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Southeastern Utah Association of Local Governments v. Department of Workforce Services, Workforce Appeals Board, and Barbara Dougherty : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Southeastern Utah Association of Local Governments Appellant, v. Department of Workforce Services, Workforce Appeals Board, and Barbara Dougherty Appellee.	Case No. **20051175-CA**

REPLY BRIEF OF APPELLANT

Appeal from a decision of the Department of Workforce Services Workforce Appeals Board; Claimant, Barbara Dougherty

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REPLY TO APPELLEES' STATEMENT OF FACTS

Appellant SEUALG reasserts its statement of facts as a true and correct recitation of the facts in this case. Appelle Workforce Appeals Board sets forth in its statement of facts some incorrect statements requiring correction.

At page 5, the Board states "Buck and Kevin were verbally disciplined by their supervisor (the claimant), on Monday afternoon, April 11, 2005, for making too many phone calls to Utah County." (Brief of Appellee at 5). Additionally, in argument on pages 20-21, the Board states "...Buck Taylor, testified that he had been disciplined by the claimant on Monday, April 11th, which was correct." (Brief of Appellee at 20).

The testimony to the Board by Buck Taylor was that he had never been in trouble but had been "chewed out" for calling associates in Utah County. R. 118:37-40. Buck initially stated it was Monday the 11th but then realized it had occurred after reporting Claimant's conduct to Bill Howell, and must have occurred on the 12th. R. 119:1-15. Claimant, in her testimony, also characterizes the discipline as minor but states that it occurred in the afternoon of the 11th. R. 163. The Board, for its part, did not make a determination as to when the event actually occurred, presumably because it was characterized as being very minor by all involved.

SUMMARY OF REPLY ARGUMENT

The narrow issue in this case is whether the Appeals Board's decision that 'strict discipline' of Claimant could have prevented future harm to SEUALG was unreasonable or irrational. First, Claimant's actions, and the possibility of her continued actions, jeopardized SEUALG's rightful interest by exposing SEUALG to the possiblity of future sex harassment lawsuits, regardless of whether those lawsuits could be proven. Second, Claimant's actions were serious enough that they violated a universal standard of conduct. Because her conduct was sufficiently serious, SEUALG was forced to discharge Claimant

to avoid future harm. Finally, because Claimant refused to admit the conduct, the effectiveness of a 'stern form of discipline' would have been ineffective and SEUALG was left no other option but termination. The Appeals Board's decision in this case was unreasonable and irrational and should be reversed.

ARGUMENT

I. WHETHER BUCK OR KEVIN COULD PREVAIL IN A TITLE VII ACTION HAS LITTLE RELEVANCE TO THIS CASE.

A. For Title VII to apply, the employer must fail to act—here, the employer acted immediately and appropriately.

Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. **42 U.S.C. § 2000e-2(a)(1) (2006).**

Without belaboring the cases, hostile work environment claims have arisen as a subset of Title VII. However, as correctly illustrated by the Appeals Board, referencing the *Ford* case, successful hostile work environment claims require that the conduct was so egregious that the employer should be held liable for failing to remedy or prevent the conduct. *Ford v. West,* 222 F. 3d 767 (10th Cir. 2000).

Certainly, this case is nothing like *Ford*, an unsuccessful hostile work environment case. In *Ford*, the plaintiff was unable to substantiate either his factual claims or the employer's knowledge of events or failure to act. *Id.* In this case, SEUALG discovered

the egregious conduct and immediately acted, which would have foreclosed a claim under Title VII.

More importantly, determining that an employer appropriately discharged an employee is an entirely different question from whether an employer failed to prevent sexual harassment in the workplace. One inquiry (the focus of this appeal) is focused on the employee who acted poorly. The other inquiry (for Title VII purposes) is focused on the employer's relationship with the victim.

In this case, the inquiry is aimed at determining, whether Claimant's actions were so serious that continuing employment would "...jeopardize the employer's rightful interest" and whether the conduct was so serious that Claimant had to be discharged to prevent future harm. R994-405-202, UTAH ADMINISTRATIVE CODE (2005). Title VII considerations are not relevant.

B. The *Ford* case cited by the Appeals Board is entirely different from this case but illustrates the problem— the possibility of litigation at great expense which the employer has a rightful interest in avoiding.

An employer has a rightful interest in preventing sexual harassment and protecting against sexual harassment lawsuits. *Martin v. Department of Workforce Services*, 2004 UT App. 264 (Unpublished); *Autoliv ASP, Inc., v. Department of Workforce Services*, 29 P.3d 7, 12 (Utah Ct. App. 2001).

The benefit of the *Ford* case is to illustrate the potential problem in this case. The *Ford* case, though it was a racial harassment rather than a sex harassment case, made it to the 10th Circuit Court of Appeals. That Court affirmed the trial court below and found the plaintiff's claims to be unfounded and unsupported. *Ford v. West*. The employee in that case failed to establish the facts to prove either that the harassment had occurred or

that the employer knew about it. *Id* at 777. Nevertheless, the employer was undoubtedly forced to expend considerable sums of money and time—likely tens of thousands of dollars worth—to defend against the plaintiff's allegations.

In contrast to *Ford*, the Board's findings of fact in this case fully support SEUALG's position that inappropriate conduct had occurred—that Claimant grabbed Kevin's buttocks, fell over him, told him he was "hung like a horse," and offered him a "blow job." R. 212-213. Notably, the conduct was perpetrated by Claimant in her capacity as direct supervisor to Kevin. There was a very real possibility of a sexual harassment lawsuit in this case because sexual harassment of subordinates had actually occurred.

Certainly, because the conduct was egregious enough to place SEUALG in a position of jeopardy with regard to the potential for **substantiated** lawsuits, SEUALG has a right to protect against that. Because Claimant refused to admit the conduct, the 'stern form of discipline' would have been ineffective and SEUALG was left no other option but termination. In this case, the Appeals Board's decision to allow benefits to Claimant was unreasonable and should be overturned.

II. THE 'UNIVERSAL STANDARD' APPLIES TO BOTH KNOWLEDGE AND CULPABILITY BUT THE APPLICATION OF THE STANDARD IS DIFFERENT FOR CULPABILITY---IT IS A BALANCING TEST.

The Appeals Board asserts that a "universal standard of conduct" consideration has no place in determining whether there was culpability in this case because the only cases addressing the issue apply to the knowledge prong of a just cause discharge.

Additionally, the Board asserts that Claimant's actions did not satisfy the culpability requirements of a just cause discharge.

First, according to statute, the Claimant's conduct must be so serious that continued employment would jeopardize the employer's rightful interest. This Court in *Autoliv* has already determined that sexually explicit material exposes an employer to sexual harassment claims. *Autoliv* at 12. And, the *Martin* court determined that an employer has a strong interest in preventing sexual harassment in the workplace. *Martin* at 265. Thus, an employer has a rightful interest in preventing sexual harassment claims. Moreover, in this case, the Appeals Board found that "it is universal knowledge that the behavior and comments of the claimant towards the subordinate would be contrary to the employer's expectations and rightful interests." R.214. The remaining question, therefore, is whether the Board's final decision, based on those findings, was unreasonable or irrational.

Second, the statute requires a consideration of prior work history, pattern of bad conduct, and seriousness of the current conduct before determining that culpability is or is not present. UTAH ADMIN. CODE R994-405-202. A violation of a universal standard of conduct certainly is an appropriate measuring rod when determining if Claimant was necessarily discharged to avoid future harm. According to statute, if there is only one instance of bad behavior, a pattern can't be established but, if seriousness enough, still may require discharge of the employee to avoid future harm. *Id.* In this case, the Board found that Claimant's behavior was clearly inappropriate in any professional

environment. R. 214. Furthermore, the substance of that behavior, as set forth in the statement of facts, was universally offensive. Since it was directed at a subordinate and occurred during a work trip, Claimant exposed the employer to the potential expense and difficulty of a lawsuit. By itself, the conduct was universally inappropriate and sufficiently serious to justify Claimant's discharge.

Third, despite the Appeals Board's focus on pattern, a pattern of behavior is not required to justify a discharge—it is simply one factor to be considered. UTAH ADMIN. CODE R994-405-202. Additionally, in this case, there is evidence of prior sexually charged behavior by Claimant while traveling for work. During 2004, it was reported that claimant had used the term "blow job" though it was not directed at a subordinate. SEUALG didn't fail to investigate or take action. Instead, SEUALG determined that Claimant's actions on that occasion, while likely inappropriate, were not directed at subordinates and were probably outside the scope of the SEUALG's ability to discipline her. R. 222. Those events may also not conclusively establish a pattern but they are certainly relevant to the analysis.

Finally, most informative in this case, is Claimant's failure to even acknowledge her behavior or to remedy the situation. She denied everything even before action was taken to terminate her employment. R. 213. That denial is the factor that so clearly justified SEUALG's determination to proceed with Claimant's termination and demonstrates the unreasonable conclusion of the Appeals Board. SEUALG could have considered lesser sanctions or discipline—if Claimant had "owned up" to her conduct.

By Claimant's denial, however, SEUALG was left with little alternative but to terminate her employment in order to protect itself.

Because Claimant's conduct was so severe, was directed at her subordinates, and potentially exposed SEUALG to very costly lawsuits (whether supported or not), SEUALG had to take action to prevent future harm. Claimant's denial of the conduct prevented the consideration of lesser sanctions and the Appeals Board's conclusion that 'stern discipline' was a viable alternative is unreasonable and irrational. This Court should reverse the decision on those grounds.

CONCLUSION

SEUALG respectfully requests that this Court reverse the Workforce Appeals Board's decision as unreasonable and irrational given the Appeal Board's findings of fact in the case.

RESPECTFULLY SUBMITTED this 3rd day of June, 2006.

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CERTIFICATE OF SERVICE

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