

1989

Walter K. Gilmore v. Salt Lake Community Action Program; Hal J. Schultz, Robert E. Philbrick, Fred Geter, Richard Fields, Ann O'Connell, and John Does 1-30 : Petition for Writ of Certiorari

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Nann Novinski-Durando, Mark S. Miner; attorneys for appellant.

John K. Rice, Stephen W. Cook; Cook & Wilde; attorneys for respondents.

Recommended Citation

Petition for Certiorari, *Gilmore v. Community Action*, No. 890362.00 (Utah Supreme Court, 1989).
https://digitalcommons.law.byu.edu/byu_sc1/2685

This Petition for Certiorari is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

DOCUMENT

KFU

45.9

:S9

DOCKET NO:

BRIEF

890362

IN THE SUPREME COURT FOR THE STATE OF UTAH

WALTER K. GILMORE,

Plaintiff/Appellant,

vs.

SALT LAKE AREA COMMUNITY

ACTION PROGRAM,

HAL J. SCHULTZ,

ROBERT E. PHILBRICK,

FRED GETER,

RICHARD FIELDS,

ANN O'CONNELL,

JOHN DOES 1-30,

Defendants/Respondents.

Case No. 390362

PETITION FOR WRIT OF CERTIORARI

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

NANN NOVINSKI-DURANDO
4348 South Jupiter Drive
Salt Lake City, Utah 84124
Telephone: (801) 277-8853

MARK S. MINER
525 Newhouse Building
Salt Lake City, Utah 84111
Telephone: (801) 363-1449

Attorneys for Appellant

JOHN K. RICE, USB # 4397
STEPHEN W. COOK, USB #0720
COOK & WILDE, P.C.
6925 Union Park Center
Suite 490
Midvale, Utah 84047
Telephone: (801) 255-6000

Attorneys for Respondents

FILED
AUG 16 1989

Clerk, Supreme Court, Utah

IN THE SUPREME COURT FOR THE STATE OF UTAH

WALTER K. GILMORE,)	
)	
Plaintiff/Appellant,)	
)	
vs.)	
)	
SALT LAKE AREA COMMUNITY)	Case No.
ACTION PROGRAM,)	
HAL J. SCHULTZ,)	
ROBERT E. PHILBRICK,)	
FRED GETER,)	
RICHARD FIELDS,)	
ANN O'CONNELL,)	
JOHN DOES 1-30,)	
)	
Defendants/Respondents.)	

PETITION FOR WRIT OF CERTIORARI

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

NANN NOVINSKI-DURANDO
4348 South Jupiter Drive
Salt Lake City, Utah 84124
Telephone: (801) 277-8853

MARK S. MINER
525 Newhouse Building
Salt Lake City, Utah 84111
Telephone: (801) 363-1449

Attorneys for Appellant

JOHN K. RICE, USB # 4397
STEPHEN W. COOK, USB #0720
COOK & WILDE, P.C.
6925 Union Park Center
Suite 490
Midvale, Utah 84047
Telephone: (801) 255-6000

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
IDENTIFICATION OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED	iv
QUESTION PRESENTED FOR REVIEW	1
REFERENCE TO THE OFFICIAL REPORT OF THE OPINION ISSUED BY THE COURT OF APPEALS	2
CONCISE STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED	2
NATURE OF THE CASE, COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE LOWER COURTS	2
STATEMENT OF THE FACTS	4
ARGUMENT FOR THE ISSUANCE OF THE WRIT	5
ARGUMENT	6
THE <u>BERUBE</u> CASE SHOULD NOT APPLY RETROACTIVELY TO THIS CASE	6
RELIEF SOUGHT	12
CERTIFICATION	12
APPENDIX	13

TABLE OF AUTHORITIES

STATUTES

Title VI, R. Utah S. Ct.	1
Rule 34, R. Utah S. Ct.	5
Rule 43(4), R. Utah S. Ct.	5
Utah Code Ann. §78-2-2(3) & (5)(Supp. 1987)	2

CASES

<u>Adkins v. Sky Blue, Inc.,</u> 701 P.2d 549 (Wyo. 1985)	11
<u>Austin v. City of Bisbee, Arizona,</u> 855 F.2d 1429 (9th Cir. 1988)	11
<u>Berube v. Fashion Centre, Inc., Ltd.,</u> 104 Utah Adv. Rep. 4 (1989)	1, 5, 7, 8, 9, 11
<u>Bihlmaier v. Carson,</u> 603 P.2d 790, 792 (Utah 1979)	8
<u>Bimbo v. Burdette Tomlin Memorial Hospital,</u> 644 F.Supp. 1033 (D.N.J. 1986)	9, 10
<u>Bullock v. Deseret Dodge Truck Center, Inc.,</u> 11 Utah 2d 1, 5, 354 P.2d 559, 562 (1960)	8
<u>Cole v. Carteret Savings Bank,</u> 540 A2d 923 (N.J. Super. L. 1988)	10
<u>Crane Co. v. Dahle,</u> 576 p. 2d 870, 872-73 (Utah, 1979) 104 Utah Adv. Rep. Ct. 8.	8

<u>Garcia v. San Antonio Metropolitan Transit Authority,</u> 838 F.2d 1411 (5th Cir. 1988)	11
<u>Gilmore v. Salt Lake Area Community Action Program,</u> 110 Uth Adv. R. 51 (1959)	2, 3, 4
<u>Great Northern Railway v. Sunburst Oil & Refining, Co.,</u> 287 U. S. 358, 53 S. Ct. 145, 77 L.Ed. 360 (1932)	6, 7
<u>Grigoletti v. Ortho Pharmaceutical,</u> 545 A.2d 185 (N.J. Super. A.D. 1988)	10
<u>McFarland v. Skaggs Companies, Inc.,</u> 678 P.2d 298 (Utah 1984)	6
<u>Ramey v. Harber,</u> 589 F.2d 753 (4th Cir. 1978)	11
<u>State Farm Mutual Insurance Co.</u> <u>v. Farmers Insurance Exchange,</u> 27 Utah 2d 166, 493 P.2d 1002, 1003 (1972)	6
<u>Vigil v. Arzola,</u> 699 P.2d 613 (N.M. App. 1983)	10
<u>Woolley v. Hoffman-La Roche, Inc.,</u> 99 N.J. 284, 49 A.2d 1257 (1985)	9,10

IDENTIFICATION OF ALL PARTIES TO THE
PROCEEDING IN THE COURT WHOSE JUDGMENT
IS SOUGHT TO BE REVIEWED

I. APPELLANTS

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

II. RESPONDENTS

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

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

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

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

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

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

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

No other parties are identified as subject to this proceeding.

QUESTION PRESENTED FOR REVIEW

Pursuant to Title VI, R. Utah S. Ct., petitioners suggest that review of the decision of the Court of Appeals in this case is appropriate. The question for which review is sought is whether the case, Berube v. Fashion Centre, Inc. Ltd., 104 Utah Adv. R. 4 (1989), decided by the Utah Supreme Court after the Court of Appeals heard oral argument in this case but before its decision, should apply retroactively to this case.

The Court of Appeals reversed the lower court's summary judgment in petitioner's favor, remanding the case for trial consistent with the decision in Berube. In so doing, the Court of Appeals relied exclusively on the Berube decision. The Berube case was decided By the Utah Supreme Court after the Court of Appeals heard argument in this case but before its decision. Material to the Court of Appeals' decision is whether the Berube case should apply retroactively to this case. The Court of Appeals overlooked or did not consider this issue. It is the opinion of petitioners' counsel, based upon applicable law, that the Berube case should not apply retroactively to this case.

REFERENCE TO THE OFFICIAL REPORT OF THE OPINION
ISSUED BY THE COURT OF APPEALS.

The opinion of the Court of Appeals for which this
Petition for a Writ of Certiorari is brought is officially
reported and may be located according to the following
citation: Gilmore v. Salt Lake Area Community Action
Program, 110 Utah Adv. R. 51 (1989).

CONCISE STATEMENT OF GROUNDS ON WHICH
JURISDICTION IS INVOKED.

The date of entry of the decision of the Court of
Appeals sought to be reviewed is June 8, 1989. A petition
for rehearing was timely filed by the petitioners before
the Court of Appeals on June 21, 1989. The Court of
Appeals entered its Order Denying Petition for Rehearing
on July 17, 1989. The specific statutory provision
conferring jurisdiction on this Court to review the Court
of Appeals' decision is Utah Code Ann. §78-2-2(3) and
(5)(Supp. 1987).

NATURE OF THE CASE, COURSE OF THE
PROCEEDINGS AND DISPOSITION IN THE
LOWER COURTS

This case is a civil, non-domestic dispute arising
out of the termination of Gilmore's employment with the
Salt Lake Community Action Program. It was first
instituted on April 25, 1979, in the United States

District Court for the District of Utah, Central Division. Walter K. Gilmore v. Salt Lake Area Community Action Program, et al., #C-79-0258. On December 30, 1980, that Court granted Defendants' motion for summary judgment, dismissing that action on its merits with prejudice, on the grounds that there was no federal jurisdiction. Gilmore appealed to the United States Court of Appeals for the Tenth Circuit. In the decision, Gilmore v. Salt Lake Area Community Action Program, 710 F.2d 632 (1983), the Tenth Circuit affirmed the District Court judgment and entered the judgment on April 18, 1983. Gilmore petitioned for a rehearing which was denied on July 27, 1983. Id.

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

At the hearing on the summary judgment motions the parties stipulated that Gilmore's sixth, seventh, eighth

and ninth causes of action would be dismissed with prejudice. R. at 547-549. The Court then granted Respondents' motion as to all of the remaining causes of action, thereby dismissing Gilmore's Complaint in its entirety, with prejudice. R. at 545 & 547-549.

Gilmore appealed the summary judgment only as it pertained to his claim that the Program's written policy manual constituted an implied-in-fact contract that altered his status as an employee-at-will. The appeal was originally taken to the Utah Supreme Court where it was then poured over to the Utah Court of Appeals for disposition. On July 8, 1989, the Court of Appeals entered its decision reversing the lower court's summary judgment and remanding for further proceedings. Respondents filed a petition for rehearing which was denied on July 17, 1989.

STATEMENT OF THE FACTS

1. In September, 1974, the Salt Lake Community Action Program (Program), hired Walter K. Gilmore (Gilmore) as fiscal director. R. at 3 & 53; Gilmore Deposition at 10; 110 Utah Adv. R. at 51.

2. Gilmore's employment with the Program was not for any specified duration of time. R. at 117, 575 & 581.

3. Gilmore does not contest that he was hired as an employee-at-will. 110 Utah Adv. R. at 52.

4. On March 14, 1977, the Program's executive director notified Gilmore in writing that his employment was being terminated due to a "reduction in force". R. at 4 & 82. Gilmore was terminated the same day. Gilmore Deposition at Vol. II p. 9, 18, Ex. D-15 & D-17.

5. The Utah Supreme Court decision, Berube v. Fashion Centre, Inc. Ltd., 104 Utah Adv. R. 4(1989) was decided on March 20, 1989.

ARGUMENT FOR THE ISSUANCE OF THE WRIT

The Utah Supreme Court should review the Court of Appeals decision by Writ of Certiorari under Rule 43(4), R. Utah S. Ct. The Court of Appeals reversed the lower court's summary judgment based solely on this court's decision in Berube v. Fashion Centre, Inc., Ltd., 104 Utah Adv. Rep. 4 (1989), remanding the case for trial consistent therewith. The Berube case was decided after the Court of Appeals heard argument in this case but before its decision. The Court of Appeals overlooked or did not consider the question of whether the decision in Berube should apply retroactively to this case. This is

an important question of state law which has not been, but should be, settled by the Utah Supreme Court.

ARGUMENT

THE BERUBE CASE SHOULD NOT APPLY RETROACTIVELY TO THIS CASE.

In McFarland v. Skaggs Companies, Inc., 678 P.2d 298 (Utah 1984) the Utah Supreme Court set forth the general rule concerning the retroactive or prospective application of its decisions:

This Court has held that "[o]rdinarily an overruling decision has retroactive operation." We have also recognized, however, that under some circumstances "an overruling decision will operate in the future only." The leading case establishing such a doctrine is a United States Supreme Court decision entitled Great Northern Railway v. Sunburst Oil & Refining Co. The rule established in that case, known as the Sunburst Doctrine, has been summarized previously by this Court as follows:

The rule is based upon the proposition that where persons had entered into contracts and other business relationships based upon justifiable reliance on the prior decisions of courts, those persons would be substantially harmed if retroactive effect were given to overruling decisions. An additional factor was that retroactive operation might greatly burden the administration of justice. (Citing State Farm Mutual Insurance Co. v.

Farmers Insurance Exchange, 27 Utah¹
2d 166, 493 P.2d 1002, 1003 (1972)

For these same reasons, the Utah Supreme Court's decision in Berube should not apply retroactively to this case. In the Berube case, the Utah Supreme Court substantially and significantly changed the at-will employment doctrine. Justice Durham, in the majority opinion stated:

We now consider the general status of the at-will rule and whether it is appropriate for this court to extend or adopt further exceptions to the rule . . . Although in the past the presumption in favor of at-will employment has been difficult to overcome, rigid adherence to the at-will rule is no longer justified or advisable. 104 Utah Adv. R. at 9 & 10.

Justice Zimmerman in his concurring opinion further emphasized the modifying effect of the decision and its impact on employers. He stated:

Because the law in this area is in a state of flux, and because the at-will doctrine has become well entrenched in our law and any change in it has the potential to affect the practices of *almost every employer in Utah*, we must proceed with care in recognizing exceptions to that doctrine. . . . All that being said, we are reversing and remanding this matter for trial and

¹ The citation for Great Northern Railway v. Sunburst Oil & Refining, Co. is 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932).

are signaling a change in the
employment-at-will law of Utah. 104
Utah Adv. R. at 16.

The Utah Supreme Court noted that employers in the State of Utah have relied for many years on the employment at-will doctrine in hiring and firing employees. This State's previous rigid adherence to this doctrine is described in the Berube case. The Court noted: "This same general rule was utilized in a number of Utah cases. See Bullock v. Deseret Dodge Truck Center, Inc., 11 Utah 2d 1, 5, 354 P. 2d 559, 562 (1960); Crane Co. v. Dahle, 576 p. 2d 870, 872-73 (Utah, 1978) (citing no authority for the rule). Bihlmaier v. Carson, 603 P.2d 790, 792 (Utah 1979)." 104 Utah Adv. Rep. at 8. As noted by Justice Zimmerman, a change in this law by which employers have operated, "will affect the practices of almost every employer in Utah." 104 Utah Adv. R. at 16.

There is no dispute in this case that when the Program hired Gilmore he was hired as an employee-at-will. 110 Utah Adv. R. at 52. Of particular interest is the fact that Gilmore was hired 15 years and terminated 12 years before the decision in the Berube case. The program, in entering into this at-will relationship, had no reason to believe that twelve years later Gilmore's 30 months of employment would evolve into something more than what the parties intended or have admitted the

relationship to be. Based upon the employment at-will doctrine, adhered to by the courts of this State at the time, the program had no reason to believe or know that twelve years later it would face the possibility of paying Gilmore substantial damages, based on a theory of law which was not recognized as an exception to at-will employment until 1989. If this new law is applied retroactively, the program faces the possibility of judgment for Gilmore's back pay in a catastrophic amount. As a result, applying the Berube decision retroactively to this case is fundamentally unfair and unjust.

In other jurisdictions the courts have ruled that modifications to the employment at-will doctrine will operate prospectively only. For example, in the case Bimbo v. Burdette Tomlin Memorial Hospital, 644 F. Supp. 1033 (D.N.J. 1986), a nurse alleged, in one cause of action, that the hospital's personnel policies manual constituted an implied employment contract. During the pendency of the Bimbo case the New Jersey Supreme Court recognized, for the first time, an exception to the traditional employment-at-will doctrine based on a contract implied from a personnel policy manual. Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, 49 A.2d 1257 (1985). The Federal District Court in Bimbo held:

In so holding, the Woolley court, to the extent it went beyond ruling only that fundamental principles of basic fairness must be adhered to in employment relationships clearly broke new ground in New Jersey employment law. As such, the Woolley decision, in our opinion, should not be applied retroactively. To apply such a significant change in the law retroactively would be distinctly unfair to those effected thereby who had previously acted in reliance upon the prior state of the law. 644 F. Supp. at 1039.

The court went on to note that the facts giving rise to plaintiff's complaint arose more than three years before the New Jersey Supreme Court's decision in Woolley.²

In Vigil v. Arzola, 699 P.2d 613 (N.M. App. 1983), the New Mexico Court of Appeals also modified the employment at-will doctrine by recognizing for the first time an exception when a termination contravenes some clear mandate of public policy. The Court held:

Because this new cause of action imposes significant new duties, and because of reliance on the long standing terminable at-will rule, we hold that the new law should be given modified prospective application. Thus, we apply the law announced to

² In later cases, Cole v. Carteret Savings Bank, 540 A.2d 923 (N.J. Super. L. 1988) and Grigoletti v. Ortho Pharmaceutical, 545 A.2d 185 (N.J. Super. A.D. 1988), the New Jersey Superior Courts disagreed with the holding in the Bimbo case on the basis that there was no reliance on the prior state of the law.

the case before us, except as to punitive damages, and to prospective cases filed after the date this decision becomes final. 699 P.2d at 621-622.

See also: Garcia v. San Antonio Metropolitan Transit Authority, 838 F.2d 1411 (5th Cir. 1988); Austin v. City of Bisbee, Arizona, 855 F.2d 1429 (9th Cir. 1988); Ramey v. Harber, 589 F.2d 753 (4th Cir. 1978); Adkins v. Sky Blue, Inc. 701 P.2d 549 (Wyo. 1985).

The Utah Supreme Court clearly broke new ground in Utah employment law by its decision in Berube. Before Berube, the at-will employment doctrine was "well entrenched in our law." 104 Utah Adv. R. at 16. Now employers face significant new duties and liabilities in its relationships with employees. For several decades prior to Berube, the program and other employers acted in accordance with the state of the law at that time. It is distinctly unfair to now subject the program to potentially catastrophic liability based on a change in the law that occurred at least twelve years after the facts. This court therefor should rule that the Berube decision does not apply retroactively to this case.

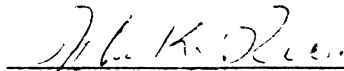
RELIEF SOUGHT

The Petitioners respectfully urge the Utah Supreme Court to grant the petition for a writ of certiorari and affirm the lower Court's summary judgment dismissing Gilmore's breach of Contract claims against all Respondents with prejudice, and an award of Respondents' costs pursuant to Rule 34, R. Utah S. Ct.


CERTIFICATION

John K. Rice and Stephen W. Cook certify that this petition for rehearing is presented in good faith and not for delay.

DATED this 16 day of August, 1989.



JOHN K. RICE
Attorney for Respondents



STEPHEN W. COOK
Attorney for Respondents

the court improperly found that the parties had about \$780 in their checking account and divided that amount between Anna and Vladimir. Anna testified that on the day she left Vladimir, she went to the bank and checked the balance in the account and the balance was about \$780. A bank statement was admitted into evidence which indicates end of day balances on April 8 of \$781.78, April 9 of \$677.09, and \$32.00 on April 10. Anna's testimony is somewhat unclear as to exactly which day she left, but nevertheless, we find it within the court's discretion to determine that each party was entitled to half of the amount in the account on the approximate date of their separation. We also find no error in the remainder of the court's order regarding the parties' assets and debts.

Affirmed in part and reversed and remanded in part. The parties shall bear their own costs of this appeal.

Pamela T. Greenwood, Judge

WE CONCUR:

Regnal W. Garff, Judge

Gregory K. Orme, Judge

Cite as
110 Utah Adv. Rep. 51

**IN THE
UTAH COURT OF APPEALS**

Walter K. GILMORE,
Plaintiff and Appellant,

v.

**SALT LAKE AREA COMMUNITY ACTION
PROGRAM, Hal J. Shultz, Robert E.
Philbrick, Fred Geter, Richard Fields, Ann
O'Connell, John Does 1-30,**
Defendants and Respondents.

**No. Case No. 870395-CA
FILED: June 8, 1989**

Third District, Salt Lake County
Honorable Homer F. Wilkinson

ATTORNEYS:

Nann Novinski-Durando and Mark S. Miner,
Salt Lake City, for Appellant

John K. Rice and Stephen W. Cook, Midvale,
for Respondents

Before Judges Bench, Billings, and
Greenwood.

OPINION

BENCH, Judge:

Plaintiff Walter K. Gilmore appeals from entry of summary judgment for defendants in

an action for wrongful termination of employment. Gilmore contends that his former employer's written policy manual constitutes an implied-in-fact contract that altered his status as an employee-at-will. Since the existence of an implied-in-fact contract is a question of fact, we conclude that summary judgment was inappropriately entered. We, therefore, reverse and remand.

Defendant Salt Lake Area Community Action Program (Program is a private, non-profit Utah corporation. Through federal funding, it administers various neighborhood programs such as "Head Start." Authority is delegated to the executive director, defendant Hal J. Shultz, through its controlling board of trustees (Board). This authority includes the power to hire and fire employees, subject to review by the Board's personnel committee.

In September 1974, the Program hired Gilmore as fiscal director. Gilmore does not recall any terms or conditions of employment, other than a six-month probationary period. Gilmore received a copy of the Program's "Personnel Policies Manual" (Manual) sometime after his probationary period had ended.

As the result of an audit for the fiscal year ending March 1976, a deficit of \$9,800 was discovered, and a decision was made to computerize Gilmore's department. Shultz later discovered additional accounting discrepancies that indicated the total deficit to be over \$46,000. Shultz then met with Gilmore and informed him that Gilmore's job could be in jeopardy unless the deficiencies in his accounting were corrected. At the end of the year, Shultz proposed to the Board that the fiscal staff be reduced, but that Gilmore remain as office manager. The Board rejected this proposal. An alternative proposal to reorganize Gilmore's department was implemented in March 1977, and an accounting supervisor was hired. Shultz assumed Gilmore's policy-making duties; the new accounting supervisor assumed Gilmore's remaining duties and received similar compensation.

On March 14, 1977, Shultz notified Gilmore in writing that his employment was being eliminated due to a "reduction in force." Gilmore appealed the decision in a letter to Shultz, who denied the appeal and referred Gilmore to the personnel committee. An immediate hearing was scheduled, and the committee took statements from Shultz and Gilmore. Neither Shultz nor Gilmore was present while the other gave his statement. Shultz also gave the committee an outline of his reasons for dismissing Gilmore. On April 14, defendant Fred Geter, chairman of the personnel committee, informed Gilmore by letter that the termination had been upheld. Further rehearings were denied.

Gilmore subsequently wrote to the Community Services Administration (CSA), the major federal grantor to the Program, alleging

that personnel policies and procedures contained in the Manual were not followed. Gilmore requested an investigation. CSA ultimately determined that the Program had violated its own procedures and CSA regulations as outlined in the Manual. The Program's funding was reduced by 10% for two years, but CSA apparently never enforced this sanction.

Gilmore filed a federal civil rights suit against the Program, its Board, and its employees in early 1979. The U.S. District Court for Utah granted summary judgment for defendants and dismissed the action for lack of federal jurisdiction. The Tenth Circuit Court of Appeals subsequently affirmed the judgment. See *Gilmore v. Salt Lake Area Community Action Program*, 710 F.2d 632 (10th Cir. 1983). Gilmore's petition for rehearing was denied.

Gilmore filed this action in 1984. The parties stipulated that depositions taken in the federal action be filed and published in the instant case. After cross-motions for summary judgment, the trial court granted defendants' motion. On appeal, the parties do not contest that Gilmore was hired as an employee-at-will. Gilmore argues, however, that the Manual constituted an implied-in-fact promise that altered his status as an at-will employee.

Summary judgment must be supported by evidence, admissions, and inferences establishing "that there is no issue of material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). After reviewing the facts in the light most favorable to the opposing party, we will reverse the trial court's determination if we conclude that there is a dispute as to a material issue of fact. *Creekview Apartments v. State Farm Ins. Co.*, 771 P.2d 693, 695 (Utah App. 1989). We conclude in this case that material issues of fact remain unresolved, and, therefore, summary judgment was erroneously granted.

Utah has followed the general common law rule that personal employment contracts are terminable at the will of either party "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." *Bruno v. Plateau Mining Co.*, 747 P.2d 1055, 1057 (Utah App. 1987) (quoting *Bihlmaier v. Carson*, 603 P.2d 790, 792 (Utah 1979)). Until recently, the existence of implied promises that would alter the at-will relationship required conduct manifesting the mutual assent of the parties to be bound by those terms. *Bruno*, 747 P.2d at 1058. The Utah Supreme Court has held, however, that rigid adherence to this rule is no longer justified. See *Berube v. Fashion Centre, Ltd.*, 104 Utah Adv. Rep. 4, 10 (1989) (employment-at-will creates a

rebuttable presumption that employment having no specified duration may be terminated without just cause). An employee can now rebut the presumption of at-will employment by affirmatively showing that the parties expressly or impliedly intended to alter the relationship. *Id.* Evidence of such an intention may be derived from employment manuals, oral agreements, the conduct of the parties, announced personnel policies, practices of a particular trade or industry, and other circumstances. *Id.* at 10-11. Whether there are sufficient indicia to rebut the presumption is a "question of fact." *Id.* at 11.

In this case, there are factual questions that remain unresolved. Although the Program hired Gilmore as an at-will employee, it later issued him a Manual that allegedly defined the conditions under which his employment could be terminated. The Manual evidently outlined appeal and discipline procedures to be followed by Gilmore and the Program. These policies and procedures may, depending on the facts, limit the Program's right to terminate Gilmore's employment. Because these factual issues are clearly material to the nature of Gilmore's employment contract, summary judgment was inappropriate.

In order to determine the nature of the employment contract, the court should consider the intent of the parties and the totality of the circumstances. *Rose v. Allied Dev. Co.*, 719 P.2d 83, 85 (Utah 1986). In the course of its analysis, the court may need to determine whether issuance of the Manual constituted an intentional surrender of the Program's right to discharge Gilmore at-will. See *Bruno*, 747 P.2d at 1058. It may also be necessary to determine whether there was an implied term in the Manual, and, if so, whether the term was expressly disavowed, or whether the Program substantially complied with the Manual. See *Berube*, 104 Utah Adv. Rep. at 14.

Summary judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

Russell W. Bench, Judge

WE CONCUR:

Judith M. Billings, Judge

Pamela T. Greenwood, Judge

IN THE UTAH COURT OF APPEALS

COPY TO CLIENT
7-25-89

Walter K. Gilmore,)
Plaintiff and Appellant,)
)
v.)
)
Salt Lake Area Community)
Action Program, Hal J. Schultz,)
Robert E. Philbrick, Fred Geter,)
Richard Fields, Ann O'Connell,)
John Does 1-30,)
Defendants and Respondents.

ORDER DENYING PETITION
FOR REHEARING

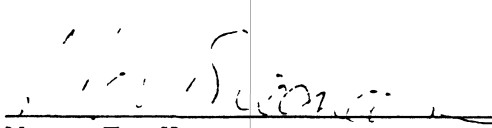
Case No. 870395-CA

This matter is before the Court upon a Petition for Rehearing filed by the respondent.

IT IS HEREBY ORDERED that the respondent's Petition for Rehearing is denied.

Dated this 17th day of July, 1989.

FOR THE COURT:



Mary T. Noonan
Clerk of the Court

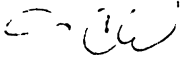
CERTIFICATE OF MAILING

I hereby certify that on the 17th day of July, 1989, a true and correct copy of the foregoing Order Denying Petition for Rehearing was mailed to each of the following:

Mark S. Miner
Attorney for Plaintiff/Appellant
525 Newhouse Building
Salt Lake City, Utah 84111

Nann Novinski-Durando
Attorney for Plaintiff/Appellant
4348 South Jupiter Drive
Salt Lake City, Utah 84124

John K. Rice
Stephen W. Cook
Attorneys for Defendants/Respondents
6925 Union Park Center #490
Midvale, Utah 84047



Julia C. Whitfield
Deputy Clerk

CERTIFICATE OF SERVICE

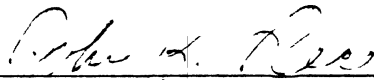
STATE OF UTAH)
 : ss.
County of Salt Lake)

JOHN K. RICE, being duly sworn, says:

That he served the attached PETITION FOR WRIT OF
CERTIORARI upon:

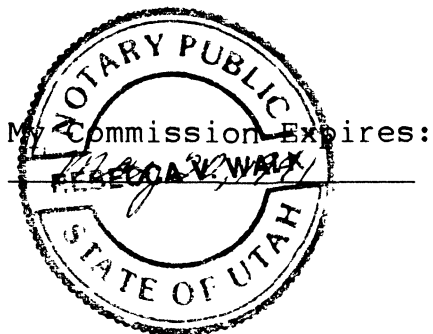
Nann Novinski-Durando
Mark S. Miner
4348 South Jupiter Drive
Salt Lake City, UT 84124

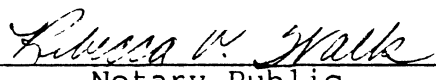
by placing a true and correct copy thereof in an envelope
and depositing the same, sealed, with first-class postage
prepaid thereon, in the United States Mail at Midvale,
Utah, on the 16th day of August, 1989.



John K. Rice

Subscribed and sworn to before me this 16th day of
August, 1989.





Notary Public
Residing at Salt Lake County