

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 : Reply Brief

Utah Court of Appeals

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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.

UTAH COURT

Case No. 870395-CA

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REPLY BRIEF OF PLAINTIFF/APPELLANT

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

APR 12 1988

Clerk of the
Utah Court of Appeals

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Argument Priority Classification 14b

PARTIES TO THE PROCEEDING

PLAINTIFF

Walter K. Gilmore, an employee of Salt Lake Area Community Action Program (CAP).

DEFENDANTS

Salt Lake Area Community Action Program (CAP), employer of Walter K. Gilmore.

Hal J. Schultz, executive director of CAP and immediate supervisor of Gilmore.

Robert E. Philbrick, elected president of the CAP board of trustees on April 20, 1977.

Fred Geter, chairman of the personnel committee of the CAP board of trustees.

Richard Fields, CAP personnel administrator.

Ann O'Connell, president of the CAP board of trustees at the time of Gilmore's discharge, succeeded by Philbrick.

OTHER PERSONS MENTIONED IN FACTS

David E. Vanderburgh, director of region 3 of the Community Services Agency.

<u>Bernice Benns</u>	}	members of the CAP personnel committee
<u>Anita Roach</u>		
<u>Glen Larsen</u>		
<u>Janet Hanson</u>		

Gary Parara, a person hired by CAP just prior to Gilmore's termination.

TABLE OF CONTENTS

i.....	List of Parties
ii.....	Table of Contents
iii.....	Authorities
1.....	Reply To Defendants' Statement of Facts
2.....	Summary of Reply To Defendants' Argument
4.....	Reply To Defendants' Argument
4.....	Reply To Point IA
7.....	Reply To Point IB
12.....	Reply To Point IC
15.....	Reply To Point ID
17.....	Reply To Point IIA
19.....	Reply To Point IIB
21.....	Reply To Point III
23.....	Conclusion

TABLE OF AUTHORITIES

CASES

Alexander v. Phillips Oil Co. 707 P.2d 1385 (Wyo. 1985).....	12
Bihlmaier v. Carson 603 P.2d 790 (Utah 1979).....	2,3,4,5,6,7,9,13,15
Bruno v. Plateau Mining Co. 73 Utah Adv. Rep. 89 (1987).....	7,8,9
Continental Air Lines Inc. v. Keenan 731 P.2d 708 (Colo. 1987).....	12
Forrester v. Parker 606 P.2d 191 (N.M. 1980).....	9,10
Geneva Pipe Co. v. S & H Ins. Co. 714 P.2d 648 (Utah 1986).....	2
Golden v. Anderson 256 Ca.App.2d 714, 64 Cal.Rptr. 404 (1967).....	22
Heideck v. Kent General Hospital Inc. 446 A.2d 1095 (Del. 1982).....	12
Johnson v. National Beef Packing Co. 220 Kan. 52, 551 P.2d 779 (1976).....	11
Leithead v. American Colloid Co. 721 P.2d 1059 (Wyo. 1986).....	12,15
Mobil Coal Producing Inc. v. Parks 704 P.2d 702 (Wyo. 1985).....	12,15,16
Moniodis v. Cook 494 A.2d 212 (Md.App. 1985).....	22,23,21

Moore v. Utah Technical College	
727 P.2d 634 (Utah 1986).....	13,14
Piacitelli v. Southern Utah State College	
636 P.2d 1063 (Utah 1981).....	5,13,14,17
Reid v. Sears, Roebuck and Co.	
790 F.2d 453 (6th Cir. 1986).....	11
Rose v. Allied Development Co.	
719 P.2d 83 (Utah 1986).....	2,7,8,10
Schroeder v. Dayton-Hudson Corp.	
448 F.Supp. 910 (E.D. Mich. 1977).....	11
Toussaint v. Blue Cross & Blue Shield of Michigan	
292 N.W.2d 880 (Mich. 1980).....	7,10,12,16
Valentine v. General American Credit Inc.	
362 N.W.2d 628 (Mich. 1984).....	10
Wise v. Southern Pacific Co.	
223 Cal.App.2d 50, 35 Ca. Rptr. 652 (1953).....	23

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Defendants/Respondents.

Case No. 870395-CA

REPLY BRIEF OF PLAINTIFF/APPELLANT

REPLY TO DEFENDANTS' STATEMENT OF FACTS

Much of the information in Defendants' Statement of Facts is immaterial to the issues at hand.

Specifically, pages 8 through 13 contain statements that, whether or not true, have no bearing on the question of whether the CAP Personnel Policies Manual was a contract and, if so, whether the contract has been breached.

Some of the statements (such as those on pages 15 and 16), although basically true, are somewhat misleading when read out of their context. For instance, Defendants state on p.16: "He [Gilmore] never requested a written decision of the Personnel Committee stating reasons for its decision." That may be true but the CAP Manual required written findings of the decision

so there was no reason for Gilmore to request them. The statement as presented by Defendants is misleading.

Another example of a statement misleading out of context is on p.16 where Defendants state: "The decision of the [personnel] Committee was based on the evidence presented" (citing the Geter deposition, p.27). First, the Geter deposition doesn't say exactly that. Second, and most importantly, part of the evidence presented was presented after the last session of the so-called hearing; this was a letter from Schultz concerning Gilmore that Gilmore was unaware of, was not questioned about and had no opportunity to refute. Yet, according to committee member Roach, the committee based its decision primarily on it. See Facts #29 and 30 of Plaintiff/Appellant's Brief.

No fact in Plaintiff/Appellant's Statement of Facts has been contradicted by Defendants. On appeal, the court must look at the facts and all fair inferences in a light most favorable to Gilmore, the party against whom summary judgment was entered. Geneva Pipe Co. v. S & H Ins., 714 P.2d 648 (Utah 1986); Rose v. Allied Development Co., 719 P.2d 83 (1986).

SUMMARY OF REPLY TO DEFENDANTS' ARGUMENT

POINT I. Gilmore's employment was not at will. The CAP Personnel Policies Manual did not prohibit the discharge of Gilmore but it did limit Defendants' right to discharge him by requiring that certain procedures be followed.

A. Bihlmaier v. Carson, 603 P.2d 790 (Utah 1979),

recognized two exceptions to an employer's right to fire at will: "an express or implied stipulation as to the duration of the employment or of good consideration in addition to the services rendered" (at 792). Bihlmaier should not be read to limit exceptions to the at-will doctrine to only those two situations. Other exceptions have been recognized; a company manual or handbook should also be recognized, not as a limitation prohibiting firings but rather as a limitation on the manner of firing according to whatever terms may be set out in the handbook. Bihlmaier did not involve any company handbooks or manuals so the question of whether handbooks or manuals would also limit the at-will doctrine was not addressed. (Plaintiff submits that a good consideration requirement would be met by Gilmore in any event; see D below and on page 14.)

B. Utah has not rejected departures from the at-will doctrine based on employer policies and manuals. The cases cited by Defendants concern situations where company handbooks or manuals were not involved and/or where a limitation based on a handbook or manual was not claimed, discussed or argued and, therefore, not rejected.

C. Gilmore does not claim that the CAP Manual constituted a contract as to duration of employment. The Manual was a contract as to procedures required for termination of employment and appeal.

D. Even if good consideration in addition to services to be rendered is required in Utah for departure from the at-will

doctrine, the requirement is met. The CAP Manual provides that consideration.

POINT II. Defendants did not substantially comply with CAP Manual procedures concerning either Gilmore's discharge or the appeal process. In light of the number of procedures that were violated and the manner in which they were violated, to claim substantial compliance is to stretch the imagination.

POINT III. The individual defendants should be held liable for breach of contract. Their role was active, not passive. There is no reason for a corporate employer to shield them.

REPLY TO DEFENDANTS' ARGUMENT

REPLY TO POINT I.

THE EMPLOYMENT WAS NOT A
TRADITIONAL AT-WILL RELATIONSHIP.

A. The employment relationship was not at-will and without restrictions.

Defendants argue that Plaintiff Gilmore's employment was terminable at-will because the duration of employment was not specified and, under Bilhmaier v. Carson, supra, employment remains at-will without a specification of duration.

In making this argument, Defendants (1) have failed to recognize the difference between an employment situation with no limitations on discharge as was involved in the Bihlmaier case and an employment situation with some limitations (such as procedures in a company handbook) as is involved in the Gilmore case and (2) are advocating a limiting and narrow application of

Bihlmaier that could not be intended and is not wise.

In the Bihlmaier case, Bihlmaier had been denied a loan because, in response to a request for information on the loan application, Carson, Bihlmaier's employer, said Bihlmaier's employment was on a trial basis and that continued employment depended on Bihlmaier himself. Bihlmaier considered this statement and the refusal to change it as a constructive discharge so he quit his job and sued Carson for breach of an oral employment contract. Bihlmaier offered no specific basis for his claim that Carson had no right to fire him. The court said that unless there is some reason to limit the employer's right to fire (such as an agreement as to duration of employment or some other good consideration), the employer retains the right to fire at will.

This is far different from Gilmore's situation. First, Gilmore has not said CAP had no right whatsoever to fire him, as Bihlmaier said. Plaintiff Gilmore is saying only that if he is fired, the procedures in the CAP Personnel Policies Manual must be followed and that he has a right to employment until procedures are complied with. The right to fire Gilmore existed but his discharge must comply with the Manual procedures. See Piacitelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981). Second, in Bihlmaier, the court found no reason to limit the at-will doctrine. In the Gilmore case, the reason is the Defendants' Personnel Policies Manual. There was no manual or handbook in the Bihlmaier case so its effect on the at-will

doctrine was not at issue.

To say that in Utah the strict rule under Bihlmaier is that an employer always has the right to fire employees at will unless there is an agreement concerning duration of employment or some good consideration in addition to services to be rendered would foreclose relief in situations where employers have fired classical at-will employees for most undesirable and improper reasons. To give Bihlmaier that strict and narrow reading, as Defendants advocate, ignores situations not involved in and, therefore, neither argued or considered in the Bihlmaier case.

Surely in Utah an employer would not be permitted to fire an employee for serving on a jury, for refusing to lie under oath about the employer's activities, for filing a worker's compensation claim, for refusing to participate in the employer's illegal activities. (These situations all led to court-established exceptions to the at-will doctrine; see cases cited on p.28 of Plaintiff/Appellant's Brief.) Surely a Utah employer would not be permitted to shield himself in such situations with the Bihlmaier case by saying the employee was strictly at will because no term of employment was specified and no other consideration was rendered by the employee. That would be the result if Defendants' two-exceptions-only argument is adopted.

Likewise, Defendants in the instant case should not be permitted to promulgate a Manual with procedures for a proper discharge, tell Gilmore he is expected to follow it, violate the Manual when Gilmore is fired and then shield themselves with a

limiting, and somewhat incorrect, application of the Bihlmaier case.

In Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W. 2d 880 (Mich. 1980), the company had made the argument, made by Defendants here, that restrictions in a company handbook could not limit the right to fire when the duration of employment had not been specified. The Michigan Supreme Court specifically rejected the lower court's finding that "a contract of indefinite duration 'cannot be made other than terminable at will by a provision....'" in a handbook (at 890-891). The same argument should be rejected in Utah as was done in Michigan.

B. The Utah appellate courts have not rejected departures from the at-will doctrine based on an employer's policies.

Defendants claim (p.22 of their Brief) that Utah has firmly rejected departures from the at-will doctrine based on an employer's policies. The two cases they cite, Bruno v. Plateau Mining Co., 73 Utah Adv. Rep. 89 (1987), and Rose v. Allied Development Co., supra, do not support that position.

In Rose, the court recognized that exceptions to the at-will doctrine do exist, citing Bihlmaier v. Carson, supra, as putting forth two exceptions (where duration of employment has been specified and where there is agreement for good consideration in addition to services to be rendered), and then found that Rose did not fall within either of the Bihlmaier exceptions. However, no written policies or procedures or employer handbooks of any kind were involved in the Bihlmaier or Rose cases and, therefore,

were not advocated as limitations on the employer's right to fire at will. Since they were not involved, argued or even discussed, it can hardly be said they were rejected as limitations on the right to fire at will.

The plaintiff in Rose based his claimed employment contract on nothing more than two very brief oral conversations ("five minutes" and "a few sentences") with the defendant during which the minds obviously never met on the terms Rose claimed.

In the recent Bruno case, written policies were involved but the plaintiff was not basing his claimed wrongful discharge on those written policies. In an interesting twist, he was trying to base his claim on what he said was a non-written practice directly opposite to the written policy. The defendant company had a written policy giving it the option to fire employees for fighting and plaintiff was indeed fired for fighting. Bruno said his discharge was wrongful because, despite that written policy, the company had an actual practice or de facto policy of not firing for fighting; Bruno claimed the practice was an implied contractual promise. The court ruled that even if such a de facto practice existed, "this practice alone is not enough to establish Plateau's intentional surrender of its right to terminate Bruno's employment at will."

Applying this reasoning to the Gilmore case, one would ask: Did Defendants do something "to establish their intentional surrender of the right to terminate Gilmore's employment at-will?" The answer is yes: they promulgated a Personnel

Policies Manual. They did not surrender the right to discharge Gilmore but they did surrender the right to discharge him unless the procedures in the Manual were complied with.

The court in Bruno found a Bihlmaier exception had not been established and rejected an attempt to create an exception based on an unwritten de facto practice. Plaintiff Gilmore is not trying to establish a Bihlmaier exception or trying to establish a Bruno-type exception. Gilmore is trying to establish a limitation based on the written Manual. Such an exception was not addressed or considered in either Bihlmaier or Bruno.

The court in Bruno further wrote: "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" (at 90-91). Again applying this language to Gilmore, we find the promulgation of the Manual and the acceptance of it as evidence of mutual consent to be bound by the terms of the Manual. Gilmore was not free to accept or reject portions of the Manual he chose. The same standard must be mutually applied the the Defendants.

Defendants attempt to get around Forrester v, Parker, 606 p.2d 191 (N.M. 1980), a case directly and completley on point with the Gilmore case. Forrester, they accurately point out, required defendants (Parker and the local CAP) to conform to procedures for terminating Forrester as spelled out in the CAP manual because the manual created an implied contract and bound

the parties. But Defendants here argue that Rose rejected this departure from the at-will doctrine, holding that "'the existence of an employment agreement not terminable at-will must be established by more than subjective understandings or expectations'" (p.25 of their Brief). Forrester did not try and Gilmore is not trying to create departures from the at-will doctrine based on "subjective understandings or expectations." Forrester relied on and Gilmore is relying on a on detailed, written policy manual, something missing in Rose.

Defendants cite Valentine v. General American Credit Inc., 362 N.W.2d 628 (Mich. 1984), as (1) a clarification of the leading case in the field, Toussaint v. Blue Cross & Blue Shield of Michigan, supra, and (2) a rejection of "Gilmore's argument that a personnel policy manual creates a new employment right" (pp. 25, 26 of their Brief). To that we respond: Valentine specifically reaffirms the Toussaint holding that company manuals may be enforceable in contract. The case does point out that Toussaint did not "recognize employment as a fundamental right or create a new 'special' right," as the plaintiff in Valentine was trying to do. But Gilmore has never claimed that he has a fundamental right to employment or that he has some "special" right to his job. His only claim is a right to be terminated properly in accordance with the procedures in the CAP Manual. He seeks to enforce the Personnel Policies Manual as a contract, a right recognized in Toussaint and reaffirmed in Valentine.

Defendants claim (p.26 of their Brief) that a majority of

the states which have considered the question have determined that a policy manual does not implicitly limit the right of an employer to terminate at will. In the cases cited, a look at the reasons for the rejection of company policies as a limitation in those cases shows them to be inapplicable to the instant case.

For instance:

* Reid v. Sears, Roebuck and Co., 790 F.2d 453 (6th Cir. 1986): Plaintiffs claimed they were wrongfully discharged because the employee handbook's listing of causes that could result in termination limited the company's right to fire. The court pointed out that an employer can defeat such claims by requiring prospective employees to acknowledge that they serve as at-will employees. Sears had included that exact language in its employment application, indicating clearly that the employee handbook was not to be a contract. No such language is involved in the Gilmore case; hence, Reid is inapplicable.

*Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976): The court here refused to construe the employee handbook as a contract because it was a "unilateral expression of company policy and procedures" and was "not published until long after plaintiff's employment." Neither description is applicable in the Gilmore case.

Schroeder v. Dayton-Hundson Corp., 448 F.Supp. 910 (E.D. Mich. 1977): The court looked at the employee handbook as something designed to inform the employee about fringe benefits, privileges and certain policies. The significant factor to

consider here, however, is that this was a federal district court applying Michigan law to state common law claims prior to the time the Michigan Supreme Court decided Toussaint.

Heideck v. Kent General Hospital Inc., 446 A.2d 1095 (Del. 1982): The court described the handbook here as a "unilateral expression" that was "issued for guidance...of employees." The court also noted that the handbook had been complied with.

Defendants have ignored the trend and the long line of cases recognizing company handbooks and manuals and contractually enforceable. In addition to cases already cited in Plaintiff/Appellant's Brief, handbooks and manuals have been found enforceable as contracts in:

Mobil Coal Producing Inc. v. Parks, 704 P.2d 702 (Wyo. 1985); Leithead v. American Colloid Co., 721 P.2d 1059 (Wyo. 1986); Continental Air Lines Inc. v. Keenan, 731 P.2d 708 (Colo. 1987); Alexander v. Phillips Oil Co., 707 P.2d 1385 (Wyo. 1985).

C. No claim is made that the CAP Manual constituted a contract as to duration of employment.

Defendants argue (p.26 of their Brief) that under Utah law an employer's policies do not constitute an express or implied contract as to the duration of employment. Plaintiff Gilmore has not argued that the CAP Manual was a contract concerning duration of employment. Gilmore has not argued that the Manual gave him a right to lifetime employment or to employment for a specified length of time. He argues that the Manual gave him a right to be terminated properly, in accordance with procedures spelled out in

the CAP Manual.

Defendants misleadingly state that Gilmore "was employed six months before he obtained a copy of the policies" (p.27), a fact that may or may not be true but in either case is immaterial. Plaintiff Gilmore was originally hired on a temporary basis and worked on that basis for six months. So whether he had a copy of the Manual during that period is not material as the policies did not necessarily apply to him in the temporary position (or at least, that question is not at issue here). But at the time Plaintiff Gilmore became a permanent employee, he had a copy and was told he was expected to follow the policies laid out in the Manual.

Defendants then argue that Moore v. Utah Technical College, 727 P.2d 634 (Utah 1986), and Piacitelli v. Southern Utah State College, supra, are cases that fall within the Bihlmaier exception (concerning length of employment) to the at-will doctrine because both cases involve one-year contracts of employment. Defendants describe the cases as "excellent examples of the employment at-will doctrine, demonstrating the circumstances under which the first exception to the doctrine applies" (p.29 of their Brief). Such a statement actually indicates a lack of understanding of both the Bihlmaier exception and the two cases.

The Bihlmaier exception concerning duration of employment involves the situation where an employee has a contract or agreement (express or implied) to work for a certain period of

time. If the employee is fired during that period, he would have a cause of action for being wrongfully terminated as the contract prevents his being fired during the time specified. In Moore and Piacitelli, a series of one-year contract periods had expired. The employers decided not to continue the employment of Moore and Piacitelli and so notified them. The question in both cases was not whether the employees (Moore and Piacitelli) had been terminated wrongfully during the period of employment specified in the contracts. Rather the question was whether they had been properly terminated in accordance with procedures detailed in the employer policy manuals. In both cases, the employers were required to comply with the manual procedures. If anything, a requirement of compliance with the CAP Manual should be stronger in the Gilmore case. In Moore and Piacitelli, the duration of employment had ended under the terms of the contract but compliance with handbook procedures was still mandated.

It is correct, as Defendants point out on p.29 of their Brief and as is pointed out on p.24 of Plaintiff/Appellant's Brief, that the Utah Supreme Court was not asked in Piacitelli to actually decide whether the personnel manual was a contract as that question had been decided in the affirmative by the Fifth District Court and was not appealed. But in its opinion, the court noted such and referred to the lower court's ruling with approval. (Piacitelli at 1065-1066.)

D. The CAP Manual was good consideration in addition to services to be rendered.

Defendants argue (p.29 of their Brief) that Gilmore did not provide any good consideration in addition to the services to be rendered and, therefore, the second Bihlmaier-recognized exception to the at-will doctrine cannot be found. Even if the court were to rule that the two Bihlmaier exceptions to the at-will doctrine are the only exceptions that will be recognized in Utah, Plaintiff Gilmore's discharge is still improper on the grounds that the second Bihlmaier exception is present. The "express or implied ...good consideration in addition to the services contracted to be rendered" (Bihlmaier at 792) is provided by the CAP Personnel Policies Manual.

In Leithead v. American Colloid, supra, the lower court had held that the company handbook was not part of the employee's contract because it was "not supported by consideration running from appellant [employee] to the company. The Wyoming Supreme Court rejected this "rule of additional consideration relied on by the district court," ruling:

The benefits extended to the employee in the handbook are enforceable contract terms, because they are supported by consideration flowing to the employer. That consideration consists of the benefit of an orderly, cooperative and loyal work force. (At 1063 and citing Mobil Coal Producing Inc. v. Parks, supra.)

In the Mobil case, the court had written:

The handbook's provisions change the appellant's [company's] unfettered right to discharge appellee [employee]...provisions [in the handbook] create an expectation on the part of an employee that they will be followed, and they induce appellee to continue his employment with appellant. Appellant 'secures an orderly, cooperative and loyal work force'...Benefit to the promisor is sufficient consideration for a contract. (At 707.)

The source of this reasoning was the Michigan Supreme Court, which had said in Toussaint:

While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knew nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with an obligation." (At 892; footnotes omitted.)

In light of the foregoing, the court should find that if the Bihlmaier case requires good consideration in order to depart from the at-will doctrine, then that requirement is satisfied by

a written policy manual promulgated by the employer and relied on by the employee.

REPLY TO POINT II.

DEFENDANTS DID NOT SUBSTANTIALY COMPLY
WITH THE CAP PERSONNEL POLICIES MANUAL.

A. Defendants did not substantially comply with the CAP
Personnel Policies Manual in discharging Gilmore.

Defendants' argument (Point II, p.31, of their Brief) that CAP substantially complied with the Personnel Policies Manual is simply not born out by the uncontested facts. In Plaintiff/Appellant's Brief, all violations of the CAP Manual are delineated in the Statement of Facts, specifically Facts #17 through 22, 26, 31, 32, 35, 39, 40, 42, 43. None of these facts have been denied by Defendants.

Defendants ignore the investigation by the Community Services Administration, a grantor agency of CAP, which determined that CAP had violated the CAP Personnel Policies Manual and then sanctioned CAP with a cut in funds (all of which is uncontested by Defendants). Apparently CSA saw no "substantial compliance."

Piacitelli v. Southern Utah State College, supra, approves of substantial compliance only where the purposes of the procedural requirements are fulfilled and the substantial interests of the parties are satisfied (at 1066). In Piacitelli, the College's handbook contained considerable detail about the purposes of various procedures (at 1066) and the court looked at those stated purposes in determining whether the actions taken by the employer were in substantial compliance. The CAP Personnel

Policies Manual, however, is largely silent as to the purposes of its various procedural requirements. Defendants have taken it upon themselves to speculate on what the purposes of the uncomplained-with procedures might be and then conclude that the purposes they have supplied have been met. Such speculative additions after the fact should not be permitted.

Defendants also try to show substantial compliance by simply talking in circles. Defendants spend three pages (pp.33, 34, 38) expounding on discussions Defendant Schultz had with Plaintiff Gilmore about alleged problems with his (Gilmore's) work performance, then point out that Gilmore was reduced in force, not discharged for poor job performance. Even assuming that such discussions took place as Defendants claim, it makes no sense to say that discussions about his job performance were supposed to give Gilmore some idea that he would be reduced in force. Taking into consideration his periodic raises in pay and the one job evaluation, which although never completed, gave Gilmore excellent and above average ratings, Gilmore certainly had no reason to believe he was about to be discharged, either because of a reduction in force or for poor job performance.

Nor was the Manual's requirement of periodic job performance evaluations ever substantially complied with in any manner that could possibly put Gilmore on notice that his job was in jeopardy. The one uncompleted evaluation did just the opposite.

B. Defendants did not substantially comply with the CAP Personnel Policies Manual in hearing Gilmore's appeal.

Defendants state (p.39 of their Brief) that CAP's appeal procedure was adopted to provide for prompt and fair consideration of personnel actions. Again Defendants have speculated on a purpose where none is stated in the Manual. But even if that is accepted as the purpose, the manner of handling Gilmore's appeal cannot be described with the terms prompt and fair.

The Manual entitled Gilmore to an appeal before Schultz. Schultz claimed a meeting he had with Gilmore before the firing was an appeal of the firing. It can hardly be said that Schultz substantially complied with the Manual by calling a meeting held before the firing an appeal hearing on the firing. [Note: Defendants state on p.44 that within four or five days after Schultz notified Gilmore of the decision to terminate him, Gilmore was afforded a full hearing. This simply is not true, as evidenced by uncontested facts. Schultz in his March 16 letter to Gilmore (Exhibit D-13 to the Gilmore deposition and Addendum-4 of Plaintiff/Appellant's Brief) said he considered a meeting he had with Gilmore the previous week to be an appeal of the March 14 termination. Neither Plaintiff nor Defendants have ever, in the lower court or in the statements of facts on appeal, stated that Schultz afforded Gilmore a full hearing before him after the firing.]

The appeal hearing before the CAP personnel committee was full of flaws: only two of five committee members present at the

first session of the so-called hearing and only three of five members present at the second session; no opportunity for Gilmore to know and refute what Schultz told the committee members, a decision based primarily on information in a letter unknown to Gilmore and given to the committee after the conclusion of the hearing, a decision issued three weeks after the hearing and not within five days as required, no written findings. (These flaws are detailed in Facts #20 through 35 of Plaintiff/Appellant's Brief.) It stretches the imagination to describe the Defendants' actions concerning the appeal process as "substantially in compliance."

Defendants argue (p.39 of their Brief) that "Gilmore believes he was not afforded a fair hearing because it was not a trial type or formal hearing." Gilmore has made no such claim. He has merely asked that the hearing and appeal process be fair and comply with the Manual rules.

The cases Defendants cite on pp.39 and 40 of their Brief are civil rights cases and a case involving a license revocation hearing. Those cases did not involve any company policy manuals. Their holdings in the due process area have limited application to company policy manual cases where enforcement is not sought on civil rights grounds.

Defendants state (p.42 of their Brief) that "Gilmore never requested the formal procedures he now claims should have been provided." First, Gilmore claims only that the procedures required by the Manual must be followed. Second, a reading of the pages of Gilmore's deposition referred to by Defendants (on pp.42 and 43 of their Brief) shows that Gilmore never waived any

rights. His testimony shows only that he never had an opportunity to request what Defendants now claim he waived.

REPLY TO POINT III.

THE INDIVIDUAL DEFENDANTS ARE
LIABLE FOR THEIR BREACH OF CONTRACT.

Defendants argue (Point III, p.45) that summary judgment dismissing claims against CAP officers and employees (Schultz, Geter, Fields, Philbrick, O'Connell) is proper because these individual defendants are not personally liable for a breach of contract with Plaintiff Gilmore.

Moniodis v. Cook, 494 A.2d 212 (Md.App. 1985), directly addressed the question of whether an officer or employee of a corporation can be sued individually and held liable for the wrongful discharge of an employee. The court ruled:

This is not to say that an "officer of a corporation or other business entity who plays a dominant role in the affairs of the corporate employer and who primarily formulates the corporation's decision to fire a particular employee or group of employees should be permitted to take refuge behind the corporate veil in order to insulate himself from liability for his own wrongful conduct. (At 218.)

Applying that criteria to the defendants in that case, the court found no individual liability because those defendants had played no key roles, had many officers senior to them with veto power over their actions, had little or no policy-making authority.

The situation is far different in the Gilmore case and applying the Moniodis criteria would lead to a finding of personal liability. Schultz was the executive director with responsibility for day-to-day operations and authority for all

personnel decisions, including initial appeals of his personnel decisions. Richard Fields was the personnel administrator, whose duties included, among others, seeing that employee evaluations were done in accordance with the CAP Personnel Policies Manual (see Manual). Fred Geter was chairman of the personnel committee, which was responsible for hearing appeals in accordance with CAP personnel policies (see Manual). Robert Philbrick and Ann O'Connell were presidents of the CAP board of trustees, both of whom Gilmore complained to concerning the lack of adherence to the Manual procedures and neither of whom took any action to correct the situation.

The court in Moniodis also pointed out that its previous decisions had not been intended to provide a cause of action for wrongful discharge against corporate officials, "at least where the evidence does not show that the officer was clothed with the essential attributes of an employer" (at 218). Certainly the individual defendants in the Gilmore case were well clothed with the "essential attributes of an employer" and should not ask the corporation to shield them from their own personal actions.

One of two cases Defendants cite (on p.45 of their Brief) to support their contention that the individual Defendants should not be personally liable, Golden v. Anderson, 256 Cal.App.2d 714, 64 Cal.Rptr. 404 (1967), actually holds the opposite, reaching the conclusion that corporate officials, not only the corporation, may be held personally liable. Mr. Golden had sued four corporate defendants and nine employees as individuals for intentional interference with a contract; as to three of the

individual defendants, the court ruled that even though they had acted for the corporation in a representative capacity and within the course and scope of their employment, they were not immune from liability as individuals. The lower court's summary judgment in their favor was reversed. Summary judgment was upheld in favor of six other individual defendants but only because the facts showed that they had absolutely no knowledge of any contract and, therefore, could not have done anything to interfere. Similar to Moniodis, the question turned on whether the individuals were active participants. And an application of that reasoning to the instant case would preclude summary judgment against the individual defendants, all of whom were active participants.

The other case Defendants cite in support of their contention, Wise v. Southern Pacific Co., 223 Cal.App.2d 50, 35 Cal.Rptr. 659 (1953), concerned a suit against fellow employees for conspiracy to obtain the plaintiff's discharge. The court's holding that employees of a corporation cannot be found to have conspired with the corporation has no applicability in the Gilmore case. Plaintiff Gilmore does not seek liability based on conspiracy.

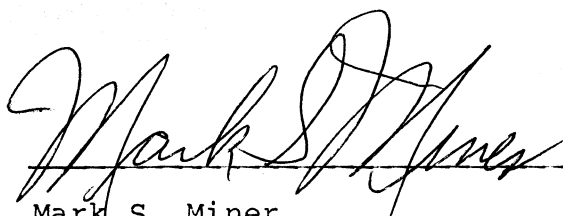
CONCLUSION

Plaintiff Gilmore has replied to each argument Defendants have made in support of the lower court's summary judgment in their favor and has demonstrated why such arguments are incorrect

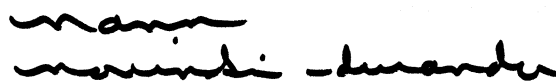
or inapplicable and should be rejected. It should also be noted that Defendants made no response to the estoppel argument made by Plaintiff Gilmore in Point II of the Plaintiff/Appellant's Brief.

In this light and in light of all materials before the court, Plaintiff Gilmore respectfully submits that he should be granted the relief sought as stated in his Brief together with an award of his costs, pursuant to Rule 34, R. Utah Ct. App.

RESPECTFULLY SUBMITTED on April 12, 1988:

A handwritten signature in cursive script, appearing to read "Mark S. Miner", written over a horizontal line.

Mark S. Miner
Attorney for Plaintiff/Appellant

A handwritten signature in cursive script, appearing to read "Nann Novinski-Durando", written over a horizontal line.

Nann Novinski-Durando
Attorney for Plaintiff/Appellant

CERTIFICATE OF MAILING

I hereby certify that on April 12, 1988, I mailed by first class mail, postage pre-paid, four copies of this Reply Brief to John K. Rice and Stephen W. Cook, Cook & Wilde, P.C., Attorneys for Defendants, at Suite 490, 6925 Union Park Center, Salt Lake City, Utah 84047.

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