

1990

Ivan J. Heslop v. Bank of Utah : Brief of Appellee

Utah Supreme Court

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900537
CKET NO. _____

IN THE SUPREME COURT OF THE STATE OF UTAH

IVAN J. HESLOP,

Plaintiff, Appellee
and Cross-Appellant,

vs.

BANK OF UTAH, A Utah
banking corporation,

Defendant, Appellant
and Cross-Appellee.

Civil No. 900532

Priority No. 16

BRIEF OF APPELLEE IVAN J. HESLOP

Appeal from Judgment Entered in the
Second Judicial District Court of Weber County,
State of Utah, Honorable David E. Roth, Presiding

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JUN 21 1991

**CLERK SUPREME COURT,
UTAH**

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Plaintiff, Appellee)	
and Cross-Appellant,)	
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I.
JURISDICTION

The Utah Supreme Court has appellate jurisdiction of this cross-appeal pursuant to Utah Code Ann. 78-2-2 (3)(j).

II.
STATEMENT OF ISSUES PRESENTED FOR REVIEW,
STANDARD OF APPELLATE REVIEW AND
SUPPORTING AUTHORITY

A. Did the trial court err in refusing plaintiff's proposed Jury Instruction No. 18 regarding an award of consequential damages, including the attorney fees incurred by plaintiff in this case?

Standard of Review: The failure to give a requested jury instruction is reversible error if it tends to mislead the jury to the prejudice of the complaining party or insufficiently or erroneously advises the jury on the law. Matter of the Estate of Kesler, 702 P.2d 86 (Utah 1985); Jorgensen v. Issa, 739 P.2d 80 (Utah App. 1987); Biswell v. Duncan, 742 P.2d 80 (Utah App. 1987); Steele v. Breinholt, 747 P.2d 433 (Utah App. 1987); and Mikkelsen v. Haslam, 764 P.2d 1384 (Utah App. 1988).

Because an appeal challenging the refusal to give a jury instruction presents a question of law only, no particular deference is given to the trial court's rulings. Carpet Barn v. State, by and through DOT, 786 P.2d 770 (Utah App. 1990) and Ramon, by and through Ramon v. Farr, 770 P.2d 131 (Utah 1989).

B. Did the trial court err in granting defendant summary judgment on plaintiff's cause of action for breach of an implied-in-law covenant of good faith and fair dealing?

Standard of Review: Correctness of the trial court's ruling, and no particular deference should be given the court's conclusion. Henretty v. Manti City Corp., 791 P.2d 506 (Utah 1990), Scharf v. B.M.G. Corp., 700 P.2d 1068 (Utah 1985); Transamerica Cash Reserve v. Dixie Power, 789 P.2d 24 (Utah 1990); and Automotive Mfrs., etc. v. Serv. Auto Parts, Inc., 596 P.2d 1033 (Utah 1979).

C. Did the trial court err in granting defendant summary judgment on plaintiff's cause of action for violation of public policy sounding in tort?

Standard of Review: Same as stated in issue B above.

D. Did the trial court err in dismissing plaintiff's cause of action for violation of public policy sounding in contract?

Standard of Review: Same as stated in issues B and C above.

III.

STATUTES AND RULES WHOSE INTERPRETATION IS DETERMINATIVE

U.C.A. Section 7-1-318. The foregoing statute is set forth verbatim and attached hereto as Addendum A.

IV.

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN THE TRIAL COURT

This is a wrongful termination of employment case. Ivan J. Heslop's (hereinafter "Heslop") Complaint contained seven causes of action. (Record on Appeal, hereinafter "R.", 1-12) The trial court dismissed Heslop's cause of action for defamation by Order dated May 25, 1989. (R. 250-251) By Order and Judgment dated July 10, 1989, the court granted the Bank of Utah's (hereinafter "the Bank") Motion for Summary Judgment on Heslop's causes of action for promissory estoppel, breach of implied-in-law

covenant of good faith and fair dealing, and intentional infliction of emotional distress. The Order denied the Bank's Motion for Summary Judgment on Heslop's causes of action for breach of implied-in-fact contract and contractual wrongful discharge, including the claim of a public policy violation. The court reserved ruling on Heslop's cause of action for tortious wrongful discharge, including the claim of a public policy violation sounding in tort. The court also ruled that Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989) applied retroactively to the case. (R. 359-361) A copy of the Order and Judgment is attached hereto as Addendum B.

On May 22, 1990, the trial court granted the Bank's Motion for Summary Judgment on Heslop's cause of action for tortious wrongful discharge, including a public policy violation sounding in tort, dismissing all claims for tort damages and punitive damages. The court's decision was based on its interpretation of Lowe v. Sorensen Research Company, Inc., 779 P.2d 688 (Utah 1989). (R. 475-476) A copy of the Partial Summary Judgment is attached hereto as Addendum C.

Prior to trial, the Bank made a Motion in Limine to exclude evidence of the accrual problem and subsequent investigations of the Bank. The motion was based on Rules 401 and 403 of the Utah Rules of Evidence. By Order dated June 13, 1990, the trial court denied the Bank's motion. (R. 487-488) A copy of the Order is attached hereto as Addendum D.

The liability issues at the beginning of trial were, 1) whether Heslop was constructively discharged; 2) whether he had an implied-in-fact contract terminable only for good cause; 3) whether there was good cause to terminate; and 4) whether he had been terminated in violation of public policy (sounding in contract). At the end of Heslop's case in chief, the trial court granted the Bank's Motion to Dismiss Heslop's public policy claim. (Transcript on Appeal, hereinafter "Tr.", 1149-1151) At the conclusion of all evidence, the Bank moved for a directed verdict on the remaining issues

in the case. The trial court denied the Motion on the issue of good cause to terminate and took the remainder of the Motion under advisement pending the jury's verdict. (Tr. 1544-1561)

The jury returned a special verdict, finding that Heslop did not voluntarily resign, that he had an implied-in-fact contract terminable only for good cause, that the Bank did not have good cause to terminate him, and that he had incurred general damages in the amount of \$160,000.00. (R. 644-645)

Judgment on the Verdict was signed on August 27, 1990. (R. 648a-648b) A copy of the judgment is attached hereto as Addendum E. The court denied the Bank's Motion for J.N.O.V. or in the alternative, for a New Trial by Order dated October 16, 1990. (R. 1182-1184) A copy of the Order is attached hereto as Addendum F. Heslop's Notice of Cross-Appeal was filed November 23, 1990. (R. 1193-1194) A copy of the Notice of Cross-Appeal is attached hereto as Addendum G.

B. STATEMENT OF FACTS

1. Heslop's Employment Background and the Bank's Policy of Terminating Employment Only for Good Cause

Heslop was an employee of the Bank for over 25 years. (Exhibit, hereinafter "Ex.", 2P; Tr. 290) He was first employed at the Bank on March 20 or 21, 1955. (Ex. 1P, 2P; Tr. 112) He worked as a collector and then a loan officer in the installment loan department. (Tr. 115) On January 26, 1955, or nearly two months prior to his first hiring, Heslop completed an application for employment at the Bank which contained requests for personal information and an employment-at-will clause. (Tr. 114; Ex. 1P) The trial court ruled that this employment application did not rise to the dignity of an employment contract. (R. 1183) Heslop quit his first employment at the Bank in August or September 1959. (Tr. 290)

In August or September 1962, Heslop approached Frank Browning about re-employment with the Bank. (Tr. 116) Frank Browning was one of the founders of the Bank. (Tr. 292) He was also chairman of the Board of Directors and President of the Bank at that time. (Tr. 816) Frank Browning arranged for Heslop to meet with his son, Roderick Browning (hereinafter "Browning") and William Beutler (hereinafter "Beutler"), both officers of the Bank. (Tr. 116, 817) Beutler testified that Frank Browning said he wanted Heslop back in the Bank. There was no question in Beutler's mind that Heslop would be rehired. The only questions were the amount of his salary and the terms of his employment. (Tr. 817)

At the employment interview, Heslop was informed of the Bank's personnel policies: a seniority system, promotion from within the organization, and termination of employment only for good cause. (Tr. 118-120) The interviewers explained to Heslop that the Bank only terminated employment for good cause because it wanted to provide an incentive for employees to remain with the Bank and develop into experienced personnel. (Tr. 120)

Heslop also inquired of his interviewers if he could immediately begin participating in the Bank's profit sharing plan since he had four and a half years of prior service. He was later informed that the Bank considered him a new employee, therefore, he was required to successfully complete a 90-day probationary period before he could begin receiving benefits. (Tr. 117)

Heslop was not asked to sign an employment application upon rehire in 1962. (Tr. 119, 818) He was rehired for career employment. No one from the Bank told him that he was being hired for six months, a year, six years, ten years, or any fixed period of time. (Tr. 293) A copy of this page of the Transcript is attached hereto as Addendum H.

On cross-examination, Heslop testified that he understood he would have employment at the Bank until he retired, unless there was good cause to terminate. The

Bank's counsel then asked, "And at that time you intended to retire at what age, 65?"

Heslop responded, "That was the standard, the expected age of retirement then, yes."

(Tr. 296) A copy of this page of the Transcript is attached hereto as Addendum I.

Heslop never said that he had a fixed employment contract to the specific age of 65. Dr.

Cris Lewis, an expert witness, testified that the normal age of retirement used to be 65.

(Tr. 935)

Browning testified that he did not expressly tell Heslop he was employed until retirement and could be terminated only for good cause. He also testified that he did not hear Beutler say that to Heslop. (Tr. 1017) Browning's testimony was incongruous because he also said that he could not even remember the interview with Heslop in 1962. (Tr. 1099-1100) Beutler had no specific recollection of the meeting other than Heslop was rehired. (Tr. 818, 881)

Beutler did, however, remember the Bank's personnel policy. He testified that employees were required to satisfactorily complete a 90-day probationary period, after which they would only be terminated for good cause. (Tr. 818-819) He also testified that the Bank used a seniority system and new employees were told that the Bank's policy was to promote from within the organization whenever possible. (Tr. 819)

Beutler did not recall hearing Frank Browning or Browning ever expressly say that no one could be terminated from the Bank except for good cause. (Tr. 886) In fact, he could not recall any instance where he said, or anyone else said, that Bank employees could only be terminated for good cause. Beutler's testimony was clearly that he did not recall. When asked the question, "You are not saying that it never happened?" he responded, "I am not saying it never did happen. It could have easily happened." (Tr. 919)

Several other long-term Officers and Directors of the Bank testified at trial. Gerald West (hereinafter "West") was employed at the Bank from 1962 until 1984. (Tr.

503) He understood that the Bank's personnel policy was to terminate employment only for good cause, promote from within the organization, and give employees with the longest service the first chance at job opportunities as they became available. (Tr. 506-508, 572) West testified that he had no input into the creation of the employment application he signed. (Tr. 571) He also said that the personnel policy that existed at the Bank, and that was explained in a lot of discussions, was actually different than the at-will statement contained in the employment application. (Tr. 545, 572)

James Packer (hereinafter "Packer") was employed at the Bank from 1958 to 1986 (Tr. 586) He testified that the Bank's practice was to place a new employee in a position for a probationary period. If successfully completed, the employee was permanently placed in the position and could only be terminated if there were a legitimate underlying reason. (Tr. 620) He also said that based on what he was told, the Bank's actual policy regarding termination was different than the statement in his employment application. (Tr. 642)

Gerald Peacock (hereinafter "Peacock") was employed at the Bank from 1975 through 1983 (Tr. 644) He testified that the Bank's policy was to terminate only for good cause. He said the actual policy was "more lenient by far" than that contained in the employment application he signed. (Tr. 676, 698)

Boyd Carlson (hereinafter "Carlson") was employed at the Bank from 1960 through 1983. When asked to describe the Bank's personnel policy, he responded:

A . . . Colonel Frank Browning instilled in all of us a belief of looking out for each other as a family. And if we put in a lot of hard work, and a lot of extra hours, we would be rewarded in the end. I felt that it was a good place to work. As long as I did my job and I performed the duties that I was asked to do and assigned, that my employment would last.

Roy Nelson was one of the individuals who hired me, and he pointed out to me at the time that they had a real good profit sharing plan. And if I stayed there through retirement, I

could have a very nice balance in that account to retire on.
And all of this made a real nice package for me to look
forward to.

...

Q Did you discuss the fact that this would be career
employment at the bank?

A Yes. And it was presented as such . . .

(Tr. 702, 703)

Carlson testified that until the summer of 1983, the Bank's policy was to terminate employment only for good cause. (Tr. 704) Heslop was terminated without good cause in the summer of 1983. The Bank's personnel policy was periodically restated to Carlson throughout the course of his employment. Carlson said that the employment application was just a standard form. He filled in the blanks and signed it. There was no negotiation. (Tr. 752)

Edward Kleyn (hereinafter "Kleyn") was employed at the Bank from approximately 1973 to 1984 (Tr. 759) He testified that the Bank's policy was to terminate employment only for good cause. (Tr. 800)

Even the Bank's own witness, Ray Kennedy (hereinafter "Kennedy"), testified that the Bank's policy was to terminate employment only if there was some good reason. (Tr. 1364) Kennedy has been employed at the Bank for over 30 years. (Tr. 1354) He also said that the employment application was nothing more than an application for employment. (Tr. 1362)

In 1962, Heslop's interviewers never said that the employment application he signed in 1955 would be revived, reactivated, or construed as an employment contract. (Tr. 119)

Heslop was rehired as a loan officer in the installment and commercial loan departments. (Tr. 121; Ex. 2P) He was appointed an officer of the Bank in 1963 and

promoted to the position of Assistant Vice President. In 1966, he was promoted to Vice President. Heslop was appointed to the Officers' Executive Committee (hereinafter "OEC") in 1976. This promotion gave him much greater responsibility in the management of the Bank. In 1980, Heslop was promoted to Senior Vice President. He retained his duties as a member of the OEC, and in addition, was appointed manager of the Bank's Salt Lake division. (Tr. 121-122, 124)

2. Accrual Problems and Heslop's Fall From Favor

The four members of the OEC were Beutler, Packer, Kennedy, and Heslop. Beutler was the chairman. The OEC oversaw the general operation of the Bank.

Browning succeeded his father as President and Chairman of the Bank's Board of Directors. The OEC members met weekly as a committee with Browning. They made a report and recommendation to Browning on any matter of major consequence. The OEC also met each month with the Bank's Directors' Executive Committee (hereinafter "DEC"). The DEC consisted of four or five Directors involved in setting Bank policy and reviewing major decisions. (Tr. 124)

In 1980, there was a problem in the Bank's computer system which caused an over-accrual of the commercial loan account and an under-accrual of the time certificates of deposit (hereinafter "TCD") account. The Bank's income was overstated as a result of the problem. (Tr. 826, 838) In late 1980, Beutler became aware of the accrual problem. (Tr. 827) In about February 1981, Beutler informed the OEC members of the accrual problem. (Tr. 129-130, 829) Beutler informed Browning of the problem the same day or the same week that he told the OEC members. (Tr. 829)

Beutler told the OEC that the TCD accrual account was off by as much as \$200,000.00. (Tr. 130, 322) Heslop specifically asked if the accrual problem would be corrected before the next call report. Beutler said yes. (Tr. 131, 323) A call report is a statement of financial condition which the Bank was required by law to file with the State

Department of Financial Institutions. Filing a false call report is a third-degree felony.
(Ex. 72P)

The accrual problem next surfaced in a November 1981 OEC meeting. Heslop asked Beutler if the TCD accrual deficiency had been corrected. Beutler said it had not, and was probably one-half million dollars (\$500,000.00) to one million dollars (\$1,000,000.00). (Tr. 135) Heslop was very upset and complained that the Bank was misrepresenting its income and assets. He insisted that Browning be informed of the problem. Beutler disagreed, but finally consented to place the matter on the agenda for the next OEC report to Browning. (Tr. 135, 834) Beutler, however, intentionally failed to mention the accrual problem in the meeting. (Tr. 136, 834)

After the meeting, Heslop returned to his office in Salt Lake City, telephoned Browning, and reported the TCD accrual deficiency. (Tr. 136, 836) Heslop said he thought Beutler would be offended by his call, therefore, he would find another job if Browning wished. Browning responded that he would handle the problem without Beutler knowing of Heslop's call. (Tr. 136)

At the following OEC meeting, Beutler told Heslop he was aware of the call to Browning. The two then engaged in a heated discussion which culminated in Beutler threatening Heslop's job. (Tr. 137-138, 332-334) Heslop argued that the Bank should forego profit sharing and dividends to immediately resolve the accrual deficiency. (Tr. 138, 334)

In 1957, the Browning family owned less than 50% of the Bank's stock. That year there was a dispute among the owners of the Bank which was resolved when the Brownings secured a line of credit with another bank and purchased controlling interest in the Bank. Since then, the Brownings' policy has been to maintain absolute control of the Bank through ownership of at least 50% of the stock. Beutler testified that the debt service on the Brownings' credit line was paid from dividends that the Brownings

received on their large stockholdings at the Bank. Beutler understood that the Bank had to pay a dividend each year. (Tr. 824-826)

In 1981 the Bank was operating near the lowest acceptable level of its capital requirement. The Federal Reserve has guidelines on the amount of capital, or owners' equity, that a Bank should have in relation to its deposits and overall size. Since the Bank was operating at the low end of that ratio, any charge-off or other action that reduced Bank capital would require a recapitalization of the Bank to bring the ratio back in line with Federal Reserve requirements.

In early 1981, State and Federal regulators discovered a number of marginal loans on the Bank's books. The regulators were inclined to require a charge-off of these loans, however, through negotiation, the Bank was allowed to retain these loans on the books. The negotiations produced a Memorandum of Understanding Agreement dated February 27, 1981 between the Bank and its regulators. The Agreement required the Bank to furnish monthly reports to the regulators on the status of the marginal loans. (Tr. 822-824; Ex. 69D)

Prior to November 1981, Beutler informed Browning of the size of the accrual problem at least every month. Beutler never shielded Browning from the problem. (Tr. 898-901) Despite his assurances to Heslop and the members of the OEC, Beutler did nothing to resolve the accrual problem. (Tr. 899) When Heslop asked about the accrual problem in November 1981, Beutler had no intention of discussing it openly with Browning because he knew that Browning was already fully aware of the problem and did not want it disclosed. (Tr. 834)

After receiving Heslop's telephone call about the accrual problem, Browning asked Beutler to come to his office. Browning informed Beutler of Heslop's call and was annoyed that Heslop had "opened the lid" on the accrual problem. Browning said the problem would have to be brought to the attention of the DEC. (Tr. 836)

Heslop's recommendation for resolving the accrual problem, i.e., recognizing it as a loss and immediately charging it to undivided profits, would have required one million five hundred thousand (\$1,500,000.00) to two million dollars (\$2,000,000.00) of new capital investment by stockholders to reach an acceptable level of capital under Federal Reserve regulations. Browning knew that he would have to contribute approximately half that amount to maintain the Brownings' 50%, or greater, ownership interest in the Bank. (Tr. 839)

Heslop's method of resolving the accrual problem through a one-time charge was the only legitimate solution to the problem. (Tr. 840, 1253) Normal Bank procedure was to immediately correct a computational error once the problem was discovered. (Tr. 511) Beutler, however, argued that the accrual problem should be resolved through monthly installment charges against undivided profits over a period of months or even years. (Tr. 325, 1026) Beutler told the OEC that he had consulted with an accountant, Fred Reed, of Elmer Fox & Company, who had advised him that the accrual problem could be resolved over time. He failed to mention, however, that they had only discussed the tax ramification of his solution to the problem. (Tr. 336, 589, 845-846) The other members of the OEC, Packer and Kennedy, took the position that they would do whatever was best for the Browning family and, therefore, they supported Beutler's method of resolving the accrual problem over time. (Tr. 840) Heslop continued to argue in meetings and day-to-day discussions with Officers and Directors of the Bank that the accrual problem should be resolved by an immediate charge to undivided profits. (Tr. 842)

On December 3, 1981, the OEC met with Browning. The accrual problem was thoroughly discussed. (Tr. 335) Heslop expressed his view of how the accrual problem should be resolved. He stated that it would be wrong to file call reports before correcting the accrual accounts. (Tr. 144-145, 335) Beutler recommended to Browning

that the accrual problem be resolved over time. Beutler was assigned by Browning to review the topic the next day at the DEC meeting. (Tr. 144, 843; Ex. 65P)

The OEC members, including Heslop, attended the DEC meeting to answer questions, but had no vote. At the December 4, 1981 DEC meeting, Beutler reported to the Directors on the TCD accrual deficiency, but the significance of the problem was down-played. Beutler's report was the sixth of seven items on the agenda. (Tr. 844-845; Ex. 65P) Heslop was never asked to give his opinion on the accrual problem at the meeting. (Tr. 145-146, 470-471)

Four Directors knew of Heslop's concerns about the accuracy of the call report prior to the DEC meeting. (Tr. 348) Although Heslop's speech was limited by Bank protocol, he was able to suggest an outside audit. Bank attorney and DEC member, David Kunz (hereinafter "Kunz"), responded, "It was just a paper entry anyway, no money has been taken, we will have it cleared up before the Feds find out about it." (Tr. 146-147, 338, 470-471) Beutler told the Directors that the TCD accrual deficiency amounted to approximately \$700,000.00. (Tr. 833, 845) The DEC voted to implement Beutler's recommendation to resolve the TCD accrual problem over time. (Tr. 847) Beutler told Heslop not to mention the accrual problem at the meeting of the entire Board of Directors on December 8, 1981. (Tr. 474)

In early December 1981, Heslop began preparing personal notes about events relating to the accrual problem. (See Ex. 39P) Some of the Directors were hesitant to sign the call report for the quarter ending December 31, 1981. (Tr. 148)

Browning was contemptuous of Heslop for exposing the accrual problem. He was angry because the problem had to be disclosed to the other Directors. Browning told Packer that he was disappointed in Heslop for not supporting the method chosen by the DEC to resolve the accrual problem. (Tr. 597, 856-857) Kunz was also contemptuous of Heslop for exposing the accrual problem. He did not hide his dislike for Heslop and

stated his belief that Heslop should have been a team player like Beutler, Packer, and Kennedy. (Tr. 854, 856) Kunz expressed to Packer a lack of confidence in Heslop. He also expressed concern about the amount of responsibility that Heslop had as a Senior Vice President and member of the OEC. Kunz instructed Packer to monitor some of Heslop's activities. (Tr. 596)

Kunz had been legal counsel and a Director at the Bank since 1958. He was fully aware that the Browning family wanted to maintain at least 50% stock ownership interest in the Bank. (Tr. 1457, 1488, 857)

In March 1981, Beutler began making "wash entries" in the TCD accrual account when the quarterly call reports came due. The purpose of a wash entry was to hide the deficiency in the TCD accrual account from Bank regulators. (Tr. 831-832, 681)

Packer was aware of the wash entries and other Officers and Directors may have also known. Heslop, however, was not aware of the wash entries. (Tr. 832-833) A wash entry was made for the quarter ending December 31, 1981. (Tr. 847)

On July 9, 1982, Beutler sent a letter to the Federal and State Bank regulators informing them of the accrual problem and the method being used to resolve the problem. (Ex. 47D; Tr. 858-860, 911-912) On August 2, 1982, the Federal and State regulators began a regular examination of the Bank. (Tr. 149-150, 350) The examiners were aware of Beutler's letter and the existence of an accrual problem at the Bank. (Tr. 970-971) The examiners were not exclusively looking for wrongdoing by Beutler. (Tr. 976) They did, however, immediately investigate the accrual problem.

Beutler told the examiners that the regulators were not informed of the accrual problem on the call reports because the bank wanted to avoid being forced to inject more capital. Beutler also said that all Directors knew of the situation. (Ex. 73P)

On August 6, 1982, Elaine Weis, (hereinafter "Weis"), Commissioner of the Utah Department of Financial Institutions, called a special meeting of the Bank's Board of

Directors at her office in Salt Lake City. At the meeting, Weis issued an order suspending Beutler as Executive Vice President and Director pending a hearing, requiring an immediate outside audit of the Bank, requiring that a representative of the Commissioner be placed in residence at the Bank, requiring the Bank to file corrected call reports, precluding the transfer of certain Bank assets, and specifically finding that Beutler violated Utah Code Ann. § 7-1-318, relating to the filing of false call reports. (See Ex. 67P)

The following week, Kunz requested that Beutler meet him at his home. He advised Beutler that he had the right to a hearing, but said he wanted him to waive the hearing and resign. Beutler protested taking the fall for an action approved by Browning and the Board of Directors. Kunz persisted and Beutler inquired about termination pay. The Bank holding company, Tennessee Homestead, ultimately purchased Beutler's vacant condominium that had been on the market for about six months. Beutler rode with Kunz to Weis' office to discuss Beutler's standing at the Bank. Beutler later waived his right to a hearing, thereby causing his permanent suspension from the Bank. (Tr. 870-874)

After the Commissioner's order was issued, Ron Draughon (hereinafter "Draughon") was appointed as Weis' representative in residence at the Bank. In mid-August, Weis was curious if Browning and Kunz knew of the extent of the accrual problem before the examination. She considered Browning and Kunz the two most influential members of the Board of Directors. Weis asked Draughon to talk to them to determine if they knew more than she thought they did.

Draughon asked Browning and Kunz if they had previously known that there was such a large accrual problem. Browning said he was really surprised and did not realize that the Bank had such a big problem. Kunz did not respond in a surprised manner. He said he did not realize the extent of the problem. (Tr. 977-979, 993-994)

Heslop testified that Draughon asked him if other Officers and Directors knew of the accrual problem prior to the examination. Heslop explained that the OEC, DEC, the auditor, Browning, and Kunz all knew of the accrual problem. Draughon returned a short time later and said they claimed they did not know anything about it. (Tr. 177-178)

Draughon stayed in residence at the Bank until about September 2, 1982. After Beutler's suspension, the remaining members of the OEC continued to oversee the day-to-day operation of the Bank. Upon leaving, Draughon wrote a letter to Browning commending Bank management. (See Ex. 75P)

3. Attorney General's Investigation

In September 1983, the Utah Attorney General's office (hereinafter "Attorney General") began an investigation of the Bank to determine if there was any criminal wrongdoing. (Tr. 153-154) Heslop received a telephone call on or about September 13, 1982, and was asked to meet with the Attorney General. (Tr. 153-154) The meeting was held shortly after the call. (Tr. 354) Heslop agreed to meet with the Attorney General to show his willingness to cooperate with the investigation. He did not want to be implicated with the Officers and Directors who recommended that the accrual problem be resolved over time. Conversely, Heslop was concerned about his future employment and the appearance that he was instigating an investigation of his employer and fellow employees. He, therefore, requested that the Attorney General subpoena his testimony and documentary evidence and that he have counsel present during the questioning. (Tr. 154-156, 357, 477-478) The Attorney General said he understood and respected Heslop's position and subpoenas would be served if necessary. (Tr. 155-156)

That evening, Kunz called Heslop at home and angrily inquired if he had met with the Attorney General earlier that day. When Heslop replied that he had, Kunz said, "Why the hell did you do that? If you had come to see us, we would have never let you talk to them." Heslop explained that he gave no information and requested legal counsel

and a subpoena. Kunz said the Bank did not want the investigation made public, and by issuing subpoenas, the matter would become public knowledge. He said the Bank was trying to avoid having the investigation go to that point. (Tr. 157-158, 479) On September 23, 1982, the Attorney General called Heslop and said authorization had been given to serve Heslop, Packer, and Kennedy with subpoenas. (Tr. 158)

The Bank retained Robert Moore (hereinafter "Moore") and Wayne Black (hereinafter "Black") to represent it in the Attorney General's investigation. Heslop met with Moore at his law office on October 12, 1982. Moore interrogated him about his prior meeting with the Attorney General. Heslop requested his own attorney because he thought Moore had a conflict of interest. Moore said he did not see the need for him to have separate counsel. Moore lied to Heslop by saying that his personal notes would be privileged, and not subject to subpoena, if he turned them over to Black and Moore. Moore wanted to hide the notes from the Attorney General. At the conclusion of the meeting, Moore suggested that Heslop contact Paul Kunz (hereinafter "P. Kunz"). (Tr. 159-166, 477; Ex. 39P)

David Kunz and Paul Kunz ("Kunz" and "P. Kunz") are brothers. Both represented the Bank. (Tr. 720) Kunz had a long conversation with Moore after the meeting with Heslop. (Ex. 92P) On October 14, 1982, Heslop and P. Kunz met with Black in his law office. Black said he was representing all Bank Officers. Heslop said his personal notes indicated that the DEC had full knowledge of the accrual problem. Black also lied to Heslop by saying that if the notes were given to him, they would become privileged, and not subject to subpoena. Black and P. Kunz eventually persuaded Heslop to surrender his personal notes. (Tr. 166-169; Ex. 39P) A copy of pertinent pages from Heslop's notes is attached hereto as Addendum J.

Kunz obtained possession of Heslop's personal notes and told Browning about them. He said Heslop's notes were derogatory toward Bank management. (Tr. 1060)

The Bank's attorneys devised a strategy to use Thomas Timmons (hereinafter "Timmons"), who was supervising a supposedly independent audit of the Bank, to assuage the Attorney General's investigation. (Tr. 160-162, 1327; Ex. 92P) A copy of Kunz' October 1982 billing statement is attached hereto as Addendum K.

Timmons told the Attorney General that the Bank was managed by people who were naive and who did not know what they were doing. Consequently, according to Timmons, there was no intentional filing of false call reports. (Tr. 182, 1326)

On November 15, 1982, Heslop accompanied Black to a meeting with the Attorney General. Black argued for an end to the investigation. Heslop said he did not think any of the Directors signed the call reports with intent to defraud the Bank. He stated that the Attorney General or the court should answer the question of whether the Directors knowingly signed false call reports. (Tr. 170-171) Later, Heslop called the Attorney General and inquired about the status of the investigation. He was told that it may have concluded and that no subpoenas would be issued. Heslop expressed concern about his future employment at the Bank. (Tr. 175-176)

4. Peat, Marwick & Mitchell Audit and the Hiring of Thomas Timmons

Weis' Order of August 6, 1982 required the Bank to retain an independent accounting firm, designated by the Commissioner, to perform a complete audit of the Bank's records. (Ex. 67P) Weis designated the accounting firm of Peat, Marwick & Mitchell (hereinafter "PMM") to perform the audit. Timmons supervised the audit for PMM. (Tr. 151-152, 360) Weis contacted PMM in August 1982 and requested a complete audit of the Bank's records for the years 1980, 1981, and through July 31, 1982. Timmons told the Bank's Board of Directors that PMM would conduct the audit for approximately \$84,000.00. (Tr. 152) Browning considered \$84,000.00 a reasonable estimate for the PMM audit because it included the cost of reconstructing the books to July 31, 1982. (Tr. 1111)

After beginning work on the audit, PMM discovered that it could not complete all the work requested by Weis. Instead, PMM limited its work to a balance sheet audit. The services not provided by PMM had been given an estimated cost of \$25,000.00. (Tr. 1232, 1309-1310; Ex. 80P)

Timmons promoted a profitability study of the Bank by PMM. The estimated cost was \$80,000.00. Certain Bank Officers, including Heslop, opposed the profitability study because the cost was excessive and the information could be derived in-house. The Board of Directors approved the study over the objection of senior management. (Tr. 180-181, 606-609) PMM also audited the Bank for the remaining five months of 1982. (Tr. 1232) The Bank actually paid PMM the total sum of \$445,930.68. (Ex. 82P)

The PMM audit work had not been completed by the end of October 1982. The audit report was completed and delivered to the Bank in early December 1982. (Tr. 1238-1239) The PMM audit recommended that the Bank resolve the accrual deficiency by a one-time charge to undivided profits. (Tr. 1253-1254) This was the same solution that Heslop initially proposed in November 1981.

After making the one-time charge, the Bank did not meet the Federal Reserve capital requirements so Browning and other stockholders input more capital. (Tr. 665-666)

In November or early December 1982, while PMM people were still at the Bank, Heslop observed that the OEC was being bypassed, and its recommendations for the day-to-day management of the Bank were ignored. (Tr. 282-283)

The Bank hired Timmons as President on December 17, 1982. His official starting day was January 17, 1983. The Bank paid Timmons a signing bonus of \$60,000.00 and a starting annual salary of \$150,000.00 with an annual increase of 10% over the five-year term of the contract. He also received generous benefits and an

annual bonus based on net profits which amounted to \$50,000.00 his first year. (Ex. 83P; Tr. 1306)

In contrast, Browning's annual salary as President was \$75,000.00 and Beutler's annual salary as Executive Vice President and Chief Operating Officer was \$54,000.00. (Tr. 1127, 904)

Timmons had approximately 14 months of actual banking experience as a Vice President of a small bank in Pekin, Illinois. He had approximately nine and a half years experience working as a Certified Public Accountant for PMM. (Tr. 1222-1229)

5. Heslop's Demotion to Agricultural Loan Specialist and the Bank's Policy of Not Making Agricultural Loans

When Timmons assumed the position of President, significant changes occurred at the Bank. There was a reorganization of personnel, a layoff of employees, and approximately eight branches were sold. (Tr. 636-637) At the same time, the Bank constructed a lavish office in Salt Lake City for Timmons. (Tr. 617)

The OEC was abolished. (Tr. 637, 1056) Packer was removed from his position as manager of the Northern Division Commercial Loan Department and placed in charge of marketing and business development. Kennedy was replaced as manager of the Real Estate Loan Department. (Tr. 638)

Heslop was demoted to the position of Agricultural Loan Specialist. His supervisory and managerial responsibilities were removed and he was placed at the lowest level for a loan officer. (Tr. 125-126, 505; Ex. 5P) He retained his same salary and title as Senior Vice President. (Tr. 2369-370) Browning testified that a Senior Vice President would generally have supervision over other employees. As Agricultural Loan Specialist, Heslop had no supervision over other loan officers. Also, his benefits at the Bank were substantially reduced. (Tr. 1179, 190-191)

In April 1983, there was an across-the-board increase in lending limits for loan officers at the Bank. The increase in lending authority was not a promotion for Heslop and benefited only the Bank. (Tr. 469-470; Ex. 50D) As the Bank's Agricultural Loan Specialist, Heslop assisted his direct supervisor, Kleyn, in servicing many of the Bank's agricultural loans. (Tr. 373)

Heslop was informed of his demotion to Agricultural Loan Specialist by Timmons on or about January 14, 1983. He objected to the demotion and said he would like to speak to Browning about the matter. Timmons replied that it would not do any good because the decision had already been made. (Tr. 194; Ex. 39P)

On January 15, 1983, Heslop met with Browning, who was still officially President of the Bank, and objected to the demotion. He asked if Browning wanted him to resign. Browning said he thought Heslop should stay with the Bank, which Heslop did. (Tr. 194-196; Ex. 39P) Browning did not ask Heslop to resign because he wanted to avoid the turnover in key personnel at a critical time for the Bank. (Tr. 998-999, 1311-1312) Heslop continued to work as a commercial loan officer and Agricultural Loan Specialist from January 1983 until October 1983.

West was appointed supervisor over all commercial lending in the reorganization. (Tr. 503, 547; Ex. 5P) During a meeting in mid-January 1983, Timmons asked West if he thought he would have any problem working with Heslop. He said if West thought there would be a problem, Heslop would be eliminated. (Tr. 503-504)

After Heslop was demoted to Agricultural Loan Specialist, Timmons verbally instituted a policy that the Bank would no longer make any agricultural loans. (Tr. 126, 191) The verbal policy was later slightly modified and incorporated into the Bank's written loan policy which became effective in April 1983. (Ex. 17P)

The written loan policy granted individual lending officers full authority to pool their lending limits and approve a loan to the extent of their aggregate limit. In such

instances, consultation with the senior Officers, other Officers or the Loan Committee was encouraged. (Ex. 17P)

Loan Policy No. 13 listed types of desirable and undesirable loans. Undesirable loans would ordinarily be declined unless specifically approved by the Loan Committee. Undesirable loans included loans to establish a new business enterprise, if repayment of the loan was dependent solely upon the profitable future operation of the enterprise, in the absence of supporting additional collateral or financially-substantial guarantors; and loans whose repayment was dependent solely upon the marketing of a growing crop or livestock, in the absence of supporting additional collateral or financially-substantial guarantors. (Ex. 17P)

6. Heslop's Constructive Discharge

In July 1983, Beutler sued the Bank for wrongful discharge and in August subpoenaed Heslop's personal notes. Heslop complied with the subpoena and the Bank's attorneys obtained a copy of his notes. Heslop went to lunch one afternoon and passed Timmons in the parking lot. Timmons rudely snubbed Heslop. Heslop learned later that afternoon that Timmons had gone to the attorneys' office earlier that day to read his notes. (Tr. 200-210, 467; Ex. 6P)

In early August 1983, Heslop was approached by Larry Richins (hereinafter "Richins"), a certified public accountant, about a \$260,000.00 loan to Clayton Gabbert, M.D. (hereinafter "Gabbert") The purpose of the loan was to create a tax shelter for Gabbert through the purchase of 310 head of cattle which would then be leased to Richins' Dairy in Newton, Utah. Richins planned to hire an experienced herdsman and expert dairy consultants to select the cattle and operate the dairy. Gabbert would then use the lease payments to make his loan payments to the Bank. (Tr. 203-204, 226) The lease payments would come from dairy income. The cattle would secure the loan from the Bank. (Tr. 227, 237, 751) At that time, dairy cows were worth approximately

\$1,000.00 per head. The Bank loan would be used to purchase 260 cows and Gabbert would contribute \$50,000.00 for an additional 50 cows which would constitute additional security for the Bank loan since all 310 head would be secured. (Tr. 213, 220, 447-448, 460)

On August 5, 1983, Heslop presented the Gabbert loan to the Loan Committee for approval. (Ex. 7P) In support of the loan, Heslop submitted Gabbert's personal financial statement showing a net worth of \$520,000.00, Richin's personal financial statement showing a net worth of \$380,507.00, Gabbert's 1981 and 1982 income tax returns showing an annual gross income in excess of \$100,000.00, and a proforma on the Newton Dairy. (Ex. 8P, 9P, 10P, 11P) The proforma showed a reduced herd size for the months of September and October 1983 indicating that the cows would be carefully selected and purchased over a period of two to three months. (Ex. 11P; Tr. 1541) Gabbert's financial statement included a second home valued at approximately \$90,000.00 with an estimated \$38,000.00 mortgage. (Ex. 8P) The home is located at 217 East 3100 South on Bountiful's East bench. The home is of all brick construction and sits on a large corner lot. (Ex. 12P)

The Loan Committee approved the loan subject to the condition that Gabbert either show a \$50,000.00 investment in dairy cows or give the Bank a second mortgage on his Bountiful home. (Tr. 213, 218) Gabbert agreed to pledge the Bountiful property as additional security. (Tr. 214)

West was chairman of the loan committee. (Tr. 214, 532) He testified that Heslop's loan documentation was typical for the type of loan being made. (Tr. 535) When Heslop informed West that the additional collateral met the Loan Committee's condition, West instructed Heslop to commit on the loan. Heslop asked if he should wait for the Bank's in-house appraisal on the Bountiful property, and West said no. Heslop also asked if the loan should be presented to the Loan Committee again, and West said

it would not be necessary because Gabbert met the committee's condition. (Tr. 214, 218, 463, 524-525, 1536)

Browning testified at his deposition in 1988 that he and Timmons knew, in 1983, that the Gabbert loan had Loan Committee approval. At trial, Browning did not recall whether he knew, in 1983, that the loan had Loan Committee approval. (Tr. 1199-1200) Peacock and Kleyn understood, in 1983, that the Gabbert loan had Loan Committee approval. (Tr. 669-670, 764-765)

Heslop committed the Bank to make the Gabbert loan. (Tr. 214) Once committed, the Bank was legally obligated to make the loan. (Tr. 576) Only West initialled the loan approval report. (Tr. 555; Ex. 7P)

In August 1983, the Bank was still in a transition period due to the reorganization. The Loan Committee was a new entity and members did not always initial every loan that was approved. Kleyn traveled to Europe in August 1983 for a three-week period and was not available to initial the loan approval report. (Tr. 575, 576, 761, 764, 796)

The Gabbert loan did not even need Loan Committee approval. The Bank's written loan policy allowed officers to aggregate their lending authority. West's lending limit on a secured loan was \$250,000.00, and Heslop's was \$50,000.00, for an aggregate lending limit of \$300,000.00. (Tr. 219, 526, 575, 794; Ex. 17P)

On August 19, 1983, after Heslop had committed on the Gabbert loan, the Bank's appraiser, Ben Quinn, appraised the value of the Bountiful property at \$45,000.00. The mortgage was approximately \$33,000.00. Quinn had been instructed to make very conservative appraisals on real estate offered as security on Bank loans. He did not give a fair market value appraisal on the Bountiful property. (Ex. 7P, 12P; Tr. 215, 464, 577, 733)

At trial, the Bank's counsel suggested that the Loan Committee would only accept the Bountiful property as additional security if it had equity of \$50,000.00. (Tr. 557)

Bank counsel also suggested that Gabbert had to place his \$50,000.00 investment into an escrow account. (Tr. 434) Actually, neither of these conditions were placed on Heslop by the Loan Committee. (Ex. 7P; Tr. 433, 1289-1290, 1533-1534) Heslop was authorized to disburse the loan to Gabbert. The closing occurred on August 22, 1983. (Tr. 437-439; Ex. 7P)

The second week in September 1983, Carlson, the Bank's Loan Review Officer, prepared a loan review and comment report on the Gabbert loan. The purpose of the loan review was to point out weaknesses so the loan could be strengthened. (Tr. 702, 711, 713; Ex. 15P, 54D) The comment report was located on the reverse side of the loan review and consisted of a list of questions about the Gabbert loan. Carlson requested that Heslop promptly return the answers. (Tr. 714; Ex. 55D, 15P) He wanted the answers returned, along with additional documentation that Heslop may have possessed, so he could arrive at a credit rating on the loan. (Tr. 740) Carlson testified that sometimes it was appropriate to prepare loan documentation after the loan had been disbursed. (Tr. 755) Carlson never saw the loan review and comment report ("review") after giving it to his supervisor for delivery to Heslop. (Tr. 715, 741)

Heslop received the review, answered the questions, and placed the document in inter-office mail for delivery back to Carlson. (Tr. 222-231) West later returned the review to Heslop after receiving it from Timmons. West said Timmons did not like some of Heslop's answers and wanted them changed. (Tr. 223) Heslop changed his answers and provided additional information to try to please Timmons. (Tr. 225)

Two hundred ninety head of cattle had been purchased by the time Carlson performed his loan review. Heslop responded to Carlson's questions with the understanding that the dairy herd would be completed in two or three months. (Tr. 1541; Ex. 11P)

Heslop's authority to administer the Gabbert loan was removed sometime between September 14 and September 29, 1983. (Tr. 221, 460-461, 768) A few months later the Bank renegotiated and recollateralized the loan. (Tr. 461-462, 769-770)

On September 29, 1983, Heslop received a copy of a memorandum from Timmons to West which specifically removed all of Heslop's lending authority. The memorandum also generally limited loans at the Bank to \$100,000.00 unless approved by Browning, Timmons or the Directors' Loan Committee. Heslop felt devastated by the memorandum. (Tr. 232-233; Ex. 16P)

Timmons' memorandum falsely accused Heslop of violating the letter and spirit of the Bank's written loan policy in making the Gabbert loan. (Ex. 16P) The Gabbert loan did not violate Loan Policy No. 13. The loan was conditionally approved by the Loan Committee, and the condition was met. Repayment of the loan was not dependent solely upon the profitable future operation of the dairy. The cattle purchased with the loan and with Gabbert's investment were security for repayment of the loan. Gabbert's Bountiful home provided additional collateral, he also had a substantial income and other valuable assets. Repayment of the loan was not dependent solely upon the marketing of a growing crop or livestock. The loan could be repaid from milk proceeds, sale of cattle, or both. No other provision of Loan Policy No. 13 applied to the Gabbert loan. (Tr. 234-238; Ex. 17P)

No one told Heslop in 1983 which policy the Gabbert loan violated. No one mentioned Loan Policy No. 13. Carlson's review questioned the loan's consistency with Loan Policy No. 7. The Gabbert loan was made to a medical doctor for a tax shelter. Gabbert's personal financial statements contained at least as much information as the Bank's preprinted personal statement forms. The Bank did not enforce the requirement of advance review of supporting legal documentation by Bank counsel, especially when preprinted forms approved by the Bank's attorneys were used. The Gabbert loan did not

violate Loan Policy No. 7. The remaining loan policies contained in the policy manual did not apply to the Gabbert loan. (Tr. 238-241, 531, 719-720; Ex. 15P)

After receiving the September 29 memorandum, West had a heated discussion with Timmons. He argued that the Gabbert loan did not violate loan policy and explained that he and the Loan Committee had approved the loan. West stated the specific reasons for approving the loan. In response, Timmons said the loan violated Bank policy, but did not identify the policy other than to say it was an agricultural loan. (Tr. 529-531)

After reading Timmons' memorandum, Heslop requested three days vacation from his supervisor, Kleyn, to contemplate his response to the memorandum. Heslop said, "It looks like they're trying to force me out and if the Board of Directors doesn't protect me, I will probably have to quit." Heslop also said he had not resigned. When Kleyn saw the memorandum, he was very sympathetic with Heslop and allowed the vacation leave. (Tr. 242, 249)

The revocation of all lending authority was particularly severe for Heslop because he had a lot of clients requesting small loans who would wait for him in the lobby. If the client qualified, Heslop would immediately make the loan. (Tr. 796-797, 573) Heslop was never told that the September 29 memorandum was anything but a permanent revocation of his lending authority. (Ex. 16P; Tr. 1288, 1536)

Heslop resolved to petition the Board of Directors for a hearing to rebut the false accusation that he violated loan policy. He sent a certified letter, dated October 3, 1983, to Browning and a copy by regular mail to each member of the Board of Directors. The letter conveyed his belief that he was being forced from the Bank and specifically requested a hearing. (Tr. 245-249; Ex. 20P)

On October 4, 1983, Heslop received a telephone call at home from Kleyn. He said Timmons wanted Heslop to submit his resignation in writing. Heslop replied that he

had not resigned and inquired about his request for a hearing before the Board of Directors. Kleyn said the request had been denied. Heslop asked whether the Board of Directors or Timmons made that decision. Kleyn did not know.

The next day, Heslop returned to the Bank and met with Kleyn. He wrote his letter of resignation and delivered it to Kleyn. The letter began, "At your request, I am submitting in writing my notice of resignation from the Bank of Utah . . ." (Tr. 249-251; Ex. 21P) Heslop was unaware that Timmons did not have authority from the Board of Directors to fire a Board-appointed Senior Vice President. (Tr. 1515-1519; Ex. 83P, 77D, 78D)

Kleyn and Timmons testified that they did not ask for Heslop's resignation. (Tr. 775, 788-789, 1286) Yet, Kleyn could not recall other facts relating to Heslop's resignation due to the amount of time that had elapsed. (Tr. 776-777) Timmons testified that the events which occurred after he delivered his 9/29/83 memorandum were a little cloudy in his memory. (Tr. 1285)

After Heslop returned home he received another call from Kleyn. He said the Board of Directors had consented to a hearing at 9:00 a.m. the following morning.

On October 6, 1983, Heslop spoke before the full Board of Directors. (Tr. 252-260; Ex. 22P) Some of the Directors were not aware that Heslop's resignation had been requested, and that he had been initially denied a hearing. (Tr. 258, 1352, 1454) Heslop requested a response to the issues raised in his 10/3/83 letter to the Directors. He said he was available for continued employment as long as the assignment was reasonable. (Tr. 257-258)

After Heslop spoke, the Directors asked no questions and made no comments. Heslop later received a letter from the personnel manager dated October 6, 1983 which stated that Heslop resigned and the Board of Directors accepted the resignation. Heslop later confronted the personnel manager about these inaccurate statements in the letter.

Heslop's separation notice and final paycheck were dated October 5, 1983. (Tr. 258-266; Ex. 23P, 24P, 25P)

The position of Agricultural Loan Specialist was never filled after Heslop's constructive discharge. He was the first and the last Agricultural Loan Specialist at the Bank. (Tr. 1211-1212)

At trial, Dr. Lewis, an economist, testified that Heslop's damages from the constructive discharge totalled \$256,024.00. (Tr. 939) There was also testimony that Heslop's damages may have been slightly less (Tr. 949) or slightly more (Tr. 954-956) than that figure.

7. Termination of Employment Without Good Cause

Heslop was never given advance notice that his lending authority could be revoked if he made a bad loan. (Tr. 267) Other Officers at the Bank made bad loans. (Tr. 820, 1193-1195) For example, Packer made a loan of approximately \$150,000.00 to The Ski Company at about the same time that the Gabbert loan was made. The loan went into default, and eventually bankruptcy, but Packer was not disciplined. (Tr. 618-619) In fact, other than Heslop, no lending officer at the Bank ever had his lending authority revoked because he made a bad loan, or even a loan that violated Bank policy. (Tr. 532-533, 617, 671, 798, 875-876, 1208)

Heslop had good rapport with his fellow employees and clientele. (Tr. 821-822, 759) He was a good loan officer with a good loan/loss record. (Tr. 534, 821, 266-267; Ex. 26P)

8. A Pattern of Wrongful Termination

After Heslop's constructive discharge, other long-term Officers of the Bank were forced to resign, or terminated without good cause. In November 1983, West was demoted from Senior Vice President in charge of the credit division to Vice President and commercial loan officer. West's supervisor, Brad Beale (hereinafter "Beale"), who

was brought to the Bank from Illinois by Timmons, called him into his office about every other week and inquired if he was looking for other employment. West was encouraged to leave the Bank. After the demotion, Timmons ignored West's suggestions and ideas regarding management of the Bank. West resigned in January 1984. (Tr. 540-541; Ex. 5P)

Peacock was manager of the Bank's audit department. In September or October 1983, Peacock was complimented on his good work by the Directors' Audit Committee. Later, Peacock delivered an annual review to Timmons that gave the audit department employees high ratings. Timmons told Peacock that the employees could not be performing that well and ordered him to reduce the ratings. Peacock complied but still indicated that the employees were performing well. On about November 30, 1983, Timmons called Peacock into his office. He said Peacock was not doing a good job as auditor. Timmons told Peacock he was being reassigned as a clerk in the accounting department under the supervision of an employee that Peacock trained. Peacock refused to accept the demotion and left the Bank the following day. (Tr. 676-679)

One day in late October 1983, Carlson went to work at the Bank as usual. Beale called Carlson into the board room and told him that his services were no longer needed. He ordered Carlson to remove his personal belongings from the premises and never return or he would be arrested. Beale then escorted Carlson from the Bank. Carlson had done nothing wrong and received no prior warning of his impending discharge. (Tr. 722-723)

9. Rulings by the Trial Court

Heslop testified at trial about the amount of his attorney fees in this case. He said he is obligated to pay forty percent (40%) of the amount received. (Tr. 280) Heslop's proposed Jury Instruction No. 18 instructed the jurors on both general and consequential damages, including attorney fees as an item of consequential damages. In

support of his request for consequential damages, Heslop's attorney cited to the trial court the cases of: Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989); Canyon Country Store v. Bracey, 781 P.2d 414 (Utah 1989); and Beck v. Farmers Insurance Exchange, 701 P.2d 795 (Utah 1985). The trial court denied Heslop's request. The court's Jury Instruction No. 23 instructed the jurors that they could only award general damages in this case. (Tr. 1562-1566) The transcript of the court's ruling is attached hereto as Addendum L.

The trial court dismissed Heslop's cause of action for violation of public policy primarily because Berube uses very restrictive language in defining the public policy exception to the employment-at-will doctrine. (Tr. 1148-1151) After the ruling, Heslop's counsel asked the court to make a statement to the jury that the public policy exception was no longer an issue in the case. The court reviewed its proposed statement with counsel in chambers before delivering it to the jury. The statement informed the jurors that dismissal of the public policy issue did not affect the remaining issues in the case. The Bank's counsel approved the content of the statement in its entirety and without correction. Counsel did not ask the court to inform the jury that evidence relating to the accrual problem was not relevant to the constructive discharge and implied-in-fact contract issues. (Tr. 1262-1266) Likewise, counsel did not request a jury instruction or do anything else to support the argument they now make that the court should have given such an instruction. (Tr. 1566-1570)

The trial court acknowledged that the total sum of payments to PMM looked curious and strange. (Tr. 1122, 1129) The court requested an explanation from the Bank's counsel for the large amount paid to PMM. (Tr. 1126-1129) Counsel failed to provide documentary evidence in support of, or a reasonable explanation for, the large sum. Furthermore, the Bank's counsel did not object to the testimony regarding the

payments to PMM. Only when Heslop's counsel offered the checks into evidence was an objection made.

The trial court appropriately restricted the arguments that Heslop's counsel could make relating to the payments to PMM and Timmons' hiring and salary. (Tr. 1164-1165)

Heslop's counsel's misstatement of Draughon's testimony during closing argument related to a minor issue in the case. The trial court instructed the jury that argument by counsel is not evidence (R. 605, 608) and that the verdict had to be based upon the evidence. (R. 611-612) Heslop's counsel prefaced his closing argument about Draughon's testimony with the statement, ". . . Mr. Draughon's testimony, as I recall it" (Tr. 1655)

The main theme of Heslop's counsel's closing argument was that Heslop believed his conduct, in opposing the method chosen to resolve the accrual problem, was proper, honest, and in the Bank's best interest. He suffered for this belief. Heslop's counsel did not argue, or infer, that all other Officers and Directors of the Bank were criminals. (Tr. 63-64, 1607-1609, 1655, 1657-1658, 1661)

V.

SUMMARY OF ARGUMENTS

A. The trial court properly denied the bank's motion for judgment notwithstanding the verdict.

1. The jury verdict was supported by sufficient evidence that Heslop was constructively discharged. Heslop had a history of promotion and favorable treatment at the Bank until November 1981. He fell from favor because he opposed the Bank's method of resolving the accrual problem. Heslop carried additional disfavor because he voluntarily met with the Attorney General in September 1982. His personal notes were deceptively taken by Bank counsel who were trying to end the Attorney General's investigation. The Bank enlisted the aid of Timmons, a supposedly independent

auditor, to end the investigation. Timmons was then hired as Bank President. Heslop opposed Timmons' hiring. In January 1983, Timmons demoted Heslop to Agricultural Loan Specialist and then instituted a policy that the Bank would make no agricultural loans. In September 1983, Heslop was falsely accused of violating loan policy and his lending authority was revoked. In October 1983, Timmons requested Heslop's written resignation. Heslop unsuccessfully petitioned the Board of Directors for relief.

The evidence presented by Heslop at trial on the constructive discharge issue was sufficient to meet the legal standard set forth in Jury Instruction Nos. 15 and 16. Arguably, the legal standard that actually applies in Utah is less stringent.

Cases cited by the Bank in support of its argument that Heslop was not constructively discharged are distinguishable from this case.

2. The jury verdict was supported by sufficient evidence that Heslop had an implied-in-fact contract with the Bank terminable only for good cause. The employment application signed by new employees at the Bank did not rise to the dignity of an employment contract. Even if Heslop's application form were construed as an express, integrated employment contract, that agreement terminated when Heslop quit in 1959. A majority of the witnesses at trial testified that the Bank's policy was to terminate employment only for just cause. The jury considered this evidence more persuasive than the Bank's evidence of an at-will employment policy.

3. The jury verdict was supported by sufficient evidence that the Bank terminated Heslop's employment without good cause. Heslop was a good loan officer with a good loan/loss record. The Gabbert loan was not good cause to terminate his employment.

Any negative criticism of Bank management by Heslop was exclusively contained within his personal notes. His notes were kept confidential until the Bank deceptively obtained them during the Attorney General's investigation.

4. The Bank failed to meet its affirmative obligation to marshal all the evidence supporting the jury verdict and then show the evidence cannot support the verdict. The Bank's Brief does nothing more than reargue the same points raised at trial.

B. The trial court properly denied the Bank's motion for a new trial.

1. The evidence at trial regarding the accrual account problem, investigations of the Bank, hiring of Timmons, payments to PMM, wash entries, and terminations of other employees was relevant to Heslop's case and the danger of unfair prejudice did not substantially outweigh its probative value. These events occurred within two years of Heslop's wrongful discharge from the Bank.

The accrual problem caused a change in Heslop's relationship with his employer. The wash entries, investigations, and PMM audit were relevant to show the correctness of Heslop's opposition to the Bank's method of resolving the accrual problem. During the Attorney General's investigation, Heslop's superiors were angry because he voluntarily met with the Attorney General. Timmons' hiring corresponded with a decline in Heslop's responsibility at the Bank. Timmons' remuneration and the payments to PMM related to the Bank's claim of financial difficulty. The wrongful terminations of other employees supported the argument that Heslop was constructively discharged.

2. After the trial court dismissed Heslop's public policy claim, the accrual problem was still relevant to the issues of good cause and constructive discharge. Facts relating to an implied-in-fact contract terminable only for just cause were remote in time and unrelated to the accrual problem.

3. Browning's failure to request Heslop's resignation in January 1983 did not preclude any causal connection between prior events and Heslop's wrongful termination in October 1983. The accrual problem was still relevant to show the abrupt

change in Heslop's relationship with his employer. Moreover, Browning may have just waited for a more opportune time.

4. The misstatement of Draughon's testimony by Heslop's counsel during closing argument was harmless error. The misstatement caused no significant difference in the outcome of the trial. The Bank's counsel failed to object to the misstatement.

C. The general rule is that a court's decision states the true nature of the law, both retrospectively and prospectively. The Berube opinion contained no statement that it applied prospectively only. The Bank has not shown that it justifiably relied on the employment-at-will doctrine in terminating Heslop's employment.

D. Heslop was promised employment at the Bank until he retired, unless there was good cause to terminate. He did not have a contract of employment to age 65, or for any other specific period of time. Since Heslop's employment contract could have been terminated within one year, it did not fall within the Statute of Frauds.

E. The trial court was aware of the Beck and Berube cases but refused to instruct the jury on consequential damages, including attorney fees. The court should have allowed such an instruction.

F. This court has recently regressed from its long-held position that all contracts contain an implied-in-law covenant of good faith and fair dealing. The Brehany v. Nordstrom decision should be vacated and this court should recognize an implied-in-law covenant of good faith and fair dealing in at-will employment contracts.

G. A large majority of the jurisdictions in the United States recognize the public policy exception to the employment-at-will doctrine. Very few of these jurisdictions have held that the public policy exception sounds in contract.

The purpose of the public policy exception is to prevent employers from discharging employees for cause "morally wrong". Contract damages may not deter employers from committing this most egregious form of wrongful discharge.

H. The Bank's decision to resolve the accrual problem over time placed Heslop in jeopardy of being charged with a third-degree felony. His opposition to the Bank's decision set in motion the events that ultimately caused his wrongful discharge. The public policy exception identified in Berube should extend to employees, like Heslop, who are wrongfully terminated for encouraging their employers to comply with the law.

VI.

ARGUMENT

A. THE TRIAL COURT PROPERLY DENIED THE BANK'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

"A J.N.O.V. can be granted only when the losing party is entitled to a judgment as a matter of law." Hansen v. Stewart, 761 P.2d 14, 17 (Utah 1988). On appeal, this court applies the following standard of review to the trial court's denial of the Bank's Motion for J.N.O.V.: "[W]e reverse only if, viewing the evidence in the light most favorable to the party who prevailed, we conclude that the evidence is insufficient to support the verdict." Id. See also Gustaveson v. Gregg, 655 P.2d 693, 695 (Utah 1982); Winters v. W.S. Hatch Co., Inc., 546 P.2d 603, 605 (Utah 1976). "The burden on an appellant to establish that the evidence does not support the jury's verdict and the factual findings implicit in that verdict under such a circumstance is quite heavy." Cambelt Intern. Corp. v. Dalton, 745 P.2d 1239, 1242 (Utah 1987).

In Mel Hardman Prod. Inc. v. Robinson, 604 P.2d 913 (Utah 1979), this court stated:

As we have numerous times indicated, the right of trial by jury is one which should be carefully safeguarded by the courts, and when a party had demanded such a trial, he is entitled to have the benefit of the jury's

findings on issues of fact; and it is not the trial court's prerogative to disregard or nullify them by making findings of his own. Therefore, in ruling on motions which take issues of fact from the jury (this includes both motions for directed verdict and for judgment notwithstanding the verdict), the trial court is obligated to look at the evidence and all reasonable inferences that fairly may be drawn therefrom in the light favorable to the party moved against; and the granting of such a motion is justified only if, in so viewing the evidence, there is no substantial basis therein which would support a verdict in his favor. On appeal, in considering the trial court's granting of such motions, we look at the evidence in the same manner.

604 P.2d at 917. Point I of the Bank's Argument must fail because there was sufficient evidence introduced at trial to support the jury's verdict.

Point I A. of the Bank's Argument is essentially an assertion that the trial court abused its discretion by allowing the jury to consider irrelevant and prejudicial evidence that prevented a fair trial. The assertions in Point I A. lend no support to the argument that there was insufficient evidence to support the jury's verdict. These arguments are more appropriately made exclusively within Point II B. Accordingly, Heslop's reply to Point II B. will also respond to the assertions contained in Point I A.

1. The Jury Verdict was Supported by Sufficient Evidence that Heslop was Constructively Discharged

From his rehire in 1962 to November 1981, Heslop had an uninterrupted history of promotion and favorable treatment at the Bank. That all changed, however, when he took a strong stand in opposition to the Bank's method of resolving the accrual problem. Beutler threatened Heslop's job. (Tr. 137-138, 332-334) Browning and Kunz, the two most influential members of the Board of Directors, were contemptuous of Heslop for exposing the accrual problem. (Tr. 856-857) The evidence plainly indicates that by December 1981, Heslop had fallen from favor and his career had begun moving in reverse.

In September 1982, Kunz was angry at Heslop because he voluntarily met with the Attorney General. (Tr. 157-158, 479) Heslop's notes, which contained his personal

criticism of the Bank, were deceptively taken by Bank counsel in October 1982. (Ex. 39P) In January 1983, Heslop was demoted to the position of Agricultural Loan Specialist and soon afterward the Bank instituted a verbal policy against making agricultural loans. (Tr. 125-126, 191)

In September 1983, Heslop was falsely accused of violating loan policy and his lending authority was revoked. (Ex. 16P) In October 1983, Timmons requested Heslop's written resignation. (Tr. 249-251; Ex. 21P)

The foregoing facts are sufficient to support the jury verdict on constructive discharge, and meet the legal standards set forth in Instructions 15 and 16. Even if the jurors believed that Heslop was not asked to submit his written resignation, there was still sufficient evidence to support the jury's verdict on constructive discharge. The jurors could have reasonably concluded that the Bank was trying to force Heslop to resign. Even if that was not the Bank's intent, however, it could still be found liable for constructive discharge. "[A]n employer may merely have intended to make life unpleasant for his employee, yet be found liable for constructive discharge, if the reasonably foreseeable impact of the employer's conduct was to cause the employee to quit." Colman v. Wayne State University, 664 F. Supp. 1082, 1092 (E.D. Mich. 1987).

The revocation of all lending authority was particularly humiliating for Heslop because of the types of loans that he made and the long-standing relationships that he had with his clients. (Tr. 796-797, 573) Heslop was a loan officer. The total revocation of his lending authority would be analogous to telling a judge that he or she could not make a decision but could perform all other judicial functions.

In Zilmer v. Carnation Co., 263 Cal. Rptr. 422 (Cal. App.2d Dist. 1989), Zilmer was discharged after 31 years of employment during which he rose from the position of office management trainee to division controller of the largest division in the company. One year before the discharge, supervisors Pate and Adams reorganized the accounting

department. They informed Zilmer that he had to obtain a certified management accountant certificate as a precondition to further employment with the company. Zilmer said he did not believe he could obtain the certificate due to added responsibilities and work requirements. The supervisors informed him that no exceptions would be made to this requirement.

After Zilmer's discharge, defendant hired non-certificated employees and relieved existing employees of the obligation. Zilmer's complaint alleged that the supervisors' representations were false and intended to create intolerable working conditions, thus forcing Zilmer's resignation. The scheme was part of a plan to replace high-level managerial personnel with associates and friends of Adams from Price Waterhouse, where he was formerly employed. The court held that Zilmer stated a claim for constructive discharge.

Several long-term employees of the Bank were wrongfully discharged by Timmons soon after Heslop left. The jurors could have reasonably concluded that Timmons was trying to force the resignations of long-term managerial personnel at the Bank for his own benefit. Without the support of influential directors like Browning and Kunz, Heslop had no chance of survival at the Bank.

In Real v. Cont'l Group, Inc., 627 F. Supp. 434 (N.D. Cal. 1986), the plaintiff began work for Continental in 1950. He received numerous promotions and pay increases until he reached the position of manager of industrial engineering for Continental's Pacific Division, a Grade E-15 position. In 1981 Real was demoted five grades to the position of supervisor of industrial engineering as a result of a reorganization at Continental. His salary and benefits, however, did not change. Real was denied the position of manager of industrial engineering for the newly-created Western Division.

In 1982 the company reorganized again and Real's position as supervisor of industrial engineering was eliminated. He was offered a Grade E-11 position at another plant, but without relocation benefits. Real declined the offer. Real was denied the position of supervisor of quality control at the nearby San Jose plant, but was eventually offered the Grade E-6 position of plant buyer at that location. Real would have retained his previous salary and benefits. However, rather than accept a nine-grade demotion, he left Continental. At trial, the jury found that Continental constructively discharged Real. Continental's Motion for J.N.O.V. argued that the evidence was insufficient to support the jury verdict of constructive discharge. In denying Continental's Motion the court said, "[T]here was a sufficient basis for the jury to find that a reasonable person in Mr. Real's position would have felt compelled to resign when he did." 627 F. Supp. at 443 The court added:

Mr. Real's career at Continental was moving in reverse with no apparent hope of any advancement at the time he left the company in February 1982. . . . Continental makes much of the fact that despite the plaintiff's demotion and job offers graded substantially below the job he held prior to June 1981, Mr. Real suffered no reduction in his salary or benefits. This fact alone is not enough to defeat the jury's finding of constructive discharge. [citation omitted]

Id. The Bank's argument that Heslop was not demoted because he retained his same salary is not persuasive. Heslop's career was certainly moving in reverse with no apparent hope of advancement.

Although the evidence of constructive discharge in this case met the legal standards contained in Instruction Nos. 15 and 16, arguably the applicable legal standard in Utah for constructive discharge is less stringent. In Derr v. Gulf Oil Corp., 796 F.2d 340 (10th Cir. 1986), the court noted a divergence of opinion among the circuits as to the findings necessary to apply the doctrine of constructive discharge. Some courts apply a subjective standard by requiring the employee to prove the employer's specific intent to

force him to leave. Other courts have adopted an objective standard requiring the employee to prove that the employer has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign. Id. at 343. In Derr the 10th Circuit Court of Appeals unqualifiedly adopted the objective standard. Contra Bratcher v. Sky Chefs, Inc., 308 Or. 501, 783 P.2d 4 (1989).

In Bihlmaier v. Carson, 603 P.2d 790, 792, Fn. 5 (Utah 1979), this court said that an employer can constructively discharge an employee if the employer's words and actions "logically lead a prudent man to believe his tenure has been terminated." This language suggests an objective standard. Heslop's counsel took exception to Instruction Nos. 15 and 16 insofar as they exceeded the scope of the objective legal standard for constructive discharge identified in Derr v. Gulf Oil Corp., supra and Bihlmaier v. Carson, supra. (Tr. 1666-1669; R. 619-620)

In Spulak v. K-Mart Corp., 894 F.2d 1150 (10th Cir. 1990), the jury returned a verdict in favor of Spulak on his claim of constructive discharge. Spulak was employed with K-Mart for almost 11 years. In 1985, K-Mart restructured and Spulak came under the supervision of Price, the new district manager. Price instigated an investigation of Spulak and he was subsequently accused of violating company policy for using the store's back door, failing to sign in and out properly, using improper invoicing procedures, and paying for merchandise after taking it from the store. Spulak presented evidence that the alleged violations were either approved or condoned by the store manager. Price gave Spulak the option of retiring or being fired and Spulak submitted his resignation. Later, Price issued a written reprimand to Spulak which advised him that he would be fired in the future if he committed additional infractions. Spulak's March 27 resignation was not effective until May 1, 1985. In the interim, Spulak asked Price if he could keep his job. Allegedly, Price said he would find another way to terminate Spulak's employment if he tried to withdraw his retirement. Price denied making that statement.

In affirming the denial of K-Mart's motion for J.N.O.V., the court said the evidence was sufficient to support a jury finding that Spulak resigned because of unreasonably harsh conditions and an ultimatum either to retire or be fired. The court cited to Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) for the proposition that "an employee is protected from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his co-workers." 894 F.2d at 1154.

The Bank placed unreasonably harsh conditions on Heslop. He was placed in the dead-end position of Agricultural Loan Specialist. The Bank then instituted a policy against making agricultural loans. When that failed to force his resignation, Timmons falsely accused Heslop of violating loan policy and revoked his lending authority. No other employee had ever been mistreated in this manner. Heslop still declined to resign and resolved to petition the Board of Directors for relief. Timmons then asked for Heslop's written resignation. In those circumstances, a reasonable person would have felt compelled to resign from the Bank.

The cases cited by the Bank in support of its argument that Heslop was not constructively discharged are distinguishable from this case. In Flanagan v. McKesson Corp., 708 F. Supp. 1287 (N.D. Ga. 1988) [Bank Brief at p. 50], the employee was demoted, but instead of reporting to his new position he immediately resigned because he found the demotion humiliating. Heslop, on the other hand, was demoted in January 1983, but continued to work for the Bank until October 1983. Even after he was falsely accused of violating loan policy and had his lending authority revoked, he still did not resign. Instead, he resolved to petition the Board of Directors for relief so he could continue his employment. Heslop did not submit his resignation until Timmons requested it in writing. The revocation of Heslop's lending authority was not a transfer to a new position.

Watson v. Nationwide Ins. Co., 823 F.2d 360 (9th Cir. 1987) [Bank Brief at p. 50] was a Title VII action based on racial discrimination. In such a case the plaintiff must show some aggravating factors such as a continuous pattern of discriminatory treatment. A single isolated instance of discrimination is insufficient to show differential treatment. This requirement, as explained by the court, "is predicated on the notion that Title VII policies are best served when the parties, if possible, attack discrimination within the context of their existing employment relationships." 823 F.2d at 361. The requirement to show a pattern of discriminatory treatment does not apply to the case sub judice.

The court in Watson also said that "the determination whether conditions were so intolerable and discriminatory as to justify a reasonable employee's decision to resign is normally a factual question left to the trier of fact." 823 F.2d at 361. The question of whether conditions were so intolerable as to justify a reasonable employee's decision to resign is the same standard that applies in this case. Derr v. Gulf Oil Corp., supra; Bihlmaier v. Carson, supra.

In Knee v. School Dist. No. 139 in Canyon Cty., 106 Id. 152, 676 P.2d 727 (Id. App. 1984) [Bank Brief at p. 52], the plaintiff, unlike Heslop, had an express three-year contract that could only be terminated for limited, specific reasons. Knee, a school superintendent, was asked by the school board for his resignation. Since the board members gave no reason for their request, as far as Knee knew the board was merely requesting his resignation and lacked the power to dismiss him. Yet, Knee voluntarily gave his resignation. "Furthermore, at no time did Knee request reinstatement or otherwise seek reconsideration of the board's action." 676 P.2d at 730.

Heslop did not have an express contract identifying the specific ways that he could be terminated. He did not know whether Timmons had authority to fire a Board-appointed Senior Vice President. Unlike Knee, Heslop sought reinstatement through his petition to the Board of Directors.

In Loose v. Nature-All Corp., 785 P.2d 1096 (Utah 1989) [Bank Brief at p. 53], the plaintiff's only supporting evidence actually provided no support for her position. Heslop's testimony relating to constructive discharge was supported by documentary evidence, and testimony by other ex-employees as to the unreasonable and unprecedented measures taken by the Bank.

In Wilson v. Bd. of Cty. Com'rs of Cty. of Adams, 703 P.2d 1257 (Colo. 1985) [Bank Brief at p. 53], Wilson protested her assignment as backup receptionist. When her employer refused to relieve her of the responsibility, she left her job and refused to return. When her leave expired, she was given an ultimatum to return to work or be terminated. Wilson failed to return.

Heslop continued to work at the Bank after his demotion to Agricultural Loan Specialist. After the revocation of his lending authority, Heslop took three days of vacation leave that was approved by his supervisor. The revocation of Heslop's lending authority was pretextual and punitive in nature, whereas Wilson's responsibility as backup receptionist was a legitimate assignment within the scope of her job description. Wilson refused to return to work. Heslop desperately tried to obtain a reasonable assignment at the Bank.

The Colorado Court of Appeals commented upon the Wilson decision in Price v. Boulder Valley School D. R-2, 782 P.2d 821 (Colo. App. 1989).

Although analysis of constructive discharge does not turn upon the subjective view of the individual employee, consideration of the condition of the particular employee may be appropriate to determine the existence of deliberate employer actions. [citation omitted] Moreover, the central concept in the definition of constructive discharge is involuntariness on the part of the employee in resigning. [citation omitted] Thus, while it would appear that Wilson v. Bd. of Cty. Com'rs, supra, requires an exclusively objective analysis, we conclude that the theory of constructive discharge countenances consideration of factors peculiar to the particular employee and the circumstances of his work to determine the larger question of whether the employee's resignation was voluntary.

782 P.2d at 824. Heslop's actions prior to, and after, submitting his written resignation show that his resignation from the Bank was involuntary.

In Christie v. San Miguel Cty. School Dist., 759 P.2d 779 (Colo. App. 1988) [Bank Brief at p. 54], the plaintiff was a school teacher with an express contract of employment. She knew that her job was protected by statute and that only the school board could terminate her employment. Christie's school district was authorized to reassign her duties by virtue of the state's "Tenure Act". When the district made such a reassignment, Christie resigned. Christie failed to produce evidence that her working conditions were intolerable.

The revocation of Heslop's lending authority on the pretext that he violated Bank policy amounted to harassment and coercion sufficient to make his working conditions intolerable. The Bank believes that Heslop should have acquiesced to Timmons' harassment indefinitely. But Heslop had been a lending officer for over 20 years and understood better than anyone the effect of Timmons' order on his job. The order was especially severe for Heslop because of the types of loans he made and the long-term relationships he had with his clients. (Tr. 796-797, 573) Heslop's petition to the Board of Directors was an appropriate and reasonable response to Timmons' harassment.

Adams v. Bd. of Review of Indus. Com'n, 776 P.2d 639 (Utah App. 1989) [Bank Brief at p. 55] was an administrative case in which the employee claimed he was constructively discharged. The central issue was whether he voluntarily left work without good cause. The employee refused to work for a couple of weeks on the night shift after being requested to do so by his employer. When the employer refused to let the employee work days, the employee quit. The court upheld the Board of Review's findings that the employee severed the employment relationship.

In another administrative case, Dept. of Air Force v. Dept. of Emp. Sec., 786 P.2d 1361 (Utah App. 1990), the court upheld the administrative finding of constructive

discharge where the employer initiated the separation with a notice of proposed removal. The employee then resigned. In the case sub judice, the Bank initiated the separation by revoking Heslop's lending authority and then requesting his written resignation.

In Lombardo v. Oppenheimer, 701 F. Supp. 29 (D. Conn. 1987) [Bank Brief at p. 56], the plaintiff was one of four employees whose job assignment was changed based on a reasonable business decision by the employer. All four were treated identically.

Heslop, however, was treated differently than other employees. No other lending officer at the Bank ever had his lending authority revoked because he made a bad loan, or even one that violated Bank policy. (Tr. 532-533, 617, 671, 798, 875-876, 1208)

In Lombardo, the court noted:

Here, plaintiff does not allege facts that suggest verbal abuse by defendants (such as threatening to fire her or giving her ultimatums). She does not allege any decrease in salary or benefit, or that defendants were overly critical of her work, or that she was wrongly accused or disciplined for making mistakes. Plaintiff merely claims she was treated coldly. Her treatment, though potentially unpleasant, was not significantly offensive and is insufficient to support a finding of constructive discharge.

[emphasis added] 701 F. Supp. at 32. Heslop's job was not only threatened, but he was actually asked to resign. He was also wrongly accused of violating Bank policy.

In both Neale v. Dillon, 534 F. Supp. 1381 (E.D.N.Y. 1982) [Bank Brief at p. 57] and Finstad v. Montana Power Co., 241 Mont. 10, 785 P.2d 1372 (1990) [Bank Brief at p. 58], the plaintiffs resigned because they did not want to accept job transfers. In Neale, the court noted, "In this case, transfers from one bureau to another were frequent; most ADAs (Assistant District Attorneys) had experienced several." Neale's primary concern was her loss of prestige from the transfer to a non-supervisory position in the appeals bureau. 534 F. Supp. at 1390.

Finstad resigned instead of accepting a transfer to Butte because he wanted to stay in Cutbank for one more year so his youngest son could graduate from high school.

Also, Finstad disliked the fact that the move to Butte would require him to drive longer distances. 785 P.2d at 1374-1375.

Heslop did not resign because he was transferred. After Heslop's demotion to Agricultural Loan Specialist and transfer to the Bank's Ogden office, he continued to work for the Bank for another nine months. In late September 1983, Heslop's lending authority was revoked, but he was not transferred.

2. The Jury Verdict was Supported by Sufficient Evidence that Heslop had an Implied-in-Fact Contract with the Bank Terminable Only for Good Cause

The Bank's argument that Heslop signed an express, integrated employment contract which made him an employee at will, overlooks three important facts. 1) The employment application signed by Heslop in 1955 was not an employment contract; 2) Heslop quit his employment with the Bank in 1959; and 3) Heslop did not sign an employment contract at the time of his rehire in 1962.

In McLain v. Great American Ins. Co., 256 Cal. Rptr. 863, 208 Cal. App. 3d 1481 (1989), McLain completed and signed an application form before starting work for Great American. The application form contained an employment at-will clause. The trial court looked at several factors in determining that the application form was not an integrated employment contract. First, the application form did not contain an integration clause. Second, the application was a standardized two-page form. Third, the application was brief and informal. Fourth, the application did not cover important aspects of the employment relationship such as salary and position. Finally, the application was a pre-printed form drafted solely by the employer. 256 Cal. Rptr. at 868. See also Stone v. Mission Bay Mortg. Co., 672 P.2d 629 (Nev. 1983).

The foregoing factors apply to Heslop's application form and support the argument that the application did not rise to the dignity of an employment contract.

(Information regarding Heslop's salary and position were added to the application after Heslop's hiring on March 20, 1955.) (Ex. 1P)

Even if Heslop's application form were construed as an express, integrated employment contract, that agreement terminated when Heslop quit in 1959. See Reagan Outdoor Advertising, Inc. v. Lundgren, 692 P.2d 776 (Utah 1984).

If the Bank wants to argue, in the alternative, that the application forms are simply evidence that the Bank's policy was employment-at-will, it must consider that the jurors found the opposing evidence more persuasive.

In Wilkerson v. Wells Fargo Bank, 261 Cal. Rptr. 185, 212 Cal. App. 3d 1217 (1989), Wilkerson and his employer did not reduce their employment relationship to an integrated writing. Wells Fargo's employee handbook and service operations manual, however, both contained at-will provisions. The court held that "rather than being controlling, the employee handbook and SOM are factors to be considered by the jury in determining the existence and content of the employment agreement." 261 Cal. Rptr. at 191.

Heslop, West, Packer, Beutler, Carlson, Kleyn, Peacock and even the Bank's own witness, Kennedy, all long-term employees of the Bank, testified that the Bank's policy was to terminate only for just cause. (Tr. 118-120, 506-508, 572, 620, 676, 698, 704, 1364) Heslop was told of the Bank's policy to terminate employment only for good cause at the time of his rehire in 1962. West, Packer and Peacock testified that the employment application was not an accurate representation of the termination policy that actually existed at the Bank. (Tr. 545, 572, 642, 676, 698) Several of the witnesses recalled that the just-cause policy was expressly stated or inferred in meetings or discussions at the Bank. (Tr. 545, 642, 702-703)

This case was tried in 1990. Many of the witnesses were asked to recall events that occurred 10, 20 or even 30 years before. The Bank's argument that the testimony of

these witnesses is insufficient to support the jury verdict, because some could not remember the specific conversation in which the specific statement was made that the Bank's policy was to terminate only for just cause, is irrational and attempts to place an undue burden on Heslop.

In Richards v. Detroit Free Press, 173 Mich. App. 256, 433 N.W.2d 320 (1988), the court reversed the trial court's grant of J.N.O.V. on plaintiff's claim for wrongful discharge. The court held:

In this case, plaintiff presented sufficient evidence for the jury to properly infer that he had a legitimate expectation that he could only be demoted for just cause. Plaintiff testified to many conversations with management personnel where he and other supervisors were told that they would have their jobs as long as they "kept their noses clean." . . . Plaintiff also testified that he and other supervisors attended a seminar on supervisory techniques at which the just-cause discharge policy was explained to them.

433 N.W.2d at 322.

In Wilkerson v. Wells Fargo Bank, supra, "Wilkerson offered the deposition testimony of two bank officers, Cha Sanders and Ronald Schneider, and the declaration of Griffith, a former executive vice president of the bank, each of whom stated the bank had a policy to terminate employees only for good cause." 261 Cal. Rptr. at 189.

In the case sub judice, the Bank tried to legally bind its employees to an at-will provision in the application form. Afterward it promised seniority, advancement, and termination only for just cause to encourage the employees to work harder and remain loyal to the Bank. This double standard is precisely the type of employee abuse that inspired the implied-in-fact contract exception to the employment-at-will doctrine. "An employer is bound by statements of policy made after the employee is hired because the employer derives benefits from a loyal and cooperative work force." Richards v. Detroit Free Press, supra at 322 (citing Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980)).

The Bank received the benefit of its bargain. Heslop was a loyal and dedicated employee for over 20 years. He worked hard, and made the Bank a lot of money. Ironically, the Bank denied Heslop the benefit of his bargain by reneging on its promise to discharge only for good cause.

3. The Jury Verdict was Supported by Sufficient Evidence that the Bank Terminated Heslop's Employment Without Good Cause

The testimony at trial indicated that Heslop was a good loan officer with a good loan/loss record. (Tr. 534, 821, 266-267; Ex. 26P) The Gabbert loan was not good cause to terminate his employment. Heslop presented evidence that he was not guilty of misconduct in making the Gabbert loan. In 1983, Heslop, West, Peacock, Kleyn and possibly Browning and Timmons knew that the Gabbert loan had Loan Committee approval. (Tr. 218, 525, 669-670, 764-765, 1199-1200)

In Whitlock v. Haney Seed Co., 114 Id. 628, 759 P.2d 919 (Id. App. 1988), the court held there was substantial evidence to support the jury's determination that Whitlock was fired without good cause.

The company claimed that Whitlock had made capital expenditures without prior approval, that he had used company personnel to care for his lawn, and that he was "stripping" trucks which the company had decided to sell. However, Whitlock presented evidence that the capital expenditures were approved and that the "stripping" of trucks actually consisted of removing his own personal property as well as changing the tires and wheels at the request of his superiors. Finally, Whitlock presented evidence that it was a known practice in the company for some managers to have company personnel perform lawn care at their homes. The jury chose to accept Whitlock's version of events.

759 P.2d at 923.

In this case, the jury apparently believed that either Heslop was not guilty of misconduct in making the Gabbert loan, or discharging an employee with over 20 years of experience for making one bad loan or even one loan in violation of Bank policy was without good cause.

Any negative criticism of Bank management by Heslop was exclusively contained within his personal notes. Heslop kept his personal notes confidential until the Bank deceptively and unethically persuaded him to surrender them. Heslop did constructively criticize Bank actions, particularly in November and December 1981. Many businesses actually approve of constructive criticism as a means of self-improvement. Had Bank management been more receptive to Heslop's constructive criticism, the accrual problem and subsequent investigations of the Bank may have been avoided.

There was substantial evidence presented at trial that Heslop was a dedicated and loyal employee of the Bank. Heslop's October 3, 1983 letter to the Board of Directors and October 6, 1983 statement to the Directors reflect his continuing loyalty and concern for the Bank's success. (Ex. 20P, 22P)

"If an employer claims the employee was discharged for specific misconduct, and the employee denies the charge, the question of whether the misconduct occurred is one of fact for the jury." Wilkerson v. Wells Fargo Bank, *supra* at 192-193.

4. The Bank Failed to Marshall all the Evidence Supporting the Verdict, Therefore, this Court Need not Consider the Challenge to its Sufficiency

In order to challenge the jury verdict in this case on the basis of insufficiency of the evidence, the Bank "'must marshall all the evidence supporting the verdict' and then show that the evidence cannot support the verdict." Hansen v. Stewart, *supra* at 17. (citing Price-Orem Investment Co. v. Rollins, Brown & Gunnell, 713 P.2d 55, 58 (Utah 1986); Cambelt Intern. Corp. v. Dalton, 745 P.2d 1239, 1242 (Utah 1987) (quoting Von Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985)); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985)). These cases place an affirmative obligation on the Bank to marshall the evidence supporting the jury verdict. This requirement was brought to the Bank's attention in Heslop's response to the Bank's Motion for Judgment Notwithstanding the

Verdict, or in the Alternative, for a New Trial. (R. 1088) The Bank's Brief fails to meet this obligation because it does nothing more than reargue the same points raised at trial.

In State v. Moore, 802 P.2d 732, 738 (Utah App. 1990), Moore also vigorously urged essentially the same points raised at trial. Moore's was a criminal case, however, the Utah Court of Appeals explained that the marshalling-of-the-evidence requirement applies to civil jury trials "where the appellate courts are even more deferential, and view the evidence and all possible inferences, in a light most favorable to the jury verdict." 802 P.2d at 739. The court gave the following reasons for the marshalling requirement:

The process of marshalling the evidence serves the important function of reminding litigants and appellate courts of the broad deference owed to the fact finder at trial. Such deference is especially appropriate where the fact finder is a jury, whose common sense is a valued buffer between the parties. We believe that this deference is appropriate and important in both civil and criminal cases. Marshalling also aids the appellate courts in deliberations and in the opinion-writing process.

Id.

This court need not consider the Bank's challenge to the sufficiency of the evidence because the Bank has not complied with the "marshalling" requirement.

B. THE TRIAL COURT PROPERLY DENIED THE BANK'S MOTION FOR A NEW TRIAL.

A trial court has some discretion in deciding whether or not to grant a new trial, and this court will reverse only when that discretion is abused. Hansen v. Stewart, 761 P.2d at 17. "However, the trial court has no discretion to grant a new trial unless the moving party shows at least one of the circumstances specified in Rule 59(a) of the Utah Rules of Civil Procedure." Schindler v. Schindler, 776 P.2d 84, 89 (Utah App. 1989) (citing Moon Lake Elec. Ass'n v. Ultra Systems W. Constructors, Inc., 767 P.2d 125, 128 (Utah App. 1988)). Rule 59(a) U.R.C.P. is subject to the provisions of Rule 61 U.R.C.P. A copy of Rule 61 is attached hereto as Addendum M. This rule places upon an appellant "the burden of showing not only that an error occurred, but that it was

substantial and prejudicial in that the appellant was deprived in some manner of a full and fair consideration of the disputed issues by the jury." Onyeabor v. Pro Roofing, Inc., 787 P.2d 525, 529 (Utah App. 1990) (citing Ashton v. Ashton, 733 P.2d 147, 154 (Utah 1987)).

When parties have been given an opportunity to present their claims to a jury in a fair trial and a verdict and judgment are entered, all presumptions are in favor of the validity of the verdict and judgment. Joseph v. W.H. Groves Latter-Day Saint Hosp., 348 P.2d 935 (Utah 1960). The Bank has failed to show at least one of the circumstances specified in Rule 59(a) U.R.C.P. Moreover, the Bank received a fair trial.

1. Evidence at Trial

The evidence at trial regarding the accrual account problem, investigations of the Bank, hiring of Timmons, payments to PMM, wash entries, and terminations of other employees was relevant to Heslop's case and the danger of unfair prejudice did not substantially outweigh its probative value. See Rules 401, 403 U.R.E. All these events occurred within a period of less than two years from the date of Heslop's wrongful discharge from the Bank.

The Bank filed a Motion in Limine on April 23, 1990, seeking to exclude evidence of the accrual problem and the investigations. The trial court had ample time to consider the Bank's Motion. The matter was argued on May 30, 1990 and the trial court signed an Order dated June 13, 1990 denying the Bank's Motion on the ground that neither Rule 401 nor Rule 403 U.R.E. would be a proper basis for excluding the evidence. (R. 409, 488)

Evidence of the accrual problem was relevant to show the change in Heslop's relationship with his superiors. Prior to November 1981, the owners, directors, and managers of the Bank were supportive of Heslop. Afterward, they were covertly and, at times, overtly hostile toward him.

Evidence of the wash entries, investigation by the Utah Department of Financial Institutions, and the audit of the Bank by PMM was relevant to show the correctness of Heslop's position in opposing the Bank's method of resolving the accrual problem. Heslop's loss of support from the owners, directors, and managers of the Bank was unjustifiable and unreasonable.

Facts relating to the Attorney General investigation were relevant to show that some Directors were angry with Heslop because of his willingness to cooperate with the Attorney General. (Tr. 157-158, 479) Also, Timmons told the Attorney General that the accrual problem was caused by the ignorance of Heslop and other Bank officers. (Tr. 182, 1326) This self-serving statement, and the effect that it had in abating the investigation by the Attorney General, may have promoted Timmons' rise and Heslop's fall at the Bank.

During the Attorney General's investigation, the Bank's attorneys deceptively persuaded Heslop to surrender his personal notes. (Tr. 166-169) The notes contained statements of Heslop's opinion that Browning and Kunz may have found offensive. The termination of Heslop's employment may have been based, at least in part, on the content of his personal notes.

In Heller v. Champion Intern. Corp., 891 F.2d 432 (2d Cir. 1989), Heller was wrongfully discharged from his employment because he made tape recordings of conversations with his supervisor. At trial, the jury found that Heller had an implied-in-fact employment contract that Champion breached by firing Heller without good cause. The trial court granted Champion's Motion for J.N.O.V. on the ground that Heller's tape recording of meetings with his superiors was good cause to terminate as a matter of law. The Second Circuit Court of Appeals held that the entry of J.N.O.V. was improper and reversed the trial court for invading the province of the jury to determine questions of fact.

Early in this case, another district court judge denied two requests by Heslop for information regarding Timmons' remuneration as President of the Bank. (R. 52, 61-62, 66-67) The trial judge denied Heslop access to this information until its relevance could be determined after hearing the evidence at trial. The court ruled at trial that the evidence was admissible. (R. 485-486; Tr. 1165) Timmons' remuneration and the Bank's payments to PMM were relevant evidence because the Bank argued that it was experiencing financial difficulty and "had to become lean and mean to survive." The Bank implied that Heslop was demoted to Agricultural Loan Specialist as a cost-saving measure. (Tr. 101) Yet, at the same time, the Bank contracted to pay exorbitant salary, bonus, and benefits to Timmons; and exorbitant payments to PMM. The Bank also constructed a lavish office in Salt Lake City for Timmons.

Out of the presence of the jurors, Heslop's counsel explained to the court two additional theories about the relevance of Timmons' hiring and the payments to PMM. The Bank's Brief conveniently fails to mention the second "and more likely scenario." (Tr. 1156-1158) The Bank devised a strategy to use Timmons, supposedly an independent auditor, to intercede in the Attorney General's investigation of the Bank. Browning and the Directors of the Bank became indebted to Timmons after he was successful in abating the Attorney General's investigation. Timmons was rewarded monetarily, his prestige was enhanced with PMM, and he was given inordinate power at the Bank. Timmons opportunistically used his power to wrongfully discharge long-term employees who had been promised termination only for good cause. He replaced them with friends or left the position vacant.

Admittedly, this additional theory is based on circumstantial evidence. But circumstantial evidence can be relevant evidence. "Also, it is not to be expected in cases of this type that a plaintiff would necessarily discover documentary or other direct

evidence in support of his claim." Chavez v. Manville Prod. Corp., 108 N.M. 643, 777 P.2d 371, 376 (1989).

Evidence that other long-term employees were discharged at about the same time, and under similar circumstances was relevant to Heslop's claim of constructive discharge. Furthermore, the evidence was relevant to show the bias of these witnesses. (Tr. 538-539)

Erickson v. Wasatch Manor, Inc., 802 P.2d 1323 (Utah App. 1990) was a "slip and fall" case. Prior to trial, Wasatch made a Motion in Limine to exclude the testimony of three potential witnesses who had also slipped and fallen on Wasatch's property. The trial court granted the Motion subject to the condition that the evidence would be admitted if shown to be relevant at trial.

On the last day of trial, Erickson presented evidence that the three prior falls occurred within a year of Erickson's fall, and in the same location. The trial court ruled that evidence of the three prior falls was relevant and admissible. The jury returned a verdict for Erickson and the trial court denied Wasatch's Motion for a New Trial. The Court of Appeals agreed with the trial court that the testimony regarding prior falls was admissible because the falls occurred in the same time period and under similar conditions.

In Spulak v. K-Mart Corp., *supra*, the trial court allowed two former K-Mart employees to testify about the circumstances under which they left their employment. On appeal, K-Mart argued that the relevance of this evidence was outweighed by its prejudice under F.R.E. 403. The Tenth Circuit Court of Appeals noted that the former employees worked in the same state as Spulak, were fired within a very short time after Spulak left K-Mart, and were wrongfully fired under circumstances similar to Spulak's discharge. The court found no abuse of discretion by the trial court. 894 F.2d at 1156, Fn. 2.

None of the evidence introduced at trial was unfairly prejudicial to the Bank. The evidence did not provoke the jury to punish the Bank. The testimony at trial indicated that Heslop's damages amounted to \$256,024.00. The actual figure may have been slightly more or slightly less. (Tr. 939, 949, 954-956) Yet, the jury only awarded Heslop \$160,000.00. Had the jurors been inclined to punish the Bank, they likely would have awarded the amount of damages requested by Heslop, or more.

In Pearce v. Wistisen, 701 P.2d 489 (Utah 1985) [Bank Brief at p. 66], the evidence of alcohol-induced debility was highly indefinite and inconclusive. There was no evidence that the decedent showed any signs of a hangover during the day. His vigorous activity in waterskiing was inconsistent with any impairment. "While Evan's character was not on trial, it became an issue after the unbridled admission of testimony of Evan's illegal purchase and consumption of alcohol." 701 P.2d at 494. The jury found the decedent's negligence to be the sole proximate cause of his death.

In the case sub judice, it would be unreasonable to conclude that the jurors improperly focused their attention on the accrual account problem, the investigations of the Bank, the hiring of Timmons, payments to PMM, the wash entries, and the terminations of other employees; and thereby determined that Heslop had an implied-in-fact employment contract terminable only for good cause. The jurors may have considered this evidence in finding that Heslop was constructively discharged without good cause because it is relevant to those issues.

The Bank has no factual support for its argument that it would have obtained a more favorable result had the court excluded this evidence. The jury could have still reached the same verdict based on the remaining evidence in the case. Exclusion of this evidence would have been unfairly prejudicial to Heslop's case. "A trial court's determination to admit or exclude evidence will not be overturned in the absence of an

abuse of discretion." Onyeabor v. Pro Roofing, Inc. at 530 (citing Pearce v. Wistisen, 701 P.2d 489, 491 (Utah 1985)).

2. Statement to the Jury

The facts relating to the implied-in-fact contract issue were remote in time and unrelated to the "Public Policy" facts. Evidence of the accrual problem and investigations was relevant to the issue of constructive discharge. When the trial judge dismissed Heslop's public policy claim, he said this evidence was relevant to the "good cause" issue. He did not say that it was not relevant to the constructive discharge issue. (Tr. 1263-1264) The judge made this statement early in the trial. Later, he recognized that evidence of the accrual problem and investigations was also relevant to the issue of constructive discharge. (R. 1183) An instruction to the jury to disregard the evidence of the accrual problem and investigations in considering the constructive discharge and implied-in-fact contract issues would have been unfairly prejudicial to Heslop's case and would have impinged on the jury's right to apply the facts to the issues in the case. During closing argument, the Bank's counsel had an opportunity to fully explain the Bank's view of how the facts applied to the issues in the case.

In Almonte v. Nat'l Union Fire Ins. Co., 705 F.2d 566 (1st Cir. 1983) [Bank Brief at p. 65], the testimony of Angelo Almonte was inflammatory and also irrelevant to all issues in the case other than bad faith. When the court directed a verdict for defendant on the bad faith claim, it should have instructed the jury to disregard the bad faith evidence. Unlike Angelo Almonte's testimony regarding bad faith, the evidence relating to Heslop's public policy claim was also relevant to the issues of constructive discharge and good cause.

3. Browning's Failure to Request Heslop's Resignation

In January 1983, Heslop asked if Browning wanted him to resign. Browning replied that he thought Heslop should stay. The Bank argues that this was an

intervening act that precludes any causal connection between prior events and the termination of Heslop's employment in October 1983. The trial court did not accept this myopic view of the facts because he understood that the accrual problem was relevant to show the abrupt change in Heslop's relationship with his employer. (Tr. 1263-1264) Moreover, Browning explained that he did not ask Heslop to resign in January 1983 because he wanted to avoid the turnover in key personnel at a critical time for the Bank. (Tr. 998-999)

A large majority of the witnesses at trial testified that the Bank's personnel policy was to terminate employment only for good cause. The Bank also had a seniority system. Browning and Kunz would have known of these promises that the Bank made to its employees.

Heslop lost support from Browning and Kunz because he exposed the accrual problem and opposed the Bank's method of resolving it over time. The Bank's method of resolving the accrual problem caused the investigations of the Bank. The investigation by the Department of Financial Institutions resulted in an order that PMM audit the Bank. Timmons would never have become President of the Bank had he not supervised the PMM audit. Timmons demoted Heslop to Agricultural Loan Specialist and initiated the policy against making agricultural loans. He revoked Heslop's lending authority and ultimately requested his resignation. Browning and Kunz at least acquiesced in Timmons' wrongful discharge of Heslop. The chemistry necessary to cause constructive discharges of long-term employees of the Bank may have been incomplete without the "Timmons" ingredient.

The reductions in force at the Bank in 1983 were not intervening events that precluded the relevance of prior events. Heslop had over 20 years of seniority. The reduction in force at the Bank in the spring of 1983 was small and the reduction in force in October 1983 occurred after Heslop's wrongful discharge. (Tr. 1067-1068)

4. Closing Argument

The misstatement of Draughon's testimony by Heslop's counsel during closing argument was harmless error. If the mistake not been made, there would have been no significant difference in the outcome of the trial. The misstatement related to the minor issue of whether Browning lied about his knowledge of the accrual problem. There were many such inferences at trial. Beutler's testimony alone made numerous inferences that Browning was untruthful on this point. Furthermore, the Bank's counsel failed to object to the misstatement.

After two weeks of trial by jury, it is difficult even for experienced counsel to remember all the evidence, especially on minor issues. Additionally, Heslop's testimony conflicted with Draughon's testimony on the substance of Browning's and Kunz' statements to Draughon. (Tr. 177-178)

In Schmidt v. Intermountain Health Care, Inc., 635 P.2d 99 (Utah 1981), the court affirmed the trial court's denial of plaintiff's Motion for a New Trial. Plaintiff contended that the mention of her past medical treatment prevented her from having a fair trial.

The court stated:

Because his position allows him to hear the remarks of the attorneys and the witnesses, view the jury, and observe the general mood in the courtroom, the trial judge is the one especially well-suited to evaluate whether this rather brief and perhaps inadvertent mention of the earlier bypass operation affected the jury. The fact that plaintiff's medical record, including four references to the bypass operation, had been admitted into evidence without objection is an additional indication that the mention of the bypass operation did not prevent plaintiff from having a fair trial.

635 P.2d at 102. Donahue v. Intermountain Health Care, Inc., 748 P.2d 1067 (Utah 1987) [Bank Brief at p. 67] involves a fact situation significantly different than this case. First, defendant's counsel objected to the misstatements made by plaintiff's counsel during closing argument. Second, plaintiff's counsel insinuated that the defendant had been unwilling to settle the case. Third, the jury rendered an inflated verdict. Finally,

the trial judge, who is also the trial judge in this case, granted the defendant's Motion for a New Trial.

In Dist. of Columbia v. Bethel, 567 A.2d 1331 (D.C. App. 1990), the court noted:

As the Supreme Court explained in a case decided in the last century, "if every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation."

567 A.2d 1337 (citing Dunlop v. United States, 165 U.S. 486, 498 17 S. Ct. 375, 379, 41 L. Ed. 799 (1897)).

5. Sufficiency of the Evidence

The jury verdict in this case was supported by sufficient evidence. See VI A. above. Hansen v. Stewart, *supra*.

C. THE TRIAL COURT CORRECTLY RULED THAT BERUBE APPLIED RETROACTIVELY.

In Malan v. Lewis, 693 P.2d 661 (Utah 1984), this court declared the Utah Guest Statute unconstitutional. The defendants in the case petitioned for a rehearing, contending that the decision should have applied prospectively only. The court noted that "the general rule from time immemorial is that the ruling of a court is deemed to state the true nature of the law both retrospectively and prospectively. . . . In the vast majority of cases, a decision is effective both prospectively and retrospectively, even an overruling decision." [citations omitted] 693 P.2d at 676.

The Malan decision overruled the state's long-standing Guest Statute. Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989) did not overrule the employment-at-will doctrine but merely created two exceptions to the doctrine. The Malan court explained:

Whether the general rule should be departed from depends on whether a substantial injustice would otherwise occur. . . . We may, in our discretion, prohibit retroactive operation where the "overruled law has been justifiably relied upon or where retroactive operation creates a burden." [citations omitted]

Id. The court inferred that in Utah, cases that have been given only prospective application usually involve the invalidation or reinterpretation of statutes. The Berube case did not involve a statute, but an archaic rule of common law with "questionable foundations." 771 P.2d at 1040. In Rio Algom Corp. v. San Juan County, 681 P.2d 184 (Utah 1984), the court held that the decision applied prospectively only. Even then, however, the court allowed the decision to apply retroactively to the six plaintiffs who were parties to the appeal. 691 P.2d at 196.

In cases where this court has applied a decision prospectively only, the court included a statement to that effect in the same opinion. See, e.g., Rio Algom Corp. v. San Juan County, *supra*; Timpanogos Planning and Water Mgmt. v. Central Utah Water Conservancy Dist., 690 P.2d 562 (Utah 1984). The Berube case contained no statement that the decision applied prospectively only.

The Bank's claim that it relied upon the employment-at-will rule to obtain summary judgment in the Beutler lawsuit is bogus. That decision was based on the Unclean Hands doctrine. Furthermore, Beutler filed suit while Heslop was still at the Bank. Thus, the Bank was on notice it may be sued if it wrongfully discharged an employee.

The employment-at-will doctrine has been in a state of flux in the United States for the past decade. The Bank's attorneys knew of this situation, as evidenced by their defense to the Beutler lawsuit. The Bank has made no legitimate showing that it justifiably relied on the employment-at-will doctrine in terminating Heslop's employment.

In Malan, the court stated, "Our ruling was also founded on the changing use of the automobile in light of current conditions and clear-cut illogical discriminations that make the statute blatantly unfair." 693 P.2d at 677. The Berube decision was founded on the questionable background of the employment-at-will doctrine in light of changing

employment conditions in an information-age society and illogical discriminations that create unreasonably harsh results and make the doctrine blatantly unfair.

The injustice that would result if employees who were wrongfully terminated prior to Berube are barred from a remedy far outweighs any prejudice to the Bank.

D. THE TRIAL COURT CORRECTLY RULED THAT THE STATUTE OF FRAUDS DID NOT BAR HESLOP'S CLAIM OF IMPLIED-IN-FACT CONTRACT.

Heslop was promised employment at the Bank until he retired, unless there was good cause to terminate. The Bank's counsel asked Heslop if he intended to work to age 65. Heslop responded, "That was the standard, the expected age of retirement then, yes." (Tr. 293-296)

The Bank now tries to extrapolate from Heslop's testimony the argument that he had a verbal contract of employment for the specific period of 33 years. The record indicates that Heslop was actually promised employment "until retirement."

In Hodge v. Evans Financial Corp., 823 F.2d 559 (D.C. Cir. 1987), Hodge, like Heslop, had a contract for permanent employment. The defendant argued that because the agreement contemplated employment over a number of years, the statute of frauds required it to be in writing to be enforceable. The court explained:

[T]he statute has long been construed narrowly and literally. . . . [I]t applies only to those contracts whose performance could not possibly or conceivably be completed within one year. . . . [A]ny contingent event could complete the terms of the contract within one year.

823 F.2d at 561-562 (citing Restatement (2d) of Contracts, § 130, Comment a (1979); 2 Corbin on Contracts § 445 at 542-543 (1950 and Supp. 1984); and 3 Williston on Contracts, § 495 at 577-583, (3rd Ed. 1960)). The court noted, "The vast majority of the state courts faced with this issue have squarely and unequivocally held that contracts such as Hodge's fall outside the statute." 23 F.2d at 562, Fn. 2 (see Footnote 2 for a long list

of authorities). The court agreed with Hodge's argument that his death could constitute a contingent event that would complete the terms of the contract within one year.

In Cowdrey v. A.T. Transport, 367 N.W.2d 433 (Mich. App. 1985), the court identified two other contingent events that could complete the terms of the contract within one year. "The company could have terminated its operations or plaintiff could have performed so poorly that defendant would have had just cause to discharge him within one year." 367 N.W.2d at 434.

Defendant's counsel asked Hodge "if he had formed an intention as to how long [he] planned to work." Hodge replied, "I really questioned if I was going to go much beyond 65." 823 F.2d at 564, Fn. 5. The defendant then argued on appeal that Hodge's contract was for a definite period of 11 years. Id. The court said, "The applicability of the statute of frauds does not depend on the expectations of the parties." 823 F.2d at 564. See also Finley v. Aetna Life & Cas. Co., 520 A.2d 208, 213 (Conn. 1987) (The enforceability of a contract under the one-year provision does not turn on the actual course of subsequent events, nor on the expectations of the parties as to the probabilities.)

The court concluded that "Hodge was merely stating his expectation as to how long he intended to continue working." 823 F.2d at 564, fn. 5. Heslop was also merely stating his expectation that he would work until retirement, which he believed would occur when he reached age 65.

The fact that Hodge expected to retire at some point does not mean that his contract could not possibly be performed within one year. All employment contracts of permanent, lifetime or indefinite duration undoubtedly contemplate retirement; such contracts certainly do not, as a matter of law, mean that the employees are bound to work until the day they drop dead.

823 F.2d at 564. See also Kestenbaum v. Pennzoil Co., 766 P.2d 280, 283 (N.M. 1988); Robards v. Gaylord Bros., Inc., 854 F.2d 1152 (9th Cir. 1988). The court held that Hodge's permanent employment contract was not barred by the statute of frauds.

In Stone v. Mission Bay Mortgage Co., *supra*, the parties' oral employment contract for a period "not less than one year" included a 30-day probationary period. The court held that the employment contract could have been terminated within one year because of the probationary period, therefore, it did not fall within the statute of frauds. 672 P.2d at 630-631.

Heslop's oral contract of employment also included a 90-day probationary period that he successfully completed. During the probationary period, however, Heslop's employment could have been terminated by the Bank. Moreover, Heslop's case is stronger because his contract was for employment until retirement, not for a period "not less than one year".

E. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON AN AWARD OF CONSEQUENTIAL DAMAGES, INCLUDING ATTORNEYS FEES.

The trial court denied Heslop's request for a jury instruction on consequential damages, including attorney fees as an item of consequential damages. In Beck v. Farmers Ins. Exchange, 701 P.2d 795 (Utah 1985), this court held that in an action for breach of an implied contract against a first-party insurer, a successful plaintiff could recover both general and consequential damages. Consequential damages are "those reasonably within the contemplation, or reasonably foreseeable by, the parties at the time the contract was made." 701 P.2d at 801. "The foreseeability of any such damages will always hinge upon the nature and language of the contract and the reasonable expectations of the parties." 701 P.2d at 802 (citing J. Calamari & J. Perillo, Contracts, § 14-5 at 523-525 (2d Ed. 1977)).

The Beck court envisioned "a broad range of recoverable damages" in such a case because "an insured frequently faces catastrophic consequences if funds are not available within a reasonable period of time to cover an insured loss." Id. The consequences faced by an employee who is wrongfully discharged are analogous to those encountered by an insured in a breach of implied contract case. The employee usually experiences a substantial or even total loss of income and may lose additional assets in an effort to cover living expenses. Moreover, the employee must pay attorney fees to redress the employer's wrongdoing.

In Zion's First Nat'l Bank v. Nat'l American Title Ins., 749 P.2d 651, 657 (Utah 1988), this court announced, in dicta, that attorneys fees could be considered an element of consequential damages in a breach-of-implied-contract case involving a first-party insurer. This dicta was later applied to the holding in Canyon Country Store v. Bracey, 781 P.2d 414 (Utah 1989). "Canyon Country's claim for recovery of fees was predicated on the theory that attorneys fees were an item of consequential damages flowing from the insurer's breach of contract." 781 P.2d at 420. Like Heslop, Canyon Country entered into a contingency fee agreement with its attorney. Canyon Country's attorney, however, sought "reasonable" fees instead of the contractual amount. The court specifically stated that attorneys fees as an item of consequential damages is a legitimate theory of damages. "However, attorney fees recovered as damages in a breach of contract suit must be based on the prevailing party's actual loss, i.e., its out-of-pocket expenses for legal counsel." Id. The court held that Canyon Country was entitled to attorney fees "in the amount of 1/3 of the amount ultimately recovered, as provided for in its attorney fees agreement." Id.

In Berube v. Fashion Centre, Ltd., supra, a majority of the justices on the court held that "Beck" damages apply in a breach of implied-in-fact employment contract case. 771 P.2d at 1050, 1053.

Berube stated the true nature of the law both retrospectively and prospectively. Malan v. Lewis, *supra*. The Bank promised to employ Heslop until retirement, unless there was good cause to terminate. Heslop expected to work at the Bank until retirement. It was reasonably foreseeable that Heslop would incur attorney fees to recover his damages if the Bank terminated his employment without good cause.

The trial court read the Beck and Canyon Country Store cases at trial. (Tr. 1562) The trial court was also aware of the Berube decision. Yet, the trial court still refused to allow an instruction to the jury on consequential damages, including attorney fees as an item of consequential damages. The trial court should have allowed such an instruction.

F. THE TRIAL COURT ERRED IN GRANTING THE BANK SUMMARY JUDGMENT ON HESLOP'S CAUSE OF ACTION FOR BREACH OF AN IMPLIED-IN-LAW COVENANT OF GOOD FAITH AND FAIR DEALING.

For over 15 years, this court consistently held that all contracts contain an implied-in-law covenant of good faith and fair dealing. *See, e.g., Beck v. Farmers Ins. Exch.*, 701 P.2d 795 (Utah 1985); Resource Mgmt. Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028 (Utah 1985); Cahoon v. Cahoon, 641 P.2d 140 (Utah 1982); Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982); Rio Algom Corp. v. Jimco, Ltd., 618 P.2d 497 (Utah 1980); Zion's Properties, Inc. v. Holt, 538 P.2d 1319 (Utah 1975); and State Automobile Cas. Underwriters v. Salisbury, 494 P.2d 529 (Utah 1972). *See also* Utah Code Ann. § 70A-1-203, Restatement (2d) of Contracts, § 205 (1981).

The court first began to backpedal from that position in Berube v. Fashion Centre, Ltd. where a majority of the court failed to recognize an implied-in-law covenant of good faith and fair dealing in a contract for employment at will. In Berube, Justice Zimmerman stated, "Until we have had a better opportunity to consider the minimum rights and obligations that inhere in the employment relationship, as we did in Beck with respect to first-party contracts of insurance, I would reject invitations to create this cause

of action [breach of an implied-in-law covenant of good faith and fair dealing]." Berube at 1052.

During the preparation of this Brief, the court filed its opinion in St. Benedict's Development Co. v. St. Benedict's Hospital, No. 890449 (Utah May 6, 1991). The St. Benedict's opinion noted the court's regression from its earlier position on the implied-in-law covenant of good faith and fair dealing. "In this state, a covenant of good faith and fair dealing inheres in most, if not all, contractual relationships." [emphasis added] St. Benedict's, Slip Opinion at 7. Berube was the lone, glaring exception cited by the court.

Ten days later, the court's backpedaling reached full speed in Brehany v. Nordstrom, Inc., No. 20590 (Utah May 16, 1991). The jury awarded Brehany and her co-plaintiffs \$285,000.00 on their cause of action for breach of an implied-in-law covenant of good faith and fair dealing. The trial court, relying on this court's prior, consistent statements that all contracts contain such a covenant, denied Nordstrom's motions for directed verdict, new trial, and J.N.O.V. On appeal, this court held that "the trial court erred in instructing the jury that it could find for the plaintiffs on the basis of a breach of an implied in law covenant of good faith and fair dealing." Brehany, Slip Opinion at 9.

This writer respectfully begs to differ with the decision of the court in Brehany v. Nordstrom. One justification given by the court for its refusal to recognize the implied covenant in an indefinite-term employment contract is that the purpose and function of the implied covenant of good faith and fair dealing recognized in all contracts is different than the purpose and function of the implied covenant of good faith and fair dealing in employment contracts. The distinction is illusory. The court explained, "Under the implied covenant of good faith applied in Resource Management, the parties to a contract are deemed to intend that the terms of a contract should be construed in a manner which assumes the parties intended that the duties and rights created by the contract should be performed and exercised in good faith." Brehany, Slip Opinion at 8.

The court presented no evidence to suggest, however, that the parties to an employment contract intend, or should be deemed to intend, anything less.

Another justification for the court's holding, and probably the lynch-pin of its argument, is that by implying a good faith covenant in an at-will employment contract, the court will create a good cause standard for all employers. The court stated, "The covenant of good faith recognized in Resource Management cannot be construed to change an indefinite-term, at-will employment contract into a contract that requires an employer to have good cause to justify a discharge." This writer agrees. However, the existence of an implied-in-law covenant of good faith and fair dealing does not lead, a fortiori, to the conclusion that employers can only terminate for good cause.

Admittedly, the court may have been compelled to reach this non sequitur due to the plaintiff's overreaching in arguing that Resource Management requires an employer to discharge an indefinite-term employee only for good cause.

Traditionally, the employment-at-will doctrine gave the employer freedom to terminate an at-will employee "for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong." Payne v. Western & Allegheny Railroad Co., 81 Tenn. 507, 519-520 (1884) (overruled on other grounds), Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915). The most troubling aspect of the doctrine is that portion which allows a termination "for cause morally wrong" or "in bad faith." The Brehany decision does not adequately address the bad faith issue.

In Fortune v. Nat'l Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1971), the employer fired the plaintiff, a long-term employee, solely to prevent him from receiving the commission on a five million dollar (\$5,000,000.00) sale on which his commission would have been over ninety thousand dollars (\$90,000.00). Common sense dictates that an employee in that situation should have recourse through the legal system.

Regrettably, however, under the Brehany decision, a Utah employee in the same

circumstance would have no cause of action, absent a showing of additional facts sufficient to fall under one of the other exceptions to the employment-at-will doctrine.

Rather than allow employers to terminate employment in bad faith, this court should adopt a holding which represents a reasonable compromise for employers and employees. The court in Gram v. Liberty Mut. Ins. Co., 429 N.E.2d 21 (Mass. 1981), adopted such a "middle ground" position. The court correctly noted that the absence of good cause to discharge an employee does not equate with the absence of good faith. The court explained:

"Certainly good cause to discharge an employee would tend to negate the existence of bad faith in the decision to discharge an employee. But termination in the absence of good cause does not establish bad faith, and it is only a factor in determining whether there was fair dealing."

429 N.E.2d at 26-27. Some courts have felt uncomfortable with the vague term "bad faith" and have, therefore, further defined it by holding that "any action by either party which violates, nullifies or significantly impairs any benefit of the employment contract is a violation of the implied-in-law covenant of good faith and fair dealing" Metcalf v. Intermountain Gas Co., 116 Id. 622, 778 P.2d 744 (1989); (citing Wagenseller v. Scottsdale Memorial Hospital, 147 Ariz. 370, 710 P.2d 1025 (1985); Foley v. Interactive Data Corp., 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (1988)). In Metcalf and Wagenseller, the courts held that a "no cause" termination did not breach the implied-in-law covenant of good faith and fair dealing. 778 P.2d at 749, 710 P.2d at 1040-1041.

In Brehany, this court cites to Murphy v. American Home Prod. Corp., 58 N.Y.2d 293, 304-305, 461 N.Y.S.2d 232, 237, 448 N.E.2d 86, 91 (1983). In Murphy, New York joined the very small minority of states in which the courts have left change in the employment-at-will doctrine to the legislature. 448 N.E.2d at 89. Utah, however, has joined the large majority of states in which the courts have recognized that the employment-at-will doctrine was created by judicial fiat and its harsh results should be

mitigated by the courts. See Berube. Thus, in New York, "the law accords the employer an unfettered right to terminate the employment at any time." 448 N.E.2d at 91. But in Utah, the law accords the employer only a rebuttable presumption that the employment is at will. Furthermore, Utah places a substantive limitation on the employer's right to discharge through an implied-in-law covenant that the employee will not be discharged in violation of public policy. Berube at 1051. In New York, it would be inconsistent to adhere to the concept of an unbridled employment-at-will doctrine and at the same time hold an employer to a just-cause standard. In Utah, however, the court has already created exceptions to the employment-at-will doctrine and has placed substantive limitations on the employer's right to discharge. It would not, therefore, be inconsistent for the court to hold that the implied-in-law covenant of good faith and fair dealing prevents an employer from discharging an employee in bad faith.

In Murphy, Judge Meyer's dissent fairly summarizes the impetus' for the movement away from unrestricted application of the employment-at-will doctrine. He said:

The harshness of a rule which permits an employer to discharge with impunity a 30-year employee one day before his pension vests (see United Steelworkers of America, Local Nos. 1617 v. General Fireproofing Co., 464 F.2d 726 (6th Cir. 1972); and Savodnick v. Korvettes, Inc., 488 F. Supp. 822)) or for no other reason than that he filed a compensation claim (2A Larsen Workmens Compensation Law, § 68.36), the bizarre origin of the termination-at-will rule, the change of economic and constitutional philosophy that has occurred since its adoption, the exclusion of a substantial segment of the working community from its effects through "just cause" limitations upon the right to fire resulting from collective bargaining, and the inconsistency of the rule not only with the common law of England and with earlier New York decisions but also with the law of most industrialized countries of the world, have caused an outpouring of judicial and scholarly writings intended to ameliorate, if not abolish, the rule.

448 N.E.2d at 93-94. The primary objective of the movement is to mitigate the harsh results of the doctrine through the legal process and thereby prevent the injustices that

employees have experienced for over 100 years. This point is completely missed by the court's opinion in Brehany. No consideration is given for an employee in a Fortune v. Nat'l Cash Register Co. fact situation. Instead, the court focuses on, what should be a secondary concern, the protection of employer interests.

In sum, this court should hold that the implied-in-law covenant of good faith and fair dealing, which exists in all contracts, including at-will employment contracts, is not breached if an employer terminates an employee for good cause, or for no cause, but is breached if any action by either party violates, nullifies, or significantly impairs any benefit of the employment contract. In the alternative, the court should establish other factors for identifying a bad faith discharge or interpret bad faith on a case-by-case basis.

G. THE TRIAL COURT ERRED IN GRANTING THE BANK SUMMARY JUDGMENT ON HESLOP'S CAUSE OF ACTION FOR VIOLATION OF PUBLIC POLICY, SOUNDING IN TORT.

In Berube, Justices Durham and Stewart recognized the existence of a tort cause of action for violation of the public policy exception to the employment-at-will doctrine. 771 P.2d at 1042. Justice Zimmerman would measure the damages for violation of public policy by contract principles only. 771 P.2d at 1051. Justices Howe and Hall were silent on the issue.

In Lowe v. Sorensen Research Co., Inc., supra, Justice Zimmerman, writing for the court, noted that in Berube, "We refused to recognize a variety of wrongful discharge actions sounding in tort." 779 P.2d at 670.

In Peterson v. Browning, No. 400401 (Utah undecided), Honorable Thomas Greene of the United States District Court for the District of Utah, Northern Division, certified the question of whether a public policy violation sounds in tort or contract to this court. No opinion has been rendered to date.

This court apparently acknowledges that a clear majority of the jurisdictions in the United States recognize the public policy exception to the employment-at-will doctrine.

Hodge v. Gibson Prod. Co., 158 Utah Adv. Rep. 6, 17 N. 7, _____ P.2d _____ (Utah 1991). Very few of the jurisdictions that recognize the public policy exception have held that it sounds in contract. See, e.g., Johnson v. Kreiser's, Inc., 433 N.W.2d 225 (S.D. 1988); Sterling Drug Co. v. Oxford, 743 S.W.2d 380 (1988); and Brockmeyer v. Dunn & Bradstreet, 113 Wis.2d 561, 335 N.W.2d 834 (1983).

One explanation for the large number of jurisdictions that recognize a tort cause of action for violation of public policy is that these courts realize that contract damages may not deter employer misconduct. The purpose of the public policy exception is to prevent employers from discharging employees for cause "morally wrong". Without the threat of tort damages, some employers may simply accept the risk of suit and continue terminating employment in the most egregious of manners. In that case, society's efforts to stop this type of reprehensible behavior would be thwarted.

Justice Zimmerman's inference in Berube that the imposition of "Beck" damages will solve the problem may work in theory but not in practice. 771 P.2d at 1051. Trial courts will be hesitant to award "soft damages", e.g., for mental anguish, under the Beck standard. Such damages, however, could conceivably be awarded in every applicable case under the tort standard. This case is a prime example that trial courts are hesitant to apply "Beck" damages.

This court should hold that in Utah the cause of action for violation of public policy sounds in tort.

H. THE TRIAL COURT ERRED IN DISMISSING HESLOP'S CAUSE OF ACTION FOR VIOLATION OF PUBLIC POLICY, SOUNDING IN CONTRACT.

The trial court in this case dismissed Heslop's cause of action for violation of public policy primarily because Berube states, "We will construe public policies narrowly and will generally utilize those based on prior legislative pronouncements or judicial decisions, applying only those principles which are so substantial and fundamental that

there can be virtually no question as to their importance for promotion of the public good." 771 P.2d at 1043. Admittedly, Heslop was not asked to prepare or sign false call reports. He was, however, a member of the OEC which recommended to the DEC that the accrual problem should be remedied over time. By resolving the problem over time, false entries were necessarily made in the Bank's accounts and false call reports were filed with the Commissioner of Financial Institutions. Heslop was in jeopardy of being charged with a third-degree felony because knowledge could have been imputed to him by virtue of his membership on the OEC. UCA § 7-1-318(1).

The Bank deceptively obtained Heslop's personal notes during the Attorney General investigation in the fall of 1982. At least part of the reason for terminating Heslop's employment may have been the content of these notes. Heslop's personal notes were subpoenaed by Beutler in August 1983. Timmons likely reviewed Heslop's notes within a month of issuing his 9/29/83 memorandum revoking Heslop's lending authority. Furthermore, Heslop's compliance with the Beutler subpoena may have been another basis for his wrongful termination.

The fact that Browning did not request Heslop's resignation during their meeting in January 1983 was another reason the court gave in dismissing Heslop's claim for violation of public policy. The trial court concluded that this was an intervening event that severed any causal relationship between prior events and Heslop's termination. Browning testified, however, that he did not request Heslop's resignation because he wanted to avoid the turnover in key personnel at a critical time for the Bank. (Tr. 998-999, 1311-1312) Browning may have just been waiting for a more opportune time.

The jury should have been allowed to decide whether any of the above-mentioned events constituted a violation of public policy. The problem confronting the trial court was accurately stated in Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980).

The issue then becomes the familiar common-law problem of deciding where and how to draw the line between claims that genuinely involve the mandates of public policy and are actionable, and ordinary disputes between employee and employer that are not. We are mindful that courts should not lightly intervene to impair the exercise of managerial discretion or to foment unwarranted litigation. We are, however, equally mindful that the myriad of employees without the bargaining power to command employment contracts for a definite term are entitled to a modicum of judicial protection when their conduct as good citizens is punished by their employers.

427 A.2d at 387-388. In Berube, Justice Durham wrote, "Some courts have recognized that the nature and scope of 'substantial public policies' upon which the exception is based are not always so easily discerned. In fact, a precise definition of public policy may be virtually impossible." 771 P.2d at 1042. The solution to this problem is identified in Cloutier v. Great Atlantic & Pac. Tea Co., 436 A.2d 1140 (N.H. 1981).

The existence of a "public policy" also calls for the type of multi-faceted balancing process that is properly left to the jury in most instances. The First Circuit Court, in the context of a negligence action, described the role the jury plays when reasonable persons could differ as to the inferences to be drawn from facts: "[I]t is deemed wise to obtain the judgment of the jury, reflecting as it does the earthy viewpoint of the common man--the prevalent sense of the community" Marshall v. Nugent, 222 F.2d 604, 611 (1st Cir. 1955). We believe it best to allow the citizenry, through the institution of the American jury, to strike the appropriate balance in these difficult cases.

436 A.2d at 1145. In the case sub judice, the trial court made a last-minute decision to dismiss the public policy cause of action. The court should have resolved any doubt about whether to send the issue to the jury in Heslop's favor.

In Wagner v. City of Globe, 150 Ariz. 82, 722 P.2d 250 (1986), the plaintiff alleged that he was terminated from the police force because he refused to conceal the illegal arrest and detention of a Mr. Hicks. Wagner called the illegal arrest and detention to the attention of the police chief and city magistrate. Had Wagner acquiesced in the illegal detention, he may have been personally liable to Hicks.

The facts in Wagner are analogous to the facts in this case. Heslop asked questions about the accrual problem and called it to the attention of the Chairman of the Board of Directors. Heslop unwillingly risked being charged with a third-degree felony due to his position on the OEC. He proposed that the problem be resolved immediately and vehemently objected to the Bank's decision to correct the problem over time.

The Wagner court identified four different factual patterns that have been collected under the same general rubric of "public policy." 722 P.2d at 256. The court concluded that the Wagner case fell in the "whistle-blower" category. In reversing the summary judgment for the employer, the court said:

We believe that whistle-blowing activity which serves a public purpose should be protected. So long as employees' actions are not merely private or proprietary, but instead seek to further the public good, the decision to expose illegal or unsafe practices should be encouraged.

722 P.2d at 257. Heslop's effort to have the Bank resolve the accrual problem with a one-time charge to undivided profits was in depositors' and the public's best interests. This fact gains greater significance when viewed in light of the recent turmoil in the banking and savings and loan industries in this country.

In Johnson v. World Color Press, Inc., 101 Ill. Dec. 251, 147 Ill. App. 3d 746, 498 N.E.2d 575 (Ill. App. 5 Dist. 1986), the plaintiff was a senior vice president and chief financial officer of the defendant. Plaintiff claimed that he was discharged in retaliation for opposing certain accounting practices of the defendant which constituted violations of federal securities laws. The practices did not conform with generally-accepted accounting principles, the effect of which was to overstate the 1981 income of defendant. The court noted that Title 18, § 1001, United States Code "establishes a clearly mandated public policy against deceptive practices aimed at frustrating or impeding legitimate functions of government departments or agencies." 498 N.E.2d at 577-578. UCA § 7-1-318 also establishes such a public policy. "An employee with a reasonable belief that illegal

activity is occurring should be able to report his belief to his superiors in an effort to insure management's compliance with the law without fear of discharge." [citation omitted] 498 N.E.2d at 578. The court in Johnson concluded:

In summary, we find that public policy favors full disclosure, truthfulness and accuracy in the financial reports made by businesses to the government and to the public, and that an employee who voices objection to practices which he reasonably believes violate this policy should be protected from being discharged as a result of such objection.

Id. See also Johnson v. Kreiser's, Inc., supra (The plaintiff, a company accountant, was discharged solely because he prevented the defendant's president and chairman of the board of directors from converting defendant's property to his own personal use.); Delany v. Taco Time Int'l, 297 Or. 10, 681 P.2d 114 (1984) (Plaintiff was fired for refusing to sign a false and possibly tortious statement that cast aspersions on the work habits of a former employee.); and Harlis v. First Nat'l Bank in Fairmont, 289 S.E.2d 692 (W. Va. 1982) (Bank officer was temporarily demoted and then fired for reporting illegal bank practices to the board of directors and otherwise attempting to require the bank to comply with federal and state laws.).

The fact that Heslop did not actually provide his personal notes and other evidence to the Attorney General or Department of Financial Institutions, and the fact that the Attorney General declined to prosecute the Bank or its Officers and Directors are not fatal to Heslop's claim of a public policy violation. See Johnston v. Del Mar Dist. Co., 776 S.W.2d 768, 771-772 (Tex. App.-Corpus Christi 1989); McQuary v. Belaire Convalescent Home, Inc., 69 Or. App. 107, 684 P.2d 21, 23, Fn. 5 (1984); Johnson v. World Color Press, Inc., supra at 578.

This court should reverse the trial court's dismissal of Heslop's claim for violation of public policy.

VII.

CONCLUSION

Heslop respectfully requests this court to affirm the jury verdict and judgment of the trial court on his cause of action for breach of an implied-in-fact contract of employment terminable only for good cause. Additionally, Heslop requests this court to remand the case to the trial court with instructions to award Heslop consequential damages in the amount of his attorney fees.

If this court decides that Heslop's cause of action for violation of public policy sounds in tort, Heslop requests that the case be remanded for a determination of whether the Bank violated public policy and if so, what amount of additional damages Heslop incurred, and whether punitive damages should be awarded.

DATED this ____ day of June, 1991.

RONALD E. GRIFFIN
Attorney for Ivan J. Heslop

CERTIFICATE OF HAND-DELIVERY

I hereby certify that four true and correct copies of the foregoing Brief of Appellee Ivan J. Heslop were hand-delivered this ____ day of June, 1991, to:

Glen C. Hanni, Esq.
Stuart H. Schultz, Esq.
600 Boston Building
Salt Lake City, UT 84111

ADDENDUM INDEX

- A. U.C.A. Section 7-1-318.
- B. Order and Judgment dated July 10, 1989.
- C. Partial Summary Judgment dated May 22, 1990.
- D. Order on Defendant's Motion in Limine dated June 13, 1990.
- E. Judgment on the Verdict dated August 27, 1990.
- F. Order dated October 16, 1990, Denying the Bank's Motion for J.N.O.V. or, in the alternative, for a New Trial.
- G. Heslop's Notice of Cross-Appeal dated November 21, 1990.
- H. Trial Transcript, Page 293, regarding Heslop's testimony that the Bank promised him employment until retirement, not for a fixed term.
- I. Trial Transcript, Page 296, showing that the Bank's counsel suggested Heslop intended to retire at age 65.
- J. Exhibit 39, Pages 11-16, Heslop's personal notes relating to his meetings with Bank counsel, Robert Moore, Wayne Black, and Paul Kunz.
- K. Exhibit 92, David Kunz billing statement for October 1982 relating to monitoring of Heslop and strategy to use Timmons to abate the Attorney General's investigation.
- L. Trial Transcript, Pages 1562, 1563, 1565 containing Heslop's argument for an instruction on consequential damages and the Court's denial of Heslop's request.
- M. Rule 61 U.R.C.P.

ADDENDUM A

7-1-318. Reports of condition — Minimum number required — Form — Verification — Publication — Falsification or failure to file.

The commissioner shall make not less than two calls annually for report of condition upon each depository institution under the jurisdiction of the department. The report shall be made according to the form prescribed by the commissioner and shall be verified by the oath or affirmation of the president or a vice president and attested by at least three directors. Except as provided in Chapter 9 with respect to publishing or mailing reports of credit unions, a copy of the report, duly certified by the commissioner, shall be published by the institution making the report in a newspaper having general circulation in the county where the principal office of the institution is located. Proof of publication shall be filed in the office of the commissioner within 30 days after the time of receipt by the institution of the copy certified by the commissioner. The commissioner may require a report of condition of any financial institution under the jurisdiction of the department whenever he considers it necessary.

(1) Any officer, director, or employee of a financial institution who knowingly subscribes or causes to be made any false statement or report to the commissioner or the supervisor having jurisdiction over that institution or any false entry in the books or accounts of the institution or knowingly subscribes or exhibits false papers with intent to deceive any person authorized to examine the institution or knowingly states or publishes any false report or statement of the institution is guilty of a felony of the third degree.

(2) Every institution which fails or neglects to make a report within 30 days after receipt of a call for any report required by the provisions of this title, an order of the commissioner, or any regulation of the department shall be subject to such penalty for each day's delay in transmitting such report as the commissioner may prescribe by regulation.

(3) Every officer and employee of a financial institution under the jurisdiction of the department required by law to take an oath or affirmation who wilfully swears falsely, is guilty of the criminal offense of perjury.

ADDENDUM B

JUL 13 9 15 AM '89

Glenn C. Hanni #A1327
Stuart H. Schultz #2886
STRONG & HANNI
Attorneys for Defendant
600 Boston Building
Salt Lake City, Utah 84111
Telephone: 532-7080

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

IVAN J. HESLOP,)	
)	
Plaintiff,	)	ORDER AND JUDGMENT
)	
vs.	)	Civil No. ^{470A} CV-99381
)	
BANK OF UTAH, a Utah)	
banking corporation,)	
)	
Defendant.	)	JUL 13 1989
)	

Defendant's motion for summary judgment was heard by the Honorable David E. Roth, District Judge, on June 7, 1989. Glenn C. Hanni and Stuart H. Schultz of the law firm of Strong & Hanni appeared on behalf of defendant, and Ronald E. Griffin of the law firm of Freestone & Griffin appeared on behalf of plaintiff. The court, having considered the motion, memoranda, and pleadings, and further having considered oral argument of the parties, now, therefore;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. The Utah Supreme Court's decision in Berube v. Fashion

Centre, Ltd, _____ P.2d _____ (Utah 1989), 104 U.A.R. 4,
shall be applied retroactively to the claims involved in this
case;

2. Defendant's motion for summary judgment with respect to
plaintiff's claims of breach of implied-in-fact contract and
contractual wrongful discharge, including the claim of a public
policy violation, is denied;

3. Defendant's motion for summary judgment with respect to
plaintiff's fifth cause of action for tortious wrongful discharge
is taken under advisement by the court, and the court reserves
ruling on the issue of whether a claim by plaintiff of a public
policy violation by defendant constitutes a tort claim or a
contract claim until the time of pre-trial of the case, and the
parties are allowed to submit briefs to the court on that issue
prior to the pre-trial, all subject to any clarifying decision(s)
issued by the Utah Supreme Court on this issue between the date
of this order and the date of pre-trial;

4. Defendant's motion for summary judgment as to all
plaintiff's remaining causes of action is granted, and judgment
dismissing said causes of action, with prejudice, on the merits,
shall be entered.

Pursuant to the foregoing order of the court, and good cause
appearing, now, therefore;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. That judgment of no cause of action is hereby entered in favor of defendant and against plaintiff on plaintiff's second cause of action for promissory estoppel and plaintiff's third cause of action for breach of implied-in-law covenant of good faith and fair dealing on the grounds that such causes of action in the context of an employee's wrongful discharge claim are not recognized, as a matter of law, in the state of Utah;

2. That judgment of no cause of action is hereby entered in favor of defendant and against plaintiff on plaintiff's sixth cause of action for intentional infliction of emotional distress on the grounds that there is no genuine issue of material fact with respect to such cause of action and that reasonable persons could not differ on the conclusion that the undisputed facts show plaintiff has no cause of action for intentional infliction of emotional distress; and

3. Plaintiff's second cause of action, third cause of action, and sixth cause of action are hereby dismissed, with prejudice, on the merits.

DATED this 10 day of June, 1989.

BY THE COURT

By

Honorable David E. Roth
District Judge

APPROVED AS TO FORM:

Ronald E. Griffin 6-29-89
Ronald E. Griffin
Freestone & Griffin
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the
foregoing Order and Judgment was mailed, postage prepaid, this
28 day of June, 1989, to the following:

Ronald E. Griffin
Freestone & Griffin
50 West 300 South #900
Salt Lake City, Utah 84101
Attorneys for Plaintiff

M. Jupp

ADDENDUM C

Mar 23 3 07 PM '99

Glenn C. Hanni #A1327
Stuart H. Schultz #2886
STRONG & HANNI
Attorneys for Defendant
600 Boston Building
Salt Lake City, Utah 84111
Telephone: 532-7080

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH, 1999
MAR 23

IVAN J. HESLOP,)	
)	
Plaintiff,	)	PARTIAL SUMMARY JUDGMENT
)	
vs.)	
)	
BANK OF UTAH, a Utah)	
banking corporation,	)	7/09 Civil No. CV-99381
)	
Defendant.)	
)	

Defendant's motion for partial summary judgment with respect to plaintiff's fifth cause of action for tortious wrongful discharge was submitted for decision by the court pursuant to Rule 4-501, Utah Code of Judicial Administration. Neither party requested oral argument.

The court having considered the motion and memoranda filed by defendant as well as the memorandum filed in opposition to the motion by plaintiff, and the court being advised in the premises, now, therefore:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Defendant's motion for partial summary judgment with

respect to plaintiff's fifth cause of action for tortious wrongful discharge is granted on the grounds that under the Utah Supreme Court case of Lowe v. Sorensen Research Co., Inc., 779 P.2d 688 (Utah 1989), the public policy exception to the at-will employment doctrine is not the basis for a tort claim.

2. Judgment is hereby entered in favor of defendant and against plaintiff dismissing plaintiff's fifth cause of action for tortious wrongful discharge, with prejudice, on the merits, no cause of action, including all claims for tort damages and punitive damages.

3. If the Utah Supreme Court issues a decision before trial of this case which either clarifies or confuses the tort issue in the context of employment at-will claims, plaintiff may move for reconsideration of this decision.

DATED this 22 day of May, 1990.

BY THE COURT:

By 

Honorable David E. Roth
District Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Partial Summary Judgment was mailed, postage prepaid, on May 7, 1990, to the following:

Ronald E. Griffin
Freestone & Griffin
50 West 300 South #900
Salt Lake City, Utah 84101

M. Supplee

ADDENDUM D

of the Utah Rules of Evidence.

The court having considered the motion and memoranda filed by defendant as well as the response filed by plaintiff, and having heard the arguments of respective counsel, and being advised in the premises, now, therefore,

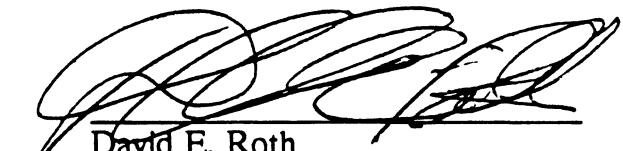
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Defendant's Motion in Limine is denied on the grounds that the evidence defendant sought to exclude appears to the court to be relevant evidence, and neither rule 401 nor rule 403 of the Utah Rules of Evidence would be a proper basis for excluding said evidence.

2. The court suggests that both counsel focus their examinations relating to the accrual problem and investigations in order to avoid any unnecessary delay in the presentation of this evidence at trial.

Dated this 13 day of June, 1990.

BY THE COURT:

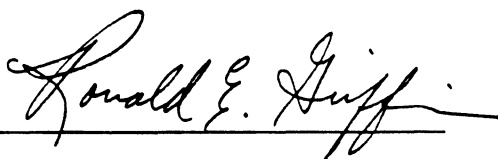


David E. Roth
Second District Court

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing ORDER ON DEFENDANT'S MOTION
IN LIMINE was mailed this 4 day of June, 1990, to:

Glenn C. Hanni, Esq.
Stuart H. Schultz, Esq.
STRONG & HANNI
Sixth Floor Boston Building
Salt Lake City, Utah 84111



ADDENDUM E

AUG 28 11 - 11 1990

RONALD E. GRIFFIN (4584)
FREESTONE & GRIFFIN
Attorney for Plaintiff
Valley Bank Tower
50 West 300 South, Suite 900
Salt Lake City, UT 84101
Telephone: (801) 322-1500

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

IVAN J. HESLOP,)	
	)	JUDGMENT
Plaintiff,)	
)	
vs.)	
	)	870999381 AUG 28 1990
	)	Civil No. 870999381
BANK OF UTAH, a Utah	)	Honorable David E. Roth
banking corporation,)	
)	
Defendant.)	

The above-entitled matter came before the Honorable David E. Roth for jury trial on Monday, July 16, 1990, at the hour of 9:30 a.m. The Court concluded nine days of trial on August 1, 1990. Plaintiff, Ivan J. Heslop, was present at trial and was represented by his counsel of record, Ronald E. Griffin. Defendant, Bank of Utah, appeared through its designated representatives, Roy Nelson and Roderick Browning, and was represented by its counsel of record, Glenn C. Hanni and Stuart H. Schultz, of the law firm of Strong & Hanni. Sworn testimony was

Indexed

taken from witnesses called by both parties to this action and numerous exhibits were introduced into evidence. The jury rendered a special verdict through answers to interrogatories propounded by the Court.


Now, therefore, it is hereby,

ORDERED, ADJUDGED AND DECREED:


Plaintiff is awarded a judgment against defendant for general damages in the amount of \$160,000.00 together with costs, to the date of judgment, in the amount of \$ 1,157.78, plus post-judgment interest thereon at the legal rate of 12% per annum from the date of entry until paid.

DATED this 27 day of August, 1990.

BY THE COURT:


David E. Beth
Second District Court

Form approved by


STRONG & HANNI

ADDENDUM F

OCT 13 2 00 PM '90

Ronald E. Griffin (4584)
FREESTONE & GRIFFIN
Attorney for Plaintiff
Valley Bank Tower
50 West 300 South, Suite 900
Salt Lake City, Utah 84101
Telephone: (801) 322-1500

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

IVAN J. HESLOP,
Plaintiff,

vs.

BANK OF UTAH, A Utah
Banking Corporation,
Defendant.

)
)
)
)
)
)
)
)
)
)

ORDER

Case No. 87-099381-CV
Judge David E. Roth

OCT 16 1990

Defendant's MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT,
OR IN THE ALTERNATIVE, FOR A NEW TRIAL came before the court for hearing on
Wednesday, October 3, 1990, at the hour of 10:30 a.m. Plaintiff was present and
represented by counsel of record, Ronald E. Griffin. Defendant's Chairman of the Board
of Directors, Roderick Browning, and President, Roy Nelson, were present and defendant
was represented by counsel of record Glenn C. Hanni. The court reviewed the extensive
memoranda filed by counsel and heard oral argument from respective counsel. The court
being fully advised in the premises, now, therefore, it is hereby,

ORDERED, ADJUDGED, AND DECREED:

1. In compliance with Rule 52(a), U.R.C.P., the grounds for the court's decision are:

- a. The instructions to the jury at trial were adequate and appropriate.
- b. The court is persuaded by the caselaw that holds that an implied in fact contract in a wrongful termination of employment case is not a violation of the Statute of Frauds.
- c. Evidence of the accrual problem, the investigations of the bank, and Thomas Timmon's hiring, all of which occurred within two years of plaintiff's discharge, was relevant to the case and not outweighed by prejudice to the defendant.
- d. The intervening event of Roderick Browning's negative response in January, 1983, when plaintiff asked if Browning would like him to submit his resignation, applied more to the public policy issue than to the remaining issues in the case.
- e. Plaintiff opposed, and was sometimes critical of, several of management's decisions during 1981 and 1982 which affected his standing with management. The jurors had to be made aware of these facts before they could make a reasonable decision on the issue of constructive discharge.
- f. There was substantial evidence to support the jury's finding of an implied in fact contract. Several senior bank officers testified that bank policy was to terminate employment only for just cause. The employment application signed by new employees at the bank did not rise to the dignity of an employment contract. Moreover, there was an

intervening quit and rehire of plaintiff.

g. There was substantial evidence to support the jury's finding that plaintiff's employment was not terminated for just cause. The jurors could have reasonably concluded that the firing of a bank employee with over 20 years experience for making one bad loan is not just cause for dismissal.

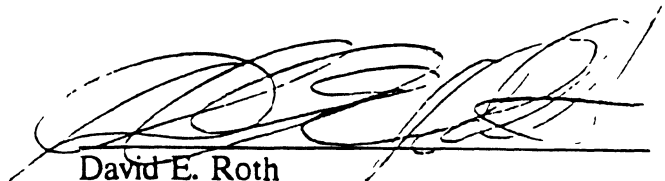
h. There was ^{substantial} ~~substantial~~ evidence to support the jury's finding of constructive discharge. The jurors could have reasonably concluded that Heslop's opposition to management decisions caused them to dislike him and consequently he was demoted and asked to resign. The jurors also could have concluded that plaintiff was asked to resign for making the Gabbert loan.

i. Plaintiff's counsel's misstatement of the Ronald Draughon testimony in closing argument was not significant enough to make a difference in the case. Defendant's counsel could have objected to the misstatement but did not.

2. Defendant's MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, FOR A NEW TRIAL is denied.

Dated this 16 day of October, 1990.

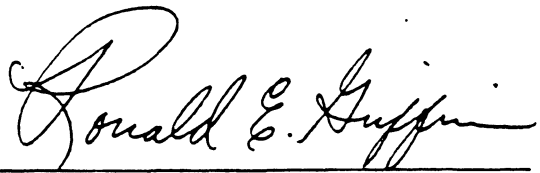
BY THE COURT:


David E. Roth
Second District Court

CERTIFICATE OF DELIVERY

I hereby certify that I hand-delivered a true and correct copy of the foregoing
ORDER this 5 day of October, 1990, to:

Glenn C. Hanni, Esq.
Stuart H. Schultz, Esq.
STRONG & HANNI
600 Boston Building
Salt Lake City, Utah



ADDENDUM G

Ronald E. Griffin (4584)
Attorney for Ivan J. Heslop
The Valley Tower
50 West 300 South, Suite 900
Salt Lake City, Utah 84101
Telephone: (801) 322-1500

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

IVAN J. HESLOP,)	
)	
Plaintiff, Appellee	)	NOTICE OF CROSS-APPEAL
and Cross-Appellant,)	
)	
vs.)	
	)	Case No. 87-0999381-CV
BANK OF UTAH, A Utah)	
Banking Corporation,	)	Judge David E. Roth
)	
Defendant, Appellant)	
and Cross-Appellee.	)	Nov 26 1990

Pursuant to Rules 3 and 4 of the Utah Rules of Appellate Procedure, Plaintiff, Appellee and Cross-Appellant, Ivan J. Heslop, hereby gives notice that he appeals certain orders of the above-entitled court made final by the judgment signed on August 27, 1990 and entered on August 28, 1990. This appeal is taken from the Second Judicial District Court of Weber County, State of Utah to the Utah Supreme Court.

Dated this 21 day of November, 1990.



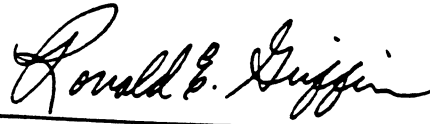
Ronald E. Griffin



CERTIFICATE OF DELIVERY

I hereby certify that a copy of the foregoing NOTICE OF CROSS-APPEAL was hand-delivered on the 21 day of November, 1990, to:

Glenn C. Hanni
Stuart H. Schultz
STRONG & HANNI
600 Boston Building
Salt Lake City, Utah 84111



ADDENDUM H

1 A No.

2 Q You knew that you could be terminated when you
3 left? I am talking about 1959. You knew you had signed
4 a contract that said you could be terminated at the will
5 of the bank. And that their only obligation was to pay
6 you through the last day you worked. You understood
7 that, didn't you?

8 A I don't know when the concept that the policy
9 would be that we would be promoted from within, and we
10 would only be fired for cause came in, whether it was
11 before or after I left. So I would have to reserve my
12 answer to say it may have been prior to my leaving the
13 first time. But that definitely was a part of the
14 conversation and the understanding upon my being hired
15 back to the bank.

16 Q That was part of the understanding that you
17 would be--that there would be promotions from within, is
18 that what you are saying?

19 A That's one of the items I mentioned, yes.

20 Q And were you--when you were rehired in 1962,
21 did anybody connected with the Bank of Utah say to you
22 we are going to hire you for six months, a year, six
23 years, ten years; any fixed period of time?

24 A No. I was rehired for a career, until
25 retirement.

ADDENDUM I

1 The bank was growing, and so that they were happy to
2 have me employed again at the Bank of Utah.

3 Q And this is what Beutler said to you?

4 A In substance. It was Beutler making most of
5 the comments, most of the discussion as I recall.

6 Q And so your understanding was when you went
7 back to work in 1962 that you were hired until you
8 retired, unless there was good cause to discharge you,
9 is that right?

10 A Or major reduction in force that would also
11 include me, yes.

12 Q And at that time you intended to retire at what
13 age, 65?

14 A That was the standard, the expected age of
15 retirement then, yes.

16 Q And so it was your feeling and belief that you
17 had been hired until you retired at age 65, unless there
18 was just cause to terminate you?

19 A Yes.

20 Q Now when you started back at the bank in 1962,
21 I believe you said you started as a commercial loan
22 officer and an installment loan officer, is that correct?

23 A A loan officer in general, which would include
24 both departments, yes.

25 Q Did there ever--what was the Bank of Utah--what

ADDENDUM J

III

Mr. Petty of A. G. office said to tell me "Don't lose your notes. We don't want another Dan Wintergate." Said who told him I had any notes, I have never talked to him.

9/23 Mr. Hines of A. G. office called saying they had received authorization to issue subpoenas and wanted to verify names of Neely, Peck & Reddy will be served.

10/11 I returned call to Atty Robert Moore's home. He asked me to meet at his office tomorrow - at 4:30.

10/12 Atty Moore "I have been retained by the Bank of Utah to represent the bank and its officers in the Attorney General's investigation. Before we start will you be representing me all the way or could there be a conflict of interest?" I don't think that will happen.

Let me tell you how we are approaching the case. I have talked to Tom Timmons, CPA this afternoon. We feel there is a great deal of confusion about how to handle the situation. We are not disputing that the call report was wrong, but no one really knew the significance of it and there was no intent to defraud. No money was taken, no depositor was denied his funds. It was just an error under Beutler's Control and he handled it in his own way.

Moore "What about ignorance of the law... What about the financial institution's book p. 174 + false call reports or false entries in the books?"

Moore "That's the approach we are taking if the A. G. will cooperate. If he won't, he could take the position of charging everyone who had knowledge of the events with criminal intent. Do you understand what I said, this is very important."

Moore "yes they could claim that we are all guilty of misapplying But it did not agree with the solution used. I did not make false entries and I didn't sign any false statements."

Mr. Petty of A.G. office said to tell me "don't lose your notes. We don't want another damn Watergate." I said who told him I had any notes. I have never talked to him.

9/23 Mr. Hines of A.G. office called saying they had received authorization to issue subpoenas and wanted to verify names of Heslop, Packer & Kennedy who will be served.

ore) 10/11 I returned call to Atty Robert Moore's home. He asked me to meet at his office tomorrow at 4:30.

10/12 Atty Moore "I have been retained by the Bank of Utah to represent the bank and its officers in the Attorney General's investigation." Ivan: Before we start will you be representing me all the way or could you have a conflict of interest." Moore: I don't think that will happen. Let me tell you how we are approaching the case. I have talked to Tom Timmons, CPA this afternoon. We feel there was a great deal of confusion about how to handle the situation. We are not disputing that the call report was wrong but no one really knew the significance of it and there was no intent to defraud. No money was taken, no depositor was denied his funds. It was just an error under Beutler's control and he handled it in his own way."

Ivan: "What about ignorance of the law. What about the financial institution's law p. 194 7-1-318(1) & (3) & false call reports or false entries in the books."

Moore: "That's the approach we are taking if the A.G. will cooperate. If he won't, he can take the position of charging everyone who had knowledge of the events with criminal intent. Do you understand what I said, this is very important.

Ivan: Yes they could claim that we are all guilty of misrepresentation. But I did not agree with the solution used. I did not make false entries and I didn't sign any false statements. That is why I want an attorney who will represent me all the way.

Moore: I may not be able to do that if each officer has charges against him individually. But again I don't see the need.

Tell me what was said at the A.E. office. Who called? Who was there. ~~(dropped the story of)~~ ~~Did anyone contact you~~ before this? "I'm not sure." Had you talked to anyone else about having information about the ^{TCO} accruals. ~~Did I talk~~ to the examiners Braght & Longbay when they were first in the bank after Bill Deutler had been removed that we were concerned with the TCO expense accrual and the credit loan interest income accrual. I tried to assure them that we had honest, capable people remaining in the bank who could continue its management. I told them I had ~~information~~ ^{information} which I had saved for the county attorney if there were an investigation. This included a copy of the computer print-out, the directors report and the published statement of Condition as of Dec. 31, 1981.

Moore: you have any other notes or personal papers regarding them or have I have made some personal notes. My job had been threatened and I thought I would need to present my case to the Board of Directors. When full disclosure was not made to the complete board of directors I made additional notes as to pertinent information.

Moore: ^{you haven't told me anything that I hadn't already heard from others} I have never told a client to commit perjury. I have never advised a client to destroy evidence. However there is some information the courts don't need. I want you to turn your notes over to me. I'm a lawyer. These are my personal notes and ~~confidential~~ ^{confidential} opinion. ~~and~~ They can affect my report with the other officers I am associated with. I have made the Bank of Utah my career. I would like to continue here. They wouldn't subpoena personal notes from me.

10-12 cont'd

Moore: I may not be able to do that if each officer has charges against him individually. But again I don't see the need for it. Tell me what was said at the A.G. office. Who called. Who was there. (I repeated the story) Did anyone contact you before this. Ivan: "No" Moore: "Had you talked to anyone else about having information about the PCD accruals. Ivan: I talked to the examiners Draughon & Sangberg when they were first in the bank after Bill Beutler had been removed that we were concerned with the PCD expense accrual and the Com'l loan interest income accrual. I tried to assure them that we had honest, capable people remaining in the bank who could continue its management. I told them I had information which I had saved for the county attorney if there were an investigation. [This included a copy of the computer printout, the directors report and the published statement of Condition as of Dec. 31, 1981]

Moore: Do you have any other notes or personal papers regarding these events.

Ivan: I have made some personal notes. My job had been threatened and I thought I would need to present my case to the Board of Directors. When full disclosure was not made to the complete board of directors I made additional notes as to pertinent information.

Moore: You haven't told me anything that I hadn't already heard from others. I have never told a client to commit perjury. I have never advised a client to destroy evidence. However, there is some information the courts don't need. I want you to turn your notes over to me. Ivan: "Why? these are my personal notes and opinion. They could affect my rapport with the other officers I ~~was~~^{am} associated with. I have made the Bank of Utah my career. I would like to continue here. They wouldn't subpoena personal notes would they?

Moore: They could unless they were in the hands of your

Cont.

attorney.

Swan: That hardly seems fair. What kind of law is that anyway.

Moore: It protects the attorney-client relationship similar to the Bishop, Priest or Rabbi or husband & wife cannot be compelled to testify against you. You see why I want these papers.

Swan: Are you my attorney all the way in this?

Moore: I told you I cannot guarantee that. If you don't feel comfortable with ^{this} you had better get yourself an attorney before Friday. Mr. Drake has given us until then to appear with Parker, Kennedy & you or they will issue subpoenas. We don't want that.

Swan: Can't we voluntarily appear for interviews, but not submit any written material this Friday?

Moore: You don't believe what I am telling you anyway. You better get yourself an attorney.

Swan: Ok. If you're going to be that way - I didn't say I didn't believe you. I just feel that my records should be in my hands or my attorney and not in the hands of someone who could later use them against me. I don't have a personal attorney, I don't know.

Moore: I suggest you call Paul King for a recommendation of an attorney & verify what I have told you.

10/13 I discussed this matter extensively with Paul King. He assured me that my papers were under my control, that my attorney is requested to keep my information confidential & return it to me if I request and that he could not use info that had given him confidence against me in behalf of another client.

10/14 Paul King came in the director's room where we were about to begin our case conference with the head of several Wayne Black wants to meet with me & Paul King in his office at 11 AM. We left immediately & met with attorney Black who requested his law firm for representing the Bank and its officers at the time of our investigation at the attorney General's office tomorrow. I am willing to agree to interview beginning with Tom Timmons of Paul Korman & Mitchell SAs. Later with Bank officers if needed. But Mr. Black would be surprised. We plan to show there was an error, agreed to of comprehension, difference of opinion as to how to handle the problem. The problem has been addressed the way requested, great effort intended to induce capital no more was taken.

10-12- 82 cont'd

attorney.

Ivan: That hardly seems fair. What kind of law is that anyway.

Moore: It protects the attorney-client relationship similar to the Bishop, Priest or Rabbi or husband and wife cannot be compelled to testify against you. You see why I want those papers.

Ivan: "Are you my attorney all the way in this?

Moore: I told you I cannot guarantee that. If you don't feel comfortable with this you had better get yourself an attorney before Friday. Mr. Drake has given us until then to appear with Packer, Kennedy & you or they will issue subpoenas. We don't want that.

Ivan: Can't we voluntarily appear for interviews but not submit any written materials this Friday?

Moore: You don't believe what I am telling you anyway. You better get yourself an attorney.

Ivan: Okay if your going to be that way - I didn't say I didn't believe you. I just feel that my records should be in my hand or my attorney and not in the hands of someone who could later use them against me. I don't have a personal attorney. I don't know who to use. *ASK*.

Moore: I suggest you call Paul Kunz for a recommendation of an attorney & verify what I have told you.

10/13 I discussed the matter extensively with Paul Kunz. He assured me that my papers were under my control that my attorney is required to keep my information confidential & return it to me if I request and that he couldn't use info I had given him in confidence against me in behalf of another client.

10/14 Paul Kunz came in the directors room 10:30 am when we were about to begin our Exec Com meeting with Rod & said Wayne Black wants to meet with me & Paul Kunz in his office at 11:am. We left immediately & met with atty. Black who reviewed his plan for representing the Bank and its officers at the mini Grand Jury investigation at the Attorney General's office tomorrow: Phase I we willingly agree to interviews beginning with Tom Timmons of Pete Marwick & Mitchell CPA's. Later with Bank officers if needed but no records would be submitted. We plan to show there was an error in accounting, a great deal of confusion, differences of opinion as to how to handle the problem. The problem has been addressed, the records corrected, great effort extended to infuse capital, no money was taken personally and no depositor has been denied. It is in the best interest of those concerned & the public to drop the investigation here.

(Pages should continue)
191482 cont'd) phase II will be if they (AG's office) insist on an interested investigation.

We will say we advise you later fellows. That type of questioning should only be in Court. At that time we may no longer like to be to represent you. For your papers would be yours and we would not use them against you. I am
regretful

even I may be naive but I will share my notes with you + find under them so I would put in such pertinent to the account and discussion in two columns. The you see they these notes will not support your position and could be damaging to me in dealing with other officers of the bank.

As we were leaving I said I was trying to remain completely separate from this situation and now I feel like I am the defendant.

id/8. Thinking about - said hearing went well at H.C. from. They think AG will compare with a talk to VPK in a few days. He request for me to appear at this time. I have no objection. But I want to go on with our thinking and stop talking about H.C. and try to get about 10:30 am. Bill Bunker called to see if I had happened for the H.C. yet. I have him to do. Even then the last inquiry in which I reflected legal counsel present. However I told this morning by Bill Bunker that the H.C. would probably drop the inquiry and we need to appear. Further we have been advised to stop the thing as soon as the inside the bank or out of it so I could not give him any details. But if it remained the account situation being discussed in the H.C. 4th day. Com. meeting. I told Bill I could not because it is little - then I was in like being in the middle of the inquiry + hoped that to be able to appear before the H.C. I am not trying to get revenge from him or anyone. I ~~only~~ ^{wanted} only to respond as required by law. I am committed to the truth and I remember it. 3:30. John King told me at the Boyer that called the H.C. office today asked for "change in health" for Bill Bunker.

10/14/82 (cont'd) (Wayne Black contin.) Phase II will be if they (A.G. office) insist on an intensive interrogation we will say we'll see you later fellows. That type of questioning should only be in Court. At that time we may no longer be able to represent you. But your papers would be yours and we could not use them against you. Paul Kunz agreed.

Ivan: I may be naive but I will share my notes with you & Paul under those conditions. I read parts which pertain to the accrual acct. discussions in exec. com. mtgs etc. Now you see why these notes will not support your position and could be damaging to me in dealing with other officers of the bank. As we were leaving I said I was trying to remain completely separate from this situation and now I feel like I am the defendant.

10/18 9:00 am. Paul Kunz called. Said hearing went well at A.G. office. They think A.G. will drop case but want to talk to V R K in a few days. No request for me to appear at this time & probably won't be. ^{ones} Rod wants us to go on with our banking and stop talking about A.G. hearing to anyone. About 10:30 am Bill Beutler called to see if I had appeared at the A.G. yet. I told him I had not other than the 1st inquiry wherein I requested legal counsel present. However I was told this morning by Paul Kunz that the A.G. would possibly drop the inquiry & I would not need to appear. Further we have been advised to stop talking about the case inside the bank or out of it so I could not give him any details. He asked if I remembered the accrual situation being discussed in the Dec 4th Dir. Exec. Com. meeting. I told Bill I could not discuss it with him. I did not like being in the middle of the inquiry & hoped not to be asked to appear before the A.G. I am not trying to get revenge ~~from~~ him or anyone else and wanted only to respond as required by law. I am committed to tell the truth as I remember it.

3:30 John Klas told me atty Boice had called the A.G. office today & asked for a "clean bill of health" for Bill Beutler.

X

Oct 92 met with Paul King at Wayne Black's office. Mr Black said he is against
all of the bank officers in meeting with the attorney general's office. The exposure
will be as follows but we don't want any substance. I don't go to the AG's
in an informal unrecorded voluntary atmosphere. If they start asking questions
that are too incriminating we will stop the interview. We will represent that
Mr. Bentler made erroneous entries in the bank's ledger. When it came time
to publish the call report some wanted to say it was wrong over the Mr. Bentler
wanted to correct the error in the succeeding month. I think the bank does
agree to do. We are not representing Mr. Bentler. He has left the bank. He is
the own attorney. He made the erroneous entry. The direction was
on him as the senior bank accountant in making the entries and preparing
the call report.
Q: Now, that's why you don't want me to go to the AG's office with you. You
prefer to appear only by subpoena and with personal legal counsel present.
A: Black: Why not appear voluntarily.
Q: Because Bill Bentler doesn't make the decision alone. The bank maintains
exec. Committee. all even of the disapproval in December before the board of directors
meeting. The decision to not report the disapproval to the full board of directors
or the examination and to say the regular dividend and profit sharing statements
were made with ~~the knowledge~~ by the directors committee with full knowledge of the
shortage which they thought was about \$700,000.
W. Black: Do you have records to that effect. A: I made notes of the committee
and meetings after the disaster exec. Comm. met in presence. So we it was a
serious violation of the Utah Code with possible criminal charges. I do not want
to voluntarily testify against any of the bank officers. I prefer to be subpoenaed
and have the protection of the court as well as my own legal counsel.
I want to protect my position of innocence in the way this matter was handled
without destroying my report with the people for whom I am employed.
W. Black: If you let me show your notes the bank cannot suppress them.
A: I don't intend to withhold information from the court. My notes are of that
kind of a deal anyway. There is no big criminal secret being withheld. (I showed
the notes with Wayne Black & Paul King)
Wayne Black: Let me keep the notes here in my desk for my eyes only and you can
have them back whenever you wish for them. Paul King agreed with this.
A: Maybe I am naive in doing this, but I have full confidence in you
I am trying to cooperate without becoming personally implicated.

Oct 14 '82 Met with Paul Kunz at Wayne Black's office. Mr. Black said he is representing all of the bank officers in meeting with the attorney general's office. The approach will be as follows: 1st we don't want any subpoenas. We will go up to the A.G.'s office in an informal unrecorded voluntary atmosphere. If they start asking questions that are too incriminating we will stop the interview. We will represent that Mr. Beutler made erroneous entries in the bank's ledgers. When it came time to publish the call report some wanted to treat it one way some another. Mr. Beutler wanted to correct the error in the succeeding months which the bank directors agreed to do. We are not representing Mr. Beutler. He has left the bank. He has his own attorney. He made the erroneous entries. The directors relied on him as the senior bank accountant in making the entries and preparing the call report.

Ivan: That's why you don't want me to go to the AG's office with you. I would prefer to appear only by subpoena and with personal legal counsel present.

Black: Why not appear voluntarily?

Ivan: Because Bill Beutler didn't make the decision alone. The Bank directors exec. committee all knew of the discrepancies in December before the December directors meeting. The decisions to not report the discrepancy to the full board of directors or the Gov't examiners and to pay the regular dividend and profit sharing distribution were made by the dir. exec. committee with the full knowledge of the shortage which they thought was about \$700,000.00.

W. Black: Do you have records to that effect. Ivan: I made notes of the conversation and meetings after the directors exec. com. mtg in December. To me it was a serious violation of the Utah Code with possible criminal charges. I do not want to voluntarily testify against any of the bank's officers. I prefer to be subpoenaed and have the protection of the court as well as my own legal counsel. I want to protect my position of innocence in the way this matter was handled without destroying my rapport with the people for whom I am employed.

W. Black: If you let me hold your notes the court cannot subpoena them.

Ivan: I don't intend to withhold information from the courts. My notes aren't that big of a deal anyway. There is no big criminal secret being withheld. (I reviewed the notes with Wayne Black & Paul Kunz)

Wayne Black: Let me hold the notes here in my desk for my eyes only and you can have them back whenever you ask for them. Paul Kunz agreed with W. Black.

Ivan: Maybe I am naive in doing this but I have full confidence in Paul Kunz. I am trying to cooperate without becoming personally implicated.

7-

1. I don't believe you said it was a mistake to represent the interest in conflict of interest. Later on, I will have to say more about it.

Nov. 15, 1982 - Met with Wayne Black + him + his wife at a City Hall office.

Wayne Black to C. Drake: we need to end this investigation right here. There are some powerful people in and around's professional career is at stake. Drake: We are trying to extend professional career to Mr. King & cooperate as much as possible but there is a certain amount of investigation we need. W. Black: We admit there were errors in the call report of 11/3/81. At the time there was confusion among the bank management as to how it should be handled. There is no action wanted to take certain action right now. Others wanted to take a more methodical approach. I don't think any of the directors signed the call report with the intent to defraud. They were acting on the information given them that's true. Look to have any money from Bank. The question of knowingly signing false statements comes down to be interpreted by the state's office for the courts.

11/18/82 - Bill Gentile called. Wanted to verify if had met with AC office. What was the line of questioning. Did I tell them the adverse procedure was changed prior to 11/3/81 by Officer + Directors etc. etc. He has appeared a city ready to file suit against C. Drake if he is not soon cleared. Told him of expressed opinion that there is no signed call report did so with varying degree of knowledge. Not want to be criminally liable. I had withheld some info that I did not want to voluntarily sign. 11/18/82 Ed Brown announced Tom Timmon of First Union with whom is going to be in conflict of Bank of America. 12/23/82 Ed Brown told Ray Jr + I that the AC office has reported to the dept of institutions that their investigation has been closed. When they will give a written statement to this effect is not known but is expected soon. The Tom Timmon

Oct.

Oct met with atty Robert Moore who said he could not commit to represent me all the way through A.G. investigation. He said he wanted my notes. I told him I want an attorney to represent me. Moore: If you don't believe me you better get yourself an attorney & you need one by Friday. Ivan: I didn't say I don't believe you. I said I want an attorney to represent me without a conflict of interest. Later met with Paul Kunz and Wayne Black. [See next page]

Nov 15, 1982 - met with Wayne Black & Hines & Drake at atty Gen's office. Wayne Black to see C. Drake: We need to end this investigation right here. There are some prominent people involved and a man's professional career is at stake. Drake: We are trying to extend professional courtesy to Mr. Kunz & cooperate as much as possible but there is a certain amount of investigation we need to do. W. Black: We admit there were errors in the call report of 12/31/81. At the time there was confusion among bank management as to how it should be handled. Ivan is an activist he wanted to take certain action right now. Others wanted to take a more methodical approach. I told them I didn't think any of the directors signed the call report with intent to defraud. They were acting on the information given them that no one had taken any money from the bank. The question of knowingly signing false statements would have to be interpreted by the A.G.'s office or the Courts.

11/18/82 - Bill Beutler called. Wanted to verify I had met with A.G. office. What was the line of questioning. Did I tell them the accrual procedure was discussed prior to 12/31/81 by Officers & Directors exec. com. he has separate attorney ready to file suit against E. Weiss, Department of Fin. Inst. if he is not soon cleared. Told him I expressed opinion that those who signed call reports did so with varying degree of knowledge but none had criminal intent. Said I had withheld some info that I did not want to voluntarily disclose. except in court.

12/15/82 Rod Browning announced Tom Timmons of Peat Marwick Mitchell & Co. is going to be new president of Bank of Utah.

12/23/82 Rod Browning told Ray, Jim & I that the A.G. office has reported to the dept of fin Institution that their investigation has been closed. When they will give a written statement to this effect is not known but is expected soon. Then Tom Timmons will start working at the bank as our new president.

ADDENDUM K

DAVID S. KUNZ - Bank of Utah Billing - October 1982

DATE	MATTER	TIME
-12-82	Reviewed, typed up narrative of accounting problems with Jerry Peacock. 2 Hrs. <u>Call to Bob Moore re approach to Attorney General.</u> 4 Hrs. <u>Long conversation with Bob Moore after he talked with Ivan.</u>	6 Hrs.
-13-82	Long conversation with Bob Moore, Wayne Black re: Report to Rod, Jim, Ray re same. Conferenece with Paul re same.	5 Hrs.
-14-82	<u>Long conversations with Bob Moore and Wayne Black re meeting with Attorney General with Timmons.</u> Calls to Ron Boyce, conferences with Rod, Jim, Ray, Report to Rod re Washington handling of Tennessee Homestead with Ben Quinn.	4 Hrs. 45 Min.
-15-82	Conference, Rod, Ray, Paul re: Attorney General. <u>Long telephone conversation, Moore & Black re report and future handling.</u> Telephone conversation with Ron Boyce. Letter to John Hawke re Tennessee Homestead.	5 Hrs. 30 Min.
-18-82	Calls to Ron Boyd re Bill. Conference with Ray Kennedy (several) and Rod Browning.	2 Hrs.
-19-82	Phone calls to Boyce and Moore	30 Min.
-25-82	Research re: letter to auditor. Preparation of letter to auditor.	1 Hrs. 30 Min.
-26-82	1 Hr. 30 Min. letter to auditor. 45 Min. Ben Quinn, property descriptions for Jerry Hawke.	2 Hrs. 25 Min.
-1-82	Met with Glen Hanni 2 Hrs. re Research Planning Case. 1/2 Hr. with Ben Quinn on Fed application.	2 Hrs. 30 Min.
-2-81	Met with Ben Quinn on Fed application.	1 Hr.
1920 Minutes - 32 Hrs. @ \$80.00 Per Hr. =		
\$2,560.00		

Plus the following telephone calls:

9-14-82	Washington, D.C. to Ogden	3.95
9-20-82	San Francisco to Ogden	3.62
9-20-82	San Francisco to Ogden	4.48
9-28-82	Ogden to San Francisco	4.05
9-27-82	Ogden to San Francisco	11.36

\$27.46

TOTAL AMOUNT DUE

\$2,587.46

ADDENDUM L

1 them. So I am not real thrilled with all of that. It
2 seems to me if you had some law on an important issue
3 you know was going to be an issue prior to trial, I
4 should have had it prior to the trial.

5 If you have law that applies to the Instructions you
6 are going to submit, you know what the Instructions are
7 prior to trial, it would have been nice to have those.

8 MR. GRIFFIN: I didn't know there would be an
9 objection. It is very clear cut based on the cases.

10 THE COURT: Clear cut that you are entitled to
11 attorney fees in this case? It is your position
12 attorney fees are--

13 MR. GRIFFIN: The Beck case.

14 THE COURT: I would be pioneering to say that
15 you are entitled to attorney fees in this case. And you
16 should have understood that.

17 MR. GRIFFIN: Well, I have got the Canyon
18 Country Store case.

19 THE COURT: I have read the Canyon Country
20 Store case this morning, and the Beck case this morning.

21 MR. GRIFFIN: And--well, my position is this:
22 That the Berube case states that consequential damages
23 can be awarded in wrongful termination cases.

24 THE COURT: The consequential damages involved
25 things other than attorney fees. And there is no

1 MR. HANNI: And we object to those because--we
2 objected at the time they were offered, and I don't
3 recall that your Honor ruled at the time.

4 THE COURT: I ruled when they were offered that
5 they were not admissible, and we wouldn't go into the
6 whole relationship between the Bank of Utah and Peate,
7 Marwick, Mitchell. Subsequent to that, we did go into
8 the entire relationship between the bank and Peate,
9 Marwick and Mitchell. I think following that it is an
10 appropriate exhibit and will be admitted. I will note
11 the Defendant's objection for the record.

12 There is an issue of whether or not Plaintiff's
13 attorney fees could logically be considered
14 consequential damages in this case. And I have ruled
15 that they are not. And I will not allow that issue to
16 go to the Jury.

17 The only question of damages will be general damages
18 that may have resulted from the improper termination of
19 employment. I don't know that it makes any sense to
20 state my reasons on the record. If this case reaches
21 the point where that should be appealed, it is my
22 impression that the evidence on that is pretty clear cut
23 and probably subject to a directed verdict should the
24 Supreme Court tell me I am wrong, and I have to award
25 consequential damages in the form of attorney fees.

ADDENDUM M

Rule 61. Harmless error.

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.