Supplemental Opinion on Denial of Rehearing
April 4, 1988

747 S.W.2d 579

PER CURIAM. Petition for rehearing is denied.

PURTLE, J., dissents.

DUDLEY, J., would grant rehearing.

JOHN I. PURTLE, Justice, dissenting. I agree with the petitioner and *amicus curiae* that we should reconsider our opinion in this case and grant rehearing. Several independent attorneys, the Arkansas Trial Lawyers Association, and the

AFL/CIO have joined in this impressive brief filed in support of the petition for rehearing. Their arguments are very persuasive.

The outstanding characteristic of the opinion in this case is that it clearly requires employees to suffer considerably more outrageous conduct by employers than is required of non-employees. This is a distinction not previously made by any court so far as I can determine. It is a result argued by no one and sought by no one.

I agree with petitioner that this court erroneously substituted its own view of the facts for that of the jury. The evidence presented to the jury concerning the employer's conduct toward this petitioner showed that the employer:

1. communicated the false message to other employees that the appellant blew the whistle on their overcharges to the government causing the company to pay over $1,000,000 in penalties or fines;

2. demoted him from highest paid sales position to that of a beginning salesman and transferred him to an especially created sales area in Texas;

3. wrote a letter to him setting up his termination (This typed letter had been used to get rid of others);

4. repeatedly and falsely accused him of misconduct when they knew he was under severe stress;

5. refused to issue stock he had earned;

6. sent him on many false sales leads;

7. made unauthorized deductions from his salary or commission;

8. threatened to sue him;

9. placed him under surveillance by other employers;

10. continued this type of conduct for eighteen months; and

11. admitted its conduct was intended as "harassment."

That's only eleven of the overt acts directed at the appellant.

What course of action short of physical violence could be more outrageous? Obviously the appellee desired to inflict this humiliation and embarrassment upon the petitioner in order to get even with him because they thought he was a "whistle blower."

The tort of outrage was described by this court in *Growth Properties* v. *Cannon*, 282 Ark. 472, 669 S.W.2d 447 (1984), where we stated:

> [T]he essence of the tort of outrage is the injury to the plaintiff's emotional well-being because of outrageous treatment by the defendant. If the conduct is sufficiently flagrant to give rise to tort, then the injury the law seeks to redress is the anguish itself and it need not rest, parasitically, on more demonstrative loss or injury. . . . [T]he argument confuses the intent to cause suffering with the intent to do an act from which suffering can be expected to result. The former may be maliciously intended while the latter may be merely the result of conscious indifference to the consequences. But even the latter, if sufficiently wanton, will sustain the award.

These words defining the tort of outrage describe well the activities of the employer in this case. In fact, the acts of the appellant in this case go beyond the wrongful acts in every case where we have recognized this tort.

"Wrongful discharge" by its very terms is a "tort." If based upon contract the suit would be for damages for breach of contract or for specific performance. Every charge in the complaint and every pleading and the judgment in this case relate to a tort. As if by "plain error" this court reached back into the past, pulling out an archaic ruling from the only jurisdiction so holding, to declare for the first time ever that this "tort" is a "contract". I agree with petitioner that: "For this court to adopt an exclusive contract remedy for wrongful discharge and then make the measure of damages back pay [up until] trial would not merely put Arkansas in a distinct minority but would, in fact, make it by far the most regressive state in protecting workers and the public welfare."

We should reconsider our opinion and grant a rehearing in order that our laws and decisions relating to the tort of outrage and the employment-at-will doctrine remain intact. It is not necessary to overrule any precedent or construe any statute to reach the just and fair result of granting rehearing.