

1990

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

Utah Supreme Court

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900532

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 APPELLANT BANK OF UTAH

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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Clerk, Supreme Court, Utah

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

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

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

1. Did the trial court err in denying the Bank of Utah's (hereinafter Bank) motion for j.n.o.v. because the evidence was insufficient as a matter of law to establish that Ivan J. Heslop (hereinafter Heslop) was constructively discharged; the evidence was insufficient as a matter of law to establish that Heslop had an implied-in-fact contract terminable only for good cause and was not an employee at will; and the evidence was sufficient as a matter of law to establish good cause to terminate?

Standard of Review: Is the verdict supported by substantial and competent evidence, is the evidence insufficient to support the verdict, and does the evidence clearly preponderate in favor of the Bank so that reasonable people could not differ on the outcome. W. Fiberglass v. Kirton, McConkie Etc., 789 P.2d 34 (Utah App. 1990); Onybear v. Pro Roofing, Inc., 787 P.2d 525 (Utah App. 1990); Canyon Country Store v. Bracey, 781 P.2d 414 (Utah 1989); Hansen v. Stewart, 761 P.2d 14 (Utah 1988).

2. Did the trial court improperly admit evidence of an accrual account problem, the State's investigations thereof, the hiring and salary of Thomas Timmons, payments by the Bank to Peat, Marwick, wash entries made by Beutler, and terminations of other employees because such evidence was irrelevant under Rules

401 and 402, U.R.E., and/or was inadmissible under Rule 403, U.R.E?

Standard of Review: Abuse of discretion and whether a substantial right of the party is affected. Whitehead v. American Motors Sales Corp., 801 P.2d 920 (Utah 1990); Rule 103, U.R.E.; Onyeabar v. Pro Roofing, Inc., supra; Pearce v. Wistisen, 701 P.2d 489 (Utah 1985).

3. Did the trial court err in failing to instruct the jury that evidence of the accrual problem and matters related thereto should be disregarded once Heslop's public policy claim was dismissed, or in the alternative, that it was only relevant to the issue of good cause?

Standard of Review: Same as stated in Issue 2; would the Bank have obtained a more favorable result absent the error, Rowley v. Graven Bros. & Co., 26 Utah 2d 448, 491 P.2d 1209 (1971).

4. Did the trial court err in denying the Bank's motion for new trial due to insufficiency of evidence?

Standard of Review: Is the evidence insufficient to support the verdict, Hansen v. Stewart, supra; was the "'verdict plainly unreasonable and unjust'" due to "'slight and unconvincing'" evidence. King v. Fereday, 739 P.2d 618 (Utah 1987).

5. Did the trial court err in denying the Bank's motion for new trial because of admission of prejudicial evidence and prejudicial arguments and misstatements by Heslop's counsel during closing argument preventing the Bank from receiving a fair trial and constituting error in law?

Standard of Review: Abuse of discretion. King v. Fereday, supra.

6. Did the trial court err in ruling that Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989), should be applied retroactively to the facts of this case?

Standard of Review: Correctness of court's ruling. No particular deference should be granted the trial court's conclusion. See Scharf v. B.M.G. Corp., 700 P.2d 1068 (Utah 1985).

7. Did the trial court err in ruling that Heslop's claims were not barred by the statute of frauds?

Standard of Review: Same as stated in Issue 10.

STATUTES, AND/OR RULES WHOSE INTERPRETATION
IS DETERMINATIVE

1. Rule 103, Utah Rules of Evidence.
2. Rule 401, Utah Rules of Evidence.
3. Rule 402, Utah Rules of Evidence.
4. Rule 403, Utah Rules of Evidence.
5. U.C.A. §7-1-318.
6. Rule 59, U.R.C.P.
7. U.C.A. §25-5-4(1).

The foregoing rules and statutes are set forth verbatim and attached as Addendum 1 to the Bank's brief.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition in the Trial Court.

This is an employment wrongful discharge case. Heslop alleged that the Bank constructively discharged him in October, 1983. Heslop further claimed he had an implied-in-fact contract of employment terminable only for cause, and that he was not an employee-at-will.

The Bank claimed Heslop voluntarily resigned, and that he was an employee-at-will who could be terminated without cause. Finally, the Bank asserted there was good cause to terminate.

Heslop filed suit in June, 1987. He asserted 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. 250-51) By order and judgment dated July 10, 1989, the court granted the Bank's motion for summary judgment as to 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. In the same order, the trial court ruled that Berube v. Fashion Centre, Ltd., supra, should be applied retroactively to the case. (R. 359-61) A copy of this Order and Judgment is attached as Addendum 2.

An additional partial summary judgment was entered by the trial court on May 23, 1990, dismissing Heslop's cause of action for tortious wrongful discharge, including all claims for tort damages and punitive damages. (R. 475-76)

The claims which remained for trial were whether Heslop was constructively discharged, whether he had an implied-in-fact contract terminable only for cause, whether he had been terminated in violation of public policy, and whether there was good cause to terminate. At the end of Heslop's case in chief, the court granted the Bank's motion to dismiss Heslop's public policy claim. (Transcript on Appeal, hereinafter Tr., 1149-51) At the conclusion of all evidence, the Bank moved for a directed verdict on the grounds that Heslop's claims were barred by the statute of frauds, that there was no constructive discharge or implied-in-fact contract and that the Bank had good cause to terminate Heslop, as a matter of law. (Tr. 1544-45) The court denied the motion on the issue of good cause and took the remainder of the motion under advisement pending the jury's verdict. The court stated it was a very close question on whether to grant the motion on the constructive discharge issue. The only evidence that corroborated Heslop's testimony that he was asked to resign was Heslop's own resignation letter which began: "Pursuant to your request". (Tr. 1552-53, 1559-61)

The jury returned a special verdict, finding Heslop did not voluntarily resign, that he had an implied-in-fact contract,

that the Bank did not have good cause to terminate him, and that he had been damaged in the amount of \$160,000. (R. 644-45) Judgment on the verdict was signed on August 27, 1990. (R. 648a-648b) Copy attached as Addendum 3. The court denied the Bank's motion for j.n.o.v. or in the alternative for new trial by order dated October 16, 1990. (R. 1182-85) Copy attached as Addendum 4. Defendant's Notice of Appeal was filed November 13, 1990. (R. 1186-87) Copy attached as Addendum 5.

B. Statement of Facts.

1. Heslop's Employment Background and the Bank's Employment Policy and Practice.

Heslop was first employed at the Bank in 1955. (Tr. 112) He worked there until 1959 when he left to take a different job. (Tr. 112) When Heslop was hired in 1955, he signed an employment application (Tr. 113; Exh. 1-P), in which he expressly agreed that his continued employment "will depend upon my usefulness to the bank, in its sole discretion; the bank reserving the right to release me without notice, its obligation ending with the payment of salary through the last day I work." (Tr. 114; Exh. 1-P)

Heslop was rehired by the Bank in 1962. (Tr. 112) He testified he discussed the terms of his rehire with Rod Browning and Bill Beutler, both officers of the Bank. (Tr. 116-119) Heslop's understanding was that he had an employment contract to work until he retired at age 65, unless there was good cause to terminate. (Tr. 296) Heslop was not asked to sign another

employment application/agreement when he was rehired in 1962.
(Tr. 119)

Heslop testified Beutler told him the Bank's policy was to terminate employees only for good cause, or when there was a major reduction in force. (Tr. 120, 296) Beutler had no recollection of any details of what he discussed with Heslop in 1962. (Tr. 881) Specifically, Beutler had no recollection of ever telling Heslop he had an employment contract until retirement which could only be terminated for cause. (Tr. 887) During all the years Beutler was employed at the Bank, he never heard Frank Browning, who was president and chairman of the board, or later Rod Browning, who became board chairman and president of the Bank, say the Bank's policy was that employees could only be terminated for cause. (Tr. 886) Beutler was himself in charge of personnel at the Bank for many years. (Tr. 880) He could not recall any instance where he said, nor was he aware of any instance where anyone else at the Bank ever said, that an employee could only be terminated for good cause. (Tr. 919)

When Heslop was rehired in 1962, no one from the Bank committed to him that he was being hired for six months, a year, six years, ten years, or any fixed period of time. (Tr. 293)

It was not the Bank's practice to have re-hired employees sign another employment application. The original personnel file and the original employment application/agreement were

revived. (Tr. 884-85, 1016-17) Several employees or former employees of the Bank testified at trial. All of them signed an employment application/agreement which contained the same at-will language as Heslop's. These included Beutler on July 2, 1957 (Tr. 881-82; Exh. 68-D), Boyd Carlsen on March 9, 1960 (Tr. 741-42; Exh. 63-D), V. Ray Kennedy on November 16, 1956 (Tr. 1354-55; Exh. 87-D), Edward G. Kleyn in February, 1974 (Tr. 792; Exh. 64-D), James K. Packer on January 15, 1958 (Tr. 634-35; Exh. 58-D), Gerald Peacock on October 24, 1975 (Tr. 693-94; Exh. 61-D), Gerald R. West in November, 1961 (Tr. 542-44; Exh. 57-D), and Roy Nelson on December 22, 1954 (Tr. 1433-34; Exh. 90-D). At the time of trial, all of the above-named witnesses except Kennedy and Nelson were no longer employed by the Bank.

The Bank's existing personnel records include files on six or eight re-hired employees. In every case, the Bank reactivated and used the original employment application for that employee. (Tr. 1434) For example, this happened with both Gerald Peacock (Tr. 693-94) and Ray Kennedy (Tr. 1354-56), as well as Heslop.

The Bank's present employment application, which has been in use for several years, contains the same basic employment-at-will language as all the other employment applications referred to above. (Tr. 1015-16, 1434-36; Exh. 91-D) Roy Nelson, president and chief operating officer of the Bank since

December, 1985, testified this reflects the Bank's policy regarding employment. (Tr. 1372, 1436)

Rod Browning is the controlling owner of the Bank. He owns 100% of the stock in Browning Bank Corporation, a holding company which owns 66% of the Bank's stock. (Tr. 1012) Browning is chairman of the board. He was actively involved in hiring for a number of years in the 1960's and part of the 1970's. He never told any employees they could only be terminated for cause. (Tr. 1017-18) As a practical matter, however, over the years, the Bank has typically never fired anyone without a reason. (Tr. 1018)

Several former employees of the Bank testified their understanding of Bank personnel policy was that they could only be fired for cause. (See Tr. 508, 620, 642-43, 704, 1364)

Gerald West testified he understood the language in the employment application meant his employment with the Bank could be terminated at the Bank's discretion. He was never given anything in writing which rescinded or changed that provision. (Tr. 544)

Heslop was rehired as a loan officer in the installment and commercial loan departments. (Tr. 121) He was made an assistant vice president in 1963 and became a vice president in 1966. In 1976, he was appointed to the Officers Executive Committee (OEC). In 1980, Heslop was appointed senior vice

president and manager of the Bank's commercial and installment loan operations in the Salt Lake Division. (Tr. 121-22, 124)

2. Accrual Account Problems and Heslop's First Offer to Resign.

The OEC oversaw general operations of the Bank on a day-to-day basis. It held regular weekly meetings and also met each month with the Bank's Directors Executive Committee (DEC). The DEC consisted of five directors involved in setting Bank policy and reviewing major decisions. (Tr. 124)

Beutler was chairman of the OEC. In spring of 1981, he reported to the OEC a \$200,000 deficiency in the time certificate of deposit interest accrual expense account. (Tr. 129) This was an internal account at the Bank. It was used to maintain a running total of the amount of interest the Bank owed on time certificates of deposit purchased by Bank customers. (See Tr. 130-31)

In November, 1981, at a regular OEC meeting, Heslop asked Beutler if the accrual deficiency had been corrected. Beutler said it had not, and was now \$500,000 or \$1,000,000. (Tr. 135)

Beutler and Heslop argued about whether to report the matter to Browning. Heslop thought it should be reported. Beutler did not. (Tr. 135) A couple of days later, the OEC met with Browning. The accrual problem was not mentioned. Later that day, Heslop called Browning and reported the problem. Heslop also offered to resign because he was concerned Beutler would think he had gone behind his back to Browning. Browning

told Heslop not to resign and that he would handle the problem from there on. (Tr. 136, 1020-21)

There were two methods of correcting the accrual account deficiency. One was to take an immediate one-time charge against the Bank's undivided profits in an amount equal to the total deficiency. The other method was to make monthly, installment charges against undivided profits until the entire deficiency was eliminated. (Tr. 138-39, 325, 906, 1026) Heslop favored taking a one-time charge. Beutler recommended the monthly, installment method. (Tr. 138-39, 325) Beutler told the OEC he had consulted with the Bank's outside accounting firm of Fox & Company who had advised him the deficiency could be cleared by use of the installment method. (Tr. 336, 338, 589) James Packer and Ray Kennedy, the two other members of the OEC, followed Beutler's recommendation. (Tr. 590-92)

At the end of each calendar quarter, the Bank was required to file a call report setting forth its financial condition with the State Department of Financial Institutions.

On December 4, 1981, the OEC met with the DEC. (Tr. 240) During this meeting, Beutler explained the accrual deficiency. He said it amounted to approximately \$700,000. Beutler presented the two methods of resolving the deficiency, reported Fox & Company's approval of either method, and recommended the installment method, which was adopted by the DEC. (Tr. 145, 342-43, 626-27, 845-46, 905-07, 1026-27, 1346, 1459-61) Beutler

said the deficiency could be resolved in about six months. (Tr. 1026-27) Heslop did not object to use of the installment method during this December 4 meeting. He did not recommend a one-time charge. He did not say the Bank's call reports would be false and inaccurate if the deficiency was corrected over time. (Tr. 343-44, 1027-28, 1346) Heslop subsequently prepared personal notes detailing the accrual account problem and other Bank matters. In his notes, he claimed he believed the installment method was a violation of Utah law. Nonetheless, he did not say that at the December 4 meeting. (See Exh. 39-P)

No one in attendance at the December 4, 1981, DEC meeting suggested that handling the deficiency on a monthly basis was illegal. (Tr. 345) All of the Directors on the DEC and also Heslop had confidence in Beutler, who had been preparing the Bank's call reports for a long time. (Tr. 347-48, 626, 627, 880) Browning relied on Beutler to prepare them. (Tr. 880, 1033-34) Browning believed it was perfectly proper to handle the accrual problem over time. (Tr. 1033-34)

Beutler did not believe the installment method was illegal or improper. He believed the DEC adopted it in good faith. He did not think any of them would intentionally break the law. Beutler did not think the December, 1981, March, 1982, and June, 1982, call reports he prepared were false, misleading, or intended to deceive. (Tr. 905-09)

Without knowledge of the DEC, Beutler, both before and after the December 4, 1981, meeting made "wash entries" to the accrual account when the quarterly call reports were due. A wash entry consisted of a book transfer of funds from one internal bank account to the interest accrual account a day or so before the date of the call report and a subsequent reversal transfer of the same funds back to the original account a day or two after the date of the call report. The purpose of the wash entry was to prevent bank regulators from seeing the accrual deficiency. (Tr. 832-33) The wash entries hid the TCD accrual accounts. (Tr. 681) Beutler nonetheless never told the DEC that handling the deficiency on a monthly basis was improper. (Tr. 905-09)

In July, 1982, Beutler notified the federal and state bank regulators of the accrual account problem and the method being used by the Bank to resolve the problem. (Tr. 349, 858-60, 911-12; Exh. 47-D)

Beutler reported to the Board and/or DEC that the deficiency would be reduced to \$80,000 by August, 1982, and was basically taken care of. (Tr. 601-02)

On August 2, 1982, the federal and state bank examiners started a regular examination of the Bank. (Tr. 350) The accrual account problem was investigated. It was determined that deficiencies existed which were much greater than Beutler had ever disclosed to the DEC or the OEC. (See Tr. 680, 982)

On August 6, 1982, Elaine Weis, Commissioner of the State Department of Financial Institutions, called a special meeting of the Bank's Board of Directors. Several regulatory people were present, including representatives from the Utah State Attorney General's Office and the Federal Reserve. (Tr. 598-99, 1039-40, 1445). Weis issued an order suspending Beutler as executive vice president and director, requiring an immediate outside audit of the Bank, requiring that a representative of the Commissioner be placed in residence in the Bank, requiring the Bank to file corrected call reports for December 31, 1981, March 31 and June 30, 1982, and specifically finding that Beutler had violated §7-1-318, Utah Code Ann., relating to the filing of false call reports. The order stated Beutler knew the amounts shown in the accrued interest account were understated by approximately \$1.5 million at various times since October, 1981. (Exh. 67-P) Dee Hutzley, one of the Bank's directors, spoke at this meeting on behalf of the other directors. He stated that they were all aware of the accrual problem and that it would be entirely resolved within the next month. (Tr. 599, 1040, 1446)

When the regulators indicated the deficiency was \$1,000,000 or more, the Directors were in a state of shock and surprise. (Tr. 628-29, 1040-41, 1446)

Ron Draughon, one of the state bank examiners, recommended to Weis that Beutler be suspended because the call reports were

inaccurate, and Beutler accepted responsibility for the inaccuracy. Draughon did not recommend that Browning be suspended because Beutler admitted he had control of the financial statements and was the person who put the financial statements together, not Browning. (Tr. 984-86) Beutler admitted at the August 6, 1982, meeting that preparing call reports was his responsibility. (Tr. 1041-42)

After the Commissioner's order was issued, while Draughon was still in the Bank, he spoke with Browning and Kunz. He was not conducting an investigation at this time, because that was the Attorney General's job. Out of curiosity, Draughon asked Browning and Kunz whether they were aware of the magnitude of the accrual deficiency before the examination started. They both indicated they were not. (Tr. 976-78) Draughon asked Browning and Kunz this question after Draughon had already discovered a much larger accrual deficiency than had been reported by Beutler. (Tr. 990-91)

The Bank hired Peat, Marwick and Mitchell to perform a complete audit. The partner in charge was Thomas Timmons. (Tr. 151-52, 1229) The audit began in August, 1982, the work was completed by the end of October, 1982 and the reports were delivered to the Bank in early December, 1982. (Tr. 1229-30)

Peat, Marwick found various accounting errors during its audit, including the accrual account deficiency. Peat, Marwick

recommended that the errors be corrected at one time--the same recommendation as Heslop made in 1981. (Tr. 152-53)

By order of Commissioner Weis dated February 23, 1983, all restrictions placed on the Bank in the August 6, 1982, order were removed. (Tr. 496-98; Exh. 56-D)

3. Attorney General Investigation.

Following Beutler's suspension, the Utah Attorney General's Office (hereinafter Attorney General) conducted an investigation of the Bank to determine if there was any criminal wrongdoing. (Tr. 153-54) The Attorney General interviewed Ray Kennedy, Jim Packer, David Kunz, and Tom Timmons. (Tr. 602-03, 1325, 1522-23) Through its investigation, the Attorney General learned about the December 4, 1981, DEC meeting, Beutler's explanation of the two methods to handle the accrual deficiency, and the DEC's decision to adopt the monthly approach for resolving the problem. The Attorney General further learned that the DEC received progress reports each month from Beutler concerning his handling of the deficiency. (Tr. 603, 1522-23)

The Attorney General's investigation was over by November, December, or early January of 1983. (Tr. 367, 633) No charges were brought against the Bank or any of its officers or directors. (Tr. 368-69, 633, 912)

When Timmons met with the Attorney General, he was asked whether the officers acted in a knowingly illegal manner, or if they really did not understand what they were doing. Timmons

told the Attorney General he believed they simply did not know what they were doing, and not that they had intentionally filed false statements. (Tr. 1326-27)

Heslop met with the Attorney General two times. First, on September 13, 1982. Heslop told the Attorney General he would not disclose any information unless he was given a subpoena and unless he had counsel present. (Tr. 357) Heslop disclosed no information during this meeting regarding the accrual problem. (Tr. 154-56)

That same evening, Heslop received a telephone call at home from David Kunz. Kunz asked Heslop why he met with the Attorney General without talking to Kunz first. Even though Heslop was a senior vice president at the Bank, knew that the Bank was being investigated by the Attorney General, knew that Beutler had been removed as an officer of the Bank by the Commissioner, and felt that this investigation was a very serious matter, he nonetheless did not feel he owed it to the Bank to mention that the Attorney General had asked him to meet before attending the September 13 meeting. (Tr. 157, 356)

The second time Heslop met with the Attorney General was in November, 1982. He was accompanied by Wayne Black, who had been retained to represent the Bank. At this meeting, Black told the Attorney General the Bank admitted there were errors in the call report of December 31, 1981. He indicated there was confusion among the Bank's management as to how the accrual problem should

be handled. He further stated that "Ivan is an activist. He wanted to take certain action right now. Others wanted to take a more methodical approach." Heslop told the Attorney General he did not think any of the directors signed the call reports with intent to defraud and that they were acting on the information given them. Heslop also said no one had taken any money from the Bank. (Tr. 171, 173)

Heslop thereafter called the Attorney General to find out the status of the investigation. He was told it was being closed, and that no charges would be brought. Heslop expressed some concern about that because he felt it left him in a bad position with his peers at the Bank. The Attorney General told Heslop if he was withholding any information, he should tell them about it. Heslop told the Attorney General, "I think you know basically the information I have, only I am asking it be received by subpoena." The Attorney General said there was no plan to issue any subpoenas. (Tr. 175-76)

At no time did Heslop ever give any of his personal notes to the Attorney General. Nor did he ever discuss the contents of his notes with the Attorney General. (Tr. 384-85)

4. Hiring of Tom Timmons.

During August, September, and October, 1982, Browning and Kunz met with federal bank regulators. The regulators were concerned about the Bank's loans, capital and management and wanted the Bank to hire someone with a strong accounting

background to straighten out the Bank's books because the Bank's officers were weak in accounting. The regulators also said the Bank needed someone with good executive skills. (Tr. 1045-47, 1049, 1466-67)

As a result, the DEC began looking for a person who could fill this function. (Tr. 1047-48) Consideration was given to Packer, Kennedy, and Heslop, but the committee decided none of them had the necessary skills. (Tr. 1048)

The Peat, Marwick audit was going forward during this same time frame. The DEC members, and specifically Browning, were impressed with Timmons. (Tr. 1051) In addition to the audit work, Timmons also provided information for Kunz and Browning with respect to raising additional capital for the Bank. Raising capital involved complex Federal Reserve regulatory provisions under the Bank Holding Company Act. Kunz learned that Timmons had extensive experience in auditing banks and other financial institutions, and also in dealing with regulatory matters with the State and the Federal Reserve. (Tr. 1468-69)

After Peat, Marwick's audit work was complete, Browning and Kunz talked to Timmons about employment as president of the Bank. (Tr. 1049-50, 1052, 1240-41) These discussions were not held until Kunz confirmed that Timmons was completely finished with all his work on the audit. (Tr. 1470-71)

Timmons initially told Kunz he was not interested in the job. (Tr. 1241-42) One of the reasons was because of his large income and potential income at Peat, Marwick. Within 3 or 4 years, Timmons expected to be earning \$225,000 to \$250,000 a year. (Tr. 1239-40, 1241-43) After further discussion Timmons changed his mind and was ultimately hired. He signed a five-year employment contract on December 17, 1982, and became president and CEO effective January 15, 1983. (Tr. 1053; Exh. 83-P)

Before accepting the Bank's offer, Timmons conferred with Peat, Marwick's Salt Lake City managing partner, as well as Peat, Marwick's head office in New York City. The Salt Lake City managing partner did a complete partner review of Timmons' audit of the Bank, confirmed that it was performed according to professional standards and that all conclusions were adequately supported. (Tr. 1244-45)

Bank regulators have a system of rating banks from 1 to 5; 1 is the highest rating and 5 is the lowest. When Timmons became president of the Bank, it had a 5 rating. When he left the Bank three years later, its rating was a 2. (Tr. 1269-70)

Timmons' starting salary at the Bank was \$150,000, with a 10% annual increase and a provision for a bonus tied into Bank profits. (Tr. 1472-73)

When Timmons became president, the Bank did not meet regulatory requirements regarding capital. The Bank was

therefore required to input more capital. Browning, along with other members of the board, came up with the additional money and infusion of capital. (Tr. 665-66)

5. Reorganization of the Bank and Heslop's
Second Offer to Resign.

Between the time Timmons signed his contract on December 17, 1982, and the time he officially began his duties in mid-January, 1983, he met and had discussions with Browning and other members of the Board regarding the Bank's organization. Sweeping changes were made because the Bank needed a complete reorganization to improve its loan quality and internal accounting operations. (Tr. 1053-54, 1247-48) Reassignments of top management positions were made with the approval of Browning and the Board. (Tr. 1056, 1065-66, 1248, 1474; Exh. 77-D and 78-D) The DEC did not just review Timmons' proposed reorganization, but actually had more input on the changes than Timmons did. (Tr. 1324)

Included among the changes was the disbanding of the OEC (Tr. 1056) Almost every senior officer was involved in some change of assignment. (Tr. 1473)

Jim Packer was removed as the Northern Division commercial loan department head and put in charge of marketing and business development. Packer had been a commercial loan officer for most of his career. After the reorganization, Packer had no lending authority. (Tr. 637-38, 1057, 1249)

Ray Kennedy had been manager of the real estate loan department. Another person was brought in to head that department. (Tr. 638) Even Browning's title was changed. He no longer was president and chief executive officer, but remained chairman of the board. (Tr. 1057-58)

Heslop was moved from the Salt Lake City office back to the Bank's main office in Ogden to work as a commercial loan officer and agricultural loan specialist. He retained his title as senior vice president and his same salary. (Tr. 369-70, 376, 1054-55, 1249-50)

Heslop had more experience with agricultural lending than any other loan officer at the Bank. The Bank had a lot of distressed agricultural loans at this time. It was important to have someone with Heslop's expertise to help with distressed agricultural loans. (Tr. 547, 781, 1249-50)

Even before Beutler was removed as executive vice president, the Bank had been required to enter into a memorandum of understanding with the Federal Reserve because of various problems at the Bank, including capitalization and problem loans. This memorandum required the Bank to make various changes as well as to make periodic status reports to the regulators. (Tr. 636, 782, 1042-43)

Heslop knew the regulators had told the Bank it needed to reorganize. Heslop understood that was exactly what Timmons was

doing so that another accrual-type problem did not occur. (Tr. 371-72)

Heslop's lending authority on secured loans was increased after Timmons became president from \$30,000 to \$50,000. (Tr. 392-95; Exh. 48-D, 49-D, and 50-D)

When Timmons explained Heslop's new assignment to him in early January, 1983, Heslop objected to the change. He considered it a demotion. (Tr. 193, 1250-51) Timmons said it was not a demotion. His only reason for reassigning Heslop was to help the Bank. (Tr. 369-70, 1255-56)

Heslop subsequently met with Browning on the weekend before the Bank's annual stockholders meeting in January, 1983. He again objected to the new assignment and offered to resign. Browning specifically told Heslop not to resign and encouraged him to stay on as an employee, which Heslop did. Browning also told Heslop the change was a lateral transfer and was in the best interest of the Bank. (Tr. 193-94, 196-97, 374-75, 1058-60) Browning felt the Bank always had the right to change an employee's assignment. This occurred many times over the years to both middle and senior management personnel. (Tr. 1018-19)

Heslop continued to work as a commercial loan officer and agricultural loan specialist from January of 1983 until October of 1983.

Timmons was unaware at the time of the reorganization that Heslop had opposed the installment method for handling the

accrual account deficiency. He did not learn until March or April of 1983 that Heslop supported a one-time charge, (Tr. 388, 1251-52), which was the same solution Timmons required as part of Peat, Marwick's audit in the fall of 1982.

The Bank had two reductions of force in 1983. A small one occurred in the spring and a larger one in the fall. Heslop was not included in either. (Tr. 636-37, 1067-68)

6. New Loan Policy.

The Board adopted a written loan policy in April, 1983. (Tr. 1256-57, 1474) The policy restricted new agricultural loans. They were considered undesirable because the Bank had so many existing problem agricultural loans. The Bank wanted its officer's to be very prudent in making new agricultural loans. (Tr. 565, 782-83)

Loan policy 13 listed desirable and undesirable loans. 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. Loan committee approval of all undesirable loans was specifically required. (Exh. 17-P)

It is the responsibility of a loan officer to make loans within the scope of the policy set by the Bank. If he fails to do that, then he is not acting within his lending authority. (Tr. 564)

The new loan policy allowed loan officers to combine their lending authority to approve loans. This was designed to take care of rush-type situations. In most instances, Timmons and the directors wanted loans to go through a loan committee approval process. (Tr. 395, 1273-74; Exh. 50-D)

7. Gabbert Loan.

In early August of 1983, Heslop was approached by a man named Larry Richins regarding a \$260,000 loan application for Dr. Clayton Gabbert. The loan was to be used by Gabbert to purchase 310 head of cattle which he would then lease to Richins who was going to operate a dairy in Newton, Utah. Richins' lease payments to Gabbert were to be used by Gabbert to make his loan payments to the Bank. (Tr. 203-04)

After Heslop's initial presentation to the loan committee, Heslop was asked to get more information about the loan, which was an agricultural loan. (Tr. 521, 783-84, 786)

On August 5, 1983, West approved the loan subject to the condition that Gabbert, in addition to securing the loan with the cattle, also either make a \$50,000 cash investment of his own into the project or provide additional collateral in the amount of \$50,000. (Tr. 430, 432-33, 557, 786-87, 1077, 1079,

1278-79, 1388-89; Exh. 7-P) Heslop was required to see that this condition was met before he could close and disburse the loan. If the condition could not be met, Heslop was obligated to ask West for a change in the approval, which West testified Heslop did not do. (Tr. 557-58, 565-66, 1395) The loan was approved, subject to this condition, by Heslop and West combining their individual lending authorities. It was not approved by the loan committee. (Tr. 554-55, 766-67, 784-85, 1272-73; Exh. 7-P and 53-D) It did not meet the Bank's loan policy requirement of specific loan committee approval on undesirable loans. (Tr. 556)

Gabbert owned property in Bountiful which he represented on his financial statement had a value of approximately \$90,000 with a first mortgage of approximately \$38,000. (Exh. 8-P) The loan was scheduled to close on Monday, August 22, 1983. On Friday, August 19, the Bank's appraiser appraised the Bountiful property at \$45,000. (Exh. 12-P) He found it had a first mortgage of approximately \$33,000. (Exh. 7-P) This left total equity of \$12,000, but in reality the property had no "loanable equity", meaning there was not enough equity to feasibly use as collateral. The Bank would not normally take a second mortgage under such circumstances. (Tr. 430-31, 559-60) For the Bank to realize anything from the Bountiful home in case of default, it would have to pay \$33,000 for the first mortgage, as well as a real estate commission and other costs associated with a sale.

The Bank would never realize even \$12,000 from such a sale.
(Tr. 431-32, 735)

In spite of the appraisal, Heslop closed the loan on August 22 and disbursed the funds. (Exh. 7-P) Although he took a second mortgage on the Bountiful property, Heslop did not meet the \$50,000 condition. Dr. Gabbert did not invest any of his own money into the project. (Tr. 558, 1079-80, 1278-79, 1389) West had no recollection of ever telling Heslop it was okay to close the loan without meeting the \$50,000 condition. (Tr. 559) West had no recollection of seeing the appraisal on Gabbert's Bountiful home. He testified the loan should not have been disbursed in light of Heslop's failure to meet the \$50,000 condition. (Tr. 557-58) Heslop, on the contrary, testified West told him to commit to disburse on the loan even before the Bountiful property had been appraised. (Tr. 463)

Bank loan policy No. 7 required all loans over \$100,000 to have advance review and approval of supporting legal documentation by the Bank's counsel. Heslop did not do this with the Gabbert loan. (Tr. 498-99)

Gabbert's personal income was insufficient to make the payments. Specifically, his net income after federal income tax in 1981 was approximately \$68,000 and in 1982 was approximately \$75,000. (Exh. 10-P) The annual payment on the note totaled more than \$72,000. (Exh. 13-P) It was essential that Richins make the lease payments to Gabbert from the dairy operation so

that Gabbert could make the loan payments to the Bank. (Tr. 421-22, 562-64, 736-38, 1085)

The first payment on the loan was due September 25, 1983. (Exh. 13-P) Richins filed for bankruptcy before that date, and Gabbert was unable to make his first payment. (Tr. 241, 1439) Richins' bankruptcy created a lot of problems for the Bank in trying to salvage the loan. (Tr. 768-70) Ultimately, the Bank and Gabbert were involved in litigation over this loan. (Tr. 1508)

About two weeks before the first payment came due on the loan, Boyd Carlsen, vice president in charge of loan review at the Bank, performed a routine review of the Gabbert loan. (Tr. 701-02, 711, 713; Exh. 54-D) No one told him to single the loan out for special review. (Tr. 740, 1274) Carlsen prepared a loan review report indicating he could not give the loan a rating because it was inadequately documented. (Tr. 726-27; Exh. 62-D) His report identified various deficiencies in the loan. He was very critical of it. For example, the file did not even document that the full number of cattle was purchased as anticipated under the loan approval. Carlsen submitted a set of questions to Heslop as part of the review. One question asked whether additional collateral was needed. Heslop answered that additional collateral was not needed, and that Dr. Gabbert had invested \$50,000 of his own money into the project. This

statement was clearly false. (See Tr. 442-44, 446-47, 567, 714, 716-18, 727-34, 743, 747-48, 753-55; Exh. 15-P and 55-D)

The Gabbert loan violated the Bank's written loan policy because it involved a new business undertaking (the dairy farm) and did not have any guarantors. (Tr. 398-401, 1086) In addition, it was solely dependent on the profitable future operation of the dairy business for repayment because Gabbert's personal income was inadequate to make payment. (Tr. 1088-89, 1205) It also did not have supporting additional collateral because the second mortgage on the Bountiful home was worthless (Tr. 1089), and it was also dependent solely upon the marketing of milk from the dairy for repayment. (Tr. 1089-90, 1205)

Mr. Browning's opinion was that the Gabbert loan violated Bank loan policy. He identified numerous problems with the loan. (Tr. 1069-77, 1079-86) Timmons also concluded the loan violated Bank loan policy for numerous reasons. (Tr. 1275-81, 1283) Roy Nelson, the Bank's present president, who reviewed and analyzed the loan and testified as an expert in lending, also concluded it violated the Bank's loan policy. (Tr. 1388-95)

Browning, Timmons and Nelson all testified there is a significant difference between a loan that goes bad and a loan that violates loan policy. The Bank is willing to take the risk of loans that go bad when made within the scope of the lending

policy, but not loans that violate policy. (Tr. 1086-87, 1258-59, 1382, 1384-85)

8. Rescission of Heslop's Lending Authority.

Because of the loan policy violations involved with the Gabbert loan, Browning and Timmons were concerned about the safety of the Bank's assets. They did not want Heslop making any more Gabbert-type loans. As an immediate, temporary protective measure, Timmons and Browning decided to revoke Heslop's lending authority. On September 29, 1983, Timmons issued a memorandum to West which removed Heslop's lending authority. The memo required either West or Ed Kleyn to approve Heslop's loans before a commitment was made to a customer. In addition, West's lending authority was reduced from \$250,000 to \$100,000. The policy of allowing loan officers to combine lending limits was restricted so that no loan in excess of \$100,000 could be made without prior approval of Browning, Timmons, or the Directors Loan Committee. This memorandum, therefore, affected several loan officers' authority. (Tr. 568-69, 1091, 1283-84; Exh. 16-P)

Both Browning and Timmons considered the rescission of Heslop's lending authority a temporary, stopgap measure until they could find out more specifics about the Gabbert loan. (Tr. 1094-95, 1285)

One of the reasons immediate action was necessary was because the Bank was still reporting, pursuant to the memorandum

of understanding, on a monthly basis to the Bank regulatory authorities on improvement of its loan portfolio. The Gabbert loan was a violation of the goal of improving loan quality. (Tr. 1091-92) Specifically, the Bank had to report on the status of any problem loans over \$50,000. (Tr. 822-23) Timmons' September 8, 1983, letter to the regulators reported progress in reducing past-due loans and in correcting credit file documentation problems found by the regulators. He further reported the delinquency level on loans was a primary concern at the Bank and that a special senior management task force had been formed to address and study the issue. He stated the Bank was implementing the committee's suggestions and anticipated significant improvement in loan delinquency levels during the remainder of 1983. (Tr. 1339-40; Exh. 86-D) The next day Carlsen's loan report on the Gabbert loan was issued showing such poor documentation that no rating could be given. (Tr. 1341)

Although Heslop could not independently commit to loans under the terms of the September 29, 1983, memorandum, he could still perform all other duties of a loan officer. He could interview and screen applicants and take loan applications, present loans to the loan committee for approval, assemble documentation and file forms and documents after approval, service loans after approval and disbursement, and discuss and give advice about loans to other officers. (Tr. 789-91, 1095-

96, 1286) Heslop's responsibilities as a loan officer to service the loan continued even after it was approved and disbursed. His post-disbursal responsibilities were equally important as the responsibilities leading up to and including approval. (Tr. 303-04, 306)

Neither Browning nor Timmons intended to fire Heslop by removing his lending authority. Heslop retained his title as senior vice president, as well as his same salary. (Tr. 1094-95, 1286) West did not think the rescission of lending authority was a permanent change. He told Heslop to stay on at the Bank and work with the change. (Tr. 569) Kleyn and Heslop had a good working relationship, and Kleyn told Heslop they could work together with the restrictions on Heslop's lending authority. (Tr. 791) Although it is difficult for a loan officer to act with no lending authority, it does not prevent him from performing his job. This was especially true at the Bank where loan officers had a close relationship. (Tr. 774) Kleyn testified it is prudent for a loan officer to take a day to consider and think about a loan before committing on it. This restriction allowed Heslop to do that. (Tr. 791)

Moreover, customers never know a loan officer's lending authority. (Tr. 800, 1095-96) Kleyn testified there are loan officers who function without independent lending authority. In his job at First Security Bank, Kleyn at one time could not

exercise his lending authority without prior approval from another officer. (Tr. 800-01)

Timmons had no reason for rescinding Heslop's lending authority or reducing West's lending authority other than the Gabbert loan. (Tr. 1287) Nelson testified that the action taken by Timmons and Browning was justified. While Nelson was the senior lending officer at Commercial Security Bank, he was frequently involved in disciplinary actions relating to lending. He changed lending authorities, took lending authorities away, and also gave them back. (Tr. 1396-97)

9. Heslop's Resignation.

After Heslop read the 9-29-83 memorandum, he spoke with Ed Kleyn and requested three days vacation to think about what he was going to do. Kleyn agreed he could take time off. (Tr. 242, 773) Heslop indicated he might resign. Kleyn told Heslop that whatever he decided to do, to please put it in writing for Kleyn. (Tr. 775-76, 1475)

Heslop sent an October 3, 1983, letter to Browning and each member of the Board requesting a special meeting. Heslop was critical of the Bank, its directors, and its management in this letter. (Tr. 245-48; Exh. 20-P)

Heslop testified Kleyn subsequently told him the board had denied his request for a meeting and demanded he submit his written resignation. (Tr. 249) Kleyn is an area manager for First Security Bank in Ogden. His duties include supervision of

all operations, and all installment and commercial loans for eight of First Security's branches. He has a personal lending limit of \$200,000, and in conjunction with another officer, can lend up to \$1,000,000. He has worked at First Security Bank since 1984 when he left the Bank of Utah. (Tr. 756-57, 777-78) Kleyn unequivocally denied he ever told Heslop to resign or that anyone from the Bank ever told him to tell Heslop to resign. He further testified he did not ever tell Heslop he could not have a hearing with the board. (Tr. 788-89)

Timmons did not instruct Kleyn or anyone else at the Bank to ask for Heslop's resignation. (Tr. 1286) West never told Heslop to resign, nor did anyone at the Bank tell West to demand Heslop's resignation. (Tr. 569-70)

On October 5, 1983, Heslop returned to the Bank and submitted his written resignation to Kleyn. (Tr. 250-51; Exh. 21-P) On October 6, 1983, Heslop met with the full board, at which time he said if they did not order Timmons to restore his lending authority, Heslop would resign. (Tr. 1482-83) Heslop criticized the Bank and its management on several issues. He stated his resignation was effective October 18, 1983. (Tr. 253-58; Exh. 22-P)

Following Heslop's statement, a motion was made to accept his resignation, which was passed unanimously. (Tr. 1093-94, 1483) Board member Spencer Baggs voted to accept Heslop's resignation because Heslop said he wanted to resign. (Tr. 1349)

Dee Hutzley voted to accept Heslop's resignation because Heslop no longer supported Bank management. (Tr. 1447-48)

By letter dated October 6, 1983, Heslop was notified his resignation had been accepted by the Board. He was paid through October 18, 1983. (Exh. 23-P) September 29, 1983, was a Thursday. Heslop took vacation on September 30, October 3, and 4. He submitted his written resignation on October 5, and had his meeting with the board on October 6. He, therefore, did not work one day at the Bank after his lending authority was rescinded.

10. Good Cause for Termination.

Disloyalty constitutes good cause to terminate an employee. (Tr. 580-81) On several occasions, Heslop exhibited disloyalty through excessive criticism of Bank management and directors. Before Beutler left the Bank, Heslop was dissatisfied that Beutler was exercising too much authority. Heslop felt he had been reduced to the status of a routine bank clerk as a result. (Tr. 313-15, 318-20; see Exh. 39-Pa and 39-Pb)

On December 23, 1982, Heslop wrote "Roderick Browning as Chairman of the Board, President and Chief Executive Officer has been unable to manage the bank in a successful manner." Heslop suggested that new Bank legal counsel be appointed and that a new president and/or executive vice president from the community be appointed. (See Tr. 483-88; Exh. 39-Pb at 20-21) West testified an employee who says the chairman of the board is not

capable of performing or that the president should be relieved, is not a loyal employee. (Tr. 549)

11. Evidentiary Rulings by Trial Court.

Heslop presented evidence, over objection, regarding wash entries made by Beutler, Timmons' hiring and salary, and payments made by the Bank to Peat, Marwick during 1982 and 1983 in the amount of approximately \$445,000. (Tr. 681-82, 803-11, 830-31, 1112-14, 1564-65; R. 668-94) Regarding Timmons' hiring, plaintiff's counsel claimed during cross-examination of Browning that the hiring was "[a]n inside job" and that standard procedure had not been followed. Defendant objected, and the court admonished plaintiff's counsel that if he was suggesting impropriety, he better be prepared to back it up. The court questioned how hiring Timmons was connected to Heslop's termination. (Tr. 1118-19)

Hearings were held outside the presence of the jury regarding the admissibility of evidence of Timmons' salary and the payments to Peat, Marwick. (Tr. 1120-30, 1152-65) Addendum 6 to the Bank's brief is a transcript of these hearings. Plaintiff's counsel claimed the evidence was relevant to show the Bank bought Timmons' silence about information he learned in his audit that was damaging to Browning and Kunz and could result in their suspension by the state. No such evidence was ever produced by plaintiff. (Tr. 1122-23, 1126, 1129, 1155-57) Moreover, three separate motions to compel production of

Timmons' salary information were denied during the course of the litigation prior to trial. (R. 52, 61-62, 66-67, 485-86) The second order specifically stated the information was irrelevant. (R. 66-67)

Counsel for plaintiff claimed the evidence of payments to Peat, Marwick was relevant because they were improper. (Tr. 1120-23, 1126, 1129, 1154-55) However, Timmons' bonus arrangement was based on profitability. (Exh. 83-P) He had no incentive to increase costs by paying high rates to Peat, Marwick. The innuendo, however, was that the Bank was acting improperly and even that Timmons was receiving kickbacks from Peat, Marwick, one of the largest accounting firms in the world. (Tr. 1162)

Although the court recognized this "evidence is obviously highly prejudicial" (Tr. 1128), he nonetheless admitted it over the Bank's objection and motion to strike. This ruling was made after the Bank proffered evidence to the court in chambers which explained the reasons for the payments to Peat, Marwick, and which the court recognized showed the payments were proper. (Tr. 1152-65) As a result of the court's ruling, the Bank was required to put on evidence explaining all the payments it made to Peat, Marwick (Tr. 1232-37, 1334-35, 1398-99), as well as the salary it paid Timmons and the reasons for hiring Timmons.

Evidence was also presented by Heslop, over objection of the Bank, regarding the circumstances of termination of several

other Bank employees. (Tr. 536-40) For example, over both objection and motion to strike, the court allowed Beutler to testify that Kunz talked him out of a hearing with Commissioner Weis in August, 1982 following his suspension. Beutler was allowed to testify that he did not want to "take the fall" for the Bank. Beutler suggested that the Bank's holding company bought his condominium as a settlement for Beutler's agreement to waive his hearing with the Commissioner. (Tr. 869-74) In fact, Beutler later filed a lawsuit against the Bank for wrongful discharge, which was dismissed in its entirety on a motion for summary judgment in December, 1984. (Tr. 1478-79) While cross-examining Browning, plaintiff's counsel claimed Beutler "took the fall" for Browning and the Bank, which Browning unequivocally denied. (Tr. 1107-09)

In addition, the court allowed Carlsen to testify about the circumstances surrounding his firing, which happened after Heslop left the Bank. Carlsen was expressly fired and escorted from the Bank the same day. (Tr. 722-23)

Prior to trial, the Bank filed a motion in limine requesting exclusion of all evidence regarding the accrual account problem and the investigations of the problem on the grounds it was irrelevant under Rule 401, U.R.E., or was inadmissible under Rule 403, U.R.E. The court denied defendant's motion in limine. Copy of Order attached as Addendum 7. Defendant objected to this same evidence at trial,

which objection the court overruled. (R. 396-410, 487-88; Tr. 131-32)

After the court dismissed Heslop's public policy claim (Tr. 1149-51), counsel for the Bank asked the court if his ruling did not make evidence of the accrual problem and Heslop's reaction to it irrelevant. (Tr. 1263) The court stated the accrual problem was still relevant, but only with respect to whether the Bank had good cause to discharge Heslop, which would only become an issue if the jury found Heslop had been constructively discharged and that Heslop had an implied-in-fact contract terminable only for good cause. (Tr. 1263-64) A copy of the court's ruling is attached as Addendum 8.

However, the court did not instruct the jury that evidence of the accrual problem was irrelevant to the constructive discharge and implied-in-fact contract issues. (Tr. 1265-66, 1267-68) The Bank took exception to the court's failure to rule the accrual evidence and everything related to it out of the case once the public policy claim was dismissed. (Tr. 1666)

12. Improper Closing Argument.

On three separate occasions during closing argument, Heslop's attorney stated that Ron Draughon testified Browning and Kunz told him they knew nothing about the accrual problem before the August, 1982, Bank examination. (Tr. 1590, 1610, 1654-55) This was clearly not Draughon's testimony. (Tr. 976-78) During cross-examination of Browning, the court

specifically sustained an objection involving this evidence and stated on the record Draughon did not testify that Browning told him he was surprised to learn about the accrual problem in August, 1982. (Tr. 1218) Copies of the transcript of Heslop's argument, Draughon's testimony, and the court's ruling are attached as Addendum 9.

Heslop's improper argument was that Browning and Kunz lied to Draughon, a representative of the Department of Financial Institutions.

When the court overruled the Bank's objection to the admission of evidence of payments made to Peat, Marwick, he told Heslop's counsel: "We are not going to try the Bank for everything that happened during those years." (Tr. 1164) However, that is exactly what Heslop's argument was designed to do.

Heslop testified he did not ascribe any criminal intent to the Bank's officers or directors. He told the Attorney General that. He memorialized it in his notes. He told the state bank examiners the Bank had 260 honest people. He did not tell them he was the only honest person involved in the accrual account decisions. (See Exh. 39-Pa and Pb) Yet, plaintiff's counsel argued, in substance, that Heslop was the only honest, noncriminal person among the group of officers and directors involved in the accrual problem. (Tr. 63-64, 1607-09, 1655,

1657-58, 1661) Copies of relevant portions of Heslop's opening statement and closing argument are attached as Addendum 10.

Heslop's counsel further argued that the evidence of Timmons' hiring as president, his salary, and the payments to Peat, Marwick were unusual. He implied there was something wrong because Timmons signed several of the Bank's checks to Peat, Marwick. (Tr. 1610-11) Heslop's counsel referred to Timmons in closing argument as follows: "You remember Mr. Timmons, he was the one making all the money." (Tr. 1598)

SUMMARY OF ARGUMENTS

1. The trial court erred in denying the Bank's motion for j.n.o.v. because:

a. Evidence of the accrual account problem, the investigation thereof, the hiring and salary of Timmons, payments made by the Bank to Peat, Marwick, the wash entries made by Beutler, and termination of other employees was improperly admitted. It was irrelevant to the issues in the case. It served to prejudice the jury against the Bank and to blacken the Bank's image in the eyes of the jury. The prejudicial effect of such evidence outweighed any probative value it had and affected the jury's decision with regard to the constructive discharge, implied-in-fact contract, and good cause issues. Browning's refusal to accept Heslop's offer to resign in January, 1983, cut off any causal connection between events in 1981-82 and Heslop's termination.

b. When Heslop's lending authority was removed, he was not constructively discharged. He could still perform all duties of a loan officer, except to independently commit. The rescission of his lending authority would not lead a reasonable person to conclude that continued employment was intolerable. Heslop had a reasonable alternative to resignation. When an employee has a reasonable alternative, but nonetheless resigns, his resignation is voluntary, as a matter of law.

c. Heslop did not have an implied-in-fact contract of employment terminable only for cause. He signed a written at-will agreement. Heslop and other employees subjectively believed the Bank's policy was to terminate employees only for cause, but that was not the Bank's intent. An implied-in-fact agreement cannot override an express at-will agreement.

d. Assuming, arguendo, Heslop was terminated, the Bank had good cause. The Gabbert loan was a violation of Bank policy which occurred at a time when the Bank was under scrutiny from the federal and state Bank regulators with regard to problem loans. Further, Heslop was a disloyal employee. He was highly critical of Bank management, including the chairman of the board, the Bank's chief legal counsel, and the new president chosen by the Board of Directors.

2. The trial court erred by failing to instruct the jury that evidence of the accrual account problem was only relevant to the issue of good cause and should be disregarded in

determining whether Heslop was constructively discharged and whether there was an implied-in-fact contract.

3. The trial court also erred by denying the Bank's motion for new trial because:

a. There was insufficient evidence to support the jury's verdict. Rule 59(a)(6), U.R.C.P. Heslop had a reasonable alternative to resignation, there was no substantial evidence that he was asked to resign, and therefore his resignation was voluntary. The evidence of an implied-in-fact contract was overridden by the written at-will contract signed by Heslop and other employees. The Gabbert loan and Heslop's disloyalty established good cause to terminate.

b. The improperly admitted evidence set forth in paragraph 1.a., supra, prejudiced the jury against the Bank and prevented the Bank from having a fair trial. Further, Heslop's attorney's improper closing argument which misrepresented testimony suggesting Browning and Kunz lied to the State Department of Financial Institutions and that Heslop was terminated because he was honest were highly prejudicial and improperly influenced the jury. Rule 59(a)(1) and (7).

4. Berube v. Fashion Centre Ltd., supra, was decided approximately five and a half years after Heslop's termination. It made substantial changes in employment law. It should not have been applied retroactively to this case. Prior to Berube, it was not uncommon for courts to find employee-at-will status

if an employee had no agreement for a specified term. Had Berube not been applied to this case, Heslop would not have been able to sustain a cause of action.

5. If Heslop's testimony is true, then he had an employment contract to work until he retired at age 65, terminable only for cause. Such a contract is barred by the statute of frauds because it could not have been performed within less than one year since Heslop was only 29 years old when he was rehired in 1962.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DENYING THE BANK'S MOTION FOR JUDGMENT N.O.V.

J.N.O.V. may be granted by the trial court where there is an "absence of any substantial evidence to support the verdict." Koer v. Mayfair Markets, 19 Utah 2d 339, 431 P.2d 566 (1967) "[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 (Utah 1988).

On appeal, this Court reviews the trial court's denial of the Bank's motion for j.n.o.v. to determine if the evidence was insufficient to support the jury verdict, and/or whether the evidence clearly preponderated in favor of the Bank so that reasonable people could not differ on the outcome. See W. Fiberglass v. Kirton, McConkie, Etc., supra, Onybear v. Pro

Roofing, Inc., supra, Canyon Country Store v. Bracey, supra,
Hansen v. Stewart, supra.

For the following reasons, the Bank requests this Court to reverse the judgment and the trial court's denial of the Bank's motion for j.n.o.v. and remand with instructions to enter judgment for the Bank.

A. Improperly Admitted Evidence.

A basic predicate to the Bank's position is that irrelevant and/or prejudicial evidence was admitted regarding the accrual account problem, investigations thereof by the State, the hiring and salary of Tom Timmons, payments by the Bank to Peat, Marwick, and terminations of other employees. All this evidence was irrelevant to the questions of constructive discharge, implied-in-fact contract, and good cause. Rules 401, 402, U.R.E.

Such evidence did not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See Rule 401, U.R.E. There was no causal connection between that evidence and Heslop's termination.

Even if it were considered relevant, the probative value was substantially outweighed by the prejudicial effect of the evidence on the Bank and was therefore inadmissible under Rule 403, U.R.E. The evidence prejudiced the jury by intimating the

Bank committed criminal acts in bad faith, that the Bank's directors and officers were dishonest, that Heslop was the only honest person involved in the accrual problem, and in general to blacken the Bank in the eyes of the jury. Evidence which tends to influence the outcome of the trial by improper means, such as appealing to the jury's sympathy or provoking an instinct to punish or otherwise cause the jury to base its decision on something other than facts of the case is unfairly prejudicial. See Terry v. Zions Co-op Mercantile Institute, 605 P.2d 314 (Utah 1979).

Heslop argued that evidence of the accrual account problem and its investigation was relevant to whether Heslop was terminated for good cause (R. 1106), and that the court's denial of the Bank's motion in limine regarding this evidence meant it was relevant to the issue of constructive discharge. (R. 1089) This is clearly not the case. When the court dismissed Heslop's public policy claim, he stated this evidence was only relevant to the good cause issue. (Tr. 1263-64) It was error for the court not to instruct the jury to disregard this evidence with regard to the constructive discharge and implied-in-fact contract issues. Absent this prejudicial evidence, the Bank submits it would have obtained a more favorable result on the constructive discharge and implied-in-fact contract issues.

The Bank submits this evidence was not relevant to any issue. The underlying assumption for the position that the

evidence was relevant to the issue of good cause is that the Bank's reassignment of Heslop in January 1983 and its removal of his lending authority in September 1983 was a pretext, and that the real reason the Bank took these actions was because it was upset with Heslop for his conduct in 1981 and 1982 and wanted to terminate him.

This theory does not follow factually. If the Bank was upset enough with Heslop for his conduct in 1981-82 to find some pretext for terminating him, then Browning's refusal to accept Heslop's offer of resignation in January 1983 makes absolutely no sense. The only reasonable and logical conclusion is that when Browning refused to accept the offer of resignation in January of 1983, any causal connection between the events in 1981-82 and Heslop's leaving the Bank in October, 1983 was cut off. Browning's refusal is an independent, intervening act that precludes any such causal connection. The trial court based his dismissal of Heslop's public policy claim in part on the very fact that Browning's refusal to accept Heslop's offer to resign in January, 1983, cut off any causal connection between events preceding that date and Heslop's termination. (Tr. 1149-51) This absence of any causal connection is further solidified because the Bank did not include Heslop in the June and October 1983 reductions in force, clearly good cause for termination. See Caldwell v. Ford, Bacon & Davis Utah, Inc., 777 P.2d 483 (Utah 1989).

Heslop argued "[t]here was no evidence presented at trial that Browning was angry enough at Heslop to request his resignation in January, 1983" (R. 1080) He also said "[n]o one suggested that Browning was 'mad enough to fire' Heslop at that point in time." (R. 1107)

These statements are absolutely contrary to Heslop's claims. Everything involving the accrual account problem, its investigation, and the hiring of Timmons had already happened by the time Heslop offered to resign in January of 1983. These are the facts upon which Heslop relied to claim he fell from favor and that the Bank wanted to get rid of him. If Heslop is saying his conduct in 1981-82 was insufficient to cause the Bank to want to terminate him in January 1983, then it is irrational, as well as illogical, to argue that evidence of that same conduct is relevant to establish a pretextual reason for the Bank's rescission of Heslop's lending authority approximately nine months later. Such a position makes no sense.

In addition, evidence of termination of other employees was irrelevant or otherwise inadmissible under Rule 403, U.R.E.

Therefore, in determining whether there was sufficient evidence to support the jury's verdict, evidence of the accrual problem, the state's investigations thereof, the hiring of Timmons, his salary, payments to Peat, Marwick, and termination of other employees should be disregarded.

B. Heslop Voluntarily Resigned and Was Not Constructively Discharged.

The relevant evidence on the issue of constructive discharge was the reorganization of the Bank in January 1983 and the rescission of Heslop's lending authority on September 29, 1983. This evidence was, as a matter of law, insufficient to allow a jury to find a constructive discharge. It did not meet the legal standard set forth in Instruction 15 that an employee "must establish by a preponderance of the evidence deliberate actions on the part of the employer which amounts to harassment and makes or allows the employee's working conditions to become so intolerable that the employee has no reasonable option except to resign. . . ." [emphasis added.]

The jury's verdict also did not meet the legal standard of Instruction 16 that an employee who resigns when there is a reasonable alternative thereto has voluntarily resigned.

Heslop had a reasonable alternative to resignation in October, 1983. He was still a senior vice president with the same salary. (Tr. 1094-95, 1286; see Exh. 16-P) He could perform all the duties of a lending officer except commit on loans without the approval of West or Kleyn. Heslop did not work even one day after his lending authority was rescinded. He did not attempt to talk to Timmons about the change. (Tr. 1286)

Kleyn, West, Browning and Timmons all testified that Heslop could have continued working as a loan officer. (Tr. 569, 774,

791, 1094-96, 1286) His failure to do so made his resignation voluntary, as a matter of law.

In Flanagan v. McKesson Corp., 708 F.Supp. 1287 (N.D. Ga. 1988), Flanagan was demoted to the position of field sales representative after 17 years of employment. He resigned without working a day at the new job. He claimed constructive discharge. The Court granted summary judgment for defendant. The court cited Garner v. Wal-Mart Stores, Inc., 807 F.2d 1536 (11th Cir. 1987) for the proposition that "[p]art of an employee's obligation to be reasonable is an obligation not to assume the worst, and not to jump to conclusions too fast." 708 F.Supp. at 1288-89 The court further held that hurt feelings due to a demotion do not constitute a constructive discharge, and that failure to work even one day after the changed assignment was unreasonable. The evidence was insufficient to present a jury issue.

Heslop had an obligation not to assume the worst when his lending authority was withdrawn and to pursue the clearly reasonable alternative of working at the job for a reasonable period of time. Where he failed to do that, his resignation was voluntary.

In Watson v. Nationwide Ins. Co., 823 F.2d 360 (9th Cir. 1987), the court stated that an employee must prove he "was subjected to incidents of differential treatment over a period of months or years" in order to establish a constructive

discharge. 823 F.2d at 361. Heslop's claims do not meet this standard. The reorganization affected numerous Bank employees, not just Heslop. (Tr. 1053-54, 1056, 1065-66, 1247-48, 1474) When Heslop's lending authority was rescinded, West's was substantially reduced, and the policy allowing combining of authorities was restricted. (Tr. 568-69, 1091, 1283-84; Exh. 16-P) Even assuming the rescission of lending authority was directed exclusively at Heslop, it is "a 'single isolated instance'" which "is insufficient as a matter of law to support a finding of constructive discharge." 823 F.2d at 361.

The Utah Supreme Court discussed constructive discharge in Bihlmaier v. Carson, 603 P.2d 790 (Utah 1979). Bihlmaier quit his job as manager of Carson's grocery store because Carson indicated on Bihlmaier's loan application that he had been hired on a trial basis only, which resulted in denial of the loan. Bihlmaier claimed he was constructively discharged. The trial court granted defendant's motion for summary judgment and plaintiff appealed.

The Supreme Court affirmed on the basis of the employment-at-will doctrine, but stated, in dicta, 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." 604 P.2d at 792, footnote 5

The court found that Carson's statement would not logically lead a prudent person to believe his employment had been terminated. Id.

The standard to be applied is not subjective. The employee must prove a reasonably prudent person would consider the employer's words and actions to mean the employee was terminated.

In Knee v. School Dist. No. 139 in Canyon Cty., 106 Idaho 152, 676 P.2d 727 (Idaho App. 1984), Knee had a written three-year employment contract as school district superintendent. During a regularly scheduled review of the contract, the school board demanded Knee's resignation. Although Knee asked for a chance to think about it overnight, the chairman of the board told Knee they wanted his resignation immediately. Knee therefore submitted his resignation that day.

Knee later filed an action for wrongful discharge. The trial court found Knee voluntarily resigned and dismissed his action at the close of his case. Knee appealed.

The Idaho Appellate Court affirmed and stated ". . . it is not appropriate to apply the doctrine of constructive discharge absent . . . harassment, intimidation, coercion or other aggravating conduct . . . which renders working conditions intolerable. . . . A mere request to resign, without more, is not sufficient to warrant a finding of constructive discharge. 676 P.2d at 730.

In the instant case, Heslop's claim that the Bank expressly demanded his resignation was not corroborated by any witnesses. (Tr. 1559-60) In Loose v. Nature-All Corp., 785 P.2d 1096 (Utah 1989), the Supreme Court upheld a lower court's finding that plaintiff had no claim for wrongful termination based in part on its review of the record which revealed no corroboration for plaintiff's testimony on a critical fact issue.

Wilson v. Bd. of Cty. Com'rs. of Cty. of Adams, 703 P.2d 1257 (Colo. 1985), involved a claim of constructive discharge by Wilson, an employee of Adams County since 1962. Wilson was hired as a receptionist. Nine years later, she assumed clerical and secretarial duties. During the entire time she was employed, she was a substitute receptionist.

In 1979, Wilson was given primary back-up receptionist responsibility. Wilson objected, claiming seniority, and also that stress from receptionist work caused medical problems.

The assignment was not changed. As a result, Wilson took leave for several months, failed to return by a specified deadline, and was terminated.

Wilson sued for constructive discharge. The jury returned a verdict for her, and the county appealed. The Colorado Supreme Court reversed and remanded, directing the district court to enter judgment in favor of defendant.

The court noted that even before the assignment as primary back-up receptionist was given, Wilson had worked as a back-up

for six years. The back-up assignment was within the scope of Wilson's job duties. Even evidence of medical or emotional problems associated with the job did not constitute constructive discharge.

Wilson is analogous to Heslop's case. Heslop complained when his duties were changed in January, 1983 to commercial loan officer with a specialty in agricultural loans. However, Heslop had specialized in agricultural lending for years. (See Tr. 547, 816-17) From January, 1983 until the time of his termination, Heslop was also a commercial loan officer, which he had been for years before the reorganization. His lending authority was increased after the reorganization. (Tr. 369-70, 376, 392-95, 1054-55, 1249-50; see Exh. 2-P)

In Christie v. San Miguel Cty. School Dist., 759 P.2d 779 (Colo.App. 1988), plaintiff was a school teacher under contract to teach music for all grades. Her position was changed to permanent substitute teacher at the same salary. She refused to accept this position, resigned and sued for constructive discharge. The trial court granted a directed verdict, plaintiff appealed, and the Colorado Court of Appeals affirmed.

The court listed the conduct Christie claimed proved constructive discharge:

Plaintiff argues that she met her burden by showing that: (1) she was asked to resign; (2) the district had a motive to force her to resign, i.e., it did not have sufficient funds to engage a "full-time" substitute; (3) the transfer was in essence

a demotion; and (4) the transfer involved a significant change in duties.

Id. at 783. The court rejected all these arguments. It held that requesting an employee to resign, standing alone, does not constitute constructive discharge "unless accompanied by harassment, coercion, or other employer conduct which makes the working conditions intolerable." [Id.] Christie never testified that her working conditions were in fact intolerable. Heslop never worked after his lending authority was withdrawn. His claim that working conditions were intolerable without lending authority is purely speculation. Since he did work for several months after the reorganization, that change clearly did not create intolerable working conditions.

The Colorado court also stated "the mere fact of a change in duties is insufficient to constitute a prima facie demonstration of constructive discharge." [Id.] Christie refused to perform her new duties. Heslop refused to work with rescinded lending authority. Christie ultimately resigned and so did Heslop. Christie was not constructively discharged, and neither was Heslop.

In Adams v. Bd. of Review of Indus. Com'n, 776 P.2d 639 (Utah App. 1989), the Board of Review denied benefits because the employee "'voluntarily left work without good cause.'" Adams appealed, and the Court of Appeals affirmed.

Adams was employed as a mechanic with Facet Automotive Filter Company. Facet asked Adams to work the night shift for

two weeks because another employee was injured. When Adams refused to work nights, Facet refused to let him work days, and Adams quit.

On appeal, Adams claimed he was constructively discharged. The court disagreed and stated:

. . . Plaintiff argues that since he was given a choice of working the night shift "or else," he had no choice at all and was thus constructively discharged.

Notwithstanding plaintiff's failure to marshal the evidence, it is clear that there is substantial evidence in support of the Board's factual findings. Plaintiff, not Facet, made the decision to sever the employment relationship.

776 P.2d at 641. Heslop had a choice. He could continue working at the Bank subject to the limitation on his lending authority, or he could resign. He voluntarily chose to resign.

In Lombardo v. Oppenheimer, 701 F.Supp. 29 (D. Conn. 1987), plaintiff claimed she was constructively discharged because her job duties were changed, her employer treated her coldly, and her new duties were monotonous and demeaning. The district court granted defendants' motion for summary judgment. Even though plaintiff's "duties did change somewhat," she retained "the same job grade, class and salary . . . [and] [a]ny change in her position was the result of a reorganization and not an isolated incident of agency mistreatment of her." 701 F.Supp. at 31. The court concluded "[p]laintiff cannot claim a constructive discharge, where there was 'no more than a change

in job responsibility, based on a reasonable business decision [by] . . . the employer'." Id.

The court also rejected plaintiff's claim she was constructively discharged because defendants treated her coldly, and because her job was monotonous and demeaning. This was simply a statement of plaintiff's subjective feelings.

Heslop's subjective feelings regarding his new position in January, 1983, and also after his lending authority was rescinded do not rise to the level of a constructive discharge.

In Neale v. Dillon, 534 F.Supp. 1381 (E.D. N.Y. 1982), the district court tried Neale's claim of sex discrimination and constructive discharge. Neale was an assistant district attorney with supervisory duties. She was passed over for a promotion which, while she was on maternity leave, was given to a male employee. The same male employee was given her office. When Neale returned to work following maternity leave, she found her personal belongings outside the office in a shopping cart. She was forced to search for another desk and was given a position with no supervisory duties. Neale resigned. In spite of all the above, the court ruled plaintiff had not proven constructive discharge:

A claim of constructive discharge must be supported by more than the employee's subjective opinion that his or her position has become so intolerable and difficult that he or she must resign. . . . The court does not find that Neale's situation had become so intolerable that a reasonable person would feel forced to resign. . . .

Although Neale was transferred to a non-supervisory position, the transfer was at no loss of pay. The court finds that if she thought her position intolerable it was due to her own perception that the promotion of Schoenberg to deputy bureau chief and her transfer to the appeals bureau in a non-supervisory position were damaging to her prestige. While understandable, particularly in the context of the manner in which she learned of Schoenberg's appointment, and the clumsiness of her superiors removing her property from her office, her embarrassment does not constitute constructive discharge.

534 F.Supp. at 1390. Finstad v. Montana Power Co., 241 Mont. 10, 785 P.2d 1372 (1990), was a claim by a petroleum engineer who had 22½ years with his employer. When the employer transferred him from Cutbank to Butte, Montana, Finstad refused and claimed he had been constructively discharged. After a verdict entered in favor of plaintiff, the Montana Supreme Court reversed and directed entry of judgment for defendant, holding that Finstad had not been constructively discharged because he had the alternative of accepting the transfer, notwithstanding the fact it was undesirable to him.

The jury's finding that Heslop did not voluntarily quit is not supported by substantial evidence. The Bank believes this finding was a result of prejudice engendered against it because of evidence improperly admitted. See Point I.A., supra.

C. Heslop Did Not Have an Implied-in-Fact Contract Terminable Only for Good Cause.

The critical issue in determining whether an implied-in-fact contract exists is whether both parties intended such. If the employee intended it, but the employer did not, then no such contract exists.

The evidence, taken most favorably to plaintiff, was that various employees believed the Bank's employment policy was to terminate only for good cause. However, every employee who so testified had signed a written, express employment at-will agreement. The Bank used the same at-will language in its employment applications from the time Heslop was first hired in 1955 until the present date. It was the Bank's intent to maintain the right to terminate employees at-will. Berube states "[an] implied-in-fact promise cannot, of course, contradict a written contract term." 771 P.2d at 1044. The written terms of Heslop's employment agreement should, therefore, control.

When a former employee was rehired, his prior written agreement was revived and continued in force. A new one was not signed. This occurred with Heslop and several other re-hired employees. (Tr. 693-94, 884-85, 1016-17, 1354-56, 1434)

Even if Heslop's written agreement is not specifically controlling, the written employment applications established the Bank's intent that employment was at-will. It was Heslop's burden to prove by a preponderance of the evidence that that was

not the Bank's intent. Other than Heslop's testimony, there was no substantial evidence that anyone in authority ever stated the Bank's policy was to terminate only for cause. There was, however, testimony from Beutler and Browning either that no such statements were made or they could not recall such statements being made. (Tr. 886-87, 919, 1017-18) Kennedy also testified he never made such statements when he interviewed prospective employees. (Tr. 1356-57) The Employee Handbook contained no statement that employees can be terminated only for cause. (Exh. 27-P)

Berube was careful to limit the application of the implied-in-fact theory:

The ability of employees to bring causes of action based upon express or implied-in-fact promises by the employer will not eliminate the at-will construction of most employment contracts. Courts have expressed concern that due deference be paid to managerial discretion and normal employment decisions.

771 P.2d at 1045-46 (emphasis added). In Gianaculas v. Transworld Airlines, Inc., 761 F.2d 1391 (9th Cir. 1985), the court rejected an implied-in-fact theory with the following language:

. . . The employment application completed by the applicants expressly states that employment is terminable at will. This term contradicts the notion that the parties agreed to limitations upon at-will employment. As a California appellate court recently held . . . "[t]here cannot be a valid express contract and an implied

contract each embracing the same subject,
but requiring different results."

Id. at 1394 (citations omitted, emphasis supplied). The only express employment contract Heslop signed made him an at-will employee. Heslop's implied-in-fact theory must fail because it requires a different result than does the written contract. For a similar holding, see Baker v. Kaiser Aluminum & Chemical Corp., 608 F.Supp. 1315, 1320 (D.C.Cal. 1984) (Noting that "[a] valid express agreement precludes a contradictory implied contract embracing the same subject" matter and rejecting an employee's implied-in-fact contract theory).

Heslop claims his superiors gave him oral assurances of continued employment as long as he performed his duties adequately. The alleged conversations do not constitute sufficient evidence to rebut the presumption that Heslop's employment was terminable at will.

The Utah Supreme Court rejected an employee's claim of an implied-in-fact employment contract based upon his selective interpretations and subjective understandings of oral conversations with superiors. Rose v. Allied Development Co., 719 P.2d 83 (Utah 1986).

D. In the Alternative, There Was Good Cause to Terminate.

Even if good cause was required, there was sufficient evidence of good cause, as a matter of law.

Heslop failed to meet the specific \$50,000 condition required by his superior, Gerald West, before closing the Gabbert loan. (Tr. 430, 432-33, 557-58, 786-87, 1077, 1079-80, 1278-79, 1388-89; Exh. 7-P and 12-P) Heslop misrepresented the facts relating to that condition when asked about additional collateral by Boyd Carlsen, the bank's loan review officer. Heslop falsely stated Dr. Gabbert invested \$50,000 into the project. (Tr. 442-44, 446-47, 567, 714, 716-18, 727-34, 743, 747-48, 753-55; Exh. 15-P and 55-D) Heslop knew that was not true.

Heslop was highly critical of Bank management, to the point of insubordination and disloyalty. He stated Browning was incapable of running the Bank, that Timmons should not be president, and that Kunz should be removed as legal counsel, all clear statements in opposition to decisions which the Board had an absolute right to make without Heslop's approval. (Tr. 483-88; Exh. 39-Pb at 20-21)

West testified that disloyalty constitutes good cause, and that statements such as those made by Heslop show disloyalty. (Tr. 549, 580-81)

In Hutchinson v. Cartwright, 692 P.2d 772 (Utah 1984), plaintiff was employed as a county jailer in Beaver County. His deposition was taken as part of a lawsuit in which he was named as a defendant. His lawyer was provided by Beaver County.

During the deposition, plaintiff's "conduct . . . was marked by conflict with both" the opposing party's attorney and his own attorney. As a result, plaintiff was permanently suspended.

Plaintiff sued for wrongful discharge. The trial court granted summary judgment, and plaintiff appealed.

The Utah Supreme Court affirmed, holding that the employer was justified in terminating an employee upon evidence of only one incident of misconduct. The facts in the instant case meet that criterion.

The trial court apparently believed the accrual problem and related evidence was relevant to the issue of good cause. The Bank disagrees. It's position on good cause is two-fold.

First, the Gabbert loan. Second, disloyalty and insubordination, not because of Heslop's opposition to the Bank's method of resolving the accrual problem or anything Heslop did with respect to the state's investigations, but because Heslop was generally critical of the Board's major policy decisions from approximately December, 1982, until Heslop left, including the hiring of Timmons, the reorganization, and the new loan policy.

The Bank had an absolute right to hire whomever it wanted as president. Heslop had no right to be made president. Despite plaintiff's innuendo and speculation, there was no

evidence of wrongdoing or misconduct associated with Timmons' hiring. Evidence associated with his hiring and payments to Peat, Marwick was not relevant to the issue of good cause.

Heslop's failure to follow Bank policy and to meet the condition for closure of the Gabbert loan certainly provided the Bank with reasonable grounds to believe sufficient cause existed to take disciplinary action. See Kesterbaum v. Pennzoil Co., 108 N.M. 20, 766 P.2d 280, 287 (1988). If this disciplinary action is deemed a constructive discharge, there was, therefore, good cause which eliminates any basis for Heslop's claims.

POINT II.

IN THE ALTERNATIVE, THE BANK IS ENTITLED TO
A NEW TRIAL.

A. Insufficiency of the Evidence.

This Court can reverse the trial court's denial of the Bank's motion for new trial if "the evidence is insufficient to support the verdict." Hansen v. Stewart, 761 P.2d at 17.

Pursuant to Rule 59(a)(6), U.R.C.P., the Bank is entitled to a new trial because the evidence was insufficient to justify the verdict or judgment or that it is against law. See Point I, supra. The verdict was against law because the jury failed to apply the legal standard enunciated in the court's instructions on constructive discharge.

**B. Error in Law or Abuse of Discretion, Which Was
Prejudicial and Prevented a Fair Trial.**

Rule 59(a)(1), U.R.C.P. allows the court to grant a new trial if there was some irregularity in the proceedings of the court, jury or adverse party or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial. Rule 59(a)(7) allows the court to grant a new trial due to error in law.

The improper admission of evidence regarding the accrual problem, the state's investigations thereof, the hiring and salary of Timmons, payments to Peat, Marwick, wash entries, and of terminations of other employees was error in law, prejudicial and prevented the bank from receiving a fair trial. It is impossible to reasonably believe that repeated references to these matters were not prejudicial or that they did not substantially affect the jury in rendering a verdict in favor of the plaintiff.

A new trial should be granted even where the court dismisses the claim which was the basis for admission of the prejudicial evidence. In Almonte v. National Union Fire Ins. Co., 705 F.2d 566 (1st Cir. 1983), plaintiff brought suit on an insurance policy arising from a fire loss. At the conclusion of plaintiff's case, the court directed a verdict for defendant on plaintiff's bad faith claim. The court failed to instruct the jury to disregard the bad faith evidence.

The trial court denied defendant's motion for new trial, the Court of Appeals reversed and stated:

Because of prejudicial error in failing to counteract the prejudice created when the jury heard these statements and evidence [concerning bad faith], this court has no choice but to reverse.

705 F.2d at 569. In the instant case, the trial court did not direct the jury to disregard the prejudicial evidence after dismissing Heslop's public policy claims. The jury should have been told that evidence was irrelevant and should be disregarded absent a public policy claim. The Bank would have obtained a more favorable result had the court so instructed the jury.

Doubts regarding possible prejudice should be resolved in favor of the Bank. In Pearce v. Wistisen, 701 P.2d 489 (Utah 1985), evidence was admitted concerning the decedent's illegal purchase and consumption of alcohol the day before the accident. Following a defense verdict, plaintiff appealed. The Supreme Court reversed and remanded, concluding that the prejudicial effect of the evidence outweighed any relevance it had. The court resolved doubts in favor of the appellant:

We do not know why the jury found Evan's negligence to be the sole proximate cause of his death. It may have been because of removing his life jacket. If so, evidence of his drinking was not prejudicial. However, we have no way of knowing this and cannot presume that the jury was not influenced by the evidence of his drinking. . . . The jury's verdict could well have been the effect of shifting its attention

away from the facts of the case and judging every one of Evan's actions before and after the disabled craft drifted away as a natural consequence of alcohol-induced debility. The probative value of testimony of so little substance coming in with such great latitude was clearly outweighed by the prejudicial effect it may have had on a jury.

* * * *

The erroneous admission of the testimony might be compared to a drop of ink placed in a vessel of milk. It cannot long be seen, but it surely remains there to pollute its contents.

701 P.2d at 494. Further irregularities occurred due to improper conduct of plaintiff's counsel.

In Donohue v. Intermountain Health Care, Inc., 748 P.2d 1067 (Utah 1987) the trial court granted defendant's motion for new trial because of "improper and prejudicial" closing argument. See 748 P.2d at 1067-68. On appeal, the Supreme Court affirmed and stated:

. . . Counsel's remarks appear motivated by a desire to stir up the jury emotionally against IHC. We have previously held that "pleas plainly designed to elicit sympathy or to inspire passion or prejudice should not be allowed." Eager v. Willis, 17 Utah 2d 314, 320, 410 P.2d 1003, 1007 (1966).

748 P.2d at 1068. In the instant case plaintiff's counsel appealed to the prejudice, passion and sympathy of the jury by implying that plaintiff was terminated because he was honest,

that all of the other directors and officers involved in the decisions related to the accrual problem were dishonest criminals, and that Browning and Kunz lied to a state investigator, which was a clear misrepresentation of the record. Such misrepresentations show Heslop intended the jury to focus on facts which were highly prejudicial to the Bank. His desire was to make the Bank look as bad as possible in every aspect of its business, regardless of whether it bore any reasonable relationship whatsoever to Heslop's claims, and after the court had dismissed the public policy claim.

Another irregularity which prevented a fair trial was plaintiff's counsel's improper representations to the court regarding his reasons for submitting evidence of Timmons' hiring, his salary, and payments made by the Bank to Peat Marwick before and after Timmons was hired.

Counsel told the court Timmons acquired information during the audit regarding Browning and Kunz which he could have used against them with the Bank Commissioner. (Tr. 1126, 1156) Counsel claimed this resulted in a sweetheart employment contract for Timmons, and subsequently to large, improper payments by the Bank to Timmons' former employer (Peat Marwick). He implied Timmons was getting kickbacks from Peat Marwick due to the Bank's payments.

Timmons gave no testimony which even remotely supported plaintiff's position, yet all the evidence with all its innuendo of wrongdoing by the Bank had been admitted. It was highly improper for plaintiff's counsel to represent the relevance of the above-specified evidence, when he knew he could not and in fact did not, connect the evidence to his theory of a "sweetheart deal" and improper payments.

Evidence of termination of other employees was also irrelevant and prejudicial to the Bank. The facts surrounding Beutler's resignation were not remotely related to Heslop's case. Yet Beutler's testimony suggested the Bank bought his resignation. The Bank obviously disputed this, but it was another example of Heslop's approach to make the Bank look as bad as possible with regard to events that had nothing to do with Heslop's termination.

The same is true of Carlsen's termination. He was fired and escorted from the Bank. He claimed the Bank treated him like a crook. It was a very emotional event for Carlsen. It happened after Heslop had left the Bank's employ. (Tr. 722-23) It had nothing to do with Heslop's termination, but again blackened the image of the Bank in the eyes of the jury.

POINT III.

THE BERUBE CASE SHOULD NOT HAVE BEEN
APPLIED RETROACTIVELY.

In his concurring opinion in Berube, Justice Zimmerman
stated:

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

All that being said, we are reversing and
remanding this matter for trial and are
signaling a change in the employment-at-
will law of Utah.

771 P.2d at 1050-51. When a change in the law occurs, the
court has discretion to apply that change prospectively only.
Since Berube changed the doctrine upon which the Bank relied in
the past, it should have been applied prospectively only and not
to terminations of employment that occurred before the date of
the decision. See Malan v. Lewis, 693 P.2d 661 (Utah 1984).

In Bimbo v. Burdette Tomlin Memorial Hospital, 644 F.Supp.
1033 (D. N.J. 1986), the federal district court applied a change
in the employment at-will doctrine announced in a New Jersey
Supreme Court decision prospectively only and held that
plaintiff had no claim for breach of contract. Bimbo contended
she was constructively discharged as a result of a demotion,
which violated her employer's personnel policy manual. Her

demotion occurred some three years before the change in the law. The Federal District Court refused to apply this change retroactively because it "would be distinctly unfair to those . . . who had previously acted in reliance upon the prior state of the law."

Berube made significant changes in Utah's employment at-will doctrine. Berube went beyond the exceptions previously identified in Rose v. Allied Dev. Co., 719 P.2d 83 (Utah 1986). Rose recognized an exception to the at-will doctrine where the employee could show an implied or express stipulation as to the duration of the employment agreement. See 719 P.2d at 85. Heslop's testimony was contradictory on this point. He said no one committed employment for any fixed period of time (Tr. 293), but also that he was promised employment until retirement at age 65. (Tr. 296) However, Berube allows an employee to overcome the at-will doctrine by implication, not simply with respect to the duration of the contract but to the very issue of whether the person is an at-will employee.

Berube also held mutuality of contract has no application. This is a clear change from Crane Co. v. Dahle, 576 P.2d 870 (Utah 1978), which held employees were entitled to quit whenever they wanted to and employers were entitled to fire employees whenever they wanted to.

The Bank relied on the at-will rule in the Beutler lawsuit and obtained summary judgment in that case in 1984 in part because Beutler was an at-will employee. At the time Heslop was hired, during his entire employment with the Bank, and at the time Heslop terminated from the Bank, the at-will doctrine was the law in Utah. More than five years after Heslop's termination, the Supreme Court changed the at-will rule. Had Berube not been applied to this case, the Bank submits Heslop would have been found to be an employee-at-will who had no valid cause of action.

POINT IV.

HESLOP'S CLAIMS ARE BARRED BY THE STATUTE OF FRAUDS.

Heslop's claim to have entered a contract in 1962 for employment until retirement at age 65 terminable only for good cause was an agreement which by its terms was not to be performed within one year of its making. In 1962, Heslop had more than 30 years' work life left before he would reach age 65. (See Exh. 1-P showing Heslop's birth date to be 5-8-30.) Such a contract must be in writing, signed by the Bank or it is unenforceable under Utah Code Ann. §25-5-4(1) There was no such writing.

McKinney v. National Dairy Council, 491 F.Supp. 1108 (D. Mass. 1980), held that an implied-in-fact agreement to employ a person until his normal retirement date was within the statute

of frauds, and absent sufficient proof of a writing memorializing the contract, was unenforceable.

In Savodnik v. Korvettes, Inc., 488 F.Supp. 822 (E.D. N.Y. 1980), plaintiff claimed he had an express or implied employment agreement terminable only for cause.

The court rejected plaintiff's argument and stated:

New York cases involving oral contracts for permanent or life-time employment have held that they may be unenforceable under the Statute of Frauds.

Based on Heslop's own testimony of the terms of his employment contract with the Bank, it could not have been performed within one year and therefore falls within the statute of frauds. Since the contract was not memorialized in a writing signed by the Bank, the alleged contract terminable only for good cause is unenforceable.

CONCLUSION

The Bank requests this Court to reverse the judgment and remand the case with instructions to the trial court to enter judgment for the Bank because the relevant evidence establishes as a matter of law that:

- a) Heslop voluntarily resigned;
- b) Heslop did not have an implied-in-fact contract terminable only for cause;
- c) The Bank had good cause to terminate Heslop; and/or
- d) Heslop's claims are barred by the statute of frauds.

In the alternative, the Bank requests the Court to reverse and remand for a new trial due to insufficiency of the evidence and/or admission of prejudicial evidence and argument with instructions that such evidence and argument are inadmissible.

Respectfully submitted this 12th day of March, 1991.

STRONG & HANNI

By Stuart H. Schultz
Glenn C. Hanni
Stuart H. Schultz
Attorneys for The Bank of
Utah

CERTIFICATE OF HAND DELIVERY

I hereby certify that four true and correct copies of the foregoing document were hand delivered this 12th day of March, 1991, to the following:

Ronald E. Griffin
Valley Bank Tower
50 West 300 South, Suite 900
Salt Lake City, Utah 84101
Attorney for Ivan J. Heslop

Stuart H. Schultz

3/200051nh

ADDENDUM INDEX

1. Rules and Statutes.
2. Order and Judgment dated July 10, 1989.
3. Judgment on Verdict dated August 27, 1990.
4. Order dated October 16, 1990, Denying the Bank's Motion for J.N.O.V. or, in the Alternative, For New Trial.
5. Bank's Notice of Appeal dated November 13, 1990.
6. Trial Transcript, Pages 1120-30, 1152-65 involving hearings regarding evidence of Timmons' salary and payments to Peat, Marwick.
7. Order dated June 13, 1990, denying the Bank's Motion in Limine regarding the accrual problem.
8. Trial Transcript, Pages 1263-64, containing the trial court's ruling that evidence of the accrual problem was relevant to good cause issue after dismissal of public policy claim.
9. Trial Transcript:
 - a) Pages 1590, 1610, 1654-55 containing Heslop's counsel's arguments regarding Ron Draughon's testimony;
 - b) Pages 976-78 containing Ron Draughon's testimony regarding his conversations with Browning and Kunz;
 - c) Page 1218 containing a question to Browning on cross-examination regarding his conversation with Draughon, an objection, and the court's ruling.
10. Trial Transcript, Pages 63-64, 1607, 1655, 1657-58, 1661 containing portions of Heslop's counsel's opening statement and closing argument regarding dishonesty and criminal conduct.

ADDENDUM 1

Rule 103. Rulings on evidence.

(a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) **Record of offer and ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) **Hearing of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) **Plain error.** Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Rule 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Advisory Committee Note. — This rule is the federal rule, verbatim, and is comparable in substance to Rule 1(2), Utah Rules of Evidence (1971), but the former rule defined relevant evidence as that having a tendency to

prove or disprove the existence of any "material fact." Avoiding the use of the term "material fact" accords with the application given to former Rule 1(2) by the Utah Supreme Court. *State v. Peterson*, 560 P.2d 1387 (Utah 1977).

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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.

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) **Time for motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

25-5-4. Certain agreements void unless written and signed.

The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

- (1) every agreement that by its terms is not to be performed within one year from the making of the agreement;

ADDENDUM 2

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DISTRICT COURT
WEBER COUNTY

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

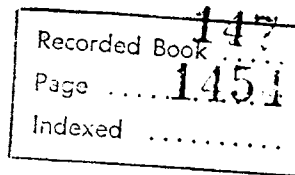
IVAN J. HESLOP,)	
)	
Plaintiff,)	ORDER AND JUDGMENT
)	
vs.)	Civil No. CV-99381
)	
BANK OF UTAH, a Utah)	
banking corporation,)	
)	
Defendant.)	
)	

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 July, 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. Supplee

ADDENDUM 3

AUG 26 11 37 PM '90

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. 87099381
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

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.

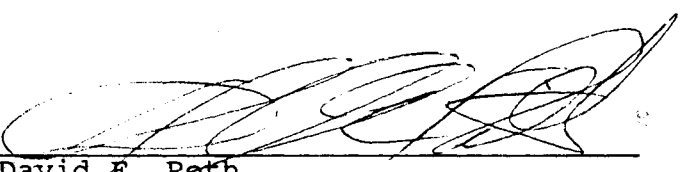
Now, therefore, it is hereby,

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 \$ 4,157.78, 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. Roth
Second District Court

Form approved by


STRONG & HANNI

ADDENDUM 4