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Lawrence Scott Robertson v. Utah Fuel Company : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

LAWRENCE SCOTT ROBERTSON,)	
)	
Plaintiff-Appellant,)	Case No. 940147-CA
)	
vs.)	
)	Priority No. 14(b)
UTAH FUEL COMPANY,)	
)	
Defendant-Respondent,)	
)	

REPLY BRIEF OF APPELLANT

APPEAL FROM SUMMARY JUDGMENT OF THE SEVENTH JUDICIAL DISTRICT COURT
OF CARBON COUNTY
HONORABLE BRYCE K. BRYNER
CASE NO. 920700021

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Determinative Constitutional provisions,
statutes, is not required. I represent
this to the Court.

John L. Black Jr

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BRIEF OF APPELLANT

ARGUMENT

POINT I

UTAH'S DISCLAIMER CASES ARE CLEARLY DISTINGUISHABLE.

A. Introduction

Plaintiff Lawrence Scott Robertson was summarily fired after ten years of faithful, productive, and loyal service to Utah Fuel Company (the "Company"). He was fired as punishment for his admitted substance abuse problem. (See Statement of Relevant Facts, Brief of Appellant) This was in direct violation of the Company's Approved Policy on Alcohol, Drugs, and Controlled Substances, which promised that those who voluntarily came forward to request help would be offered treatment without fear of retribution. (See Appendix 4, to Brief of Appellant) Robertson

was fired without first being provided with progressive discipline as promised in the Company's employee handbook.

Both parties have cited the cases of Johnson v. Morton Thiokol, Inc., 818 P.2d 997 (Utah 1991) and Hodgson v. Bunzl Utah, Inc., 844 P.2d 331 (Utah 1992) in their initial briefs. The Company has also referred to the recently decided cases of Kirberg v. West One Bank, 236 Ut.Adv.Rep. 20 (Ct. App. April 1, 1994) and Sorensen v. Kennecott-Utah Copper Corp., 236 Ut.Adv.Rep. 36 (Ct. App. April 11, 1994). They argue that these cases are controlling. A close examination of these decisions reveals that Robertson's case is clearly distinguishable on its facts, and the facts in this case compel a reversal of the summary judgment.

B. Kirberg v. West One Bank.

Kirberg v. West One Bank, supra, involved the termination of Patricia Kirberg's employment as branch manager of West One Bank's West Jordan branch. She was fired for failing to report what she had heard about the legal problems and criminal charges against the infamous Dr. Robert Davis, a customer with substantial deposits and a substantial existing loan. Kirberg argued that she could not be fired without cause and without progressive discipline. She based this on her "belief" that this was the company's policy.

West One pointed out that Kirberg's signed employment application contained a disclaimer of contractual liability. In addition to this, West One's Human Resource Manual contained an

"at-will" disclaimer. This manual also provided that, "Depending on the severity of the problem, disciplinary action may result in progressive discipline, a negotiated voluntary separation, or immediate involuntary separation." [Emphasis added]

Later, these key portions of the manual were incorporated into yet another separate booklet entitled "Code of Conduct." Kirberg received a copy of this and signed a statement acknowledging that she had read it.

The Utah Court of Appeals affirmed summary judgment, finding that Kirberg's observations and training that led her to the belief that discipline should be progressive, and that she would not be fired without cause, did not create a genuine fact issue sufficient to defeat summary judgment. Kirberg had failed to identify any affirmative and definite acts of West One, demonstrating West One's intent to modify its at-will contract with her. The court held that she had not raised a jury question as to whether West One nullified its disclaimers and affirmatively offered her employment other than at-will.

Plaintiff Robertson presents a much stronger case. His case is based on a clear-cut company policy which is not contained within the handbook and thus not subject to its disclaimers. (Appendix 4, Brief of Appellant) The clear import of this policy, as confirmed by the testimony of Robertson's supervisor, William Shriver, as well as past company practices, is that those who voluntarily come forward to request treatment, before being found in violation of the policy, would be offered treatment, and would

not otherwise be sanctioned. On the other hand, violations of this company policy "may" result in disciplinary action.

Unlike Kirberg, Utah Fuel's handbook is not at all equivocal in its directives regarding progressive discipline. It states at page 14:

When these situations develop, it is very important that they be handled fairly. To accomplish this, we have implemented the following procedures:

STEP ONE: If there is a problem with your workmanship, safety, attendance, relationships with others or similar matters, your supervisor will discuss the problem with you. . . . [Emphasis added]

(Appendix 5, Brief of Appellant)

There is nothing indefinite in the directive, "Your supervisor will discuss the problem with you." This action is mandated! West One's analogous provision stated:

Depending on the severity of the problem, disciplinary action may result in progressive discipline, a negotiated voluntary separation, or immediate involuntary separation. [Emphasis added]

Kirberg, supra, at 21. Utah Fuel has taken affirmative and definite acts that clearly demonstrate its attempt to modify their at-will contract with Robertson. Thus, Kirberg does not support Utah Fuel's position herein.

C. Sorensen v. Kennecott-Utah Copper Corporation.

Sorensen v. Kennecott-Utah Copper Corporation, supra, involves an appeal of the trial court's dismissal pursuant to Rule 41(b) of the Utah Rules of Civil Procedure. Rule 41(b) allows the court in a bench trial to dismiss when "upon the facts and law the

plaintiff has shown no right to relief." On appeal, the "clearly erroneous" standard applies and the court must view the evidence in a light most favorable to the trial court's findings. Supra at 37.

The standard of review in this matter is, of course, quite different. In reviewing a summary judgment, the appellate court must view the facts and all reasonable inferences drawn therefrom in a light most favorable to the non-moving party. Sanderson v. First Security Leasing Co., 844 P.2d at 303 (Utah 1992).

Sorensen relied heavily on a 1973 company booklet entitled "General Rules of Conduct" which was in use when he was first hired. Sorensen argued that this document required termination for cause only, and then only after a written warning, or a suspension subject to hearing rights. Significantly, this 1973 Code had been superseded by numerous revised editions, including a 1986 revision. (Sorensen was terminated in 1989.) Unlike the 1973 Code, subsequent Codes required neither a written warning nor suspension for rule violations. The 1986 Code simply stated, "[e]mployees who do not conform to this general code of conduct will be subject to discipline."

The Utah Court of Appeals held that such an amorphous threat of discipline could not constitute a manifestation by the employer that was "sufficiently definite" to demonstrate an intent to form a relationship other than at-will. Sorensen, supra at 40.

Utah Fuel's "Improvement and Progress Program" is mandatory. It requires basically a verbal warning, a written warning, and a suspension prior to termination. There is nothing ambiguous or

equivocal in its directives, "Your supervisor will meet with you periodically. . . . These meetings will include . . . your supervisor will discuss the problem with you . . ." [Emphasis added]

By contrast, Kennecott's 1986 booklet no longer required a written warning or suspension with hearing rights. It merely stated that failure to conform one's conduct to the Code "will be subject to discipline" without ever specifically defining what that discipline would be. This is clearly different from Utah Fuel's policy.

Utah Fuel cannot now disclaim this self-imposed mandate. Having announced this company policy, Utah Fuel may not now treat its promise as illusory. Toussaint v. Blue Cross and Blue Shield of Michigan, 292 N.W.2d 880 at 895 (Mich. 1980).

Utah Fuel now argues that the handbook applied only to hourly workers. This argument fails scrutiny as well. The strongest argument against Utah Fuel is the handbook itself which contains no such limitation within its 98 pages. Moreover, both William Shriver and the plaintiff testified that the handbook applied to salaried and hourly workers alike. The company argues that references to "supervisor" in the handbook imply that it does not apply to salaried workers. This argument is meaningless as Robertson was a supervisor, but he had a supervisor, Shriver. Shriver had a supervisor, Zumwalt; and Zumwalt had a supervisor as well, Vernal Mortensen. (Zumwalt depo. at 140)

Judge Scott Daniels, in Sorensen, found that references in Kennecott's handbook to "contact a shop steward or union representative" were supportive of Kennecott's claim that the manual applied only to union employees. The word "supervisor" provides Utah Fuel no such corroboration. Moreover, ambiguities in the handbook must be interpreted against Utah Fuel. This Court must view the facts in a light most favorable to Robertson. This Court must therefore accept as fact that Utah Fuel's handbook applied as to Robertson.

D. Johnson v. Morton Thiokol, Inc.

Plaintiff, in his initial brief, recounted the essential facts of Johnson v. Morton Thiokol, Inc., 818 P.2d 997 (Utah 1991) and Hodgson v. Bunzl Utah, Inc., 844 P.2d 331 (Utah 1992). An examination of the facts in these cases discloses that they are clearly distinguishable as well.

In Johnson v. Morton Thiokol, supra, Bill Johnson relied entirely on the company handbook to support his argument that he could not be fired except for cause. He did not claim that Thiokol had failed to comply with its own grievance procedures. In fact, Thiokol had followed its grievance procedure in accordance with the handbook, and Johnson used this fact to support his cause argument. The handbook contained a detailed disclaimer, more detailed than the disclaimers used by Utah Fuel. The Utah Supreme Court upheld summary judgment on the basis of the disclaimer. Despite this disclaimer, the Supreme Court stated that Johnson would have been

entitled to challenge his termination under the handbook's procedures, though not the right to be fired only for cause. Id. at 1003.

E. Hodgson v. Bunzl Utah, Inc.

Hodgson v. Bunzl Utah, Inc., supra, provides a good example of what a company ought to do if it truly wants to inform its employees that their employment is at-will. Bunzl Utah, Inc. informed its employees of their at-will status seven different ways. (See Brief of Appellant at p. 30) Hodgson was told in his initial interview that his employment would be at-will. The "New Employee Checklist" further so advised him. The company handbook contained five different at-will references, one of which specifically informed employees that they may not rely on progressive discipline.

Understandably, the Utah Supreme Court had no difficulty in affirming summary judgment. Nevertheless, the court noted, as it had in Johnson v. Morton Thiokol, supra, "An employer may be bound to follow any discharge procedures outlined in an employee handbook." Id. at 333.

Thus, both Johnson and Hodgson instruct us that an employer may be bound to follow its own discharge procedures despite its at-will disclaimers no matter how extensive they may be. Under these precedents, Robertson at a minimum, was entitled to the progressive discipline as required in the company handbook prior to being demoted or fired.

POINT II

ROBERTSON'S CLAIM FOR INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS IS NOT BARRED BY THE WORKERS COMPENSATION LAWS.

Utah Fuel has argued that Robertson's cause of action for intentional infliction of emotional distress is barred by Utah's workers compensation laws. This is not correct. Although ordinarily workers are barred from suing their employers for on-the-job injuries, intentional injuries are the exception. Bryan v. Utah International, 533 P.2d 892 (Utah 1975).

Plaintiff maintains that Utah Fuel fired him to punish him for his substance abuse problem. Prior to obtaining treatment, Robertson's supervisors were completely unaware of his problem. (Shriver depo. at 50, 61, App. 2, Brief of Appellant; Zumwalt depo. at 35) Neither Shriver nor Zumwalt had seen anything in Robertson's work performance to suggest he had a problem. Id. Yet, the day he returned to work following his treatment, Glen Zumwalt, vice president and general manager of the mine, told him he was being demoted four steps to "A-Pay Miner." (Zumwalt depo. at 66, App. 3, Brief of Appellant) Zumwalt told Robertson the reason for this demotion was because of his drug problem. (Robertson depo. at 132-133, App. 1, Brief of Appellant) Utah Fuel's motive was punitive and this was done with the intention of causing Robertson severe emotional distress. Plaintiff has indeed suffered severe emotional distress as a result of these events. (Robertson depo. at 67-68, App. 2, Brief of Appellant)

The Utah Supreme Court has held that a managerial employee's tortious intent can be imputed to his or her own employer if the employee acted within the scope of his authority and was motivated either in whole or in part to carry out the employer's purposes. Hodges v. Gibson Products Co., 811 P.2d 151 at 157 (Utah 1991).

Zumwalt was clearly acting within the scope of his authority when he fired Robertson, thus his tortious intent will be imputed to Utah Fuel Company as a matter of law. Therefore, the workers compensation bar does not apply. (See also, Retherford v. AT&T Communications, 844 P.2d 949 at fn. 8 (Utah 1992))

CONCLUSION

The doctrine of employment at-will creates a mere rebuttable presumption that the employment relationship can be terminated at the will of the employer. This presumption can be overcome by proof of the existence of an implied-in-fact employment contract. The existence of an implied-in-fact employment contract is a fact issue.

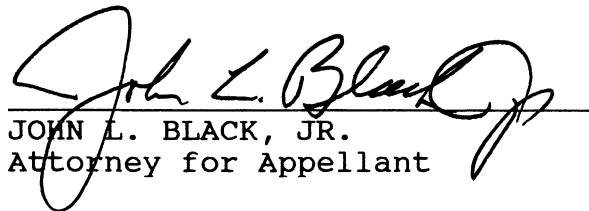
Plaintiff Robertson has established competent evidence that an implied-in-fact employment contract existed between him and Utah Fuel Company. That contract provided that Robertson would not be sanctioned for voluntarily coming forward to seek substance abuse treatment. The contract further required that Robertson would not be demoted or fired, except for violation of certain specified acts establishing good cause. Moreover, sanctions would not be imposed without first providing Robertson with progressive discipline.

Robertson was fired after voluntarily coming forward to obtain treatment in reliance on Utah Fuel's promise. He was fired for having done so. He was fired without having first been provided with progressive discipline in further violation of the parties' implied-in-fact contract.

Utah Fuel attempts to shirk its contractual obligations by asserting that it had disclaimed all such responsibilities. Utah Fuel thus seeks to reserve to itself the right to depart from and treat as illusory all of its promises. This it cannot do. The courts have stated that disclaimers cannot serve as an eternal escape hatch for an employer to make whatever unenforceable promises it is to its benefit to make.

Defendant Utah Fuel Company is not entitled to judgment as a matter of law. This Court should therefore reverse the lower court's ruling and allow this matter to be decided by the jury.

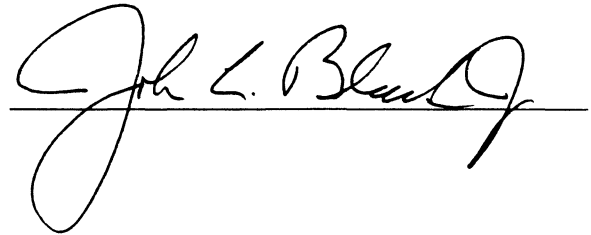
DATED this 11 day of May, 1994.


JOHN L. BLACK, JR.
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 1994, that two true and correct copies of the Appellant's Reply Brief were mailed, postage prepaid, to the following:

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A handwritten signature in cursive script, reading "John L. Blum", is written over a horizontal line.