, Inc., et al.*, 2003 U.S. Dist. LEXIS 16981 (Mo. 2003).
- New York *N.Y. WORKERS’ COMP. LAW § 120* (prohibiting discharge or discrimination in any manner), as recognized in (*Axel v. Duffy-Mott Company, Inc.*, 47 N.Y.2d 1; 389 N.E.2d 1075 (1979) (“This relatively recently enacted statute forbids employers to discharge or otherwise discriminate against employees who claim compensation for job-related injuries or who testify in proceedings to enforce such payment”); cf. *Murphy v. American Home Products Corporation*, 58 N.Y.2d 293; 448 N.E.2d 86 (1983) (“This court has not and does not now recognize a cause of action in tort for abusive or wrongful discharge of an employee; such recognition must await action of the Legislature”).
- North Carolina *Dockery v. Lampart Table Company and U.S. Furniture Industries*, 36 N.C. App. 293; 244 S.E.2d 272 (1978) (“If the General Assembly of North Carolina had intended a cause of action be created, surely, in a workmen’s compensation statute as comprehensive as ours, it would have specifically addressed the problem.”), superseded by statute, *N.C. GEN. STAT. § 95-241* (prohibiting discrimination or retaliatory action), as recognized in *Abels v. Renfro Corporation*, 335 N.C. 209; 436 S.E.2d 822 (1993).



South Carolina *Raley v. Darling Shop of Greenville, Inc.*, 216 S.C. 536; 59 S.E.2d 148 (1950) (dismissing complaint because a retaliatory discharge for filing a worker's compensation claim fails to state a claim), *superseded by statute*, S.C. CODE ANN. § 41-1-80, as recognized in *Hinton v. Designer Ensembles, Inc.*, 343 S.C. 236; 540 S.E.2d 94 (2000) (prohibiting discharge or demotion).

**3. IN 25 STATES, LEGISLATURES FILLED SILENCE BY ENACTING ANTI-RETALIATION OR INTERFERENCE STATUTES IN DEROGATION OF THE AT-WILL RULE**

Alaska *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427 (Alas. 2004) (allowing a cause of action based on ALASKA STAT. § 23.30-247, which prohibits discrimination in hiring, “promotion, or retention policies or practices”).

California *Portillo v. G. T. Price Productions, Inc., et al.*, 131 Cal. App. 3d 285; 182 Cal. Rptr. 291 (1982) (allowing a cause of action based on CAL. LABOR CODE § 132a, which prohibits discharge, threatening to discharge or discrimination in any manner).

Connecticut *Baldracchi v. Pratt & Whitney Aircraft Division, United Technologies Corporation*, 814 F.2d 102 (1987) (allowing a cause of action based on CONN. GEN. STAT. § 31-290a, which prohibits discharge or discriminating in any manner).

Hawaii *Takaki v. Allied Machinery Corporation, et al.*, 87 Haw. 57; 951 P.2d 507 (1998) (allowing a cause of action based on HAW. REV. STAT. § 378-32 which prohibits discharge and discrimination based “solely” the employee suffering a work injury).

Indiana *Frampton v. Central Indiana Gas Company*, 260 Ind. 249; 297 N.E.2d 425 (1973) (“We believe the threat of discharge to be a ‘device’ within the framework of 22-3-2-15”) (allowing a cause of action based on IND. CODE ANN. § 22-3-2-15, which provides that “No contract or agreement, written or implied, no rule, regulation or other device shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by this act”).

Iowa *Springer v. Weeks and Leo Company, Inc.*, 429 N.W.2d 558 (1988) (allowing a cause of action based on IOWA CODE § 85.18, which provides that “No contract, rule, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this chapter except as herein provided”).

Kentucky	<i>Overnite Transportation Company v. Michael A. Gaddis, et al.</i> , 793 S.W.2d 129 (1990) (allowing a cause of action based on <i>KY. REV. STAT. ANN. § 342.197</i> , which prohibits discharge, refusal to hire, harassment, coercion or discrimination in any manner).
Louisiana	<i>Robin v. Raoul “Skip” Galan, Clerk of the Court of Jefferson Parish</i> , 545 So. 2d 1129 (La. 1989) (allowing a cause of action based on <i>LA. REV. STAT. ANN. § 23:1361</i> , which prohibits discharge and refusal to hire).
Maine	<i>ME. REV. STAT. ANN. tit. 39-A § 353</i> (prohibits discrimination in any manner).
Maryland	<i>Ewing v. Koppers Company, Inc.</i> , 312 Md. 45; 537 A.2d 1173 (1988) (allowing a cause of action based on <i>MD. CODE ANN. LAB. &amp; EMPL. § 9-1105</i> , which prohibits discharge based “solely” on employee filing a claim).
Massachusetts	<i>Ourfalian v. Aro Manufacturing Company, Inc.</i> , 31 Mass. App. Ct. 294; 577 N.E.2d 6 (1991) (allowing a cause of action based on <i>MASS. ANN. LAWS. CH. 152 § 75B</i> , which prohibits discharge, discrimination in any manner or refusal to hire).
Minnesota	<i>Wojciak v. Northern Package Corporation</i> , 310 N.W.2d 675 (1981) (allowing a cause of action based on <i>MINN. STAT. § 176.82</i> , which prohibits discharge or threatening to discharge).
Montana	<i>Lueck v. United Parcel Service</i> , 258 Mont. 2; 851 P.2d 1041 (1993) (allowing a cause of action based on <i>MONT. CODE ANN. § 39-71-317</i> , which prohibits termination).
New Jersey	<i>Lally v. Copygraphics</i> , 85 N.J. 668; 428 A.2d 1317 (1981) (allowing a cause of action based on <i>N.J. Stat. Ann. § 34:15-39.1</i> , which prohibits retaliation).
Ohio	<i>Wilson v. Riverside Hospital</i> , 18 Ohio St. 3d 8; 479 N.E.2d 275 (1985) (allowing a cause of action based on <i>OHIO REV. CODE ANN. § 4123.90</i> , which prohibits discharge, demotion, reassignment or any punitive action).

Oklahoma	<i>Bishop v. Hale-Halsell Company, Inc.</i> , 1990 OK 95; 800 P.2d 232 (1990) (allowing a cause of action based on <i>OKLA. STAT. tit. 85 § 5</i> , which prohibits discharge).
Oregon	<i>Brown v. Transcon Lines et al.</i> , 284 Ore. 597; 588 P.2d 1087 (1978) (allowing a cause of action based on <i>OR. REV. STAT. § 659A.043</i> , which prohibits discharge, discrimination or refusal to hire).
South Dakota	<i>Niesent v. Homestake Mining Company of California</i> , 505 N.W.2d 781 (S.D. 1993) (allowing a cause of action based on <i>S.D. CODIFIED LAWS § 62-3-18</i> , which provides that “No contract or agreement, express or implied, no rule, regulation, or other device, shall in any manner operate to relieve any employer in whole or in part of any obligation created by this title except as herein provided”).
Tennessee	<i>Clanton v. Cain-Sloan Company</i> , 677 S.W.2d 441 (1984) (“In this regard, we agree with <i>Frampton</i> that a retaliatory discharge constitutes a device under § 50-6-114) (allowing a cause of action based on <i>TENN. CODE ANN. § 50-6-114</i> , which provides that “No contract or agreement, written or implied or rule, regulation or other device, shall in any manner operate to relieve any employer, in whole or in part, of any obligation”).
Texas	<i>Texas Steel Company v. Edward Douglas</i> , 533 S.W.2d 111 (1976) (allowing a cause of action based on <i>TEX. LAB. CODE § 451.001</i> , which prohibits discharge or discrimination in any manner).
Vermont	<i>Murray v. St. Michael’s College and Donald Sutton</i> , 164 Vt. 205; 667 A.2d 294 (1995) (allowing a cause of action based on <i>VT. STAT. ANN. tit. 21 § 710</i> , which prohibits discharge or discrimination).
Virginia	<i>Cooley v. Tyson Foods, Inc.</i> , 257 Va. 518; 514 S.E.2d 770 (1999) (allowing a cause of action based on <i>VA. CODE ANN. § 65.2-308</i> , which prohibits discharge).
Washington	<i>Lins v. Children’s Discovery Centers of American, Inc.</i> , 95 Wn. App. 486; 972 P.2d 168 (1999) (allowing a cause of action based on <i>WASH. REV. CODE § 51.48.025</i> , which prohibits discharge or discrimination in any manner).
West Virginia	<i>Skaggs v. Eastern Associated Coal Corp.</i> , 212 W. VA. 248; 569 S.E.2d 769 (2002) (allowing a cause of action based on <i>W. VA. CODE ANN. § 23-5A-1</i> , which prohibits discrimination in any manner).

Wyoming

*Griess v. Consolidated Freightways Corporation of Delaware*, 776 P.2d 752 (Wyo. 1989) (allowing a cause of action based on *WYO. STAT. ANN.* § 27-14-104(b), which provides that “No contract, rule, regulation or device shall operate to relieve an employer from any liability created by this act except as otherwise provided by this act”).

Tab C

## EXHIBIT C

### IN 11 STATES, COURTS CREATED A CAUSE OF ACTION BASED ON THE GENERAL POLICIES IN THE WORKERS' COMPENSATION STATUTE, DESPITE THE ABSENCE OF A SPECIFIC ANTI-RETALIATION OR INTERFERENCE STATUTE

- Arizona      *ARIZ. REV. STAT. § 23-1501* (prohibits retaliatory termination and provides the right to bring a tort claim for wrongful termination). Although the Arizona Supreme Court indicated in *Wagenseller v. Scottsdale Memorial Hospital et al*, 147 Ariz. 370, 710 P.2d 1025 (1985) (that an at-will employee could bring a wrongful termination in violation of public policy and that the court itself could determine the public policy from common law, the Arizona legislature rebuked the court for usurping its function. *Galati v. America West Airlines, Inc.*, 205 Ariz. 290; 69 P.3d 1011 (2003) (“The legislature in enacting A.R.S. § 23-1501 took express exception to the court’s indication that it rather than the legislature had the authority to define public policy”).
- Arkansas      *Wal-Mart v. Pam Baysinger*, 306 Ark. 239; 812 S.W.2d 463 (1991) (creating a cause of action based on criminal statute), *superseded by ARK. CODE ANN. § 11-9-107* (prohibits discrimination in regard to hiring or employment and provides penalties as determined by the Workers’ Compensation Commission; specifically annulling *Wal-Mart*) *as recognized by Tackett v. Crain Automotive d/b/a Car Pro*, 321 Ark. 36; 899 S.W.2d 839 (1995) (“There is no doubt that the legislature’s intent in the passage of Act 796 of 1993 [amending Ark. Code Ann. § 11-9-107] in fact its avowed purpose was to overrule our decisions [in three cases, including *Wal-Mart*], where we” created retaliatory discharge tort based on the criminal statute) (J. Corbin dissenting opinion).
- Colorado      *Lathrop v. Entenmann’s Inc.*, 770 P.2d 1367; 1989 Colo. App. LEXIS 26 (1989).
- Illinois      *Kelsay v. Motorola, Inc.*, 74 Ill. 2d; 384 N.E.2d 353 (1978) (creating a wrongful discharge tort based on “beneficent purpose” of the workers’ compensation law).
- Kansas      *Murphy v. City of Topeka-Shawnee County Department of Labor Services et al.*, 6 Kan. App. 2d 488; 630 P.2d 186 (1981).

- Michigan      *Svento v. The Kroger Company*, 69 Mich. App. 644; 245 N.W.2d 151 (1976) (retaliatory discharge contravenes public policy) This state now has a statute to enforce retaliatory discharge *MICH. COMP. LAWS* § 418.301 (prohibiting discharge or discrimination in any manner).
- Nebraska      *Jackson v. Morris Communications Corporation*, 265 Neb. 423; 657 N.W.2d 634 (2003).
- Nevada      *Hansen v. Harrah's*, 100 Nev. 60; 675 P.2d 394 (1984).
- New Mexico      *Michaels v. Anglo America Auto Auctions, Inc.*, 117 N.M. 91; 869 P.2d 279 (1994) (enforcing *N.M. STAT. ANN.* § 52-1-28.2) (prohibiting discharge, threatening to discharge or retaliating).
- North Dakota      *Krein v. Marian Manor Nursing Home and Rodney Auer*, 415 N.W.2d 793 (1987) (allowing a cause of action based on *N.D. CENT. CODE* § 65-01-01, which provides a cause of action based on language in the workers' compensation act providing for "sure and certain relief").
- Pennsylvania      *Shick v. Donald L. Shirey T/D/B/A Donald L. Shirey Lumber*, 465 Pa. Super. 667; 691 A.2d 511 (1997).

Tab D



## **EXHIBIT D**

**IN 3 STATES, COURTS HAVE NOT DETERMINED WHETHER A CAUSE OF ACTION EXISTS AND THE LEGISLATURE HAS NOT ENACT AN ANTI-RETALIATION OR INTERFERENCE STATUTE**

Idaho

New Hampshire

Utah

## **CERTIFICATE OF SERVICE AND FILING**

I hereby certify that on December 12, 2005 I served the foregoing

OPENING BRIEF OF APPELLANT on:

Erik Strindberg  
Strindberg, Scholnick & Chamness, LLC  
426 North 300 West  
Salt Lake City, UT 84103

by mailing by first class to each person listed above two (2) full and correct copies thereof.

I further certify that I filed the foregoing OPENING BRIEF OF

APPELLANT on:

Clerk of the Court  
Utah Supreme Court  
450 South State, Fifth Floor  
P.O. Box 140210  
Salt Lake City, Utah 84114-0210

by mailing by first class mail, the original and ten (10) true and correct copies thereof.

I further certify that said copies were contained in a sealed envelope addressed to each person at the addressed listed above and Administrator at the addresses listed above, said sealed envelopes were then deposited in the post office at Portland, Oregon.

A handwritten signature in cursive script that reads "Jathan Janove/sj". The signature is written in dark ink and is positioned above a horizontal line.

**Jathan Janove**  
**Attorneys for Appellant**  
**La-Z-Boy Incorporated**

CERTIFICATE OF SERVICE