

1993

# Kelly Sorenson v. Kennecott-Utah Copper Corporation : Brief of Appellee

Utah Court of Appeals

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Reid C. Davis; Stephen W. Cook; Cook & Davis.

Barbara Polich; Kenneth R. Wallentine; Parsons Behle & Latimer.

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UTAH COURT OF APPEALS  
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DOCKET NO. 930126

IN THE UTAH COURT OF APPEALS

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KELLY SORENSON,	)	No. 930126
	)	
Plaintiff/Appellant,	)	Priority No. 15
	)	
vs.	)	Appeal from Order and
	)	Judgment of Dismissal of
KENNECOTT-UTAH COPPER	)	The Third Judicial
CORPORATION, a Delaware	)	District Court, Salt Lake
corporation,	)	County, State of Utah
	)	
Defendant/Appellee.	)	Honorable Scott Daniels
	)	

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BRIEF OF APPELLEE

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REID C. DAVIS, USB #4475  
STEPHEN W. COOK, USB #0720  
COOK & DAVIS  
Attorneys for Appellant  
323 South 600 East  
Suite 200  
Salt Lake City, UT 84102  
Telephone: (801) 595-8600

BARBARA POLICH, USB #2620  
KENNETH R. WALLENTINE, USB #5817  
PARSONS BEHLE & LATIMER  
Attorneys for Appellee  
201 South Main Street  
Suite 1800  
P.O. Box 11898  
Salt Lake City, UT 84147-0898  
Telephone: (801) 521-1234

**FILED**

Utah Court of Appeals

MAR 4 1993

  
Mary T. Noonan  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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BRIEF OF APPELLEE

---

REID C. DAVIS, USB #4475  
STEPHEN W. COOK, USB #0720  
COOK & DAVIS  
Attorneys for Appellant  
323 South 600 East  
Suite 200  
Salt Lake City, UT 84102  
Telephone: (801) 595-8600

BARBARA POLICH, USB #2620  
KENNETH R. WALLENTINE, USB #5817  
PARSONS BEHLE & LATIMER  
Attorneys for Appellee  
201 South Main Street  
Suite 1800  
P.O. Box 11898  
Salt Lake City, UT 84147-0898  
Telephone: (801) 521-1234

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## JURISDICTION OF THE COURT OF APPEALS

This appeal is properly within the jurisdiction of the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2a-3 (2)(j).

## STATEMENT OF THE ISSUES

- I. DID THE TRIAL COURT ERR IN FINDING THAT PLAINTIFF FAILED TO REBUT THE EMPLOYMENT AT WILL PRESUMPTION?
- II. DID THE TRIAL COURT PROPERLY CONSIDERED THE TESTIMONY OF THE WITNESSES?
- III. CAN THE COURT OF APPEALS ALTERNATIVELY AFFIRM THE DECISION OF THE TRIAL COURT ON THE GROUND THAT DEFENDANT MET THE TERMS OF ANY IMPLIED-IN-FACT CONTRACT WITH PLAINTIFF?

## STANDARD OF REVIEW

The Court of Appeals reviews the trial court's findings of fact underlying an order to dismiss under Utah Rule of Civil Procedure 41(b) for clear error, according "great weight to the findings made and the inferences drawn by the trial judge." Southern Title Guaranty Co. v. Bethers, 761 P.2d 951, 954, (Utah App. 1988); accord Handy v. Union Pacific R. Co., 841 P.2d 1210, 1215 (Utah App. 1992). The trial court's findings are clearly erroneous only if they are against the great weight of the evidence, or if the appellate court reaches a definite and firm conviction that the trial court has erred. Southern Title Guaranty Co., 761 P.2d at 954. The Court reviews the trial court's conclusions of law for correctness. Id. The existence of an implied-in-fact contract of employment and adherence thereto is a



factual question. Sanderson v. First Security Leasing Co., 201 Utah Adv. Rep. 18, 19 (Utah 1992).

Rule 41(b) commits the weighing of the evidence to the discretion of the trial judge. The Court of Appeals reviews credibility and weight determinations for an abuse of that discretion. It is within the exclusive province of the trial court to decide "whether a witness is believable and [to] determin[e] what weight to assign a witness's testimony." Lemon v. Coates, 735 P.2d 58, 60 (Utah 1987); see also Wessel v. Erickson Landscaping Co., 711 P.2d 250, 252 (Utah 1985) (purpose of Rule 41 is to permit the judge to weigh the evidence and draw inferences therefrom).

#### **STATEMENT OF THE CASE**

This is an appeal of the dismissal of plaintiff's case pursuant to Rule 41(b) of the Utah Rules of Civil Procedure. Plaintiff Kelly Sorenson brought suit in the Third District Court alleging wrongful termination in violation of an implied contract of employment. Sorenson contends that he was entitled to, and subsequently denied, notice of his deficient job performance, and application of progressive discipline prior to his termination. The trial court found that Sorenson was an at-will employee and could be terminated for any reason. Notwithstanding, Sorenson received substantial notice of his deficient performance and was granted significant opportunities to improve his performance and retain his employment.

Sorenson filed his complaint in the Third District Court on September 18, 1989. After a year of discovery, defendant Kennecott brought a Motion for Summary Judgment. The trial court denied Kennecott's Motion for Summary Judgment and granted Sorenson's motion to amend his Complaint. A trial was conducted before Judge Scott Daniels on January 27 through January 30, 1992. Sorenson testified extensively in his own behalf, and also introduced the testimony of three former Kennecott employees. Stewart Smith testified by videotape deposition, shown at trial. After Sorenson concluded the presentation of his case, Kennecott sought a dismissal under Rule 41(b). The district court heard arguments on Kennecott's motion on March 12, 1992, and the court granted Kennecott's motion and dismissed Sorenson's Amended Complaint on April 2, 1992.

In granting Kennecott's motion to dismiss, the trial court found that Kennecott's progressive discipline practices were required by the Collective Bargaining Agreement for union-represented employees. In contrast, progressive discipline was not applied to supervisory employees as a matter of contract. Rather it was applied in an informal manner and as a matter of good management. The court found that Sorenson failed to demonstrate the existence of any implied contract between Kennecott and himself for continued employment, and found that Sorenson, as a supervisory employee, was not entitled to progressive discipline as a matter of contract.

### FACTUAL HISTORY

Kennecott hired Sorenson on March 18, 1974, as an entry-level metallurgical engineer in the operations group at its smelter facility. (T. pp. 50, 59.)<sup>1</sup> Sorenson remained in the operations group until 1987, where he held several titles, the last being that of material handling general foreman. He held this title from 1984 to 1987, which included a period during which the smelter was in a shutdown mode. (T. pp. 72, 367-368.) During this period of time Dallas Mikich, operations superintendent, was Sorenson's direct supervisor.<sup>2</sup> (T. pp. 68, 366.) In June 1987, after the start-up of the smelter, Sorenson was transferred from the operations group to the smelter technical group, reporting to David George, technical superintendent. (T. pp. 370-371.) As part of this transfer, Sorenson received a two-level grade reduction and was demoted to metallurgical engineer, a title he retained until his transfer to the Bonneville concentrator facility in July 1988. (T. pp. 369, 373.) David George remained his supervisor during this entire time from July 1987 through July 1988. As a member of the technical group, Sorenson provided technical support for the start-up of the smelter. (T. p. 370.) In that capacity Sorenson was

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<sup>1</sup> References to the trial transcript are abbreviated "T." followed by the appropriate page number. References to the deposition of Stewart Smith, video taped and presented at trial, are indicated as "(Stewart depo. p. \_\_.)" References to the Kelly Sorenson deposition, published at trial, are abbreviated "(Sorenson depo. p. \_\_.)" Trial exhibits are abbreviated "Ex. \_\_."

<sup>2</sup> There were four groups at the smelter: operations, maintenance, technical, and by-products, each with their own superintendent who in turn reported to the smelter manager. (T. p. 370).

assigned in July 1987 to provide support to the anode plant, where he remained until November 1987, when he was given the assignment of coordinating the start-up of the filter plant. (T. pp. 77, 373, 375, 377, 380.) Sorenson remained in the filter plant until he was transferred to the Bonneville concentrator in July 1988. Sorenson worked at the Bonneville concentrator until his employment was terminated on January 31, 1989. (T. p. 50.)

In attempting to establish an implied-in-fact contract of employment between Kennecott and himself, Sorenson relied principally upon a 1973 edition of the general code of conduct which he signed 1974 when he accepted employment with Kennecott. Sorenson particularly relies on the fourth paragraph of the foreword to the 1973 edition of the general rules of conduct, which states:

Violation of these rules is cause for either (1) written warning, or (2) suspension subject to hearing for discipline purposes. Such a hearing can result in penalty, lay-off or discharge, depending upon the seriousness of the offense.

(T. pp. 387-88; Ex. 1.) Sorenson also cites oral representations made to him by Charlie Bird and Gene Bryant at the time he was hired. (T. pp. 54, 57.) Bird and Bryant each merely reiterated the provisions of the rules of conduct. (T. pp. 54, 57-58.) These rules of conduct were in effect until April 4, 1974, when they were succeeded by a replacement code of conduct. (T. pp. 383-84; Ex. 154.) The 1974 code did not contain any language similar to the paragraph relied upon by Sorenson, and explicitly stated that it superseded all prior codes of conduct and disciplinary rules. The

1974 code was, in turn, replaced by a new set of general rules of conduct issued in 1977. (T. p. 384; Ex. 155.) Those rules were once again superseded by rules issued in 1980. (T. p. 385; Ex. 156.) Successor general codes of conduct were issued in 1984 and 1986. (T. pp. 385-87; Ex. 157, 158.) Without exception, each of these subsequent documents expressly stated that it superseded and replaced any and all previously issued rules of conduct. (T. p. 389.) Also without exception, none of these documents contained any language similar to that relied upon by Sorenson in the 1973 General Rules of Conduct, now five times succeeded, in effect at the time Sorenson accepted employment at Kennecott. (T. p. 388.)

Sorenson also places great weight on the course content of several management training seminars which he attended during his tenure at Kennecott. Sorenson's first management training seminar was held approximately six weeks after he began employment with Kennecott in 1974. (T. p. 113.) Progressive discipline was presented as including verbal warnings, written warnings, suspension, and hearings as precedents to termination. (T. p. 119.) The seminar included detailed discussions of dovetailing progressive discipline with the provisions of the Collective Bargaining Agreement for hourly workers. (T. pp. 114-15.) Sorenson testified that none of the facilitators of this presentation distinctively excluded salaried (or supervisory) employees from their discussions of corrective or progressive discipline. (T. p. 115.) From this absence of exclusion, Sorenson formed a subjective belief that all of the provisions of

progressive discipline applied to him. (T. pp. 120, 122-23.) Later in the same year Sorenson attended another seminar where progressive discipline was "briefly touched on" and the discussions "did not contradict" Sorenson's subjective understanding of the application of progressive discipline. (T. p. 116.) Again, Sorenson relies on the fact that no one issued a disclaimer that the discussions of the mechanics of progressive discipline applied only to union employees and not to salaried employees. (T. p. 117.)

Sorenson next attended two management training sessions in the early 1980s, one at which corrective discipline principles were illustrated through a pre-packaged video tape presentation that Kennecott had purchased (Zenger-Miller course). (T. p. 121.) Sorenson recalled that one of the Zenger-Miller video tapes depicted supervisors addressing both supervisors and hourly employees concerning the correction of behavioral problems but provided no detail as to the content of those tapes. (T. p. 122.) Sorenson also testified he also attended a management training seminar sometime in 1983 or 1984 which was almost identical in content to the initial training program he attended in the early 1980's. (T. pp. 123, 125.) Once again, Sorenson testified that none of the instructors specifically articulated that their comments were strictly limited to employees covered under the Collective Bargaining Agreement. (T. p. 125.)

In the last training program he attended, Sorenson was a facilitator. This program was known as the Fresh Start program, a

program for Kennecott employees returning to work in 1986 after the shutdown of Kennecott Utah Copper. It emphasized team spirit and Kennecott's "fresh start". (T. pp. 128-30, 513; Ex. 143.) No one at that program said salaried employees were entitled to a progression of discipline which included verbal and written warnings, and suspension prior to termination. (T. pp. 396-97.) Sorenson also relies on a manual distributed in connection with a 1988 management seminar which he did not attend, despite the fact that his initial testimony detailed his attendance at that seminar. (Sorenson depo. pp. 32-39; T. pp. 398-411).

Sorenson also relies upon the discipline of approximately twelve supervisors during his fifteen year tenure at Kennecott to support his belief that he was subject to progressive discipline requirements (Sorenson had personal knowledge of only seven). Sorenson contends that various elements of progressive discipline were applied to these twelve supervisors, and therefore established a course of conduct requiring Kennecott to apply progressive discipline to him. Notwithstanding, Sorenson testified that disciplinary measures for supervisors had to be dealt with in "new creative ways." Sorenson stated that with one supervisor, they "hit upon an idea" for discipline, implying that the various training seminars did not address the discipline of supervisory employees.

Sorenson's performance resulted in a two-grade demotion in June of 1987. (T. p. 369.) Sorenson's performance continued to be questionable during 1987. For example, after being dispatched

to Chile in December to acquire information to assist Kennecott in troubleshooting its Utah operations, Sorenson failed to report his evaluation to his supervisor, David George, until ten days after his return. (T. pp. 90, 94.) This failure to timely report prompted David George, Sorenson's supervisor, to write a letter to Sorenson detailing his performance deficiencies. (T. p. 449.) In his 1987 annual performance review, which he received in February 1988, Sorenson received a G- (below average) performance rating, reflecting his substandard job performance. (T. p. 448.) Although both Sorenson and Jerry Hansen,<sup>3</sup> on Sorenson's behalf, challenged this rating, Stewart Smith, the smelter plant manager, would not agree to alter the rating. (T. p. 576.) Smith also testified about Sorenson's deficiencies. He testified that Sorenson's coordination of the start-up of the anode casting plant did not go "particularly well." (Smith depo. p. 17.) Sorenson failed to execute "numerous plans of action" or executed action plans improperly. (Smith depo. pp. 18-19.) Smith discussed Sorenson's management deficiencies with him and ultimately directed that Sorenson be removed from the anode plant for "inadequate performance." (Smith depo. pp. 19, 21.)

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<sup>3</sup> Jerry Hansen was the operations superintendent. Both George and Hansen reported to Stewart Smith, smelter manager. (T. p. 370; Smith depo. pp. 15, 20.) Jerry Hansen was maintenance superintendent from 1977 to January 1, 1987 (T. p. 86); acting plant manager from January 1, 1987 to June 1987, the period immediately preceding the smelter start-up; operations superintendent from July 1987 to August 1988; and manager of engineer projects from August 1988 to September 1989 when he left Kennecott. (T. p. 485-486.) Hansen became the operations superintendent at the same time Sorenson was transferred from the operations group to the technical group.



Smith testified that he would not have continued to employ Sorenson at the smelter because Sorenson had had "ample opportunity to mend his ways." (Smith depo. p. 23.) Despite Sorenson's performance failures, Kennecott gave Sorenson the opportunity to transfer to the Bonneville concentrator. (Smith depo. p. 22.) When Sorenson failed to report to work at the Bonneville concentrator as scheduled, Smith called Sorenson into his office and advised him "this may be [your] last chance and [you] should get over there [to the concentrator] post-haste." (Smith depo. p. 22.) Smith continued, telling Sorenson that "this is an opportunity where you can redeem yourself. I suggest you get over there and give it your best shot." (Smith depo. p. 28.)

Sorenson transferred to the Bonneville concentrator in July 1988 as the operations general foreman. Senior managers Rod Davey and Bill Strickland toured the concentrator plant in December 1988. (T. pp. 298-307.) Sorenson conceded they appeared displeased with the condition of the plant. (T. p. 307.) Subsequently, Gary Jungenburg, Sorenson's immediate supervisor, told Sorenson that Davey and Strickland were not happy with the condition of the concentrator and wanted a cleanup schedule. (T. pp. 316-17.) Sorenson expressed his recognition of these problems in memoranda to Gary Jungenburg detailing cleanup schedules for equipment in the secondary crushing area. (T. pp. 319-20; Ex. 17.) Sorenson and Jungenburg had ongoing conversations during this period concerning the condition of the Bonneville concentrator and the necessity for immediate action. (T. p. 326.) In January,

Sorenson had a similar conversation with Chris Robison, Jungenburg's successor and Sorenson's new supervisor. (T. pp. 325-29.) Shortly before his termination Robison told Sorenson that the condition of the Bonneville concentrator was likely to cause "some people [to] lose their jobs," although there was no direct reference to Sorenson. (T. p. 330.)

#### **SUMMARY OF THE ARGUMENT**

Kennecott did not hire Sorenson for any definite period of time and he is therefore presumed to be an at-will employee. Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1040 (Utah 1989). The trial court properly found that Sorenson did not rebut the presumption of at-will employment because Sorenson could not meet the standard articulated in Johnson v. Morton Thiokol, Inc., 818 P.2d 997 (Utah 1991). Under Johnson, an employee must show that he reasonably believed his at-will status was altered by a sufficiently definite communication that the employer intended to create an employment relationship other than employment at-will. Johnson, 818 P.2d at 1002. Sorenson relied on the preface of an out-dated and superseded code of conduct, as well as subsequent communications in management training classes and Kennecott's course of conduct, in his attempt to show that he had an implied-in-fact contract for continued employment. None of these factors factually supported an implied contract.

The trial court implicitly discounted witness testimony concerning Sorenson's contractual entitlement to progressive

discipline. Rule 41(b) of the Utah Rules of Civil Procedure allows the trial judge to determine witness credibility and to assess the proper weight to assign to testimony. Sorenson's credibility was demonstrably diminished by self-conflicting testimony. Jerry Hansen, Sorenson's secondary witness, testified about progressive discipline in vague terms, and had little actual supervisory responsibility over Sorenson. Finally, both witnesses were sharply contradicted by Stewart Smith, a witness fired by Kennecott.

Even if the Court holds that the trial court's factual finding that there was no implied contract is clearly erroneous, the Court should alternatively affirm the trial court's judgment on the grounds that Kennecott provided Sorenson notice prior to termination. Sorenson received a series of communications, such as a performance evaluation, letter from his supervisor, and memoranda regarding his area of responsibility. In addition, Sorenson's supervisors counseled with him and advised him to improve his performance. Sorenson was not entitled to a rigid succession of disciplinary measures. He received adequate notice that Kennecott viewed his performance as unsatisfactory, and ultimately unacceptable.

## ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN FINDING THAT PLAINTIFF FAILED TO SUCCESSFULLY REBUT THE PRESUMPTION OF EMPLOYMENT AT WILL.

A. Because Sorenson was Hired for an Indefinite Period of Time, His Employment was Terminable at Will.

When an employee is hired for an indefinite period of time, the law presumes that the employment relationship is terminable at-will, i.e., that it may be terminated by either the employee or the employer at any time and for any reason. Berube, 771 P.2d at 1040-41, 1044. Sorenson had no employment contract with Kennecott for a definite period of time such as one or two or twenty years; he was employed for an indefinite period. (T. p. 359.) Accordingly, a presumption arises that his employment was terminable at-will by himself or by Kennecott. Brehany v. Nordstrom, Inc., 812 P.2d 49, 55 (Utah 1991); Berube, 771 P.2d at 1044. The trial court ruled that Sorenson's implied contract claim failed because he could not overcome this presumption that his employment was terminable at-will.

The trial court found that Kennecott's disciplinary practices with salaried employees were "never part of a contract." Sorenson v. Kennecott Utah Copper Corp., Order and Judgment of Dismissal, No. 89-0905608 at 2 (3rd Dist. Ct., Apr. 2, 1992). The presumption of at-will employment may be overcome where "an employer's internally adopted policies and procedures concerning discharge . . . purport to establish limitations on the employer's right to discharge." Caldwell v. Ford Bacon & Davis Utah, Inc.,

777 P.2d 483, 485 (Utah 1989); Brehany, 812 P.2d at 55. An implied employment contract, whether based on a written document, such as the 1973 General Rules of Conduct, or the employer's course of conduct with its employees, may establish implied terms of employment only if the policy statement or custom relied on clearly indicates that the employer has relinquished its "unfettered right to discharge its employees." Brehany, 812 P.2d at 54-56.

In Johnson v. Morton Thiokol, Inc., the Utah Supreme Court held that in determining whether an employer has contractually limited its right to terminate at will the intent of the employer is controlling. Johnson, 818 P.2d at 1002. Therefore, for there to be an implied employment contract that overcomes the presumption of at-will employment, the plaintiff must establish that the employer "intended to modify the employment relationship to provide that an employee could be terminated only for good cause." Johnson, 818 P.2d at 1003.

The Johnson court articulated the employee's burden as showing that the employer manifested its intent to contract on other than at-will basis.

[F]or an implied-in-fact contract to exist, it must meet the requirements for an offer of a unilateral contract. There must be a manifestation of the employer's intent that is communicated to the employee and sufficiently definite to operate as a contract provision. Furthermore, the manifestation of the employer's intent must be of such a nature that the employee can reasonably believe that the employer is making an offer of employment other than employment at-will.

Johnson, 818 P.2d at 1002 (citations omitted). Thus, no contract is formed if the employer communicates its intention in such a way that an employee could not reasonably believe that his or her employment is other than at-will.

The Johnson court also emphasized that an employer is free to change or abolish the terms of the unilateral contract by offering superseding or different terms. "The unilateral nature of such an employment contract is important because it affects the flexibility of the employment relationship." Johnson, 818 P.2d at 1002.

In the case of a unilateral contract for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become contractual obligations. In this manner, an original employment contract may be modified or replaced by a subsequent unilateral contract. The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job although free to leave, the employment supplies the necessary consideration for the offer.

Id. (quoting Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983)). See also Brehany, 812 P.2d at 56 n.2 ("the continued rendering of services by an employee is . . . consideration that supports the binding effect of the terms. The employer may, however, change those terms or even abolish them").

**B. The Trial Court Properly Found That Kennecott's Code of Conduct Did Not Support an Implied-in-fact Contract for Continued Employment.**

The trial court found that the 1973 General Rules of Conduct did not support an implied-in-fact employment contract.

Even though the General Rules of Conduct were superseded by five subsequent documents, Sorenson relies exclusively on a single paragraph in the preface, which paragraph finds no home in any of the subsequent documents. Sorenson ignores the fact that each of the subsequent codes of conduct contain explicit and unequivocal declarations that all prior codes were superseded. Thus, under Johnson, the language relied upon by Sorenson is of no effect. Applying the unilateral contract principles articulated in Johnson, a number of courts have held, as a matter of law, that an employer's new employment terms offered to an employee supersede prior unilateral contract terms. For example, in Bedow v. Valley National Bank, 5 I.E.R. Cases 1678 (D. Ariz. 1988), the court held that a personnel manual containing an at-will disclaimer, which was in effect at the time of plaintiff's termination, was controlling. The court stated:

Any other conclusion would create chaos for employers who would have different contracts for different employees depending upon the particular personnel manual in force when the employee was hired.

Id. at 1680. See also Ferrer v. Nielsen, 799 P.2d 458, 460 (Colo. App. 1990) (summary judgment affirmed where court applied 1986 provisions rather than 1982 provisions to defeat discharged employee's implied contract claims); Castiglione v. Johns Hopkins Hospital, 517 A.2d 786, 790, n.4 (Md. App. 1986) (by continuing to work for hospital after new manual distribution, discharged employee, by her conduct, impliedly assented to modification of employment agreement). The trial court properly discounted the

1973 General Rules of Conduct as supporting an implied-in-fact contract for employment because the Rules were subsequently superseded.

In sum, Johnson stands for the proposition that an implied employment contract, if indeed one exists, is a unilateral contract that an employer may alter or terminate by providing new terms or conditions. Therefore, under Johnson, the trial court properly dismissed plaintiff's implied contract claim on the grounds that the 1973 General Rules of Conduct did not give rise to an implied contract term.

**C. The Trial Court Properly Found that  
Kennecott's Course of Conduct in  
Practicing Progressive Discipline  
was Not a Part of Any Contract.**

The Utah Supreme Court has never held that an employer's course of conduct or oral statements, standing alone, creates an implied-in-fact contract for continued employment. Hodgson v. Bunzl Utah, Inc., 202 Utah Adv. Rep. 22, 23 (Utah 1992). However, the respective conduct of an employer and employee may constitute evidence of an employer's intent to alter the at-will employment relationship. Gilmore v. Salt Lake Area Community Action Program, 775 P.2d 940, 942 (Utah App. 1989). The supreme court has recently held that "in order for an employer's conduct to create an implied-in-fact contract modifying at-will employment, the conduct must meet the standards of a unilateral offer and acceptance." Hodgson, 202 Utah Adv. Rep. at 24 (citing Johnson, 818 P.2d at 1002).

Sorenson testified that his opinion regarding Kennecott's course of conduct was developed from his familiarity with



circumstances involving seven non-union employees who were subjected to some form or facet of progressive discipline, during his fifteen year tenure. (T. p. 151.) Jerry Hansen and Tracy Johnson also related their knowledge of five other disciplinary situations involving supervisors. (T. pp. 551-59, 640-41, 646-47.) While Sorenson testified that several of those employees received verbal and/or written warnings, Sorenson was able to identify only one employee who had received a disciplinary hearing and only one instance when suspension was used in the course of progressive discipline. (T. p. 564.) With respect to this instance, Sorenson testified that two discussions among the smelter plant manager and various foremen preceded the decision to suspend this particular employee. (T. p. 430.) The group struggled with the appropriate course of action in an attempt to "determine our next step," and to find a solution "short of termination." (T. pp. 429-30.) They were "looking for a creative way to handle the problem," and expressed concern that if suspension was used without a corresponding pay reduction that suspension for salaried employees would be viewed as a desired break rather than a punitive or corrective action. (T. pp. 431-32.) No one in attendance was aware of any instance in which a supervisor had ever been suspended. (T. p. 436.) Significantly, these discussions occurred after most of the training sessions Sorenson relies on to establish that progressive discipline -- consisting of a progression from verbal to written warnings, then to suspension -- was clearly applicable to supervisory personnel. See section D, below.

Stewart Smith testified that suspension was definitely not part of a defined supervisory disciplinary scheme during his tenure with Kennecott. (Smith depo. p. 46.) And, in fifteen years, acting in his supervisory capacity, Sorenson never utilized rigid steps of progressive discipline for those employees under his supervision. (T. pp. 438-39.) Although on occasion he counseled supervisors about performance problems, he never issued any written performance notices to any of his salaried employees nor suspended anyone. (T. p. 438.)

Significantly, each of the witnesses Sorenson relies on, as well as Sorenson himself, were either terminated by Kennecott or received a demotion. Sorenson testified that he was given a double grade demotion in 1987, but there is no testimony that the demotion was preceded by any form of notice or discipline. Jerry Hansen, a critical witness for Sorenson's course of conduct theory, was demoted from a high level management position and assigned as an engineer. (Smith depo. p. 27.) Yet Hansen did not claim to have received notice prior to removal. Tracy Johnson, another of Sorenson's witnesses, had been reassigned because of performance deficiencies and was ultimately terminated from employment without prior notice or discipline. (T. pp. 644, 649-50.) Finally, Stewart Smith, Sorenson's last witness, was similarly fired by Kennecott, without a stated reason and without prior notice. (Smith depo. p. 44.) Smith, having been fired, testified that there was no company policy regarding discipline of supervisors. (Smith depo. at 46.)

Sorenson attempted to show the trial court a pattern of progressive discipline based upon his knowledge of seven isolated and distinct incidents, spread over the course of fifteen years, and handled distinctively as the circumstances required. In Hodgson, the plaintiff argued that the employer's course of conduct in disciplining other employees created an expectation that she would receive disciplinary warnings prior to termination. Hodgson, 202 Utah Adv. Rep. at 24. The plaintiff produced evidence of four episodes of employee discipline in two years, resulting in two written warnings and two oral warnings as well as the imposition of probationary periods. The probationary periods varied from ninety days to an unspecified period, and no written policy dictated the length of probation for any specific offense. The court held that this pattern of employee discipline did not meet the standard for creating an implied-in-fact contract modifying the at-will employment relationship. The court stated that the disciplinary sanctions meted out to the employees were not "sufficiently definite to constitute a contract term because they were too inconsistent." Hodgson, 202 Utah Adv. Rep. at 24.

Sorenson's testimony of his view of Kennecott's course of conduct is not unlike the situation before the court in Hodgson. Indeed, Sorenson's own testimony demonstrated that Kennecott managers were uncertain as to how to proceed with a salaried employee who might require discipline. Sorenson, Hansen, Johnson and Stewart had first hand experience with Kennecott's course of conduct, and knew that demotions or other actions might come

without prior communication from Kennecott. It is this same uncertainty that mandates the result reached by the trial court. Under the standard of Johnson v. Morton Thiokol, Inc., the employer's conduct must be sufficiently definite and consistent to act as a contract provision. Johnson, 818 P.2d at 1002. Kennecott's individual attention and reaction to the performance difficulties of a relative few salaried employees over the course of fifteen years simply did not meet this standard. Faced with this weak evidence, and confronted with conflicting evidence of Kennecott's course of conduct presented by Sorenson himself, the trial court did not err in finding that Kennecott's course of conduct does not support an implied-in-fact contract for continued employment.

**D. Kennecott's Management Training Programs do not Support an Implied-in-fact Contract for Continued Employment.**

Neither Sorenson's subjective impressions following discussions with his own superiors nor the concepts taught in Kennecott's management training seminars support a finding that Kennecott intended to alter the at-will employment status of its salaried employees. Sorenson participated in six management training seminars over the course of his fifteen year tenure. (T. pp. 110-26.) It is readily apparent from the content of these seminars that the seminars were intended to instruct management personnel on dealing with employees covered by the Collective Bargaining Agreement, and not to teach generally applicable principles for the discipline of all Kennecott employees. (T. pp.

412-14.) Consistent treatment of union workers was a repeated theme throughout the management seminars. (T. p. 413.) The seminars taught tools for implementing the terms of the Collective Bargaining Agreement.<sup>4</sup> For example, Sorenson testified extensively about a manual distributed at a management training seminar at Copperton.<sup>5</sup> (Ex. 5.) Prominently placed in the pocket of the training manual was a complete copy of the Collective Bargaining Agreement. (T. p. 412.) A principal section of the manual was dedicated to Discipline and Counseling. (T. p. 413.) That section contained a disciplinary checklist specifically harmonized with the Collective Bargaining Agreement and designed with the objective of providing consistent discipline according to the terms of the Collective Bargaining Agreement. (T. p.413.) The manual also discussed the Justice and Dignity requirement, a term drawn directly from the Collective Bargaining Agreement and not appearing in any document applying to management employees. (T. p. 413-14.) Finally, the training manual discussed participation in the

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<sup>4</sup> Sorenson argues that his understanding of progressive discipline as taught during the various seminars was a singular system applicable to all employees, i.e., there was "no distinction made that progressive discipline was limited in application to hourly and union employees." Appellant's Brief at 10. This assertion is inconsistent, however, with his recognition that he was not entitled to progressive discipline as applicable to hourly workers. Appellant's Brief at 30-31.

<sup>5</sup> Sorenson also testified extensively and in meticulous detail concerning the content of the seminar, attendance at the seminar, and discussions held during the seminar. However, he later recanted the entirety of that testimony and admitted that he had never actually attended the seminar, although he did receive and review the manual distributed at the seminar. (Sorenson depo. pp. 32-39; T. pp. 398-411.)

grievance procedure. (T. p. 414.) Grievance procedures were applicable solely to union-represented employees; Sorenson conceded that there was no grievance procedure available to any salaried employee. (T. p. 438.)

Although Sorenson argues that Kennecott's course of conduct supports his claim of an implied-in-fact employment contract, Sorenson's own post-seminar conduct demonstrates that the seminar discussions did not address how to handle performance problems with salaried staff. After attending several training seminars at which progressive discipline was discussed, Sorenson participated in mid-level management discussions revolving around questions of how to deal with Ray Stireman and Bob Chesley, two salaried supervisors experiencing performance problems. (T. pp. 419-20.) Sorenson described the content of these discussions with phrases such as "hit upon an idea" and arriving at a "new creative way to handle" these disciplinary situations. (Sorenson depo. pp. 51-52; T. pp. 431-32.) There was no precedent or directive to guide the discipline of supervisory personnel. Apparently, the provisions of progressive discipline which Sorenson claimed to apply to all employees, including salaried management employees, were given short shrift in these discussions.

## **II. THE TRIAL COURT PROPERLY CONSIDERED THE TESTIMONY OF THE WITNESSES.**

Sorenson complains that the trial court failed to properly consider the testimony regarding progressive discipline as constituting a term and condition of his employment with Kennecott.

Essentially, Sorenson complains that the trial court did not give sufficient weight and credibility to Jerry Hansen's testimony on this issue. In ruling on a Rule 41(b) motion for dismissal, the trial court may make assessments of credibility and determine, in its discretion, what weight to assign a witness's testimony. Lemon, 735 P.2d at 60; Wessel, 711 P.2d at 252. Sorenson must demonstrate to this Court that the trial court's evaluation of the evidence was an abuse of discretion. Several episodes in the record illustrate that there are flaws in both Sorenson's and Hansen's credibility, and demonstrate the proper weight to assign their testimony.

Sorenson banked heavily on Jerry Hansen's testimony to establish the practice of progressive discipline at Kennecott. On direct examination, Hansen testified at length regarding his understanding of progressive discipline. (T. pp. 533-96.) His testimony emphasized his teaching in a series of repetitive management training seminars from 1975 through 1981, and suggested the content of those seminars provided for the application of a rigid system of progressive discipline which applied equally to employees governed by the Collective Bargaining Agreement as well as supervisory personnel. This system required informal counseling, verbal and written warnings, suspension and a hearing before termination. But the content of the seminars was not directed to disciplining supervisors but rather was focused on hourly employees. For instance, the application of the hot stove rule (e.g., anyone who touches the stove will be burned) was

illustrated by references to actual grievances involving the union work force. (T. p. 492) The seminar materials show the same emphasis -- foremen applying discipline to hourly employees (T. p. 493). There were no statements, no illustrations, no context from which it can be established that the seminar was intended to address the issue of the discipline of supervisors. Further, when his definition of progressive discipline was probed on cross examination, Hansen's testimony described a system of progressive discipline with highly elastic parameters. (T. pp. 585-95.) Moreover, the pivotal element of Hansen's testimony was that the range of protections, such as the stepped grievance process, arbitration, reinstatement, record expungement, union representation, and appeal, central to the concept of progressive discipline and which are embodied in the Collective Bargaining Agreement, were unequivocally unavailable and not applicable to supervisory personnel. (T. pp. 594-95.) Significantly, Hansen stated that he did not have authority to create new policy or to bind Kennecott. (T. p. 590.)

Although Sorenson also testified in detail concerning his subjective understanding of Kennecott's practice of progressive discipline, Sorenson's credibility was highly suspect. The trial court was confronted with evidence that Sorenson had testified in great detail and at great length as to the content, hours, and discussions held at a particular management training seminar. (Sorenson depo. pp. 32-39; T. pp. 398-411.) However, when counsel's questions became pointed, Sorenson retreated and stated



that he had forgotten that he had not attended that particular training session. (T. p. 411.) Both Sorenson's and Hansen's testimony regarding other matters was also often directly contradicted by plaintiff's exhibits and by the testimony of Stewart Smith, former smelter manager. (Smith depo. pp. 19, 31, 38; Ex. 127, 129.) Sorenson testified that the start-up of the anode casting plant went "very, very well" and had been a great success. (T. pp. 81, 87-89.) On direct examination Hansen testified similarly. This testimony was contradicted by two memoranda singularly addressing anode plant operations during the period in which the anode casting plant was supervised by Sorenson. (Ex. 127, 129.) These memoranda articulate numerous critical problems with the anode plant operations and illustrate that many of the failings of the anode plant had been ongoing for some time. On cross examination Hansen admitted that at one time the problems at the filter plant and Stewart Smith's dissatisfaction were of sufficient magnitude, that Stewart Smith removed all of Hansen's responsibility for the filter plant. (T. p. 617.)

Although Sorenson made general denials that he had ever been informed of his performance deficiencies, Sorenson's own testimony contradicted the notion that all was rosy with his performance. (T. p. 185.) Sorenson admitted that while at the smelter he received a less than satisfactory performance review, which review when challenged was reaffirmed by Stewart Smith. He also received direct criticism of his performance by both David George, his direct supervisor, as well as Stewart Smith himself.

While at the concentrator, Sorenson testified he recognized Rod Davey's and Bill Strickland's disappointment and dissatisfaction with the secondary crushing operations under Sorenson's supervision. (T. pp. 316-17.) He acknowledged that he had numerous discussions with Gary Jungenburg about the condition of the plant, and that Chris Robison told him that Davey and Strickland felt sufficiently strongly about the affairs at the concentrator that some people could lose their jobs. (T. p. 330.) But yet, amazingly, Sorenson's testimony was that his performance at the concentrator had not been criticized (T. p. 82.) Sorenson also gave conflicting explanations regarding his preparation of Exhibit 17, a memorandum to Gary Jungenburg discussing cleanup in the crusher area and dated December 6, 1988. (T. p. 322-24.) This memorandum was prepared at approximately the same time Davey and Strickland expressed their dissatisfaction to Sorenson with his performance. (T. p. 322.) When his testimony did not coincide with the date on the memo his explanation was that he back-dated it. (T. pp. 322-24.)

Sorenson suggests that Jerry Hansen was his supervisor for extended periods of time, and therefore should be familiar with his performance level. (Appellant's Brief pp. 13, 46.) This testimony was contradicted by Stewart Smith, who testified that while Sorenson may have reported operationally to Jerry Hansen at certain times, Sorenson worked under the daily and administrative supervision of David George, technical group superintendent, during most times critical to this lawsuit, the times during which

Sorenson's failing performance was directly at issue. (Smith depo. pp. 20-21.) Sorenson reported directly to Hansen only during a short period while the plant was idle and Jerry Hansen was acting plant manager. Other than that brief period of time, Sorenson was assigned to the technical department, while Hansen worked in the maintenance or operations departments. (See supra, note 2.)

Confronted by directly conflicting testimony, the trial court was obliged to make credibility and weight assessments to guide its ruling on Kennecott's Rule 41(b) motion. The trial court had before it the testimony of the plaintiff, Kelly Sorenson. The trial court also had the testimony of former employee, Jerry Hansen, who had "expressed total disappointment in his removal" from a senior management position and reassignment as an engineer. (Smith depo. p. 27.) Finally, the court had the testimony of Stewart Smith, a former high level Kennecott official and smelter plant manager. Smith certainly had no motivation to color his testimony in favor of Kennecott. Kennecott fired Smith without any stated reason, after only three years at Kennecott. (Smith depo. p. 44.) These facts, coupled with the inconsistencies and inaccuracies of Sorenson's and Hansen's testimony, prevent Sorenson from meeting his burden before this Court of establishing that the trial court abused its discretion in its weight and credibility assessments of the witnesses who testified as to progressive discipline.

III. THE COURT OF APPEALS MAY ALTERNATIVELY AFFIRM THE DECISION OF THE TRIAL COURT ON THE GROUND THAT DEFENDANT MET THE TERMS OF ANY IMPLIED-IN-FACT CONTRACT WITH PLAINTIFF.

A. If Plaintiff Proved Any Terms of an Implied-in-fact Contract, He Showed Only That He Was Entitled to Notice of Unsatisfactory Performance.

Although defendant Kennecott did not present its case to the trial court, having successfully brought a Rule 41(b) motion for dismissal, there is adequate evidence in the record to affirm the decision of the trial court on the alternative ground that Sorenson received notice of his unsatisfactory performance prior to his termination. The Court of Appeals may affirm the trial court's decision on any reasonable ground, even if not relied upon by the trial court. Kenyon v. Regan, 826 P.2d 140, 142 (Utah App. 1992). "Thus, if an argument made for the first time on appeal will result in affirmance, the argument will be considered" by the Court of Appeals. State v. Elder, 815 P.2d 1341, 1344 (Utah App. 1991).

Progressive discipline, as interpreted and practiced by Kennecott, does not mean a lock-step disciplinary approach. For example, a worker need not receive a certain number of verbal warnings prior to receiving a written warning, or a certain number of written warnings prior to suspension or termination. (T. p. 586.) Jerry Hansen offered extensive testimony concerning Kennecott's practice of progressive discipline. Hansen testified that progressive discipline did not necessarily mean that one was always entitled to a verbal warning. (T. pp. 586-87.) Hansen

further stated that a written warning would not necessarily be preceded by a verbal warning. (T. pp. 586, 588.) Hansen further testified that progressive discipline might mean that discipline was initiated at the time off stage, bypassing both written and verbal warnings. (T. p. 586.) Finally, Hansen testified that Kennecott's practice of progressive discipline would allow for the discharge of a salaried employee who had received neither a verbal warning, written warning or suspension prior to termination. (T. p. 586.) Hansen described a panoply of rights applicable to union-represented employees subjected to discipline. Hansen stated that not one of those rights was applicable to salaried employees. (T. pp. 594-95.)

Kennecott practiced progressive discipline with its union-represented employees as a means of implementation of and adherence to the Collective Bargaining Agreement. In contrast, progressive discipline was applied to salaried employees, not as a matter of contract, but as a good management technique. (Smith depo. p. 46.) Jerry Hansen conceded that as a supervisor he viewed the application of progressive discipline differently for salaried and union-represented employees. (T. p. 596.) This difference is exhibited in Hansen's own experience of demotion without preceding discipline, as well as the terminations of Tracy Johnson and Stewart Smith.

**B. Kennecott Provided Sorenson Adequate  
Notice of Performance Deficiencies  
Prior to Termination.**

Sorenson's own testimony and trial exhibits demonstrate that he had a significant history of counseling and other communications prior to termination. In fact, Sorenson had been previously demoted by two grades, and had been removed from his position in the anode casting plant for inadequate performance. (T. p. 369; Smith depo. p. 21.) During the period preceding his removal, Sorenson received verbal counseling from Stewart Smith, plant manager, concerning his performance in the anode casting plant. (Smith depo. pp. 19, 31, 38.) Moreover, Sorenson became aware of management's dissatisfaction with his performance through written memoranda from Stewart Smith to Jerry Hansen and David George discussing operations at the anode plant, operations for which Sorenson was directly responsible. (Ex. 127, 129.)

Sorenson's immediate supervisor in the anode casting plant, David George, criticized Sorenson's performance on several occasions. Sorenson testified that George criticized him when he failed to report promptly after his troubleshooting trip to Chile. (T. p. 92.) Sorenson also received a G- performance rating for 1987 while he was under the supervision of David George. (T. p. 448.) At about that same time, George gave Sorenson a detailed letter articulating Sorenson's performance problems and deficiencies in the anode plant. (Smith depo. p. 32.)

Sorenson began his final assignment at Kennecott with a performance admonition. When Stewart Smith called Sorenson into

his office to hasten Sorenson's transfer, Smith told Sorenson that the transfer was an opportunity for Sorenson to "redeem" himself from past performance deficiencies and that this was his "last chance." (Smith depo. pp. 22, 28.) Despite this unambiguous declaration, Sorenson did not effect significant improvement at the concentrator plant. Sorenson testified that Rod Davey and Bill Strickland communicated their disappointment in the condition of the secondary crushing area to him during their plant tour in December 1988. (T. p. 307.) Sorenson also testified that Gary Jungenburg identified numerous problems in the concentrator plant and told Sorenson what to do about them. (T. pp. 319-20, 326.) Sorenson's supervisor, Chris Robison, went so far as to tell Sorenson that the plant condition was so poor that "some people could lose their jobs." (T. p. 330.)


In sum, even though Sorenson had no contractual entitlement to progressive discipline, he received the type of communication normally made to Kennecott salaried employees regarding performance issues. Sorenson was on notice of his deficient performance by virtue of extensive counseling and written communications, including his formal annual performance evaluation conducted by David George. Accordingly, the Court of Appeals may affirm the decision of the trial court on the grounds that, even if Sorenson did benefit from an implied-in-fact contract of employment, Sorenson received the progressive discipline impliedly required by that contract.

### CONCLUSION

The trial court properly dismissed Sorenson's amended complaint under Rule 41(b) of the Utah Rules of Civil Procedure. Sorenson did not prove an implied-in-fact contract for continued employment; neither the superseded code of conduct, Kennecott's practice of progressive discipline nor the management training courses supported Sorenson's claim. Alternatively, the Court of Appeals may affirm the trial court's judgment on the grounds that Sorenson received progressive discipline through the numerous verbal and written warnings of his inadequate job performance. The court also properly exercised its discretion under Rule 41(b) in assessing weight and credibility of the trial witnesses.

Kennecott asks the Court to affirm the judgment and decision of the trial court in all respects and to award its costs on appeal as provided by Utah Rule of Appellate Procedure 34.

DATED this 4<sup>th</sup> day of March, 1993.



BARBARA K. POLICH  
KENNETH R. WALLENTINE  
of and for  
PARSONS BEHLE & LATIMER  
Attorneys for Appellee



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing APPEAL FROM ORDER AND JUDGMENT OF DISMISSAL, postage prepaid, first class mail this 4<sup>th</sup> day of March, 1993 to:

REID C. DAVIS, Esq.  
STEPHEN W. COOK, Esq.  
COOK & DAVIS  
323 South 500 East, Suite 200  
Salt Lake City, Utah 84102

\_\_\_\_\_*Barbara K Polich*