

1966

Vincent Chiodo v. Bear River Telephone Company : Appellant's Brief

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Peter W. Billings and Dale E. Anderson; Attorneys for Defendant-Appellants

Recommended Citation

Brief of Appellant, *Chiodo v. Bear River Telephone*, No. 10473 (1966).
https://digitalcommons.law.byu.edu/uofu_sc2/3730

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

FEB 28 1966

IN THE SUPREME COURT OF THE STATE OF UTAH

~~FILED~~

VINCENT CHIODO,

Plaintiff and Respondent,

vs.

Case No.
10473

BEAR RIVER TELEPHONE
COMPANY,

Defendant and Appellant.

APPELLANT'S BRIEF

Appeal from the District Court of Box Elder County,
State of Utah
Lewis Jones, District Judge

PETER W. BILLINGS
DALE E. ANDERSON

Fabian & Clendenin
800 Continental Bank Building
Salt Lake City, Utah

Attorneys for
Defendant-Appellant

WALTER G. MANN
DAVID K. WATKISS

115 East Second South
Salt Lake City, Utah

Attorneys for Plaintiff-Respondent

TABLE OF CONTENTS

	Page
STATEMENT OF KIND OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	
I. THE EMPLOYMENT CONTRACT HERE IN ISSUE MAY BE TERMINATED FOR CAUSE WITHOUT LIABILITY FOR BREACH OF CONTRACT.	10
II. VINCENT CHIDO WAS AN AGENT OF BEAR RIVER TELEPHONE COMPA- NY BY VIRTUE OF THE EMPLOYMENT AGREEMENT AND THE ACTIONS OF VINCENT CHIDO DURING THE COURSE OF HIS EMPLOYMENT WITH BEAR RIVER TELEPHONE COMPANY WERE INCONSISTENT WITH THE RE- LATION OF PRINCIPAL AND AGENT AND BEAR RIVER TELEPHONE COM- PANY HAD GOOD CAUSE FOR HIS DIS- CHARGE.	16
A. Payroll Padding	17
B. Insubordination	26

	Page
C. Disclosure of Confidential Information	32
D. Disloyalty	35
E. Failure to Render Proper Accounts	36
F. Failure to Communicate Information	38
 III. THE GROUNDS STATED BY THE TRIAL COURT FOR REFUSING JUDGMENT IN FAVOR OF DEFENDANT DESPITE ITS PROOF OF GOOD CAUSE ARE CONTRARY TO LAW.	 41
A. The Trial Court Erred in Deciding That the Moral Standards of the Community Were So Low As To Excuse the Actions of Vincent Chiodo.....	41
B. The Trial Court Erred in Deciding That Bear River Telephone Company Could Not Rightfully Discharge Vincent Chiodo Because of The Acceptance of His Activities Over the Three Year Period..	46
 IV. THE EMPLOYMENT AGREEMENT MAY NOT BE VARIED BY PAROL EVIDENCE; AND EVEN IF SUCH PAROL EVIDENCE IS ADMITTED THERE IS NOTHING IN THE PAROL EVIDENCE OFFERED WHICH WOULD MAKE THE CONTRACT HERE IN QUESTION A CONTRACT WHICH CANNOT BE TERMINATED FOR JUST CAUSE.	 49
 V. WHEN AN EMPLOYER IS HELD TO HAVE WRONGFULLY DISCHARGED AN EMPLOYEE, THE DAMAGES MUST BE REDUCED BY THE AMOUNT THE EMPLOYEE CAN EARN OVER THE BALANCE OF THE CONTRACT TERM	

	Page
THROUGH THE USE OF REASONABLE DILIGENCE.	57
A. Damages May Be Assessed Only to The Date of Trial, As Future Earnings Cannot be Known at The Time of Trial.	57
B. If Damages Are Assessed Beyond The Date of Trial Then Such Damages Must Be Reduced By The Amount to Be Earned Over The Balance of The Contract Period Through the Exercise of Reasonable Diligence by The Employee.	63
CONCLUSION	67

AUTHORITIES CITED

CASES

Borg v. International Sisal Co., 4 N.W.2d 113, 141 A.L.R. 657 (Minn. 1942)	14
Bullock v. Deseret Dodge Truck Center, Inc., 11 Utah 2d 1, 354 P.2d 559 (1960)	11
Corby v. Seventy-One Hundred Jeffery Ave. Bldg. Corp., 60 N.E.2d 236 (Ill. 1945)	58
Craig v. Thompson, 244 S.W.2d 37 (Mo.)	14
Dixie Glass Co. v. Pollak, 341 S.W.2d 530, 91 A.L.R.2d 662 (Tex. Cir. App. 1960)	17-18
Elggren v. Wooley, 64 Utah 183, 228 Pac. 906 (1924)	35
Glen Allen Mining Co. v. Pack Galena Mining Co., 77 Utah 362, 296 Pac. 231 (1931)	35
Haag v. Revell, 184 P.2d 442 (Wash.)	14-16

	Page
Last Chance Ranch Co. v. Erickson, 82 Utah 475, 25 P.2d 952 (1933)	58
McMullan v. Dickinson Co., 62 N.W. 120 (Minn. 1895)	58
Polk v. Missouri P.R. Co., 245 S.W. 186 (Ark. 1922)	14
Robinson v. McAlhaney, 6 S.E.2d 517 (N.C. 1940)	58

OTHER AUTHORITIES

35 Am. Jur., Master and Servant, Section 40.....	13
Section 57.....	64-65
81 A.L.R. 282	65-66
Black's Law Dictionary, Fourth Edition 89.....	55
3 Corbin on Contracts (1960), Section 573	51-52
5 Corbin on Contracts (1960), Section 1095..	63-64, 65
Degnan, "Parol Evidence—The Utah Version," 5 Utah Law Review 158, 162 (1956)	54
Restatement of The Law (Second) Agency (1958), Section 278	48-49
381	38-39
382	36
383	39
385	26
387	17, 26
391	35
394	35
395	32
399	12
409	11, 12, 36, 47, 48
78-25-1 Utah Code Annotated 1953	44

IN THE SUPREME COURT OF THE STATE OF UTAH

VINCENT CHIDO,

Plaintiff and Respondent,

vs.

BEAR RIVER TELEPHONE
COMPANY,

Defendant and Appellant.

Case No.
10473

APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is an action for breach of an employment agreement.

DISPOSITION IN LOWER COURT

The case was tried to the Court without a jury. From a decision and judgment for the plaintiff, defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and judgment in its favor as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

This action was commenced by Vincent Chiodo and others against General Waterworks Corporation, a Delaware corporation, Bear River Telephone Company, a Utah corporation, and 2500 shares of stock of Bear River Telephone Company, a Utah corporation. Pursuant to a stipulation of the parties this Court on September 29, 1964, entered its order dismissing the complaint against General Waterworks Corporation for lack of jurisdiction. By stipulation of the parties entered into in open court on April 2, 1964, the service of process against the 2500 shares of stock of Bear River Telephone Company was quashed for lack of in rem jurisdiction. Therefore, the trial of this matter was limited to an action between Vincent Chiodo and the Bear River Telephone Company for breach of an employment contract. There are no other issues and no other parties involved in this appeal.

The defendant Bear River Telephone Company is a Utah corporation which has existed in this state since 1905 (Ex. 37).

The plaintiff Vincent Chiodo first acquired stock ownership in the Bear River Telephone Company in

1943 when he acquired fifty-one per cent of the outstanding stock (R. 20). At the time of the occurrence of the events out of which this controversy arose, he was its general manager and principal stockholder.

On December 21, 1960, as a result of negotiations beginning on or about May 5, 1960, plaintiff sold his stock in the Bear River Telephone Company to General Waterworks Corporation and on January 18, 1961, plaintiff entered into the employment agreement here in question (Ex. 6) with the Bear River Telephone Company. This agreement provides as follows:

January 3, 1961

Mr. Vincent Chiodo
651 North Third Street East
Tremonton, Utah

Dear Mr. Chiodo:

Since 1943 you have been active in the operation and management of Bear River Telephone Company (Bear River) and you presently hold the offices of Vice President and General Manager in that company.

As you know, Bear River has recently become a subsidiary of General Waterworks Corporation. This letter is written to confirm our understanding with you concerning your continuing employment by Bear River and the nature of your duties.

In accordance with the understanding and agreement which we have arrived at, your employment by Bear River is to continue for a period of ten years from the date hereof. At the

end of such ten-year period your continuing employment by Bear River shall be considered by you and by us, and shall be subject to such agreement as may then be arrived at. Nothing in this letter agreement, however, shall be held to preclude your continuing employment by Bear River after such ten-year period.

Your duties shall be those of manager of Bear River, which presently operates telephone exchanges in and about the municipalities of Tremonton, Bear River City, Snowville, Fielding, Thatcher and Garland, Box Elder County, Utah, and such other duties as may be assigned to you from time to time. Such duties shall include the management of such other telephone properties as may be acquired by Bear River from time to time, either through purchase or expansion, or such other telephone companies in the Utah area as may become subsidiaries of our parent company, General Waterworks Corporation. You shall, if so requested and if you are elected to that office, act as a vice president of Bear River from time to time. You shall devote your full time to Bear River and to such other telephone subsidiaries of General Waterworks Corporation.

Your salary for the duties performed by you for Bear River during the term of this agreement shall be \$12,000 per year beginning January 1, 1961 and payable in semi-monthly installments of \$500 each.

In the event of any substantial increase in our work load because of the expansion of the Bear River telephone properties or the acquisition by General Waterworks Corporation of other telephone properties in the Utah area, the compen-

sation to be paid you shall be increased, the amount of such increase to be arrived at by mutual agreement between us.

In connection with our retirement and insurance plan for our employees, there has been issued to you by New England Mutual Life Insurance Company its Monthly Retirement Income contract #2,330,952 in the face amount of \$10,000 and which contract provides, among other things, for certain retirement income payments to you. The annual premium for such contract is \$1,520. We have paid 75% of such premium each year since the contract was issued and you have paid 25% thereof, which arrangement shall continue. Our obligation to pay any part of such premiums shall terminate upon (a) your death, (b) November 1, 1969, or (c) your leaving our employment, whichever event shall first occur.

If the foregoing correctly sets forth the understanding which we have arrived at will you please so indicate by your acceptance thereof on the enclosed copy of this letter and return it to me.

**BEAR RIVER TELEPHONE
COMPANY**

By /s/ A. W. Sanders
Executive Vice President

The foregoing correctly sets
forth my understanding with
you and is agreed to this
18th day of January, 1961.

/s/ Vincent Chiodo
Vincent Chiodo

Prior to the acquisition of the stock of Bear River Telephone Company by General Waterworks Corporation, a series of meetings and negotiations took place between plaintiff and representatives of General Waterworks Corporation relative to the employment contract which would be entered into by Bear River Telephone Company after General Waterworks Corporation acquired the Bear River Telephone Company stock and elected directors. The final draft of this agreement and the one which was actually entered into was furnished to plaintiff on November 4, 1960 (Exs. 5 and 6).

During the course of negotiations, a meeting was held on August 3, 1960, in Logan, Utah, between A. W. Sanders, a representative of General Waterworks Corporation, and Vincent Chiodo. The discussion at this meeting was recorded by a certified shorthand reporter (Ex. 1). The trial court concluded that the negotiations of General Waterworks Corporation relative to the employment contract including the Logan discussion were ratified by the Bear River Telephone Company when it entered into the employment agreement (R. 649).

Pursuant to the written employment agreement Vincent Chiodo continued in his position as manager of Bear River Telephone Company from the time General Waterworks Corporation acquired the stock of Bear River Telephone Company until December 10, 1963, when he was discharged. Almost from the moment General Waterworks took over as owner of the com-

trolling interest of Bear River Telephone Company, Chiodo evidenced his regret in having sold his control in the Company (Ex. 22 and Exs. 30-32). This lingering regret came to a climax late in July of 1961, just six months later, when Chiodo was informed by representatives of General Waterworks Corporation that a trade of the property with Mountain State Telephone & Telegraph Company was a possibility and that if consummated, Chiodo was through as manager (R. 40-41). Although this trade did not come about, Chiodo took the announcement as a declaration of war and embarked upon a program of non-cooperation, internal sabotage and general insubordination to force the Company to discharge him. Pursuant to this deliberate program, Vincent Chiodo engaged in various "unorthodox" practices which led to his eventual discharge. Some of these acts were characterized by the trial court as "moonlight operations, as we call it, double work contracts and all kinds of unorthodox employment practices" (R. 592). Chiodo's tactics successfully culminated in his discharge effective December 10, 1963 (Ex. 49). A summary of the grounds for discharge of Vincent Chiodo established by defendant at the trial is as follows:

1. Vincent Chiodo falsified payroll records for his son, Don Chiodo (Ex. 101, 11/16/62, R. 407, Ex. 83, R. 244) and instructed a subordinate employee to prepare other false payroll records for his son, Don Chiodo, so Don Chiodo could be paid by Bear River Telephone Company even though he was then working in Montana for another employer (R. 249, 411-412, Exs. 83, 101).

2. Vincent Chiodo permitted and condoned other payroll practices permitting improper payments to be made directly and indirectly to members of his family, including his 14-year-old granddaughter (R. 199-389; Exs. 50-98, R. 468, 470, Ex. 109).

3. Vincent Chiodo instructed subordinate employees to engage in improper payroll practices by improperly reporting their own time in violation of the Federal Wage and Hour laws (R. 428, 466).

4. Vincent Chiodo actively engaged in a subterfuge to obtain the stock of Bear River Telephone Company from its principal shareholder, for an undisclosed principal while he was employed as manager and vice-president of Bear River Telephone Company (R. 130-134, Ex. 42).

5. Vincent Chiodo wrote letters to the Utah Public Utilities Commission and the R.E.A. in Washington concerning the proposed exchange of stock of the Bear River Telephone Company by the owner of said stock when he was informed of such proposal on a confidential basis by his employer and was specifically instructed to keep this information private (R. 41-42, Exs. 23, 31).

6. Vincent Chiodo wrote letters to his superiors which were disrespectful and insolent, communicated this disrespect to his subordinates and instructed his own subordinate employees not to provide any information to the main office which was not specifically asked for (R. 316-324, 326, 393-402, 425-426, 489).

7. Vincent Chiodo instructed his subordinate employees not to make proper billings to customers of Bear River Telephone Company and to prepare the records in such a way that the home office could not determine what was being done (R. 438-445).

8. Vincent Chiodo refused to follow specific directions from his superiors in the simple matter of the cancellation of an insurance policy on Bear River Telephone Company equipment (R. 570, Exs. 30, 31, 32).

Plaintiff's case was:

(a) That the contract was part of the deal for the sale of the controlling stock of Bear River Telephone Company to General Waterworks Corporation and hence not terminable for any reason;

(b) That plaintiff was a good manager and should not have been discharged; and

(c) That the grounds shown by defendant did not constitute good cause.

The trial court ruled against plaintiff on the first issue, and defendant did not dispute that the telephone company was profitably operated while Chiodo was manager. As to the third issue, the trial court concluded (R. 596-597):

“ . . . while the plaintiff's conduct has certainly not been lilywhite, considering the Sodam and Gomorrah community that he was working in at that time, I'm not going to charge him with such a serious violation in the light of the sur-

rounding circumstances and surrounding methods of operation so as to justify discharge."

After stating fully its conclusions (R. 588-593), the trial court adopted over defendant's objections (R. 674-677) findings of fact and conclusions of law stating that the discharge of Chiodo was wrongful and "without just cause or excuse" and awarded Chiodo a judgment in the full amount of the contractual salary for the balance of the ten-year term of the contract plus certain fringe benefits as allowed by the contract.

It is defendant's contention on this appeal:

1. That the conclusion of the trial court is not supported by the evidence, and that defendant is entitled to a judgment, no cause of action as a matter of law.

2. Failing that, the defendant is entitled to a new trial.

3. Failing that, the judgment should be reduced by the amount Chiodo could reasonably be expected to earn during the balance of the ten-year contractual period, or alternatively that defendant be awarded judgment on its counterclaim for the damages incurred by it in having to replace Chiodo with a loyal manager.

ARGUMENT

I. THE EMPLOYMENT CONTRACT HERE IN ISSUE MAY BE TERMINATED FOR CAUSE WITHOUT LIABILITY FOR BREACH OF CONTRACT.

The general rule as to employment contracts is that the relationship is one at the will of either party, and it may be so terminated. *Bullock v. Deseret Dodge Truck Center, Inc.*, 11 Utah 2d 1, 354 P.2d 559 (1960). In the case at bar, the contract between Chiodo and Bear River Telephone Company was for a term of ten years. This provision qualifies the *Bullock* rule to require the employer to show cause, i.e. a breach of an express or implied term of the contract by one party to excuse performance by the other. Defendant contends that it has clearly established several such breaches of contract by Chiodo.

Restatement of The Law (Second), Agency (1958) hereinafter referred to as *Restatement, Agency*, states in Section 409:

“(1) A principal is privileged to discharge before the time fixed by the contract of employment an agent who has committed such a violation of duty that his conduct constitutes a material breach of contract or who, without committing a violation of duty, fails to perform or reasonably appears to be unable to perform a material part of the promised service, because of physical or mental disability.

“(2) The election by the principal not to discharge the agent for a breach of duty does not of itself release the agent from liability for loss caused by the breach nor, if the agent commits subsequent breaches of duty, is the principal prevented from electing subsequently to treat the first breach as cause for discharge.”

In the comments on Subsection (1) of Section 409, *Restatement, Agency*, it is stated as follows:

“b. *What breach justifies dismissal.* As stated in Section 118, a principal can terminate any specific authority of an agent at any time, and can also terminate the relation between them. He cannot, however, do this rightfully before the end of the period for which he has agreed to employ the agent, unless the agent has committed a material breach of contract or has failed to perform a condition. An unexcused failure substantially to perform the work which he has contracted to do, or a serious violation of the duty of loyalty or of obedience, constitutes an entire breach of contract. A wilful disobedience or a violation of duty of loyalty may constitute a material breach of contract although the harm likely to arise from such breach is very small. In other matters, the harm arising from the breach is a matter to be considered in determining whether or not the misconduct of the agent is sufficiently serious to be a cause for discharge.”

Also, Section 399 states:

“A principal whose agent has violated or threatens to violate his duties has an appropriate remedy for such violation. Such remedy may be:

. . .

“(j) discharge; or . . .”

As appears from the *Restatement, Agency*, as above set forth, a contract of employment may be rightfully terminated before the time fixed by the contract if the agent has violated his duty of loyalty or of

obedience to the employer. This same rule is also summarized in *35 Am. Jur., Master and Servant*, Section 40:

“Generally.—While if a contract of employment is general in regard to the term of employment the employer may terminate it at will without incurring liability to the employee for the discharge, where an employee is engaged for a definite term of employment, the employer, in order to justify a dismissal of the employee during the agreed term, must be able to show a breach on the part of the employee of some express or implied provision of the contract of service. The implied provisions of such a contract are violated when the servant does something inconsistent with the relation of master and servant or incompatible with the due and faithful performance of his duties. As typical of the causes or reasons which will justify the dismissal of an employee before termination of the contract of employment may be mentioned neglect of duty, negligence, incompetence, or inefficiency; dishonesty; intoxication; disobedience of the employer’s rules, instructions, or orders; insolence or disrespect; unfaithfulness to the employer’s interests; immoral, disreputable, and unbecoming conduct;—in short, anything which indicates unfitness for the service for which the employee was engaged. These general principles apply with reference to the right to discharge employees in executive or supervisory capacities as well as those in subordinate positions, although, perhaps, one holding a supervisory position has more latitude in the performance of his duties than does a mere clerk or workman; the extent of his discretion, however, depends upon the particular circumstances.”

That an employer need not retain an employee who disobeys the employer's rules, instructions and orders, who is insolent and disrespectful and is unfaithful to the employer's interests would seem to be axiomatic. However, see, e.g., *Polk v. Missouri P.R. Co.*, 245 S.W. 186 (Ark. 1922); *Borg v. International Sisal Co.*, 4 N.W. 2d 113, 141 A.L.R. 657 (Minn. 1942); *Craig v. Thompson*, 244 S.W. 2d 37 (Mo.); *Haag v. Revell*, 184 P.2d 442 (Wash.).

The *Haag v. Revell* case, *supra*, involved a question of discharge of an employee for insolence and the court summarized the law as follows:

“Appellant prays for reversal upon several grounds. It is urged that the ground of discharge which the court found valid, was not pleaded. However, no objection was made to the introduction of the evidence, which tended to establish that ground. If objection had been made, we think it would have been rightly overruled. Plaintiff alleged that he was discharged ‘without cause.’ The defendant categorically denied that allegation and, therefore, had the right to introduce evidence that there was a cause. A broad field was opened by the plaintiff’s allegation that he was discharged without cause. It is said in 35 Am. Jur. 471, § 37:

“ ‘It is not necessary that an employer, in order to justify a dismissal, show that in dismissing his employee he in fact acted upon some proper ground of dismissal. It is sufficient if a ground of dismissal existed at that time. It is not material whether the employer knew of grounds which in fact existed at the time of dis-

charge; notwithstanding his ignorance, he may avail himself thereof, and in the event of his death, his representative has the same right. *Nor is it material that the employer assigned another ground as the cause of the employee's dismissal. The employer may justify a dismissal by relying on a ground different from that assigned at the time of the dismissal.*' (Emphasis added).

"The trial court, in its memorandum opinion, relied upon certain sections of the article on Master and Servant in 35 Am. Jur., a limited portion of which we quote:

" 'Unprovoked insolence or disrespect on the part of the employee toward the employer or the latter's representative may afford ground for the discharge or dismissal of the employee prior to the conclusion of the term of employment.' 35 Am. Jur. 480, § 48.

" 'Even though one's services are engaged by another for a definite term, the employer may discharge him for good cause during the term of the employment without incurring liability for breach of contract. This is true even where the contract of employment stipulates that the employee shall be retained in the service during the term of his life.' 35 Am. Jur. 470, § 36.

"Appellant relies largely upon the case of *McIntosh v. Abbot*, 231 Mass. 180, 120 N.E. 383. The case of *Dorrance v. Hoopes*, 122 Md. 344, 90 A. 92, Ann. Cas. 1916A, 1012, is even closer to the instant case in its facts.

"The law governing discharge for insolence is well settled. The real value of the cases just

cited is that they demonstrate that every case of this kind must be decided upon its own facts."

II. VINCENT CHIDO WAS AN AGENT OF BEAR RIVER TELEPHONE COMPANY BY VIRTUE OF THE EMPLOYMENT AGREEMENT AND THE ACTIONS OF VINCENT CHIDO DURING THE COURSE OF HIS EMPLOYMENT WITH BEAR RIVER TELEPHONE COMPANY WERE INCONSISTENT WITH THE RELATION OF PRINCIPAL AND AGENT AND BEAR RIVER TELEPHONE COMPANY HAD GOOD CAUSE FOR HIS DISCHARGE.

The contract in question (Ex. 6) is set forth, *supra*. The trial court determined that this contract was to be interpreted (contrary to defendant's contention) by a consideration of all prior negotiations including the transcript of a conversation held in Logan, Utah, on August 3, 1960 (Ex. 1). Even accepting this ruling, *arguendo*, it is still clear that the agreement between the Bear River Telephone Company and Vincent Chido was one of master and servant. While plaintiff seems to take the position that he was given broad management authority by the discussion in Logan (Ex. 1) he has not alleged nor shown that he was an independent contractor and not subject to any control by or duty to the officers and directors of the Bear River Telephone Company. There is nothing in that transcript to justify either plaintiff or an impartial reader in concluding that Chido was to run the Bear River Telephone Com-

pany as his own master, free from any control by the representatives of the new owner, all without any duty of loyalty to his corporate employer and its new corporate stockholder.

The following are specific breaches by Vincent Chiodo which justify his discharge:

A. Payroll Padding.

Section 387 of the *Restatement, Agency*, provides as follows:

“Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.”

In *Dixie Glass Co. v. Pollak*, 341 S.W.2d 530, 91 A.L.R.2d 662, 679 (Tex.Cir.App. 1960) the court said:

“It is true that many cases state the rule broadly to be that whether an act occurred is, if the evidence is conflicting, a question of fact for the jury, and, if the jury finds it did occur, the question of whether it constitutes good cause for discharge is a question of law for the court to decide. However, while the rule is thus broadly stated, we think no more was intended than that under the facts of the particular case, the acts of the employee were such, as a matter of law, as to be good cause for discharge. These cases, for the most part, were cases of violation of reasonable and substantial rules governing the employee in performance of his work, or *aggravated cases of refusal to obey reasonable orders of the employer*

that amounted to insubordination, or, cases of clearly dishonest acts toward the employer on the part of the employee in the attempted performance of the employee's work, or acts such as an unprovoked fight by an employee with an officer of the employer in the presence of other employees. Royal Oak Stave Company v. Grace, Tex Civ App, 113 SW 2d 315, writ diss; Robertson v. Panhandle, S. F. Ry. Co., Tex Civ App, 77 SW2d 1078, writ diss; Matlock v Gulf, C. & S.F.R. Co., Tex Civ App, 99 SW2d 1056, writ diss; Swilley v Galveston, H. & S.A. Ry. Co., Tex Civ App, 96 SW2d 105, writ diss; Shute & Limont v McVitie, Tex Civ App, 72 SW 433. (Emphasis added).

It is unusual when it is possible by uncontroverted evidence to prove that payroll records have been falsified so as to permit improper payments to employees. It is a fully documented fact in this case, that Vincent Chiodo himself prepared false payroll records for the benefit of his son, Don Chiodo, and also directed his subordinate employee, Maurice Staples, to prepare other false payroll records for Don Chiodo.

Between November 15, 1962 and November 24, 1962, Don Chiodo was in Montana working for Max Fannesbeck (Ex. 83) and was paid for the work there performed for Bonneville Construction Company (R. 249). During the precise same period the time sheets for Don Chiodo as a regular employee of Bear River Telephone Company (Ex. 101) showed he was working full time at specific company facilities located a long way from Montana (Ex. 101). It was not dis-

puted that he was paid his regular salary by the company for that period. One of these time sheets was filled in personally by Vincent Chiodo showing his son as working at Tremonton and Fielding on November 16, 1962 for a total of eight hours.

"Q And the first daily time sheet, who prepared that? [Ex. 101. 11/16/62]

"A I put in the head and Mr. Chiodo filled in the hours and code.

"Q Mr. Don Chiodo?

"A Mr. Vincent Chiodo." (R. 406-407).

The others for the period were filled in with false information stating that Don Chiodo was on the job for Bear River Telephone Company by employee Staples pursuant to directions from Vincent Chiodo (R. 411-412).

"Q Now do you know whether Don Chiodo was in Tremonton all during the time that those time tickets cover?

"A No, he wasn't in Tremonton during this whole period.

"MR. RAMPTON: You mean he was there none of the time or was not there all the time?

"A He wasn't there all the time. Some of the time he was there.

"Q Did you prepare some of those time tickets or daily time reports yourself?

"A Yes.

"Q Who instructed you, or were you instructed to fill these time sheets out?

"A Yes.

"Q Who instructed you that you should fill them out?

"A Mr. Vincent Chiodo.

"Q What did he say?

"A He just told me the account numbers to use for these days that Don wasn't here.

"MR. RAMPTON: As to what?

"A As to the days he wasn't there.

"Q Are the numbers which Mr. Vincent Chiodo told you to use in recording these time records the numbers which appear thereon now?

"A Yes."

The time records for Don Chiodo prepared by Max Fannesbeck compared with the Bear River Telephone Company records for the same period prepared by Vincent Chiodo or by Mr. Staples pursuant to Vincent Chiodo's instructions show:

Date	Max Fannesbeck Record (Ex. 83)	Bear River Telephone Company Daily Time Report of Don Chiodo (Ex. 101)
11/15/62	Logan to Great Falls	Repairs to Pole Lines
	Don Chiodo 8 hours	Code 3 [Tremonton] 8 hours
	Max Fannesbeck 8 hours	

Date	Max Fannesbeck Record (Ex. 83)	Bear River Tele- phone Company Daily Time Report of Don Chiodo (Ex. 101)
11/16/62	Great Falls Don Chiodo 9 hours	Code 903 [Tremonton] 4 hours
	Max Fannesbeck 9 hours	Code 905 [Fielding] 4 hours
11/17/62	Great Falls Don Chiodo 9 hours Max Fannesbeck 9 hours	No time sheet
11/18/62	Great Falls Don Chiodo 9 hours Max Fannesbeck 9 hours	No time sheet
11/19/62	Great Falls Don Chiodo 9 hours	Code 3 [Tremonton] 4 hours
	Max Fannesbeck 9 hours	Code 5 [Fielding] 4 hours
11/20/62	Great Falls Don Chiodo 9 hours	Code 3 [Tremonton] 4 hours
	Max Fannesbeck 9 hours	Code 4 [Promontory] 4 hours
11/21/62	Great Falls Don Chiodo 9 hours	Code 3 [Tremonton] 8 hours
	Max Fannesbeck 9 hours	

Date	Max Fannesbeck Record (Ex. 83)		Bear River Telephone Company Daily Time Report of Don Chiodo (Ex. 101)
11/22/62	Great Falls		No time sheet (Thanksgiving)
	Don Chiodo	9 hours	
	Max Fannesbeck	9 hours	
11/23/62	Great Falls		Code 4 [Promontory] 8 hours
	Don Chiodo	9 hours	
	Max Fannesbeck	9 hours	
11/24/62	Great Falls to Logan		No time sheet
	Don Chiodo	8 hours	
	Max Fannesbeck	8 hours	

This documentary evidence indisputably establishes falsification of payroll records for the benefit of Don Chiodo by Vincent Chiodo personally or pursuant to his instructions. Although the trial court refused to amend the findings of fact prepared by plaintiff's counsel, it did tacitly determine that this payroll fraud was engaged in by Vincent Chiodo when it said (R. 592):

“ . . . but there's always padding in these cost-plus deals, and when Mr. Chiodo took over this company he was living in these surroundings, and these parties must have envisaged moonlight operations, as we call it, double work contracts and all kinds of unorthodox employment practices.”

In addition to the payroll padding and falsification of payroll records for Don Chiodo, Vincent Chiodo also

permitted his sons, Don and Gene Chiodo, to receive monetary benefits for work done by Bear River Telephone Company employees on Bear River Telephone Company time for work that was ostensibly under contract to Max Fannesbeck.

The evidence establishes that Don and Gene Chiodo were paid the following amounts in connection with contracts let by Bear River Telephone Company to Max Fannesbeck:

Date	Exhibit No.	Record Ref.	Don Chiodo	Gene Chiodo
7/19/61	55	219	\$ 300.00	\$
9/2/61	—	229-230	2,000.00	—
1/29/62	96	284	—	300.00
1/31/62	62	232	1,000.00	—
5/5/62	63	232	400.00	—
3/20/62	75	237-238	—	3,060.00
7/5/62	97	284	—	165.00
8/22/62	98	284	—	270.00
12/22/62	—	284	—	—
			<hr/> \$3,700.00	<hr/> \$4,795.00

The evidence to support the claim that Don and Gene Chiodo were obtaining benefits through the use of Bear River Telephone Company employees on Bear River Telephone Company time requires a study of the testimony and the exhibits introduced beginning on page 199 of the record and concluding on page 495.

This evidence shows that Vincent Chiodo's sons did do some of the work on the contracts in question on their own time when they were not being paid directly by Bear River Telephone Company. Max Fonnesbeck and another subcontractor of Max Fonnesbeck, Grant Allred, did perform portions of such contracts on their own time and by use of their own employees. However, the record is clear that some employees of the Bear River Telephone Company were used by Vincent Chiodo's sons on regular company time to perform work which Vincent Chiodo's sons had subcontracted on a fixed fee basis and from which they profited at the expense of Bear River Telephone Company.

Jerry Jones (R. 362-370), Steve Anderson (R. 353-359), Richard Clark (R. 346-348), and David Scott (R. 335-339) all testified that they had performed work on regular time and while being paid by Bear River Telephone Company which work had been identified by Mr. Allred and Mr. Fonnesbeck as work covered by contracts let to Fonnesbeck and which Fonnesbeck had subcontracted in part to Don Chiodo or Gene Chiodo either directly or through Grant Allred. David Scott (R. 334-335) and Richard Clark (R. 344-345) both testified that they saw splicing being done on a Max Fonnesbeck contract by other Bear River Telephone Company employees while they were working for Bear River Telephone Company during regular company working hours.

Steve Anderson testified that he had personally assisted Don Chiodo periodically over a period of three

or four months on Bear River Telephone Company time in splicing an installation of telephone cable at Thiokol (R. 355) and this particular telephone cable was installed under contract by Max Fonnesbeck (Exs. 57 and 58) which Fonnesbeck had subcontracted to Don Chiodo (R. 230, 242). Jerry Jones testified that he had personally installed on Bear River Telephone Company time some of the equipment in the Tremonton addition (R. 362-366), the installation of which was nominally under contract to Max Fonnesbeck but which was totally subcontracted to Grant Allred and Gene Chiodo (R. 202-204).

Additional evidence of this practice of payroll padding and fraud against Bear River Telephone Company was a payment of \$354.20 (Ex. 109) to Vincent Chiodo's 14-year-old granddaughter (R. 468-470) for the purported delivery of Bear River Telephone Company directories when, in fact, Don Chiodo handled the delivery of these directories, in part at least, on regular company time (R. 488).

The facts relating to this specific breach are clearly established and the law is also clear in permitting an employer under such circumstances rightfully to terminate the employment of the agent.

This brief could be terminated at this point as to point II of the argument but there are many additional breaches of contract by Vincent Chiodo which are material and support the defendant's claim of rightful discharge.

B. Insubordination.

Comment (b) under section 387 of *Restatement, Agency*, states:

“b. Scope of duty. The agent’s duty is not only to act solely for the benefit of the principal in matters entrusted to him (see §§ 388-392), but also to take no unfair advantage of his position in the use of information or things acquired by him because of his position as agent or because of the opportunities which his position affords. See §§ 393-398. The agent is also under a duty not to act or speak disloyally in matters which are connected with his employment except in the protection of his own interests or those of others. He is not, however, necessarily prevented from acting in good faith outside his employment in a manner which injuriously affects his principal’s business. His duties of loyalty to the interests of his principal are the same as those of a trustee to his beneficiaries. See the *Restatement of Trusts*, § 170.”

Section 385, *Restatement, Agency*, states:

“Duty to Obey.

(1) Unless otherwise agreed, an agent is subject to a duty to obey all reasonable directions in regard to the manner of performing a service that he has contracted to perform.

(2) Unless he is privileged to protect his own or another’s interest, an agent is subject to a duty not to act in matters entrusted to him on account of the principal contrary to the directions of the principal, even though the terms of the employment prescribe that such directions shall not be given.”

The record of this case establishes that Vincent Chiodo was disobedient, insolent, disrespectful and unfaithful to his employer's interests and that he communicated his insolence and disrespect to employees of Bear River Telephone Company. As early as January 6, 1961, about two weeks after he sold his Bear River Telephone Company stock, Vincent Chiodo began making complaints to Mr. A. W. Sanders, the Executive Vice President of Bear River Telephone Company (Ex. 22).

In April 1961, Vincent Chiodo was directed to contact a Mr. Brough, an insurance agent, and cancel an insurance policy because the company could effect a savings of 32 per cent by use of a blanket policy which was used to insure affiliated companies (Ex. 30). Mr. Chiodo was told (Ex. 30):

"I am quite sure that you can properly explain the Company's position in this matter to Mr. Brough, and ask that you do so. We are trying hard to assist you as much as possible on every day matters at Tremonton. Matters such as this make me wonder if we are receiving your 100% co-operation."

In reply to this directive Vincent Chiodo simply refused to comply and wrote Mr. Sanders (Ex. 31) telling Mr. Sanders about Vincent Chiodo's gripes and finally saying:

"I am returning herewith all papers pertaining to your deal with Mr. Brough, you can dispose of it as you see fit."

The policy of insurance in question was a policy on the properties of Bear River Telephone Company and was an ordinary insurance policy which had been awarded Mr. Brough on the basis of bids submitted to Bear River Telephone Company by various insurance companies (Ex. 31).

Rather than follow his orders Vincent Chiodo became rebellious and considered the matter as his personal business rather than the company's business. In response to questions concerning this insubordination, Vincent Chiodo testified as follows (R. 570):

"Q And you got along beautifully with Mr. Sanders too?

"A Yes, we did.

"Q Well, in evidence is a letter chastising you about this Brough insurance matter in April of 1961; isn't that true?

"A The odd thing—yes, that's true.

"Q All right. And isn't it true that you in the course of that disobeyed a direct order from Mr. Sanders. He told you to cancel out with Mr. Brough and you refused to do so and told him to do it himself?

"A I do not break contracts with any man. He asked me to break by solemn word, and I won't do it for anybody.

"Q But you did disobey a direct order from Mr. Sanders?

"A If that is an order, I disobeyed it, yes."

Vincent Chiodo wrote Donald Bell, Sanders' successor, the following concerning Vice President Hansen (Ex. 29) :

"After you read these please destroy them. I think that the Letter of April 25, 1961 is enough to hang both Hansen and Anderson. As I see it however, Anderson was a tool of Hansen.

"If you have trouble hanging Hansen, let me know and I'll come out and do the job myself."

Vincent Chiodo also wrote Mr. Sanders about Mr. Hansen (Ex. 27) :

"Your attention is directed to the problem of providing a licensed engineer. As you know Mr. John Swenson was hired as a temporary operator until VICE PRESIDENT HANSON had time to make permanent arrangements. Unless provision is made at this time for an orderly replacement of Mr. Swenson at the time that he leaves school, the operation of the Microwave at Promontory will be in jeopardy.

"Please be advised that the Collins microwave engineerd (sic) by Vice President Hanson is not performing properly. This matter has been called to your attention on at least one occasion previously, but no remedial action has been taken."

When inquiry was made by Mr. Cornwell, a staff officer of the New London office,¹ regarding the billing of Bear River Telephone Company subscriber, Vincent

¹ New London was the headquarters for all of the telephone companies owned by General Waterworks Corporation, including Bear River Telephone Company.

Chiodo took it upon himself not only to castigate Mr. Cornwell, but to carry his displeasure not to his superior officer, Mr. Sanders, but to the president of the company, Mr. Butcher, who had no function whatever as to the daily operational problems of Bear River Telephone Company. In addition, Vincent Chiodo also sent a copy of his letter to the billing agent of Bear River Telephone Company in Provo, Utah, who had no bona fide interest whatever in the internal operations of Bear River Telephone Company. The letter (Ex. 24) states:

“This is in reply to your letter dated 4-1-63 to DHI Computing Service, Provo, Utah. Please be advised that the contract for DHI was between Vincent Chiodo and Bliss Crandall and has nothing to do with you. Therefore please stop bothering Mr. Crandall. . . .

. . .

“This property was sold to General Waterworks with the provision that I was to manage it. I intend to run this plant in accordance with my agreement with Mr. Butcher. In the meantime if you have any questions you will contact me. Under no condition are you to contact my people.”

On numerous occasions Vincent Chiodo would indicate to the Bear River Telephone Company employees that his superior officers didn't know what they were doing and were incompetent to manage the Bear River Telephone Company (R. 316, 425). In June 1963, Vincent Chiodo told Don Korth that he (Vincent Chiodo) “should not have to request authority from

people like him (Dick Hansen) who were incompetent and not telephone men" (R. 316). He also frequently directed the Bear River Telephone Company employees to keep the officers of the company in the dark and not to send them anything which was not specifically asked for (R. 319-324, 326, 393-400). He advised the employees that there was going to be a court battle over his contract as early as six months after the sale (R. 322-324, 326). Vincent Chiodo also told Mr. Sam Warner, another employee of Bear River Telephone Company, in late 1961 or early 1962 that he (Vincent Chiodo) believed (R. 489):

"that New London was trying everything they could to get him to resign from his position as manager, and that he would not resign regardless of what they did."

He also told Mr. Warner (R. 489) "that he would do everything he could legally to get himself discharged." This may account for the obvious insolence and disrespect demonstrated continually by Vincent Chiodo in his correspondence to the head office in New London. Some of the more obvious of Vincent Chiodo's insubordinations, which are documented, are set forth above. The full flavor of Vincent Chiodo's disobedience, insolence and disrespect can be better appreciated by a review of all the pertinent exhibits. The exhibits which are particularly pertinent to this point are numbers 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 42, 43, 44, and 46.

C. Disclosure of Confidential Information.

Restatement, Agency, Section 395, states as follows:

“Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge.”

On July 31, 1961, Vincent Chiodo was informed of pending negotiations with Mountain States Telephone and Telegraph Company for the exchange of the Bear River Telephone Company properties. Vincent Chiodo was informed of this matter in his official capacity as manager of Bear River Telephone Company. Mr. Chiodo in his letter of August 4, 1961, directed to Mr. Harold F. Clark, Director, Western Area Telephone REA, recognizes that he was instructed to keep this matter secret. He said (Ex. 23, p. 3):

“Mr. Sanders has asked me not to make this action public but I can see no reason for not advising you and the commission people.”

In direct and flagrant violation of his orders, Vincent Chiodo sent letters to the Public Service Commission of Utah and to the REA. Copies of the letters forwarded to the Public Service Commission are Exhibit

23 in this case. The absolute refusal of Vincent Chiodo to follow orders cannot be more manifest than in the letters sent to the Public Service Commission (Ex. 23).

In an effort to excuse his disobedience Vincent Chiodo testified that he felt that he was justified in making such disclosures because he, Vincent Chiodo, had sold the company and certain representations were made as to what General Waterworks Corporation was going to do. His excuses were as follows (R. 563-564):

“Q I’ll ask you this. Had you discussed, prior to the sale, with myself, with R.E.A. and with the Public Service Commission the purpose—no; what General Waterworks was going to do so far as holding this company for operation or taking it for investment?

“A I had even gone further. I had discussed in detail practically all of the terms that are in our August third transcript with all members of the Utah Public Service Commission, including engineer Wilford Robinson. I had forwarded that same information to the chief of the western area for R.E.A. They had approved of my sale, as it were, on that basis, and the sale was at that time interpreted as being to a company that was going to operate the property and not buying it for speculation.

“Q And you went to them and told them that this no longer held good?

“A Yes, I told them I was terribly surprised, that I had not meant to lie to them originally. I was taken by surprise.

“Q Now we’ve got evidence in here where I

wrote to Mr. Sanders and then Mr. Sanders wrote back to you upbraiding you for having discussed it.

"A Yes."

It is clear that Vincent Chiodo was not concerned about what the company's shareholders and directors desired for the company, he was only concerned about himself. The attempt to justify himself by his assumption that the purchase of Bear River Telephone Company by General Waterworks Corporation was approved because of Vincent Chiodo's representations as to the purpose of General Waterworks Corporation is patently absurd and merely makes his disobedience more palpable. His own testimony is conclusive (R. 42):

"Q Why did you go to the Public Service Commission?

"A Why didn't I go—

"Q Why did you?

"A Well, I was seeking advice on what to do to look after *my own interests* in this matter." (Emphasis added).

It was immediately after this meeting in Denver that Vincent Chiodo declared war on Bear River Telephone Company and did everything in his power to cause trouble and problems for the company.

D. Disloyalty.

Restatement, Agency, Section 391, states as follows:

“Acting for Adverse Party without Principal’s Consent

“Unless otherwise agreed, an agent is subject to a duty to his principal not to act on behalf of an adverse party in a transaction connected with his agency without the principal’s knowledge.”

Also, Section 394, *Restatement, Agency*, provides:

“Acting for One with Conflicting Interests

“Unless otherwise agreed, an agent is subject to a duty not to act or to agree to act during the period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed.”

During September and October of 1962, Vincent Chiodo contacted Mr. Elwood A. Crandall of the J. A. Hogle Company for the purpose of acting as an undisclosed agent of a prospective purchaser of Bear River Telephone Company from its principal owner, General Waterworks Corporation. This entire negotiation was carried out at a time when Vincent Chiodo owed the highest duty of fidelity and trust to the stockholders of Bear River Telephone Company as he was both an officer and director of the Bear River Telephone Company. See, e.g., *Elggren v. Wooley*, 64 Utah 183, 228 Pac. 906 (1924); *Glen Allen Mining Co. v. Pack*

Galena Mining Co., 77 Utah 362, 296 Pac. 231 (1931).
Mr. Crandall testified as follows (R. 134):

“Mr. Chiodo said that he believed General Waterworks would sell the company back to him and that if he could buy it he would in turn sell it to Independent Telephone. That he would charge no fee in the process, or markup. He asked that we not advise General Waterworks that he was acting in this capacity. He suggested that we contact Mr. Rampton and work with him in contacting General Waterworks.”

Although Vincent Chiodo's efforts to obtain the stock of his employer for the benefit of an undisclosed third party were not successful, it is not the success or failure which determines the breach but the violation of the duty of loyalty as stated in Comment on Subsection (1) to Section 409, *Restatement, Agency*, paragraph (b):

“A wilful disobedience or a violation of duty of loyalty may constitute a material breach of contract although the harm likely to arise from such breach is very small.”

E. Failure to Render Proper Accounts.

Restatement, Agency, Section 382, states as follows:

“Duty to Keep and Render Accounts

“Unless otherwise agreed, an agent is subject to a duty to keep, and render to his principal, an account of money or other things which he has received or paid out on behalf of the principal.”

In violation of his duty to properly account for funds belonging to Bear River Telephone Company, Vincent Chiodo deliberately failed to collect proper charges from customers because of his personal feud with his superiors in the home office.

Mr. Sam Warner testified that certain charges for some "watts band service" should have been made to Thiokol in June 1963. Vincent Chiodo instructed him that any inquiry on these charges should be referred directly to Vincent Chiodo and Mr. Warner was to communicate nothing to the New London office (R. 439). Vincent Chiodo further instructed Mr. Warner, after several months, to prepare the correct bill so that New London would not know what was being done (R. 443) :

"Q Now in connection with these offsetting entries, did Mr. Chiodo made (sic) any statement concerning the way that these two things should be reported?

"A Yes, he said to make them up on one sheet or one charge or one credit, whichever way you would like to put it, that the—he said to put them on one page so that they wouldn't know they were being—by 'they' I mean New London—that New London would not know whether Thiokol was being charged for the additional services or being given credit for them."

In addition, Vincent Chiodo told Mr. Warner that he (Vincent Chiodo) and Warner had no responsibility to make correct charges because New London could figure it out themselves (R. 444) :

“A He said that New London had all the figures that we have, that they received all the papers from Mountain States Telephone Company that we do, they receive a copy of our revenue distribution, and if they can't figure out that they are losing or making money from those figures, that that was their fault, that it didn't mean anything to us here.”

There were also some charges for advertising in telephone directories which Vincent Chiodo refused to bill to Bear River Telephone Company customers. The failure to make these charges were brought to Vincent Chiodo's attention on “at least three occasions” (R. 444) by Mr. Warner and Mr. Chiodo told him that it was not the responsibility of the Tremonton office to advise the main office. Mr. Warner testified that (R. 445):

“A Mr. Chiodo said that New London had exactly the same papers that we had, they had the bill from Mountain States Telephone Company which showed the amount that we were being charged, they also had our revenue distribution which showed the amount that we were billing our customers, and that if they couldn't pick the fact that they were losing money, then it was not up to us to tell them, that as long as we were getting our money and doing our work, he didn't care.”

F. Failure to Communicate Information.

Section 381, *Restatement, Agency*, states:

“Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs

entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person."

Also, Section 383, *Restatement, Agency*, states:

"Except when he is privileged to protect his own or another's interests, an agent is subject to a duty to the principal not to act in the principal's affairs except in accordance with the principal's manifestation of consent."

In Comment (e) to Section 383 it states in pertinent part as follows:

"Acts for which agent is liable. The agent may be subject to liability to his principal because he has made an unauthorized contract for which his principal is liable (see sections 159-178, 194-202); . . ."

In violation of his duty properly to inform his employer and not to enter into agreements in violation of law without the consent of Bear River Telephone Company, Vincent Chiodo did direct two employees improperly to report overtime work in violation of the federal Wage and Hour laws.

By letter of July 22, 1963 (Ex. 35), Vincent Chiodo represented to Mr. Bell, the Vice President and General Manager of Bear River Telephone Company, that employees Warner and Staples were being paid overtime to do certain janitorial and automotive repair work. As a matter of fact these men were not being paid at overtime rates but were in fact being paid less than straight

time rates. Further, they were reporting their time at Vincent Chiodo's direction so that the federal Wage and Hours examiners would not be able to detect the false reporting. Mr. Warner testified that Vincent Chiodo had given him directions as to how his time was to be reported and further testified (R. 446) :

“A He told me that I was to show two hours on my time sheet for every three hours that I worked at the janitor job.

“Q Did he say anything further about the rate of pay or anything of that nature?

“A Nothing more about the rate of pay.

“Q Did he say anything else that you can recall?

“A He said that if anyone should ever question the time that I put on the time sheet for the janitor's job, that I was to tell no one anything, that it was strictly between him and myself.”

Mr. Staples also testified that Vincent Chiodo had instructed him as to his time reporting so no questions would arise with regard to the Wage and Hour laws (R. 428) :

“Q What did he (Vincent Chiodo) say?

“A He said I was to report my time so that it would figure out at two dollars an hour so that there wouldn't be any question with the hour and wage law.

“Q What was your regular rate of pay at that time?

“A Approximately two-fifty an hour.

"Q Then how would you report your time, for example if you spent three hours doing extra work? How would this appear on your time record, in addition to an eight hour day?

"A This would show two hours."

III. THE GROUNDS STATED BY THE TRIAL COURT FOR REFUSING JUDGMENT IN FAVOR OF DEFENDANT DESPITE ITS PROOF OF GOOD CAUSE ARE CONTRARY TO LAW.

After hearing the evidence and receiving voluminous briefs by the parties, the trial court on June 15, 1965, announced its ruling (R. 589, et. seq.) and the reasons therefor. It is submitted that the ruling based upon these reasons is in error and the findings of fact and conclusions of law prepared by counsel for plaintiff and adopted by the court should be set aside and judgment entered for defendant.

A. The Trial Court Erred in Deciding That The Moral Standards of the Community Were So Low As To Excuse The Actions of Vincent Chiodo.

From the District Court's opinion, it is clear that the court was convinced that the activities of Vincent Chiodo set forth in the statement of facts and point II of the argument did in fact occur. The court said (R. 591-592, 596-597):

"Now the record is quite meager on the surrounding circumstances in the broad sense of

the word at the time these negotiations on the contract were going on, but the court can't overlook the fact—and I guess it's common knowledge; the court will take notice of the proposition that there was a giant rocket facility being placed in here on a cost-plus program, which in the court's view was one of the most wasteful ways of spending the taxpayers' money that the court knows anything about. Now it's true in time of war or stress that cost-plus contracts are indulged in, but in time of peace when a giant cost-plus facility is placed in a community it immediately sets into motion great inflation. And the only reason this is material here, gentlemen—I'm not launching on an attack on government policy, but at the time these negotiations were going on it's common knowledge that the great inflation was taking place in this community. This cost-plus facility out here was being operated in the great American custom, and the great American custom calls, of course, in the court's view, and I'm not picking on Thiokol Chemical as against the other, but there's always padding in these cost-plus deals, and when Mr. Chiodo took over this company he was living in these surroundings, and these parties must have envisaged moonlight operations, as we call it, double work contracts and all kinds of unorthodox employment practices.

“Now as a matter of New England honesty the court can't uphold all of these what I call somewhat minor acts of Mr. Chiodo, but considering his surroundings and the inflation and the padding and the purchase orders and all of this other business going on around here, the court can't convince itself that Mr. Chiodo's conduct was sufficient to justify his discharge.

That's all I'm leading up to. I'm not making any attack on the Thiokol Chemical Company as such. If there's to be any attack it should be on the government itself for permitting such contract practices."

. . . .

"... Now professionally, gentlemen, the court hangs its hat on three propositions: First, that this contract has a—I don't want to use the word 'loophole', but the contract refers to another agreement and undertaking, and that in the court's view that's sufficient to permit the court to look behind the contract. Second, that the parties by their practical interpretation of the contract have construed it under the plaintiff's theory of the case. Now, of course, that's a question of fact. Third, the court finds and concludes that, while the plaintiff's conduct has certainly not been lilywhite, considering the Sodom and Gomorrah community that he was working in at that time, I'm not going to charge him with such a serious violation in the light of the surrounding circumstances and surrounding methods of operation so as to justify discharge. Now I may be wrong; I've been wrong before; but I'm hanging my hat on those three propositions."

There are no decided cases (which have come to defendant's attention) which would indicate that an employer cannot rightfully discharge a dishonest employee who permits and participates in payroll padding, is disobedient of employer's instructions and orders, is insolent and disrespectful and is unfaithful to his employer's interest because the moral standards of the community have been depressed to such a point that

“moonlight operations . . . double work contracts and all kinds of unorthodox employment practices” (R. 592) are commonplace giving the community a “Sodom and Gomorrah” (R. 596) atmosphere. Aside from the fact that the law does not condone improper conduct by an employee — even though the community practices are at that low level — there is no evidence in the record to sustain the District Court’s conclusion relative to such moral standards. If the moral standards of the community are supposed to permit the kinds of activities engaged in by Vincent Chiodo, then it should appear from witnesses acquainted with such standards and not by the court’s ipse dixit.

Section 78-25-1, Utah Code Annotated, 1953, sets forth those matters as to which a court may take judicial notice. There is nothing in this statute which would permit a court to take judicial notice of the effect of the establishment of government defense installations in Box Elder County on the moral standards of businessmen in the area. If the actual status of the community’s moral standards is relevant to the termination of the issues of this case, and we submit that it is not, the trial court should have required plaintiff to offer evidence in support of this excuse for his breaches of contract and permitted defendant to offer rebuttal evidence. The court in order to justify its conclusion in this case must have concluded and should have made a finding that the employment agreement between Bear River Telephone Company and Chiodo was entered into in light of the claimed low moral standards in the Box Elder County

community, and that Chiodo was not expected to measure up to any higher standard. To so conclude in the absence of any evidence on the point is to compound the court's error.

A telephone company is a public utility. Its rates and standards of service are supervised and regulated by the Public Service Commission of Utah. It is an invasion of that Commission's prerogatives for the trial court to assume that Chiodo and the Bear River Telephone Company would contract for a standard of conduct of its manager which would inflate the Company's costs and affect materially the quality of its services. If the federal government and its taxpayers were fair game for the citizens of Box Elder County because of the government contract with Thiokol as the trial court apparently assumed, does that mean that the stockholders of Bear River Telephone Company and the users of the Bear River Telephone Company service were equally fair game for the local manager of Bear River Telephone Company?

The record is clear that the trial court refused to find justification for the discharge of Vincent Chiodo because of its belief that the community morals from 1960 to 1963 permitted such conduct and not because the court had concluded that the various actions claimed by defendant to have been engaged in by Vincent Chiodo had not in fact occurred. Defendant specifically requested the court to set forth the facts relative to Vincent Chiodo's conduct (R. 674-677) but the court merely

denied defendant's motion and did not make any specific finding of fact relative to the actions of Vincent Chiodo. The effect of this determination is that in the trial court's opinion it makes no difference whether such acts were or were not engaged in by Vincent Chiodo because, as a matter of law, these acts do not constitute sufficient justification to permit Bear River Telephone Company rightfully to discharge Vincent Chiodo. In this the trial court erred.

B. The Trial Court Erred in Deciding That Bear River Telephone Company Could Not Rightfully Discharge Vincent Chiodo Because of The Acceptance of His Activities Over The Three Year Period.

The trial court in its opinion said (R. 590-591):

"There's one other thing that's persuasive to the court in this matter, and that is the interpretation given by the parties on this exhibit six during the three years that Mr. Chiodo operated this company and the practice of the parties lends itself to the proposition that Mr. Chiodo was to be in practically absolute charge of this Bear River Telephone Company during this period of time. It's true that he was deprived of the right to sign checks by a resolution, but that had nothing to do with the main operation of the company.

"So the court finds as a fact that the parties did interpret the contract as indicated by the court by their conduct."

The court by this reference appears to be finding that while Vincent Chiodo did the things which defen-

dant claims he did the defendant cannot rightfully discharge him, because by failing to discharge him sooner the defendant has in effect condoned his actions. The authorities do not sustain this interpretation and the trial court erred in its conclusion that by suffering through three years of intolerable insolent and disrespectful activity by Vincent Chiodo, Bear River Telephone Company became estopped from doing anything other than continuing his pay for the balance of the contract period.

The *Restatement, Agency*, sets forth several specific duties of an agent, the breach of which will justify the agent's discharge and the comments on Section 409, Subsection (2) in paragraph (g) makes it clear that while a material breach may be condoned to the extent the employer elects not to discharge the agent for the breach, such breach will still furnish justification for discharge of the employee for subsequent other breaches which taken alone would not justify his discharge.

“g. *Effect of condonation.* If the principal elects not to discharge the agent for a material breach of contract, such breach is not of itself a cause of future discharge. If, however, the agent commits a subsequent breach of duty too small in itself to constitute a cause for dismissal, the prior breach of duty may be considered, so that, because of the two, the principal may be privileged to discharge the agent. In no event, however, does the principal's condonation of previous conduct by the agent relieve the agent from liability for damages caused by his breach of duty, unless the principal has so contracted or the agent has changed his position in reliance

upon an agreement with the principal not to take action upon it."

Comments on Section 409, Subsection (2), paragraph (e) of the *Restatement, Agency*, make it clear that the principal need not have actual knowledge of the agent's breach at the time the agent is discharged in order for the discharge to be justified:

"e. *Principal's knowledge of breach.* If a principal has cause for the discharge of an agent and discharges him, the fact that the principal is not at the time aware that he has cause for discharge is immaterial. See the *Restatement of Contracts*, § 278. If, under such circumstances, the principal were to compensate the agent for the supposed breach of the employment contract in discharging the agent, the principal would be entitled to restitution. See the *Restatement of Restitution*, § 18.

Illustration:

"5. A, who has been employed by P for a period of one year, is discharged by P on the alleged ground that A is performing his duties in an unsatisfactory manner. This is not true: P is satisfied with A's services. The cause for discharge is a diminution in P's business. Unknown to P, A has embezzled from him. A has no cause of action against P for his discharge.

"6. Same facts as in Illustration 5, except that at the time of discharge P paid A \$1,000 to compensate A. P is entitled to recover back this amount."

Section 278 of *Restatement, Contracts* (1932), also makes it clear that actual knowledge of a breach at the

time of the discharge is immaterial in order to justify the discharge:

“Promisor’s Ignorance of Facts That Would Operate As a Discharge.

“The failure of a condition to exist or to occur or the actual or prospective failure to perform a return promise which would prevent a promisor’s duty from arising or would discharge it if he knew of the facts, has the same effect although he is ignorant of them.”

While the trial court seems to have found that the Bear River Telephone Company accepted Chiodo’s interpretation of the employment agreement as being modified by the Logan transcript (Ex. 1), giving Chiodo considerable latitude in his discretion as manager, there is nothing in the record to indicate that Bear River Telephone Company interpreted the contract as so modified to allow Mr. Chiodo to be disloyal, disrespectful or dishonest or condoned such actions.

IV. THE EMPLOYMENT AGREEMENT MAY NOT BE VARIED BY PAROL EVIDENCE; AND EVEN IF SUCH PAROL EVIDENCE IS ADMITTED, THERE IS NOTHING IN THE PAROL EVIDENCE OFFERED WHICH WOULD MAKE THE CONTRACT HERE IN QUESTION A CONTRACT WHICH CANNOT BE TERMINATED FOR JUST CAUSE.

In points I to III, *supra*, it has been assumed, *arguendo*, that the employment contract here in question

could be varied by the parol evidence introduced by plaintiff relative to the negotiations leading up to the written contract. It is submitted, however, that the trial court was correct when it first ruled that parol evidence could not be introduced to vary this contract (R. 584) and not, when it later ruled that the contract could be varied by parol. The court said (R. 584) :

“THE COURT: Well, if you’re going to assert there’s some parol understanding as part of that written contract—in other words, if you’re going to claim there’s an exception to the parol evidence rule—

“MR. WATKISS: I’m not going to brief you any more on that. I’ve given it to you.

“THE COURT: Well, you haven’t given me any law on it.

“MR. WATKISS: Yes, I have. My last brief has maybe four or five cases and restatements and otherwise.

“THE COURT: I’m still not sold now—now that we got over the threshold and we’ve got a written contract now, the court is not sold that there are any exceptions to the parol evidence rule involved here.”

The court apparently changed its mind on this point because it later said (R. 589) :

“Gentlemen, the plaintiff may prevail in this action. The court feels impelled to state its reasons and to make some discussion in this case. First of all, looking at the contract between the defendant, Bear River Telephone, and the plain-

tiff, there's a phrase in that contract which in the court's view permits it to examine into and scrutinize the prior negotiations and prior agreements between the parties. That's the first phrase in paragraph three, which reads, 'In accordance with the understanding and agreement which we have arrived at.' Then as we all know, the letter goes on to recite certain specific things. Now it's this court's view that that phrase is the 'Open Sesame' that permits this examination, and but for that perhaps the court couldn't look at or examine or consider these prior negotiations and the interview in the Eccles Hotel which was taken down by the reporter, and the letter, even the letter of Mr. Sanders, if it was the letter, which enclosed this letter contract, as well as the telegram."

If the written agreement cannot be varied by parol then the law clearly permits Bear River Telephone Company to terminate Chiodo's employment on any one of the grounds it established; and Bear River Telephone Company need not assume the additional burden of proof which it did assume for purposes of the argument in points I to III.

It is not practical in this brief to explore in depth the parol evidence rule. The text writers, when discussing this rule, generally hasten to point out that it is a rule of substantive law and is not a rule of evidence. In Section 573 of 3 *Corbin on Contracts* (1960) it states:

"When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate in-

tegration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing. This is in substance what is called the 'parol evidence rule,' a rule that scarcely deserves to be called a rule of evidence of any kind, and a rule that is as truly applicable to written evidence as to parol evidence. The use of such a name for this rule has had unfortunate consequences, principally by distracting the attention from the real issues that are involved. These issues may be any one or more of the following: (1) have the parties made a contract? (2) Is that contract void or voidable because of illegality, fraud, mistake, or any other reason? (3) Did the parties assent to a particular writing as the complete and accurate 'integration' of that contract? "

It was not contended by Vincent Chiodo that the parties did not enter into the written employment contract nor that the contract is void or voidable because of illegality, fraud or mistake. It is difficult to determine whether Vincent Chiodo contends that the oral conversation of August 3, 1960 (Ex. 1) is itself a separate contract or whether he claims that the contract actually entered into (Ex. 6) should be amended to include this transcript. Apparently, the trial court has concluded that the employment contract should be amended to include Exhibit 1 as part of the terms of the employment agreement.

Exhibit 1 may not be considered by the Court for the purpose of varying or interpreting the agreement

where there is no claim of fraud or mistake of fact in the execution of the contract. The Utah Supreme Court in *Last Chance Ranch Co. v. Erickson*, 82 Utah 475, 25 P.2d 952, 956, stated:

"The appellant thus first urges that the testimony of any such oral agreement was received in violation of the parol evidence rule. That the deed on its face is a completed contract and the contract and the terms and subject-matter thereof fully and completely stated free from uncertainty or ambiguity is not disputed. No claim is made of any fraud, misrepresentation, accident, or mistake of fact in the execution of the deed. The action is not laid nor did it proceed on any such theory. All that also is true and admitted as to the written agreement executed by the parties January 22, 1924, heretofore referred to. The rules of evidence are familiar and not disputed by the respondent that extrinsic evidence is not admissible either to contradict or subtract from, add to or vary, the terms of a written instrument, and that, in the absence of accident, fraud, or mistake of fact, the execution of a contract in writing is deemed to supersede all of the stipulations concerning its terms or subject-matter which preceded or accompanied its execution. 10 R.C.L. 1016. Texts and cases to that effect are cited by the appellant. 1 Elliott on Contracts, 19; 2 Elliott on Contracts, 937; *Bartels v. Brain*, 13 Utah 162, 44 P. 715; *Reese Howell Co. v. Brown*, 48 Utah 142, 158 P. 684."

The reason that evidence of prior negotiations leading up to a contract is not properly admissible as evidence to vary the terms of the contract is succinctly set

forth by Ronan E. Degnan in "Parol Evidence — The Utah Version," 5 Utah Law Review 158, 162 (1956), as follows:

" . . . Contracts and other documents are normally if not always preceded by some negotiation and even perhaps by transaction. But eventually, if concord occurs at all, much of the preliminary agreement and discussion will be abandoned or replaced by a final agreement of the parties; it is the jural act to which the law attributes changes in legal relationships. In short, the later agreement supersedes all former. Thus former negotiations or even agreements are excluded from a trial not because evidence as to their existence would be untrustworthy but because they are legally immaterial; if their existence were proved or even admitted it would not affect the rules of law to be applied in determining the disposition of the case. This theory makes the name given the rule a misnomer indeed—it states a preference for written over oral testimony, while the true foundation, according to Wigmore, is a preference for subsequent agreement over prior."

Exhibit 1 was never intended or considered by either party to the contract to amount to an agreement. On September 9, 1960, Mr. Chiodo sent an offer to sell his stock to Mr. A. W. Sanders (Ex. 18). In this offer Mr. Chiodo offers to sell if certain terms are agreed to. One of these terms is that the memorandum of August 3, 1960 "shall form a part of this agreement." This offer of Vincent Chiodo was not accepted and on November 4, 1960, a letter from V. F. Rigling (Ex. 5) was sent to

Vincent Chiodo. This letter enclosed a copy of the agreement finally entered into but it was stated that:

“ . . . in the event that such exchange transaction is consummated, and our nominees are then elected to the board of directors of Bear River Telephone Company, we will then cause Bear River Telephone Company to enter into an employment agreement with you, for a period of ten years, such agreement to be in the form attached hereto with such changes therein as may be agreed to.”

These subsequent negotiations evince the fact that neither party considered the conversation of August 3, 1960 (Ex. 1) to be an agreement between them. *Black's Law Dictionary, Fourth Edition* 89, defines an agreement as:

“The act of two or more persons, who unite in expressing a mutual and common purpose, with the view of altering their rights and obligations. The union of two or more minds in a thing done or to be done; a mutual assent to do a thing.”

Effect of Exhibit 1 if it Is Admissible as Evidence

If the court should determine that Exhibit 1 is admissible for all purposes, i.e., that the parol evidence rule is inapplicable in this case, plaintiff is not benefited. The only conversation regarding an employment contract appears between pages 26 and 29 of Exhibit 1. In this conversation Mr. Sanders says that he has been led to believe that Vincent Chiodo cannot be fired under the employment contract but this is a legal matter that should be taken up with a lawyer.

Mr. Sanders was correct in his understanding. The only problem was that neither Mr. Sanders nor Mr. Chiodo considered the possibility that Vincent Chiodo might engage in the various activities which the evidence showed he did engage in. So long as Vincent Chiodo did not violate the conditions of his employment which are implied in law, Bear River Telephone Company had no legal just cause for discharging him. However, Mr. Sanders and Mr. Chiodo did not discuss what would happen if Vincent Chiodo should engage in activities of the nature disclosed by the evidence. Accordingly, Sanders and Chiodo could not have reached an agreement as to what would happen if Vincent Chiodo so abused his position as manager. In the absence of such an agreement limiting Bear River's rights to discharge Mr. Chiodo the general legal rules pertaining to employment contracts are applicable and Chiodo was bound to meet the standards of integrity of the usual manager.

The clear purpose of the conversation between Chiodo and Sanders reflected in Exhibit 1 was that Chiodo having had experience with large corporations wanted reassurance that he would not be bound by strict rules as to standard operating procedures common to such organizations. There is not the slightest hint in the conversation nor in the other negotiations concerning the terms of the employment agreement that Chiodo was to be allowed to raid the Company treasury at will to give special benefits to his children or to completely ignore the organizational chain of command of the Bear River Telephone Company. He was selling his control-

ling interest. He was being retained as manager. There is nothing in Exhibit 1 which would indicate an intent on the part of General Waterworks Corporation as a prospective purchaser that Chiodo's status as manager would permit him to expend General Waterworks' money for the benefit of himself and his family.

V. WHEN AN EMPLOYER IS HELD TO HAVE WRONGFULLY DISCHARGED AN EMPLOYEE, THE DAMAGES MUST BE REDUCED BY THE AMOUNT THE EMPLOYEE CAN EARN OVER THE BALANCE OF THE CONTRACT TERM THROUGH THE USE OF REASONABLE DILIGENCE.

Although defendant believes that there was no wrongful discharge of Vincent Chiodo and that this court need not consider the question of damages, the following arguments are included in the event this court should conclude that defendant had no just cause for the discharge of Vincent Chiodo.

There are two rules for the assessment of damages which have been followed by various courts. The Utah Court has not yet determined which of the rules shall be following in this state.

A. Damages May Be Assessed Only to The Date of Trial, as Future Earnings Cannot Be Known at The Time of Trial.

Some courts have determined that an employee who

brings an action for wrongful discharge before the expiration of the employment term may only recover damages up to the time of trial. See, e.g., *Robinson v. McAlhaney*, 6 S.E.2d 517 (N.C. 1940); *McMullan v. Dickinson Co.*, 62 N.W. 120 (Minn. 1895); *Corby v. Seventy-One Hundred Jeffery Ave. Bldg. Corp.*, 60 N.E.2d 236 (Ill. 1945).

The basis for this determination is that the employee can only recover for actual damages and such damages are the amounts due under the contract less the amount the employee could earn by the exercise of reasonable diligence. Because it is not possible to know in advance what the discharged employee can earn by reasonable diligence, the courts which follow this rule refuse to grant recovery beyond the date of trial.

The facts of the present case provide a good example of why this rule is a reasonable and fair one. Vincent Chiodo testified at the trial (R. 45) :

“Q Have you been employed by Bear River since that date (December 12, 1963) ?

“A No, sir.

“Q Have you been able to find any other employment?

“A Not particularly.

“Q What have you had?

“A I had four days of work with a firm in Nebraska and a few days in Canada.

“Q How much have you earned in total in the time since you were discharged?

"A Oh, about \$500.

"Q How did your expenses of getting that employment compare with the \$500?

"A I think I spent about 800.

"Q In expenses to earn the five?

"A In expenses, yes."

Also, on cross examination, Vincent Chiodo testified as follows (R. 76-78):

"Q Now, Mr. Chiodo, you testified yesterday in connection with your efforts to find other employment since your employment was terminated with the Bear River Telephone Company in December of 1963. Would you describe just what you did and what efforts you made?

"A Well, I've met with the Snelling and Snelling people in an employment service in Stamford, Connecticut, and I have been referred or have referred myself to a number of people such as Service Design Company, Magrath Engineering Company, and for the moment I think that's it.

"Q I notice you mentioned that you first found an opportunity or sought an opportunity to sell your company through advertisements in Telephony, the magazine you referred to.

"A Yes.

"Q Have you looked in Telephony for advertisements to see if there was a place for someone with your background?

"A Now that you call that to my attention, I have sent in a number of resumes to people in Telephony Magazine.

"Q Have you made any efforts to find employment in the telephone business with an R.E.A. cooperative?

"A I'm not sure of that. I'm not sure of that.

"Q By that you mean you have not?

"A I'm not sure whether I have or haven't. I don't know who the people in the Telephony were.

"MR. RAMPTON: He didn't know whether the people he wrote were R.E.A. or not.

"A I can't recall.

"Q Now what other efforts have you made to find employment?

"A That's the extent of it.

"Q Have you considered using your experience in the telephone and electronic business as a contractor or consultant, any of those things?

"A Yes, I have.

"Q Made any effort to do that?

"A Yes.

"Q Where?

"A Oh, I've just been on the lookout for an opportunity that might arise. In fact, I have contacted a firm in—what's the suburb immediately north of Los Angeles, right on the Pacific? Now it's a fair sized suburb.

"MR. RAMPTON: Santa Monica.

"A Santa Monica, yes. I have contacted a firm in Santa Monica.

"Q I take it then that—

"A But no results.

"Q Your interest in finding employment isn't confined to Tremonton or Box Elder County. You're willing to go any place?

"A Well, it all depends. It's got to be remunerative enough to pay me to take the loss in Tremonton. I just can't go to work for someone a thousand miles away and keep doing it at a loss.

"Q I understand that, but you're willing, in other words, to work anywhere in the United States you can find suitable employment; is that correct?

"A Absolutely.

From this testimony, it could only be concluded that (1) Vincent Chiodo had no knowledge of any available employment, or (2) Vincent Chiodo was not telling the truth if he did have knowledge of available employment.

The trial of this case was completed on December 18, 1964, and Vincent Chiodo commenced work in Canada on January 8, 1965, where he was employed until July 31, 1965 (R. 661). During the course of this employment Vincent Chiodo was paid \$4,152.00 (R. 659) plus \$7.28 per day for expenses.

Beginning only a few days after the trial, Vincent Chiodo actually earned in less than eight months \$4,152.00, even though he had testified under oath that he had no knowledge of available employment.

Defendant has never contended that Vincent Chiodo was not technically able as an engineer nor that he was not capable of performing any job assigned to him. The only contentions by defendant have been that Vincent Chiodo for reasons of his own was unfaithful to the interest of his employer, the Bear River Telephone Company, and that as a result of his actions Bear River Telephone Company had just cause for his discharge.

However, the trial court refused to take into account the technical ability and training of Vincent Chiodo as an aid in determining what he might earn in the future and rendered judgment for the total amount of the wages to become due under the contract. In defendant's motion for a new trial (R. 655), it was pointed out that Vincent Chiodo had been employed since shortly after the termination of the trial and that knowledge of the availability of such employment was obviously had by him at the time of the trial. Despite the fact that it was known, prior to the judgment becoming final, that Vincent Chiodo had actually been gainfully employed, the trial court still refused to exercise its duty as a fact finder and determine, upon the basis of the known facts, how much Vincent Chiodo could expect to earn through the exercise of reasonable diligence over the remaining period of the employment contract. This refusal is only consistent with the theory that judgment for damages to the date of trial is all that can be allowed.

If no estimate as to Vincent Chiodo's future earnings over the balance of the contract is to be made then

the judgment should only run to the date of trial so that the employee is not given a windfall profit because of his discharge. Such windfall would arise by virtue of the receipt in full of his wages from the past employer plus everything else he could earn from a new employer. The absence of such a rule would make it more desirable for the employee to get fired than to do his best job to render good and loyal service to the employer and would be contrary to the public good.

B. If Damages Are Assessed Beyond the Date of Trial Then Such Damages Must Be Reduced By The Amount to Be Earned Over The Balance of The Contract Period Through The Exercise of Reasonable Diligence by The Employee.

It is recognized that the majority of courts which have decided the issue have permitted judgments to be entered beyond the date of trial where the contract period extends beyond such date. However, where such a result is obtained the courts require a determination of the amount which the employee could earn through reasonable diligence. This rule is succinctly stated in 5 *Corbin on Contracts*, § 1095, p. 515, as follows:

“If at the time of his wrongful discharge the employee has not substantially completed the service of a particular period for which a definite wage installment was the agreed equivalent, the employer is not yet a contract debtor for the amount of that wage instalment. The employee can maintain an action of damages for the wrongful breach, but he cannot maintain an action of debt for the agreed wages. The con-

trary rule was once laid down by the English courts, and it may still be followed in a few jurisdictions today. It was held that the employee might remain ready and willing to perform the agreed service and at the end of the period of service maintain an action of debt for the agreed wages. This has sometimes been referred to as the doctrine of constructive service. The doctrine has been generally abandoned, however, because of the unnecessary economic waste that it involves. In cases of this kind the rule concerning avoidable consequences is generally of definite and easy application. The employee, instead of remaining idle, is expected to get other service of a like character if he can do so by making a reasonable amount of effort. The damages that he can recover for a wrongful discharge, therefore, are the total amount of the unpaid wages that were promised to him for his service, less the amount that he can earn by making reasonable effort to obtain similar service under another employer. It is not necessary for him to take any serious bodily or financial risks or to accept service of a kind that in itself is distinctly less desirable. It should be observed that other service is not in itself less desirable merely because the wages offered therefor are lower in amount."

35 *Am. Jur., Master and Servant*, § 57, p. 490, states in pertinent part:

" . . . Nor does the mere fact that a wrongfully discharged employee has not obtained other employment or has not been paid compensation from any other source necessarily entitle him to recover the full contract price of his services for the unexpired term of his contract with the de-

fendant. It is a well-settled principle that upon the breach of a contract of employment calling for personal services by the wrongful discharge of the employee, the latter is required to use reasonable efforts to obtain other employment of like nature for the purpose of lessening or minimizing the damages. In short, in an action by a wrongfully discharged employee for the breach of his contract of employment the defendant employer may reduce the amount of the damages recoverable by whatever the plaintiff has earned or by reasonable diligence could have earned in other employment subsequent to his discharge.

In order to be entitled to reduce the damages claimed, the employer is not required to prove that the employee will in fact find employment. The employee may refuse any and all employment but the damages must still be reduced by the amount which the employee would earn by reasonable effort. This rule is stated in Section 1095, 5 *Corbin on Contracts*, p. 518, as follows:

"It has frequently been said that the employee is under a 'duty' to mitigate damages by looking for other work and accepting it if it can be obtained. Accurately speaking, however, this is not the case. It makes no difference whatever whether the employee actually uses the time that is set free for his use by the employer's discharge or does not use it. His recoverable damages are exactly the same in either case. He is legally privileged to throw away his time if he so desires."

This same rule is stated in different words in the A.L.R. Annotation, 81 A.L.R. 282-283, as follows:

"It is commonly said that the rule imposes on a plaintiff the duty of taking all reasonable steps to minimize the loss. The use of the term 'duty' in this connection, while perhaps convenient, is loose and inaccurate. There is no corresponding right to require the avoidance of unnecessary loss; a party is not subject to an action for a breach of the so-called duty. *Rock v. Vandine* (1920) 106 Kan. 588, 189 Pac. 15; *McClelland v. Climax Hosiery Mills* (1930) 252 N.Y. 357, 169 N.E. 605, concurring opinion of Cardozo, Ch. J. what is meant by the supposed duty is merely that, if a plaintiff neglects to do what ordinary and reasonable prudence dictates to lessen the damages, he will not be heard to say that the loss properly chargeable to his own neglect is a jural consequence of the wrong such consequences are deemed not to flow directly and naturally from the wrongful act and are regarded as remote. It is considered that the will of the plaintiff intervenes at the time the cause of action accrues, and that the loss resulting to him thereafter is suffered through his own act."

The trial court refused to make any reduction in the judgment because of the reasonably anticipated future earnings of Vincent Chiodo (R. 616) even though, on the motion for a new trial (R. 655-658) it was admitted by plaintiff that he had been employed nearly continuously from the date of the trial and until after the date of the entry of judgment.

If Vincent Chiodo is entitled to recover on his employment contract then the law clearly requires the finder to make a determination of what the employer

could earn by reasonable effort on his part. The record is clear that Vincent Chiodo is a trained engineer having completed the junior year of college (R. 18) with many years experience in the telephone business. Vincent Chiodo claimed to have built the Bear River Telephone Company from a "high wire outfit" (R. 21) which "was so bad you hardly would call it a community outfit" (R. 21-22) to "the best physical condition of any community plant anywhere in the state of Utah" (R. 23). Defendant never contested the fact that Vincent Chiodo was a capable engineer or could have been a competent manager.

Certainly the trial court had sufficient evidence to permit it to determine that Vincent Chiodo could, by reasonable effort, have reduced his damages substantially. This conclusion is substantiated by the facts, which are a part of the record on the motion for a new trial, that Vincent Chiodo did in fact earn \$4,152.00, plus expenses, during a period of less than seven months. If Vincent Chiodo is entitled to recover for breach of contract then the case should be remanded to the trial court for a determination of the amount which Vincent Chiodo could earn by making reasonable efforts.

CONCLUSION

The Bear River Telephone Company submits that the record in this case shows:

1. The contract between Bear River Telephone

Company and Vincent Chiodo was an employment agreement for ten years — one of the implied terms of which was that the employee could not be discharged except for good cause. But equally it implied that the employee would be a faithful and loyal servant.

2. The Bear River Telephone Company had good and sufficient cause for the discharge of Vincent Chiodo in that:

(a) Vincent Chiodo personally falsified payroll records for his son, Don Chiodo, and instructed his subordinate employees to also falsify payroll records so Don Chiodo could be paid by Bear River Telephone Company while he was actually employed in Montana by another company. Vincent Chiodo also permitted and condoned other payroll practices permitting improper payments to be made to members of his family. He instructed subordinate employees to improperly report their own time and thus subject the company to liability under the federal wage and hour laws.

(b) Vincent Chiodo wrote letters to his superiors which were disrespectful and insolent and demonstrated a general refusal to cooperate with other employees of Bear River Telephone Company.

(c) Vincent Chiodo actively engaged in a subterfuge to obtain the stock of the Bear River Telephone Company from its shareholders for an undisclosed principal at the same time he was employed as manager and vice-president of Bear River Telephone Company and had the highest duty of loyalty to the said stockholder.

(d) Vincent Chiodo did interfere with plans of the principal stockholder of Bear River Telephone Company which had been made known to him on a confidential basis by sending letters to the Utah Public Utilities Commission and the R.E.A. in Washington, D.C.

(e) Vincent Chiodo knowingly permitted his sons to profit from contracts nominally entered into in the names of other for work of the Bear River Telephone Company through the use of Bear River Telephone Company employees who were being paid by the Bear River Telephone Company for their time.

(f) Vincent Chiodo instructed his subordinate employees to not give the company officers in New London any information unless it was specifically requested and prevented the employees from giving their full cooperation making the administration of the affairs of Bear River Telephone Company more difficult and costly.

3. The most that can be said for the transcript of the conversation between the representative of General Waterworks Corporation and Chiodo preceding the sale of the stock and execution of the employment agreement is that Chiodo was given some leeway from strict standard operating procedures in the local management of the Company. Assuming the conversation was ratified by Bear River Telephone Company merely by the execution of the employment agreement, there is nothing in such conversation or other evidence of negotiations to indicate that it was contemplated Chiodo was authorized to be dishonest, disrespectful, or disloyal. The top

management of Bear River Telephone Company endured nearly three years of this type of conduct. The fact that its patience reached an end only in December 1963, should not impose liability for action it could have taken earlier.

4. If Bear River Telephone Company did not have just cause for the discharge of Vincent Chiodo, then the case should be remanded to the trial court for a determination of the amount which Vincent Chiodo would, through the exercise of reasonable diligence, earn over the remaining period of the contract or reduce the judgment to the damages sustained to the date of trial.

Respectfully submitted,

PETER W. BILLINGS
DALE E. ANDERSON

Fabian & Clendenin

800 Continental Bank Building
Salt Lake City, Utah

Attorneys for Defendant-Appellant