

1987

Walter K. Gilmore v. Salt Lake Area Community
Action Program, Hal J. Schultz, Robert E. Philbrick,
Fred Geter, Richard Fields, Ann O'Connell, John
Does 1-30 : Brief of Respondent

Utah Court of Appeals

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DOCKET NO. 870395-CA

IN THE UTAH COURT OF APPEALS

WALTER K. GILMORE,)
)
Plaintiff/Appellant,)
)
vs.)
)
SALT LAKE AREA COMMUNITY)
ACTION PROGRAM,)
HAL J. SCHULTZ,)
ROBERT E. PHILBRICK,)
FRED GETER,)
RICHARD FIELDS,)
ANN O'CONNELL,)
JOHN DOES 1-30,)
)
Defendants/Respondents.)

Case No. 870395-CA

BRIEF OF RESPONDENTS

Appeal from a Summary Judgment
Third Judicial District Court
The Honorable Homer F. Wilkinson

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COURT OF APPEALS

IDENTIFICATION OF ALL PARTIES

I. APPELLANTS

The Appellant is Walter K. Gilmore, referred to as "Gilmore" herein. He was the Plaintiff in the Court below.

II. RESPONDENTS

The Respondents, Defendants in the Court below, are as follows:

1. The Salt Lake Area Community Action Program, a State of Utah, private, non-profit corporation, referred to as "S.L.C.A.P" hereafter;

2. Hal J. Schultz, referred to as "Executive Director" hereafter;

3. Robert E. Philbrick, referred to as "Board of Trustee's President" hereafter;

4. Fred Geter, referred to as "Personnel Committee Chairman" hereafter;

5. Richard Fields, referred to as "S.L.C.A.P.'s Personnel Administrator" hereafter;

6. Ann O'Connell, referred to as "Former President of the Board of Trustees" hereafter.

No other parties are identified as subject to this proceeding.

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JURISDICTION

Jurisdiction of this appeal properly lies in the Utah Court of Appeals under Utah Code Ann. §78-2a-3(2)(h)(Supp. 1986).

NATURE OF THE PROCEEDINGS BELOW

This is a civil, non-domestic lawsuit arising out of the termination of Gilmore's employment with the Salt Lake Area Community Action Program. It was instituted in the Third Judicial District Court for Salt Lake County. The Honorable Judge Homer Wilkinson presided. On June 26, 1987, the Court granted the Respondents' Motion for Summary Judgment and entered its Order dismissing Gilmore's Complaint in its entirety.

Gilmore is appealing this Summary Judgment only as it pertains to his first and second causes of action which are for breach of an employment contract. Brief of Appellant/Plaintiff, p. 4. The appeal was originally taken to the Utah Supreme Court. It was then poured over to the Utah Court of Appeals for disposition.

ISSUES PRESENTED FOR REVIEW

1. Whether Gilmore's employment was at will.
2. Whether the Personnel Policies Manual conferred any contractual rights upon Gilmore.
3. Whether Respondents breached the employment contract.
4. Whether the Respondents, other than the Salt Lake Area Community Action Program, are personally liable for breach of the employment contract.

STATEMENT OF THE CASE

This case is a civil, non-domestic dispute arising out of the termination of Gilmore's employment with the Salt Lake Community Action Program. It was first instituted on April 25, 1979, in the United States District Court for the District of Utah, Central Division. Walter K. Gilmore v. Salt Lake Area Community Action Program, et al., #C-79-0258. On December 30, 1980, that Court granted Defendants' motion for summary judgment, dismissing that action on its merits with prejudice, on the grounds that there was no federal jurisdiction. Gilmore appealed to the United States Court of Appeals for the Tenth Circuit. In the decision, Gilmore v. Salt Lake

Area Community Action Program, 710 F.2d 632 (1983), the Tenth Circuit affirmed the District Court judgment and entered the judgment on April 18, 1983. He petitioned for a rehearing which was denied on July 27, 1983. Id.

On July 23, 1984, Gilmore instituted this lawsuit in the Third Judicial District Court for Salt Lake County. Record at 2 (hereafter abbreviated "R."). The Court ordered, pursuant to the parties' stipulation, that the depositions and other discovery taken in the previous Federal Court action be filed and published in this action. Once published, Gilmore and Respondents filed cross motions for summary judgment. R. at 52 & 101.

At the hearing on the summary judgment motions the parties stipulated that Gilmore's sixth, seventh, eighth and ninth causes of action would be dismissed with prejudice. R. at 547-549. The Court then granted Respondents' motion as to all of the remaining causes of action, thereby dismissing Gilmore's Complaint in its entirety, with prejudice. R. at 545 & 547-549.

STATEMENT OF FACTS.

A. Background.

The Salt Lake Area Community Action Program, (hereafter referred to as S.L.C.A.P.) is a private, non-profit corporation organized under the laws of the State of Utah. R. at 2 & 24. It is not a Federal or State program or entity. Gilmore v. Salt Lake Area Community Action Program, 710 F.2d 632. It was organized "to establish, operate and coordinate community action programs in order to prevent and alleviate poverty and its causes, and to cooperate with other organizations, and to secure and expend monies for these purposes." R. at 150. For instance, S.L.C.A.P. performs numerous neighborhood programs including the administration in whole or in part for the Community Food and Nutrition Program, Head Start, Day Care, Handicap Head Start, Weatherization, Energy Crisis Assistance Program and others. Parara Deposition at 72-83.

S.L.C.A.P. funds these programs by qualifying for various grants and contracts. Schultz Deposition at 12-13. One major grant comes from a federal agency, the Community Services Administration. Vanderburgh Deposition at 10-15. S.L.C.A.P. qualifies for this grant by conforming to Community Services Administration

Instructions. Id. at 29; 45 C.F.R. 1060-1070 (repealed 1981). In so doing, S.L.C.A.P. adopted a personnel policies manual in 1972 to conform with these instructions. Schultz Deposition at 9 & Ex. P-1. This manual was in effect at all times material to this action. R. at 5 & 54.

S.L.C.A.P. is controlled by a Board of Trustees. R. at 153; Philbrick Deposition at 12. The Board is composed of local officials, representatives of the poor, business, and labor. R. at 152. The Board's President is the Defendant Robert E. Philbrick. R. at 3; Philbrick Deposition at 5. He succeeded the Defendant Ann O'Connell who was president at the time the employee, Walter Gilmore, was discharged from employment. R. at 3.

The Board of Trustees delegates its authority for the day-to-day operations of S.L.C.A.P. to the Executive Director, Defendant Hal J. Schultz. R. at 151. He has authority for all personnel decisions, including the authority to reduce in force employees as he deems fit. R. at 151; Philbrick Deposition at 15. His decisions are, however, subject to review by the Personnel Committee. R. at 156; Schultz Deposition at 9 & Ex. P-1.

The Personnel Committee is comprised of three members elected by the Board of Trustees. R. at 150 & 156. Its

membership is limited to three of the Board of Trustees' Members. Id.

B. Facts Relating to Gilmore's Contract of Employment.

Gilmore first interviewed for a temporary accounting position with S.L.C.A.P. on March 5, 1974. Gilmore Deposition at 5 & 7-8. In that interview salary was discussed and he was told that the job "was a temporary position, that it would last probably three months." Id. at 7-9; R. at 53. Gilmore does not remember that any documents were provided him. Gilmore Deposition at 9. He does not recall anything else about the interview "except that it was just the - - I'm sure it was a rather typical question and answer type of interview. He asked me about my experience and qualifications and I'm sure the usual type of inquiries." Id. at 8. He was hired for the position the following day, March 6, 1974. R. at 3 & 53.

Gilmore worked in this temporary position for six months. R. at 3. During this time he did not have any conversations with anyone of a supervisory nature concerning the terms of his employment, "Not beyond what I had already understood, as I remember." Gilmore Deposition at 9.

On about September 6, 1974, the position of Fiscal Director became available. Id. at 10. The Executive

Director, Hal J. Schultz, was the immediate supervisor over this position and responsible for staffing it. R. at 2 & 151. Gilmore asked the Executive Director to consider him for the position. Gilmore Deposition at 10. The Executive Director checked Gilmore's qualifications and on September 9, 1974, he was promoted to the position. Id. at 11-12, R. at 3 & 53. Gilmore does not remember any other terms or conditions of his employment discussed at that time other than that he was subject to a six month probationary period. Gilmore Deposition at 12-13. He also does not remember any documents provided him in reference to the terms and conditions of his employment. Id. at 13.

Sometime soon after September 9, 1974, Gilmore was supplied with a copy of the Personnel Policies Manual. Gilmore Deposition at 18. He obtained a copy for his desk and kept it there. Id. He does not recall how he obtained it, who gave it to him or having any conversations with anyone about it at that time. Id. at 18 & 19.

One conversation took place with the Executive Director in terms of Gilmore's responsibilities as fiscal director towards the company and the staff. Id. at 19-21. But Gilmore does not know how, when or where the

conversation took place. He recalls being told, "that the regulations in it would apply. Those, so far as they would apply, I would be expected to follow them in my position as employee as well as supervisor." Id. at 17 & 20. He does not remember any other conversations with anyone else at S.L.C.A.P. relative to his employment through March, 1975. Id. at 22.

The Executive Director maintained a policy of advising persons who were hired that the Manual existed. But he did not personally advise each employee. Schultz Deposition at 16. Gilmore admits, however, that his employment with S.L.C.A.P. contained no specified definite period of time for employment. R. at 117, 575 & 581.¹

C. Facts Relative to Gilmore's Termination.

Sometime during 1976 federal officials indicated that Gilmore was having difficulty in the record keeping and reporting. Gilmore Deposition at 87 - 88. They also reported that S.L.C.A.P.'s accounting systems and procedures were cumbersome and outdated. Schultz

¹ This fact is an admission made by Gilmore in response to Respondents' Request For Admissions. R. at 575 & 581. This admission is reproduced verbatim in the addendum herein, p. 5 & 11.

Deposition at 99 - 100. An audit was performed for the fiscal year ending March 31, 1976. Gilmore's accounting reflected a deficit for that period of \$1,800.00. The audit established that the deficit was \$9,800.00. Id. at 151; Gilmore Deposition at 81-82. The auditors declared that fiscal period inauditable as well as the entire period Gilmore was Fiscal Director. Gilmore Deposition at 84-85.

The decision was made in May or June, 1976 to computerize the Fiscal Department. Id. at 86 & 89; Schultz Deposition at 99-100. However, Gilmore held no computer skills. Gilmore Deposition at 28. S.L.C.A.P. retained the firm, Bunker and Bunker, Certified Public Accountants, to assist Gilmore in this process. Id. at 89; Schultz Deposition at 100 & 126. The computerization process was to proceed without delay. The general ledger was top priority, followed by the payroll. Id. at 101-102; Gilmore Deposition at 89. But Gilmore's accounts had to be reconstructed. It took six months to place the payroll into the computer. Gilmore Deposition at 89-90.

During the fall of 1976, the federal officials continued to complain about how Gilmore's department was handling S.L.C.A.P.'s affairs. Id. at 94-96. Both the Department of Health, Education and Welfare and the

Community Services Administration indicated their desire for accurate accounting. Id.

It was during this time, on September 27, 1976, that the Executive Director began a written evaluation on Gilmore's job performance. Schultz Deposition at 23 & Exhibit P-2. This was the only written evaluation he attempted to make on Gilmore. R. at 11. He did not complete or sign it. Schultz Deposition at 23 & Exhibit P-2. In October, 1976, he discovered vast discrepancies in Gilmore's work. Id. at 124 & 125. While the audit for the year ending March 31, 1976, established a \$9,800.00 deficit, in October, the Executive Director discovered an additional \$16,000.00 variance in the reports prepared for him and the reports prepared for the Community Services Administration Id. at 124. The actual deficit was finally established at \$46,362.00. Id. at 90 & Ex. D-12.

The Executive Director showed "understandable concern for the problems that the accounting department was having." Gilmore Deposition at 99. As a result he held several meetings with Gilmore prior to his discharge. Within the two years prior to discharge the Executive Director met with him on four or five occasions about specific problems with his department and the need to computerize it. Id. at 90, 101-102 & Ex. D-12. Finally, the Executive Director met with Gilmore in October and

November or December, 1976, and indicated that Gilmore's job was in jeopardy if the deficiencies were not corrected. Id. at 95-96.

On December 15, 1976, the Executive Director reported specifically to the Board of Trustees a plan to reduce the large deficit. Id. at 90 & Ex. D-12. Gilmore was present during the discussion of this plan. Id. The Executive Director proposed a reduction in the fiscal staff, and to obtain contract accounting. Id. The idea was to contract the accounting out to a professional firm and have Gilmore remain as Office Manager. Schultz Deposition at 128. However, the Board turned the plan down. Id.

The Executive Director had no choice but to establish a different plan. Id. at 129. About February, 1977, in a meeting between the Executive Director, Gilmore and Mr. Johnson, the Executive Director examined Gilmore on his ability to submit properly a report to the Regional Office, and indicated, again, that his job was in jeopardy due to the deficiencies in the performance of his responsibilities. Id. at 100-101 & 111.

Finally, in March, 1977, the Executive Director completely reorganized the Fiscal Department. Schultz Deposition at 129. The substantive reorganization was:

I hired an accounting supervisor with specified computer accounting background and reduced the force, terminating Mr. Gilmore, and I took over all the

policy type functions of the fiscal director and ordered the computer specialist to get our accounts straightened out and into a computer. Id. at 129-130.

The Executive Director eliminated the position of Fiscal Director and assumed the fiscal policy making duties himself. Id. at 130. Gilmore was reduced in force rather than being fired. Id. at 131. This was because the Executive Director believed that Gilmore needed unemployment compensation and needed to find other employment. Id. He notified Gilmore of his termination in a meeting the first part of March, 1977. Gilmore Deposition at 104. This meeting lasted the better part of an hour. Id. at Vol. II p. 16.

One to three days later, Gilmore called the Executive Director at his home and "told him that I would like a chance to meet with him and discuss the situation to see if possibly I could prevail upon him to change his mind." Id. at 108. The Executive Director agreed to hear him. Id. Gilmore describes the meeting as follows:

It was a series of refutations, refuting of my efforts to defend myself as to my performance during the time I had been employed and efforts to suggest some kind of alleviating measures that could be taken without it, meaning my termination. ... The substance of what I said was to dissuade Mr. Schultz from his decision and to persuade him if possible, that there would be a better way to solve the problem for the agency and certainly for me than to fire me. I do not remember the words I used to bring that about, but that was about the extent of what I said. ... Id. at 109-110.

He describes what the Executive Director said as follows:

The substance of what he said was that it was too late; there was no way now that I could save myself or salvage my job, that he was committed, he'd made statements to people, he was committed that my termination was to be made. And then he began to recite a number of instances, one of which I have mentioned about the false report. ... And Mr. Schultz questioned me on my ability to submit properly a form, a report to the regional office ... that I was huffy in the meeting that we had and the conversation that we had between him and myself and Mr. Johnson. Another thing that was brought up was a little argument I had with an employee, a man named Del Barker. ... Mr. Schultz's issue was that I had caused a disturbance and was argumentative with Mr. Barker over his paycheck ... Yes, a number of others, and I don't recall them right now. ... And, my responsibility for Jerry Murray, that this would be another very serious transgression on my part. Id. at 111-115.

In both of these meetings Gilmore was not prevented from demonstrating why he should not be terminated. He was not limited in terms of being able to bring up those instances he felt justified his retention. Id. at Vol. II p. 6 & 17.

On March 14, 1977, Gilmore was notified in writing of his reduction in force. R. at 4 & 82. He was also provided a Utah Department of Employment Security Separation Notice citing the reason for termination as "reduction in force". R. at 4, 54 & 84. The March 14, 1977, notification provided two weeks pay in lieu of notice. Gilmore Deposition at Vol. II p. 9, 18, Ex. D-15 & D-17.

On March 15, 1977, Gilmore wrote the Executive Director appealing his discharge. R. at 6, 55 & 83. On March 16, 1977, the Executive Director wrote Gilmore stating that he considered the second meeting in March to constitute his appeal to the Executive Director and that Gilmore had a right to appeal to the Personnel Committee. R. at 6 & 55.

Gilmore then appealed to the Personnel Committee. A hearing was scheduled on March 16, 1977. R. at 7. Two members of the Committee were present. The format of the hearing was described in advance to Gilmore that he "would make a statement, that it would be taped on a tape recorder, and that when my statement was finished, that I would be excused and Mr. Schultz would be called in to make a statement on the tape recorder." R. at 7 & 55-56; Gilmore Deposition at Vol. II p. 29-31. It was also determined at the beginning of the meeting that there would not be time to complete it until the following week. Id. Gilmore had no objection to this format. Id. at 31. He then began making his statement into the recorder. The Executive Director was not present. R. at 7 & 56.

The hearing was continued to March 21, 1977. Id. The Committee's three members were present while Gilmore

finished making his statement into the recorder. R. at 7 & 56. He was then excused and the Executive Director was invited in to make his statement. Gilmore was not present during the Executive Director's presentation. R. at 7 & 56. The Committee decided to have them give statements out of each other's presence because it believed it would be more fair not to have Gilmore's immediate supervisor present, "so Mr. Gilmore would feel free to speak his mind." Geter Deposition at 29.

Gilmore admits that there was no evidence refused by the Committee that was offered by him. Gilmore Deposition at Vol. II p. 33. The Committee never, at any time, refused to allow him to do something he requested to do. Id. at 158. He admits he never requested that the Executive Director be present. Id. at Vol. II, p. 29. Nor did he request to confront or cross-examine him at any time. Id. Gilmore further admits he never requested the right to challenge or disqualify any member of the Personnel Committee. R. at 575 & 581.² He never requested that the decision of the Personnel Committee be based solely upon evidence adduced at the hearing. Id.³

² Id.

³ Id.

He never requested a written decision of the Personnel Committee stating reasons for its decision. Id.⁴ He never requested that any verbatim record be made. Id.⁵ He never requested counsel. Gilmore Deposition at 158.

All of the witnesses testified that Gilmore was afforded the same rights as was the Salt Lake Area Community Action Program. Geter Deposition at 13. The Personnel Committee Chairman testified that the Personnel Committee was not biased and was fair. Id. The decision of the Committee was based upon the evidence presented. Id. at 27. Both Gilmore and the Executive Director wrote statements in support of their position. Id. at 42-44 & 48.

On about April 1, 1977, the Personnel Committee Chairman told Gilmore that he had not been able to arrange for the members to meet to reach a final decision. R. at 8. Gilmore was also notified that the Committee was not able to reach its decision in five days after the conclusion of the hearing due to the many pieces of evidence and legal ramifications. Gilmore Deposition at 166. He did not object to this or make any statements to any member of the Committee or anyone else that they couldn't do that because it would take longer than five days. Id. at 166-167.

⁴ Id.
⁵ Id.

On April 13, 1977, the Chairman of the Personnel Committee, Fred Geter, wrote to Gilmore and informed him that it " . . . upholds the decision of Hal Schultz in your reduction of force and reorganization of the Fiscal Department." Gilmore Deposition at 5-6 & Ex. D-14. The decision of the Personnel Committee was final. Id. at 52.

SUMMARY OF ARGUMENT

POINT I. THE TRIAL COURT'S DISMISSAL OF THE BREACH OF CONTRACT CLAIMS SHOULD BE AFFIRMED BECAUSE GILMORE'S EMPLOYMENT WAS AT WILL.

Gilmore admits that his employment with S.L.C.A.P. was for an indefinite period of time. He has not set forth any facts or presented any argument that his employment falls within an exception to the employment at-will doctrine. As a result, under the cases Bruno v. Plateau Mining Co., 73 Utah Adv. Rep. 89 (Utah Ct. App. 1987), Rose v. Allied Development Co., 719 P.2d 83 (Utah 1986) and Bihlmaier v. Carsen, 603 P.2d 790 (Utah 1979), Gilmore was an at-will employee who could be terminated for just cause or no cause, without recourse against his employer for breach of the employment contract.

S.L.C.A.P.'s promulgation of a policy manual does not constitute an implied contract of employment. The manual does not contain any terms concerning the duration of

Gilmore's employment. In Bruno, 73 Utah Adv. Rep. 89, this Court flatly rejected other jurisdictions' departures from the employment at-will doctrine in order to imply an employment contract from an employer's policies.

POINT II. THE SUMMARY JUDGMENT SHOULD BE AFFIRMED
BECAUSE S.L.C.A.P. COMPLIED WITH THE
PERSONNEL POLICIES.

Even if S.L.C.A.P.'s policies limited the right to terminate Gilmore at will the law does not require strict or literal compliance with its terms. If S.L.C.A.P. substantially complied with the terms of the contract so as not to compromise the interests such terms were designed to safeguard, then it is not guilty of breach of the contract. Piacitelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981).

In this case, S.L.C.A.P. substantially complied with the policies, and each of the interests the policies were designed to safeguard were satisfied or protected. A close examination of the facts shows that in some instances S.L.C.A.P.'s slight deviations from the procedures actually promoted or enhanced the interests concerned. Therefor, even if S.L.C.A.P.'s policies limited the right to terminate Gilmore at-will, S.L.C.A.P. is not guilty of a breach thereof.

POINT III. THE SUMMARY JUDGMENT DISMISSING GILMORE'S CLAIMS AGAINST THE EMPLOYEES AND OFFICERS OF S.L.C.A.P. IS PROPER BECAUSE THESE INDIVIDUALS ARE NOT PERSONALLY LIABLE FOR ANY PURPORTED BREACH OF CONTRACT.

An employee or officer who acts within the course and scope of employment acts under a privilege and cannot be held individually liable for a corporation's breach of contract. Gilmore has not made any allegation in his first or second causes of action, nor set forth any facts, that the individual Defendants named in this lawsuit acted otherwise than in the course and scope of their employment.

ARGUMENT

POINT I THE TRIAL COURT'S DISMISSAL OF THE BREACH OF CONTRACT CLAIMS SHOULD BE AFFIRMED BECAUSE THE EMPLOYMENT WAS AT WILL.

A. The Dismissal Of The Breach Of Contract Claims Was Proper Because The Employment Relationship Was Terminable At Will.

Gilmore asks this Court to reverse the trial court's summary dismissal of the breach of contract claims on the ground that the termination of employment did not comply with S.L.C.A.P.'s Personnel Policies Manual. The undisputed evidence in this case is that the employment contract did not contain any specified period of duration. When the duration of employment is not specified the

employer may terminate the employee at will, for just cause or no cause, without fear of liability. Bruno v. Plateau Mining Co., 73 Utah Adv. Rep. 89 (Utah Ct. App. 1987); Rose v. Allied Development Co., 719 P.2d 83 (Utah 1986); Bihlmaier v. Carsen, 603 P.2d 790 (Utah 1979). Inasmuch as the employment was at will, the employer did not breach any contract and the trial court's summary dismissal was proper.

The Bihlmaier case is dispositive of this issue. In that case the plaintiff, after extended negotiations, left a job in California and accepted employment in Utah to become the acting manager of a grocery store. The employer testified that plaintiff's employment was conditioned upon his activities during a trial period. Shortly after arriving in Utah the plaintiff tried to purchase a house. His loan application was refused when the employer stated on the application, "continued employment depends on applicant - hired on a trial basis only." Bihlmaier, 603 P.2d at 791. The plaintiff considered the employer's refusal to change this statement a constructive discharge and initiated a lawsuit for breach of the employment contract. The trial court granted the employer's motion for summary judgment and the plaintiff appealed. Id.

On appeal the Utah Supreme Court relied on the plaintiff's admission that the employment contract contained no express terms concerning the duration of his employment. The Court held:

When an individual is hired for an indefinite time, he has no right of action against his employer for breach of the employment contract upon being discharged. Thus, in the present case, since it was shown the term of employment was indefinite and terminable at the will of either party, even if the acts of the employer did constitute a constructive discharge of the plaintiff, the plaintiff has no right of action against the employer for that discharge. Therefore, the defendant is entitled to a judgment as a matter of law and the granting of the summary judgment motion was proper. Id. at 792.

In this case, Gilmore admits that his employment contract did not contain any express term concerning the duration of the employment. Specifically, his admission is that the contract did not specify any definite period of time of employment. R. at 575 & 581.⁶ In other words, he was hired for an indefinite time. Thus, as stated in Bihlmaier, " . . . he has no right of action against his employer for breach of the employment contract upon being discharged." Bihlmaier, 603 P.2d at 792. The trial court's summary dismissal of Gilmore's breach of contract claims was, therefore, proper because Gilmore's employment was at-will.

⁶ Id.

B. The Utah Court of Appeals and Utah Supreme Court Have Firmly Rejected Any Departures From the Employment At Will Doctrine Based On An Employer's Policies.

In two recent cases, Bruno v. Plateau Mining Co., 73 Utah Adv. Rep. 89, and Rose v. Allied Development Co., 719 P.2d 83, the Utah Supreme Court and the Utah Court of Appeals reaffirmed the employment at-will doctrine as the law of this State. Gilmore asks this Court to disregard this law on the ground that S.L.C.A.P.'s Personnel Policies Manual is the employment contract. In the Bruno case the Utah Court of Appeals firmly rejected this argument in favor of the at-will doctrine. As a result, the dismissal of the breach of contract claims was proper and should be upheld.

In the Bruno case the employer maintained a de facto personnel policy of imposing only temporary suspension as the maximum penalty for employee fighting. Bruno, nevertheless, was forced to resign for fighting in the mine. He filed a lawsuit against his employer for wrongful discharge. The undisputed evidence was that Bruno was hired as an employee at-will. Nevertheless, he claimed that the employer's de facto personnel policy created an implied employment contract which was breached by his termination. The lower court granted the employer's motion for summary judgment on the ground that Bruno's

employment was at-will and he failed to show a policy or practice that changed this term of his relationship.

On appeal, this Court noted that several other jurisdictions have departed from traditional contract principles by recognizing an implied contract arising solely from the unilateral promulgation of personnel policies, citing the lead case, Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W. 2d 880 (1980). This Court flatly rejected this departure, stating:

However, such is not the law in Utah, which still follows the general common law rule concerning personal employment contracts: 'In the absence of some further express or implied stipulation as to the duration of the employment or of a good consideration in addition to the services contracted to be rendered, the contract is no more than an indefinite general hiring which is terminable at the will of either party.' (Citations omitted). An implied contract altering the employment at-will relationship, like other contracts implied-in-fact, would require actions or conduct manifesting the mutual assent of both parties to be bound by the certain terms of their bargain. Bruno, 73 Utah Adv. Rep. at 90.

The Court then held:

The content of Plateau's actual policy toward employees who fight is not a material fact precluding summary judgment. Even if we assume that Plateau has a de facto personnel policy of not terminating employees who fight in its mines, this practice alone is not enough to establish Plateau's intentional surrender of its right to terminate Bruno's employment at will. Id.

In this case, Gilmore is asking this Court to do exactly what it refused to do in the Bruno case - that is, depart from the employment at-will doctrine and recognize an implicit contractual right based upon an employer's unilateral promulgation of a policy manual. This Court has already rejected this major departure from Utah law which Gilmore urges based on the cases Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880, and Forrester v. Parker, 606 P.2d 191 (N.M. 1980).

In Toussaint, the Michigan Supreme Court stated: "We hold that employer statements of policy, such as the Blue Cross Supervisory Manual and Guidelines, can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee, . . . ". (Emphasis added) Toussaint, 292 N.W.2d at 892. The Court of Appeals held in the Bruno case that this was not the law in Utah and that an implied contract, altering the at-will relationship, must be proven by acts or conduct manifesting the mutual assent of both parties. (Emphasis added). Bruno, 73 Utah Adv. Rep. at 90.

In Forrester, the New Mexico Supreme Court held that a personnel policy guide controlled the employment relationship, holding:

Forrester should have and did expect Parker to conform to the procedures for terminating him as spelled out in the guide. For the guide constituted an implied employment contract; the conditions and procedures provided in it bound both Forrester and Parker. (Emphasis added). Forrester v. Parker, 606 P.2d at 192.

However, the Utah Supreme Court, in the Rose case flatly rejected this departure holding that "the existence of an employment agreement not terminable at-will must be established by more than subjective understandings or expectations." Rose, 719 P.2d at 86. The Court then refused to alter the at-will doctrine to imply a term of employment to which the employer had not expressly agreed. Id. at 86-87 (explaining Bullock v. Deseret Dodge Truck Center, Inc. 11 Utah 2d 1, 354 P.2d 559 (1960)).

Furthermore, the Supreme Court of Michigan recently clarified its holding in Toussaint as follows:

Toussaint makes employment contracts which provide that an employee will not be dismissed except for cause enforceable in the same manner as other contracts. It did not recognize employment as a fundamental right or create a new "special" right. The only right held in Toussaint to be enforceable was the right that arose out of the promise not to terminate except for cause.

Employers and employees remain free to provide, or not to provide, for job security. Absent a contractual provision for job security, either the employer or the employee may ordinarily terminate an employment contract at any time for any, or no, reason. [Emphasis added.]

Valentine v. General American Credit, Inc., 420 Mich. 256, 258-59, 362 N.W. 2d 628 (1984) (footnote omitted). Thus even the Michigan Supreme Court has rejected Gilmore's argument that a personnel policy manual creates a new employment right or exception to the at-will doctrine.

Moreover, the law in the majority of states which have considered this question is that the promulgation of a policy manual does not implicitly limit the right of an employer to terminate at-will. See, e.g. McConnell v. Eastern Air Lines, Inc., 499 So.2d 68 (Fla. App. Ct. 1986); Shaw v. S.S. Kresge, Co., 167 Ind. App. 1, 328 N.E.2d 775 (1975); Heideck v. Kent General Hospital, Inc., 446 A.2d 1095 (Del. 1982); Reid v. Sears Roebuck & Co., 790 F.2d 453 (6th Cir. 1986); Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976); Schroeder v. Dayton-Hudson Corp., 448 F.Supp. 910 (E.D. Mich. 1977).

C. The Dismissal Was Also Proper Because Under Utah Law The Employer's Policies Do Not Constitute An Express Or Implied Contract As To The Duration Of Employment.

In both the Bruno and Rose cases, the Courts have recognized only two limited exceptions to the employment at-will doctrine. These two exceptions are: 1) an express or implied stipulation as to the duration of the employment, or; 2) good consideration in addition to the

services contracted to be rendered. Bruno, 73 Utah Adv. Rep. at 90; Rose, 719 P.2d at 85. Gilmore has not set forth any facts supporting an implied stipulation of the duration of employment nor has he advanced any argument that this exception applies. Actually, there are no facts in this regard. There is no evidence establishing any bargain between the parties in which both assented to be bound by S.L.C.A.P.'s unilateral promulgation of personnel policies. There is also no evidence that S.L.C.A.P. intended to relinquish its right to terminate Gilmore at will. There is absolutely no language in the personnel policies that suggests Gilmore's employment was for any term other than an indefinite term. In short, Gilmore and S.L.C.A.P. simply did not expressly or implicitly stipulate that Gilmore was employed for any definite period of time.

The opposite is true. S.L.C.A.P. unilaterally promulgated its personnel policies about four years before Gilmore was hired. Schultz Deposition at 9 & Ex. P-1. Gilmore was employed at least six months before he obtained a copy of the policies. Gilmore Deposition at 18-19. Prior to that time he does not recall being provided with the policies or discussing the policies in

relation to the terms and conditions of his employment. Id. at 8-9 & 12-13. After obtaining a copy of the policies Gilmore was simply told that he was expected to follow them in his position as employee and supervisor. Id. at 17 & 20. He does not recall any other conversation relative to the policies. Id. at 22. The Executive Director maintained a policy of advising new employees that the manual containing the policies existed, but he did not advise each one. Schultz Deposition at at 16. This evidence does not alter the fact that Gilmore was hired for an indefinite time. The parties did not expressly or implicitly stipulate that Gilmore was employed for any specific period of time. The trial Court correctly applied the law in dismissing the breach of contract claims.

In further support of his argument Gilmore relies on two Utah cases, Moore v. Utah Technical College, 727 P.2d 634 (Utah 1986), and Piacitelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981). He contends that these cases stand for the proposition that personnel policy manuals give rise to contractual rights and obligations. Actually, these cases fall within the first exception to the employment at-will doctrine. In each case, the plaintiffs were hired under a one year contract.

This contract of employment expired after one year, whereupon a new one year contract was negotiated. In other words, the plaintiff in each case was hired for a definite duration, one year, thereby explicitly excepting the employment relationship from the at-will doctrine. As a result these cases do not support Gilmore's argument. Rather, they are excellent examples of the employment at-will doctrine, demonstrating the circumstances under which the first exception to the doctrine applies.

In addition, in Piacitelli, the Utah Supreme Court did not reach the issue of whether the personnel manual was a contract. The Court was bound by res judicata because the lower Court's ruling on that issue was not appealed. Piacitelli, 636 P.2d at 1065, n. 5.

D. The Dismissal Was Proper Because Gilmore Did Not Provide Any Good Consideration In Addition To The Services Contracted To Be Rendered.

As previously explained, the only other recognized exception to the employment at-will doctrine is good consideration, that is offered and accepted, in addition to the services contracted to be rendered. Bruno, 73 Utah Adv. Rep. at 90. For instance, in the Rose case, the Utah Supreme Court held:

To satisfy the "good consideration" exception of Bihlmaier, plaintiff would have had to offer Allied, at its request, something more than what he was already obligated to do under his employment agreement, not just a continuation of the duties he was required to perform.

Neither the statements made by Wetsel nor plaintiff's subjective understanding of those statements is adequate justification to find an implied contract or consideration sufficient to fall within the exceptions recognized by this Court. Rose, 719 P.2d at 86.

In this case, Gilmore has not set forth any facts that support this exception to the employment at-will doctrine, nor has he advanced any argument in this regard. There simply is not any evidence in this case that can justify a finding of added consideration sufficient to fall within this exception. The personnel policies were always in effect during Gilmore's employment. He simply continued to perform his duties during his employment. There is no evidence that either party offered any new consideration during his employment. Inasmuch as this exception has no application in this case, the summary judgment should be affirmed.

POINT II THE SUMMARY JUDGMENT SHOULD BE AFFIRMED
 BECAUSE S.L.C.A.P. COMPLIED WITH THE
 PERSONNEL POLICIES

A. S.L.C.A.P. Complied with the Personnel Policies Manual in Terminating Gilmore.

Assuming arguendo that S.L.C.A.P.'s Personnel Policies Manual limited the right to terminate Gilmore at-will, Gilmore asks this Court to reverse the trial Court on the ground that S.L.C.A.P. did not literally or strictly comply with the exact procedures spelled out in the manual. For instance, an example of some of the literal procedures he claims S.L.C.A.P. violated are: 1) two weeks pay in lieu of notice; and, 2) oral instead of written evaluations. Taking this as true, the question of whether S.L.C.A.P. breached the procedures is a question of law which is properly decided by summary judgment. Argikos v. Lowry, 179 P.988 (Utah 1919).

The law in Utah does not require literal or strict compliance. Substantial compliance is sufficient so long as the substantial interests the procedures are designed to safeguard are satisfied or protected. Piacitelli, 636 P.2d 1063; Barracrough v. Atlantic Refining Co., 326 A.2d 477 (Pa. 1974). Also see 17 Am Jur. 2d, Contracts §375.

For example, in the Piacitelli case, the personnel manual provided four steps of progressive discipline culminating in termination; 1) oral warning, 2) written

warning, 3) suspension, and 4) dismissal. The manual made clear that the purpose of this procedure was to prevent major acts of misconduct by giving early warning of the possible consequences for continued misconduct. The employer did not strictly comply with this procedure. Instead, Piacitelli was advised in numerous oral interviews of his unacceptable conduct, the specific deficiencies in his performance and that his job was in jeopardy. The Utah Supreme Court held:

While exact conformance with the precise terms of the termination procedures is doubtless the least controversial course, so long as the substantial interests those procedures are designed to safeguard are in fact satisfied and protected, failure to conform to every technical detail of the termination procedure is not actionable. Piacitelli, 636 P.2d at 1067.

As in the Piacitelli case, S.L.C.A.P.'s policy manual provides for progressive disciplinary steps, culminating in termination. It also provides for yearly written evaluations to be used, in part, for consideration in these disciplinary steps. Schultz Deposition at 9 & Ex. P-1. For instance, disciplinary action for incompetency or inefficiency should be evidenced by at least two consecutive performance evaluations. Id. The Manual does not contain any statement of this policy's purpose. However, such policies are generally designed to provide

employees early warning of misconduct, the opportunity to correct it and notify the employee of the consequences if the misconduct continues.

The manner in which Gilmore was terminated did not compromise this interest or purpose. Within two years prior to termination the Executive Director met with Gilmore on four or five occasions concerning problems in his work. On September 27, 1976, the Executive Director began a written evaluation which was never completed. Schultz Deposition at 23 & Ex. P-2. From the time Gilmore's difficulties became apparent through September 27, 1976, Gilmore was aware that the Executive Director was concerned for his problems and desired to correct them. Gilmore Deposition at 99-100. In October, and November or December, 1976 the Executive Director met with Gilmore and indicated that his job was in jeopardy as a result of the deficiencies in his performance. Id. at 95-96. On December 15, 1976, Gilmore was present when the Executive Director reported his reorganization plan to the Board of Trustees. Id. at 90 & Ex. D-12. About February, 1977, Gilmore was examined on his ability to properly submit forms and again was told that his job was in jeopardy as a result of his deficiencies and the reorganization. Id. at 100-101. Finally, the first part

of March, 1977, he was notified that he was going to be terminated. Id. at 104.

These undisputed facts show that the Executive Director met with Gilmore on numerous occasions about the problems with his work. Gilmore was well advised during his employment of the Executive Director's evaluation of his performance, even though the evaluations were not written. As in the Piacitelli case, the Executive Director notified Gilmore in these numerous oral interviews of his unacceptable conduct, the deficiencies in his performance, and that his job was in jeopardy. These notifications occurred long before his termination. As a result, the purposes for which the policy was established were satisfied. Gilmore was granted substantial early warning of his deficiencies and of the consequences thereof if the deficiencies persisted. Therefore, S.L.C.A.P.'s method in terminating Gilmore substantially complied with the policy manual.

While Gilmore's job performance was deficient, this was not the primary reason for his termination. Gilmore was actually reduced in force. When it became apparent early in 1976 that Gilmore was having difficulty, federal officials also reported that S.L.C.A.P.'s accounting systems and procedures were cumbersome and outdated.

Schultz Deposition at 99-100. In May or June, 1976, the decision was made to computerize Gilmore's department. Gilmore Deposition at 86 & 89. However, Gilmore held no computer skills. Id. at 28. Despite this drawback, on December 15, 1976, the Executive Director proposed a plan to the Board of Directors in which Gilmore would, nevertheless, remain as an Office Manager. The Board turned this plan down. Schultz Deposition at 128. As a result, the Executive Director completely reorganized Gilmore's department by hiring an accounting supervisor with computer accounting background, directing a computer specialist to establish all of S.L.C.A.P.'s accounts on the computer and having the Executive Director assume all of the policy type functions of Gilmore's position. Id. at 129-130. This eliminated Gilmore's position resulting in his reduction in force. Id. The Executive Director believed that Gilmore needed unemployment compensation and needed to find other employment. Therefore, he cited only this primary reason, reduction in force, as the reason for termination. Id. at 131.

The procedures and policies pertaining to a reduction in force are set forth at Chapter VII, Section B of the Manual as follows:

When it becomes necessary because of funding or budgetary limitations to terminate, reassign, transfer, or demote an employee, the Executive Director shall take such action based upon employee seniority, performance, skills, abilities and importance of position. All employees reassigned, terminated, transferred, or demoted shall be give fifteen (15) days of written notice, said notice specifying the reasons which dictated the actions of the Executive Director.

Schultz Deposition at 9 & Ex. P-1. This policy only applies when funding or budgetary limitations necessitate termination. As shown in the preceding paragraph, Gilmore was reduced in force because the computerization of his department eliminated his position. The manual does not provide for any policies or procedures in this circumstance. Instead, the Executive Director has authority to reduce in force employees as deemed appropriate. R. at 151; Philbrick Deposition at 15. As a result, S.L.C.A.P. was not in violation of any specific policy or procedure for reducing Gilmore in force due to the elimination of his position.

The manual does provide, however, that employees are entitled to fifteen days advance written notice of termination. Schultz Deposition at 9 & Ex. P-1. This procedure or policy is generally designed to provide the

employee an opportunity to begin securing new employment, thereby lessening the effects of unemployment. The first part of March, 1977, the Executive Director orally notified Gilmore that he was going to be terminated. Gilmore Deposition, at 104. On March 14, 1977, he was notified of his termination in writing. R. at 4 & 82. In the written notice, the Executive Director did not make the termination effective until four days later, March 18, 1977. Gilmore then received two weeks pay in lieu of advance written notice, effective March 18. Gilmore Deposition at Ex. D-15.

These undisputed facts establish that Gilmore was orally notified, about two weeks prior to the effective date, that he would be terminated. He was also given four days advance written notice. Then he was paid for two weeks beginning March 18, 1977, without having to report to work. This allowed Gilmore fifteen days of free time, with pay, to find new employment. If S.L.C.A.P. had strictly complied with the fifteen day advance written notice procedure Gilmore would not have enjoyed this free time with pay. As a result, the procedure S.L.C.A.P. used provided Gilmore with more opportunity to find new employment and lessen the effects of possible unemployment than the procedure in the policy manual. In other words,

the interests or reasons for this policy and procedure were certainly not compromised; rather, they were advanced. Hence, S.L.C.A.P., at the very least, substantially complied with the manual in this respect.

The manual also provides that the notice of termination shall specify the reasons therefor. Schultz Deposition at 9 & Ex. P-1. As shown above, prior to termination Gilmore was well aware that his department was being computerized. He knew he held no computer skills. He was present at the meeting when the Executive Director proposed a plan to nevertheless retain Gilmore, which was turned down. He was handed his Separation Notice which cited the reason for termination as a reduction in force. R. at 4, 54 & 84. His written notice of termination explained that his position was eliminated. Gilmore Deposition at Vol. II, p. 9 & Ex. D-15. As is also shown above, the Executive Director met with Gilmore on numerous occasions regarding the problem with his work. Gilmore knew that his job was in jeopardy because of these problems. As a result, Gilmore was well advised and provided numerous notice of the reasons for terminating his employment. Hence, S.L.C.A.P. was in substantial compliance with this policy as well.

B. S.L.C.A.P. Complied With The Policy Manual In Hearing Gilmore's Appeal.

S.L.C.A.P.'s appeal procedure was adopted to provide for prompt and fair consideration of personnel actions. Schultz Deposition at 9 & Ex. P-1. Gilmore complains that he was not afforded prompt and fair consideration. Specifically, he complains that he was not afforded a "formal hearing", was not given the right to confront or cross-examine the Executive Director, was never advised of the evidence presented against him, was not given the opportunity to rebut or respond to the evidence against him, and the literal or strict appeal procedures were violated. In other words, Gilmore believes that he was not afforded a fair hearing because it was not a trial type or formal hearing. However, due process, or fairness and justice, does not require a trial type hearing in every case. Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 894, 81 S.Ct. 1743, 6 L.Ed. 2d 1230 (1961).

In Robinson v. Wichita Falls and North Texas Community Action Program, 507 F.2d 245 (5th Cir. 1975), an employee falsely accused another employee of misappropriating funds. The employee appealed the decision to terminate him. The grievance committee's

review was made on the basis of written statements, without personal appearance, formal presentations of evidence and argument, confrontation or cross examination, or any other formal or trial type characteristic. The United States Fifth Circuit Court held that a trial type hearing was not required. The rights afforded the employee by the fairness requirements of due process were satisfied by the Community Action's procedure. Also see Kelly v. Action for Boston Community Development, Inc., 419 F.Supp. 511 (D. Mass. 1976), and Withrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed. 2d 712 (1975).

The manner in which S.L.C.A.P. reviewed Gilmore's termination was substantially similar to the review afforded the employee in the Robinson v. Wichita Falls and North Texas Community Action Program case. The appeal procedure consists of two levels of review. The first level is to the Executive Director. Schultz Deposition at 9 & Ex. P-1. He notified Gilmore the first part of March, 1977, of the decision to terminate him. One to three days later Gilmore arranged a meeting with the Executive Director to prevail upon him to change his mind. Gilmore Deposition at 108. The meeting was held in the Executive Director's office. It lasted the better part of an hour. Id. at Vol. II, p. 16. Gilmore admits that in this

meeting he was given every opportunity to demonstrate why he should not be terminated. Id. at Vol. II, p. 6 & 17. He describes the meeting as a series of refutations between the Executive Director and himself. Id. at 109-115. The Executive Director did not change his mind.

The second level of review is to the Personnel Committee. Schultz Deposition at 9 & Ex. P-1. A hearing was scheduled for March 16, 1977. R. at 7. At the beginning of the meeting the Committee explained the hearing format to Gilmore. Gilmore was to make his statement before the Committee on a tape recorder. He would then be excused and the Executive Director would be called in to do the same. Gilmore Deposition at Vol. II, p. 29-31. The Committee also explained that there would not be sufficient time to conclude the hearing that day, so it would be continued to the next week. Id. Gilmore had no objection. Id. The reason for this format was to afford Gilmore the right to speak his mind and present all the evidence he had outside of his immediate supervisor's, the Executive Director, presence. The Committee believed that this was more fair for Gilmore. Geter Deposition at 29. The hearing was then conducted according to this format. Gilmore admits that the Committee did not refuse any of the evidence he offered. Gilmore Deposition at

Vol. II, p. 33. Both Gilmore and the Executive Director wrote statements to the Committee supporting their positions. Id. at 42-48. Gilmore was afforded the same rights as was S.L.C.A.P. Geter Deposition at 13. The Committee's chairman testified that the Committee was not biased against Gilmore but was fair in its hearing of Gilmore's appeal. Id. The decision was based on the evidence presented. Id. at 27.

Just as in the Robinson v. Wichita Falls and North Texas Community Action Program case, a formal hearing was not necessary to satisfy the requirements of due process. The procedures used at both appeal levels were fair and prompt. Gilmore was given notice of the hearing. He was afforded the right to be present and he presented all the evidence he desired. He was afforded the right to submit a written statement in addition to his testimony. His case was heard by three impartial members of the Committee. As a result, the purposes for which the appeal procedure was adopted were fully satisfied.

Moreover, Gilmore never requested the formal procedures he now claims should have been provided. The Committee never refused to allow Gilmore to do something he requested to do. Gilmore Deposition at Vol. II, p. 33. He never objected to the format of the hearing. Id. at

Vol. II, p. 32. He never requested the Executive Director's presence. Id. at Vol. II, p. 29. He never requested that he be allowed to confront or cross-examine the Director at any time. Id. He never requested the right to challenge or disqualify any member of the Committee. R. at 575 & 581.⁷ He never requested that the Committee's decision be based solely on the evidence adduced at the hearing. Id.⁸ He never requested a written decision from the Committee. Id.⁹ He never requested a verbatim record. Id.¹⁰ As a result, he waived these rights. Singer v. United States, 380 U.S. 24, 13 L.Ed. 2d 630, 86 S.Ct. 783 (1965); Eliason v. Wilborn, 281 U.S. 457, 74 L.Ed. 962, 50 S.Ct. 382 (1930). Pierce v. Somerset R. Co., 171 U.S. 641, 43 L.Ed. 316, 19 S.Ct. 64 (1898); Doty v. Love, 295 U.S. 64, 79 L. Ed. 1303, 55 S. Ct. 558 (1935).

In addition, the procedures used in hearing Gilmore's appeal substantially complied with the personnel policies manual. The manual provides that the Executive Director provide employees a hearing within seven days of the notice of appeal. Schultz Deposition at 9 & Ex. P-1. The reasons for this type of procedure are to afford the employee an opportunity to change the decision, to give

⁷ Id.
⁸ Id.
⁹ Id.
¹⁰ Id.

his side of the story, to be fully informed of the reasons for termination, and allow the person or body hearing the appeal an opportunity to review the decision. Within four or five days after the Executive Director notified Gilmore of the decision to terminate him, he was afforded a full hearing. Gilmore was granted every opportunity at this hearing to change the Executive Director's mind. The Executive Director heard all of the evidence, reviewed it and upheld his decision. As a result, this appeal policy was fully satisfied.

The manual then provides that an appeal may be taken to the personnel committee. Id. The Committee is responsible to provide a hearing within seven days of the notice of appeal. Id. Within five days after concluding the hearing the Committee is then responsible to prepare and submit its findings. Id. The reason for this type of procedure is to insure that the procedures below were administered fairly and not arbitrarily, capriciously or discriminatively. Gilmore was afforded his hearing before the Personnel Committee within seven days after notice of his appeal. It was held on March 16, 1977, and finished on March 21, 1977. The Committee consists of three members and it was heard by all three. R. at 7, 56, 150 & 156. Gilmore had every opportunity to present all his

evidence and argument. Gilmore Deposition at 158. On April 1, 1977, the Personnel Committee Chairman advised Gilmore that the Committee was not able to make arrangements to meet for the final decision. R. at 8. The Chairman also told him that the reason they could not reach the decision within five days was due to the many pieces of evidence and the legal ramifications. Gilmore Deposition at 166. Gilmore did not object, nor did he insist that the Committee render the decision in five days despite this notification. Id. at 166-167. On April 13, 1977, the Committee rendered its finding supporting the Executive Director's decision to terminate Gilmore. Id. at 5-6 & Ex. D-14. Again, this procedure substantially complied with the manual. Gilmore was afforded a prompt, fair hearing and the policies of review were fully satisfied.

POINT III SUMMARY JUDGMENT DISMISSING GILMORE'S CLAIMS AGAINST THE EMPLOYEES AND OFFICERS OF S.L.C.A.P. IS PROPER BECAUSE THESE INDIVIDUAL DEFENDANTS ARE NOT PERSONALLY LIABLE FOR ANY PURPORTED BREACH OF CONTRACT.

The well established rule of law is that individual employees and officers of a corporation, who act within the course and scope of their employment, act under a privilege and cannot be held individually liable for the

corporation's breach of contract. Wise v. Southern Pacific Co., 223 Cal. App. 2d 50, 35 Cal. Rptr. 659 (1953), aff'd on other grounds, 1 Cal. 3d 600, 83 Cal. Rptr. 202 (1970). Also see Golden v. Anderson, 256 Cal. App. 2d 714, 64 Cal. Rptr. 404 (1967).

In the Wise case the plaintiff sued his former employer for wrongful discharge and also sued his former co-employees for conspiracy to obtain his discharge. The Court of Appeal upheld demurrers to the complaint as to the individual defendants and stated:

Agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage. [Citations omitted.] This rule derives from the principle that ordinarily corporate agents and employees acting for and on behalf of the corporation cannot be held liable for inducing a breach of the corporation's contract since being in a confidential relationship to the corporation their action in this respect is privileged. The inducement of the breach to be actionable must be both wrongful and unprivileged. (Citations omitted; emphasis added.) Wise, 223 Cal App. 2d at 72-73.

In Gilmore's claim for breach of contract he has not made any allegation that the employees and officers, individually named in this suit, acted beyond the scope of their employment. The undisputed facts show clearly that these individuals acted only in the course of their employment, for and on behalf of S.L.C.A.P. Therefore, their actions were privileged and they cannot be held personally liable for any purported breach of the employment contract. Because Gilmore has not alleged that these individual defendants acted other than in the course and scope of their employment, nor set forth any facts showing otherwise, the trial Court's summary dismissal of his breach of contract claims against the individual defendants is proper.

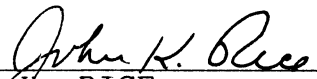
CONCLUSION

Respondents seek the following relief:

1. An affirmance of the lower Court's summary judgment dismissing Gilmore's breach of contract claims against all Respondents, with prejudice, and an award of Respondent's costs pursuant to Rule 34, R. Utah Ct. App.

2. In the alternative, affirmance of the lower Court's summary judgment dismissing the breach of contract claims against the Respondents Hal J. Schultz, Robert E. Philbrick, Fred Geter, Richard Fields and Ann O'Connell, and an award of their costs, pursuant to Rule 34, R. Utah Ct. App.

DATED this 25 day of February, 1988.



JOHN K. RICE
Attorney for Respondents

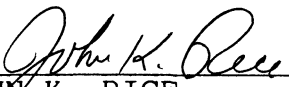


STEPHEN W. COOK
Attorney for Respondents

Certificate of Service

I hereby certify that on the 25 day of February, 1988, I mailed, postage prepaid, four copies of the Brief of Respondents together with a copy of this Certificate of Service to the following:

Nann Novinski-Durando and
Mark S. Miner
4348 South Jupiter Drive
Salt Lake City, Utah 84124



JOHN K. RICE
Attorney for Defendants/Respondents

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

-----ooo0ooo-----

WALTER K. GILMORE,
Plaintiff,

v.

SALT LAKE AREA COMMUNITY
ACTION PROGRAM, a Utah cor-
poration; HAL J. SCHULTZ,
Executive Director; ROBERT E.
PHILBRICK, President, Board
of Trustees; FRED GETER,
Chairman, Personnel Committee;
ANN O'CONNELL, TERRY WILLIAMS,
JOHN E. DELANEY, TED L.
WILSON, JENNINGS PHILLIPS,
GLEN GREENER, PETE KUTULAS,
WILLIAM DUNN, RALPH McCLUFE,
JESS AGRAZ, DON MIERVA, LUCY
OTERO, GLEN M. LARSEN, BERNICE
BENNS, LAMBERTUS JENSEN,
SOLOMON CHACON, LEON REESE,
PALMER DEPAULIS, RICHARD LIGH,
VICTOR DELGADO, NORBEST
MARTINEZ, MAVIS LINDSAY,
M. C. EBERHARDT, CLEMENT JAY,
EV. MAEZ, JERRI BROWN, WAYNE
HORROCKS, MERNONE JEX, ROBERT
MACRI, constituting the Board
of Trustees of the Salt Lake
Area Community Action Program,
their officers, employees,
successors and assigns,

Defendants.

DEFENDANTS' FIRST REQUESTS
FOR ADMISSIONS

Civil No. C-78-0258

-----ooo0ooo-----

The Defendants by and through their undersigned counsel
Stephen W. Cook, pursuant to Rules 36 and 37(c) of the Federal
Rules of Civil Procedure, herewith serve upon the Plaintiff the
following requests for admissions for response within thirty (30)
days. Each request shall be deemed by the Defendants as admitted
unless, within thirty (30) days after service of the requests, the
Plaintiff serves upon the Defendants a written answer or an appro-
priate objection addressed to the request signed by the Plaintiff
or his attorney. The Defendants provide notice of their intent

pursue reasonable expenses including attorney's fees in proving any request inappropriately denied. All requests are directed to the period of April 1, 1976 to April 1, 1977.

REQUEST NO. 1: The Salt Lake Community Action Program has no power to impose governmental sanctions, either civil or criminal in nature, upon any citizen of the State of Utah or any subdivision thereof.

REQUEST NO. 2: The Salt Lake Area Community Action Program has no power to impose governmental sanctions, either civil or criminal in nature, upon any citizen of the United States of America or any subdivision thereof.

REQUEST NO. 3: The Salt Lake Area Community Action Program has no power to impose taxes, levy fines or assessments, or other governmental fees upon the citizens of the State of Utah and its subdivisions or upon the citizens of the United States and its subdivisions.

REQUEST NO. 4: The Salt Lake Area Community Action Program does not enjoy free mailing privileges or has postage paid by the Utah State or United States Government.

REQUEST NO. 5: The Salt Lake Area Community Action Program has no vested regulatory authority to regulate the conduct or affairs of non-employee citizens of the State of Utah or any of its political subdivisions.

REQUEST NO. 6: The Salt Lake Area Community Action Program has no vested regulatory authority to regulate the conduct or affairs of non-employee citizens of the United States or any of its political subdivisions.

REQUEST NO. 7: None of the Defendants are agencies or instrumentalities of the State of Utah or its political subdivisions.

REQUEST NO. 8: None of the Defendants are agencies or instrumentalities of the United States or any political subdivisions.

REQUEST NO. 9: The Salt Lake Area Community Action Program is not a federal or state agency.

REQUEST NO. 10: The Salt Lake Area Community Action Program has no power or right to publish rules and regulations in the Federal Register.

REQUEST NO. 11: The Salt Lake Area Community Action Program has no power or right to publish rules and regulations in the State of Utah Bulletin published by the Department of Finance, Utah State Archives & Records Service.

REQUEST NO. 12: The Salt Lake Area Community Action Program has no power or right to the use of equipment, facilities, or supplies provided by the General Services Administration.

REQUEST NO. 13: The Salt Lake Area Community Action Program has no power or right to the use of equipment, facilities, or supplies owned by the State of Utah or any of its political subdivisions.

REQUEST NO. 14: The Salt Lake Area Community Action Program does not have any powers of condemnation.

REQUEST NO. 15: The Salt Lake Area Community Action Program has no authority to deposit and withdraw money from the monetary depositories of the Utah State or Federal Governments.

REQUEST NO. 16: The Salt Lake Area Community Action Program employees are not employed and subject to any municipal, county or state merit systems.

REQUEST NO. 17: The employees of the Salt Lake Area Community Action Program are not employees of, nor paid by, the State of Utah or its political subdivisions.

REQUEST NO. 18: The Community Services Administration does not operate as a federal agency on a local level and does not supervise the daily operation of a community action agency.

REQUEST NO. 19: The State of Utah and its political subdivisions have no authority or power over the daily personnel decisions of the Salt Lake Area Community Action Program.

REQUEST NO. 20: The State of Utah and its political subdivisions does not supervise or participate in the daily personnel decisions of the Salt Lake Area Community Action Program.

REQUEST NO. 21: There are no rules or regulations of the Community Services Administration that authorizes the Community Services Administration to supervise or participate in the daily personnel decisions of the Salt Lake Area Community Action Program.

REQUEST NO. 22: The Community Services Administration has neither interpreted nor defined the phrase "fair consideration" in CSA instruction 6900-01(c)5.

REQUEST NO. 23: The relationship of the Community Services Administration to the Salt Lake Area Community Action Program is in the nature of a grantor-grantee/contractor-contractee relationship.

REQUEST NO. 24: The Community Services Administration has no authority to require the Salt Lake Area Community Action Program to hire or fire particular employees or take other specific personnel actions.

REQUEST NO. 25: The Salt Lake Area Community Action Program is a private non profit corporation organized under Section 16-6-10 et. seq. U.C.A. (1953), as amended, entitled "Utah Nonprofit Corporation and Cooperative Association Act".

REQUEST NO. 26: Prior to the Plaintiff's termination of employment and the completion of all grievance procedures provided by the Defendants' personnel policies, the Plaintiff never requested information relating to hearing procedures and format, including rules governing the admissibility of evidence.

REQUEST NO. 27: Prior to the Plaintiff's termination of employment and the completion of all grievance procedures provided by the Defendants' personnel policies, the Plaintiff never requested to be represented by counsel or by an appropriate counsel substitute.

REQUEST NO. 28: Prior to the Plaintiff's termination of employment and the completion of all grievance procedures provided by the Defendants' personnel policies, the Plaintiff never requested to confront or cross-examine witnesses or accusers.

REQUEST NO. 29: Prior to the Plaintiff's termination of employment and the completion of all grievance procedures provided by the Defendants' personnel policies, the Plaintiff never requested any right to challenge and disqualify members of the hearing body nor did he challenge or attempt to disqualify members of the hearing body.

REQUEST NO. 30: Prior to the Plaintiff's termination of employment and the completion of all grievance procedures provided by the Defendants' personnel policies, the Plaintiff never requested any right to have the decision of the hearing body based solely upon evidence adduced at the hearing.

REQUEST NO. 31: Prior to the Plaintiff's termination of employment and the completion of all grievance procedures provided by the Defendants' personnel policies, the Plaintiff never requested the right to have a written decision of the hearing body stating the reasons for their decision and the evidence adduced at the hearing upon which the decision was based.

REQUEST NO. 32: Prior to the Plaintiff's termination of employment and the completion of all grievance procedures provided by the Defendants' personnel policies, the Plaintiff never requested the right to have a verbatim record of the hearing made and exhibits retained.

REQUEST NO. 33: The Plaintiff had no individual written employment contract that specified any definite period of time for employment with the Defendants.

REQUEST NO. 34: The Plaintiff was terminated for cause from the Assistance Payments Division on April 14, 1979.

REQUEST NO. 35: During 1977, 1978, and 1979, there were jobs in bookkeeping, accounting, and accounting collection with private employers in the area paying between \$500.00 and \$700.00 a month, that the Plaintiff could have obtained had he applied.

REQUEST NO. 36: No employer has refused to employ the Plaintiff because of the Plaintiff's prior employment service with

the Defendants.

REQUEST NO. 37: The Defendants' sole stated reason for the Plaintiff's termination of employment was "Reduction in Force."

REQUEST NO. 38: At the time of the Plaintiff's termination of employment, the fiscal department of the Defendants was reorganized: by, inter alia, the position of Fiscal Director was abolished; the assumption of the Fiscal Director's responsibilities by the Executive Director, Hal J. Schultz; and the hiring of an accounting supervisor, Gary Pararra, who had training in computer programming and accounting.

REQUEST NO. 39: For the fiscal year ending September 30, 1977, the State of Utah and its political subdivisions never appropriated funds (as opposed to donations and specific contracts) for the administration of the Salt Lake Area Community Action Program.

REQUEST NO. 40: For the fiscal year ending September 30, 1977, the percentage of total income received by the Salt Lake Area Community Action Program from the State of Utah and its political subdivisions for specific contracts was 7.2% (\$145,000.00 divided by \$2,026,000.00).

REQUEST NO. 41: For the fiscal year ending September 30, 1977, the percentage of total income received by the Salt Lake Area Community Action Program from the State of Utah and its political subdivisions for donations was 3.5% (\$70,068.00 divided by \$2,026,000.00).

REQUEST NO. 42: For the fiscal year ending September 30, 1977, all income received by the Salt Lake Area Community Action Program from the Federal Government was for specific contracts or grants with the Federal Government.

REQUEST NO. 43: The Plaintiff was afforded the right to submit a grievance under Chapter IX, Section A, of the Defendants' Personnel Policies and the Plaintiff did so submit a grievance.

REQUEST NO. 44: The Plaintiff was afforded the right to have his grievance referred to the Personnel Administration under Chapter IX, Section A, of the Defendants' Personnel Policies.

REQUEST NO. 45: The Plaintiff was afforded the right to refer his grievance to the Executive Director under Chapter IX, Section A, of the Defendants' Personnel Policies and the Plaintiff did so by letter dated March 15, 1977.

REQUEST NO. 46: The Plaintiff was afforded the right to appeal his grievance to the Executive Director under Chapter IX, Section B, of the Defendants' Personnel Policies and he did so appeal to the Executive Director by letter dated March 15, 1977.

REQUEST NO. 47: The Executive Director considered the Plaintiff's referral/appeal and notified the Plaintiff by letter dated March 16, 1977, of such consideration.

REQUEST NO. 48: The Plaintiff was afforded the right to appeal his grievance to the Personnel Committee of the Board of Trustees under Chapter IX, Section B, of the Defendants' Personnel Policies and he did so appeal to the Personnel Committee of the Board of Trustees.

REQUEST NO. 49: The Plaintiff was afforded a hearing within seven (7) days from his notice of appeal to the Personnel Committee under Chapter IX, Section B, of the Defendants' Personnel Policies.

REQUEST NO. 50: The Plaintiff was provided the right and opportunity to present any witnesses or evidence he desired in his behalf under Chapter IX, Section B, of the Defendants' Personnel Policies.

REQUEST NO. 51: Within five (5) days of the hearing of the Personnel Committee, the Personnel Committee notified the Plaintiff in writing that they required more time to deliberate and the Plaintiff did not object to this procedure.

REQUEST NO. 52: On April 13, 1977, the Plaintiff was notified in writing by the Personnel Committee of its findings under Chapter IX, Section B, of the Defendants' Personnel Policies.

REQUEST NO. 53: The Plaintiff was afforded all grievance and appeal rights and opportunities set forth in Chapter IX of

the Defendants' Personnel Policies.

REQUEST NO. 54: The Plaintiff received pay for two weeks he did not work following his termination of employment from the Defendants.

REQUEST NO. 55: The Plaintiff was not terminated because of any exercise of his constitutional rights.

REQUEST NO. 56: Prior to the Plaintiff's termination of employment and the completion of all grievance procedures provided by the Defendants' Personnel Policies, the Plaintiff never complained about (A) the hearing procedures and format, including the rules governing the admissibility of evidence; (B) not having counsel or an appropriate counsel substitute; (C) any lack of confrontation or cross-examination of witnesses or accusers; (D) the composition of the hearing body; (E) the decision of the Personnel Committee being based upon the evidence adduced at the hearing; and (F) not having a verbatim record of the hearing made and exhibits retained.

REQUEST NO. 57: Prior to the Plaintiff's termination of employment, the Salt Lake Area Community Action Program received no income or training and technical advice from the Utah State Economic Opportunity Office.

REQUEST NO. 58: There are no procedures or practices whereby an employee has a right of appeal from personnel decisions of the Salt Lake Area Community Action Program to the State of Utah or its political subdivisions or to the federal government.


REQUEST NO. 59: The Plaintiff's grievance was provided prompt consideration by the Defendants.

REQUEST NO. 60: The Personnel Committee, individually and collectively, was not biased or prejudiced against the Plaintiff.

REQUEST NO. 61: The Utah State Economic Opportunity Office is an organization separate and distinct from the Salt Lake Area Community Action and has no regulatory authority over the Salt

Lake Area Community Action Program.

DATED this 20 day of February, 1980.


STEPHEN W. COOK
Attorney for Defendants
LITTLEFIELD, COOK & PETERSON
426 South Fifth East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

Mailed a copy of the foregoing Defendants' First Requests
for Admissions to Kathryn Collard, Attorney at Law, Newhouse Build-
ing, Salt Lake City, Utah 84111, this _____ day of February, 1980,
postage prepaid.

COLLARD, KUHNHAUSEN, PIXTON & DOWNES
ATTORNEYS AT LAW
TEN EXCHANGE PLACE, SUITE 210
SALT LAKE CITY, UTAH 84111

KATHRYN COLLARD
Attorney for Plaintiff
COLLARD, KUHNHAUSEN, PIXTON & DOWNES
Ten Exchange Place, Suite 210
Salt Lake City, Utah 84111
Telephone: (801) 534-1663

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

WALTER K. GILMORE,	:	PLAINTIFF'S ANSWERS TO
	:	DEFENDANT'S FIRST REQUEST
Plaintiff,	:	FOR ADMISSIONS
	:	
-v-	:	
	:	
SALT LAKE AREA COMMUNITY	:	Civil No. C-78-0258
ACTION PROGRAM, et al.,	:	
	:	
Defendants.	:	

Plaintiff, WALTER K. GILMORE, by and through his attorney, KATHRYN COLLARD, hereby submits his Answers to Defendant's First Request for Admissions, in accordance with the provisions of Rule 36 of the Federal Rules of Civil Procedure.

Request No. 1: Admit.
Request No. 2: Admit.
Request No. 3: Admit.
Request No. 4: Admit.
Request No. 5: Deny.
Request No. 6: Deny.
Request No. 7: Deny.
Request No. 8: Deny.
Request No. 9: Admit.
Request No. 10: Admit.
Request No. 11: Admit.
Request No. 12: Deny.
Request No. 13: Deny.
Request No. 14: Admit.
Request No. 15: Deny.
Request No. 16: Admit.

Request No. 17: Deny.

Request No. 18: Deny.

Request No. 19: Deny.

Request No. 20: Deny.

Request No. 21: Deny.

Request No. 22: Deny.

Request No. 23: Admit.

Request No. 24: Deny.

Request No. 25: Admit.

Request No. 26: Deny.

Request No. 27: Deny.

Request No. 28: Deny.

Request No. 29: Admit.

Request No. 30: Admit.

Request No. 31: Admit.

Request No. 32: Admit.

Request No. 33: Admit.

Request No. 34: Deny.

Request No. 35: Plaintiff objects to this request

for admission upon the ground that it requires Plaintiff to speculate about facts and occurrences about which he has no personal knowledge.

Request No. 36: Plaintiff has no information upon which to admit or deny this request for admission and accordingly denies the same.

Request No. 37: Deny.

Request No. 38: Deny.

Request No. 39: Deny.

Request No. 40: Deny.

Request No. 41: Deny.

Request No. 42: Admit.

Request No. 43: Plaintiff admits that he filed a grievance but denies that the grievance was filed pursuant to Section A of Chapter IX of the Defendants' Personnel

COLLARD, KUHNHAUSEN, PIXTON & DOWNES
ATTORNEYS AT LAW
TEN EXCHANGE PLACE, SUITE 210
SALT LAKE CITY UTAH 84111

Policies.

Request No. 44: Deny.
Request No. 45: Deny.
Request No. 46: Deny.
Request No. 47: Deny.
Request No. 48: Deny.
Request No. 49: Admit.
Request No. 50: Deny.
Request No. 51: Deny.
Request No. 52: Deny.
Request No. 53: Deny.
Request No. 54: Admit.
Request No. 55: Admit
Request No. 56: Deny.
Request No. 57: Deny.
Request No. 58: Deny.
Request No. 59: Deny.
Request No. 60: Deny.
Request No. 61: Admit.

DATED this 21 day of March, 1980.

Walter K. Gilmore
WALTER K. GILMORE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

WALTER K. GILMORE, being first duly sworn upon his oath, deposes and states that he is the Plaintiff in the above referenced action; that he has read the foregoing Answers to Defendant's First Request for Admission; that the answers thereto are true and correct to the best of his knowledge, information and belief.

DATED this 21 day of March, 1980.

Walter K. Gilmore
WALTER K. GILMORE

SUBSCRIBED and sworn to before me this 21 day of March, 1980.

MY COMMISSION EXPIRES 8-1-83

Kenia Stewart Addendum

MAILING CERTIFICATE

I hereby certify that on this 20th day of March, 1980, I mailed a true and correct copy of the foregoing Plaintiff's Answers To Defendants First Request For Admissions, to Stephen W. Cook, Attorney for Defendants, to his office at 426 South 500 East, Salt Lake City, Utah, 84102, by depositing the same in the U.S. Mail, postage prepaid.

Tami Stewart

COLLARD, KUHNHAUSEN, PIXTON & DOWNES
ATTORNEYS AT LAW
TEN EXCHANGE PLACE, SUITE 210
SALT LAKE CITY UTAH 84111