

1991

# Lee Ann Hodgson v. Bunzl Utah Inc., and Carl A. Kruse : Brief of Appellee

Utah Supreme Court

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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

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LEE ANN HODGSON,

Plaintiff/Appellant,

vs.

Civil No. 910037

BUNZL UTAH INC., and CARL A.  
KRUSE,

Priority No. 16

Defendants/Appellees

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BRIEF OF APPELLEES

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APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
THE HONORABLE RICHARD H. MOFFAT, DISTRICT JUDGE

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CLERK SUPREME COURT,  
UTAH

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I. LIST OF ALL PARTIES

The caption contains the names of all parties in the court whose judgment is sought to be reviewed.

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#### IV. STATEMENT OF JURISDICTION

Appellant/plaintiff appeals from the Third Judicial District Court's entry of summary judgment in favor of appellees/defendants Bunzl Utah, Inc. and Carl A. Kruse. Jurisdiction is proper in this court pursuant to Utah Code Ann. § 78-2-2(3) (1953, as amended).

#### V. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. If an employee checklist (which new employees sign) and an employee handbook clearly and unambiguously state that employment is "at-will," does a vague, non-specific, pre-employment oral statement that employees will be "given a chance to correct work deficiencies" before termination create an implied-in-fact agreement that an employee's status will be other than at-will?

2. Do limited instances of written or oral warnings to other employees modify the at-will relationship expressed in the company's written policies creating an implied-in-fact agreement that an employee must receive warnings and be given a chance to correct deficiencies before being terminated?

3. Is evidence of either an oral statement or an employer's course of conduct sufficient to create a question of fact as to whether an implied-in-fact agreement exists when both an employee checklist and an employee handbook expressly state that employment is at-will?

4. Even if the employer in this case did have an implied-in-fact agreement not to dismiss an employee without giving the

employee an opportunity to correct her deficiencies, did the employer fulfill that obligation under the undisputed facts of this case?

5. Does this case justify a ruling that is directly contrary to recent precedent and established Utah case law regarding:

(a) Utah's refusal to recognize a cause of action for breach of an implied covenant of good faith and fair dealing in an at-will employment relationship;

(b) Utah's requirements that a defamation claim include allegations and proof of special damages or statements that are slanderous per se, and publication to third-parties; and

(c) Utah's refusal to recognize a common law claim for retaliatory discharge?

The issues in this case were summarily decided in defendants' favor. Summary judgment is appropriate when the facts as established in the pleadings and affidavits, viewed in the light most favorable to the non-moving party, present "no genuine issue[s] as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). This determination is a question of law. Under the appropriate standard of review, this court should afford the trial court's conclusions of law no deference, and should review them de novo "for correctness." Clover v. Snowbird Ski Resort,

155 Utah Adv. Rep. 3, 4 (Utah 1991); see also Blue Cross & Blue Shield v. State of Utah, 779 P.2d 634, 636 (Utah 1989).

#### VI. DETERMINATIVE AUTHORITIES

Defendants submit that Berube v. Fashion Centre Ltd., 771 P.2d 1033 (Utah 1989) and Brehany v. Nordstrom, Inc., 161 Utah Adv. Rep 7 (Utah 1991) are controlling in this case and affirm that defendants are entitled to judgment as a matter of law.

#### VII. STATEMENT OF THE CASE

##### A. Nature of the Case and Course of Proceedings Below

This appeal is taken from the Third Judicial District Court's order of summary judgment for defendants on December 19, 1990. Plaintiff commenced this action against defendants in December 1988, alleging six causes of action for wrongful termination and defamation. R. 2-9. The wrongful termination claims were based on purported breaches of both an implied covenant of good faith and fair dealing and an implied-in-fact agreement altering the company's at-will employment policy. Defendants moved for summary judgment. After oral arguments, the Third District Court granted and entered judgment on December 19, 1990, based upon defendants' memoranda. R. 482-483. Plaintiff filed a Notice of Appeal on January 17, 1991. R. 484.

B. Statement of Facts

Defendant, Bunzl Utah, Inc. ("Bunzl") hired plaintiff as a bookkeeper on January 27, 1986. R. 2. Prior to her employment, she was interviewed by Terry Frank of Bunzl. R. 300-301. During the interview, Mr. Frank explained to her that Bunzl was "an at-will company and that [plaintiff had] the right to leave at any time, and . . . [Bunzl had] the right to dismiss [plaintiff] at any time." R. 303-304. Plaintiff then inquired, "Surely you would not dismiss an employee without giving them a chance to correct deficiencies for job performance?" Plaintiff alleges that Mr. Frank responded, "Oh, no. We would never do anything like that. We have procedures that we follow for disciplinary action. . . ." R. 304.<sup>1</sup>

On her first day of employment with Bunzl, approximately January 31, 1986, plaintiff signed a New Employee Checklist. Immediately above her signature, the Checklist stated:

I understand the above are general management guidelines and may be changed as business necessity requires. The above does not constitute a written contract and I understand my employment is for no definite period and may be terminated at will.

I acknowledge that we have discussed all the above.

R. 364 (emphasis added).

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<sup>1</sup> Respondents deny that Mr. Frank made any such statement. For purposes of this appeal, however, respondents assume that Mr. Frank made this statement, in order to present the facts in the light most favorable to the plaintiff.

Plaintiff admits that she was hired for an indefinite period. R. 366, She also admits that she understood she would be an "at-will" employee and that she never had a written employment contract with Bunzl. R. 302, 308, 366. Plaintiff understood that she could leave Bunzl at any time for any or no reason. R. 309.

At the time of her hire, plaintiff understood that Bunzl was preparing an Employee Handbook which would outline the company's disciplinary and termination procedures. R. 306-307. In April 1987, plaintiff received a copy of the Handbook and read it. R. 309. The front page of the Employee Handbook provides as follows:

The plans, policies, rules and procedures described in this Handbook are not conditions of employment. Bunzl reserves the right to modify, revoke, suspend, terminate, or change any or all such plans, policies, rules or procedures, in whole or in part, at any time with or without prior notice. The plans, policies, rules and procedures described in this Handbook supersede the terms and conditions of any previous plans, policies, rules and procedures.

This Handbook is not intended to create, nor shall it be construed to create, a contract between Bunzl and any employee, nor shall any of the provisions of the plans, policies, rules or procedures described in this Handbook create an employment of any fixed or indefinite duration.

Any action of any Bunzl officer, manager, supervisor or representative in applying the terms of this Handbook, which may leave the appearance of establishing an employment contract of fixed or indefinite duration, is expressly without authorization and may not be relied upon by any Bunzl employee.

See R. 370 (emphasis added).

The Handbook also expressly provides that employment with Bunzl is at-will:

Except for employees who are parties to express written Bunzl employment contracts or agreements providing to the contrary, employment with Bunzl is employment at will and as such, the employee may terminate his/her employment at any time and for any reason. Bunzl may terminate the employment of a Bunzl employee under the same terms. Nevertheless, in order to allow for the orderly change of assignments, the Company expects an employee to provide to Bunzl notice of separation at least fourteen (14) calendar days prior to the date of separation. In turn, except in cases of misconduct warranting immediate termination, Bunzl, before effecting separation of a full time employee with more than twelve (12) months service, will provide in its discretion either notice of separation fourteen (14) calendar days prior to the date of separation or provide, without notice, separation pay equivalent to not less than the regular straight time base pay the employee would have otherwise earned during such fourteen (14) calendar day period.

See R. 372 (emphasis added).

Finally, the Handbook indicates that no plan of progressive discipline or any disciplinary procedures other than at-will are in place:

The Rules that follow are not set down in a sequence of gravity or importance. No employee may rely that a program of progressive discipline is in effect, but rather that each employee must recognize that unless he/she has an express written Bunzl employment contract or agreement to the contrary, employment at Bunzl is at-will employment and just as employees may without cause separate from Bunzl upon appropriate fourteen calendar day notice, so, also, Bunzl may separate employees without cause with appropriate fourteen calendar day notice (except that fourteen calendar day Bunzl notice may be dispensed with for conduct warranting immediate termination). As a consequence, separation may be effected with or without cause as

well as for any single Rule violation, without regard for any other consideration.

See R. 384 (emphasis added).

As part of her responsibilities, plaintiff was required to prepare month-end closing reports for the Salt Lake City office. She would then send these reports to Bunzl's regional controller, Debra Scott, in the home office in St. Louis, Missouri. The deadline for these reports was approximately five days after the end of each month. R. 310-312, 361-362. By November of 1987, plaintiff was routinely requesting extensions of this deadline. Plaintiff was late in submitting her closing reports in January, February, March, and April of 1988. R. 313-314.

Debra Scott visited the Salt Lake Office in November 1987 and reviewed the office's accounting procedures and plaintiff's bookkeeping procedures. She spent time with plaintiff, assisting her in overcoming her delays in submitting the closings and streamlining office procedures. R. 313, 317-318, 362.

The tardiness of the month-end reports created problems for Debra Scott in Bunzl's corporate office, and plaintiff was aware of that. In fact, when plaintiff was working on the January 1988 closing, Ms. Scott told her, "I have to have your closing. I have to correlate my figures and give them to corporate by the 15th of the month. I have to have those closings." R. 314-315. Plaintiff became very concerned about the lateness of the

reports, and indicated that she "felt very bad" about the problem. R. 316.

Debra Scott again visited the Salt Lake City office in February or March of 1988. Upon her arrival, Ms. Scott asked plaintiff when the closing would be finished. Plaintiff said it would take "at least two days." Ms. Scott responded, "Well, then I'll help you, because we don't have two days." Ms. Scott then did some of the postings to help close the books. Plaintiff realized at that time that her lateness was a major concern to Ms. Scott and the company. R. 321-324.

Another Bunzl corporate employee, Trina Travis, visited the Salt Lake City office in April 1988 and assisted plaintiff in finalizing the closing reports for March. R. 323-324. Bunzl also hired temporary employees in February and March of 1988 to assist plaintiff in filing the reports. R. 324-326, 341-345, 346-358.

Plaintiff was late in finalizing the April 1988 closing report. In fact, she was still working on it on May 20, 1988 when Debra Scott returned to the Salt Lake City office. R. 321-322, 329-330. Plaintiff was terminated on that day, at which time defendant Carl Kruse, the Salt Lake City office manager, gave her a termination letter and explained that her termination was principally due to her consistent lateness in submitting the closings. R. 327-328. At the time of her termination, plaintiff



received two weeks' severance pay pursuant to the terms of the Employee Handbook. R. 340.

With respect to her defamation claim, plaintiff admits that the only allegedly defamatory statement of which she complains is her termination letter, in which defendant Carl Kruse stated that her job performance was "unacceptable." R. 338, 388. Plaintiff has no personal knowledge or direct evidence that anyone at Bunzl made any defamatory statements about her to other Bunzl employees. Plaintiff, herself, heard no defamatory statements and is aware of none. R. 335-339. ("Q. [A]re you aware of any specific defamatory statement that was made? A. No.") Similarly, plaintiff has no personal knowledge and is unaware of any defamatory statements about her made by Carl Kruse or anyone else at Bunzl to any person outside of Bunzl. R. 339. ("Q. Do you have personal knowledge that statements were made to any people outside of Bunzl? A. No. I just can't remember ever having heard of anything said to anyone outside of Bunzl.")

Plaintiff cites four instances of warnings or probationary time periods issued to other Bunzl employees. Glen Rigby received a memorandum outlining certain employment objectives and giving him sixty days to make improvements in his job performance. He was later demoted. R. 451-452. Ron Romero was given written warning of his deficiencies and a 90-day probationary period. He was later terminated. R. 449. Rodney Austin was given two oral warnings to stop "playing salesman."

R. 454. Kathy Fletcher received a written notice of performance deficiencies and was told that unless she improved, she would be terminated. R. 458.

#### VIII. SUMMARY OF THE ARGUMENT

A. Summary judgment was appropriate in this case because:

1. Both the signed Employee Checklist and Bunzl's subsequent Employee Handbook clearly and unambiguously state that employment was at-will. Therefore:

a. Bunzl had the right to terminate plaintiff's employment at any time, with or without cause;

b. The vague, oral statement by Mr. Frank did not create an implied-in-fact agreement altering plaintiff's at-will status;

c. Instances of progressive discipline did not abrogate the at-will policy nor create an implied-in-fact agreement; and

d. Evidence of either the inconsistent oral statement or Bunzl's course of conduct in the face of clear written promulgations is insufficient to preclude summary judgment.

2. Even if an implied-in-fact agreement was created that plaintiff would receive an opportunity to correct her deficiencies before termination, plaintiff had that opportunity. Plaintiff was aware of the problem and given seven months to correct it before her termination.

B. Plaintiff's remaining claims fail because:

1. Pursuant to several cases, including this court's recent decision in Brehany v. Nordstrom, Inc., 161 Utah Adv. Rep. 7 (Utah 1991), Utah does not recognize an implied-in-law covenant of good faith and fair dealing exception to the at-will rule.

2. Plaintiff does not and cannot state a claim for defamation; and

3. Utah does not recognize a common law claim for retaliatory discharge.

#### IX. ARGUMENT

##### POINT I.

THE UTAH SUPREME COURT SHOULD AFFIRM THE  
THIRD DISTRICT COURT'S GRANT OF SUMMARY  
JUDGMENT FOR DEFENDANTS.

Summary judgment is appropriate where no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). In the instant case, no such issues of fact exist. Neither the alleged oral statement by Terry Frank nor Bunzl's course of conduct with other employees created an implied-in-fact agreement that plaintiff's employment status would be anything but strictly at-will. Since Bunzl's at-will policy was not merely a presumption, but rather was expressly outlined in both the Employee Checklist and the Employee Handbook, any evidence of an implied-in-fact agreement that would limit that unfettered right is insufficient to create a question of fact, and defendants are entitled to judgment as a matter of law.

A. The Ambiguous Pre-Employment Oral Statement did not Create an Implied-in-Fact Agreement Modifying Plaintiff's At-Will Status Because Bunzl's Written Policies Clearly State that Employment was At-Will.

1. Under Utah Case Law, Bunzl's written Employee Checklist and Employee Handbook establish that plaintiff was an at-will employee.

The Utah Supreme Court, in recent decisions, has held that if an employee is hired for an indefinite term without a written employment contract, a presumption is created that employment is at-will. Caldwell v. Ford, Bacon, & Davis, Inc., 777 P.2d 483 (Utah 1989). This presumption may be rebutted by evidence of a contrary intent based on language in an employment manual or bulletin. See Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044 (Utah 1989); Brehany v. Nordstrom, Inc., 161 Utah Adv. Rep. 7 (Utah 1991). However, in the instant case, that presumption is affirmed, rather than rebutted, by the language in the company's written policies. Plaintiff claims that the alleged oral statement by Terry Frank rebutted the at-will doctrine. However, the aforementioned cases indicate that the written policies control in this case and establish that plaintiff was an at-will employee.

If the language of the Employee Handbook has the power to abrogate the at-will doctrine, then under Berube and Nordstrom, it certainly has the power to reinforce it. In Nordstrom, Justice Stewart states that evidence of "pertinent oral

representations" and "employer's course of conduct" may be relevant to determine the intent of the parties. 161 Utah Adv. Rep. at 11. However, such evidence only becomes relevant "[i]f the terms of the manual do purport to limit [the company's] power to discharge." Id.

The obvious corollary to Justice Stewart's statement is if the Handbook expresses the at-will policy in clear language, then evidence of inconsistent oral statements or course of conduct is irrelevant and insufficient to create a question of fact as to the parties' intent. In fact, Justice Stewart states "that when it is plain that a manual or bulletin does not limit the right to discharge at will, the case need not go to a jury." Id. at 11 (quoting Caldwell, 777 P.2d at 486). Triable factual issues therefore only exist if the terms of an employment manual attempt to limit the right to terminate at-will. Since the Bunzl Handbook reaffirms the at-will policy, the evidence of the alleged contradictory oral statement is irrelevant. The company's at-will policy, expressed unambiguously in writing, obviates the issue, and an inconsistent oral statement can not create an implied-in-fact agreement to the contrary.

Plaintiff suggests that because the Employee Handbook did not exist at the time of her hire, its stated at-will policy did not apply to her. However, plaintiff was aware of Bunzl's at-will policy long before the Handbook was issued. Plaintiff admits that during her pre-employment interview with Mr. Frank he

explained to her that her employment was at-will and Bunzl could terminate her at any time. R. 303-304. Moreover, at the time of her hire, plaintiff also read and signed the Employee Checklist which clearly states that her employment could be "terminated at will." R. 364. Plaintiff's signature on this document indicates that she, in fact, was conscious from the beginning of her employment that she could be terminated at-will.

In addition, pursuant to the language in the Handbook itself, plaintiff was clearly bound by its terms. Plaintiff admits that at the time she began working for Bunzl, she knew the Employee Handbook was forthcoming and that it would outline the company's procedures on termination and discipline. R. 306-307. She admits she received and read the Handbook when it was published in April, 1987. R. 309. The Handbook states that it "supersedes the terms and conditions of any previous plans, policies, rules and procedures." R. 370. It goes on to state in two different places that employment is "at-will." R. 372, 384. Finally, it expressly states that, "[n]o employee may rely that a program of progressive discipline is in effect . . . ." R. 384. These provisions specifically override any implications which could be drawn from Mr. Frank's statement, even though the handbook was published later. Since the Handbook terms superseded any previous policies, the Handbook was applicable to all employees, regardless of their starting dates.

Additionally, by continuing her employment, plaintiff impliedly accepted the terms of the Handbook. In Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988), the California Supreme Court held that an employment manual can be interpreted as an offer for a unilateral contract. An employee can impliedly accept that offer by continuing to work. This court said essentially the same in Berube, stating that continued service after the publication of a handbook is sufficient consideration to make the additional terms part of the employment contract. 771 P.2d at 1044-45. Therefore, by continuing to work, plaintiff accepted the "offer" formed by the Handbook and impliedly agreed to be bound by it.

2. Given the existence of the written Employee Checklist and Employee Handbook, evidence of an inconsistent oral statement is insufficient to preclude summary judgment.

The Employee Handbook and Employee Checklist are written, affirmative expressions of the company's intention to preserve the at-will relationship. Other jurisdictions have ruled on this issue and held that, as a matter of law, written publications of the company's at-will policy prevail over oral statements that attempt to limit it. In Lofvendahl v. Barclays American Corp., 5 IER Cases (B.N.A) 821 (C.D. Cal. 1990),<sup>2</sup> the plaintiff submitted evidence that during his interviews, he was given oral assurances

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<sup>2</sup> A copy of this case is attached hereto as Addendum A.

that as long as he "carried out his duties, he would have a job." Id. at 824. He claimed that the oral representations created an implied-in-fact agreement that he would only be terminated for cause. Barclays, however, submitted a copy of its Employee Handbook, which clearly stated that employment with the company was at-will and that an employee could be terminated with or without cause at any time. The court held that in view of the Handbook, with its specific at-will provisions, any evidence of oral statements or implied-in-fact agreements inconsistent with the Handbook would constitute a mere "scintilla" of evidence too insignificant to preclude summary judgment. Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-252 (1986)). See also Wing v. Anchor Media Ltd. of Texas, 59 Ohio St.3d 108, 110, 570 N.E.2d 1095, 1098 (1991) (written statements which unequivocally [set forth] that employment is "terminable at the will of the employer" bar a finding that the employment relationship is other than at-will); Allan v. Sunbelt Coca-Cola Bottling Co., 4 IER Cases (B.N.A.) 1453 (S.C., County Ct. C.P. 1989)<sup>3</sup> (defendant company negated any contractual effect of prior oral statements by notifying plaintiff in writing that employment was at-will).

In a recent decision, the Michigan Court of Appeals, also held that a company's written statements--not oral representations--are its controlling policy. Grow v. General

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<sup>3</sup> A copy of this case is attached hereto as Addendum B.



Products, 184 Mich. App. 379, 457 N.W.2d 167 (1990). There, the plaintiff claimed that oral statements such as, "you have a good future here," and "you have expertise," created an implied-in-fact agreement that his employment could only be terminated for cause. However, the company had issued a memorandum that clearly and unambiguously stated that employment could be terminated with or without cause, at any time. The court therefore held that in light of the clear statement of the at-will policy in the memorandum, plaintiff's reliance on the oral statements was unjustifiable as a matter of law. Id. at 381, 457 N.W.2d at 770.

The Utah Supreme Court has also addressed this issue in Caldwell v. Ford Bacon & Davis, 777 P.2d 483 (Utah 1989), in which the court focused on the written policies of the company, not the alleged oral representations. The defendant in Caldwell had a written employment manual which outlined a detailed procedure for discharging employees for cause. The manual stated that involuntary terminations could be carried out without notice. However, the plaintiff testified that he was told in his hiring interview that an employee could only be terminated for cause after first receiving three letters or three warnings. Plaintiff was later terminated without notice.

The Utah Supreme Court followed its Berube decision and held that a factual question existed as to whether the employment manual formed a term of employment. Significantly, the court declined to even mention the oral representations as having any

force to rebut the at-will presumption. The court did hold, however, that summary judgment was appropriate because the employer properly followed the provisions of the handbook in terminating the plaintiff.

Similarly, in this case, during the employment interview, Mr. Frank allegedly promised plaintiff that employees would not be terminated without an opportunity to correct deficiencies; however, neither the Employee Checklist nor the subsequent Handbook mentioned such a policy. Instead, they clearly emphasized that employment with Bunzl was at-will, negating any prior oral statements to the contrary. Therefore, the evidence regarding the alleged oral representation is insufficient to create a question of fact. Moreover, Bunzl followed the express terms of its Employee Handbook in terminating plaintiff's employment by paying plaintiff two-weeks' severance pay at the time of her termination. This is the only procedure, aside from the at-will policy, provided in the Handbook. Therefore, based on Caldwell, because Bunzl properly followed the provisions of its Handbook in terminating plaintiff, it was entitled to judgment as a matter of law.

3. The alleged oral statement of Mr. Frank was vague, ambiguous, and insufficient to create an implied-in-fact agreement.

Assuming Mr. Frank made the alleged oral statement, defendants were still entitled to judgment as a matter of law. Even absent the Checklist or Handbook provisions outlining the at-will policy, Mr. Frank's oral statement was so vague and ambiguous that it lacked the force to rebut the presumption of at-will, and it did not merit plaintiff's reliance that she would be given a chance to correct deficiencies before termination. In Aberman v. Malden Mills Indus., 414 N.W.2d 769 (Minn. Ct. App. 1987), the Minnesota Court of Appeals held that statements such as, "permanent employment," "life employment," and "we are offering you security" were too vague to create a contract for anything other than at-will employment. The court declared that "oral, uncorroborated, vague in important details, and highly improbable statements" are not sufficient to change at-will employment status. Id. at 771.

In Sanders v. Amerihealth, 898 F.2d 131 (11th Cir. 1990), the company president told the plaintiff during a pre-employment interview that "as long as you do a good job for me, you've got a good future with this company." However, the Eleventh Circuit held that the statement was too general and vague to have the sufficient contractual effect to abrogate the plaintiff's at-will status.

The Utah Supreme Court faced a similar claim in Rose v. Allied Development Co., 719 P.2d 83 (Utah 1986). There, the plaintiff contended that he relied on the employer's promise on two separate occasions that the plaintiff could return to school and still continue his employment. When the employer determined that school was interfering with plaintiff's work responsibilities, he was discharged. The Utah Supreme Court upheld the summary judgment granted in the employer's favor, noting that the plaintiff was an at-will employee and to prevail on a wrongful discharge claim requires more than the plaintiff's "subjective understanding that the brief conversations [with his employer] became a binding obligation not to terminate him." Id. at 87.

Rose presents a much more compelling argument than the present case. In Rose, the plaintiff had two conversations with his supervisor after his hire, as opposed to one vague, generalized statement made during a pre-hire interview. The plaintiff in Rose also had his employer's specific assent to return to school. Here the alleged statement by Mr. Frank did not specifically set out what the company would do to give an employee an opportunity to correct job deficiencies.

In Aberman and Sanders the oral statements, although deemed too vague to form a contract, were also more specific than Mr. Frank's ambiguous comment, which was merely a response to plaintiff's question whether employees would be given an

opportunity to correct work deficiencies. Mr. Frank added, "we have procedures that we follow for disciplinary action." R. 304. However, he did not mention what those specific procedures were. Nor did he mention any specific details as to how employees would receive notice or warnings, whether the warnings would be written or oral, or a specific time period allotted for the corrective action to take place. In short, he gave no specific outline of the company's discipline procedure. If the oral statements in Rose, Aberman, and Sanders lacked contractual force, then Mr. Frank's alleged oral statement, which was also general, vague, and susceptible to plaintiff's subjective understanding, had no power to create an implied-in-fact agreement, particularly in the face of clear written language to the contrary.

B. If the Employee Checklist and Employee Handbook State that Employment is At-Will, Limited Instances of Written or Oral Warnings to Other Employees do not Alter Plaintiff's At-Will Status.

An employer's practices and conduct do not abrogate its at-will rights. Even if Bunzl did, in fact, give some employees warnings or probation, such conduct would not change plaintiff's at-will status. In Bruno v. Plateau Mining Co., 747 P.2d 1055 (Utah Ct. App. 1987), the plaintiff, who was terminated for fighting inside a mine, claimed that Plateau had a de facto policy of not terminating employees for fighting; he even submitted affidavits from co-workers who knew of no Plateau

employees who had been terminated for fighting. The court stated, however, that even if the company did have such a policy, that was not "enough to establish Plateau's intentional surrender of its right to terminate [plaintiff's] employment at will." 747 P.2d at 1058. The court also held as a matter of law that even if the allegations were true, they were insufficient to create an implied-in-fact agreement, and summary judgment was therefore appropriate. Id.

Bruno is analogous to the present case. Simply because Bunzl management issued written or oral warnings to four other employees, no implied-in-fact agreement was ever created that plaintiff would be treated in the same manner. Past actions do not automatically abrogate an employer's right to terminate at will.

Again, Lofvendahl v. Barclays American Corp., 5 IER Cases (B.N.A) 821 (C.D. Cal. 1990), is on point. There, the plaintiff claimed that in addition to receiving oral assurances of job security, Barclays had a standard practice of terminating employees for cause only, and that this course of conduct created an implied-in-fact agreement that he would be terminated only for cause. The court answered this question as it did the issue of oral representations: in the face of a handbook that clearly states that employment is at-will, evidence of inconsistent course of conduct is insufficient to create a question of fact.

The employer was therefore entitled to judgment as a matter of law. Id. at 824.

Similarly, in the present case, any evidence of contrary conduct becomes irrelevant in view of the terms of the handbook. Even if Bunzl did issue warnings to a few other employees and give them opportunities to improve, the fact that the handbook expressly stated that employment was at-will means that the trier-of-fact could not reasonably find any implied-in-fact agreement contrary to the at-will policy. The trial court therefore correctly granted summary judgment.

Plaintiff may argue that language in Brehany v. Nordstrom, Inc., 161 Utah Adv. Rep. 7 (Utah 1991) indicates that evidence of "employer's course of conduct" is relevant. Again that evidence is only relevant "[i]f the terms of the manual do purport to limit [the company's] power to discharge [at-will]." 161 Utah Adv. Rep. at 11. Since the Bunzl Handbook, as well as the Employee Checklist, affirms the at-will policy, the evidence of Bunzl's course of conduct is not relevant.

- C. Even if the Oral Statements and/or Course of Conduct did Create an Implied-in-Fact Agreement, Plaintiff was Aware of Her Deficiencies and Given Abundant Opportunity to Correct Them Prior to Her Termination.

Repeated visits from Bunzl's corporate personnel were sufficient notification to plaintiff that her performance was unsatisfactory, and Bunzl afforded her ample opportunity to correct those deficiencies. The undisputed facts establish that

plaintiff was aware that her tardiness was creating problems for Bunzl's corporate offices. R. 314-315. She admits that she was routinely seeking extensions of the closing deadline by November 1987, and that her reports for January, February, March and April, 1988, were all late. R. 313-314. She also admits she knew this was a major problem and concern for Debra Scott, Bunzl's regional controller. R. 321-324.

The problem was so severe that Debra Scott made three trips to Salt Lake City to address this problem; Trina Travis, another Bunzl employee, also came to Salt Lake City to assist plaintiff in timely finishing the closings. R. 313, 317-318, 321-324, 329-330. Bunzl also hired temporary employees for two-week periods in both February and March of 1988, to help plaintiff. R. 324-326, 341-345, 346-358.

Debra Scott and the other corporate personnel were not making routine training or inspection visits. Rather, they came with the specific intent to help plaintiff overcome her deficiencies and "streamline" the office procedures. R. 313, 317-318, 362.

Those visits, especially in light of comments such as "we don't have two days" (R. 322), and "I have to have those closings" (R. 314-315) were sufficient to put plaintiff on notice that her performance was inadequate and that unless she made significant improvement, she would be replaced. Plaintiff, in fact, admits that she knew her deficiencies were a problem. R.



321-324. Bunzl endured the problem for seven months from November 1987 to May 20, 1988, giving her abundant opportunity to make improvement and correct her deficiencies. See R. 372. Thus, even if Bunzl had an implied-in-fact agreement not to dismiss plaintiff without giving her an opportunity to correct her job deficiencies, Bunzl complied with that obligation based on the undisputed facts of this case.

Moreover, at the time of termination, Bunzl correctly followed the only applicable termination procedure set forth in the Employee Handbook. Because plaintiff was a full-time employee with more than twelve months service, Bunzl paid her two weeks' severance pay. See R. 340.

#### POINT II.

THIS CASE DOES NOT WARRANT AN OVERRULING OF RECENT,  
ESTABLISHED UTAH CASE LAW.

Plaintiff states without any substantial support or analysis that the present case justifies "a modification of the language and decisions in Utah cases" concerning employment relations. (Appellant's Brief at p.6). However, defendants assert that the logic and language of recent Utah Supreme Court decisions are directly applicable to the present case and affirm that summary judgment was appropriate.

A. The Utah Supreme Court has Declared that No Implied Covenant of Good Faith and Fair Dealing Exists in an At-Will Employment Relationship.

In Berube v. Fashion Centre Ltd., 771 P.2d 1033 (Utah 1989), this court, by a three to two vote, declined to recognize an implied covenant of good faith and fair dealing exception to the at-will rule. Subsequently, in Loose v. Nature-All Corp., 785 P.2d 1096, 1097 (Utah 1989), this court refused to recognize a cause of action for breach of an implied covenant of good faith and fair dealing that would limit an employer's right to terminate an at-will employee. Finally, in Nordstrom, supra, this court unanimously declared that absent any express terms limiting the employer's right to terminate at-will, there is no cause of action for alleged breach of an implied-in-law covenant of good faith and fair dealing. 161 Utah Adv. Rep. at 10-11. Therefore, no such covenant exists in the present case, and summary judgment was appropriate on this issue.

B. Plaintiff's Defamation Claim is Barred Because the Undisputed Facts Establish that the Alleged Defamatory Statement is Not Slander Per Se, Plaintiff has Suffered No Special Damages, and there was No Publication of the Alleged Defamatory Statement to Third Parties.

Plaintiff alleges a cause of action for defamation, claiming that "her discharge for unacceptable performance constitutes a defamation of her in her business and professional capacities."

R. 8.

An action for defamation will not lie unless the plaintiff has suffered special damages or, alternatively, the statements complained of amount to slander per se. Allred v. Cook, 590 P.2d 318, 320-21 (Utah 1979). Special damages are those "particular items of damages which result from circumstances peculiar to the case at hand," and should be specially pled. Prince v. Peterson, 538 P.2d 1325, 1328 (Utah 1975).

In this case, plaintiff does not allege statements that amount to slander per se. The only alleged defamatory statement of which plaintiff complains is her termination letter, in which Carl Kruse stated that her performance was "unacceptable." R. 338, 388. Words that merely impute poor business practices are insufficient to support a claim of slander per se. Baum v. Gillman, 667 P.2d 41, 43 (Utah 1983) (statements concerning plaintiff's inabilities regarding his profession, that he was deeply in debt, involved in business related litigation, failed to make promised payments and used other's money to pay his creditors were not slanderous per se). Accordingly, a discharge for "unacceptable performance" is not per se slanderous as a matter of law.

Given the fact that the alleged defamatory statement is not slanderous per se, plaintiff must plead and prove that she has suffered special damages. However, nowhere in her Complaint does she make such an allegation and, as a result, her defamation claim is defective.

Plaintiff also fails to allege, and there is no proof of, the requisite publication of a defamatory statement to a third-party. Judge Winder stated the following in Boisjoly v. Morton Thiokol, Inc., 706 F. Supp. 795, 800 (D. Utah 1988), in analyzing the pleading requirements of a defamation claim under Utah law,

Utah law requires that a claim must identify the defamatory statement either by its words or words to that effect; general conclusory statements are inadequate . . . the complaint [must] allege when, where and to whom the alleged defamatory statement was made.

Id. at 800 (emphasis added). Plaintiff admits that she has no personal knowledge of, and is unaware of, any defamatory statements being made by anyone at Bunzl to any other person either inside or outside the Bunzl organization. R. 335-339. Thus, plaintiff does not allege, nor can she prove, to whom any alleged defamatory statements were made and, as a result, utterly fails to satisfy the requisite publication element.

C. Utah does Not Recognize a Common Law Claim for Retaliatory Discharge.

Plaintiff also alleges that her manager terminated her in retaliation for her disclosures of local office problems to corporate headquarters. See R. 6-7. This claim appears to be merely another attempt to allege a wrongful discharge action. Significantly, Utah has no common law claim for retaliation. Since plaintiff fails to cite any authority for this proposition,

and defendants are aware of none, these allegations fail to state a cause of action.

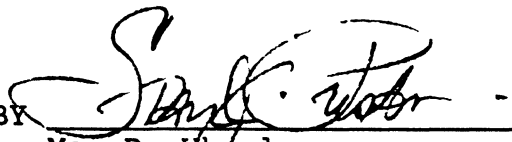
Utah statute does recognize a retaliation claim under the Utah Anti-Discrimination Act, Utah Code Ann. § 34-35-1, et seq. (1953, as amended), which addresses illegal discrimination based on sex, race, age, religion, handicap, or national origin. However, such a cause is obviously not applicable to the facts of this case and, even if it were, plaintiff has failed to follow the procedures to assert a retaliation claim under the Act, and the time period for filing such a claim has long expired.

#### X. CONCLUSION

Appellees respectfully request that this court find in its favor and affirm the Third District Court's grant of summary judgment.

DATED this 21st day of June, 1991.

SNOW, CHRISTENSEN & MARTINEAU

BY   
Max D. Wheeler  
Stanley D. Preston  
Attorneys for Defendants

XI. ADDENDA

Addendum A: Lofvendahl v. Barclays American Corp., 5 IER Cases  
(B.N.A) 821 (C.D. Cal. 1990)

Addendum B: Allan v. Sunbelt Coca-Cola Bottling Co., 4 IER  
Cases (B.N.A.) 1453 (S.C., County Ct. C.P. 1989)

## Addendum A

*lantic Nat'l Bank/Merchants*, No. 88-4141, Slip Op. at 14, 1990 W.L. 4622, p. 6 (D.N.J. 1990). Where the termination decision is accompanied by a showing of harassment on the part of the employer, however, courts have allowed claims for intentional infliction of emotional distress to go to the jury. *Borecki*, 694 F.Supp. at 61.

[2] Although plaintiff claims harassment from March to May 1988 in his brief and complaint, no submission was made in conjunction with this motion which would support the harassment charge. Based upon the record before it, it appears to the court that defendants' conduct was not sufficiently severe to be considered so outrageous and extreme that it exceeds all bounds of societal decency.

Expert testimony is required to support a claim for an injury which is either subjective in nature or of the sort that its cause and degree of severity cannot be determined by laymen. *Kelly v. Borwegen*, 95 N.J.Super. 240, 243-44 (App. Div. 1967); *Menza v. Diamond Jim's, Inc.*, 145 N.J.Super. 40, 46 (App. Div. 1976). Plaintiff's claims of emotional distress, including depression, sleep loss, embarrassment and humiliation are encompassed by this category; therefore, expert testimony is required to support them. Dondero's submissions in opposition to the instant motion were unaccompanied by any such testimony. Additionally, symptoms similar to Dondero's were found to be insufficient to support an emotional-distress claim in *Buckley*, 111 N.J. at 368. Accordingly, this claim also must fail.

Defendants seek the dismissal of Count 11, the CEPA count, solely on the ground that it is untimely because it was not filed within the statute of limitations period. The whistleblower statute provides:

Upon a violation of any of the provisions of this act, an aggrieved employee or former employee may institute a civil action in a court of competent jurisdiction, within one year, for relief . . .

N.J.S.A. 34:19-5.

[3] Defendants argue that the statute of limitations began to run on March 18, 1988, the date they notified Dondero of his reassignment. The CEPA count of plaintiff's complaint charges that "a determinative factor in defendants' decision to discharge plaintiff was plaintiff's objecting and refusing to engage in [ ] wrongful and unlawful acts." (Complaint, Count 11, ¶4) This language indicates that plaintiff bases his unlawful-retaliation claim on a theory of constructive discharge, (*id.*), which began with plaintiff's reassignment and culmi-

nated with defendants' refusal to accept Dondero's withdrawal of resignation. The date on which it became clear that Dondero's and defendants' regular employment relationship would terminate was June 23, 1988, the date on which Carol Asselta, Dondero's replacement as Director of Human Resources, informed plaintiff that his attempt to withdraw his resignation had been rejected. (Defendants' Exhibit G). Therefore, the time within which plaintiff had to file a claim for retaliatory constructive discharge began to run on this date. Dondero's June 14, 1989, filing of his complaint in state court fell within the one-year statute of limitations period. Accordingly, plaintiff's CEPA claim is timely and will not be dismissed.

For the foregoing reasons, defendants' motion is granted in part and denied in part: the motion for summary judgment on Count 1 is granted, and the motion for summary judgment on Count 11 is dismissed. An order accompanies this opinion. No costs.

#### Order

This matter having come before the court on motion by defendants, Lenox China, Richard L. Lewis and Anthony L. Barth, for summary judgment on Counts 8 and 11 of the complaint herein; and the court having considered the written submission and oral argument of counsel; and good cause appearing,

IT IS on this 19th day of June, 1990,

ORDERED that defendant's motion be granted with respect to Count 8 and denied with respect to Count 11; and it is further

ORDERED that Count 8 of the complaint filed herein be and hereby is dismissed.

LOFVENDAHL v. BARCLAYS  
AMERICAN CORP.

U.S. District Court,  
Central District of California

LOFVENDAHL v. BARCLAYS  
AMERICAN CORPORATION, et al.,  
No. CV 89-3228-RSWL, April 17, 1990

#### CONTRACTS

1. Discharge — Breach — National  
Banking Act •100.07 •450.1205

Bank that submitted no evidence  
that officer was discharged by board of



directors may not rely on at-pleasure provision of National Banking Act in defense of breach-of-contract claim.

**2. Discharge — Breach — Disclaimer — Summary judgment** ▶450.1205 ▶450.09 ▶515.15

In light of clear at-will disclaimers in application form and employee handbook, discharged employee's evidence that supervisor offered him long-term employment when he was hired constitutes mere "scintilla of evidence" of implied or express for-cause contract, which is insufficient to avoid summary judgment for employer.

**3. Discharge — Reduction in force — Summary judgment** ▶450.1205 ▶200.1565 ▶515.15

Employee whose position was eliminated during reduction in force was discharged for cause and has no claim for breach of contract; evidence shows that bank had stopped servicing most of its customers, and fact that cutback was not discussed with his supervisor and that supervisor was shocked to learn of it constitutes mere "scintilla of evidence" that cutback was not for legitimate business reasons, which is insufficient to avoid summary judgment for employer.

#### **PUBLIC POLICY**

**4. Reporting misconduct of co-worker to police** ▶425.0301

Employee fails to state claim for discharge in violation of public policy, where he was terminated after reporting to police that his supervisor had struck him during fistfight; weight of evidence shows that employee was discharged when his position was eliminated during reduction in force.

#### **TORTS**

**5. Exclusivity of remedies — Intentional infliction of emotional distress** ▶505.11 ▶400.03

Employee's claim that his discharge caused him emotional distress is barred by exclusivity provision of worker's compensation act, since termination is part of normal business relationship.

#### **DAMAGES**

**6. Punitive damages — Discharge** ▶610.0307

Employee whose position was eliminated during reduction in force failed to show that employer acted with oppression or malice in discharging him,

and punitive-damages claim is not supported by evidence.

Michael J. Collins (Meserve Mumper & Hughes), Irvine, Calif., for plaintiff.  
Robert L. Lofts and Jan T. Chilton (Severson & Werson), San Francisco, Calif., for defendant Barclays.

Christopher W. Gardner (Glynn & Harvey), Pasadena, Calif., for defendant Brewer.

#### *Full Text of Opinion*

LEW, District Judge: — Defendants Barclays American Corporation and Barclays Bank of Delaware (hereinafter "Barclays") have moved for summary judgment against plaintiff Steve Lofvendahl on the first (breach of employment contract) and second (termination in violation of public policy) claims for relief, that portion of the third (intentional infliction of emotional distress) claim for relief which arises from Lofvendahl's termination rather than the alleged assault and battery, and that portion of the prayer for punitive damages which is based on Lofvendahl's termination rather than the alleged assault and battery. Lofvendahl timely opposed the motion. Oral argument was heard on April 16, 1990. Having considered all of the papers filed in support of and in opposition to the motion, and oral argument of counsel, the Court hereby issues the following order:

Barclays' motion is **GRANTED** in its entirety. Summary judgment is hereby rendered in Barclays' favor against Lofvendahl on the first and second claims for relief, that portion of the third claim for relief which arises from Lofvendahl's termination rather than the alleged assault and battery, and that portion of the prayer for punitive damages which is based on Lofvendahl's termination rather than the alleged assault and battery.

#### **BACKGROUND**

Barclays American Corporation is a holding company which owns Barclays Bank of Delaware. Barclays Bank of Delaware's sole business is offering private label credit cards through retailers. For example, the retailer sells products to consumers on credit. Rather than extending that credit itself, the retailer contracts with Barclays Bank of Delaware to provide the necessary credit. Barclays Bank of Delaware makes the decision whether to extend credit to particular consumers. If the consumer is given credit, he or she is issued a credit card, bearing

the retailer's name and logo, which entitles him or her to secure additional credit from Barclays Bank of Delaware for goods or services purchased from the retailer.

Lofvendahl was employed by Barclays Bank of Delaware since 1985 as vice president and sales manager for the western region of the United States, including California. Defendant Raymond Brewer was a senior vice president for Barclays Bank of Delaware, and Lofvendahl's immediate superior. On April 17, 1989, Brewer and two other Barclays' executives visited California for the purpose of checking on business, and had dinner with Lofvendahl. During and after dinner the four men each consumed numerous alcoholic beverages. At about midnight, the two non-party bank executives went to their hotel rooms. Brewer and Lofvendahl remained and engaged in conversation together. About 2:00 a.m., Lofvendahl and Brewer left and on the way back to their hotel rooms they engaged in a brawl/fist-fight with each other. Lofvendahl reported the incident to the local police. Criminal charges were filed against Brewer but subsequently dropped. Shortly after the incident, both Lofvendahl and Brewer were terminated by Barclays. Brewer was terminated for cause for striking a subordinate. Lofvendahl's position was allegedly simply eliminated due to market forces. Lofvendahl filed this suit alleging four claims for relief for breach of employment contract, termination in violation of public policy, intentional infliction of emotional distress, and assault and battery, respectively. Barclays now moves for summary judgment on the first and second claims for relief, that portion of the third claim for relief which arises from the termination rather than the alleged assault and battery, and that portion of the punitive damages prayer which arises from Lofvendahl's termination rather than the alleged assault and battery.

#### **FIRST CLAIM FOR RELIEF: BREACH OF EMPLOYMENT CONTRACT**

The first claim for relief alleges as follows: Lofvendahl was hired by Barclays on October 16, 1985 as vice president and western area sales manager. During the course of Lofvendahl's employment, an express and implied-in-fact employment contract existed between Lofvendahl and Barclays which provided that Lofvendahl would be able to continue his employment with Barclays indefinitely so long as he carried out his duties in a proper and competent manner, that Lofvendahl

would not be terminated without good cause, that Lofvendahl would be given written notice of and a meaningful opportunity to respond to any complaints lodged against him regarding his performance, and that Barclays would not eliminate Lofvendahl's position with the company without proper notice and explanation. This contract was evidenced by various written documents, oral representations and course of conduct. Barclays breached this contract by terminating Lofvendahl in violation of this agreement.

Barclays argues that it was entitled to terminate Lofvendahl without cause and, if not, that Lofvendahl was terminated for cause.

#### **National Banking Act**

The National Banking Act, 12 U.S.C. §24 (Fifth), provides that a national banking association has the power to "elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places." [Emphasis added.]

This provision has been consistently interpreted to mean that the board of directors of a national bank may dismiss an officer without liability for breach of the agreement to employ, and that any agreement which attempts to circumvent the complete discretion of a national bank's board of directors to terminate an officer at will is void as against public policy. In order to be subject to the dismissal portion of this section, the employee must have been an officer, and must have been hired and discharged by the board of directors (or by persons authorized by the board to do so). *Mackey v. Pioneer National Bank*, 867 F.2d 520, 524 (9th Cir. 1989).

[1] In the instant case, Barclays submits a copy of the transcript of Lofvendahl's deposition wherein Lofvendahl testified that he became an officer of Barclays when he was appointed by the board of directors. However, Barclays submits no evidence that Lofvendahl was discharged by the Barclays board of directors. Therefore summary judgment cannot be granted on this ground. Fed. R. Civ. P. 56(c).

#### **Foley and Pugh**

California Labor Code §2922 provides in relevant part, "An employment, having no specified term, may be terminated at the will of either party on notice to the other." The California Supreme Court in *Foley v. Interactive Data Corp.*, 47 Cal.3d 654,

254 Cal.Rptr. 211 [3 IER Cases 1729] (1988), explained that pursuant to §2922, if the parties reach no express or implied agreement to the contrary, the relationship is terminable at any time without cause, but when the parties have enforceable expectations concerning either the term of employment or the grounds or manner of termination, §2922 does not diminish the force of such contractual or legal obligations. The presumption that an employment relationship of indefinite duration is intended to be terminable at will is subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some cause for termination. Factors to consider when determining if an implied-in-fact contract exists are the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged. *Id.* at 680, 254 Cal.Rptr. at 225; *Pugh v. See's Candies, Inc.*, 116 Cal.App.3d 311, 324-327, 171 Cal.Rptr. 917 [115 LRRM 4002] (1981).

Barclays argues that uncontradicted evidence shows that no express or implied-in-fact contract existed between it and Lofvendahl. Barclays submits a copy of the employment application signed by Lofvendahl which provides immediately above the signature line,

I agree that if I am employed, my employment shall not be construed as being for any definite period of time, but will be for an indefinite period, terminable at will by the Company or me.

Barclays also submit a copy of Barclays' "Employee Handbook," which provides under the heading "Termination,"

This handbook does not constitute a contract of employment between the Company and you. No commitment for employment for any specified duration, e.g. 'lifetime', 'permanent' or 'as long as performance is satisfactory' shall be valid or binding on the Company unless it is expressly set forth in a written document and signed by the employee and the Chief Executive Officer of the Company. Employment and compensation may be terminated with or without cause at any time by the Company or by you."

Lofvendahl testified in his deposition that he had read the "Employee Handbook."

In response, Lofvendahl submits a copy of the transcript of Brewer's de-

position, wherein the following transpired,

Q. When you hired [Lofvendahl], did you express to him that this was not a temporary position?

A. I don't know if I said those exact words, but I'm sure for him to leave his job he would have assumed it wasn't a temporary job.

Q. Did you suggest to him that this was a career position?

A. I would have assumed — yes, sir.

Q. Did you assure him that he was going to be with the bank as long as he fulfilled the objectives that the bank expected of him?

A. Maybe not in so much in those words but again, when you were trying to hire someone who had a present job, you sold the benefits of working for the bank.

Q. And one of those benefits that you were selling was security?

A. Yes, sir.

...

Q. Under the terms under which you feel you were hired, would the bank have the right to terminate you in a general elimination of all sales staff?

A. ... I had to assume giving up a ten-year career with G.E. that I would have job security, that I would relocate on the pretense, I guess, that as long as I did my job I'd have a job. ... So, I would have to say that the actions I made were based upon as long as I did the job I would have a job. That was the same kind of scenario I gave to Mr. Lofvendahl who had gainful employment at a very good company ...

Lofvendahl also submits his own declaration wherein he states that he was never led to believe by any of his superiors that his position with Barclays was in jeopardy.

[2] Summary judgment must be rendered where the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. The mere existence of a scintilla of evidence in support of the plaintiff's position is insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-252, 106 S.Ct. 2505, 2511-2512, 91 L.Ed.2d 202 (1986). The evidence submitted by Lofvendahl (i.e. Brewer's and Lofvendahl's testimony) is merely a scintilla of evidence in Lofvendahl's favor and is insufficient, in view of the language in the employment application and the "Employee Handbook" set forth above, to raise a question of fact as to whether an express or implied-in-fact contract existed between Lofvendahl and Barclays whereby Barclays agreed not to discharge Lofvendahl without cause. If an express contract can be found, it provides that Lofven-

dahl can be terminated at will without cause as per the language in the employment application signed by Lofvendahl and the "Employee Handbook." With respect to an implied-in-fact contract and the relevant factors set forth in *Foley and Pugh*, although Brewer's deposition testimony indicates that Brewer may have assured Lofvendahl of continued employment, the language in the employment application and "Employee Handbook" clearly shows that Barclays personnel policy was that employees were terminable at will with or without cause. In addition, Lofvendahl was employed by Barclays for a mere three and one-half years. Based on the evidence submitted the Court finds that there is insufficient evidence in Lofvendahl's favor to raise a question of fact as to whether an express or implied-in-fact contract prohibited Barclays from terminating Lofvendahl without cause. Accordingly summary judgment must be rendered in Barclays' favor on the first claim for relief.

#### Terminated for Cause

Even if Barclays was contractually prohibited from terminating Lofvendahl at will without cause, summary judgment must be rendered in Barclays' favor because the Court finds that Lofvendahl was terminated for good cause.

Under California law, reduction in staff to meet market conditions constitutes good cause for termination as a matter of law. *Guanaculas v. Trans World Airlines, Inc.*, 761 F.2d 1391, 1395 [119 LRRM 3246] (9th Cir. 1985). *Clutterham v. Coachmen Industries, Inc.*, 169 Cal.App.3d 1223, 1227, 215 Cal.Rptr. 795, 797 [2 IER Cases 164] (1985) (Where "uncontradicted evidence showed a legitimate business reason for terminating" an employee, "[c]ourts must take care not to interfere with the legitimate exercise of managerial discretion.")

Barclays argues that Lofvendahl was terminated when his position was eliminated due to market forces and the lack of profitability of Barclays Bank of Delaware's enterprise. In support, Barclays submits the declarations of Richard Farmer, president of Barclays Bank of Delaware and a member of the board of directors, Dale Peters, executive vice-president and chief operating officer of Barclays American Corporation and a director of Barclays Bank of Delaware, Charles Davis, vice president of the human resources department of Barclays Bank of Delaware, and Leonard Casario, national field manager for Barclays Bank of Delaware. These declarations

establish the following. At the time Lofvendahl was terminated, Barclays Bank of Delaware had been unprofitable for some time. In an effort to reverse that trend, the bank drastically reduced the number of dealers it serviced and placed a moratorium on signing new dealers. Between August 1988 and May 1989, the number of dealers serviced by the western area sales region, which Lofvendahl managed, was reduced from 22 to 2. Nationally, by May 31, 1989, Barclays Bank serviced only 12 dealers, and it was seriously considering terminating three of those. The process of terminating dealers continued after Lofvendahl was discharged. Barclays Bank now services only four dealers nationwide. As the number of dealers declined, so did Barclays Bank's need for sales and marketing personnel to sign new dealers and service existing ones. Barclays Bank closed its western area office in September 1988 and laid off five of the seven employees under plaintiff in the region. Staff in the eastern and central areas was also cut. The bank felt there was no need to pay Lofvendahl, or someone else in his position, \$70,000 per year to supervise two sales representatives and, with their help, service two dealers. The employee to whom Lofvendahl's duties were assigned after his suspension was able to perform all of those new duties in about five days a month. In or about February 1989, Farmer and Peters discussed the fact that Lofvendahl would have to be terminated when the number of dealers reached a sufficiently low level. At the beginning of April 1989, the bank's sales staff was headed by a national sales manager, Brewer, and three area sales managers, Lofvendahl and two others. All four positions have now been eliminated, and the bank no longer employs sales personnel.

In opposition, Lofvendahl argues that business necessity and market forces was just a pretext for Lofvendahl's termination. Lofvendahl points out that Brewer testified in his deposition that he was "shocked" when he heard that Lofvendahl's position had been eliminated because Brewer "was his direct supervisor, and [ ] was on the senior management team that any decision of that magnitude would have been discussed at a senior management meeting. And it had never been discussed." Brewer also submits a copy of a memorandum memorializing a conversation between Farmer and Davis on April 20, 1989 regarding the April 17, 1989 incident, wherein the business necessity for terminating Lofvendahl was never discussed.

[3] As explained above, summary judgment must be rendered where the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. The mere existence of a scintilla of evidence in support of the plaintiff's position is insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-252, 106 S.Ct. 2505, 2511-2512, 91 L.Ed.2d 202 (1986). Here, the fact that Brewer was shocked when he learned Lofvendahl's position had been eliminated, and the fact that the alleged legitimate business reason for eliminating Lofvendahl's position was not discussed in a single memorandum memorializing a single conversation between Farmer and Davis, is merely a scintilla of evidence that Lofvendahl's position was not terminated due to legitimate business reasons when considered with the declaration testimony of four of Barclays' top executives. The Court finds that the evidence submitted would be insufficient to support a finding by a reasonable jury that Lofvendahl was terminated for a reason other than business necessity. Accordingly summary judgment must be rendered in Barclays' favor.

**SECOND CLAIM FOR RELIEF:  
TERMINATION IN VIOLATION  
OF PUBLIC POLICY**

[4] The second claim for relief alleges that public policy encourages citizens to report criminal conduct to proper state authorities, and that upon Barclays' learning of Lofvendahl's reporting the conduct of Brewer to the police, Barclays terminated Lofvendahl's employment in order to punish Lofvendahl for that conduct, which termination was violative of public policy.

As stated above, the Court finds that the evidence submitted would be insufficient to support a finding by a reasonable jury that Lofvendahl was terminated for a reason other than business necessity. Therefore summary judgment must be rendered in Barclays' favor on the second claim for relief.

**THIRD CLAIM FOR RELIEF:  
INTENTIONAL INFLICTION  
OF EMOTIONAL DISTRESS**

The third claim for relief alleges that Lofvendahl suffered emotional distress from the alleged assault and

battery and from his termination. Barclays moves for summary judgment on the third claim for relief except that portion that arises from the alleged assault and battery, arguing that such claim is within the exclusive jurisdiction of the Workers' Compensation Board.

The proper test is whether the acts alleged were part of the normal employment relationship. When employers step out of their roles as such and commit acts which do not fall within the reasonable anticipated conditions of work, they may not then hide behind the shield of workers' compensation. *Cole v. Fair Oaks Fire Protection District*, 43 Cal.3d 148, 233 Cal.Rptr. 308 [1 IER Cases 1644] (1987); *Hart v. National Mortgage & Land Co.*, 189 Cal.App.3d 1420, 235 Cal.Rptr. 68 (1987), *Semore v. Pool*, — Cal.App.3d —, 266 Cal.Rptr. 280 [5 IER Cases 129] (1990).

[5] As stated above, the Court finds that the evidence submitted would be insufficient to support a finding by a reasonable jury that Lofvendahl was terminated for a reason other than legitimate business necessity. This act was clearly part of the normal employment relationship in that Barclays did not step out of their roles as employers and commit acts not within the anticipated conditions of work. Thus this claim is within the exclusive jurisdiction of the Workers' Compensation Board.

**PUNITIVE DAMAGES PRAYER**

[6] Lofvendahl in the operative complaint prays for punitive damages, and alleges in all four claims for relief that Barclays acted with malice and oppression. Barclays moves for summary judgment on that portion of the punitive damage prayer arising from Lofvendahl's termination rather than the alleged assault and battery. Again, the Court finds that the evidence submitted would be insufficient to support a finding by a reasonable jury that Lofvendahl was terminated for a reason other than legitimate business necessity. The Court further finds that there is no evidence that Barclays acted with oppression or malice with respect to Lofvendahl's termination. Summary judgment must therefore be rendered in Barclays' favor on this issue.

**IT IS SO ORDERED.**

## Addendum B

the performance of plaintiffs Toth and Branham was inferior to others in the same areas and their jobs could more easily be eliminated without serious disruption. Affidavit of John E. Menkhaus; (2) plaintiff Threatt had the lowest supervisory performance rating in the factory. Affidavit of John E. Menkhaus; (3) plaintiff Snyder was selected because of performance problems, technical limitations and because he was less proficient in certain areas than another employee in his section. Affidavit of Charles L. Kuckuck; (4) plaintiff Newton's performance was substantially inferior to the performance of the three other technicians in her department. Affidavit of Dwight D. Morgan; (5) plaintiff Bean could not get along with other managers and was very defensive when criticized. Affidavit of John E. Menkhaus; (6) plaintiff Hilley's duties had decreased in recent years because of "changes in manufacturing philosophies" and his remaining duties could easily be divided among other employees. Affidavit of Charles Bauer; (7) plaintiff Gallo "was selected for layoff due to his poor job performance in comparison with other factory supervisors." Affidavit of John E. Menkhaus; and (8) plaintiff Eames's performance was inferior to that of the other four clerks in her department. Affidavit of William H. Rider. Because the ADEA plaintiffs have not produced any evidence that these legitimate reasons for the ADEA plaintiffs' lay-offs are merely pretextual, the Court concludes summary judgment for the defendant is appropriate on the causes of action for violation of the ADEA."

For the foregoing reasons, the Court grants the defendant's motion for summary judgment on the claims for outrage in all of these consolidated cases and on the claims for violation of the ADEA in C.A. Nos. 87-1998, 87-1999, 87-2000, 87-2002, 87-2004-16, 87-2005, 87-2006, 87-2007, and 87-2515. The Court denies the defendant's motion insofar as it seeks summary judgment on any of the plain-

"The Court's conclusion that the defendant has succeeded in rebutting a *prima facie* case of age discrimination is not inconsistent with its earlier holding that the defendant failed to establish as a matter of law that the plaintiffs did not possess the requisite qualifications to enjoy the protection of the handbook provisions. See *supra* Part II(C). The fact that the ADEA plaintiffs were less qualified than others in their departments or that their jobs could more easily be eliminated than others' is a legitimate non-discriminatory reason for laying them off. Those facts, however, do not render them "unqualified" under the handbook provisions which make no mention of comparative qualifications. See *supra* note 7.

tiffs' claims for breach of an employment contract.

IT IS SO ORDERED.

#### ALLAN v. SUNBELT COCA-COLA BOTTLING CO.

South Carolina  
Court of Common Pleas  
Dorchester County

ALLAN v. SUNBELT COCA-COLA BOTTLING COMPANY, INC., No. 88-CP-18-936, August 15, 1989

#### CONTRACTS

##### 1. Covenant of good faith and fair dealing ▶450.1203 ▶400.13

South Carolina does not recognize cause of action for breach of implied covenant of good faith and fair dealing in at-will employment contracts.

#### TORTS

##### 2. Fraudulent breach of contract ▶400.05 ▶275.08

Warehouse manager who was laid off during economic cutback failed to state claim for fraud accompanying alleged breach of contract; there was no evidence of fraudulent intent, or that reason for layoff was pretextual.

#### CONTRACTS

##### 3. Handbook — Lack of specificity ▶450.1205

Handbook that recited company's policy of assisting employees in developing themselves for future opportunities and of trying to provide permanent work under normal business conditions is not specific enough to alter employees' at-will status.

##### 4. Employer promises ▶450.1205

Vague oral assurances about job security by company owners were insufficient to create contract altering employee's at-will status; subsequent handbook containing all employment policies did not include just-cause provision, and oral statements were not adopted by employer that purchased company.

##### 5. Unilateral modification — Disclaimers ▶450.1205 ▶450.25

Employer negated any contractual effect of prior employer's handbook

and oral assurances by issuing conspicuous disclaimers on employment application and notice of company policies employer's unilateral modification of just-cause termination policy to one of at-will does not require employee's express assent, and employee's return to work constitutes acceptance of and consideration for change.

6. Reduction in force — Just cause for layoff •450.1205 •200.1565 •275.08

Employer did not breach any just-cause contract by laying off warehouse supervisor during reduction in force, economically motivated cutback constituted just cause for discharge.

C Steven Moskos, Charleston, S C., for plaintiff

Charles T. Speth II and M Susan Eglin (Haynsworth, Baldwin, Johnson and Greaves), Greenville, S C., for defendant

#### *Full Text of Opinion*

BROWN, Presiding Judge — This matter was tried before this Court on July 17-19, 1989. Defendant Sunbelt Coca-Cola Bottling Company moved for Directed Verdict after the close of Plaintiff's case, and again after the close of all the evidence. For the reasons set forth below, the Court grants Defendant's Motion for Directed Verdict as to all causes of action.

#### **FACTS**

Plaintiff Michael C Allan was employed by Dorchester Coca-Cola Bottling Company (hereinafter "Dorchester") beginning March 26, 1973. Defendant Sunbelt purchased the stock of Dorchester on May 31, 1985. On March 23, 1980, Plaintiff was permanently laid off when his position of Day Warehouse Manager was eliminated as part of an ongoing company-wide economic cutback.

Plaintiff alleged that his termination breached a contract of employment which allegedly existed between himself and Defendant based on an employee handbook and various oral assurances made by the present and prior owners of Dorchester.

The handbook upon which Plaintiff based his claim was distributed in 1981 by the then-owners of Dorchester. Plaintiff relied on the following provisions:

It is the operating philosophy of this Company that each employee be treated with individual dignity and made a contributing member of the organization. The Company in its obligations to its employ-

ees sets forth the following principles by which both the Company and the employee can join in contributing to future job security and individual growth.

5) That to the extent possible the Company will assist employees in developing themselves for future opportunities.

6) That employees shall be promoted on the basis of demonstrated ability and loyalty.

7) That the Company will try insofar as possible to provide permanent, steady work to all employees subject to its normal business conditions.

The handbook did not contain specific procedures as to how layoffs should be conducted.

In early June, following the purchase of Dorchester by Sunbelt, an employee meeting was held in the Dorchester warehouse to discuss the sale with employees. Homer Durruss, Chairman of the Board of Sunbelt, spoke at this meeting. It was undisputed that no guarantees of permanent employment were made at this meeting. Furthermore, nothing was said at the meeting with regard to the Dorchester handbook or personnel policies.

During his employment by Sunbelt, Plaintiff received two statements which notified him that his employment with Sunbelt was at will and could be terminated at any time. The first such statement appeared on an employment application completed by Plaintiff in October 1985. The following statement appears directly above the signature line:

FURTHER, I UNDERSTAND AND AGREE THAT MY EMPLOYMENT IS FOR NO DEFINITE PERIOD AND MAY, REGARDLESS OF THE DATE OF PAYMENT OF MY WAGES AND SALARY BE TERMINATED AT ANY TIME WITHOUT ANY PREVIOUS NOTICE.

While Plaintiff denied signing the application, he admitted that he received it.

The second disclaimer was presented to Plaintiff on March 8, 1988. This notice contained Company policies describing hours of work, method of payment, vacations, holidays, severance pay, and sick leave, and included the following provision directly above Plaintiff's signature:

7. These policies are NOT a contract of employment. The provisions of our personnel policies are subject to change at any time by Sunbelt Coca-Cola Bottling Company. Notwithstanding any of the provisions of any personnel policy, all employees of Sunbelt Coca-Cola Bottling Company are "employees-at-will" who may quit at any time for any or no reason and who may be terminated at any time for any or no reason.

(Emphasis in original.) Plaintiff admitted that he received the notifica-



tion, signed it, and understood its meaning.

The uncontested evidence showed that Plaintiff and other employees at Defendant's Summerville and Charleston facilities were laid off on March 23 for economic reasons. Defendant presented un rebutted testimony that Plaintiff's former job position remains unfilled to this date and that the warehouse is operating efficiently despite the job elimination. Prior to his termination, Company officials attempted to find Plaintiff another position within the Company. However, no position was available for which Plaintiff, in the judgment of management, was qualified.

**I. Plaintiff Presented No Evidence That Defendant Violated The South Carolina Wage Payment Statute.**

South Carolina Code Section 41-10-50 provides as follows:

Whenever an employer separates an employee from the payroll for any reason, the employer shall pay all wages due to the employee within forty-eight hours of the time of separation or the next regular payday which may not exceed thirty days after written notice is given.

"Wages" includes "vacation, holiday, sick leave, and severance payments which are due to an employee under any employer policy or employment contract." S.C. Code Ann. §41-10-10 (Supp. 1988).

Plaintiff claimed that Defendant violated the South Carolina wage payment statute by not paying him for 61 days of sick leave which he did not use prior to his termination. Plaintiff, however, failed to present any evidence of an employer policy, an employment contract, or a past practice of paying departing employees for unused sick leave. Plaintiff, in fact, conceded that in certain instances, such as voluntary quits, employees should not be paid for unused sick leave. The absence of proof as to any policy, practice, or agreement to pay employees for unused sick leave necessitates dismissal of this cause of action.

**II. South Carolina Does Not Recognize A Separate Cause of Action For Breach of Implied Covenant of Good Faith And Fair Dealing In The Employment Context.**

[1] South Carolina has recognized implied covenants of good faith and fair dealing in commercial contracts. See *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 147 S.E.2d 481 (1966); *Tharpe v. G.E. Moore Co.*, 254 S.C. 196, 174 S.E.2d 397 (1970). No South Carolina court has recognized

such a covenant in at-will employment contracts. *Satterfield v. Lockheed Missiles & Space Co.*, 617 F.Supp. 1359, 1364 (D.S.C. 1985). Consequently, no separate cause of action exists for breach of implied covenant of good faith and fair dealing.

Even if South Carolina were to recognize such a covenant in employment contracts, there was no breach in the present case inasmuch as Sunbelt discharged Plaintiff under an express provision of the handbook. There is no evidence of anything but that Plaintiff was terminated in an economic layoff. Within the contract as alleged, such a termination would not violate any duty of good faith.

**III. Plaintiff Presented No Evidence Of Fraud Accompanying The Alleged Breach Of Contract Sufficient To Sustain This Cause Of Action.**

[2] The essential elements of Plaintiff's claim for breach of contract accompanied by fraudulent act are: (1) a breach of contract; (2) fraudulent intent in connection with the breach of contract; and, (3) a fraudulent act accompanying the breach. *Smith v. Canal Ins. Co.*, 275 S.C. 256, 269 S.E.2d 348, 350 (1988); *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 336 S.E.2d 502, 503-04 (Ct.App 1985). Assuming for the moment that Plaintiff can establish the first element set out above, there was a complete failure of proof as to the other two elements. Plaintiff made no showing of any fraudulent act by Defendant at the time of the termination. Plaintiff presented no evidence that he was discharged for reasons other than the economic reason articulated by the Company. Furthermore, there was no evidence from which the jury could infer fraudulent intent on the part of Defendant. No knowing misrepresentation was proved, as required to sustain this cause of action.

**IV. The 1981 Dorchester Coca-Cola Handbook Does Not Constitute A Contract Of Employment Between Plaintiff And Defendant.**

In *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 337 S.E.2d 213 [1 IER Cases 1099] (1985), the South Carolina Supreme Court affirmed that the "at-will" doctrine continues to govern employment relationships in South Carolina. Without equivocation, the *Ludwick* court stated, "The doctrine of termination at will remains the law of this state." 337 S.E.2d at 216. The Court stated further, "Beyond (a concern for vexatious and frivolous litigation) is a common con-

cern that the employer not be unduly fettered in exercising his rightful prerogative to select employees." *Id.* *Ludwick* thus affirms the continuation of the presumption of at-will employment in South Carolina.

In *Small v. Springs Industries, Inc.*, 292 S.C. 481, 357 S.E.2d 452 [2 IER Cases 266] (1987), the South Carolina Supreme Court recognized, under a unilateral contract theory, that an employer's written policy may constitute a contractual modification of the at-will relationship if the policy was "a limiting agreement on the employee's at-will employment status." 357 S.E.2d at 455. The holding in *Small* did not abrogate the *Ludwick* presumption. Employment is at will unless the employer's written policy contains limiting language providing for a different employment relationship.

[3] In *Small*, the employee handbook outlined a four-step disciplinary procedure which altered the otherwise at-will employment relationship. Similarly, in *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 [115 LRRM 4708] (1988), upon which *Small* is based, the employee handbook in question contained a specific statement that discharge would be "for just cause only." *Id.* at 884. The 1981 Dorchester handbook does not contain the type of specific procedure or specific discharge policy addressed in these two cases. In fact, nothing in the Dorchester handbook sets forth how layoffs or terminations will take place. Without some limiting language in the handbook, Defendant's right to dismiss employees for any reason remains unfettered.

Our holding that this handbook is not sufficient to establish a contract finds support from cases in other jurisdictions. For example, in *Mursch v. Van Dorn Co.*, 851 F.2d 990 [3 IER Cases 893] (7th Cir. 1988), the Seventh Circuit Court of Appeals found as a matter of law that no claim for breach of contract existed where the handbook's repeated use of nonmandatory guidelines and permissive wording indicated clear intent not to create a binding agreement. The handbook in question repeatedly referred to its provisions as "guidelines," and failed to contain either "a hierarchy of rules the infraction of which could lead to discharge, . . . [and/or a provision] that a discharge would only be for 'just cause.'" *Id.* at 996 (citations omitted). The court held that an employment manual can alter an employee's at-will status only if the handbook contains express language "clearly manifest[ing] the parties' intent to bind each other." *Id.* at 998.

[4] Plaintiff's contract claim was twofold. In addition to his claim that the Dorchester handbook constituted a contract, Plaintiff asserted that certain oral assurances by the prior owners of Dorchester constituted terms of his employment contract with Sunbelt. However, these oral assurances of the prior owners are irrelevant, inasmuch as they were never adopted by Sunbelt Coca-Cola. Furthermore, Plaintiff himself admitted that the 1981 handbook constituted a complete compilation of all Dorchester employment policies in operation at the time.

In addition, the oral assurances by Dorchester's prior and present owners allegedly relied upon by Plaintiff consist only of general statements about job security which are not sufficient to change the nature of the at-will employment relationship. *Aberman v. Malden Mills Indus., Inc.*, 414 N.W.2d 769, 772 [2 IER Cases 1430] (Minn. Ct.App. 1987). In *Aberman*, the Minnesota Court of Appeals gave the following examples of oral statements that, absent stipulation of the duration of the employment, do not create employment contracts: " 'permanent employment,' 'life employment,' . . . 'as long as the employee chooses,' . . . 'I will always take care of you,' 'we are offering you security,' and '[you will be a] lifetime sales representative.' " *Id.* at 771-72; *Skagerberg v. Blandin Paper Co.*, 197 Minn. 291, 294-95, 266 N.W. 872, 874 (1936). Likewise in *Mursch*, the Seventh Circuit held that the statement by the company vice president that "so long as you do your job you can be here until you're a hundred" amounted merely to "encouragement and optimism" and as such did not create a contract of employment. 851 F.2d at 996. The court noted further that no reasonable employee would have taken such a statement to be a binding contract of guaranteed employment and that such a statement "should not be twisted and contrived into an expression of intent to create a binding contract of lifetime employment." *Id.* at 998. Like the statements discussed in *Aberman* and *Mursch*, the oral statements relied upon by Plaintiff in the present case are the type of "oral, uncorroborated, vague in important details and highly improbable" statements which are not sufficient to establish an employment contract. *Aberman*, 414 N.W.2d at 771 (quoting *Degen v. Investors Diversified Servs., Inc.*, 260 Minn. 424, 428-29, 110 N.W.2d 863, 866 (1961)).

Even if the Dorchester handbook and oral assurances were to be viewed as contractual, Defendant negated any contractual effect by notifying

Plaintiff that his employment was at will. The Supreme Court of South Carolina in *Small* expressly emphasized that an employer retains the freedom to preserve the at-will relationship. The court stated:

If an employer wishes to issue policies, manuals, or bulletins as purely advisory statements with no intent of being bound by them and with a desire to continue under the employment at will policy, he certainly is free to do so. This could be accomplished merely by inserting a conspicuous disclaimer or provision into the written document.

357 S.E.2d at 455. Thus where an employer has affirmatively expressed its desire to preserve the at-will relationship with its employees, an employment policy cannot provide the basis for a contrary contract claim, unilateral or otherwise.

In the present case, Defendant Sunbelt effectively preserved the at-will nature of Plaintiff's employment by doing exactly as the state Supreme Court recommended: it issued to Plaintiff two conspicuous disclaimers, one in 1985, shortly after Defendant bought the Company, and the second in 1988, prior to Plaintiff's termination. The fact that Plaintiff denied signing the first disclaimer is irrelevant; he admitted that he received and filled out the application containing the disclaimer. His failure to turn in the second disclaimer to Company officials is similarly irrelevant. He admitted that he received the disclaimer, read it, signed it, and understood what it meant.

[5] Plaintiff's express assent to this modification is not required. In the unilateral contract framework, which clearly applies to the alleged contract, the employees' returning to work the next day constitutes his acceptance of and consideration for the employer's modification of existing policies. *Brookshaw v. South St. Paul Feed, Inc.*, 381 N.W.2d 33, 36 (Minn. Ct.App. 1986). This holding finds support in a recent decision of the Michigan Supreme Court, which decided *Toussaint*. In *Bankley v. Storer Broadcasting Co.*, No. 78200 [4 IER Cases 673] (Mich. June 6, 1989) (LEXIS, States library, Mich. file), the court held that an employer may unilaterally change from a discharge-for-cause to an employment-at-will policy. Mutual assent to the modification is not required. The court reasoned that in cases such as *Toussaint*, "where 'contractual rights' have arisen outside the operation of normal contract principles, the application of strict rules of contractual modification may not be appropriate."

To hold Defendant liable for a breach of contract in the face of two

conspicuous, unambiguous disclaimers acknowledged by Plaintiff would be to ignore completely the South Carolina Supreme Court's admonition in *Small*. Accordingly, this Court finds that no implied contract of employment existed between Plaintiff and Defendant.

Finally, even if the Dorchester handbook did create an implied contract, Defendant Sunbelt did not breach that contract in discharging Plaintiff. Rather, Defendant Sunbelt clearly discharged Plaintiff in accordance with the plan and unambiguous terms of a specific provision included in the handbook. The Dorchester handbook provides in its list of general principles as follows:

7. That the Company will try insofar as possible to provide permanent, steady work to all employees subject to its normal business conditions.

Defendant presented uncontested evidence that business conditions were not "normal" at the time of Plaintiff's discharge. Plaintiff, himself, conceded that earlier layoffs and the closing of production at the facility did not constitute "normal business conditions."

[6] Plaintiff argued that the handbook and oral assurances created an expectation that he could be discharged only for just cause. However, it is widely held that an economically motivated reduction in force constitutes "just cause for dismissal." See *Boynston v. TRW, Inc.*, 858 F.2d 1178, 1179-80 [3 IER Cases 1350] (6th Cir. 1988) (applying Michigan law); *Grayson v. American Airlines, Inc.*, 803 F.2d 1097 [1 IER Cases 849] (10th Cir. 1986) (applying Oklahoma law); *Gianaculas v. Trans World Airlines, Inc.*, 761 F.2d 1391, 1395 [1 IER Cases 938] (9th Cir. 1985) (interpreting both New York and California law); *Parker v. Diamond Crystal Salt Co.*, 683 F.Supp. 168, 173 [3 IER Cases 398] (W.D. Mich. 1988). Therefore, even if Plaintiff's discharge is controlled by a contractual "just cause" provision, Defendant did not breach this provision when it discharged Plaintiff for economic reasons.

#### CONCLUSION

In sum, the evidence is not sufficient to submit the case to the jury. No controverted issue of material fact exists on which reasonable persons could differ. For the reasons set forth above, Defendant's Motion for Directed Verdict is hereby granted. Judgment is hereby entered in Defendant's favor as

to all causes of action. Each party is to bear its own costs.

IT IS SO ORDERED this the 12 day of August, 1989.

### MILLS v. LEATH

U.S. District Court,  
District of South Carolina,  
Florence Division

MILLS v. LEATH, Individually and as City Manager for the City of Myrtle Beach, et al., No. 4 88-2483-15, November 4, 1988

### U.S. CONSTITUTION

1. Due-process hearing — Property interest — City police officer — Statute ▶425.0607 ▶505.11

City police officer's due-process claim premised on 42 USC 1983 must fail where he worked at-will, since he had no property interest in continued employment under South Carolina statute giving city manager authority to remove employees "when necessary for the good cause of the municipality."

2. Due-process hearing — Property interest — City police officer — Personnel manual ▶425.0607 ▶450.1205

City personnel manual providing that employment was at-will does not give rise to property interest in continued employment despite policy statement that disciplinary actions would be fair and not based on discriminatory considerations.

3. Due-process hearing — Liberty interest — City police officer — Reasons for discharge ▶425.0606

City police officer who was discharged for "dereliction of duty," allegedly based on his outspoken disagreement with department policy requiring that officers write at least two speeding citations per shift, failed to state liberty-interest claim under 42 USC 1983, since he produced no evidence that reasons for discharge were publicly disclosed.

4. Conspiracy to discharge — Property interest — City police officer ▶425.0607 ▶200.01

City police officer who alleged that he was discharged because he disagreed with department policy requiring that officers write at least two speeding citations per shift failed to

state claim that department officials conspired to terminate his employment, at-will status precludes such cause of action.

### JURISDICTION

5. Pendent jurisdiction — State-law claims ▶500.05

Federal district court declines to exercise pendent jurisdiction over state-law claim for wrongful discharge where city has been granted summary judgment on police officer's remaining federal due process claims

See also 4 IER Cases 1462.

John R. Clark, Myrtle Beach, S.C. for plaintiff

Vance J. Bettis, Columbia, S.C. for defendants

### Full Text of Opinion

HAMILTON, District Judge — This case arises out of plaintiff's termination from employment as a police officer on June 29, 1988. The matter is presently before the court on defendants' motion to dismiss, Rule 12(b)(6), Fed. R. Civ. Proc., or in the alternative for summary judgment, Rule 56 Fed. R. Civ. Proc. The court has jurisdiction pursuant to 28 USC § 1331. The court has concluded that defendants' motion for summary judgment should be granted on two of the claims and the remaining pendent state-law claim dismissed without prejudice.

### I. BACKGROUND:

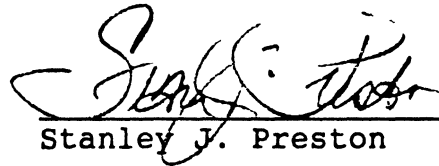
Plaintiff, James Mills, was an employee of the Myrtle Beach Police Department from May 1971 until he was terminated by police chief Stanley Bird on June 29, 1988. Immediately prior to his termination, plaintiff alleges he was directed to issue two speeding tickets during each shift regardless of his other duties or whether

<sup>1</sup> Plaintiff initially filed suit in state court on August 31, 1988 and defendants removed under 28 USC § 1441 on September 23, 1988.

CERTIFICATE OF SERVICE

I hereby certify that I caused four true and correct copies of the foregoing Brief of Appellee to be served by first class mail, postage prepaid, on June 21, 1991 upon the following:

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