

1992

William J. Searles v. Dayna Communications, INC : Brief of Appellee

Utah Court of Appeals

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Jon E. Waddoups; Attorney for Appellee.

D. Kendall Perkins; Attorney for Appellant.

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IN THE UTAH STATE COURT OF APPEALS

WILLIAM J. SEARLES, :
Plaintiff-Appellant, :
vs. :
DAYNA COMMUNICATIONS, INC. :
a Utah corporation, : Case No. 920285-CA
Defendant-Appellee. : Priority No. (4)

BRIEF OF APPELLEE

Appeal from the Third Judicial District
Court of Salt Lake County, the Honorable
Michael R. Murphy, Presiding.

JON E. WADDOUPS
P.O. Box 43540
50 South Main Street, Suite 1600
Salt Lake City, Utah 84145
Attorney for Defendant/Appellee

D. KENDALL PERKINS
124 South 600 East, Suite 300
Salt Lake City, Utah 84102
Attorney for Plaintiff/Appellant

UTAH COURT OF APPEALS
BRIEF

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Clerk of the Court
Utah Court of Appeals

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50 South Main Street, Suite 1600
Salt Lake City, Utah 84145
Attorney for Defendant/Appellee

D. KENDALL PERKINS
124 South 600 East, Suite 300
Salt Lake City, Utah 84102
Attorney for Plaintiff/Appellant

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JURISDICTION

The order that is the subject of this appeal is a final order and judgment of the Third Judicial District Court of Salt Lake County. Pursuant to Utah R. App. P. 42 the Utah Supreme Court transferred this appeal to the Court of Appeals for disposition. The Utah Court of Appeals has jurisdiction of this matter pursuant to Utah Code Ann. § 78-2a-3(2)(k).

STATEMENT OF THE ISSUES AND STANDARD OF APPELLATE REVIEW

1. Did the trial court err in granting Dayna's motion for a "directed verdict" at the conclusion of Searles's case?

Because this case was tried to the bench and not to a jury, Dayna's motion is more properly identified as a motion for involuntary dismissal under Rule 41(b), Utah R. Civ. P. When a trial court has granted involuntary dismissal under Rule 41(b) made findings and entered judgment thereon, it is the appellate court's duty to review the evidence in the light most favorable to the findings. Lawrence v. Bamberger Railroad Co., 3 Utah 2d 247, 282 P.2d 335 (1955); Child v. Hayward, 16 Utah 2d 351, 400 P.2d 758 (1965); Petty v. Gindy Mfg. Corp., 17 Utah 2d 32, 404 P.2d 30 (1965); Petrie v. General Contracting Co., 17 Utah 2d 408, 413 P.2d 600 (1966). The trial court's findings of fact will be reversed only if clearly erroneous. Conclusions of law are reviewed for correctness. Southern Title Guarantee Co. v. Bethers, 761 P.2d 951 (Utah Ct. App. 1988).

2. Did the trial court err in denying Searles' motion to amend the pleadings to allow parol evidence to vary the terms of Searles' written contract of employment?

A motion to amend the pleadings falls within the sound discretion of the trial court and is reviewed for an abuse of discretion. Kelly v. Utah Power & Light, 746 P.2d 1189 (Utah Ct. App. 1987); Westley v. Farmer's Insurance Exchange, 663 P.2d 93 (Utah 1983).

CONTROLLING PROVISIONS

Rule 15(b), Utah Rules of Civil Procedure

(b) Amendments to conform to the evidence. When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

Rule 41(b), Utah Rules of Civil Procedure

(b) Involuntary dismissal; effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the subdivision in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

Rule 52(a), Utah Rules of Civil Procedure.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact, and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the

witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

STATEMENT OF THE CASE

This is an action for breach of a one-year written employment contract between Plaintiff/Appellant William J. Searles ("Searles") and Defendant/Appellee Dayna Communications, Inc. ("Dayna"). Searles was employed as an area director of sales at Dayna from October 1, 1988 through January 27, 1989 under a written contract that had a one-year term. (R. 335; Tr. Ex. P-2, attached hereto as Appendix A)

The contract contains specific termination provisions including termination "for cause" for Searles' material breach of his obligations under the contract or for failure of Searles "to perform the duties assigned to [him] in an acceptable manner." (Tr. Ex. P-2) The contract contains specific responsibilities of Searles as an area director of sales, including "[t]o fulfill the Quota requirements established pursuant to this Agreement." (Tr. Ex. P-2) The quota

requirements are set out in paragraph 6 of the contract.

Searles' quota for the first quarter of the 1989 fiscal year was \$1,000,000. (Tr. Ex. P-2)

Searles did not meet his sales quota for the first quarter of the 1989 fiscal year. (R. 323) Dayna terminated Searles' employment on January 27, 1989, paid his commissions through the month of January, and paid his salary through February 10, 1989. (R. 362)

Searles filed suit against Dayna alleging two causes of action. The first cause of action sought compensatory damages for breach of contract for termination contrary to the terms of the contract. The second sought punitive damages for breach of an implied covenant of good faith and fair dealing. (R. 2-8)

Searles called two witnesses at trial, Keith Bradford Romney, Jr., executive vice president of Dayna, and Searles. After Searles has presented all evidence but before formally resting his case, Searles moved to amend the pleadings to conform to the evidence and suggested that the express terms of the written employment contract were subject to conditions precedent. The court denied the motion.

After formally resting, Dayna moved for a "directed verdict." The trial court granted Dayna's motion finding that Searles had failed to establish a prima facie case. The court

explained its findings to the parties (R. 395-9) and entered a "Statement of Grounds for Directed Verdict." (R. 191-3)

SUMMARY OF ARGUMENT

I. The Trial Court's Decision to Grant Dayna's Motion for Involuntary Dismissal Was Not Clearly Erroneous.

A. Dayna's Motion for Involuntary Dismissal Was Inadvertently Mislabeled as a Motion for a "Directed Verdict."

At the conclusion of Searles' case, Dayna moved for and was granted a "directed verdict." Because the case was tried to the bench and not to a jury, the motion was actually a motion for involuntary dismissal under Rule 41(b). On appeal, the motion should be reviewed as a motion for involuntary dismissal.

B. Involuntary Dismissal of Searles' Case Was Appropriate Because Searles Failed to Show any Right to Relief.

The trial court granted Dayna's motion because Searles had failed to establish a prima facie case. Even if Searles had presented a prima facie case, the dismissal was appropriate because Searles failed to carry his burden of persuasion showing his right to relief.

C. The Dismissal of Searles' Case Is Well-Supported by Decisions Under the Parallel Federal Rule.

Decisions under the parallel Federal Rules of Civil Procedure demonstrate that the dismissal of Searles' case after his presentation of the evidence was proper.

II. The Trial Court Did Not Abuse its Discretion in Denying Searles' Motion to Amend the Pleadings to Conform to the Evidence.

At the conclusion of his presentation of the evidence but before formally resting his case, Searles moved to amend the pleadings to conform to the evidence.

A. Searles Failed to Present Any Admissible Evidence that the Written Agreement Was Subject to Conditions Precedent.

Throughout his presentation of the evidence, Searles attempted to introduce parol evidence that would contradict or vary the express terms of his written agreement with Dayna. After timely objections by Dayna, Searles agreed to offer the evidence only as foundation for the written agreement and not to vary the terms of the agreement. Thus, no evidence was admitted to vary the terms of the agreement and the denial of the motion to amend was proper.

III. Searles Has Failed to Present Any Evidence That Shows His Entitlement to Relief.

A. The Law of the Case Doctrine Is Inapplicable in the Present Case.

Searles has attempted to introduce a transcript of an oral ruling by another judge in another case as evidence of his entitlement to relief in the present case. The transcript has no precedential value in the present case and should be disregarded for purposes of this appeal.

ARGUMENT

I. The Trial Court's Decision to Grant Dayna's Motion for Involuntary Dismissal Was Not Clearly Erroneous.

A. Dayna's Motion for Involuntary Dismissal Was Inadvertently Mislabeled as a Motion for "Directed Verdict."

At the conclusion of Searles' case, Dayna moved for a "directed verdict" in its favor. The court granted the motion, finding that Searles failed to present a prima facie case. Because the case was tried to the court and not to a jury, the motion was more properly a motion for involuntary dismissal under Rule 41(b). Although mislabeled by the parties and by the trial court, the grant of Dayna's motion was proper and well-supported.

Inadvertent mislabeling of motions under Rule 41(b) has been common.¹ Parties in non-jury cases have often mistakenly moved for a directed verdict, or parties in jury

¹ Under the parallel Federal Rules of Civil Procedure, the provision in federal Rule 41(b) that provided for dismissal for failure to show a right to relief in a non-jury action was deleted in 1991 and has been replaced by new Rule 52(c). 5 James W. Moore & Jeremy C. Wicker, Moore's Federal Practice ¶ 41.13 (2d ed. 1992). Federal Rule 52(c) now authorizes entry of judgment against the defendant as well as the plaintiff, and earlier than the close of the case of the party against whom judgment is rendered. A motion to dismiss under Rule 41 on the ground that a plaintiff's evidence is legally insufficient should now be treated as a motion for judgment on partial findings as provided in Rule 52(c). Committee Note of 1991 to Amended Rule 41(b).

cases have erroneously sought an involuntary dismissal.² The cases have universally held that a mislabeled motion should be treated as though it had been properly made and judged under the appropriate standards. 5A James W. Moore & Jeremy C. Wicker, Moore's Federal Practice ¶ 50.03[1] (2d ed. 1992). See, e.g., International Union, United Auto, Aerospace & Agricultural Implement Workers of America, UAW v. Mack Trucks, 917 F.2d 107 (3d Cir. 1990); Kotzen v. Levine, 678 F.2d 140 (11th Cir. 1982); McCorstin v. United States, 621 F.2d 749 (5th Cir. 1980).

B. Involuntary Dismissal of Searles' Case Was Appropriate Because Searles Failed to Show any Right to Relief.

Rule 41(b) governs involuntary dismissals and in pertinent part provides as follows:

After the plaintiff in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the

² The Advisory Committee Note to the 1991 amendments to Rule 50, Fed. R. Civ. P., indicates that such labeling errors are "merely formal." Professor Moore anticipates that such labeling errors will proliferate under the 1991 revisions to the Rules because of changes in terminology made by the Rules. 5A James W. Moore & Jeremy C. Wicker, Moore's Federal Practice ¶ 50.03[1] (2d ed. 1992).

plaintiff, the court shall make findings as provided in Rule 52(a).

Utah R. Civ. P. 41(b).

The above-cited rule is substantially identical to Rule 41(b) of the Federal Rules of Civil Procedure prior to the 1991 revisions to the Federal Rules. The Utah Supreme Court has recognized that Federal interpretations of Federal Rule 41(b) are applicable to Utah Rule 41(b). See Wilson v. Lambert, 613 P.2d 765, 767 n.2 (Utah 1980); Winegar v. Slim Olson, Inc., 122 Utah 487, 252 P.2d 205, 207 (1953).

The purpose of Rule 41(b) is to permit a defendant to move for judgment in his favor when the trial court, even before hearing the defendant's evidence, determines that the plaintiff has failed to offer persuasive evidence regarding the necessary elements of his case. Feldman v. Pioneer Petroleum, Inc., 813 F.2d 296, 299 (10th Cir.), cert. denied, 484 U.S. 954 (1987). In the present case, the trial court considered all of the evidence offered by Searles and concluded that Searles had failed to prove his case against Dayna.

First, the trial court found no evidence that Dayna violated any provision of the written contract, reasoning as follows:

Count 1, the literal contract claim. There's been a failure to produce any evidence that the defendant violated any terms and conditions of the contract in terminating the [plaintiff]. [Plaintiff], according to the evidence, construed in a

light most favorable for the plaintiff, was terminated for cause. Cause is defined by the contract, not by any moral considerations or anything like that. Cause in this particular contract is established, in part, by failure to meet quotas.

The evidence unequivocally indicates that the [plaintiff] concedes that the quotas were not met. Therefore, the contract provision on cause could be invoked, it was invoked, and the termination was had, and the termination does not constitute a violation of the contract.

(R. 396) Thus, the trial court found no evidence that Dayna's termination of Searles' employment contract violated any contract right.

Second, the trial court considered Searles' claim that Dayna had acted in bad faith and had violated the implied covenant of good faith and fair dealing found in every contract. The court reasoned as follows:

As to the second count, good faith and fair dealing, there is no evidence before the Court that there was any unfair dealing or that there was any bad faith by the defendant. The evidence does not establish any requirement of the defendant. The evidence does not establish any requirement of the defendant to provide product, per se. The covenant of good faith and fair dealing, however, would prohibit the defendant from failing to provide product in bad faith. There is no evidence to suggest that there was bad faith in doing so.

(R. 396-7) The trial court found absolutely no evidence that Dayna had acted other than in good faith and attributed the lack of available product to "inaccurate projections." (R. 397)

While every contract includes an implied covenant of good faith and fair dealing, that implied covenant will not alter the terms of the contract. Where explicit rights are specified in a contract, any different or contrary implied rights are precluded. "[A]n express agreement or covenant relating to a specific contract right, excludes the possibility of an implied covenant of a different or contradictory nature." Ted R. Brown & Assoc., Inc. v. Carnes Corp., 753 P.2d 964, 970 (Utah Ct. App. 1988) (citing Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980)). Thus, Searles could not rely on any implied terms to limit or contradict Dayna's rights as defined in the contract.

The trial court's reasons for granting Dayna's motion were stated in significant detail on the record. (See R. 396-9) The court subsequently entered its formal findings of fact and conclusions of law in its "Statement of Grounds for Directed Verdict." (R. 191-3, attached hereto as Appendix B) When a trial court has made findings and entered judgment thereon, it is the appellate court's duty to review the evidence in the light most favorable to the findings, which must be allowed to stand if reasonable minds could agree with them. Lawrence v. Bamberger Railroad Co., 3 Utah 2d 247, 282 P.2d 335 (1955); Child v. Hayward, 16 Utah 2d 351, 400 P.2d 758 (1965); Petty v. Gindy Mfg. Corp., 17 Utah 2d 32, 404 P.2d 30 (1965); Petrie v. General Contracting Co., 17 Utah 2d 408, 413 P.2d 600 (1966).

The findings of the trial court were well stated and supported by the evidence at trial.

Searles argues that this Court should review the evidence in a light most favorable to him. (Searles' Brief p.15) Searles argues that the standard of review set forth in Davis v. Payne & Day, Inc., 10 Utah 2d 53, 348 P.2d 337 (1960), should be applied because the trial court failed to make finding of fact as provided in Rule 52(a). As discussed above, however, the trial court did enter findings of fact both orally on the record and again in a formal document. The standard of review used by the Davis court, however, is applicable only where no findings have been entered by the trial court.

Involuntary dismissal under Rule 41(b) is appropriate either when the trial judge finds that the claimant has failed to make out a prima facie case or when the trial judge is not persuaded by the evidence presented by the claimant. Lemon v. Coates, 735 P.2d 58 (Utah 1987); Southern Title Guarantee Co. v. Bethers, 761 P.2d 951 (Utah Ct. App. 1988). The trial judge found that Searles had failed to make out a prima facie case. Even if Searles had presented a technically correct prima facie case, however, the trial judge clearly found the evidence unpersuasive.

Involuntary dismissal under Rule 41(b) is not limited to cases where the plaintiff has failed to present a prima facie case but is appropriate whenever the plaintiff fails to carry

his burden of persuasion. The Utah Supreme Court has explained the application of the Rule as follows:

When a court sitting without a jury has heard all of plaintiff's evidence, it is appropriate that the court shall then determine whether or not the plaintiff has convincingly shown a right to relief. It is not reasonable to require a judge, on motion to dismiss under Rule 41(b), to determine merely whether there is a prima facie case, such as in a jury trial should go to the jury, when there is no jury--to determine merely whether there is a prima facie case, sufficient for the consideration of a trier of the facts when he is himself the trier of the facts. To apply the jury trial practice to non-jury proceedings would be to erect a requirement compelling a defendant to put on his case and the court to spend the time and incur the public expense of hearing it if the plaintiff had, according to jury trial concepts, made "a case for the jury," even though the judge had concluded that on the whole of the plaintiff's evidence the plaintiff ought not to prevail. A plaintiff who has had full opportunity to put on his own case and has failed to convince the judge, as trier of the facts, of a right to relief, has no legal right under the due process clause of the Constitution, to hear the defendants' case, or to compel the court to hear it, merely because the plaintiff's case is a prima facie one in the jury trial sense of the term.

Johnson v. Bell, 666 P.2d 308, 311 (Utah 1983) (quoting Winegar v. Slim Olson, Inc., 122 Utah 487, 252 P.2d 205, 207 (1953)) (emphasis in original).

The record is clear that Dayna had grounds to terminate Searles' employment under the express terms of the contract. (Tr. Ex. 2, attached hereto as Appendix A) The

employment contract between the parties governs their relationship. "The beginning point of interpretation of a contract is an examination of the language used therein in accordance with the ordinary and usual meaning of the words." Pugh v. Stockdale & Co., 570 P.2d 1027, 1029 (Utah 1977).

Paragraph 7D of the contract between Dayna and Searles provides that Searles shall have the responsibility "[t]o fulfill the Quota requirements established pursuant to this Agreement." Paragraph 6 sets the quota for Searles for the first quarter of the 1989 fiscal year at \$1,000,000. Searles did not fulfill that quota obligation.

Paragraph 10 of the contract provides in pertinent part;

This Agreement shall terminate prior to the end of its Term . . . (iii) "for cause" which shall include, but not be limited to . . . any material breach of [Searles] obligations, covenants, agreements or warranties hereunder, or a failure by [Searles] to perform the duties assigned to [him] in an acceptable manner.

Searles testified that he did not meet his sales quota for fiscal 1988 or for fiscal 1989. (R. 336-7). Dayna, therefore, had grounds to terminate Searles "for cause" under the explicit terms of the agreement between the parties.

Pursuant to Rule 41(b), the trial court sitting as finder of the facts is entitled at the end of plaintiff's presentation of evidence to weigh that evidence, and if it is

found to be unbelievable or insufficient in some regard, to make a ruling on the merits of the evidence and dismiss the complaint. Johnson v. Bell, 666 P.2d 308, 311 (Utah 1983); Southern Title Guar. Co. v. Bethers, 761 P.2d 951 (Utah Ct. App. 1988). The trial court did, in fact, allow Searles to present his case, weighed that evidence and found the evidence insufficient to support a claim against Dayna.

In ruling on a motion for involuntary dismissal under Rule 41(b), the "court does not make any special inferences in the plaintiff's favor, instead, [the] court must examine and weigh all of the evidence." Henderson, 731 F. Supp. at 1378 (citing Ekanem v. Health & Hosp. Corp., 724 F.2d 563, 568 (7th Cir. 1983), cert. denied, 469 U.S. 821 (1984)). In the present case, however, the trial court considered the evidence in a light most favorable to Searles and still found the evidence insufficient. (R. 396)

C. The Dismissal of Searles' Case Is Well-Supported by Decisions Under the Parallel Federal Rule.

The involuntary dismissal of Searles' case against Dayna is well-supported by similar cases decided in the Federal courts under the parallel Federal Rules of Civil Procedure. In Dance v. Ripley, 776 F.2d 370 (1st Cir. 1985), the plaintiff, a black woman brought an action under Title VII against the head of the agency for which she worked claiming that she had been discriminated against because of her race. The plaintiff was

the only witness called for her case. After her testimony, the plaintiff rested. The defendant then moved for dismissal under Fed. R. Civ. P. 41(b), arguing that plaintiff had failed to establish a prima facie case, or, in the alternative, that plaintiff's case had been rebutted by evidence that defendant's actions were legitimate and nondiscriminatory.

The district court granted the motion to dismiss, issuing very brief findings of fact and conclusions of law under Rule 52(a) that plaintiff had not presented a case that she was rejected by reason of unlawful discrimination.

The plaintiff appealed, contending that the dismissal was based on a finding that she had not presented a prima facie case, and that she had presented a case. The First Circuit Court of Appeals affirmed finding that, although the district court's findings could have been clearer, it did not appear from them that the district court simply rejected plaintiff's prima facie case, but rather that the court had weighed plaintiff's case against uncontested evidence of a nondiscriminatory motive, and had found defendant's rebuttal decisive. The court concluded that, once the plaintiff had rested her case, a Rule 41(b) dismissal was appropriate.

In the present case, the trial court reviewed the evidence presented by Searles in support of his case and found that evidence insufficient. Although the trial court's findings could have been more detailed, the findings clearly support the

court's ruling. The findings are more than adequate to allow this Court to review the basis for the trial court's rulings.

The application of Rule 41(b) is well supported by other authority. See, e.g., Sepulveda v. Pacific Maritime Ass'n, 878 F.2d 1137, 1139 (9th Cir.), cert. denied, 110 S. Ct. 561 (1989) (an action tried to the court may be dismissed pursuant to Rule 41(b) when the district court considers the evidence presented and finds that the plaintiff has failed to establish a prima facie case); Feldman v. Pioneer Petroleum, Inc., 813 F.2d 296 (10th Cir.), cert. denied, 484 U.S. 954 (1987) (involuntary dismissal under Rule 41(b) was proper where plaintiffs had not proven the necessary elements of their case); Allres v. Amoco Production Co., 774 F.2d 409 (10th Cir. 1985) (district court had not abused its discretion in granting motion to dismiss under Rule 41(b)); Henderson v. United Parcel Service, Inc., 731 F. Supp. 1374 (S.D. Ind. 1990) (plaintiff failed to set forth direct evidence of discrimination in a Title VII action or establish a prima facie case that he was discriminated against on the basis of race).

II. The Trial Court Did Not Abuse its Discretion in Denying Searles' Motion to Amend the Pleadings to Conform to the Evidence.

At the conclusion of Searles' presentation of the evidence but before formally resting, Searles made a motion to amend the pleading to conform to the evidence. Searles claimed that the evidence had raised a question as to whether the

contract was a complete integration and suggested that there were conditions precedent to Dayna's ability to terminate Searles for failure to reach his sales quota. The court denied the motion finding the contract to be "clear and unambiguous." (R. 385). A motion to amend the pleadings falls within the sound discretion of the trial court and will not be overturned absent an abuse of discretion. Kelly v. Utah Power & Light, 746 P.2d 1189 (Utah Ct. App. 1987); Westley v. Farmer's Insurance Exchange, 663 P.2d 93 (Utah 1983).

A. Searles Failed to Present Any Admissible Evidence that the Written Agreement Was Subject to Conditions Precedent.

Amendment of the pleadings to conform to evidence presented at trial is governed by Rule 15(b) which in pertinent part provides as follows:

When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time

Utah R. Civ. P. 15(b) (emphasis supplied). Amendment of the pleadings to allege the existence of a condition precedent to enforcement of the contract by Dayna was inappropriate because Dayna did not expressly or impliedly consent to the trial of the issue.

In his own brief, Searles admits that "[t]hroughout the trial and during presentation of Searle's [sic] case, Dayna objected to the Court considering any evidence that might be used to contradict or vary the terms of the written agreement between the parties." (Searles' Brief p.18) Time and time again, Searles attempted to offer evidence that might vary the express terms of the written contract between Searles and Dayna. Counsel for Dayna consistently objected to the introduction of any evidence that would contradict or vary the terms of the agreement. Counsel for Searles insisted that the evidence was not offered to vary the terms of the agreement but only as foundation and as evidence of whether or not Dayna acted in good faith. The trial court admitted the evidence only for this limited purpose. (See, e.g., R. 35, 318-20, 338-9) After numerous objections from counsel for Dayna, and numerous assurances from counsel for Searles that the evidence was not being offered to vary the terms of the written agreement, the following exchange took place:

THE COURT: Let me tell you, I think a more fair way to proceed here is since you represent the plaintiff, the plaintiff has a burden of proof, the plaintiff collects its claims and throws out other alternative claims, that if at any time you're offering a piece of evidence to vary the terms of the agreement, then you need to tell us. How is that? Then we don't have to worry about adding these objections. Is that a fair way to proceed?

MR. PERKINS: Yes. I'll go with that.

MS. LEITH: I think that would be very helpful. Thank you, your Honor.

(R. 339) Searles did not identify or offer any evidence to vary the terms of the agreement. At the conclusion of his presentation of the evidence, Searles attempted to circumvent Dayna's objections and the court's rulings by moving to amend the pleadings to conform to the evidence. Because the evidence was never offered to vary the terms of the agreement, the issue was never tried and amendment under Rule 15(a) was inappropriate.

Searles cites Stanger v. Sentinel Sec. Life Ins. Co., 669 P.2d 1201 (Utah 1983) for the proposition that where a written contract is not the complete contract, parol evidence may be admitted. The Stanger court explained the doctrine of partial integration as follows:

The doctrine of partial integration is that where a written contract is obviously not, or is shown not to be, the complete contract, parol evidence not inconsistent with the writing is admissible to show what the entire contract really was, by supplementing, as distinguished from contradicting, the writing. In such a case parol evidence to prove the part not reduced to writing is admissible, although it is not admissible as to the part reduced to writing.

Stanger v. Sentinel Sec. Life Ins. Co., 669 P.2d 1201 (Utah 1983) (emphasis added). Thus, parol evidence may only be admitted under the partial integration doctrine if the evidence

is "not inconsistent with the writing." The doctrine is clearly inapplicable where, as in the present case, a party attempts to introduce parol evidence to contradict or vary the terms of a written agreement.

Searles had a full and fair opportunity to allege the terms and conditions of his agreement with Dayna. Searles failed to present any evidence for the purpose of contradicting or varying the terms of the written agreement. Finding the written agreement to be an integrated document, the trial court refused to admit contradictory parol evidence or to allow the pleadings to be amended to conform to this inadmissible evidence. The decision of the trial court to deny Searles' motion to amend was not an abuse of the court's discretion.

III. Searles Has Failed to Present Any Evidence That Shows His Entitlement to Relief.

In his "Statement of Issues on Appeal" contained in his brief, Searles appears to argue that the Court of Appeals should make and enter its own findings and award judgment in his favor. (Searles Brief p.7) This argument is completely without support in the body of the brief and is contrary to the appropriate standards of review identified above. Searles has, however, attempted to introduce evidence of a ruling in another case to establish the "law of the case" in the present action.

A. The Law of the Case Doctrine Is Inapplicable in the Present Case.

Searles makes the astounding claim that an unpublished decision in another case with different facts and different parties, tried to a different judge, somehow establishes the "law of the case" in the present case. Searles acknowledges that unpublished orders may not be cited as authority. (Searles' Brief p.25) Searles' argument appears to be nothing more than an attempt to circumvent the Court's prohibition on the citation of unpublished authority.

The law of the case doctrine has no application where two different cases are involved. That doctrine was recently explained by this Court:

The purpose of the law of the case doctrine is "to avoid the delays and difficulties that arise when one judge is presented with an issue identical to one which has already been passed upon by a coordinate judge in the same case." Sittner v. Big Horn Tar Sands & Oil, Inc., 692 P.2d 735, 736 (Utah 1984). Ordinarily, a judge cannot overrule the decision of another judge of the same court. Richardson v. Grand Cent. Corp., 572 P.2d 395, 397 (Utah 1977). However, "the ruling of one judge as to the sufficiency or effect of pleadings, does not prevent another division of the court from considering the same question of law if it is properly involved on a subsequent motion which presents the case in a different light." Id.

DeBry v. Valley Mortgage Co., 835 P.2d 1000, 1003 (Utah Ct. App. 1992) (emphasis added).

Thus, the law of the case doctrine has nothing to do with the present case. Searles' has presented a transcript of an oral ruling by another judge, in another case, on different facts, tried after the Searles case was decided. The unpublished transcript, therefore, has absolutely no precedential value and should be disregarded by this Court.

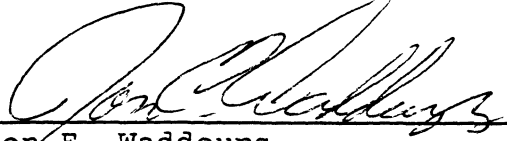
CONCLUSION

Searles has failed to carry his burden of establishing that the trial court erred in any of its rulings or that the case should be remanded for further proceedings. Accordingly, Dayna respectfully urges this Court to AFFIRM the judgment of the trial court.

DATED this 4th day of November, 1992.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY


By


Jon E. Waddoups
Attorneys for Defendant/Appellee
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

CERTIFICATE OF MAILING

I hereby certify that I caused four true and correct copies of the within and foregoing Brief of Appellee to be mailed, postage prepaid, this 4th day of November, 1992, to the following:

D. Kendall Perkins
124 South 600 East, Suite 300
Salt Lake City, Utah 84102

A handwritten signature in cursive script, appearing to read "John C. Callahan", is written over a horizontal line.

20309

F. DISTRICT COURT
SALT LAKE COUNTY

OCT 4 1991

VAN COTT, BAGLEY, CORNWALL & MCCARTHY
Patricia M. Leith, Bar No. 1932
Attorneys for Defendant
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

By Michael R. Murphy
Clerk of Court

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

WILLIAM J. SEARLES,)	
)	STATEMENT OF GROUNDS FOR
)	DIRECTED VERDICT
Plaintiff,)	
)	
vs.)	
)	Civil No. 900902787CN
DAYNA COMMUNICATIONS, INC.,)	
a Utah corporation,)	Honorable Michael R. Murphy
)	
Defendant.)	
_____)	

The Court, having granted the motion of defendant Dayna Communications, Inc. for a directed verdict against the plaintiff William J. Searles at the close of the plaintiff's case, issues this brief written statement of the grounds for its decision as required by Rule 52(a) of the Utah Rules of Civil Procedure.

FIRST CAUSE OF ACTION -- BREACH OF CONTRACT

The Court finds that Searles has failed to produce evidence that Dayna violated the terms of the written contract between the parties. "Cause" for termination is defined by the contract. "Cause" for termination was established here by Searles' failure to meet sales quotas established by the contract. Therefore, Dayna's termination of the contract for

Searles' failure to meet his sales quotas was not a violation of the contract.

SECOND CAUSE OF ACTION -- BREACH OF COVENANT OF GOOD FAITH

The Court finds that there is no evidence of unfair dealing or bad faith on the part of the defendant Dayna Communications, Inc. The evidence does not establish an obligation on the part of Dayna to provide new products. There is evidence to suggest that any failure on the part of Dayna to meet its projections was natural to the industry. Prognostications, perhaps particularly in the microcomputer industry, are not always met.

Searles agreed in the written employment contract to meet the sales quotas. He did not meet them, perhaps through no fault of his own. A different situation would be presented if the quotas were set after the contract was executed.

This case centers on basic notions of contract law. Without construing the intent of the parties, it may be that the provision for termination for failure to meet contract responsibilities, which include meeting quotas, was included because the industry tends to overestimate the market capacity or the ability of research and development to place new products on the market. In any event, it was part of the agreement of the parties.

Under the circumstances, Searles' remedy is not an action for breach of contract or breach of good faith and fair

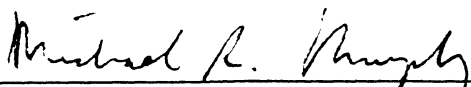
dealing. His remedy is not to enter into a contract to produce at a certain level unless he is satisfied that the products are available and he is satisfied with other conditions he believes are necessary for him to perform.

There is no evidence that this contract was immoral or illegal or otherwise unenforceable.

An employment contract is not an unconditional guarantee of continued employment; the employee is entitled to continued employment under the contract only if he or she meets the responsibilities agreed on in the contract.

DATED this 4th day of ~~September~~ ^{October}, 1991.

BY THE COURT:


Honorable Michael R. Murphy
Judge, Third Judicial District

Approved as to form:

D. Kendall Perkins
Attorney for Plaintiff

FIL. 10091
Third Judicial District

OCT 4 1991

VAN COTT, BAGLEY, CORNWALL & MCCARTHY
Patricia M. Leith, Bar No. 1932
Attorneys for Defendant
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

W. J. Seales
By *W. J. Seales*
Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

WILLIAM J. SEARLES,

Plaintiff,

vs.

DAYNA COMMUNICATIONS, INC.,
a Utah corporation,

Defendant.

JUDGMENT

Civil No. 900902787CN

Honorable Michael R. Murphy

The Court, having granted defendant's motion for a
directed verdict at the end of plaintiff's case,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the
defendant Dayna Communications, Inc. is awarded judgment against
the plaintiff for no cause of action.

MADE AND ENTERED this 4th day of October, 1991.

BY THE COURT:

Michael R. Murphy
Honorable Michael R. Murphy
Judge, Third Judicial District

Approved as to form:

D. Kendall Perkins
Attorney for Plaintiff

AREA DIRECTOR AGREEMENT

THIS AREA DIRECTOR AGREEMENT (the "Agreement") made and entered into on the date set out below, by and between WILLIAM SEARLES ("AD") and DAYNA COMMUNICATIONS, INC. ("Dayna"), each of whom acknowledges and agrees to abide by these covenants.

RECITALS

1- Dayna desires to secure the services of AD to promote sales of Dayna Products, pursuant to the terms and conditions herein contained.

2- AD desires to enter into this Agreement in order to receive compensation for efforts to be expended by AD pursuant to the terms and conditions of this Agreement.

NOW THEREFORE, in consideration of the mutual covenants and conditions herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, do hereby agree as follows:

1- Term.

The term of this Agreement shall begin on October 1, 1988 and shall continue to September 30, 1989, subject to prior termination as hereinafter provided. It is the intention of the parties that this Agreement shall be reviewed, and a new and similar Agreement shall be entered into to cover Dayna's fiscal year 1990, based on performance under this Agreement.

2- Salary.

The salary to be paid to AD by Dayna shall be Forty-four Thousand and no/100 Dollars (\$44,000) computed on an annual basis, payable on a biweekly basis, pursuant to Dayna's usual and customary payroll practices, and subject to termination as hereinafter provided.

3- Commission and Incentive Bonus.

The Override to be paid to AD for net dollars revenue to Dayna from the assigned Territory (see Paragraph 5, Territory) in the first six months of the Term of the Agreement shall be one percent (1%) of all net dollars to Dayna as a result of sales to all Buyers other than Distributors. Revenue dollars from sales to Distributors in the first six months of the Term of the Agreement shall earn Override of six-tenths of one percent (0.6%). The Override to be paid to AD in the second six months of the Term of the Agreement for all Buyers other than Distributors shall be eight-tenths of one percent (0.8%). Revenue dollars from sales to Distributors shall continue to earn Override of six-tenths of one percent (0.6%). Commission and Override on all Major National Store Chains shall be paid at the rate of seventy-five percent (75%) to the Area into which the goods are shipped, twenty-five percent (25%) to the Area handling the Corporate offices.

A- Neither Commission nor Override shall be paid on service revenues, spare parts or accessories ordered from Customer Support, or on component parts of any Dayna product that may be ordered as a

result of negotiations conducted by persons employed by Dayna other than the AD or Agents under his control.

- B- The Commission and Override shall be paid on net dollars received by Dayna. In the event substantial or extraordinary discounts are offered in order to obtain a specific contract, the Commission or Override rate, if any, may be negotiated by Dayna's Vice President of Sales, or other authorized Dayna officer.
- D- Incentive Commission shall be paid for performance in excess of Quota (see Paragraph 6, Quota). In the first six months of the Term of the Agreement, Quota shall have been met when the Quota for First Six Months has been shipped and invoiced by the Company. Incentive Commissions shall be paid on all dollars in excess of Quota that have been shipped and invoiced during that six month period. In the second six months of the Term of the Agreement, Quota shall have been met when the Annual Quota has been shipped and invoiced by the Company, and Incentive Commission shall be paid on all dollars in excess of that Quota that have been shipped and invoiced during the Fiscal Year. Incentive Commission shall consist of two times the Commission Rate.
- F- In order to earn the Override the AD or agents under his control must obtain a purchase order against which product may be properly shipped and invoiced, and the customer must honor the invoice with payment. **UNTIL THE PAYMENT IS COMPLETE, THE COMMISSION HAS NOT BEEN EARNED.** Notwithstanding this fact, Dayna may elect to pay the Commission in anticipation of payment being completed. In that event, should payment not be completed, the AD may be charged back an amount equal to the Commission paid.
- G- The Commission shall be paid on the last paycheck of each month, for the previous monthly period. (i.e., April's Commission paid on last paycheck of May).

4- Expenses.

Dayna shall reimburse AD for the reasonable amount of hotel, traveling, entertainment and other expenses wholly, exclusively, and necessarily incurred by AD in the discharge of AD's duties hereunder, in accordance with the normal practice for such reimbursements by Dayna to its other employees. AD shall submit to Dayna substantiation of the expenses incurred, as reflected in a credit card statement or other documentation, together with a record of (1) the amount of the expenditure, (2) the time, place and nature of the expenditure, (3) the business reason for the expenditure and expected benefit, (4) the names, positions and other information concerning individuals entertained sufficient to establish their business relationship to Dayna, and (5) any and all other information specifically required by Dayna, from time to time. The foregoing information shall be submitted in such form as Dayna may, from time to time, determine. Reimbursement of expenses shall be contingent upon the approval of Dayna's Vice President of Sales, or other authorized Dayna officer.

5- Territory.

The AD shall have as his Area of Management the States West of the Mississippi River, and the States of Alaska and Hawaii, except for the States of Minnesota, Iowa, and Missouri.

The foregoing Territory assignment shall be subject to change at Dayna's sole discretion.

6- Quota.

The Quota assigned to AD shall be as set forth below for the Term of this Agreement:

Quarter 1, Fiscal 1989	\$1,000,000	
Quarter 2, Fiscal 1989	<u>\$1,400,000</u>	
First Six Months Quota		\$2,400,000
Quarter 3, Fiscal 1989	\$2,600,000	
Quarter 4, Fiscal 1989	<u>\$3,800,000</u>	
Annual Quota Fiscal 1989		\$8,800,000

The Quota is to be derived from the assigned Area.

7- Responsibilities of Area Director.

The AD shall have the following responsibilities:

A- To obtain, or direct agents under his control to obtain, orders for Dayna Products which can be shipped and invoiced with complete expectation that the customer will honor the invoice with payment at prices specified in Dayna's published pricing schedules, or pursuant to specific contracts with such customer.

B- To represent Dayna, its products, personnel and business in a manner which Dayna shall prescribe as appropriate for its sales personnel.

C- To refrain from making any misleading, inaccurate or other improper statement, or from giving such indication to any third party relative to Dayna's business, products or relationships.

D- To fulfill the Quota requirements established pursuant to this Agreement.

8- Time Devoted by Area Director.

AD agrees to devote his or her full business time, attention, efforts and abilities exclusively to the business of Dayna and to use his or her utmost endeavors to promote the interests of Dayna.

9- Chargebacks.

In the event of payment of the Commission in advance of receipt by Dayna of all monies from the customers on orders covered by such payment, or in the event a

draw against Commission is outstanding, a "chargeback" in the amount of the Commission shall be paid to Dayna by AD should the employment of AD be terminated.

10- Termination.

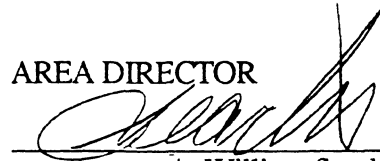
This Agreement shall terminate automatically at the end of its Term. This Agreement shall terminate prior to the end of its Term (i) at the death of AD, or (ii) at Dayna's option and upon the giving of ninety (90) days' written notice of termination to AD, or (iii) "for cause" which shall include, but not be limited to, conviction of a felony, dishonesty, breach of confidentiality, any material breach of AD's obligations, covenants, agreements or warranties hereunder, or a failure by AD to perform the duties assigned to AD in an acceptable manner. If employment is terminated pursuant to this paragraph, all compensation shall cease and no additional amounts will be payable to AD by Dayna, or to AD's heirs, executors, administrators or legal representatives, other than that portion of any Commission which was earned by AD, pursuant to the terms hereof, prior to such termination, net of any chargeback.

11- Entire Agreement.

This Agreement contains the entire agreement between the parties pertaining to the subject matter hereof. This Agreement shall be subject to, and construed in accordance with, the laws of the State of Utah. This Agreement shall supercede any and all prior agreements between the parties.

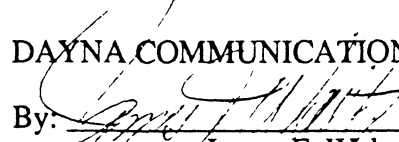
IN WITNESS WHEREOF, the parties hereto have set their hands this ____ day of _____, 1988.

AREA DIRECTOR



William Searles

DAYNA COMMUNICATIONS, INC.

By: 

James F. Waltz

Its: VICE PRESIDENT, SALES

W. SEARLES

EXHIBIT "B"

THIS EXHIBIT DESCRIBES CERTAIN ACCOUNTS assigned the District Sales Manager or the Area Sales Manager. These accounts are the Territory of the designated Field Sales Representative. The support of these accounts does remain the duty of the Dealer Support Sales Rep responsible for the geographical territory.

CERTAIN SPECIFIC ACCOUNTS ARE EXCEPTED from the Territories of all Field Sales Representatives. These accounts are:

Apple Computer	Cupertino, CA and all ordering offices, world-wide.
PRC (FAA contract only)	Washington, DC area
Apple Third Party Developers	Domestic U.S.

TERRITORIAL ACCOUNTS

EDS Technical Products	Richardson, TX
Resource Dynamics	Dallas, TX
Alphagraphics	Tucson, AZ
Big Three Industries	Houston, TX
Diamond Shamrock Corporation	Dallas, TX
E-Systems, Inc.	Dallas, TX
Fleming Companies	Oklahoma City, OK
Lomas and Nettleton Financial Corp	Dallas, TX
NASA Space Center	Houston,
TXSchlumberger, Ltd.	Dallas, TX
Shell Oil Company	Houston, TX
Alpha-Beta	Scaggs
University of Utah	Salt Lake City, UT
	Salt Lake City, UT

Continued on next page
W. Searles

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

WILLIAM J. SEARLES,
Plaintiff,
vs.
DAYNA COMMUNICATIONS, INC.,
a Utah corporation,
Defendant.

Case No. 900902787CN

Murphy

TRANSCRIPT OF PROCEEDINGS

August 29, 1991

BEFORE THE HONORABLE MICHAEL R. MURPHY
District Court Judge

A P P E A R A N C E S:

For the Plaintiff: D. Kendall Perkins
Attorney at Law
124 South 600 East
Salt Lake City, Utah 84102

For the Defendant: Patricia M. Leith
VAN COTT, BAGLEY, CORNWALL &
McCARTHY
Attorneys at Law
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145

FILED DISTRICT COURT
Third Judicial District

JUN 1 1992

GAYLE B. CAMPBELL
Clerk of the Court
SALT LAKE CITY

By _____ Deputy Clerk

1 MS. LEITH: I misspoke when I said I did not
2 have an objection to Exhibit 3. I do have the same
3 objection. That is that it should not be admitted for
4 purposes of varying the terms of Exhibit 2.

5 THE COURT: Do you intend to use that for
6 purposes of varying Exhibit 2?

7 MR. PERKINS: Same purpose as we have stated
8 with regard to Exhibit 1, your Honor.

9 THE COURT: Which includes the proposition
10 neither 1 nor 3 are intended for the purpose of varying
11 the terms of Exhibit 2?

12 MR. PERKINS: That's correct.

13 THE COURT: All right. 1 and 3 are then
14 received for the limited purposes indicated, and the
15 objection to any further use is sustained.

16 Q. (By Mr. Perkins) Now, with regard to the other
17 products, Mr. Romney, we talked about Dayna Net and its
18 projections, Dayna Talk had a couple of varieties; is
19 that correct, there was a PC version and Mac version?

20 A. Yes.

21 Q. And tests projected that these products, too,
22 would come on line and be able to be sold and develop
23 additional revenues for the company?

24 A. Correct.

25 Q. They too were delayed, weren't they?

1 which we were operating sales of the company proposed for
2 fiscal 1989.

3 Q. And that included how the company was going to
4 achieve the quota goals that had been or were being set?

5 A. Yes. A number of the pages here refer to the
6 sales quotas by area, by sales person, and so on.

7 Q. And do you recall if Mr. Searles participated
8 in the preparation of this plan?

9 A. I don't know what involvement Bill had in the
10 preparation of the plan. It was prepared and modified on
11 various occasions by Jim Walls. I believe he would claim
12 to be the author of the document from beginning to end.

13 Q. Do you recall if this plan was adopted by the
14 company to set forth the sales plan it would pursue?

15 A. Well, in effect, it was adopted. I'm not sure
16 we ever had any kind of a formal adoption by the company
17 of the sales plan, okay? We agreed that we were going to
18 try to make this plan happen and took steps in that
19 direction.

20 Q. So it wouldn't require the board to adopt it,
21 but management would decide this looks like a reasonable
22 thing to do, so let's do it?

23 A. Correct.

24 MR. PERKINS: I move for the admission of 7-P.

25 MS. LEITH: I would object to the admission for

1 any purpose other than to go to the issue of good faith.

2 THE COURT: Do you have any other purposes for
3 offering it?

4 MR. PERKINS: Well, we have been talking very
5 narrowly about the issue of good faith, your Honor. I
6 think there's also -- there are also issues that have
7 related to good faith but that are involving implied
8 conditions to the employment contract. I believe that it
9 can be shown that the company, by implication, said that
10 "We're going to provide additional personnel, promotional
11 money, money to hire new people, and we're going to have
12 product ready to be sold and delivered to enable the
13 sales force to be able to meet the quota goals."

14 THE COURT: But does that relate to anything
15 that's an attempt to vary the express terms of the
16 contract?

17 MR. PERKINS: I don't think it varies the term.
18 It, again, goes to good faith by implying these things
19 would be done to enable the sales force to meet quota
20 and, if not done, it goes to whether or not the
21 termination clause of the employment agreement was
22 exercised in good faith or not.

23 THE COURT: All right. I'll take that to mean
24 it's not being offered to vary the term of the contract,
25 and with that limitation in mind -- what is it, 7?

1 MR. PERKINS: Yes.

2 THE COURT: 7 is received.

3 MS. LEITH: Thank you, your Honor.

4 Q. (By Mr. Perkins) I'll direct your attention to
5 the third page of that document, which is an
6 organizational chart dated 9-30-88 in the left-hand upper
7 corner, and on the right side under Jim Walls, it shows
8 Western Area Sales Director, W. Searles, and it has four
9 locations, Los Angeles, San Jose, Dallas and Seattle.
10 Everywhere but the San Jose entry it shows sales open
11 fiscal year '89.

12 Now, does that entry mean that it's proposed to
13 add a sales employee under Mr. Searles in that location?

14 A. Yes.

15 Q. And so at that time there was only P. Sun.
16 That was someone who was an existing employee?

17 A. Yes, Pam Sun.

18 Q. Now, were these other three locations -- or did
19 these other three locations ever receive a sales
20 representative as projected?

21 A. Los Angeles did. I don't believe we ever hired
22 anybody in Dallas or Seattle. May I note that Seattle
23 doesn't call for a sales person. It calls for a support
24 person.

25 Q. What's the difference between sales and

1 A. Yes.

2 Q. The quota is a percentage mark that if the
3 sales director meets that quota, he then gets commission
4 of twice the usual rate?

5 A. I think the effect of it -- and, by the way, it
6 was never achieved by Mr. Searles, nor anyone else that I
7 can remember -- the effect was to set a quota for
8 performance and if there were stellar performances beyond
9 that quota, for those sales that were beyond the quota
10 amounts, the commission rate would double. But it
11 wouldn't affect any commission rate for sales up to
12 quota.

13 Q. That's true. But nobody made quota, did they?

14 A. I don't recall and I haven't analyzed that.
15 There might have been someone who made quota. Quotas
16 were different for various types of sales people.

17 Q. That's true. But no area director made their
18 quota, did they?

19 A. Of the two, no. I don't believe either
20 Mr. Zachery or Mr. Searles made quota.

21 Q. Did Mr. Walls have a quota requirement in his
22 employment agreement?

23 A. He had no employment agreement.

24 Q. He was working month to month. I don't know if
25 you would call it month to month. It's working day to

1 Q. And what were your goals in obtaining a written
2 agreement?

3 A. To not have any misunderstandings with respect
4 to the employment conditions.

5 Q. To have a set term of employment?

6 A. This agreement was from August 12 until the end
7 of September, which was fiscal year '88 for Dayna.

8 Q. I see.

9 A. At that time I signed another agreement which
10 was for one year beginning, basically, October 1st of
11 '88.

12 Q. But when you first came on as an employee of
13 Dayna Communications, you didn't anticipate merely
14 working for a six-week period, did you?

15 A. Absolutely not.

16 Q. Was there a discussion with Mr. Walls that he
17 would have an employment agreement for a term longer than
18 the expiration of their current fiscal year?

19 A. Under this agreement or --

20 Q. No.

21 A. -- the next agreement?

22 Q. This agreement only lasted the six weeks?

23 A. Six weeks; that's correct.

24 Q. Was there a discussion with Mr. Walls that
25 after this agreement ended there would be another written

1 agreement with a different term?

2 A. Absolutely.

3 Q. Okay. If I can show you Exhibit 2 -- well,
4 let's go back to Exhibit 1. The second page, paragraph 6
5 is entitled Quota. On the third page it states that a
6 quota signed to the A.D., which, I assume, is the area
7 director, for the remainder of fiscal 1988 until
8 September 30 of 1988 or \$550,000 in sales. Was that
9 achieved?

10 A. To the best of my knowledge, it was not.

11 Q. Was there any comment or complaint about your
12 not having achieved that quota?

3 A. No.

4 Q. Do you know what quota based on that was
5 included in Exhibit 1-P?

6 A. Quotas had to be assigned. Jim had a sales
7 quota, per se, and that total sales quota had to be
8 assigned to the various area directors, the international
9 sales people, the telemarketing sales director,
0 Bob Barrett. This was any portion of that total quota.

1 Q. Did anybody meet their quota for the end of
2 fiscal '88?

3 A. To the best of my knowledge, no. The possible
4 exception may have been John at international.

5 Q. Domestically?

1 A. No.

2 Q. Directing your attention to what has been
3 marked Exhibit 2-P, is this the next agreement you signed
4 for fiscal year '89?

5 A. Yes, it was.

6 Q. Directing your attention to the third page
7 again, paragraph 6, the quota provision, there are four
8 quota requirements, the first six months' quota totals
9 two million four. First quarter, a million, second
10 quarter is a million four. Were those numbers achieved?

11 A. No, they were not.

12 Q. Were there any reasons why those quotas weren't
13 achieved?

14 A. We all felt that the first quarter fiscal quota
15 was going to be a Hail Mary, so to speak, pass until we
16 started being able to ship new product, primarily Dayna
17 Mail, Dayna Talk and Dayna Net.

18 Q. Okay.

19 A. So we had to rely on the old product, which was
20 Dayna File, for the first quarter.

21 Q. Was that the only product you had to sell in
22 the first quarter of '89?

23 A. That was the only product we had to sell that
24 could be delivered. It was not the only product that we
25 had to sell.

1 Q. Okay. Now, approximately how many units would
2 have to have been moved to reach the million dollar mark
3 in the first quarter?

4 A. It would be an average of 2,000 units divided
5 by an average of \$550 per unit. My calculations -- I
6 don't have a calculator in front of me.

7 Q. That was for just your part of the production;
8 is that correct?

9 A. Yes.

10 Q. Was there an understanding as to what
11 percentage of the total company production you were going
12 to be responsible for?

13 MS. LEITH: Your Honor, I'll object to the
14 extent that it's parol evidence, outside the term of the
15 contract.

16 MR. PERKINS: I think it's foundational and
17 will ultimately go toward indicating whether or not good
18 faith or good faith exercise of contracts or terms was
19 affected by the defendant.

20 THE COURT: And therefore not varying the term
21 of the agreement?

22 MR. PERKINS: Right.

23 MS. LEITH: His question was what was the
24 understanding of that percentage. If that does not go
25 toward varying to or adding to the term of the contract,

1 then I have no objection if the evidence is admitted.

2 THE COURT: Let me tell you, I think a more
3 fair way to proceed here is since you represent the
4 plaintiff, the plaintiff has a burden of proof, the
5 plaintiff collects its claims and throws out other
6 alternative claims, that if at any time you're offering a
7 piece of evidence to vary the terms of the agreement,
8 then you need to tell us. How is that? Then we don't
9 have to worry about adding these objections. Is that a
10 fair way to proceed?

11 MR. PERKINS: Yes. I'll go with that.

12 MS. LEITH: I think that would be very helpful.
13 Thank you, your Honor.

14 Q. (By Mr. Perkins) So do you recall if there was
15 discussions as to how much of the company's total
16 production you were going to be responsible for?

17 A. Well, we had a total annual quota of \$8.8
18 million, as I recall. The sales objective for the
19 company fiscal '89 was around \$25 million. Just a little
20 less than one-third of it.

21 Q. Okay. Now, that would be consistent with three
22 basic areas, or were there more than three basic areas:
23 western United States, eastern and international?

24 A. That's correct. There was a fourth area, which
25 was the telemarketing, but to clarify one thing that Brad

1 termination, and I thought that was going to did they
2 make an inquiry of the employer. Excuse me.

3 MR. PERKINS: The question was: Did the
4 unemployment intake worker inquire as to why he was
5 terminated?

6 THE COURT: Inquire of him?

7 MR. PERKINS: Yes.

8 THE COURT: What was your answer?

9 THE WITNESS: I was laid off.

10 THE COURT: All right. The answer will stand.
11 The objection is overruled.

12 MS. LEITH: Thank you.

13 Q. (By Mr. Perkins) Did your former employer ever
14 contest that information?

15 A. Not to my knowledge, no.

16 Q. You didn't have a hearing before the
17 unemployment department as to whether or not you had been
18 terminated for cause and therefore not entitled to the
19 same amount of unemployment benefits as if you had been
20 laid off?

21 A. No, that's correct.

22 Q. Showing you what's been marked Exhibit 6, have
23 you seen that document before?

24 A. I have seen the document up through the January
25 daily report.

1 becoming effective."

2 And I think that the evidence clearly shows the
3 corporation, Dayna Communications, had an obligation to
4 provide additional funding, to provide additional head
5 count to sell the product, and to in fact supply product
6 to be sold on a timely basis to enable the sales crew to
7 meet the quotas as set forth in the agreements.

8 If they didn't do that, then they breached
9 their obligation which was implied, and I think it would
10 be extremely unfair and unjust to hold the sales force to
11 meeting quotas that were predicated on those
12 considerations.

13 THE COURT: All right. Motion is denied for
14 the following reasons: The contract in question is clear
15 and unambiguous. If it contains an integration clause
16 and those are the preliminary determinations of the
17 Court, the evidence that's been offered, which is the
18 premise of the motion to amend to conform with the
19 evidence is such that these items that are called
20 conditions do not rise to the level of the conditions.

21 They were admitted specifically for the purpose
22 of -- well, for any purpose over and above amending the
23 contract, and even if admitted for the purpose of
24 amending the contract, they do not rise to the level of
25 conditions precedent.

1 Honor.

2 I'd like to point out that the contract at
3 issue, Exhibit 2, does not have any kind of notice
4 requirement or any kind of procedure for termination. It
5 just states grounds, and those grounds are called "for
6 cause."

7 And I would also like to point out that for
8 cause does not necessarily impose a guilt requirement or
9 fault, as Mr. Perkins has suggested. The notice that has
10 been introduced that Mr. Walls gave to Mr. Searles about
11 his termination doesn't say anything about fault or guilt
12 or cause. I think, contrary to the assertion that Dayna
13 was acting in bad faith, Dayna was acting in good faith.
14 Dayna cooperated with these people, Dayna did what it
15 could to make the sales good, Dayna had an interest in
16 seeing that Mr. Searles did well, because that was in
17 Dayna's interest too. And Dayna was trying to be nice at
18 the time of the termination, giving Mr. Searles more
19 money than he was actually entitled to under the
20 contract. And I think that negates any doubt that there
21 might be about good faith execution of the contract.

22 THE COURT: In consideration of the motion, the
23 Court construes the evidence in a light most favorable to
24 the plaintiff, Mr. Searles. And as an additional point,
25 I should indicate that in one of my previous rulings on

1 either a motion for a protective order by the defendant
2 or motion to compel by the plaintiff, I ordered that
3 information concerning other employees be produced so
4 that Mr. Searles would have the opportunity to put on
5 evidence that his termination was pretextual. No such
6 evidence came before me today.

7 With those prefatory matters in mind, I'm going
8 to grant the motion for the following reasons:

9 Count 1, the literal contract claim. There's
10 been a failure to produce any evidence that the defendant
11 violated any terms and conditions of the contract in
12 terminating the defendant. Defendant, according to the
13 evidence, construed in a light most favorable for the
14 plaintiff, was terminated for cause. Cause is defined by
15 the contract, not by any moral considerations or anything
16 like that. Cause in this particular contract is
17 established, in part, by failure to meet quotas.

18 The evidence unequivocally indicates that the
19 defendant concedes that the quotas were not met.
20 Therefore, the contract provision on cause could be
21 invoked, it was invoked, and the termination was had, and
22 the termination does not constitute a violation of the
23 contract.

24 As to the second count, good faith and fair
25 dealing, there is no evidence before the Court that there

1 was any unfair dealing or that there was any bad faith by
2 the defendant. The evidence does not establish any
3 requirement of the defendant to provide product, per se.
4 The covenant of good faith and fair dealing, however,
5 would prohibit the defendant from failing to provide
6 product in bad faith. There is no evidence to suggest
7 that there was bad faith in doing so.

8 There is, however, evidence that would
9 suggest -- and not to credit it or discredit it, all I'm
10 saying is there's been a failure of evidence. But there
11 is evidence to suggest that the failure of providing
12 product was somewhat natural to this industry in the
13 sense that that occurs from time to time and that hope
14 springs eternal, evidently, in this industry, and
15 frequently prognostications are not met.

16 The conduct generating the failure to provide
17 product and necessarily the inability of the plaintiff,
18 through no fault of his, to meet the quotas was due to
19 inaccurate projections.

20 Now, it would be one thing if these quotas were
21 set after the signing of the contract or that something
22 occurred thereafter by the defendant and affirmatively
23 and in bad faith or unfair interfering with defendant to
24 meet his quotas. There is no evidence of that in this
25 case.

1 What this case is really about is what are
2 contracts about? Without construing the motivation
3 behind the for cause provision premised on quotas in the
4 contract, it could well have been that that provision is
5 in there because the industry tends to overestimate the
6 market capacity or the ability of research and
7 development to place the product on the market at or
8 before the time anticipated.

9 The real difficulty in this case is not a
10 breach of contract or breach of good faith and fair
11 dealing. The remedy is to not enter into contracts that
12 will allow the defendant to terminate for failure to meet
13 quotas when the product is not available. Such provision
14 is not in this contract and, thus, that remedy is
15 unavailable. The contract itself, there's been no
16 evidence that it's a contract of adhesion, that it's
17 immoral, unlawful or anything else. And, therefore, the
18 contract is not a guarantee of employment. It's a
19 guarantee of employment only if all conditions from the
20 employee's side are met, where they were not met in this
21 case, through no fault of the plaintiff, but that's not a
22 basis upon which to find a breach of contract or breach
23 of implied covenant of good faith and fair dealing.

24 For the reason stated, the motion under Rule
25 50, is granted and there is still pending before me a

1 motion to dismiss, which is, therefore, mooted by my
2 ruling now. A motion under Rule 50 is not one which
3 requires findings of fact and conclusions of law,
4 because, in effect, my obligation as a finder of fact is
5 never invoked until the prima facie case is established.

6 I have determined that no prima facie case has
7 been established and, thus, not a finding for findings of
8 fact and conclusions of law. There is, however, an
9 obligation that the ruling of the Court, when there were
10 multiple grounds for it, must be set forth in writing. I
11 believe that's stated in Rule 52. So, Ms. Leith, you
12 need to prepare an order or judgment consistent with the
13 Court's ruling here. And I believe under the rule I was
14 referring to -- that's not right. If there's a
15 requirement to have more than just a judgment for the
16 defendant, then you'll find it in Rule 52, and you should
17 adhere to that if there's such an obligation, and submit
18 to me the judgment in accordance with Rule 504.

19 MS. LEITH: Your Honor, are you looking for the
20 provision that you referred to?

21 THE COURT: .No. I'm trying to make up my mind
22 on taxable costs. Well, I'm not going to say anything
23 about costs here. I'll tell you why. If I say nothing
24 then it's still open, even though the presumption is that
25 the taxable costs are awarded to the prevailing party.