2002

Cathy Brehany v. Nordstrom, Inc. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

20590

CATHY BREHANY, Plaintiff/Respondent, vs. NORDSTROM, INC., Defendant/Appellant.	
	Case No. 20590
DENNIS KNAPP and BARBARA KNAPP, his wife, Plaintiffs/Respondents, vs. NORDSTROM, INC., Defendant/Appellant.	Category 13b

BRIEF OF RESPONDENTS

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY
HONORABLE DAVID B. DEE, DISTRICT JUDGE

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LIST OF ALL PARTIES TO PROCEEDING

Appellant:

Nordstrom, Inc. (Defendant below in C82-5828 and C82-5860)

Respondents-Cross Appellants

Dennis Knapp (Plaintiff below in C82-5860)

Barbara Knapp (Plaintiff below in C82-5860)

Cathy Brehany (Plaintiff below in C82-5828)

Other Parties:

Darrell Hume (Defendant below in C82-5828 and C82-5860)

James Nordstrom (Defendant below in C82-5828 and C82-5860)

Robert Bender (Defendant below in C82-5828 and C82-5860)

Robert Dunlap (Defendant below in C82-5860)

Carter, Hawley Stores, Inc. (Defendant below in C82-5860)

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Does the law of Utah recognize that under certain circumstances a contract for employment, of indefinite duration will give rise to implied covenants of good faith and fair dealing.

2. Is the covenant of good faith and fair dealing (inherent in other contracts under Utah law) inherent in an at-will employer-employee relationship where a policy and procedure manual exists.

3. Does a policy and procedure manual governing employer and employee relationships create an express or implied contract of employment such as to create a cause of action should the terms of the manual not be followed.

4. Does the defense of qualified privilege exist under the facts and circumstances of this case so as to justify dismissal of a defamation claim.

5. Did the District Court err in partially dismissing plaintiffs' claim for breach of contract and in dismissing plaintiffs' claim for defamation.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an appeal of a jury verdict awarding monetary damages for plaintiffs and against defendant Nordstrom. A cross appeal was also filed by plaintiffs from the partial dismissal by the trial court of their breach of contract claims and the dismissal of their defamation claims.

II. DISPOSITION BY THE LOWER COURT

Following a jury trial held from January 14 through January 30, 1985, the jury awarded judgment on special interrogatories in favor of the plaintiff Dennis Knapp in the sum of $150,000, in favor of the plaintiff Barbara Knapp in the sum of $80,000 and in favor of the plaintiff Cathy Brehany in the sum of $50,000. R. C82-5828, 538. At the conclusion of the case and prior to its submission to the jury, the district court dismissed plaintiffs' cause of action claiming defamation and partially dismissed plaintiffs' cause of action claiming breach of contract. T. 2319-2321. The district court subsequently denied defendant's Motion for Summary Judgment Notwithstanding the Verdict, New Trial or Remittitur. T. 2467-68. This appeal and cross appeal followed. R. 82-5828 2475-76, 2478-79.

III. STATEMENT OF FACTS

Plaintiffs Dennis Knapp, Barbara Knapp and Cathy Brehany were employees of defendant at its Crossroad Plaza Store in Salt Lake City, Utah. Dennis Knapp had been employed by defendant since July 1973. T. 954. Barbara Knapp had been employed by defendant since October 1975 and Cathy Brehany was employed by Nordstrom but the exact date is unclear from the record. T. 1152-53.

At the time each of the plaintiffs was hired each was given and required to sign a Manual entitled Nordstrom History, Policy and Regulations. (Ex.P-1) T. 957-959, T. 1153, 1274-1275. The manual provides for a set of rules and describes the conduct expected of employees. It provided for a procedure for termination of employees and stated in part:

"The following offenses may result in immediate dismissal:

5. Unbecoming conduct bringing reflection or criticism upon the store and its personnel, malicious mischief, neglect or carelessness resulting in injury to individuals or destruction of store or other property.

8. Introduction, possession, or use of habit forming drugs, hallucinogens, illegal narcotics or intoxicating liquors on the property of the store or reporting for duty under the influence of same. This includes use or consumption during breaks, lunch period or prior to reporting for work."

A total of eleven grounds are stated as offenses which may result in immediate termination. pp. 23-24 of Ex.P-1.

Ex.P-1 further provides:

"REGULATIONS PROTECTING YOU AND YOUR STORE" (Emphasis Added)

"In organizations of our size, there must be rules to maintain harmony and prevent injustice. (Emphasis Added) Nordstrom has as few rules as possible, but they are strictly enforced in fairness to the group as a whole.

The following may result in discharge after a written warning..."

Nine categories of offenses are then listed. On July 21, 1981 defendant terminated the employment of all three plaintiffs. Plaintiff Dennis Knapp was fired for using drugs. T. 999-1000. Plaintiff Barbara Knapp was fired because she was the wife of Dennis Knapp. T. 1298, 1300. Cathy Brehany was fired for supplying drugs to employees. T. 1143.

After the firing of plaintiffs, agents of defendants advised others who asked what they should tell other employees about the termination, to tell them the plaintiffs were fired because they were involved in drugs or narcotics. T. 1140, 1331, 1337, 1338, 1358, 1360, 1367, 1372-77, 1392-99, 1403-07.

The defendant claims that the events leading up to the termination of plaintiffs began with an internal investigation.

In fact, no real investigation was done. The defendant's agents relied upon rumor, innuendo, hearsay and speculation in terminating the plaintiffs. T. 1560-68.

Of particular import is Mary Tasa's description of the birthday party at Michael Soul's home where drugs were allegedly used. Tasa never stated that either Dennis, Barbara or Cathy were present. T. 1565. In fact, there was testimony that none of the plaintiffs in fact attended that party. T. 945-48, 1327-33.

Counsel for defendant-appellant on page 6-9 refers this court to many transcript citations in an effort to show the careful investigation conducted by defendant's agents and offices. Plaintiffs-respondents adopt these citations as evidence that the investigation was one of rumor, hearsay, innuendo and suspicion. In fact, a careful review of all the evidence offered at trial shows that no real investigation into the allegations involving the plaintiffs was ever made by anyone on behalf of the defendant.

The jury heard all of the evidence and under the instructions given to it by the court and using the special interrogatories form of verdict submitted to it concluded that the defendant did not act in good faith in terminating the employment of plaintiffs. C-82-5828, 538.

SUMMARY OF ARGUMENT

1. This case should be affirmed insofar as the jury verdict awarding plaintiffs damages for breach of an implied covenent of good faith and fair dealing. The court should follow the majority of cases which have accepted the doctrine of good faith and fair dealing as a contractual obligation growing out of the contract

especially where as here there is a policy and procedure manual dictating the rights of the parties.

(a) The evidence was sufficient to justify the verdict;

(b) The issue of breach of implied warranty was properly raised;

(c) The jury instructions given were proper;

(d) Bad faith was adequately defined in the jury instructions;

(e) No remittitur should be granted.

2. That portion of the district court's judgment partially dismissing plaintiffs' claimed breach of contract should be reviewed and the case remanded for a new trial since an express or implied contract existed by virtue of the policy and procedure manual signed on behalf of each plaintiff.

3. That portion of the district court's judgment dismissing plaintiffs' claim for defamation should be reversed and the case remanded for trial since a qualified privilege did not exist under the circumstances of this case.

ARGUMENT

POINT I

THE UTAH SUPREME COURT SHOULD AFFIRM THE JURY VERDICT IN FAVOR OF THE PLAINTIFFS AND AGAINST THE DEFENDANT.

The judgment of the jury in favor of plaintiffs is not in error and should be affirmed. Plaintiffs were not at-will employees of Nordstrom, such that they could be fired for any reason. Utah law should recognize a claim for breach of an implied covenant of good faith and fair dealing. There was adequate evidence to substantiate and justify the jury verdict. A claim for relief for breach of an implied convenant of good faith and fair dealing was

pled and properly presented to the jury.

A. The Circumstances Surrounding Plaintiffs' Employment and The Method Employed By Defendant In Firing Them Created A Cause Of Action Under Which Plaintiffs Are Entitled To Recover Damages.

The Supreme Court of Utah has never decided a case directly on point with the case at bar. A careful analysis of the two leading Utah cases in this area leads to the conclusion that Utah does recognize that under certain circumstances, a contract for employment, of indefinite duration, will give rise to implied covenants to not discharge except for cause and in good faith.

In Bihlmaier v. Carson, 603 P. 2d 790 (Utah 1979) the plaintiff sued for breach of an oral employment contract with defendant, who founded and operated a small grocery store. Carson, because of his age and desire to spend more leisure time, sought a qualified person to become acting manager of his store. Plaintiff and defendant engaged in "extended negotiations" before plaintiff left his previous job in California to take the managerial position.

In was undisputed in Bihlmaier that the employment was being conducted on a trial basis only, and that plaintiff's continued employment and assumption of complete managerial duties was conditional upon the plaintiff's performance during a "trial period".

Shortly after arriving in Utah, and starting his employment, plaintiff Bihlmaier sought a loan to buy a house. The loan was refused because the employer answered a question on the loan application form, as to the probability of plaintiff's continued employment as follows: "continued employment depends upon applicant hired on a trial basis only."

The plaintiff considered this to be a constructive discharge and a breach of the oral employment contract, and thereafter plaintiff terminated his employment and brought suit.

The Supreme Court affirmed a summary judgment in favor of the defendant employer, noting:

> "Under the facts as presented in the depositions of the two parties, the final oral employment contract contained no express terms concerning the duration of the plaintiff's employment. Rather, the evidence indicates that both parties intended the employment to be indefinite and terminable at the will of either party. The plaintiff explained in his deposition:
>
> Q. Was there any agreement as to how long you would be employed with Mr. Carson?
> A. Other than I was hired as a store manager, no, no specific time.
> Q. There was no specific time at all, was there?
> A. No. That is correct.
>
> ***
>
> Q. So you did understand and agree that your employment was for no definite period of time and might be terminated at any time without previous notice. Isn't that right?
> A. Yes, I think that's fair, ...
>
> The 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. The evidence presented in support of the summary judgment motion shows this was the express intent and understanding of the contracting parties." (603 P. 2d at 792, emphasis supplied.)

It is clear from the emphasized portion of the opinion quoted above that this court specifically recognized that if there is an express or implied stipulation as to the duration of the employment then the contract is not terminable at will. Clearly the evidence in Bihlmaier was that the contract could be terminated anytime. Yet, the court in its decision does not confine itself to these facts but observed that if there is an express or implied stipulation

as to duration then termination at will does not apply.

In Piacitelli v. Southern Utah State College, 636 P. 2d 1063 (Utah 1981), the plaintiff had been employed by the defendant College since 1973, as Coordinator of Counselling. His position was "classified staff" non-faculty, and not eligible for tenure. Every academic year from 1973 to 1978, he was issued a Notice of Appointment, signed by the college president, and "effective for the contract period of July 1 through June 30". This Notice set forth his job title, salary, and department. Each year, he would sign and return a form indicating his acceptance of employment as specified in the Notice.

Early on in his employment, the plaintiff had numerous disputes with his supervisors. Some of these were never resolved. In December of 1978, plaintiff's immediate supervisor recommended that the college not continue to employ plaintiff.

The college president sent plaintiff a one sentence letter dated January 24, 1979, indicating his contract would "not be renewed at the end of the contract period." Plaintiff was later advised by a second letter from the president dated February 13, 1979 that the college's action was "not to be interpreted as dismissal for cause" which action if taken, would result in immediate termination of employment. A later affidavit from the dean of students indicated non-renewal, rather than dismissal for cause, was used "out of consideration for [plaintiff's] professional future and in accordance with higher education practices."

The plaintiff sued, alleging the failure to renew the employment contract was, in effect, a dismissal for cause, and violated his

due process rights, as set out by the SUSC Personnel Policies and Procedures. Plaintiff argued that the college's Personnel Policies and Procedures Manual (hereinafter manual) controlled the case.

The manual suggested that classified employees were either probationary, hence "terminable at will" or permanent, hence "terminable only after compliance with specified procedures." Plaintiff argued the college's action of not renewing his contract was an attempt to avoid its own procedures, and do indirectly what its own manual would not allow directly.

The college agreed that plaintiff was not probationary, but contended that since he was employed on a year to year basis, and his contract had expired by its own terms, he was not dismissed at all, rather, he was merely not rehired. Therefore, the termination procedures did not apply. The Supreme Court noted:

> "In January, 1980, the district court ruled that the college's Personnel Manual governed the terms of Piacitelli's employment contract with the college, that Piacitelli had acquired 'permanent employment status' under that contract, and that the college's failure to renew Piacitelli's annual employment contract without complying 'with due process of law requirements pursuant to [the Personnel Manual]... constituted plaintiff's termination and thus a breach of contract.' The district court thereupon ordered the college to grant Piacitelli 'administrative due process procedure pursuant to the [Personnel Manual]'.
>
> This was a final order, which, unless reversed on appeal, is res judicata and binding upon these parties.
>
> ****
>
> The order was not appealed. Consequently, for purposes of this case, we must treat Piacitelli as an employee with permanent employment status whose employment contract entitled him to the formal procedures specified in the Personnel Manual before he could be dismissed or terminated, even at the conclusion of the annual contract period." (636 P. 2d at 1065, citations omitted.)

Thereafter, the college issued a formal notice of dismissal. The plaintiff appealed through three separate levels of college authorities. All upheld the dismissal. The plaintiff then returned to the district court, which ruled that the college had substantially complied with its procedures, and that the termination was sound, and that no grounds existed to reinstate plaintiff. Plaintiff was awarded back pay for the period from when his contract expired until the proper termination was effected.

The plaintiff's sole issue on appeal was that the college had not adequately complied with the contractual termination procedures contained in the manual. The Supreme Court held that the college had substantially complied with the procedures, and substantial compliance was sufficient, because this satisfied the substantial interests of the parties, so that the employment contract was not breached.

The college had cross-appealed the award of back pay, presenting the issue,

> "Is a college employee who was dismissed with sufficient cause, but in violation of contractually guaranteed termination procedures, entitled as a matter of contract law to back pay for the period between the procedurally defective dismissal and the subsequent proper dismissal?" (636 P. 2d at 1067)

The Supreme Court held such an employee was entitled to back pay as a matter of contract law. The Court distinguished the contract claim from the type of claim found in an action based upon deprivation of constitutional rights, which sound in tort, and which routinely do not allow for recovery of back wages where, although due process if followed, good cause nevertheless exists

for the discharge.

> "This outcome contrasts with the outcome produced by analyzing the same problems from the standpoint of breach of contract. By entering into an employment contract of the type before us, the parties assume continuing obligations to one another: the employee to render services, the employer to pay salary. Those obligations continue until they are extinguished. Here, the termination mechanism described in the Personnel Manual, which the district court found to govern the terms of the contract between the college and its employee, was the sole means by which the college could extinguish the contractual relationship. Until it at least substantially complied with those procedures, its contractual obligation continued in force and the clock continued to fun on Piacitelli's right to receive his contract salary. Piacitelli is therefore entitled to recover that accrued salary, and is not limited to reimbursement for an injury caused by a specific wrongful act.
>
> This result comports with what we deem to be sound policy for contractual employer-employee relations. It will encourage employers to comply promptly with their contractual termination procedures, and if they fail to do so will impose the monetary consequences on the party at fault. If the rule were otherwise, the employer could discharge an employee summarily and then omit or delay the contractual termination procedures with impunity so long as it was in possession of evidence which, when ultimately provided, would justify the discharge. In that circumstance, the employee, without notice of the reason for his dismissal and without any opportunity to refute the charges, would remain in an indefinite and painful state of limbo, uncertain about his ultimate right to reinstatement or back pay. If our rule works any hardship on employers, they can avoid it by prompt and substantial compliance with the procedures to which they have agreed." (636 P. 2d at 1069, emphasis supplied).

The direction of the court was clear: to protect those innocent employees who might be falsely accused of wrongdoing. The court, by following modern contract concepts, formulated a remedy that gives the employment contract meaning not mere illusion, and enforces that contract strictly, even to the point of requiring back pay to an employee whose discharge was defective only as to process

since good cause existed for the dismissal.

In the case at bar, the plaintiffs were discharged not for improper performance, but because they were sacrificed as an example to others. The entire charade was based upon a ludricrous witch hunt.

Utah is not alone in carving out exceptions to the terminable-at-will doctrine. In fact, more than two thirds of American jurisdictions have abandoned the employment-at-will rule as a strict substantive formulation. See Perritt, Employment Dismissal Law & Practice, 1985 at page 18.

> "In the past five years virtually every state court has had to confront whether and how to curtail an employer's reliance on the employment at will rule. Employers had relied on the rule to discharge employees in their absolute discretion except as limited by statute or contract. Now, a majority of jurisdictions to varying degrees have abrogated employment at will by recognizing causes of action for wrongful discharge . . ." Springer, The Wrongful Discharge case, trial, June 1985 at page 38.

These inroads are a result of the inherent unfairness of the traditional rule. Increasingly, the courts have been willing to recognize a cause of action for wrongful discharge even where the employment is of an indefinite duration or where the employee is given no special consideration other than his services. See cases collected at 1 & 2 Employment-at-Will Reporter (May 1983-January 1985).

The employment-at-will is based on outdated assumptions and leads to unnecessarily harsh results. See 93 Harvard Law Review 1816 (1980). It is the employees who will bear the risk of malicious and capricious firings by employers unless the courts imply a

contractual term allowing only good faith discharges. Such an approach somewhat similar to what we see in protecting consumers in product liability cases, will result in protecting employees from the financial and emotional harm brought about by employer abuse of discretion to terminate.

The reporters are replete with cases limiting and confining the termination-at-will doctrine and I will only cite several of the most significant.

In Larrabee v. Penobscot Frozen Foods, 486 A. 2d 97 (Me. 1984), the plaintiff asserted an implied contract existed as a result of writings entitled "General Policy" and "Word Rules". The defendant discharged the plaintiff for "misconduct". The trial court dismissed the cause of action on the basis that absent an allegation that the employment was for a particular period of time, the employment was terminable at will.

The Main Supreme Court in reversing the trial judge said:

> "[5] While the employment of much of the country's labor force is governed by the terminable at will rule, a subtantial percentage of the labor force is protected by collective bargaining agreements or are employed by federal or state governments, and can generally be discharged only for 'just cause'. See 93 Harv. L. Rev. 1816, 1816 n. 1 & n. 2. There is no reason why individuals not otherwise given this protection and their employers should not be free to contract against discharge without good cause, as the plaintiffs in the instant case allege they did. We hold, therefore, that parties may enter into an employment contract terminable only pursuant to its express terms--as 'for cause'-- by clearly stating their intention to do so, even though no consideration other than services to be performed or promised is expected by the employer, or is performed or promised by the employee. In so holding, we join several other courts which have carved out the identical or a similar exception to the terminable-at-will rule."

In Toussaint v. Blue Cross Blue Shield of Michigan, 292 N.W. 2d 880 (Mich. 1980), an employee was discharged without good cause under the employer's policy manual which states that it was the company's policy to require good cause for discharge and that the employee had also been told that as long as he did his job well, he would have a job with Blue Cross. These representations the court concluded gave the employee a legitimate expectation of job security on which he could base a cause of action in contract for discharge. See also Weiner v. McGraw Hill, Inc., 443 N.E. 2d 441 (New York 1983).

In Forrester v. Parker, 606 P. 2d 191 (New Mexico 1980) the plaintiff maintained that the personnel policy guide controlled the employer-employee relationship. The trial court held it did not because plaintiff was an employee at will who could be discharged even without cause. The supreme court reversed holding that the policy guide constituted an implied employment contract and the conditions in it bound both the plaintiff and the defendant.

In Gates v. Life of Montana Insurance Company, 638 P. 2d 1063 (Montana 1982), the employee entered into an employment contract terminable at will. Later the employer promulgated a handbook of personnel policies establishing procedures with regard to termination. The court ruled:

> "If the employer has failed to follow its own policies, the peace of mind of its employees is shattered and an injustice is done.
> 4]We hold that a covenant of good faith and fair dealing was implied in the employment contract of the appellant. There remains a genuine issue of material fact which precludes a summary judgment, i.e. whether the respondent failed to afford appellant the process required and if so, whether the respondent thereby breached the covenant

of good faith and fair dealing."

In Southwest Gas Corporation v. Ahmad, 668 P. 2d 261 (Nevada 1983), Ahmad had an oral employment contract. Subsequently, Southwest Gas issued Employee Information and Benefit Handbooks to its employees. The Supreme Court ruled that the handbook became part of the original contract and thus termination had to comply with the clause of the handbook relating thereto.

In Shah v. American Synthetic Rubber Corporation, 655 S. W. 2d 489 (Ky. 1983), Shah claimed a contract existed because of a policies and procedure manual. The defendant asserted that he was an employee for an indefinite period of time thus rendering his employment terminable at will. In rejecting the employer's claim the court said:

> "[2] Protection of employees against discharge without cause is routinely provided under collective bargaining agreements, as well as under civil service statutes and ordinances. See cases and statutes collected in 93 Harv. L. Rev. 1816, 1816, n. 1 (1980). It is there estimated that one-third of the entire national work force is afforded such protection. Employers and individual employees should be equally free to contract against discharge without cause, as Shah and ASRC are presumed for purposes of ASRC's motion for summary judgment to have done. We joint a number of other jurisdictions which hold that parties may enter into a contract of employment terminable only pursuant to its express terms--as 'for cause'--by clearly stating their intention to do so, even though no other considerations than services to be performed or promised, is expected by the employer, or performed or promised by the employee." E.g. Littell v. evening Star Newspaper Co., 120 F. 2d 36,37 (D.C. Cir. 1941). See also Rowe v. Noren Pattern & Foundry Co., 91 Mich. App. 254, 283 N.W. 2d 713 (1979); Drzewiecki v. H & R Block, 101 Cal. Rptr. 169, 24 Cal. App. 3d 695 (1972).

In Oslerkamp v. Atkota, Mfg. Inc., 332 N.W. 2d 275 (S.D. 1983, the South Dakota Supreme Court ruled that the rules, regulations

and disciplinary procedures of the employer-employee handbook created a contractual right for which recovery could be had for wrongful discharge. A like decision was reached by the Minnesota Supreme Court in Pine River State Bank v. Mettile, 333 N. W. 2d 622 (Minn. 1983):

> "[4] If the handbook language constitutes an offer, and the offer has been communicated by dissemination of the handbook to the employee, the next question is whether there has been an acceptance of the offer and consideration furnished for its enforceability. In the case of unilateral contracts for employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. In this manner, an original employment contract may be modified or replaced by a subsequent unilateral contract. The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer."

In Vinyard v. King, 728 F. 2d 428 (10th Cir. 1984) the court held that where the only writing evidencing an employment contract was the employee handbook signed by both the employee and the employer that under Oklahoma law a property interest existed that was protected by the Fourteenth Amendment.

In Wadeson v. American Family Mutual Insurance Company, 343 N. W. 2d 367 (N.D. 1984) the North Dakota Statute provided:

> "34-03-01. Termination of Employment at will--Notice Required. An employment having no specified term may be terminated at the will of either party on notice to the other, except when otherwise provided by this title."

In spite of the statute the court recognized an implied covenant of good faith and fair dealing in all contracts and required an employer to exercise good faith and fair dealing in terminating an employee.

The Arizona Supreme Court has adopted the Personnel Policy Manual exception to the termination-at-will doctrine in Wagenseller v. Scottsdale Memorial Hospital, 710 P. 2d 1025 (Arizona 1985) and Accord Leikvold v. Valley View Community Hospital, 688 P. 2d 170 (Arizona 1984).

In the case at hand, plaintiffs were required to sign the Nordstrom History and Policy Regulations, Ex. P-1, T. 957-59, 1153, 1274-75.

Restatement, Second, Contracts Section 205 provides:

> "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

This concept is likewise recognized in Williston Contracts (3rd Edition §670, 1295):

> "Whenever, therefore, a contract cannot be carried out the way in which it was obviously expected that it should be carried out, without one party or the other performing some act not expressly promised by him, a promise to do that act must be implied."

There is no compelling reason, public or otherwise to read out of an employment contract an implied obligation of good faith and fair dealing regardless of whether or not such contracts of employment can be terminated at will. To do so would remove the universal obligation of good faith which Utah law has to this point traditionally read into and required in all contractual relationships, and thus an implied contract existed and plaintiffs were entitled to rely upon the procedures set forth therein and to require that the defendant comply with the convenant of good faith and fair dealing in any termination.

B. Utah Has Recognized an Implied Covenant of Good Faith and Fair Dealing and the Courts Should Apply It in Employment Contract Cases.

Utah has recognized that an implied covenant of good faith and fair dealing is inherent in every contract entered into in this state. Beck v. Farmer's Insurance Exchange, 701 P. 2d 795, (Utah 1985); Leigh Furniture and Carpet Co. v. Isom, 657 P. 2d 293 (Utah 1982); Prince v. Elm Company, Inc., 649 P. 2d 820 (Utah 1982); W. P. Harlin Construction Co. v. Utah State Road Commission, 431 P. 2d 792 (Utah 1967).

In this case plaintiffs were merely asserting their rights under Utah law with specific reference to the covenant of good faith and fair dealing implied by the law in all contractual relationships.

Appellant in Point I B asserts that a majority of states have rejected a bad faith exception to the at-will rule. Such is not the case and in fact a majority of states have embraced the good faith and fair dealing concept as pointed out in the numerous citations above. Appellant asserts only public policy demands can justify good faith and fair dealing requirements. However, the cases cited herein make it clear that it is a contractual obligation to terminate only in good faith and with fair dealing.

Appellant also asserts that any change in the at-will rule should be made by the legislature. I am compelled to note at this point that in Utah the at-will doctrine, as it exists, is a court created doctrine and since the court possesses the legitimate heritage of common law innovation that developes new principles to accomodate changing values as discussed by Holms in the Common

Law, and since the courts created the at-will rule, it is entirely appropriate for the courts to modify or eliminate it.

There was ample and sufficient evidence to justify the jury's verdict. As pointed out in the statement of facts and the citations to the record therein, defendants so-called investigation can best be characterized as one based on rumor, hearsay, innuendo and suspicion. The testimony of Betsey Sanders probably characterizes the investigation best:

> "If one person came to me it would be rumor. If some-- if a couple of people came, that would certainly begin to be enough evidence that we probably had something definite, and if several people were telling the same story could be enough to get people fired." T. 1960

Appellant asserts that the issue of good faith and fair dealing was never raised in the pleadings. However, counsel cites the amended complaints of the Knapps and Ms. Brehany in this brief, page 33, wherein the plaintiffs allege that the defendant "breached its duty of good faith in that plaintiffs were wrongfully discharged." R. C82-5828, 108 and R. C82-5860, 4-5, 12. In addition, plaintiffs' trial memorandum filed on January 18, 1985 clearly established good faith and fair dealing as a theory plaintiffs were relying upon. The appellant is struggling to find reversible error.

The remaining issues raised in appellant's brief are without merit and are not sustained by the state of the record and the evidence presented in this case and should be summarily rejected.

POINT II

THE DISTRICT COURT COMMITTED ERROR IN PARTIALLY DISMISSING PLAINTIFFS' CLAIM OF BREACH OF CONTRACT AND THE SUPREME COURT SHOULD REVERSE AND REMAND THIS CASE FOR FURTHER TRIAL ON SUCH CLAIM.

It is well settled that an implied covenant in a contract is just as binding as one that is express. See, for example, the opinion of Justice Cardozo, in Wood v. Lucy, Lady Duff-Gordon, 222 N. Y. 88, 118 N. E. 214 (1917) It is equally accepted that:

> "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (Restatement Second of Contracts §231)

17 Am. Jur. 2d 653, Contracts §256 states:

> "Every contract implies good faith and fair dealing between the parties to it, and a duty of cooperation on the part of both parties. Moreover, there is an implied undertaking in every contract on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out his part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Ordinarily if one exacts a promise from another to perform an act, the law implies a counter-promise against arbitrary or unreasonable conduct on the part of the promisee."

Numerous reported cases apply this rule to cases involving employment contracts, including those involving so-called "at-will" employees. See for example, Smithers v. MGM Studios, Inc., 189 Cal. Rptr. 20 (1983), a formal written contract, with implied covenant of good faith and fair dealing; Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981), a contract of employment for indefinite duration, with implied covenant of good faith and fair dealing, and implied agreement that the employee would be terminated only for good cause; Cancellier v. Federated Department Stores, 672 F. 2d 1312 (9th Cir. 1982), applying California law, finding an implied covenant of good faith and fair dealing in an employment contract; Monge v. Beebe Rubber Co., 316 A.

2d 549 (N. H. 1974), employment at-will, terminated by employer in bad faith, constitutes a breach of the employment contract; and Fortune v. N.C.R. Co., 364 N.E. 2d 1251 (Mass. 1977) finding an implied covenant of good faith in employment contract that was terminable-at-will.

Numerous cases have found implied covenants do not discharge an employee except for good cause. See for example, Pugh v. See's Candies, Inc., supra,; Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980), employment contract, terminable-at-will has implied covenant of good faith and fair dealing and employer is estopped to discharge employee without good cause; Novosel v. Nationwide Insurance Co., 721 F. 2d 894 (3rd Cir. 1983) applying law of Pennsylvania, finding employee's custom, practice or policy can create contracual requirements of just cause, or contractual procedures, which an employer must abide by to discharge an employee; and Toussaint v. Blue Cross and Shield of Michigan, supra.

Toussaint v. Blue Cross & Blue Shield, supra, is typical holding, inter alia, 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.
>
> ***
>
> 4) a jury could also find for a wrongfully discharged employee based on legitimate expectations grounded in his employer's written policy statements set forth in the manual of personnel policies." (292 N.W. 2d at 885.

While some cases have held that employment handbooks are not a part of an employment contract, there is a large body of well-reasoned cases in accord with Toussaint v. Blue Cross and Blue Shield, supra, including Conley v. Board of Trustees, 707 F. 2d 175 (5th Cir. 1983), Mississippi law, employer's guidebook containing rules adopted pursuant to expressly granted authority from the legislature, created a constitutionally protected claim to continued employment; Greene v. Howard University, 412 F. 2d 1128 (D. C. Cir. 1969), faculty handbook created contractual obligation, notwithstanding purported disclaimer; Forrester v. Parker, supra, personnel policy guide constituted implied employment contract arising as a result of parties conduct; Yartzoff v. Democrat-Herald Publishing Co., 281 Ore. 651, 576 P. 2d 356 (1978), no summary judgment where issue of fact existed as to whether provisions in employee handbook were intended to be part of original contract for employment and that contract allowed termination only for good cause; Walker v. Northern San Diego County Hospital District, 135 Cal. App. 3d 896, 185 Cal. Rptr. 617 (1982), error to direct verdict for employer where issues existed as to whether employee had a written or oral or implied in fact agreement that she would be terminated only for cause; Southwest Gas Corporation v. Ahmad, supra, holding that parties were contractually bound by termination clause in employee handbook; and Weiner v. McGraw-Hill, Inc., supra.

In Weiner v. McGraw-Hill, Inc., supra, an employee sued for wrongful termination. The employer's motion to dismiss was denied by the trial court. The employer appealed to the appellate division,

which reversed. Appeal was then taken to the Court of Appeals, which reinstated the trial court's ruling.

The court of appeals in Weiner noted that although the plaintiff's employment was for an indefinite term of duration, he still could state a cause of action for breach of contract on the ground that he was discharged without "just and sufficient cause", or the rehabilitative efforts specified in the employer's personnel handbook. The court stated:

> "Turning now to substance, it is also clear that the fact that plaintiff was free to quit his employment at will, standing by itself, was not entitled to conclusory effect. Such a position proceeds on the oversimplified premise that, since the plaintiff was not bound to stay on, the agreement for his employment lacked 'mutuality', thus leaving the defendant free to terminate at its pleasure. But this would lead to the not uncommon analytical error of engaging in a search for 'mutuality', which is not always essential to a binding contract, rather than of seeking to determine the presence of consideration, which is a fundamental requisite. For, while co-extensive promise may constitute consideration for each other, 'mutuality' in the sense of requiring such reciprocity, is not necessary when a promisor receives other valid consideration." (443 N.E. 2d at p. 444, citations omitted)

The court continued:

> "As to consideration, any basic contemporary definition would include the idea that it consists of either a benefit to the promisor or a detriment to the promisee. As elaborated in Hamer v. Sidway, the seminal case on the subject, '[i]t is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him' (citation omitted)
>
> Far from consideration needing to be coextensive or even proportionate, the value or measurability of the thing forborne or promised is not crucial so long as it is acceptable to the promisee. Thus, courts have not hesitated to find sufficient consideration not only in what is now the proverbial peppercorn but in 'a horse or a canary, or a tomtit if [the promisee] chose'. In

fact, the detriment suffered or the thing promised need be of no benefit to the one who agreed to it. So, in Hamer what the plaintiff 'suffered' was self-denial of liquor and tobacco, a sacrifice which prompted our court, quoting from Anson's Principles of Contracts (at page 63), to explain that it would 'not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone.' (citations omitted)

Apt too in the circumstances before as now is the following comment by Corbin: [I]f the employer made a promise, either express or implied, not only to pay for the service but also that the employment should continue for a period of time that is either definite or capable of being determined, that employment is not terminable by him 'at will' after the employee has begun or rendered some of the requested service or has given any other consideration... this is true even though the employee has made no return promise and has retained the power and legal privilege of termination of the employment 'at will'. The employer's promise is supported by the service that has been begun or rendered or by the other executed consideration. (1A Corbi, Contracts, Section 152, page 14). So understood, an agreement on the part of an employer not to dismiss an employee except for 'good and sufficient cause only' and, if such cause was given, until the prescribed procedures to rehabilitate had failed, does not create an ineluctable employment at will." (443 N.E. 2d at 444-445)

The court of appeals found the facts of the case presented a question for trial as to whether or not the employer was bound to a contract to not discharge its employer without just and sufficient cause, and an opportunity for rehabilitation.

Finally, the court noted that Martin v. N.Y. Life Insurance Co., 148 N.Y. 117, 42 N.E. 416 (1895) . . .

". . . itself, when, in 1895, it adopted New York's at-will rule, afforded it no greater status than that of a rebuttable presumption (citations omitted)[if no definite term is fixed by contract, a hiring at will is deemed to have resulted only 'in the absence of circumstances showing a different intention']. In determining whether such a presumption is overcome here the trier of the facts will have to consider the 'course of conduct' of the parties, 'including their writings' (citations

> omitted) and their antecedent negotiations. Moreover, as Brown suggests it is not McGraw's subjective intent, nor 'any single act, phrase or other expression' but the 'totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain', which will control." (443 P. 2d at p. 446, citations omitted)

The fact that Nordstrom offered a profit sharing plan, See Ex P-1, is still more evidence of an implied covenant to not discharge except for good cause, in good faith. By holding out this plan, in their employee handbook as "One of the Most Important Benefits Nordstrom Has For Its Employees" (original emphasis), and setting up the plan so that the benefits are "divided proportionately among the employees according to their earnings and their years in the plan" (emphasis added), Nordstrom could only have intended to convey to its employees that their employment was secure, so long as they performed their jobs well.

Indeed, the pamphlet states, in the Profit Sharing Section (page 19):

> ". . . the more efficiently you work and the less time you waste, the greater the company's profits and the greater your share becomes. . ."

To allow dismissal without cause or good faith would render the Profit Sharing Plan an illusion and a nullity. See Cain v. Allen Electric & Equipment Co., 346 Mich. 568, 78 N.W. 2d 296 (1956); Psutka v. Michigan Alkali Co., 274 Mich. 318, 264 N.W. 385 (1936); Gaydos v. White Motor Corp., 54 Mich. App. 143, 220 N.W. 2d 697 (1974); Clarke v. Brunswick Corp., 48 Mich. App. 667, 211 N.W. 2d 101 (1973); Couch v. Administrative Committee of the Diffco Laboratories, Inc., Salaried Employees Profit Sharing Trust, 44, 205 N.W. 2d 24 (1972); and Haney v. Lamb, 312 A. 2d

330 (Del. 1973).

All of the foregoing is consistent with the theory of contracts expressed in Corbin on Contracts, One Volume Edition, §18.

"§18. Express and Implied Contracts.

> Contractual duty is imposed by reason of a promissory expression. As to this, there is no difference between an express contract and an implied contract; all contracts are express contracts. But there are different modes of expressing assent. Expression may be by the tongue, the eye, the hand, or by all of them at once. It may be by language, by words written or spoken. Yet there is also "sign language" which may consist of signs that are mere translations from a language of words, or of signs that convey ideas independently of any word language. A contract made by sign language is an express contract.
>
> The language used to express assent, whether of words or other other signs and symbols, may be one invented by the parties themselves for their own private communications, or indeed for one communication only. They may use code words instead of English words, their own code, or the Morse code or the Western Union telegraphic code. They may twist ordinary English words into code words, so that man signifies dog and tree signifies a thousand bushels of wheat. A contract made by a code communication is an express contract. Throwing up one's hat is usually an expression of joy; but it may be made to express assent to an agreement to sell land for ten thousand dollars.
>
> From the above, it appears also that all contracts are implied contracts; for the meaning to be given to any and all of these modes of expression is found by a process of implication and inference. There are implications in English words as well as in other signs and symbols; and what your words imply is also what your words express. Assent may be expressed by acts that have no antecedent agreed meaning, although no meaning can be attributed to them except in relation to the previous usage and conduct of men. The inference to be drawn from the acts is determined by what the actor and other men have used them to express.
>
> The distinction between an express and an implied contract, therefore, is of little importance, if it can be

said to exist at all. The matter that is of importance, is the degree of effectiveness of the expression used. Clarity of expression determines the reasonableness of understanding and eases the court's problems in case of dispute. The character of the evidence to be presented to the court depends upon the mode of expression used: and the more variant and obscure the mode, the more difficult the court's problem. No where is accomplished artistry worth more than in the drafting of an important contract. It may be an exaggeration to say that nowhere is it less often to be found. Where an expression of agreement is put into words that are frequently used with more than one meaning, it is difficult, and sometimes impossible to decide that an express contract exists. Likewise, when conduct other than words is such as persons frequently perform with different meanings, it is difficult, and sometime impossible, to decide that an implied contract exists.

It is now well understood that a contract may be unilateral; that is, that only one of the parties makes a promise, the consideration for which is some non-promissory performance rendered by the other or for which no consideration is necessary. In such cases, it is nearly always the promisor who makes an offer of his promise and requests action or forbearance in return. If such is the offer that has been made a promise that he will render the requested performance. Generally, therefore, the implication of a return promise is directly bound up with the interpretation of the terms of the offer. If the offeror has not asked for a promise, the normal result is that he doesn't get one; but if the offeror does ask for a promise and the conduct of the offeree makes him believe reasonably that the requested promise has been made, the court will generally find that it has been made, by implication if not expressly. This will be true, whether the plaintiff is trying to prove that the defendant made such an implied promise in order to maintain action for its enforcement, or whether the plaintiff is trying to show that he himself made such an implied promise in order to establish a consideration for the express promise of the defendant.

Parties who have made an express contract to be in effect for one year (or any other stated time) frequently proceed with performance after expiration of the year without making any new express agreement, of extension or otherwise. From such continued action a court may infer that the parties have agreed in fact to renew the one-year contract for another similar period. Illustrations can be found in leaseholds, employment transactions, and contract for a continuing supply of some commodity." (citation ommitted).

Applying the Corbin reasoning to the totality of facts and circumstances in the case at bar, it is clear that an employment contract existed between plaintiffs and Nordstrom, and, as a part of that contract, there existed a covenant that plaintiffs would be secure in their positions, and subject to discharge only for good cause, and in good faith. This covenant was grossly breached by Nordstrom.

Plaintiffs herewith incorporate the argument and cases cited in Point I, supra. Finally, the facts of the instant case, and the statements and acts of Nordstrom, amount to circumstances which any reasonable, objective person seeking employment, or one already employed, would construe as a promise of job security, and a promise that one would not be dismissed except for cause and in good faith.

Nordstrom must certainly have reasonably expected that its statements and acts would lead employees and potential employees to believe they were promised job security; indeed they must have intended such a construction, and further intended that such a construction (i.e. job security, no dismissal without case, in good faith) would induce employees to work for their corporation.

Under such circumstances as here, when injustice can only be avoided by the enforcement of the promise, the principles behind the doctrine of promissory estoppel mandate that the promise be enforced. See Restatements of Contracts, Second, §90.

POINT III

THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIM OF DEFAMATION AND THE SUPREME COURT SHOULD REVERSE AND REMAND THIS CASE FOR FURTHER TRIAL ON SUCH CLAIM.

The facts herein present for the court a straight-forward defamation case. Defendant, through its agents, made defamatory statements in the nature of accusations of criminal conduct that resulted in plaintiffs being injured. T. 1140, 133, 1337-38, 1358, 1360, 1367, 1372-77, 1392, 1399, 1403-1407. Defendants argued and the court in dismissing plaintiffs' claim adopted the defense of qualified privilege.

While such doctrine is recognized in Utah, Combs v. Montgomery Ward and Co., 288 P. 2d 272 (1951); Ogden Bus Lines v. KSL, Inc., 551 P. 2d 222 (1976); Lind v. Lynch, 665 P. 2d 1276 (1983), no cases exist which deal specifically with the facts presented by this case, that is the accusation of a crime involving drugs or narcotics.

Professor Prosser in Handbook on the Law of Torts, 4th Ed. 1971 succinctly discusses the law of qualified privilege. On page 785 he sets forth six (6) categories of interest protected by a qualified privilege.

> "1. Interest of Publisher. Roughly similar to the privileges of self-defense or the defense of property is the privilege which attaches to the publication of defamatory matter for the protection or advancement of the defendant's own legitimate interests. Thus, he may publish in an appropriate manner, anything which reasonably appears to be necessary to defend his own reputation against the defamation of another, including, of course, the allegation that his accuser is an unmitigated liar and the truth is not in him."
>
> "2. Interest of Others. The privilege to use force to protect the safety of another finds a general parallel in the privilege to publish defamation for the protection of the interests of persons other than the publisher . . . As in the case of the use of force, the defendant must have

reason to believe that the publication is necessary for the purpose, and that the other is unable to protect himself."

"3. Common Interest. A conditional privilege is recognized in many cases where the publisher and the recipient have a common interest, and the communication is of a kind reasonably calculated to protect or further it. . . . This is most obvious, of course, in the case of those who have entered upon or are considering business dealings with one another, or where the parties are members of a group with a common pecuniary interest, as where officers, agents or employees of a business organization communicate with stockholders, or with other employees or branch offices about the affairs of the organization itself, or taxpayers discuss the management of public funds, or an association of property owners the desirability of a prospective purchaser, or creditors the affairs of a common debtor. . . . The privilege has also been extended to the members of groups with a common interest of a non-pecuniary character, such as religious or professional societies, fraternal, social or educational organizations, families or labor unions, if the matter communicated is pertinent to the interest of the group. In all such cases, however, the privilege is lost, if the defamation goes beyond the group interest, or if the publication is made to persons who have no reason to receive the information."

"4. Communication to One Who May Act in the Public Interest. The interest of the general public as distinguished from that of any individual has given rise to two qualified privileges, which often has been confused. . . . The first sometimes called the 'public interest' privilege, involves communications made to those who may be expected to take official action of some kind for the protection of some interest of the public. It is on this basis that communications from one public officer to another in an effort to discharge official duty are held to be at least qualifiedly privileged. . . . But private citizens likewise are privileged to give information to proper authorities for the prevention or detection of crime, or to complain to them about the conduct of public officials and seek their removal from office."

"5. Fair Comment on Matters of Public Concern."

"6. Reports of Public Proceedings."

Professor Prosser after recognizing and describing the categories of Qualified Privilege points out that such conditional privilege may be lost to the publisher when he abuses the privilege.

"Abuse of Qualified Privilege. The condition attached to all such qualified privileges is that they must be exercised in a reasonable manner and for a proper purpose. The immunity is forfeited if the defendant steps outside of the scope of the privilege, or abuses the occasion. Thus qualified privilege does not extend, in any of the above cases, to the publication of irrelevant defamatory matter with no bearing upon the public or private interest which is entitled to protection; nor does it include publication to any person other than those whose hearing of it is reasonably believed to be necessary or useful for the futherance of that interest. ... Furthermore, the qualified privilege will be lost if the defendant publishes the defamation in the wrong state of mind. The word 'malice', which has plagued the law of defamation from the beginning, has been much used in this connection, and it frequently is said that the privilege is forfeited if the publication is 'malicious'. ... Perhaps the statement which best fits the decided cases is that the court will look to the primary motive or purpose by which the defendant apparently is inspired. Discarding 'malice' as a meaningless and quite unsatisfactory term, it appears that the privilege is lost if the publication is not made primarily for the purpose of furthering the interest which is entitled to protection." ... Finally, since there is not social advantage in the publication of a deliberate lie, the privilege is lost if the defendant does not believe what he says. Many courts have gone further, and have said that it is lost if the defamer does not have reasonable grounds, or 'probable cause' to believe it to be true. ... Probably the best statement of the rule is that the defendant is required to act as a reasonable man under the circumstances, with due regard to the strength of his belief, the grounds that he has to support it, and the importance of conveying the information."

With respect to burden of proof Professor Prosser says:

"Burden of Proof-Court and Jury. The burden is upon the defendant in the first instance to establish existence of a privileged occasion for the publication, by proof of a recognized public or private interest which would justify the utterance of the words.

> Whether the occasion was a privileged one, is a question to be determined by the court as an issue of law, unless of course the facts are in dispute, in which case the jury will be instructed as to the proper rules to apply. Once the existence of the privilege is established, the burden is upon the plaintiff to prove that it has been abused by excessive publication, by use of the occasion for an improper purpose, or by lack of belief or grounds for belief in the truth of what is said."

Two Utah cases cited previously as recognizing the doctrine of conditional privilege must each be viewed from their particular factual settings. Combs v. Montgomery Ward & Co., supra, involved an agent of defendant interviewing fellow employees about missing money and plaintiff's reputation for honesty. After the interviews and at the end of the day, plaintiff was terminated. He sued alleging defamation. At trial the court directed a verdict for the defendant on the grounds that: (1) the statements were privileged and (2) that there was no evidence of actual malice so as to remove the privilege. The Supreme Court affirmed the findings of conditional privilege citing the law of torts, Sec. 594, p. 242:

> "An occasion is conditionally privileged when the circumstances induce a correct or reasonable belief that:
>
> (a) facts exist which affect a sufficiently important interest of the publisher, and
>
> (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest."

The court further stated:

> "... any communication between employer and employee is protected by this privilege, provided it is made bona fide about something in which (1) the speaker or writer has an interest or duty; (2) the hearer or person addressed has a corresponding interest or

> duty; and provided (3) the statement is made in protection of that interest or in the performance of that duty. There must also be an honest belief in the truth of the statement."

The court went on to discuss the limited category of person with whom proper inquiry, under a conditional privilege might be made:

> "As indicated in the foregoing quotation, for the purpose of safeguarding against too widespread, careless or ill-advised inquiry under the protection of the cloak of conditional privilege, the law reuqires that there also be a proper interest on the part of the one to whom the inquiry is made. This subject is covered under the comments of (g) and (h) on clause (b) of the Rule 594 from the Restatement of Torts referred to above:
>
> (g) Under the rule stated ... it is further necessary that the publication be made to a person, who if the defamatory matter be true, may reasonably be expected to be of service in the protection of the interest.
>
> (h) . . . an owner of property may communicate his reasonable belief that it is in danger of theft or harm to his employee or a police officer since such persons have a legal duty to assist him in the protection of his property interests."

The court concluded from the facts shown that inquiry of the fellow employees was necessary to determine what had become of the money since each fellow employee had access to it. The court further concluded that the employees either had or should have had an interest in protecting employers property thus finding a commonality of interest which would sustain a conditional privilege. This case may be described by Professor Prosser as a case falling within category three, Common Interest.

Ogden Bus Lines v. KSL, Inc., supra dealt with an editorial wherein the defendant KSL reported that the plaintiff had been charged with driving on a revoked license.

The court adopted the conditional privilege rule as follows:

> "It is firmly established that matters of public interest and concern are legitimate subjects of fair comment and criticism, not only in newspapers and in radio and television broadcasts, but by members of the public generally, and such comments and criticisms are not actionable, however severe in their terms, unless they are made maliciously..."

This case falls within Professor Prossers category four.

Lind v. Lynch was a case where stockholders in a corporation mailed to other stockholders in the corporation copies of a complaint filed against the plaintiff in a federal court. The court in affirming summary judgment said:

> "It has long been held that communications between persons who share a common business interest are qualifiedly privileged and not libelous in the absence of malice."

This case falls within Professor Prosser's category three.

In looking at the facts presented by the case here before the court we must ask which of the categories of Qualified Privilege can this case be argued to fall within. It can only be argued to fall within category three, Common Interest. What common interest, if any, can there be said to exist between the defendants in this case and their employees so far as the statemen that plaintiffs are involved in drugs or narcotics is concerned? Obviously, there is no common interest. The only interest served by the publication of the statements was self interests of the defendants. A case almost identical on its facts to this case is Haddad v. Sears Roebuck and Co., 526 F. 2d 83 (6th Circuit 1976). In that case plaintiff was accused of gambling and allowing others to gamble on company property and of falsifying company records. After his firing, employees who had been supervised

by plaintiff asked for a meeting with the store manager. The manager told the employees that the plaintiff has been discharged for gambling and allowing gambling and for falsification of company records. The jury returned a verdict for $37,000 for plaintiff. On appeal it was asserted the trial court erred by not finding the statements to fall within a qualified privilege. The court in denying a qualified privilege cited two previous Michigan cases, Bostetter v. Kirsch Co., 319 Mich. 547, 30 N.W. 2d 276 (1948) and Sais v. General Motors, 372 Mich. 542, 127 N. W. 2d 357 (1964) as follows:

> "Qualified privilege exists in a much larger number of cases. It extends to all communications made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty. And the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation."
>
> "On the question of the publication of the statement we hold that in calling in fellow employees of plaintiff and 'explaining' the circumstances of his separation, defendant corporation was serving its own particular interest. That interest, as described by defendant's representatives was to restore morale in the plant protection force and to quiet rumors that were circulating among its members, adversely affecting the company."
>
> "The question of application of qualified privilege in a situation like this involving communications to fellow employees (particularly where the plaintiff has been a supervisor and his former subordinates have sought information about his discharge) is not an easy one."

It is submitted that the facts of Haddad v. Sears Roebuck & Co., supra, are on all fours with the facts before this court.

The allegations here are drugs, in that gambling. The communication in both cases was to employees of one in a supervisory capacity. No common interest exists such as the protection of company money as was seen in Combs v. Montgomery Ward & Co., supra. No common interest exists such as among stockholders as was seen in Lind v. Lynch, supra. The publication herein tended to serve only the particular interests of the defendants and none other.

As a result the Qualified Privilege cannot be said to exist. See Drennen v. Westinghouse Electric Corporation, 328 Southern 2d 52 (1976).

Even if a Qualified Privilege were found to have existed it must be deemed to have been lost because of abuse as previously discussed by Professor Prosser, see abuse of Qualified Privilege supra.

In Dillard Department Stores v. Felton, 634 S. W. 2d 135 (1982) a Dillard security guard observed a box of merchandise in Felton's car. Felton was called to the office of the supervisor and there he was accused of being a thief and a liar. Felton walked out of the meeting. He told a fellow employee that he had been accused of taking some things. When the supervisor came out of the office the fellow employee asked what had happened and the supervisor said Felton had been fired because he had been caught stealing. The jury awarded damages and the company appealed arguing that they had not exceeded the qualified privilege existing under the law. In discussing this issue the court cited the Restatement (Second)

of Torts §595 (1981)).

> "(1) An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonble belief that
>
> (a) there is information that affects a sufficiently important interest of the recipient or a third person and,
>
> (b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct.
>
> (2) In determining whether a publication is within the generally accepted standards of decent conduct it is an important factor that
>
> (a) The publication is made in response to a request rather than volunteered by the publisher or
>
> (b) a family or other relationship exists between the parties."

In affirming the award of the jury the court went on to say:

> "One important condition attaches to the qualified privilege, such communications must be exercised in a reasonable manner and for a proper purpose. The immunity does not protect a defendant from publication to persons other than those whose hearing is reasonably believed to be necessary or useful for the furtherance of that interest."

The court found that the communication to Felton by the supervisor in his office was protected as a qualified privilege but further found that the statement to fellow employees that Felton had been fired because he was caught stealing exceeded the privilege afforded by law.

> "Since we find no legitimate interest necessitating Martin's statement and find it to have been factually inaccurate at the expense of appellee's reputation, we think it excessive and therefore supportive of the award of compensatory damages."
>
> "The protection of the privilege may be lost by the manner of its exercise, although the belief

> in the truth of the charge exists. The privilege does not protect any unnecessary defamation. In order for a communication to be privileged, the party making it must be careful to go no farther than his interest or his duties require. Where the party exceeds his privilegeand the communication complained of goes beyond what the occasion demands that he should publish, and is unnecessarily defamatory of plaintiff, he will not be protected, and the fact that a duty, a common interest or a confidential relation existed to a limited degree is not a defense, even though he acted in good faith."

The findings of this case are applicable in the case before this court. There was no legitimate interest necessitating the statement of defendants that plaintiffs were terminated for involvement in drugs or narcotics. The defendants exceeded any privilege which may have existed and they published unnecessarily defamatory statements and by doing so lost that privilege. Had the defendants stated that plaintiffs were under investigation for drugs they would have been on safer ground but such is not the case and the privilege, if any, must be deemed waived.

Should the court by chance find that a qualified privilege exists there is sufficient evidence of actual malice to permit this case to be decided by the jury.

Two Utah cases have dealt with the malice that must be shown to overcome a conditional privilege. Ogden Bus Lines, supra at page 225 provides:

> "The malice which plaintiff must show in order to overcome a conditional privilege is simply an improper motive such as a desire to do harm or that the defendant did not honestly believe his statements to be true or that the publication was excessive."

> "The question of whether a qualifiedly privileged article is written or published with malicious motive or otherwise is generally speaking, a question of fact to be determined by the jury."

See also Seegmiller v. KSL, Inc., 626 P. 968 (1981) at page 975.

The United States Supreme Court has also spoken on the issue of what must be shown to overcome a qualified privilege and have stated that publications subject to a qualified privilege are actionable only upon a showing that they were made with knowledge that they were false or with reckless disregard of whether they were false or not. New York Times v. Sullivat, 376 U.S. 254 at p. 280, 84 S. Ct. 710 at p. 726, 11 L. Ed. 2d 686.

CONCLUSION

For the reasons stated above, this court should affirm the jury verdict in favor of the plaintiffs and against the defendant; the court should deny a remittitur and deny the granting of a new trial. The court should reverse and remand for trial that portion of the District Court's judgment partially dismissing plaintiffs' claim for breach of contract and should likewise reverse and remand for trial that portion of the District Court's judgment dismissing plaintiffs' claims for defamation.

DATED this 5th day of May, 1986.

/S/
D. GILBERT ATHAY
Lawyer for Respondents-Cross Appellants

CERTIFICATE OF SERVICE

I hereby certify that four copies of the foregoing Brief of Respondents was delivered to Mr. Stephen J. Hill, SNOW, CHRISTENSEN & MARTINEAU, attorneys for appellant, 10 Exchange Place, Eleventh Floor, Salt Lake City, Utah 84110 this 5 day of May, 1986.