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The Dallas Court of Appeals Holds That the Sabine Pilot Exception That Prevents an Employer from Terminating an at-Will Employee for the Sole Reason of Refusing to Perform an Illegal Act Does Not Extend to Employees Protected by a Collective Bargaining Agreement - *Simmons Airlines v. Lagrotte*

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THE DALLAS COURT OF APPEALS HOLDS THAT THE *SABINE PILOT* EXCEPTION THAT PREVENTS AN EMPLOYER FROM TERMINATING AN AT-WILL EMPLOYEE FOR THE SOLE REASON OF REFUSING TO PERFORM AN ILLEGAL ACT DOES NOT EXTEND TO EMPLOYEES PROTECTED BY A COLLECTIVE BARGAINING AGREEMENT—*SIMMONS AIRLINES V. LAGROTTE*

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THE GENERAL RULE in Texas states that employment for an indefinite period may be terminated at will and without cause.[1] Apart from statutory exceptions created by the state legislature,[2] *Sabine Pilot*[3] is the only case that has carved out a common law exception to this rule. It states that an at-will employee may maintain a claim for wrongful discharge if the sole reason for the employee's discharge was that he or she refused to perform an illegal act.[4] In the recent case of *Simmons Airlines v. LaGrotte*,[5] the Dallas Court of Appeals was asked to apply that exception to employees protected by a collective bargaining agreement. It refused to do so.[6] By not applying the *Sabine Pilot*

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1 E. Line & Red River R.R. Co. v. Scott, 10 S.W. 99, 102 (Tex. 1888).

2 TEX. LAB. CODE ANN. § 451.001 (Vernon 1996) (prohibiting retaliation for filing a worker's compensation claim in good faith); TEX. LAB. CODE ANN. § 101.052 (Vernon 1996) (prohibiting denial of employment based on union membership); TEX. GOV'T CODE ANN. § 431.006 (Vernon 1998) (prohibiting termination based on active duty in the state military); TEX. CIV. PRAC. & REM. CODE ANN. § 122.001 (Vernon 1997) (prohibiting termination due to jury service); TEX. LAB. CODE ANN. § 21.051 (Vernon 1996) (prohibiting discrimination based on employee's race, color, disability, religion, national origin, age, or sex).

3 Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985).

4 *Id.* at 735.

5 Simmons Airlines v. LaGrotte, 50 S.W.3d 748 (Tex. App.—Dallas 2001, pet. denied).

6 *Id.* at 752.

exception to "just cause"[7] employees as well as "at-will" employees, the court ignores the underlying purpose of the exception, which is to prohibit employers from pressuring their employees into conduct that is contrary to public policy against crime.[8]

Appellant Simmons Airlines employed appellee Michael LaGrotte as a commercial airline captain.[9] On Sunday, November 24, 1996, LaGrotte was scheduled to fly American Eagle Flight 3701 from Dallas/Fort Worth International Airport ("DFW") to Houston's Hobby Airport on a turboprop ATR-42.[10] This is the same type of airplane that crashed to the ground two years earlier in Roselawn, Indiana, killing everyone on board, due to an accumulation of ice on the wings.[11] The weather on November 24 was similar to the weather conditions during the Roselawn crash: wet and cold with forecasts of freezing rain up to 16,000 feet.[12] Concerned about the safety of flying into such conditions, LaGrotte made several phone calls to the dispatcher on duty, Mark Tremell, to inquire about the weather conditions.[13] Tremell and LaGrotte were ultimately unable to agree as to whether the flight could take off safely.[14] In this situation, both the Federal Aviation Administration ("FAA") regulations and the American Eagle Flight Manual expressly state that the flight should not take off if the captain and the dispatcher are not in complete agreement about the safety of the flight.[15] LaGrotte, however, contends that Simmons maintains a system of pressuring pilots into flying ("pilot pushing") when the pilot is the party who believes the flight cannot be conducted safely,

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[7] "Just cause" employment refers to employment relationships in which the employer promises not to terminate the employee unless there is good cause, like inadequate job performance or a systemic cause like a large-scale reduction in the work force due to business factors. *See* MICHAEL J. ZIMMER ET AL. CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 20-21 (5th ed. 2000).

[8] *Sabine Pilot Serv.*, 687 S.W.2d at 735 (Kilgarlin, J., concurring) ("Allowing an employer to require an employee to break a law or face termination cannot help but promote a thorough disrespect for the laws and legal institutions of our society.").

[9] *Simmons Airlines*, 50 S.W.3d at 750.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Brief for Appellee at 2, Simmons Airlines v. LaGrotte, 50 SW.3d 748 (Tex App–Dallas 2001) (No.05-00-00656-CV). A flight dispatcher provides pilots with weather information and fuel requirements and is responsible for making sure that every flight is dispatched safely. *See* 14 C.F.R. § 121.463.

[14] Brief for Appellee at 2, *Simmons Airlines* (No. 05-00-00656-CV).

[15] *Id.*

and that he was subjected to that pressure by Simmons' director of flight operations.[16] LaGrotte ultimately signed the dispatch release and took off.[17]

Within thirty seconds after takeoff, at an altitude of 1,000 feet, the plane's level 3 ice protection warning light came on, indicating the highest level of exposure.[18] The first officer requested an expedited climb to move out of the icing conditions, and air traffic control cleared the plane up to 4,000 feet.[19] Between 3,000 and 4,000 feet, the icing conditions worsened to the point that both pilots could see ice accumulating on the wings, the fuselage, and the windshield.[20] Air traffic control would not authorize the plane to climb higher than 4,000 feet at that time, so LaGrotte decided to descend to warmer air and return to DFW.[21] The plane began shedding ice shortly after it started to descend, and it landed safely at DFW.[22] As soon as LaGrotte entered the pilot's lounge after landing, he was told to contact crew scheduling, whereupon the lead coordinator told him that Flight 3701 was being refueled, and that LaGrotte was to take off again.[23] When LaGrotte refused, the lead coordinator suspended him in accordance with the instructions of Simmons' director of flight operations.[24] LaGrotte went home, but the weather continued to worsen, eventually forcing the lead coordinator to cancel Flight 3701, along with approximately 224 other American Eagle flights that were cancelled due to weather that day.[25]

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16 *Simmons Airlines*, 50 S.W.3d at 750. Tremmell called the dispatch supervisor, Robert Nault, who, after talking to LaGrotte, called Simmons' director of flight operations, Jack Shattuck (just two steps removed from the company president). Shattuck then called LaGrotte and said, "I'd better see you in that airplane," despite the fact that Shattuck was at his home in Longview and had no idea what the weather was like at DFW. Simmons agreed that "pilot pushing" is illegal. Brief for Appellee at 3-4, *Simmons Airlines* (No. 05-00-00656-CV).

17 *Simmons Airlines*, 50 S.W.3d at 750. LaGrotte maintained that he decided to take off based on the belief that (1) an acceptable corridor of weather existed into which he could take off, (2) he could "better assess the situation" once he was in the air, and (3) he could safely land at two different diversion cities if the weather worsened. *See* Brief for Appellee at 5, Simmons Airlines (No. 05-00-00656-CV).

18 Brief for Appellee at 5, *Simmons Airlines* (No. 05-00-00656-CV).

19 *Id.* at 5-6.

20 *Id.* at 6.

21 *Id.*

22 *Id.*

23 Brief for Appellee at 7, *Simmons Airlines* (No. 05-00-00656-CV).

24 *Id.*

25 *Id.*

LaGrotte maintained his belief that he would have violated Federal Airline Regulations ("FAR") regarding icing conditions if he had continued Flight 3701 or gone back up on another flight, but Simmons inquiry focused on the fact that LaGrotte was threatening to expose its system of pilot pushing.[26] After several meetings, four of Simmons' senior officers conducted a conference call in which they decided to fire LaGrotte.[27] At no time during this call did the decision makers discuss a previous incident in which LaGrotte was disciplined – an event later used to justify LaGrotte's termination.[28] LaGrotte received his termination notice on December 30, which stated that he was being fired for poor judgment and for failing to follow the "Severe Icing Checklist."[29]

LaGrotte filed a grievance with his union, but withdrew it and commenced this lawsuit when the union informed him that his grievance would not be heard for two years.[30] LaGrotte filed suit in the 68th District Court of Texas alleging wrongful discharge under *Sabine Pilot* (claiming that Simmons terminated him for the sole reason that he refused to perform an illegal act.)[31] LaGrotte moved to bifurcate the trial into two phases – one on liability and one on damages – so as not to confuse the jury after Simmons dug up "after-acquired evidence" regarding

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[26] *See id.* at 8-10. LaGrotte expressed his concern about "pilot pushing" to other pilots. *See id.* at 9. LaGrotte also expressed this concern to Simmons' chief pilot, Cliff Kliesing, and Simmons' fleet manager, Bruce Hildewig, who in turn revealed this to Simmons' director of flight operations, Jack Shattuck, the same person who told LaGrotte, "I'd better see you in that plane." *Id.* at 10.

[27] Brief for Appellee at 11, *Simmons Airline* (No. 05-00-00656-CV).

[28] *See id.* Simmons maintained a progressive disciplinary procedure in which three strikes justified termination. LaGrotte received a written report in March 1996 after his first officer filed a report indicating that LaGrotte improperly tried to repair a flight instrument. *See id.* at 11. Simmons did not mention this incident until *after* litigation commenced. *Id.* at 13. LaGrotte received a second warning after the plane he was piloting bumped into ground equipment in May 1996. *Simmons Airlines*, 50 S.W.3d at 751.

[29] *See Simmons Airlines*, 50 S.W.3d at 751. In particular, LaGrotte was criticized for failing to climb during the icing incident and for failing to increase the propeller RPM to 100 percent, both as per the checklist. However, this criticism failed to take into account that (1) air traffic control restricted LaGrotte to 4,000 feet, (2) the result of climbing was speculative as the weather may have been worse or just as bad at higher altitudes, and (3) by the time the first officer called out to increase propeller speed, the plane had already exited the icing conditions, so climbing was unnecessary. Brief for Appellee at 12, *Simmons Airlines* (No. 05-00-00656-CV).

[30] *Simmons Airlines*, 50 S.W.3d at 750; Brief for Appellee at 13, *Simmons Airlines* (No. 05-00-00656-CV).

[31] *Simmons Airlines*, 50 S.W.3d 748.

LaGrotte's alleged misconduct.[32] The trial court granted this request, and a jury ultimately found that Simmons acted with malice in terminating LaGrotte for the sole reason that he refused to perform an illegal act.[33] The trial court entered judgment in LaGrotte's favor in the amount of $2,354,504 in actual damages and $3,459,008 in exemplary damages.[34] The court denied Simmons' motions for judgment notwithstanding the verdict and for a new trial.[35]

In Simmons' first point of error, the airline contends that the trial court impermissibly extended the *Sabine Pilot* exception to LaGrotte, who was not an at-will employee.[36] Simmons asserts that because LaGrotte is protected by a collective bargaining agreement that provided he could not be terminated without "just cause," he has no cause of action under the *Sabine Pilot* exception.[37]

Writing for the court, Justice LaGarde only considered Simmons' first point of error – whether an employee protected by a "just cause" collective bargaining agreement could sustain a

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[32] *See* Brief for Appellee at 14, *Simmons Airlines* (No. 05-00-00656-CV). Simmons' "after-acquired" evidence tried to show that LaGrotte was dishonest in his employment application by not disclosing a teenage misdemeanor conviction for drug possession, even though LaGrotte's attorney advised him that he was not required to disclose that fact. *Id.* Simmons also tried to show that LaGrotte took prescription drugs and steroids, ignoring facts that would have explained his use of those drugs. *Id.*

[33] *Simmons Airlines*, 50 S.W.3d at 749.

[34] *Id.* The trial court modified the jury's original finding of $7,000,000 in exemplary damages in accordance with TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (Vernon 1997). *Id.*

[35] *Id.* at 750.

[36] *Id.* Simmons appealed under nine other points of error, including: (1) the trial court lacked jurisdiction because the federal Railway Labor Act gave exclusive jurisdiction to an arbitration board; (2) federal law preempted LaGrotte's *Sabine Pilot* claim and his claims for compensatory and exemplary damages; (3) LaGrotte did not show that the acts he was discharged for refusing to perform carried criminal penalties as required by Sabine Pilot; (4) there was no evidence that LaGrotte was discharged solely for refusing to perform an illegal act, or that Simmons acted with malice; (5) the trial court abused its discretion when it bifurcated the trial because the case was brought as a tort case; (6) it was error to allow LaGrotte's attorney to testify as a witness; (7) LaGrotte cannot recover mental anguish damages or exemplary damages under *Sabine Pilot*; (8) there was insufficient evidence to support the jury's awards for damages; and (9) the jury's refusal of Simmons' after-acquired evidence defense was against the great weight and preponderance of the evidence. *See* Brief of Appellant at xiv-xvi, *Simmons Airlines* (No. 05-00-00656-CV).

[37] Simmons Airlines, 50 S.W.3d at 750.

cause of action under the *Sabine Pilot* exception.[38] The court stressed the narrowness of the Texas Supreme Court's holding in *Sabine Pilot* and emphasized the breadth of statutory exceptions to the at-will employment doctrine.[39]

Focusing on stare decisis, the court pointed out that on two occasions, the Texas Supreme Court declined to add an exception to the at-will employment doctrine,[40] and on one occasion, its attempt to do so failed.[41] The Texas Supreme Court's hesitation to create new common-law causes of action, along with the emphasized narrowness of the *Sabine Pilot* exception, led the court to conclude that, to adhere to stare decisis, it must not apply the *Sabine Pilot* exception to a "just cause" employee.[42]

The court further posited that the purpose underlying the *Sabine Pilot* exception does not justify its application to "just cause" employees.[43] The exception was created to protect at-will employees who would have no recourse other than termination if they refused to perform an illegal act.[44] But where an employee is protected by a "just cause" provision, the employee has guaranteed contractual protections, such as arbitration proceedings, that relieve the necessity of the *Sabine Pilot* exception.[45] Under these circumstances, the court refused to apply the *Sabine Pilot* exception to LaGrotte and held that he did not have a valid cause of action.[46] As a result of this finding, the court declined to address Simmons' nine other points of error, it reversed the

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[38] *Id.* at 752.

[39] Id. at 752-53. In *Sabine Pilot,* the court states, "We now hold that public policy. . .requires a very narrow exception to the employment-at-will doctrine. . .That narrow exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act." *Sabine Pilot Serv.,* 687 S.W.2d at 735. *See* statutes cited *supra* note 2 (citing statutory exceptions to employment-at-will doctrine).

[40] *Simmons Airlines,* 50 S.W.3d at 752. The two cases the court notes are *Austin v. Healthtrust, Inc.,* 967 S.W.2d 400, 403 (Tex. 1998) and *Winters v. Houston Chronicle Publ'g Co.,* 795 S.W.2d 723, 724-25 (Tex. 1990), both of which involve the discharge of a private employee for reporting illegal activities.

[41] *Simmons Airlines,* 50 S.W.3d at 752; *see* McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69 (Tex. 1989), rev'd, 498 U.S. 133 (1990). This attempt failed because the United States Supreme Court determined that ERISA preempted the state law claim involved.

[42] *Simmons Airlines,* 50 S.W.3d at 753.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

trial court's judgment, and rendered a take-nothing judgment against LaGrotte.[47]

The court was incorrect in refusing to apply the *Sabine Pilot* exception to "just cause" employees. The purpose of *Sabine Pilot* is not merely to protect at-will employees who would otherwise have no recourse; its scope is meant to prohibit employers from abusing their power over employees by pressuring them to perform illegal acts.[48] The employer misconduct that *Sabine Pilot* is concerned with is just as harmful where "just cause" employees are involved as it is when at-will employees are involved. It is the *employer's* conduct at issue in the *Sabine Pilot* exception, not the employee's contractual standing.

In its reliance on precedent, the Court of Appeals misconstrued the implications of prior decisions that have refused to extend the *Sabine Pilot* exception. The decision in *Sabine Pilot* was admittedly based on very particular facts, and the court needed only to create this narrow exception to grant the relief that was prayed for.[49] "But, our decision today in no way precludes us from broadening the exception when warranted in a proper case."[50] In fact, two of the cases the Court of Appeals cites include the condition that, although the court is declining to extend *Sabine Pilot* under those particular facts, that does not foreclose the possibility of extending the exception in the future under different facts.[51] The facts presented in *Simmons Airlines* merits just such a step.

The fact that LaGrotte had remedies available to him through a collective bargaining agreement should not limit his options for recourse. The remedies afforded by a collective bargaining agreement do not restrict an employee from enforcing rights that are independent of the contract.[52] LaGrotte's right to be

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[47] *Simmons Airlines*, 50 S.W.3d at 753.

[48] *Sabine Pilot Serv.*, 687 S.W.2d at 735 (Kilgarlin, J., concurring); Borden v. Amoco Coastwise Trading Co., 985 F. Supp. 692, 699-700 (S.D. Tex. 1997) ("the rationale. . .is to prohibit employers from exerting economic pressure on their employees to perform acts contrary to strong public policy"); Ran Ken, Inc. v. Schlapper, 963 S.W.2d 102, 106 (Tex. App.—Austin 1998, pet. denied) ("The public policy behind the *Sabine Pilot* exception is to deter the violation of criminal laws.").

[49] *Sabine Pilot Serv.*, 687 S.W.2d at 735 (Kilgarlin, J., concurring).

[50] *Id.*

[51] *See Winters*, 795 S.W.2d at 725; *Austin*, 967 S.W.2d at 403-04.

[52] *See* Carnation Co. v. Borner, 610 S.W.2d 450, 453 (Tex. 1980); *see also* Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 258 (1994); Smith v. Bates Technical Coll., 991 P.2d 1135, 1140 (Wash. 2000).

free from this type of coercion is borne of public policy and exists independently from his contractual rights. The courts that abide by this theory focus on the nature of the rights being pursued.[53] "Because they are substantive non-waivable rights of all workers, separate and distinct from rights created by the collective bargaining agreement, judicial recourse is permitted notwithstanding the existence of binding arbitration."[54] Therefore, "sound public policy compel[s] the conclusion that the tort of discharge in violation of public policy should be available to all employees, regardless of their contractual status."[55] Even where the Texas Supreme Court refused to extend the *Sabine Pilot* exception, it did note that the purpose of the exception is to allow a plaintiff to recover where he was "unacceptably forced to choose between risking criminal liability or being discharged."[56] This is precisely the situation LaGrotte faced when he refused to fly.

Although no Texas court has explicitly determined whether the *Sabine Pilot* exception applies to contractual employees,[57] several other jurisdictions hold that it does.[58] These courts recognize the broad purpose of *Sabine Pilot* in its protection of the public by prohibiting the misconduct of employers.[59] The Tenth Circuit recognized that a public policy action similar to *Sabine Pilot* was applicable to a contractual, "just cause" employee even though it was described by the Oklahoma Supreme Court as an exception to the at-will employment doctrine.[60] The Utah Supreme Court emphasized this reasoning by stating, "[we] cannot fulfill such a purpose if we hinge this cause of ac-

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[53] LePore v. Nat'l Tool & Mfg. Co., 540 A.2d 1296, 1300 (N.J. Super. Ct. App. Div. 1988).

[54] *Id.*

[55] Retherford v. AT&T Communications, Inc., 844 P.2d 949, 960 (Utah 1992).

[56] *Winters*, 795 S.W.2d at 724.

[57] *But see* Salmon v. Miller, 958 S.W.2d 424, 429-30 (Tex. App—Texarkana 1997, pet. denied) (holding that a municipal judge could not maintain an action for wrongful discharge under the *Sabine Pilot* exception because he was not an at-will employee because he had served for a specified term). However, the court never reached the merits of whether *Sabine Pilot* applies generally to contractual employees.

[58] *See e.g.*, Davies v. American Airlines, Inc., 971 F.2d 463, 469 (10th Cir. 1992); *Smith*, 991 P.2d at 1140; *Retherford*, 844 P.2d at 959-60; *LePore*, 540 A.2d at 1300; Ewing v. Koppers Co., 537 A.2d 1173, 1174-75 (Md. 1988); Midgett v. Sackett-Chicago, Inc., 473 N.E.2d 1280, 1283-84 (Ill. 1984).

[59] *See supra* note 58.

[60] *Davies*, 971 F.2d at 468-69.

tion on employees' contractual status and thus limit its availability to any one class of employees."[61]

Both Simmons' and the court's portrayal of LaGrotte's claim as an "extension" of the *Sabine Pilot* exception is erroneous. To apply *Sabine Pilot* to LaGrotte would not be an extension at all; it would simply be the equal application of a policy that furthers the public's interest in prohibiting all employers from pressuring their employees to perform illegal acts, regardless of their contractual status. Indeed, any other application of *Sabine Pilot* would be illogical, as it would deny contractual employees access to the courts equal to that of at will employees.[62] The application of *Sabine Pilot* to the entire workforce will serve as a deterrent to *all* employers, thereby avoiding costly litigation and contract disputes. Without this remedy, "just cause" employees will be limited in their options for recourse, and the public policy against employers' misconduct will go un-enforced in large sectors of the workforce.

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[61] *Retherford*, 844 P.2d at 960.

[62] *Ewing*, 537 A.2d at 1175.


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