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Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

UTAH
DOCUMENT
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DOCKET NO. 19488

IN THE SUPREME COURT

OF THE STATE OF UTAH

WILLARD S. ROSE,	)	
Plaintiff and Appellant,	)	Case No. 19488
vs.	)	
ALLIED DEVELOPMENT COMPANY, a Utah corporation,	)	
	)	
Defendant and Respondent.	)	

BRIEF OF APPELLANT

Appeal from the Judgment of the Third
Judicial District Court for Salt Lake County
Honorable Peter F. Leary, Judge

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FILED

NOV 2 8 1983

Clerk, Supreme Court, Utah

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TABLE OF CONTENTS

Page

NATURE OF THE CASE 1

DISPOSITION IN LOWER COURT 2

RELIEF SOUGHT ON APPEAL 2

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 4

ARGUMENT

I THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ALLIED 8

II THE LOWER COURT ERRED IN DETERMINING THAT MR. ROSE'S EMPLOYMENT CONTRACT WAS TERMINABLE AT WILL 9

Point 1
Utah Law Required That Mr. Rose's Employment Contract Was Not Terminable At Will 9

Point 2
Mr. Rose Had An Enforceable Employment Contract With Allied, Duration Of Which Could Not Be Terminated On The Basis Of School 10

Point 3
Mr. Rose Incurred Independent Consideration Resulting In Lack Of Employment Terminability Based On School 18

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Page

Point 4
Allied Was Estopped From Terminating Mr. Rose's Employment Without Good Cause And/Or On The Basis Of School 19

III THE COURT BELOW ERRED IN DETERMINING THAT MR. ROSE IS NOT ENTITLED TO RECOVER AGAINST ALLIED PURSUANT TO THE DOCTRINE OF PROMISSORY ESTOPPEL 22

IV MR. ROSE IS ENTITLED TO RECOVER UNDER THE THEORY OF WRONGFUL DISCHARGE 23

Point 1
The Utah Supreme Court Should Adhere To The Recent Evolution In Employment Contract Law To Expand The Rights Of Employees 23

Point 2
Mr. Rose Is Entitled To Recover Under Wrongful Discharge On The Implied Contract Basis 26

Point 3
Mr. Rose Is Entitled To Recover Under Wrongful Discharge For The Violation Of The Covenant Of Good Faith And Fair Dealing 37

Point 4
Mr. Rose Is Entitled To Recover Under The Theory Of Wrongful Discharge For Allied's Violation Of Public Policy 41

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82m

Page

V THE LOWER COURT ERRED IN DETERMINING THAT MR. ROSE WAS NOT ENTITLED TO RECOVER AGAINST ALLIED ON THE BASIS OF ALLIED'S VIOLATION OF THE COVENANT OF GOOD FAITH AND FAIR DEALING 43

CONCLUSION 43

TABLE OF STATUTES, RULES, CASES AND AUTHORITIES CITED

STATUTES AND RULES CITED

Page

Utah Const. Art. XVI, § 1 .... 35, 41

Utah Code Ann. § 34-19-1(3) 34, 41

Utah Code Ann. § 34-20-1(1), (2) 35, 41

Utah Code Ann. § 70A-1-201(19) 38

Rule 56(c), Utah Rules of Civil Procedure 8

CASES CITED

Bihlmaier v. Carson, 603 P.2d 790 (Utah 1979) 9, 19

Bullock v. Deseret Dodge Truck Center, Inc., 11 Utah 2d 1, 354 P.2d 559 (Utah 1960) 8, 9, 19

Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (Cal. Ct. App. 1980) 32, 33, 34, 37, 40

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Page

DeFeyter v. Riley,
43 Colo. App. 299, 606 P.2d 453 (1979) 13

Farmer v. Arabian American Oil Co.,
277 F.2d 46 (2nd Cir. 1960) 17

Fortune v. National Cash Register Co.,
364 N.E.2d 1251 (Mass. 1977) 37, 39

Lampley v. Celebrity Homes, Inc.,
42 Colo. App. 359, 594 P.2d 605 (1979) 12, 31

Manwill v. Oyler,
11 Utah 2d 433, 361 P.2d 177 (1961) 12

Perry v. Sindermann,
408 U.S. 593 (1972) 32

Petroleum Refractionating Corp v. Kendrick Oil Co.,
65 F.2d 997 (10th Cir. 1933) 11, 12

Pugh v. See's Candies, Inc.,
116 Cal. App. 3d 311, 171 Cal. Rptr. 917
(Cal. Ct. App. 1981) 14, 18, 35, 36, 37, 38

Stevens v. G. L. Rugo & Sons, Inc.,
209 F.2d 135 (1st Cir. 1953) 12, 13, 14, 20

Sugarhouse Finance Co. v. Anderson,
610 P.2d 1369 (Utah 1980) 12

Toussaint v. Blue Cross & Blue Shield of Michigan,
292 N.W.2d 880 (Mich. 1980) 14, 26, 27, 28, 29, 30, 31, 32

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Machine-generated OCR, may contain errors.

COLLATERAL AUTHORITIES

Page

17 Am. Jur. 2d Contracts § 96 12

Bakaly, Erosion of the Employment At-Will Doctrine, 1982 J. Contemp. L. 63 (Utah) 25, 37, 38

Bourhis, Recognition and Recovery for Bad Faith Torts, December 1982 Trial 47 .... 25, 38, 39

17 C.J.S. Contracts § 70 12

Harper, Expanding Liability for Employment Termination, December 1982 Trial 60 25

Lawless, Wrongful Discharge, The Employer's Duty of Good Faith, December 1982 Trial 54 .... 24, 25

Restatement (Second) of Contracts § 2 (1981) 11

Restatement (Second) of Contracts § 4 (1981) 11

Restatement (Second) of Contracts § 71 (1981) 15

Restatement (Second) of Contracts § 71(2) (1981) 15

Restatement (Second) of Contracts § 71(3) (1981) 15

Restatement (Second) of Contracts § 71(4) (1981) 16

Restatement (Second) of Contracts § 76 (1981) 14

Restatement (Second) of Contracts § 77 (1981) 14

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	Page
Restatement (Second) of Contracts § 79 (1981)	13, 14
Restatement (Second) of Contracts § 79, Comment f (1981)	14
Restatement (Second) of Contracts § 90 (1981)	21, 22
Restatement (Second) of Contracts § 205 (1981)	37
Restatement (Second) of Contracts § 205, Comment a	38
Uniform Commercial Code § 1-201(19)	38

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IN THE SUPREME COURT

OF THE STATE OF UTAH

WILLARD S. ROSE,	)	
Plaintiff and Appellant,	)	Case No. 19488
vs.	)	
ALLIED DEVELOPMENT COMPANY, a Utah corporation,	)	
	)	
Defendant and Respondent.	)	

BRIEF OF APPELLANT

Willard S. Rose, appellant herein, appeals the order of the Third Judicial District Court, which granted Summary Judgment to defendant-respondent, in Willard S. Rose v. Allied Development Co., Third Judicial District Court of Salt Lake County, State of Utah, Civil No. C-83-811, entered on August 23, 1983, and respectfully submits this Brief of Appellant in support of his appeal, as follows:

NATURE OF THE CASE

This is an action for breach of contract, promissory estoppel, contractual and tortious wrongful discharge and breach of the implied covenant of good faith and fair dealing. The action arose out of Allied's termination of Mr. Rose's employment contrary to the parties' agreement.

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DISPOSITION IN LOWER COURT

The case was decided by the court on Allied's Motion for Summary Judgment. From a Final Order Granting Summary Judgment to Defendant Allied Development Company, Mr. Rose appeals.

RELIEF SOUGHT ON APPEAL

Mr. Rose seeks reversal of the summary judgment and judgment in his favor as a matter of law, or that failing, remand to the Third Judicial District Court for further proceedings.

STATEMENT OF THE CASE

On February 2, 1983, appellant, hereinafter Mr. Rose, filed his Complaint to initiate this action. The Complaint alleges several causes of action, including breach of contract, promissory estoppel, contractual wrongful discharge, tortious wrongful discharge and breach of the implied covenant of good faith and fair dealing.

On or about February 28, 1983, respondent, hereinafter Allied, filed its Answer to Mr. Rose's Complaint, therein admitting and denying Mr. Rose's averments (hereinafter Answer).

On May 12, 1983, Mr. Rose sent Interrogatories Propounded to Defendant, pursuant to Rule 33, Utah Rules of Civil Procedure.

On May 24, 1983, at the hour of 9:00 a.m., Allied took the deposition of Mr. Rose, pursuant to Rule 30, Utah Rules of Civil Procedure (hereinafter D-___).

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On or about June 24, 1983, Allied filed and mailed to Mr. Rose its answers to Mr. Rose's Interrogatories (hereinafter Int.).

On or about June 8, 1983, Allied filed it Notice of Motion, Motion for Summary Judgment and Memorandum in Support of Defendant's Motion for Summary Judgment, pursuant to Rule 56, Utah Rules of Civil Procedure.

On July 28, 1983, Mr. Rose filed his Memorandum in Response to Defendant's Motion for Summary Judgment and his supporting Affidavit.

On August 4, 1983, Allied filed Defendant's Reply Memorandum and supporting Affidavits.

On August 5, 1983, a hearing was held on Allied's Motion for Summary Judgment, before the Honorable Peter F. Leary, Utah Third Judicial District Court Judge. Counsel for Mr. Rose and Allied agreed to submit the motion on the memoranda and affidavits as filed.

On August 22, 1983, the Honorable Peter F. Leary executed the Final Order Granting Summary Judgment to Defendant Allied Development Company, which was entered on August 23, 1983. From this order, Mr. Rose filed his Notice of Appeal to the Supreme Court of Utah, in the Third Judicial District Court, on September 19, 1983.

On September 29, 1983, Mr. Rose filed his Designation of Record and Certificate stating that no transcript was required because no oral argument occurred during the summary judgment hearing.

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On October 4, 1983, Mr. Rose filed his Docketing Statement in the Supreme Court of the State of Utah.

STATEMENT OF FACTS

In August, 1981, Allied hired Mr. Rose as Assistant Manager-Sales Clerk of its Shoe Department. Answer No. 4. See also, letter executed by Richard Cowley, on September 7, 1982, attached hereto as Exhibit "A" and incorporated herein by this reference.

Mr. Rose was hired under an oral agreement for a term of employment of indefinite duration.

On or about January, 1982, Mr. Rose's job requirements were substantially increased through additional responsibilities for shoe departments in other stores as well as handling shoe sales at the Murray store. Answer No. 5.

Between March and June, 1982, Allied promoted Mr. Rose to Manager of the Shoe Department and he was required to coordinate sales between the Tooele, Sandy and Murray stores. D-8, line 6 through D-9, line 5.

In July, 1982, Mr. Rose met with his supervisor, John Wetsel, concerning possible college attendance. "Mr. Wetsel informed [Mr. Rose] that there would be no difficulty with his attending school so long as his school obligations did not interfere with his job duties." Answer No. 6. Further, Mr. Wetsel told Mr. Rose that as long as Mr. Rose maintained his average number of hours per week, approximately 45 hours, and insured that the

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sales floor was supervised, he had no problem with Mr. Rose going back to school. He then did specify that Mr. Rose should later inform him of the details. D-29, lines 14-18, D-33, lines 16-19. If Allied or Mr. Wetsel had then, or later, but prior to registration, stated that he did not want Mr. Rose to attend school while working, Mr. Rose would not have pursued college attendance. D-30, lines 8-11.

Subsequent to such meeting, Mr. Rose and Rayne Johnstun, Assistant Manager of the Shoe Department, drew up tentative class schedules to determine if the requirements could be met, "because we knew we had to meet the hour requirement and the supervision of the selling floor requirements." D-31, lines 10-17.

In August, 1982, Mr. Wetsel, Mr. Rose and Rayne Johnstun conferred in Mr. Wetsel's office concerning the employees' college attendance. All three reviewed the class schedules and determined that this class scheduling would allow both Mr. Rose and Rayne Johnstun to work their average 45 hours per week and provide supervisory coverage to the sales floor at all times. D-32, line 17 through D-33, line 5. Mr. Wetsel stated that the schedules looked fine and that as long as Mr. Rose and Mr. Johnstun maintained their 45 hours per week, and supervision over the selling floor, he saw no problem with Mr. Rose starting school. Id. and D-33, lines 3-4; D-34, lines 11-15.

The 45-hours-per-week requirement was an estimation based upon the average number of hours worked by Mr. Rose and Rayne Johnstun. Previous working schedules had alternated between Mr. Rose and Mr. Johnstun working five and one-half days per week and Mr. Rose and Mr. Johnstun

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working six days one week and five days the next. The average number of hours required was approximately 45.

Mr. Rose then registered for full-time attendance at Westminister College. His Fall semester tuition charges totalled the sum of $1,645. A copy of a letter verifying such charges is attached hereto as Exhibit "B" and incorporated herein by this reference. Mr. Rose also incurred costs for books at an estimated amount of $97.81. A copy of such estimation produced by Folletts Westminister Book Store is attached hereto as Exhibit "C" and incorporated herein by this reference.

Although Mr. Wetsel had expressly approved the class scheduling as meeting the aforementioned conditions, Allied's only subsequent reaction concerning the number of hours that Mr. Rose worked was that Mr. Rose should be available to work longer hours when needed and certain hours during the day when specific tasks were required. Int. No. 7, paragraph 3. In addition, "[i]n particular, Mr. Wetsel stated that he needed considerably more flexibility in [Mr. Rose's] work schedule". Int. No. 12(a), lines 4-6.

Lack of flexibility because of Mr. Rose's class schedule, which was previously approved by Mr. Wetsel, was the reason for Mr. Wetsel's subsequent ultimatum to Mr. Rose. Such ultimatum was given on or about October 16, 1982, and ostensibly provided Mr. Rose with three choices. First, Mr. Rose could remain as an employee with Allied, in the position of manager, but was required to quit school. Second, Mr. Rose could continue attending school. He must continue, however, to perform the same responsibilities previously required and must accept an approximate $500 per

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month decrease in income, based on a change from a salary of $1,500 to an hourly wage. Third, Mr. Rose could terminate his employment and continue to attend college. Int. No. 12(a); D-41, line 11 through D-43, line 7; D-61, lines 3-8. In addition, Mr. Wetsel stated that he would be uncomfortable with Mr. Rose remaining as an employee because he would carry the same job responsibilities but be paid much less. D-42, lines 4-25; D-61, lines 3-8.

Mr. Rose had previously understood that if he met the conditions expressly stated by Mr. Wetsel, his job was secure. D-60, lines 3-12. During the conversation concerning Mr. Rose's termination, Mr. Wetsel stated that flexibility was the basis of his decision. Mr. Rose informed Mr. Wetsel that he did not understand, that he and Mr. Wetsel had an agreement and he had complied with such agreement. Mr. Wetsel stated that he knew but "I've changed my mind." D-43, line 18 through D-44, line 8. Allied states that "[f]or purposes of this motion only, [Mr. Rose's] allegation [that Allied discharged him] can be treated as true." Memorandum in Support of Defendant's Motion for Summary Judgment, Statement of Facts, paragraph 13.

At all times material to this case, Mr. Rose did fully and/or substantially perform all of Allied's job-related requirements. After the termination, Mr. Wetsel wrote and executed a reference letter for Mr. Rose. Such letter states that "[h]is attitude and performance in this position was commendable. We would recommend him for any position of this nature." A copy of this letter is attached hereto as Exhibit "D" and incorporated herein by this reference.

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In conjunction with the employment termination, Mr. Wetsel promised that Mr. Rose would receive the expected bonus to which he was entitled. Answer No. 28.

ARGUMENT

I

THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ALLIED.

Pursuant to Rule 56(c), Utah Rules of Civil Procedure, to obtain a grant of summary judgment, Allied must prove that "that there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." To satisfy such requirement, Allied's "showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor." Bullock v. Deseret Dodge Truck Center, Inc., 11 Utah 2d 1, 354 P.2d 559, 561 (1960). As demonstrated in this brief, Allied is not entitled to summary judgment against Willard Rose. There may be controverted issues of fact including the parties' statements basing the contract, the parties' intentions concerning such statements and the resulting understanding and agreements of the parties. Finally, Allied is not entitled to a judgment as a matter of law because authorities support Mr. Rose's entitlement to recover upon the legal theories of breach of contract, promissory estoppel, contractual wrongful discharge, tortious wrongful discharge, violation of public policy and breach of the implied covenant of good faith and fair dealing. Consequently, the lower court erred in granting summary judgment to Allied in contravention of this authority.

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821

ARGUMENT

II

THE LOWER COURT ERRED IN DETERMINING THAT MR. ROSE'S EMPLOYMENT CONTRACT WAS TERMINABLE AT WILL.

Point 1

Utah Law Required That Mr. Rose's Employment Contract Was Not Terminable At Will

Utah law requires that an employment contract be terminable at will unless there is a contrary agreement, independent consideration, or other circumstances negating such terminability.

Allied has argued that "[t]he Utah Supreme Court has consistently held that employment contracts which specify no duration are terminable at the will of either party." Although this assertion is somewhat correct, Allied fails to recognize the exceptions created in this employment-at-will doctrine. Such exceptions have often been stated by the Utah Supreme Court. The court, in Bihlmaier v. Carson, 603 P.2d 790, 792 (Utah 1979), stated that

> [t]he general rule concerning personal employment contracts is, 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. (Emphasis added.)

In addition, although the Bullock court did grant summary judgment in favor of defendant, it was careful to recognize that there was no contractual provision concerning duration of employment, there was no ambiguity that might suggest that the employment contract was not terminable at will, "[n]or does Bullock suggest that he could produce parol evidence to the contrary", and "there is definitely nothing to indicate that such provision existed by reason of estoppel." 354 P.2d at 562.

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The following points to Argument II demonstrate that Mr. Rose falls within the exceptions to the employment-at-will doctrine because he did have a contrary agreement, independent consideration and other circumstances that negate the terminability standard.

Point 2

Mr. Rose Had An Enforceable Employment Contract With Allied, Duration Of Which Could Not Be Terminated On The Basis Of School

Within the introduction to Allied's memorandum supporting its motion for summary judgment, Allied states that "[f]or purposes of this motion, however, plaintiff's version of the disputed facts will be accepted as true." As the statement of facts demonstrates, Mr. Rose sought an agreement with his supervisor that would grant him job security for protection against termination on the basis of his college attendance. Mr. Rose discussed such attendance with Mr. Wetsel and was informed that such attendance would not be a problem as long as he met the conditions of fulfilling his average number of hours per week, that Mr. Rose and the assistant manager would provide supervisory coverage over the sales floor and, expressly or impliedly, Mr. Rose's job performance would remain satisfactory. Details of the arrangement were negotiated between Mr. Rose and Mr. Wetsel during the second meeting when Mr. Rose, the assistant manager and Mr. Wetsel reviewed the schedules, Mr. Wetsel reinforced the imposed conditions and Mr. Wetsel agreed that college attendance would not jeopardize Mr. Rose's position with Allied as long as such conditions were met. Although Allied or Mr. Wetsel did not expressly state that he would not fire Mr. Rose on the basis of his college attendance, his statement that there would be no

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difficulty caused by school, his imposed conditions, his conduct in reviewing the schedules and approving them, his subsequent conduct having absolutely no negative implications on Mr. Rose's college attendance and his general conduct concerning employees' college attendance certainly created a promise on his part that Mr. Rose would not be fired on the basis of such attendance. The Restatement (Second) of Contracts provides that "[a] promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct." Restatement (Second) of Contracts § 4 (1981).

In addition, on the basis of such conditions and conduct, Mr. Rose was certainly under the reasonable assumption that Allied would not fire him on the basis of college attendance. "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Restatement (Second) of Contracts at § 2.

Second, both parties provided consideration and, therefore, an enforceable contract resulted. Allied's consideration included Mr. Wetsel's promise, the giving up of the legal right to terminate Mr. Rose at will and substituting the promise that Mr. Rose's college attendance would not provide grounds for termination of his employment unless the express conditions were not met. Although Allied argues that Mr. Rose provided no consideration because he did not benefit Allied, Mr. Rose did provide consideration for the contract. Consideration not only includes the giving of a benefit, it also includes the incurring of a detriment. Petroleum Refractionating Corp. v. Kendrick Oil Co., 65 F.2d 997, 998-99 (10th Cir. 1933) ("And where there is

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a detriment to the promisee, there need be no benefit to the promisor."); Lampley v. Celebrity Homes, Inc., 42 Colo. App. 359, 594 P.2d 605, 608 (1979); Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369, 1372 (Utah 1980) (citing Petroleum Refractionating Corp., 65 F.2d 997, to answer question whether promisor must receive benefit from promisee's detriment, which is answered in the negative.); Manwill v. Oyler, 11 Utah 2d 433, 361 P.2d 177, 178 (1961); 17 Am. Jur. 2d Contracts § 96 ("sufficient consideration may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."); 17 C.J.S. Contracts § 70. Relying on Allied's statements, and the agreements reached thereby, Mr. Rose did register at Westminister College as a full-time student, did schedule his classes during times when he was available and not required to work for Allied, paid $1,645 for Fall 1982 tuition charges and $97.81 for books. Cearly, Mr. Rose thereby incurred substantial time and financial commitments resulting in the detriment required for the element of consideration. Further, Mr. Rose forfeited the right to register for classes at any time of the day, and thereby provided consideration. See Stevens v. G. L. Rugo & Sons, Inc., 209 F.2d 135, 139 n.2 (1st Cir. 1953) (employee gave consideration by giving up right to renew previous employment contract). In addition, Mr. Rose was seeking a degree in business management. Such degree could have clearly benefited Allied through Mr. Rose's continued employment and his use of the knowledge obtained.

As described above, Mr. Wetsel promised Mr. Rose that the employment with Allied would not terminate so long as the aforementioned conditions were met. In addition, Mr. Rose promised Mr. Wetsel that he would maintain an

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approximate 45-hour work week and would provide supervisory sales floor coverage along with the assistant manager. Further, Mr. Rose obtained Mr. Wetsel's approval of his class schedule and, thereby, promised that he would be available for work at any time not inconsistent with said schedule. Mr. Wetsel's promise, in exchange for Mr. Rose's promise, imposed obligations on both parties and were sufficient consideration to render the contract enforceable. DeFeyter v. Riley, 43 Colo. App. 299, 606 P.2d 453, 454 (1979).

Allied has previously argued that because Mr. Rose did not give up the right to quit, the contract lacks mutuality and, therefore, is not enforceable. Mutuality, however, only requires mutual consideration, not mutual obligations. Each party must give consideration. As stated, both Allied and Mr. Rose gave consideration by providing benefit and/or incurring detriment. If mutuality of obligation was required, no contract could be enforceable because the parties' obligations are distinct. Each party bargains for something it does not have. Mutuality of obligation, therefore, cannot in all practical sense apply to any contract. Mr. Rose's failure to give up the right to quit Allied does not constitute lack of consideration or mutuality. Stevens, 209 F.2d at 138-39, 139 n.2.

The Restatement (Second) of Contracts § 79 (1981) states the rule that "[i]f the requirement of consideration is met, there is no additional requirement of (a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or (b) equivalence in the values exchanged; or (c) 'mutuality of obligation.'" The Comment further explains that

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> [c]lause (c) of this Section negates any supposed requirement of 'mutuality of obligation.' Such a requirement has sometimes been asserted in the form, 'Both parties must be bound or neither is bound.' That statement is obviously erroneous as applied to an exchange of promise for performance; it is equally inapplicable to contracts governed by §§ 82-94 and to contracts enforceable by virtue of their formal characteristics under § 6. Even in the ordinary case of the exchange of promise for promise, § 78 makes it clear that voidable and unenforceable promises may be consideration. The only requirement of 'mutuality of obligation' even in cases of mutual promises is that stated in §§ 76-77.

Restatement (Second) of Contracts § 79, Comment f (1981).

Section 76, of the Restatement concerns conditional promises, of which the promisor knows the condition will not occur when the promise is made. Section 77 deals with illusory and alternative promises. Consequently, both § 76 and § 77 are inapplicable to the present case.

Pursuant to § 79, Restatement (Second) of Contracts, and Stevens, 209 F.2d 135, therefore, mutuality of obligation is not required to create an enforceable contract between Mr. Rose and Allied. Consequently, the failure of Mr. Rose to give up the right to quit Allied is not relevant to these proceedings. Also, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917, 924 (Cal. Ct. App. 1981); Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880, 885 (Mich. 1980).

Allied has argued that Mr. Rose has not given consideration because the detriment he incurred was not pursuant to the request of Allied. First, Mr. Rose promised that he would satisfy the aforementioned conditions at the request of Mr. Wetsel and in exchange for Mr. Wetsel's promise. Second, Mr. Rose gave up the right to arbitrarily determine his class schedule timing pursuant to the request, conditions imposed and approval of Mr. Wetsel.

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Third, Mr. Rose then incurred detriment by relying on Mr. Wetsel's promise and registering for college, including payment for tuition and books, and during the previously agreed times.

The Restatement (Second) of Contracts § 71 (1981) does require that for a performance or promise to constitute consideration it must be bargained for. The Restatement further explains that "[a] performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." Restatement (Second) of Contracts § 71(2) (1981). Mr. Rose sought Mr. Wetsel's promise that his college attendance would not jeopardize his position with Allied. In return for that promise, Mr. Wetsel sought a promise from Mr. Rose that he would maintain an average 45-hour work week and provide supervisory sales floor coverage along with the assistant manager. Further, Mr. Wetsel sought Mr. Rose's promise that he would not register for classes at times other than on the approved schedule. Mr. Rose's promise to satisfy those conditions was given in exchange for Mr. Wetsel's promise of job security during college attendance. Following the Restatement, Mr. Rose provided consideration to Allied.

The Restatement also provides that the "performance may consist of . . . (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation." Restatement (Second) of Contracts § 71(3). Mr. Wetsel, clearly, agreed to forbear from firing Mr. Rose on the basis of school, as long as the conditions were satisfied. In addition, Mr. Wetsel's promise did modify the legal relation of employer-employee by limiting Allied's reasons for terminating Mr. Rose. In conjunction, Mr. Rose promised to forbear from

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requesting a shorter average work week, refusing to provide supervisory coverage, when not attending school, and to forbear from taking classes at times other than on the approved schedule. Said promise also resulted in a modification of the employer-employee relationship because Mr. Rose was committed to availability outside his school schedule and for an average 45-hour work week. Previously, Mr. Rose had not been required to maintain availability on a set schedule. Mr. Rose promised that he would be available to work at times not inconsistent with the class schedule approved by Mr. Wetsel and, therefore, promised to forbear from taking classes at different times. Mr. Rose complied with said promise by registering for classes within the time frames approved by Mr. Wetsel. His promise and performance was given to Allied. In addition, his performance was also given to Westminister College by so registering at the specified times. The Restatement (Second) of Contracts § 71(4) states that the performance or promise may be given to the promisor or to some other person. According to the Restatement, which is a restatement of the general law, Mr. Rose provided consideration to Allied and Allied gave consideration to Mr. Rose. Consequently, an enforceable contract was created whereby Allied could not terminate Mr. Rose's employment on the basis of school so long as Mr. Rose satisfied his promised conditions.

Allied has argued that Mr. Rose has not shown any promise regarding duration of his employment. Allied is correct in asserting that Mr. Rose does not state a definite date through which his employment was secure. Allied has failed to note, however, the significance of the contract regarding duration of employment. The contract required Allied to forbear termination of Mr. Rose's employment on the basis of school, while Mr. Rose attended

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college, as long as Mr. Rose complied with his promised conditions. The duration of the contract, therefore, was the period during which Mr. Rose attended college. Said period could have ended after Mr. Rose attended Westminister for one semester. Or the period may have continued for a couple years, at which time Mr. Rose would complete his college education and graduate. This was the period, and therefore, the duration, to which the parties bargained and agreed. Allied's arguments concerning lack of duration are unfounded when considering the parties' agreement.

In Farmer v. Arabian American Oil Co., 277 F.2d 46, 51 (2nd Cir. 1960), the court found that an oral contract was created and enforceable with the duration being "the duration of [employer's] oil operations in Saudi Arabia". The court held that the series of oral negotiations between the parties created the contract. Further, because the employee testified that the parties orally agreed to the continuance of employment for the duration of the employer's Saudi Arabia operations, the contract would then terminate, and therefore, this was the contract duration. As in the present case, no specific date was necessary to determine contract duration. Many contracts terminate on the happening of some specified event, rather than a particular date. E.g., Uniform Real Estate Contract (the closing on the home); Revolving Charge Account Contract (paying off the amount of purchase); Partnership Agreements (partner's bankruptcy, incompetency or death).

Mr. Rose intended to protect his employment from termination on the basis of factors related to his college attendance. He solicited Allied's agreement that such attendance, and the time commitment involved therefor, would not jeopardize his employment. In return, Mr. Wetsel, Allied's agent,

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clearly implied, if not expressed, through the conditions mandated, that Mr. Rose's employment would not be terminated on the basis of such schooling. Mr. Wetsel's intentions are clearly shown by his acknowledgement of the parties' agreement and his statement that he had changed his mind concerning such agreement, made during the parties' meeting when the discharge ultimatum was given. The parties' statements and conduct clearly demonstrate mutual intentions concerning the agreement. Said agreement was intended to provide that as long as Mr. Rose met the aforementioned conditions his employment would not be terminated on the basis of college attendance.

Point 3

Mr. Rose Incurred Independent Consideration Resulting In Lack Of Employment Terminability Based On School

As discussed in Point 2, Mr. Rose did provide consideration in exchange for Allied's promise and consideration, which created an enforceable oral agreement. Such agreement provided that as long as Mr. Rose met the conditions of working his average number of work hours per week and he and the assistant manager provided supervisory coverage of the sales floor, Allied could not terminate Mr. Rose's employment during or on the basis of school. As explained, the primary consideration provided by Mr. Rose was his promise and the detriment he incurred through limitation on class schedule, time and financial commitments resulting from registration at Westminster College. Consequently, this detrimental consideration was outside the realm of the employment services Mr. Rose was required to perform for Allied. It was, therefore, independent consideration. Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917, 925 (Cal. Ct. App. 1981). The

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giving "of a good consideration in addition to the services contracted to be rendered" negates the at-will terminability generally implied in an employment contract in Utah. Bihlmaier, 603 P.2d at 792.

Point 4

Allied Was Estopped From Terminating Mr. Rose's Employment Without Good Cause And/Or On The Basis Of School

Mr. Rose sought out Allied's agreement that college attendance would not jeopardize his employment. Mr. Wetsel, Allied's agent, expressly stated the conditions that Mr. Rose was required to satisfy to obtain such an agreement. In addition, Mr. Wetsel's conduct clearly implied a promise, an agreement, that as long as the conditions were met Mr. Rose's employment would not be terminated because of his schooling. Finally, Mr. Wetsel approved Mr. Rose's class schedule as not creating difficulties with his employment. When a person informs another that as long as certain conditions are met there will be no difficulty caused by school attendance, and when the informing party discusses, reviews and approves the details concerning such conduct, the class scheduling, it is certainly reasonable for the second party to believe that his conduct will not jeopardize his employment position with the informing party.

> 'Here there is no actual 'meeting of the minds'; and yet there may be a valid contract. Interpreting the elliptical expressions of the parties, the court may find that the expressions, interpreted in the light of the surrounding facts, made the understanding of one of the parties reasonable and made it unreasonable for the other party not to know that such would be the first party's understanding. In such a case there is a contract in accordance with that understanding. The second party having negligently or intentionally misled the first, is bound by estoppel.'

Bullock, 354 P.2d at 562 n.5 (quoting 3 Corbin on Contracts, 685, § 684).

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The discussions between Mr. Rose and Mr. Wetsel, in conjunction with the parties' concurrent and subsequent conduct, resulted in a reasonable understanding on Mr. Rose's part that his college attendance would not jeopardize his employment with Allied. Allied's primary reason for discharging Mr. Rose was the lack of flexibility in Mr. Rose's schedule. Such lack of flexibility was based on Mr. Rose's class schedule, which Mr. Wetsel had expressly approved. Mr. Wetsel should have anticipated this lack of flexibility when he approved Mr. Rose's class schedule. Consequently, it was not a justifiable reason for discharge. Stevens, 209 F.2d at 140. Mr. Wetsel provided Mr. Rose with a very complimentary reference letter concerning future employment. The letter states that Mr. Rose's job performance was more than satisfactory. In addition, Mr. Rose also believes that his performance was satisfactory to Allied. If Allied wishes to negate the conclusions that Mr. Rose's performance was satisfactory and, therefore, there was just cause for termination of Mr. Rose's employment, Allied must argue controverted material facts, resulting in its lack of entitlement to a summary judgment. Id.

Allied attempts to negate the satisfactory performance by supplying affidavits of Johny Wetsel and Donna Wetsel. The affidavits, however, do not contradict the recommendation letter executed by Johny D. Wetsel. Such letter states that "[h]is attitude and performance in this position was commendable. We would recommend him for any position of this nature." First, if Mr. Wetsel did not believe that Mr. Rose's performance was commendable, he should not have had the letter prepared or executed said letter. Second, the affidavit of Johny D. Wetsel states that "the statement that Mr. Rose's attitude was commendable is correct." While the affidavit

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attempts to explain away the complimentary recommendation letter, by providing an alleged reason for its execution, which is controverted by Mr. Rose, the reason for execution is not relevant. The statements contained therein express the fact of Mr. Rose's satisfactory performance.

Mr. Wetsel's affidavit further supports the factual statements and legal theories of Mr. Rose. Mr. Rose argues that although Mr. Wetsel approved his class schedule during the agreement reached between the parties, Mr. Wetsel fired Mr. Rose on the lack of flexibility caused by such schedule, contrary to and in breach of the agreement. Mr. Wetsel's affidavit states that "[t]he difficulties arose when his school began to take so much of his time that he could not be present at the necessary times to meet his job responsibilities." The only times during which Mr. Rose could not be present were previously approved by Mr. Wetsel when he approved the class schedule. Consequently, in derogation of the parties' agreement, Mr. Wetsel fired Mr. Rose on the basis of his college attendance, not because his job performance was unsatisfactory.

As discussed in Point 2, each party made promises. Allied and Mr. Wetsel did or should have reasonably expected his promise to Mr. Rose to induce Mr. Rose's registration in college. Such promise did induce Mr. Rose to register at Westminister College. Finally, Allied and Mr. Wetsel terminated Mr. Rose in contravention of such promise and injustice can be avoided only by enforcement of the promise. Consequently, Allied is also estopped from denying such promise on the basis of the doctrine of promissory estoppel. Restatement (Second) of Contracts § 90 (1981).

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The lower court's order granting Allied summary judgment clearly contravenes the weight of authority and the facts of this case. Said authority and facts clearly demonstrate that Mr. Rose and Allied entered into a contract which Allied breached.

ARGUMENT

III

THE COURT BELOW ERRED IN DETERMINING THAT MR. ROSE IS NOT ENTITLED TO RECOVER AGAINST ALLIED PURSUANT TO THE DOCTRINE OF PROMISSORY ESTOPPEL.

As discussed in Point 4 of Argument II, § 90, Restatement (Second) of Contracts (1981), defines the action of promissory estoppel. To satisfy the elements of § 90, "the promisor should reasonably expect to induce action or forbearance on the part of the promisee", the promise must actually "induce such action or forbearance", and upon such inducement, the promise "is binding if injustice can be avoided only by enforcement of the promise." Section 90 generally requires a promise, a promisor that should reasonably expect reliance on the promise, actual reliance on the promise, such reliance must be detrimental and lack of enforcement of the promise would cause injustice.

As discussed above, Mr. Wetsel promised Mr. Rose that college attendance would not jeopardize his employment as long as Mr. Rose complied with the stated conditions. Mr. Wetsel then approved Mr. Rose's class schedule as meeting the conditions. Mr. Rose was induced by the promise to register in college. Consequently, he actually relied on the promise. As discussed above, such reliance was reasonable in light of the statements and

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circumstances surrounding the events. The reliance was detrimental in that it actually resulted in the termination of Mr. Rose's employment in contravention of such promise. In addition, Mr. Rose could not subsequently obtain unemployment benefits. He had registered in school in reliance on Mr. Wetsel's promise, however, contrary to the benefits' requirements, Mr. Rose had not earned the major portion of his earnings while attending college. Mr. Rose has suffered substantial financial difficulties, all caused by the breach of Mr. Wetsel's promise. Clearly, Allied should be estopped from denying this promise and the promise should be enforced to compensate Mr. Rose for the injustice resulting from such breach. Mr. Rose would not have registered at Westminster College, if Mr. Wetsel had not promised that his employment would be secure. Mr. Rose suffered from the payment of tuition, the loss of his job and salary commensurate therewith. Promissory estoppel, clearly, must apply to the present case. The lower court, therefore, granted summary judgment to Allied contrary to the law.

ARGUMENT

IV

MR. ROSE IS ENTITLED TO RECOVER UNDER THE THEORY OF WRONGFUL DISCHARGE.

Point 1

The Utah Supreme Court Should Adhere To The Recent Evolution In Employment Contract Law To Expand The Rights Of Employees

As demonstrated above, the Utah Supreme Court has always provided exceptions to the general rule that employment contracts are terminable at will. Such exceptions are followed by the overwhelming authority of other jurisdictions. Recently, several jurisdictions have expanded, combined and

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re-entitled these exceptions to fall within the theory of wrongful discharge. As reported in the December issue of Trial, "some ten states have been prepared to modify the at will concept in one way or another through holdings or dicta", "[l]ess definite expressions of a willingness to revise the doctrine in appropriate circumstances are found in eight more states" and "four states can be classified as accepting or stating they would accept modifications in certain situations". Lawless, Wrongful Discharge, The Employer's Duty of Good Faith, December 1982 Trial 54, 56 (hereinafter Wrongful Discharge). In the Pacific region, California and Oregon are definitely changing the at-will concept. Colorado, Idaho and Montana are listed as express possibilities for change and Washington has changed this concept in certain circumstances. Arizona is apparently the only Pacific reporting state that has recently reaffirmed the at-will concept as defined by very early authority.

The United States Supreme Court decisions have undermined any constitutional basis for the employment-at-will doctrine. Wrongful Dishcarge, supra, at 55-56. In reinterpreting this doctrine, courts have recognized the employee's lack of bargaining power and the societal importance of stability in the job market. Recently, such stability has gained added importance because of the high rate of unemployment and the comparatively high number of people being supported by unemployment benefits, welfare and other government aid.

The wrongful discharge cause of action merely takes the exceptions to the at-will doctrine, including express or implied contrary agreements, independent consideration, the duty of good faith and fair dealing implied in

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every contract; combines these exceptions with other theories of recovery, including interference with contract, interference with business relations, some conspiracy causes of action and several tortious bad faith claims; adds the recognition that employees must receive some judicial protection for justified expectations of an employer and re-entitles all of this as the doctrine of wrongful discharge. Such expansion of employees' rights does not entirely negate the employment-at-will doctrine and the rulings of the Utah Supreme Court. It merely reemphasizes values, combines the many exceptions and causes of action, seeks to reinforce the societal importance of job security and desires to terminate substantial confusion resulting from the crossover of claims and remedies. See Bakaly, Erosion of the Employment At-Will Doctrine, 1982 J. Contemp. L. 63 (Utah); Harper, Expanding Liability for Employment Termination, December 1982 Trial 60; Bourhis, Recognition and Recovery for Bad Faith Torts, December 1982 Trial 47; Wrongful Discharge, supra.

The Utah Supreme Court has not ruled on the doctrine of wrongful discharge, its expansion of employees' rights, the combination and clarification of the many theories under which employees have previously litigated and the many exceptions to such theories, either negatively or affirmatively. These expansions, however, do not expressly contravene the Court's rulings. They simply reinterpret and expand on many of the exceptions and theories under which the Utah Supreme Court has provided that employment contracts are not terminable at will.

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Point 2

Mr. Rose Is Entitled To Recover Under Wrongful Discharge On The Implied Contract Basis

As discussed above, the Utah Supreme Court has provided an exception to the employment-at-will doctrine concerning contrary express or implied agreements. In addition, Argument II demonstrates that Mr. Rose and Allied had reached such a contrary express or implied agreement providing that Allied would not terminate Mr. Rose's employment on the basis of his college attendance, so long as Mr. Rose met the aforementioned conditions, without just cause.

Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880 (Mich. 1980), is factually analogous to the present case. The cases of Toussaint and Ebling v. Masco Corporation were consolidated on an appeal to the Supreme Court of Michigan. Both cases involved litigation initiated by employees against their employers for wrongful discharge based on breach of employment contracts having indefinite periods of duration but provisions requiring good cause for termination. In both cases, the employees had asked about job security and reasons for discharge. Both were informed that the employers did not discharge, except for cause or good cause. At the end of the trial, juries awarded verdicts to both plaintiffs. The Court of Appeals then reversed Toussaint and affirmed Ebling. Both cases were appealed to the Michigan Supreme Court. The Michigan Supreme Court affirmed Ebling and reversed the judgment of the Court of Appeals concerning Toussaint, thereby reinstating the jury verdict. Toussaint was employed in a middle management position with Blue Cross for five years and Ebling was similarly employed by Masco for two years.

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The Michigan Supreme Court recognized the general rule that "'in the absence of distinguishing features or provisions or a consideration in addition to the services to be rendered, such contracts are indefinite hirings, terminable at the will of either party.'" 292 N.W.2d at 883 (quoting Lynas v. Maxwell Farms, 279 Mich. 684, 687, 273 N.W. 315 (1937)). It then declared, however, that such rule was merely a rule of construction and not a substantive limitation on the enforceability of employment contracts. Id. at 884. The oral statements alleged by the plaintiffs as creating oral contracts were that the employees would be with the company as long as they did their jobs. In addition, the plaintiffs provided as evidence of the employers' agreements to discharge only for cause, the employers' written policy statements.

First, the Toussaint court held that:

> 1) a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable although the contract is not for a definite term - the term is 'indefinite,' and
>
> 2) such a provision may become part of the contract either by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements.
>
> 3) in Toussaint, as in Ebling, there was sufficient evidence of an express agreement to justify submission to the jury.

292 N.W.2d at 885.

Pursuant to the Toussaint holding, Mr. Rose has a cause of action for wrongful discharge. Mr. Wetsel certainly promised that Mr. Rose's schooling would not cause employment termination as long as the conditions were met, thus limiting the cause Allied could use to fire Mr. Rose. As in Toussaint, the provision limiting cause for termination "is legally enforceable [even if]

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the contract is not for a definite term". 292 N.W.2d at 885. The provision concerning cause limitation "may become part of the contract either by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements." Id. As demonstrated above, the cause limitation became a part of the contract through the express oral agreement between Mr. Rose and Mr. Wetsel. In addition, the agreement, the conduct of the parties during and subsequent to said agreement and Allied's policies concerning termination and discipline, including the allowance of other employees' college attendance, requires that the cause limitation be a part of the contract according to Mr. Rose's legitimate expectations.

Finally, according to Toussaint, the lower court erred in granting summary judgment to Allied because Mr. Rose has offered "sufficient evidence of an express agreement to justify submission to the jury." 292 N.W.2d at 885.

Although in the present case, Allied attempts to argue that Mr. Rose cannot recover because of lack of mutuality of obligation, the Toussaint court expressly ruled that enforceability of a contract does not depend upon mutuality of obligation. 292 N.W.2d at 885. In discussing the determination of the contract duration, the court recognized that such duration was found "from written or oral communications between the parties, usages of trade, the type of employment, and other circumstances." Id. at 886. As is apparent, these factors are generally used to determine any term of any contract.

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In the present case, as expressed and implied from the parties' statements, conduct and other circumstances, Mr. Rose and Mr. Wetsel agreed that Mr. Rose's job would not be jeopardized on the basis of his schooling so long as he met the conditions imposed by Mr. Wetsel. In addition, "[a] large number of Allied's employees attend college or other schools." Int. No. 5. Allied has long allowed such college attendance and has not had a policy for termination therefor. Finally, Allied has provided its employees with a list of factors resulting in discipline or termination. Such list provides eleven "terminable out of bounds" items which may subject an employee to immediate discharge. In addition, the list provides "operational out-of-bounds" which may subject an employee to discipline, although generally short of discharge. A copy of this list is attached hereto, as Exhibit "E" and incorporated herein by this reference. None of the examples set forth on this list require non-college attendance. In light of Mr. Wetsel's imposed conditions, approval of Mr. Rose's class schedule as meeting such conditions, Allied's large number of employees attending college and this list of reasons for termination or discipline, Mr. Rose was certainly under the legitimate expectation and understanding that Allied would not require him to forgo his schooling or terminate his employment for reasons concerning such college attendance.

Toussaint held that "an employer's express agreement to terminate only for cause, or statements of company policy and procedure to that effect, can give rise to rights enforceable in contract." 292 N.W.2d at 890. Such agreement to terminate only for cause is similar to the agreement in the present case. Mr. Wetsel imposed conditions on Mr. Rose to obtain the job security that he requested. Upon promising to meet such conditions, pursuing a class schedule that allowed compliance with these conditions and

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obtaining Mr. Wetsel's approval of this class schedule, an express agreement to not terminate Mr. Rose on the basis of his school and the time involved therefor, as long as the aforementioned conditions were met, resulted. As stated by the Toussaint court,

> suppose the contracts here were written, not oral, . . . [t]o construe such an agreement as terminable at the will of the employer would be tantamount to saying . . . that a contract of indefinite duration 'cannot be made other than terminable at will by a provision that states that an employee will not be discharged except for cause'.

Id. at 890-91.

As in Toussaint, Mr. Rose was hired for a responsible position. In addition, he negotiated specifically regarding job security. If Mr. Wetsel had not intended that Mr. Rose pursue his schooling, or had not expressly reviewed and approved the class schedule, and had wanted more flexibility from Mr. Rose than his schooling would allow, Mr. Wetsel could have then informed Mr. Rose of his intentions and negated any misunderstandings between the parties. Mr. Wetsel, however, did not tell Mr. Rose of any such intentions. Contrary thereto, Mr. Wetsel imposed the conditions, approved Mr. Rose's schedule and even wished him well in his pursuit. If Allied continues to argue that no agreement was reached between the parties, there is a question of material fact which requires determination by a jury. 292 N.W.2d at 897 n.39. The controverted factual question, therefore, was not one for determination on a motion for summary judgment.

In addition, the Toussaint court rules that employer's statements of policy

> 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 . . . and although no

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> reference was made to the policy statement in pre-employment interviews and the employee does not learn of its existence until after his hiring.

292 N.W.2d at 892.

The court reasoned that when the employer creates policies, he contemplates mutual adherence to the policies and receives benefits from a cooperative and loyal work force on the basis of those policies. Because of the expectation of mutual cooperation, the employer's policies are enforceable and the employee has provided consideration by providing the benefit expected and obtained by the employer. 292 N.W.2d at 892-93; Lampley, 594 P.2d at 608. Although the oral contracts and policies discussed in Toussaint were somewhat more general than in the present case, as concerning a provision for just cause, the specificity provided in the agreement between Mr. Rose and Mr. Wetsel, from the imposed conditions and the approval of the class schedule, can only create a stronger case for Mr. Rose regarding wrongful discharge. Allied's policy to allow employees' college attendance increases the strength of Mr. Rose's case.

In the present case, the parties discussed and negotiated terms for the contract. In addition, as demonstrated by Exhibit "E", Allied published reasons for termination and discipline to its employees, none of which include college attendance. Further, Allied has a long standing policy allowing its employees to attend college. Consequently, Allied has a policy against firing employees for furthering their education. Allied expected mutual adherence to its policies and received benefits from a cooperative and loyal work force. Allied's expectation of mutual cooperation made its policies enforceable. Pursuant to Toussaint, Mr. Rose provided consideration for enforcement of

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said policies by providing the benefit expected and obtained by Allied. 292 N.W.2d at 892-93.

As discussed in Toussaint, the United States Supreme Court, in Perry v. Sindermann, 408 U.S. 593, 601-03 (1972), found that not only could a written express contract provide entitlement to continuation of employment unless sufficient cause for discharge is found, but also "'the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied'''". 292 N.W.2d at 894 (quoting Perry v. Sindermann, 408 U.S. at 601-03). The United States Supreme Court further stated that "'[e]xplicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.'''" Id. Finally, the court stated that an employee can show through circumstances and other relevant facts that he has a legitimate claim of entitlement to job tenure, in the present case, job security.

Finally, in Toussaint, the court determined and held that many questions in wrongful discharge cases are for the jury's resolution. These questions include the question of breach of contract, the question of just cause, the question of whether the employee committed the employer's claimed specific misconduct and the question concerning the contested reason for discharge. 292 N.W.2d at 895-96.

In Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (Cal. Ct. App. 1980), the California court discussed the history of employment contract law and the emerging wrongful discharge cause of action.

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The court recognized that California had a statute providing that employment contracts were terminable at will. The court notes that the legislature enacted the statute because it thought that if an employee could terminate his employment relationship at will, the employer also should be so entitled. It recognized, however, that "when viewed in the context of present-day economic reality and the joint, reasonable expectations of employers and their employees, the 'freedom' bestowed by the rule of law on the employee may indeed by fictional." Id. at 725. In addition, "the rule applied in its purest form easily leads to harsh results for the employee." Id. It then noted that the at-will doctrine was subject to exceptions, including the independent consideration exception discussed in Argument II, Point 3, supra. Further, the court stated that an employer could be subject to damages for terminating at-will employment "'when the employee was engaged contractually to serve so long as he performed to the satisfaction of the employer'". Id. at 726 (quoting Patterson v. Philco Corp., 252 Cal. App. 2d 63, 65, 60 Cal. Rptr. 110 (1967)).

In the present economy and case, employees, particularly Mr. Rose, lack the freedom that the employment-at-will doctrine was intended to give employees. In addition "the rule applied [to Mr. Rose] in its purest form easily leads to harsh results". 168 Cal. Rptr. at 725. In the context of the parties' discussions and agreements, it is clear that both parties intended the understanding that Mr. Rose's college attendance, during the time periods specified in the approved class schedule, would not constitute cause for dismissal. Lack of flexibility because of the approved scheduling, however, was the exact cause for employment termination. Such dismissal, therefore,

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did create in Mr. Rose an action for wrongful discharge pursuant to the language in Cleary.

The Cleary court then discussed three recent cases illustrating "the increasing reluctance of the courts to allow termination of employment relationships without imposition of liability when it is deemed appropriate." 168 Cal. Rptr. at 727. The court therein recognized that "'employment contracts, like other agreements, should be construed to give effect to the intention of the parties as demonstrated by the language used, the purpose to be accomplished and the circumstances under which the agreement was made.'" Id. at 727 (quoting Drzewiecki v. H & R Block, Inc., 24 Cal. App. 3d 695, 703-04, 101 Cal. Rptr. 169 (1972)). Finally, the Cleary court noted "the continuing trend toward recognition by the courts and the Legislature of certain implied contract rights to job security, necessary to insure social stability in our society." Id. at 729. As discussed in Cleary, and otherwise, economic conditions, the change of values concerning employment and the permanency thereof and the difference in bargaining power between the employer and the employee have kindled the legislative and judicial trend towards providing protection for the employee. The Utah legislature has recognized workers' inability to exercise actual liberty of contract, to protect their freedom of labor and to obtain acceptable terms and conditions of employment within the employment contract. Utah Code Ann. § 34-19-1(3) (providing for the ability of an employee to organize and choose its representative). In addition, the Utah legislature declared that it is this state's policy to protect and promote not only the employer's interest, but also the employee's interests and the public's interests. Such interests include "regular and adequate income for the employee, and uninterrupted

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production of goods and services". Id. at § 34-20-1(1), (2) (policy concerning employment relations and collective bargaining). Further, the legislature provides that "[n]egotiation of terms and conditions of work should result from voluntary agreement between employer and employee." Id. at (3). Although these statutes are not expressly applicable to the present case, they demonstrate the Utah legislative recognition that employees' rights need to and must be protected. Finally, the Utah Constitution provides that "[t]he rights of labor shall have just protection through laws calculated to promote the industrial welfare of the State." Utah Const. Art. XVI, § 1. An employee's right to require compliance with agreements, understandings and policies between the employee and the employer would promote the industrial welfare of Utah. Such rights provide feelings of satisfaction, cooperativeness and productivity while negating feelings of helplessness and insecurity. According to these legislative pronouncements, Mr. Rose had the right to contract with Allied and Allied is responsible for the breach of such contract.

The California court further defined the wrongful discharge cause of action in Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (Cal. Ct. App. 1981). The court recognized that even the at-will doctrine did not give the employer absolute right to terminate the employee. The two relevant limiting principles were public policy and traditional contract doctrine, "when the discharge is contrary to the terms of the agreement, express or implied." Id. at 922. Further, the court stated that "[a] contract which limits the power of the employer with respect to the reasons for termination is no less enforceable because it places no equivalent limits upon the power of the employee to quit his employment." Id. at 924. Again,

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although in the present case Allied argues that Mr. Rose cannot enforce his agreement with Allied because of lack of mutuality of obligation, such mutuality is not required. The agreement between Mr. Rose and Allied did limit the power of the employer to terminate Mr. Rose with respect to the reasons for termination. That contract is no less enforceable because Mr. Rose did not give up the right to quit his employment.

The Pugh court also discussed the independent consideration exception. It held that such exception provided an evidentiary function because "it is more probable that the parties intended a continuing relationship, with limitations upon the employer's dismissal authority, when the employee has provided some benefit to the employer, or suffers some detriment, beyond the usual rendition of service." 171 Cal. Rptr. at 925. As discussed above, in the present case Mr. Rose clearly suffered detriment through commitment of time and financial resources to his schooling and the forbearance from registering in classes during times other than on the approved schedule, in reliance on Mr. Wetsel's promises. In addition, his sought after degree was business management, which could have substantially benefited Allied.

The Pugh court held that agreements limiting the reason for termination could be expressed or implied, and could be implied-in-fact or implied-in-law. Factors creating an implied-in-fact promise included "the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged." 171 Cal. Rptr. at 925-26. In addition, the employer's conduct could give rise to an implied promise that it would not act arbitrarily towards

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its employees. Id. at 927. Other factors to consider were commendations and promotions the employee received, lack of direct criticism, assurances he was given, the totality of the parties' relationship and the acts and conduct of the parties, interpreted according to the subject matter and surrounding circumstances. Id. The implied-in-law covenant of good faith and fair dealing inherent in every contract can imply a promise contrary to termination at will. Id. at 926. Such covenant is discussed in Point 3, infra.

Through the parties' statements and conduct, in light of the circumstances and subject matter, Mr. Rose and Mr. Wetsel certainly reached an express or implied-in-fact agreement that Allied would not terminate Mr. Rose's job because of his schooling. In addition, because Mr. Wetsel expressly approved the class schedule of Mr. Rose, he knew when Mr. Rose would be absent from work and expressly agreed thereto. Allied, therefore, reached an express or implied-in-fact agreement that Mr. Rose's job would not be terminated because he was not available at those specific times. Consequently, the lack-of-flexibility reason for termination did breach said agreement. Allied must be held liable for its breach.

Point 3

Mr. Rose Is Entitled To Recover Under Wrongful Discharge For The Violation Of The Covenant Of Good Faith And Fair Dealing

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205 (1981). Also, Cleary, 168 Cal. Rptr. at 728; Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1255-56 (Mass. 1977); Erosion

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of the Employment At-Will Doctrine, supra, at 75; Recognition and Recovery for Bad Faith Torts, supra, at 47-48. This covenant is implied in every contract as a matter of law. Pugh, 171 Cal. Rptr. at 926. The covenant requires "'that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.'" Recognition and Recovery for Bad Faith Torts, supra, at 47 (quoting Brown v. Superior Court, 34 Cal. 2d 559, 546, 212 P.2d 931 (1949)). The breach of this covenant entitles the damaged party to a cause of action in contract and/or tort. Id. Said breach gives rise to a tortious cause of action because it is a breach of the duty growing out of the contract rather than a breach of promise set forth within the contract. Id. at 48 (quoting Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 175, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980)). The tort cause of action also follows from the purpose of the law of torts, to compensate individuals who are injured by the unreasonable conduct of another. Id. (quoting Wagner v. Benson, 101 Cal. App. 3d 27, 34, 161 Cal. Rptr. 516 (1980)).

Good faith has been defined in several ways. In the Uniform Commercial Code it is defined as "honesty in fact in the conduct or transaction concerned." Uniform Commercial Code § 1-201(19). Also, Utah Code Ann. § 70A-1-201(19). Good faith "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party". Restatement (Second) of Contracts § 205, Comment a. Mr. Wetsel told Mr. Rose that he had no difficulty with Mr. Rose pursuing his college education so long as certain conditions were met. In addition, Mr. Wetsel approved the class scheduling as meeting the aforementioned conditions. Subsequently, Mr. Rose's employment with Allied was terminated on the

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primary basis of lack of flexibility because of such schedule. Clearly, by requiring such flexibility after expressly approving the lack thereof, Mr. Wetsel did injure the right of Mr. Rose to receive benefits of their agreement. In addition, Mr. Wetsel's conduct certainly did not demonstrate faithfulness to the agreed common purpose or consistency with the justified expectations of Mr. Rose. Mr. Wetsel was very aware of his and Mr. Rose's statements, conduct and Mr. Rose's understandings concerning the parties' agreement. Mr. Wetsel's termination of Mr. Rose's employment with Allied was a conscious disregard of Mr. Rose's rights concerning this agreement. Because of this conscious disregard, Allied not only acted unreasonable, but also should be subject to an award of punitive damages favoring Mr. Rose. Recognition and Recovery for Bad Faith Torts, supra, at 49.

In Fortune v. National Cash Register Co., 364 N.E.2d 1251, the court implied the covenant of good faith and fair dealing in a written contract that was terminable at will, without cause, by either party on written notice. Plaintiff was a salesman and was fired just prior to obtaining bonuses and commissions. The court found that it was bad faith to terminate the salesman before paying all of the commissions earned. The employer was aware that the salesman had a right to the commissions and consciously disregarded such right by terminating the employee and refusing to pay such commissions. In the present case, Mr. Wetsel was aware of the express agreement and the understanding reached between the parties. He, also, was aware that Mr. Rose would be receiving a bonus. Upon termination of the employment, Mr. Wetsel promised that Mr. Rose would receive this bonus. Mr. Rose, however, has not received any such bonus. Allied acted in conscious disregard, or at least unreasonable, regarding the understandings and

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agreements between Mr. Rose and Mr. Wetsel. Mr. Rose was subjected to the humiliation resulting from his employment termination, the financial problems caused by the firing and ineligibility for unemployment benefits, the inability to satisfactorily support his family and the emotional turmoil of attempting to meet his responsibilities to his family and others while working temporary jobs in areas other than those in which Mr. Rose is trained.

Allied either did not act honestly in fact with Mr. Rose or acted unreasonably and in conscious disregard of Mr. Rose's rights. Mr. Wetsel stated that Mr. Rose's college attendance would cause no difficulty with his job and he approved Mr. Rose's class schedule. He then, however, terminated such employment because of lack of flexibility, caused by Mr. Rose's school, and thereby denied the ability of Mr. Rose to obtain the benefits of his bargain. Allied, therefore, did violate the covenant implying a duty of good faith and fair dealing and must be held liable therefor.

As seen in Cleary, 168 Cal. Rptr. at 727-28, the cause of action for wrongful discharge includes breach of the implied covenant of good faith and fair dealing. In addition, when "an employee's action for wrongful discharge is founded in tort as well as in contract, . . . the employer may be subject to liability for both compensatory and punitive damages." Id. at 728. Contrary to the summary judgment granted in favor of Allied, the law supports Mr. Rose's recovery of compensatory and punitive damages arising from Allied's breach of the implied covenant of good faith and fair dealing.

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Point 4

Mr. Rose Is Entitled To Recover Under The Theory Of Wrongful Discharge For Allied's Violation Of Public Policy

As discussed above, the Utah legislature has enunciated a policy to protect the rights of labor, employees, in contract negotiations and representation. See Utah Code Ann. §§ 34-19-1(3); 34-20-1(1), (2). Although such statutes do not expressly apply to the present case, they demonstrate a legislative recognition of the importance of protecting employees because they lack bargaining power. In addition, the Utah Constitution also provides protection for the rights of labor. Utah Const. Art. XVI, § 1.

Allied entered into an agreement with Mr. Rose that Mr. Rose's job would not be threatened by his college education so long as the conditions were met. At the very least, Allied misled Mr. Rose concerning such job security and knew or should have known that he was so misleading Mr. Rose. Pursuant to the protections afforded by the Utah legislature concerning employees' rights to negotiation and representation, Allied's violation of the agreement with Mr. Rose and refusal to recognize the rights Mr. Rose obtained in said agreement, violates this public policy concerning protection of employees' right to contract. Such violation was incurred through Mr. Wetsel's bad faith, conscious disregard and unreasonable actions in "changing his mind" concerning the agreement reached with Mr. Rose.

It is vitally important to require employers' compliance with agreements entered into with employees. Such compliance will provide stability and productivity in the work force, resulting in a positive industrial welfare of

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this state. The Utah legislature enacted the statutes concerning an employees' right to bargain and contract with an employer. Clearly, the legislation was a response to the employee's lack of bargaining power and control in the present day economic climate. The Utah legislature recognized the importance of job stability to an employee and the necessity of allowing the employee some strength to negotiate toward needed terms in the employment contract. In addition, the Utah Constitutional provision demonstrates this state's recognition of the significant rights involved between an employee and employer and requires protections for those rights.

These provisions clearly enunciate a Utah policy of granting and protecting the employee's right to contract with an employer. Mr. Rose entered into negotiations which culminated in a contract with his employer. Allied's subsequent termination of Mr. Rose's employment was in complete derogation of the parties' contract. This absolute contravention of the terms agreed upon expressly disregards Mr. Rose's right and necessity to contract for needed terms in his employment relations. Such utter disregard of Mr. Rose's rights contravenes and violates the policy demonstrated by the Utah legislature concerning protection for employees' right to contract. Consequently, Allied must be held liable for violation of this important societal goal and public policy.

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ARGUMENT

V

THE LOWER COURT ERRED IN DETERMINING THAT MR. ROSE WAS NOT ENTITLED TO RECOVER AGAINST ALLIED ON THE BASIS OF ALLIED'S VIOLATION OF THE COVENANT OF GOOD FAITH AND FAIR DEALING.

As discussed in Argument IV, Point 3, the covenant of good faith and fair dealing is implied by law in every contract. This covenant is not merely applicable in the doctrine of wrongful discharge. It is applicable to every relationship based upon a contract, including employment contracts. For the reasons discussed in Argument IV, Point 3, Allied is liable for violation of this covenant and Mr. Rose is entitled to recover against Allied therefor.

CONCLUSION

The lower court granted summary judgment to Allied. This judgment, however, clearly disregards the authority and facts supporting recovery for Mr. Rose. To support a summary judgment, Allied must prove that Mr. Rose could not produce evidence during a trial that would support a verdict in his favor. Allied has not satisfied this burden of proof.

Presently applicable Utah law requires that Mr. Rose's employment contract was not terminable at will. Mr. Rose had an enforceable employment contract with Allied, duration of which could not be terminated during and on the basis of school. Under the general rule that employment contracts are terminable at will, there are several exceptions. The present case falls into the exceptions regarding an express or implied contrary agreement, independent consideration and estoppel.

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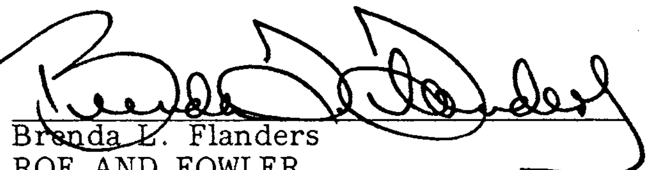
Further, Mr. Rose is entitled to recover under the doctrine of promissory estoppel.

In addition, courts have recently combined the exceptions to the at-will doctrine with several other causes of action and attempted to clarify them under one new cause of action, wrongful discharge. Under the theory of wrongful discharge, Mr. Rose is entitled to recover on the basis of express or implied contract, the violation of the covenant of good faith and fair dealing and the violation of public policy.

Finally, Mr. Rose is entitled to recover against Allied, in an independent cause of action, for the violation of the covenant of good faith and fair dealing, that is implied by law in every contract.

WHEREFORE, Mr. Rose respectfully requests that this Court reverse the summary judgment granted to Allied and grant summary judgment in his favor as a matter of law, or that failing, remand to the lower court for further proceedings.

Respectfully submitted this 23rd day of November, 1983.



Brenda L. Flanders
ROE AND FOWLER
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Appellant

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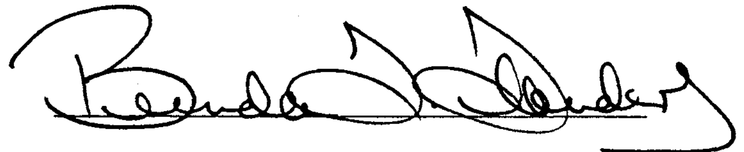
CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of November, 1983, I served the foregoing Brief of Appellant upon David A. Anderson, attorney for respondent, by depositing two copies thereof in the United States mails, postage prepaid, addressed as follows:

David A. Anderson, Esq.
PARSONS, BEHLE & LATIMER
185 South State Street
P.O. Box 11898
Salt Lake City, Utah 84147



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TO WHOM IT MAY CONCERN

I am the manager at Allied Development Corp.

Since August 1981, Willard Rose has been employed by our company and has fulfilled the following with an acceptable level of competancy.

1. Managing the Sales Floor of the Clothing and Shoe Departments with a combined annual income over One Million Dollars.

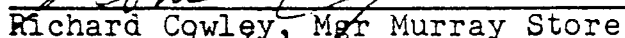
2. Supervise 14 employees in the process on running above departments.

3. Seeing that merchandise is displayed and ready for items that on the ads for current week.

4. Distribute footwear to all 3 stores.

5. Handle all return merchandise to vendors.

Comments:



Richard Cowley, Mgr Murray Store
Date: 9/7/82

Allied Development Corp.,
6419 S. State Street,
Murray, Utah, 84107

(801) 262-6411

EXHIBIT "A"

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'ESTMINSTER
ƆLLEGE

TABLISHED 1875

1840 South 1300 East
Salt Lake City, Utah 84105
Telephone (801) 484-7651

April 8, 1983

TO WHOM IT MAY CONCERN:

This is to verify Fall 1982 Tuition charges to WILLARD ROSE, a current student at Westminster College. Willard was charged $1645.00 which was paid in full by different forms of financial aid.

Nancy Ricks
Nancy Ricks
Westminster College
Accounts Receivable

EXHIBIT "B"

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FOLLETTS WESTMINSTER BOOKSTORE

WESTMINSTER COLLEGE

1840 SOUTH 1300 EAST • SALT LAKE CITY, UTAH 81405

PHONE 801 • 484-9203

FOLLETT STORE NO. 454

Customer's Order No.	Date 4/8/83
Sold to Willard Rice	
Address [illegible]	
City [illegible]	

Sold by	Cash	C.O.D.	Charge	On Acct.	Mdse. Ret.	Paid Out	

Quantity	Description	Price	Amount
1	H. 342 Hist. of Latin Am		11 95
	Ec 253 Econ Today		24 00
	[illegible] Phil		7 25
	Ma 250 Intro to Stats		23 00
	Mb 326 Bus. Law		26 95
	Estimated cost of		
	books for Fall		
	(written receipt)		93 15
		Tax	4 66
Thank You In case of claims or returned goods please present this bill.		Total	97 81

RS 510-8

No. 000337

Uarco Business Forms

Received by Stephen Lee

EXHIBIT C

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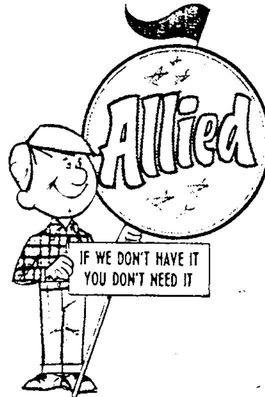
Your family store serving the Intermountain West



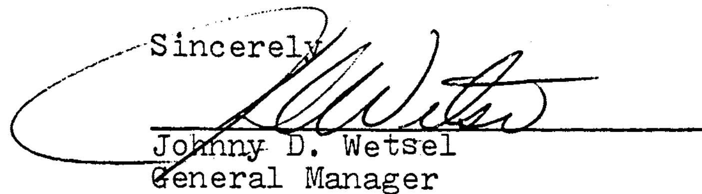
December 22, 1982

Mr. Will Rose
52 South 350 East
North Salt Lake, Utah 85054

TO WHOM IT MAY CONCERN:

This letter is a reference for Mr. Will Rose. He was employed by Allied Development Co. as a manager of the Shoe Department for over one year. In addition to Manager of this department, he managed and supervised the personell. His attitude and performance in this position was commendable. We would recommend him for any position of this nature.

Sincerely



Johnny D. Wetsel
General Manager

JDW/cb

EXHIBIT "D"

ALLIED DEVELOPMENT COMPANY, INC.

Wholesale and Retail Sporting Goods, Hardware and Clothing

6419 SOUTH STATE STREET / MURRAY, UTAH 84107 / DIAL (801) 262-6411

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TERMINAL OUT OF BOUNDS

1. Theft of money or goods
2. Fighting with outher employees
3. Under the influence of drugs or alcohol
4. Failure to report to work second time
5. Willful disrespect of management
6. Time clock violation
7. Willful destruction of merchandise or property
8. Late ten minutes or more three times a week
9. Smoking or chewing on sales floor or warehouse or yard
10. Giving unauthorized discounts
11. Taking money under false pretenses.

OPERATIONAL OUT OF BOUNDS

1. Smocks, vests, hats and name tags
2. Bad attitude
3. Failure to acknowledge customer
4. Excessive personal phone calls
5. Socializing with friends while working
6. Failure to keep breakroom clean
7. Attending sales training meetings
8. Failure to answer phones
9. Personal appearance
10. Swearing on sales floor

EXHIBIT "E"

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