

1993

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

Utah Court of Appeals

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Barbara Polich; Parsons, Behle & Latimer; attorneys for appellee.

Reid C. Davis, Stephen W. Cook; Cook and Davis; attorneys for appellant.

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BRIEF

STATE OF UTAH

93-0125-CA

Appellate Case No. [REDACTED]

Priority No.

Appeal from Order and
Judgment of Dismissal of
The Third Judicial
District Court, Salt Lake
County, State of Utah.

Honorable Scott Daniels

BRIEF OF APPELLANT

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

CLERK SUPREME COURT
UTAH

IN THE SUPREME COURT

STATE OF UTAH

KELLY SORENSON,	)	Appellate Case No. 920263
)	
Plaintiff/Appellant,	)	Priority No.
)	
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
)	

BRIEF OF APPELLANT

BARBARA POLICH
PARSONS, BEHLE & LATIMER
Attorneys for Appellee
201 South Main Street
Suite 1800
Box 11898
S.L.C., Utah 84147-0898
Telephone: (801) 521-1234

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

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE ISSUES	1
STANDARD OF APPELLATE REVIEW	1
STATEMENT OF THE CASE	3
A. <u>NATURE OF THE ACTION</u>	3
B. <u>COURSE OF PROCEEDINGS AND DISPOSITION</u> <u>BELOW</u>	3
C. <u>RELEVANT FACTS</u>	6
SUMMARY OF ARGUMENTS	29
ARGUMENT	32
REQUEST FOR ORAL ARGUMENT	48
CONCLUSION AND RELIEF SOUGHT	48
EXHIBITS	
1. Kennecott Copper Corporation, Utah Copper Division, July 1, 1973 General Rules of Conduct.	
2. Deposition of Stewart Butchart Smith, <u>Sorenson v.</u> <u>Kennecott - Utah Copper Corporation</u> , pages 10-14.	
3. Kennecott's 1982, 1987 and 1988 Performance Evaluations on Kelly Sorenson.	
4. Order and Judgment of Dismissal, dated April 2, 1992	
5. Defendant's Memorandum in Support of Motion for Summary Judgment, page 3.	
6. Order on Defendant's Motion for Summary Judgment.	

TABLE OF CASES AND AUTHORITIES

	<u>Page</u>
<u>Berube v. Fashion Centre, Ltd</u> , 771 P.2 1033 (Utah 1989)	32, 33, 36
<u>Brehany v. Nordstrom, Inc.</u> , 812 P.2d 49 (Utah 1991)	40
<u>Caldwell v. Ford, Bacon & Davis</u> , 777 P.2d 483 (Utah 1989)	33, 40, 41
<u>City Electric v. Dean Evans Chrysler-Plymouth</u> , 672 P.2d 89 (Utah 1983)	47
<u>Hodgson v. Bunzi Utah, Inc.</u> , 202 Utah Adv. Rep. (Utah 1993)	34, 42
<u>Johnson v. Morton Thiokol, Inc.</u> , 818 P.2d 997, Utah 1991)	33, 37
<u>Lemon v. Coates</u> , 735 P.2d 58 (Utah 1987)	1
<u>Lowe v. Sorenson Research Co. Inc.</u> , 779 P. 2d 668 (Utah 1989)	40
<u>Pugh v. See's Candies, Inc.</u> , 171 Cal.Rptr. 917 (App. 1981)	33
<u>Rose v. Allied Development Co.</u> , 719 P.2d 83 (Utah 1986)	33
<u>Sanderson v. First Security Leasing</u> , 201 Utah Adv. Rep. 18 (Utah 1992)	33, 34, 44
<u>Southern Title Guar. Co. v. Bethers</u> , 761 P.2d 951 (Utah App. 1988)	2, 42
<u>Thompson v. St. Regis Paper Co.</u> , 685 P.2d 1081 (Wash. 1984)	35
<u>Thurston v. Box Elder County</u> , 191 Utah Adv. Rep. 27 (1992)	34, 35, 47
<u>Wessel v. Erickson Landscaping Company</u> , 711 P.2d 250 (Utah 1985)	2

JURISDICTION OF APPELLATE COURT

This appeal is properly within the jurisdiction of the Utah State Supreme Court pursuant to Section 78-2-2(j) U.C.A.

STATEMENT OF THE ISSUES

I. WHETHER THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE UNDER RULE 41(b) OF THE URCP.

A. INTRODUCTION

B. WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT PLAINTIFF FAILED TO REBUT THE PRESUMPTION OF HIS EMPLOYMENT AT-WILL AND OTHERWISE FAILED TO ESTABLISH THE EXISTENCE OF AN IMPLIED-IN-FACT CONTRACT OF EMPLOYMENT.

1. WHETHER THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT'S 1973 "GENERAL CODE OF CONDUCT", FAILED TO CONSTITUTE AN IMPLIED TERM AND CONDITION OF EMPLOYMENT AND REBUTTED THE PRESUMPTION THAT PLAINTIFF WAS HIRED AT WILL.

2. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANT'S ORAL REPRESENTATIONS AND HISTORICAL CONDUCT OF APPLYING THE PRINCIPLES OF PROGRESSIVE DISCIPLINE TO PLAINTIFF AND OTHER SUPERVISORY PERSONNEL WAS MERELY "GOOD MANAGEMENT" RATHER THAN AN IMPLIED TERM AND CONDITION OF PLAINTIFF'S EMPLOYMENT.

3. WHETHER THE TRIAL COURT ERRED IN FAILING TO PROPERLY CONSIDER THE TESTIMONY OF WITNESS, JERRY HANSEN.

STANDARD OF APPELLATE REVIEW

The trial court's findings supporting an order of dismissal under Rule 41(b) URCP shall not be disturbed unless "clearly erroneous". Lemon v. Coates, 735 P.2d 58, 60 (Utah 1987). Utah Rule of Civil Procedure 41(b) is appropriately applied when the trial judge finds that the claimant has either failed to make out a prima facie case or when the trial judge is not

persuaded by the evidence presented by the claimant. Id.

Rule 41(b) permits a court trying a case without a jury to grant a motion to dismiss when it concludes "that upon the facts and the law the Plaintiff has shown no right to relief". The trial court is not precluded from granting such a motion merely because plaintiff has made out a prima facie case, as it is when ruling on a Rule 50(a) motion for a directed verdict in a case tried to a jury. Wessel v. Erickson Landscaping Company, 711 P.2d 250, 252 (Utah 1985). The purpose of the rule is to permit the judge, as the fact finder, "to weigh the evidence, draw inferences therefrom and, if it finds the evidence insufficient to make out a case for the plaintiff, to render a decision for the defendant on the merits". Id.

In reviewing involuntary dismissals, appellate courts give great weight to the findings made and the inferences drawn by the trial judge, but must reject his findings found to be clearly erroneous. Findings are clearly erroneous if they are against the clear weight of the evidence or if the reviewing court otherwise reaches a definite and firm conviction that a mistake has been made. On the other hand, a reviewing court will not defer to conclusions of law but will review them for correctness. Southern Title Guar. Co. v. Bethers, 761 P.2d 951, 954 (Utah App. 1988).

STATEMENT OF THE CASE

A.

NATURE OF THE CASE

This wrongful termination action for lost income and fringe benefits was brought following the discharge of Plaintiff/Appellant (hereinafter, Plaintiff) from his employment with Defendant/Appellee (hereinafter, Defendant) on January 31, 1989. On that date, Plaintiff was summarily and without warning terminated from his \$50,000 per year, mid-level management position for alleged inadequate performance. Plaintiff's termination occurred without any advance notice of Defendant's dissatisfaction with Plaintiff's performance, and despite fifteen years of satisfactory performance evaluations, the last given just three months prior to Plaintiff's discharge.

Plaintiff alleges that throughout his fifteen year employment, an implied-in-fact agreement existed which entitled him to a procedure of progressive discipline, including notice, hearing and just cause, before being terminated by the Defendant for inadequate performance. Defendant's termination of Plaintiff's employment was contrary to the agreement of the parties and has caused Plaintiff to be damaged thereby.

B.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Plaintiff's Complaint in this matter was filed in the

Third Judicial District Court, State of Utah, on September 18, 1989. Defendant answered timely and the parties commenced discovery by way of paper requests and depositions.

In August 1990, Defendant brought its Motion for Summary Judgment alleging, in part, that no implied contract of employment existed between the parties requiring, (1) cause for termination; (2) advance notice of unsatisfactory job performance; and, (3) the application of progressive discipline prior to Plaintiff's termination from employment. (Def. Memo. in Support of Mot. for Sum. Jud. p. 3, attached hereto as Exhibit 5)

Plaintiff filed its response and moved to amend its Complaint. After oral argument, the Court granted Plaintiff leave to amend its Complaint and denied Defendant's Motion for Summary Judgment. The trial Court's denial was based on the finding that genuine issues of material fact existed with respect to the formation of an implied contract of employment. (Order, para. 2, attached hereto as Exhibit 6). Thereafter, Plaintiff filed its Amended Complaint, an Amended Answer was filed by Defendant, additional deposition discovery was taken by Defendant and the case was ultimately set for trial. Prior to trial, the Court bifurcated proceedings on the issues of liability and damages.

On the issue of Defendant's liability, Plaintiff's case in chief, was tried before the Bench on January 27-30, 1992. The

trial Court and the parties toured the Defendant's Bonneville concentrator the morning of January 27th, after which Plaintiff commenced presentation of its case. At trial, Plaintiff introduced the testimony of the following witnesses:

1. Kelly Sorenson (Plaintiff)
2. Gerald Hansen (Plaintiff's former supervisor)
3. Tracy Johnson (Former Magna smelter general foreman)
4. Stewart Smith (Smelter manager. Testimony by videotape due to witness's unavailability)

At the close of Plaintiff's evidence and, because additional time was unavailable, the Court scheduled further proceedings and set Defendant's case in defense for May 26-29, 1992.

At the conclusion of Plaintiff's case, Defendant moved for dismissal pursuant to Rule 41(b) of the Utah Rules of Civil Procedure. Said Motion was not heard until March 12, 1992, at which time the parties appeared and presented oral argument. Defendant's Motion was granted and the Court's Findings of Fact, Conclusions of Law and Order were entered on April 2, 1992.

On or about May 1, 1992, the trial Court judge, Honorable Scott Daniels, left the bench due to his candidacy for the position of Utah State Attorney General.

C.

RELEVANT FACTS

At trial, Plaintiff identified five factors relevant to the creation of an implied-in-fact contract of employment. Those factors are as follows: (1) Defendant's 1973 General Rules of Conduct, signed by the parties; (2) Defendant's management training regarding progressive discipline given Plaintiff during his employment; (3) Defendant's oral instruction that Plaintiff and other supervisory personnel were entitled to progressive discipline prior to discipline or discharge; (4) Defendant's historical application of progressive discipline to Plaintiff and other supervisory personnel; and, (5) Defendant's use of regular performance evaluations.

The following evidence was introduced in support of each element.

1. 1973 General Rules of Conduct

Plaintiff was hired by the Defendant on March 31, 1974. (Trans. p. 50) Contemporaneous with his hiring, Plaintiff was interviewed by Defendant's Director of Human Resources, Charles Bird. (Trans. p. 51) During the interview, Bird asked Plaintiff to read and sign a company policy statement entitled General Rules of Conduct. (1973 General Rules of Conduct attached hereto as Plaintiff's Exhibit 1, Trans. p. 53) The General Rules of Conduct, dated July 1, 1973, was admitted at

trial as Plaintiff's Exhibit 1. (Trans. p. 55) Relevant language in the document states that the enumerated rules, although "not all-inclusive", are "the general rules of conduct that apply to all Kennecott personnel while on company operating property". (Emphasis added). The document also states that, "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, layoff or discharge, depending upon the seriousness of the offense." (Exhibit 1)

During the interview, Plaintiff discussed Defendant's policy statement with Mr. Bird. Mr. Bird told Plaintiff that the Rules of Conduct set forth the means by which violations of company rules would be addressed. (Trans. p. 54) Plaintiff signed the document to evidence that he had read and understood its contents. (Trans. p. 53) The Rules of Conduct was additionally signed by Defendant's smelter manager, D.A. Kinneberg. (Exhibit 1, Trans. p. 53)

During the interview, Plaintiff signed other company documents such as forms for initiating coverage in Defendant's group insurance plan and Defendant's Confidentiality Agreement. (Trans. p. 54-55)

Following the Bird interview, Plaintiff was interviewed in Defendant's Magna smelter by employee relations representative, Gene Bryant. (Trans. p. 57-58) Bryant told Plaintiff that he

was expected to follow the provisions of the General Rules of Conduct and that breaches of the policy could lead to discipline or discharge. (Trans. p. 57-58)

At the time of his hiring, Plaintiff recalled no specific discussion describing his status in the work place or the use of the words, "at-will". (Trans. p. 56, 58)

2. Defendant's Management Training

While employed with Defendant, Plaintiff held the following positions:

- a. 1974 metallurgical engineer. (Magna smelter) (Trans. p. 59)
- b. Mid-1974 until early 1976 filled in for frontline foremen and general foremen. (Magna smelter) (Trans. p. 60)
- c. 1976 to early 1977 material handling general foreman. (Magna smelter) (Trans. p. 61)
- d. 1977 to 1979-80 reverberator and converter general foreman. (Mange smelter) (Trans. p. 61)
- e. 1979-80 material handling general foreman. (Magna smelter) (Trans. p. 62)
- f. 1980 to 1982 anode department general foreman. (Magna smelter) (Trans. P. 63)
- g. 1982 to 1984-85 material handling general foreman. (Magna smelter) (Trans. p. 63)
- h. During plant shutdown in 1985-86, assigned non-supervisory "fire watch" duties and environmental

department duties. (Magna smelter) (Trans. p. 65-66)

i. 1987 to 1988 anode plant foreman. (Magna smelter)
(Trans. p. 78)

j. 1988 material handling general foreman. (Trans. p.
79)

k. 1988 to January 31, 1989 operations general foreman.
(Bonneville concentrator) (Trans. p. 80)

In all of the positions held by Plaintiff from between mid-1974 until his termination in 1989, one of his principal duties included the discipline of subordinate personnel. (Trans. p. 105) To facilitate this duty, Plaintiff and other company managers were required to attend numerous management training seminars which provided instruction pertaining to the discipline of employees. (Trans. p. 111, 113)

Plaintiff attended the first of such seminars in May 1974. (Trans. p. 113) The company sponsored seminar was held at the Travelodge Motel in Salt Lake City, Utah and taught by employees of Defendant's human resources department. (Trans. p. 110, 113, 114, 390) At the seminar, Plaintiff and others in attendance were instructed that Defendant's policy of progressive discipline, i.e., the use of verbal and written warnings, suspension, termination, and hearings, was to be applied to all employees. (Trans. p. 111, 114)

The second seminar attended by Plaintiff was also held in 1974. The seminar was taught in the Magna smelter by human

resources representatives, Gene Bryant and Sid Hollinger, and as a refresher course to the earlier Travelodge seminar. (Trans. 116-117, 392) The instruction given Plaintiff with respect to employee discipline was consistent with the materials taught at the Travelodge seminar. (Trans. p. 116-117)

Plaintiff testified that in 1976 he attended a third seminar taught by smelter maintenance superintendent, Gerald Hansen, and employee relations director, Sid Hollinger. (Trans. p. 118-119) This seminar was held in the Magna smelter and included the topic of employee discipline. (Trans. p. 119) The instruction relating to progressive discipline was consistent with earlier training given Plaintiff with no distinction made that progressive discipline was limited in application to hourly and union employees. (Trans. p. 120) The instruction provided in the 1976 seminar served to confirm Plaintiff's understanding, gained at the time of his hiring, that progressive discipline was to apply to all employees. (Trans. p. 120)

Plaintiff testified to a fourth seminar which he attended during the 1982-83 time frame and which was also held in the Magna smelter. (Trans. p. 120) The seminar was taught by smelter operations general foreman, Jack Haymond, and smelter maintenance general foreman, Wayne Johnson. (Trans. p. 121) The topic of employee discipline was covered and supplemented

by a videotape presentation of management/leadership styles. (Trans. p. 121) One of the videotapes depicted supervisors disciplining other supervisors. (Trans. p. 121-122) Plaintiff testified that the videotape reinforced his understanding that progressive discipline applied to him and other salary employees. (Trans. p. 121-122) During the seminar, no mention was made that progressive discipline was limited to hourly employees or that salary/supervisory employees were employees at-will. (Trans. p. 122, 123)

Plaintiff attended a fifth company sponsored seminar at the Airport Hilton Hotel in 1983-84. (Trans. p. 123) This seminar was taught by Defendant's employees, Gene Bryant, Wayne Johnson and Jack Haymond, and included the topic of employee discipline. (Trans. p. 123) Defendant's training as to the use and application of progressive discipline was consistent with earlier instruction with no exclusions relating to salary employees. (Trans. p. 123, 125)

In 1986 Plaintiff was asked by smelter manager, Stewart Smith, to teach Defendant's "Fresh Start" program. (Trans. p. 125) Attendance in the "Fresh Start" program was required for all salary and hourly employees who were called back to work after Defendant's shutdown in 1984-85. (Trans. p. 125) Plaintiff taught the "Fresh Start" course every week for almost a year or approximately fifty times in all. (Trans. p. 416) The program was designed to eliminate the adversarial

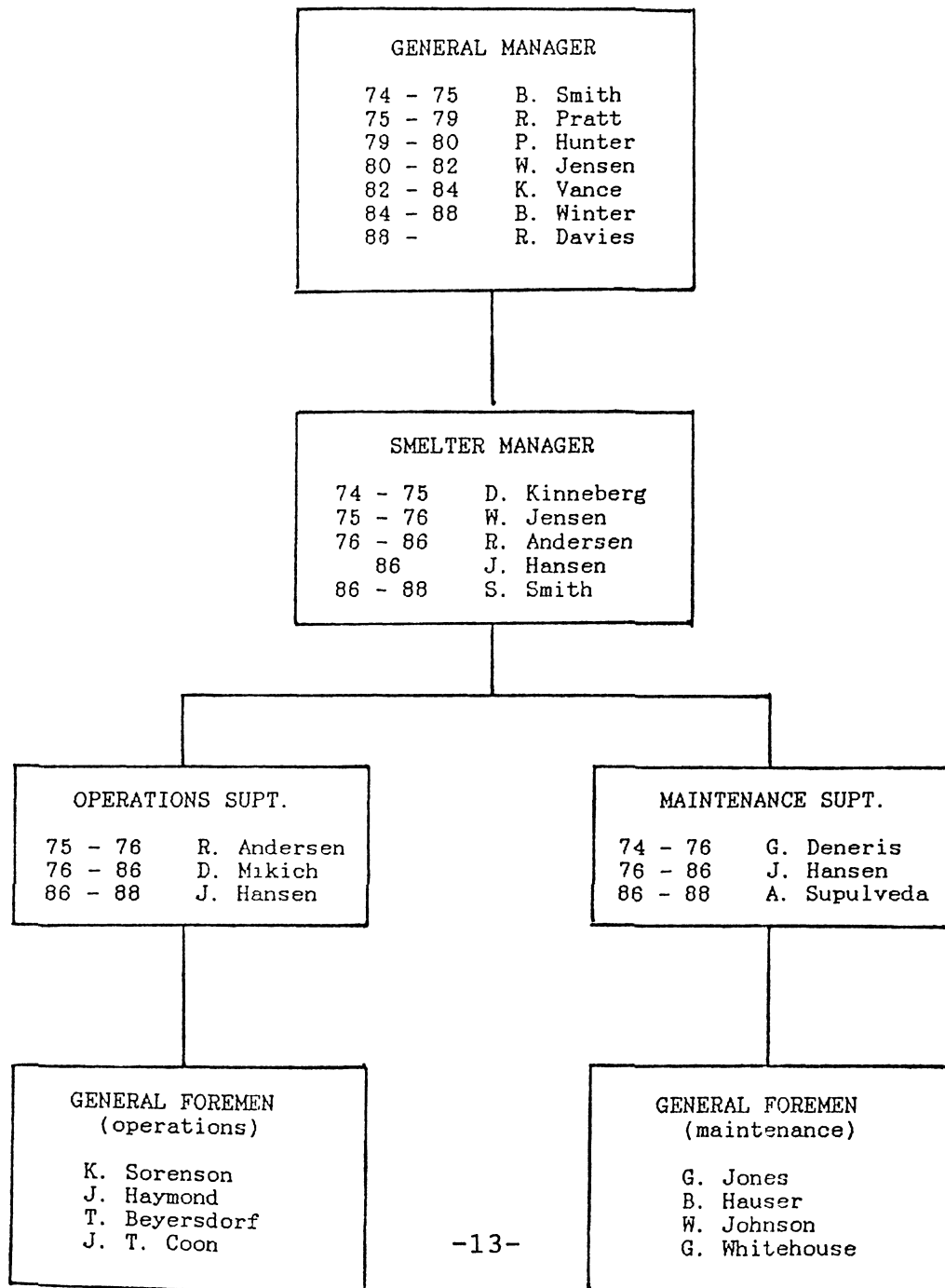
relationship previously existing in the company and to attain greater consistency in managing employees. (Trans. p. 512, 513) During the "Fresh Start" presentation, returning employees were frequently addressed by plant manager, Burgess Winter. (Trans. p. 128) Winter represented to those in attendance that all employees would be informed of performance deficiencies and that all employees would otherwise be informed if their performance was "good or bad". (Trans. p. 128, 129, 130) Plaintiff understood Winter's comments to apply to supervisors because supervisors were in attendance. (Trans. p. 130)

Plaintiff testified to a sixth company seminar held in May 1988. Plaintiff did not attend the seminar but was given the seminar Management Training Manual by smelter maintenance superintendent, Gerald Hansen. (Trans. p. 411, 412, 416)

3. & 4. Oral representations and historical practice with respect to the application of progressive discipline

During the entire fifteen years of his employment, Plaintiff was repeatedly told by senior management and other agents of Defendant that he and other supervisory employees were entitled to progressive discipline prior to discipline or discharge. (Trans. p. 54, 57-58, 110-111, 129-130, 140-144, 174-177, 536-537, 545, 547-548) The communications to Plaintiff defined and required the historical practice and conduct engaged in by the parties in disciplining salary employees.

A chart reflecting the hierarchal structure of management in the Magna smelter was introduced at trial as Plaintiff's Exhibit 30. (Trans. p. 104) It is reproduced here for illustrative purposes only and to assist in establishing the general chain of command in Plaintiff's smelter employment:



Plaintiff testified that during his employment he received oral instruction and informal management training on a day-to-day basis or as the situation arose. (Trans. p. 130) He testified that most of the informal training, which included instruction on the application of Defendant's disciplinary policy, emanated from the smelter's employee relations department and conveyed by Sid Hollinger, Gene Bryant and Messrs. Sequin and Ludwig. (Trans. p. 131) Plaintiff stated that he had many discussions with Bryant which addressed the application of progressive discipline to supervisory employees. (Trans. p. 132, 134) Other instruction was received by Plaintiff from senior smelter management as outlined infra.

With respect to Defendant's historical practice of applying progressive discipline to supervisory employees, Plaintiff testified to a number of specific instances.

Plaintiff recalled that in approximately 1979-80, a Mr. Stireman (foreman) and a Mr. Chesley (anode foreman) were given verbal and written warnings by general foreman, Coon. (Trans. p. 137, 151, 153) The disciplinary problems relating to these two foremen were discussed in a meeting at which Plaintiff, smelter manager, Bob Anderson, maintenance superintendent, Gerald Hansen, and general foremen, Mikich, Haymond, Coon, Hauser, and Johnson, were present. (Trans. p. 135) Because general foreman, Coon, had already given Stireman and Chesley verbal and written warnings, the topic was raised and discussed

as to how the next step, i.e., suspension, would be handled.
(Trans. p. 137)

Plaintiff recalled a conversation which took place in general foreman Mikich's office in which Plaintiff, Mikich and general foreman, Coon, discussed the suspension of a salary employee. (Trans. p. 138)

Plaintiff additionally testified that he was personally aware that a Mr. Corona (service general foreman) was given verbal and written warnings for sleeping on the job and for failure to adequately supervise, (Trans. p. 154), that a Mr. Cottrell (maintenance foreman) was given verbal and written warnings for a safety violation and a suspension for failing to correct his behavior, (Trans. p. 154-156), that a Mr. Callahan (service foreman) was given verbal and written warnings by plant manager, Stewart Smith, for performance problems, (Trans. p. 156-157), that a Mr. Salazar was given a verbal and written warning from plant manager, Stewart Smith for performance problems, (Trans. p. 157-158), and that a Glenn Whitehouse (electrical general foreman) was given verbal and written warnings, suspension and finally termination for alcohol abuse. (Trans. p. 158-159)

Plaintiff testified that he attended a meeting in 1987 which included smelter manager, Stewart Smith, superintendents, Gerald Hansen and Dallas Mikich, and general foremen, Jack Haymond, Wayne Johnson, Bob House and Tom Beyersdorf. (Trans.

p. 139) This meeting was held shortly after Stewart Smith had been named smelter manager and was called to discuss management concepts, including disciplinary policy, that would be used in the smelter. (Exhibit 2, Smith depo. p. 10, 11, 12)

Because Smith was unaware of any written policy governing the discipline of salary employees, in the meeting he asked what procedure was being used to discipline supervisory personnel. (Trans. p. 139, Exhibit 2, Smith depo. p. 12) Smith was informed by Gerald Hansen that supervisors were given progressive discipline, which consisted of hearings, verbal and written warnings, suspension, and finally, termination if all preceding steps failed. (Trans. p. 140)

During this meeting Smith specifically communicated to those present that, if they did not perform properly, they would be told of their "shortcomings" and given the opportunity to "mend their ways". (Exhibit 2, Smith depo. p. 13) He went on to assure the persons in the meeting that if initial verbal counseling did not work then the employee should be given a written warning. (Exhibit 2, Smith depo. p. 13)

In his deposition, which was introduced at trial as Defendant's Exhibit 41, (Trans. p. 653) Smith was asked what procedure he would follow if a supervisory employee committed a more serious violation, such as theft or ingesting alcohol on company property. (Exhibit 2, Smith depo. p. 14) Smith's response paralleled the existing procedure for progressive

discipline. "If a serious offense occurred, the individual would be sent home, and I would have then taken the opportunity to review the circumstances with my superior and with the human resources people, to decide on an appropriate course of action." (Exhibit 2, Smith depo. p. 14)

Plaintiff testified that in another meeting held sometime after the one just mentioned, Stewart Smith instructed supervisors that when disciplining salary employees, verbal warnings should be limited in number, and if ineffective, written warnings should be issued. (Trans. p. 140, 143)

The communications that were made in the two meetings with smelter manager, Stewart Smith, reinforced Plaintiff's belief that he was entitled the procedures of progressive discipline as represented. (Trans. p. 141)

Plaintiff's personal experience in disciplining supervisory subordinates involved issuing verbal warnings to foreman, Ben Smith, (Trans. p. 146) and foreman, Dave Bairline, for their failure to adequately supervise their subordinates. (Trans. p. 147) Plaintiff documented the disciplinary action taken in his logbook and in the file on each foreman. (Trans. p. 148)

Plaintiff was given no authority to deviate from Defendant's policy of applying progressive discipline to supervisory personnel. In this regard he testified to three statements, one by Dallas Mikich and two from Gerald Hansen in

which this policy was clearly communicated. (Trans. p. 174, 176, 177)

The first statement occurred in 1976-77 in the office of operations superintendent, Dallas Mikich. (Trans. p. 174) In the presence of Plaintiff and the other operating general foremen, Mikich stated that progressive discipline was to be "strictly" applied to all employees. (Trans. p. 175)

The second statement occurred during a meeting in the office of Gerald Hansen in the late 1970's. (Trans. p. 176) At this time, Plaintiff held the position of anode general foreman and Hansen was in the senior management position of operations superintendent. (Trans. p. 176) The meeting was attended by two other operating general foremen. (Trans. p. 176) Hansen specifically instructed those present that they were to follow progressive discipline; that employees needed to be made aware of their shortcomings; that he didn't want them to "flock shoot" out there; that they were to make sure that they documented verbal and written warnings so that people knew what was expected of them and what would happen if the supervisor's performance continued to be poor. (Trans. p. 176-177)

The third communication occurred in 1988 and in the context of the suspension of salary employee, Don Cottrell. (Trans. p. 176) During this period, Hansen held the position of operations superintendent and Plaintiff the position of

operating general foreman. (Trans. p. 176) Hansen stated to Plaintiff and the other operating general foremen present that every employee was entitled to the disciplinary procedure of verbal and written warnings, suspensions, etc., and that Plaintiff and other general foremen did not need to worry about "someone walking in at some time and firing them or terminating them without having been told beforehand . . .", or without being provided preliminary discipline. (Trans. p. 177)

Plaintiff's testimony was fully and credibly corroborated through the testimony of Gerald Hansen.

By way of background, Mr. Hansen began his employment with Defendant as a part-time employee in the Magna smelter in 1966, 1967 and 1968. (Trans. p. 479-480) He first began exercising disciplinary duties in 1968. (Trans. p. 480-481) After graduating from the University of Utah in 1969, (B.S. mechanical engineering) Hansen was hired by Defendant full-time in 1970. (Trans. p. 481) Thereafter and until leaving Defendant's employment on September 15, 1989, (Trans. p. 485), Hansen held the following positions in the Magna smelter:

(a) Shop support foreman, 1970 to 1973 (Trans. p. 485-486)

(b) Field repair general foreman, 1973 to January 1977 (Trans. p. 486)

(c) Maintenance superintendent, January 1977 to January 1987 (Trans. p. 486)

(d) Acting plant manager, January 1987 to June 1987 (Trans. p. 486, 545-546)

(e) Operations superintendent, June 1987 to August 1988 (Trans. p. 486, 568)

(f) Manager of engineering projects, August 1988 to September 1989 (Trans. p. 486)

In 1975, Hansen became involved in the development and teaching of management training to Defendant's supervisory employees including Plaintiff. (Trans. p. 489) Hansen was personally instrumental in developing Defendant's policy governing employee discipline. (Trans. p. 490)

At seminars, Hansen taught that Defendant's progressive discipline policy was "impartial" and akin to a "hot stove", i.e., anyone who violated the rules of conduct would be "burned". (Trans. p. 492) Hansen taught that progressive discipline was corrective not punitive in nature, that proper discipline required clear communication of expectations to ensure that employees knew what was expected of them, that certain violations (e.g., fighting and drinking on the job) could lead to immediate termination and that individual employees were to be treated with dignity and respect. (Trans. p. 494)

Of vital importance to the instant case, Hansen testified that company discipline relating to inadequate performance would be corrective in nature and that the company, after giving notice of deficiencies, would work with the employee to improve performance. (Trans. p. 495) Hansen also testified that employees having performance problems were entitled to

"just cause" before being terminated--ordinarily meaning that termination was imposed as a last resort and only after less severe steps in the progressive discipline scheme had been implemented and found ineffectual. (Trans. p. 496) Hansen stated that he taught supervisors to look at the offense and then decide what discipline was appropriate. (Trans. p. 588)

Hansen testified that the first step in the process of progressive discipline involved verbally counseling the individual employee. (Trans. p. 496) If the problem persisted, then stronger measures, either verbal or written warnings should appropriately be given. (Trans. p. 497) If the preceding steps failed to correct the problem, then suspension with or without pay could be imposed and, if all else failed, the employee could be terminated. (Trans. p. 497)

Hansen testified that he first began teaching the policy of progressive discipline to smelter frontline foremen, general foremen and plant managers over a four month period in 1975, (Trans. p. 497, 498) and specifically taught that the procedure applied to all employees, including supervisory employees. (Trans. p. 496, 499)

When asked if he knew how long smelter supervision had been subject to progressive discipline, Hansen testified that the practice was already in existence when he began working there in 1970. (Trans. p. 500)

Hansen not only taught the above principles of progressive

discipline to employees in the Utah Copper Division but also taught the course to Defendant's employees in the Nevada Mines Division and in Tucson, Arizona as well. (Trans. p. 509)

Hansen testified that, while employed in the smelter, discussions pertaining to the application of progressive discipline to supervisory employees were engaged in "as a matter of course", (Trans. p. 532) and that supervisory employees were told that they were entitled to progressive discipline on a "routine basis". (Trans. p. 536-538) Hansen explained that many of these discussions took place in regularly scheduled Thursday morning meetings attended by all smelter management, including Plaintiff, (Trans. p. 532, 533) and the purpose of discussing discipline was to ensure consistency of discipline in the plant and division. (Trans. p. 534) Hansen testified that at no time during employment was he told that the principles of progressive discipline were to be confined to hourly/union employees. (Trans. p. 519)

Hansen testified to numerous discussions involving the application of progressive discipline to smelter management employees. They are as follows:

(a) Discussion occurring in 1987-88 involving the termination of a supervisory employee, a Mr. Lindsey, who had been caught stealing scaffolding. (Trans. p. 534, 535)

(b) Two discussions in the smelter conference room on two separate occasions, relating to the suspension of salary

employee, Don Cottrell. (Trans. p. 539) The first involved a discussion as to whether the progressive step of suspension was appropriate discipline where Cottrell had committed a "reckless" and unsafe act. (Trans. p. 540, 562) During this meeting, newly appointed smelter manager, Stewart Smith, inquired as to the means by which salary employees were being disciplined. (Trans. p. 540) As referenced, supra, Hansen explained that progressive discipline constituted the historical practice used in this regard. (Trans. p. 540) The second discussion occurred approximately two weeks later, (Trans. p. 542, 543) and again involved whether Cottrell should be suspended under the policy of progressive discipline. (Trans. p. 543-544) When Hansen was questioned whether Smith ever instructed him to discontinue the practice of applying progressive discipline to salary employees, Hansen testified that Smith had not. (Trans. p. 542)

(c) Discussions relating to Hansen's application of progressive discipline to electrical general foreman, Glenn Whitehouse. (Trans. p. 537, 554) Hansen testified that he was Whitehouse's immediate supervisor and that the application of progressive discipline to Whitehouse for poor performance was specifically discussed with human resources employee, Gene Bryant, in 1985. (Trans. 551, 553, 555) Hansen's discussion with Bryant involved reviewing the need to apply the initial steps of verbal counseling to Whitehouse. (Trans. p. 552)

Hansen testified that the disciplinary steps subsequently afforded Whitehouse consisted of (1) verbal counseling and a six month opportunity to correct performance; (Trans. p. 554), (2) providing Whitehouse with written notice of performance deficiencies in his annual performance evaluation; (Trans. p. 555), (3) Hansen and Gene Bryant issuing Whitehouse a written warning which stated, "if your performance does not improve, you will be terminated"; (Trans. p. 555), (4) a copy of the written notice placed in Whitehouse's personnel file and a copy sent to smelter manager, Bob Anderson; (Trans. p. 555), (5) suspension; (Trans. p. 555), and, (6) ultimately termination. (Trans. p. 555) Hansen further testified that the underlying purpose of applying progressive discipline to Whitehouse and other supervisory employees was to give the employee a chance to correct problem behavior, demonstrate that individuals in the company were important and because of the Defendant's investment in its supervisory personnel, to utilize termination only as a last resort. (Trans. p. 556)

(d) Perhaps the most compelling portion of Hansen's testimony pertained to his specific communications to Plaintiff. Hansen testified that in 1987 he was Plaintiff's immediate supervisor and specifically instructed Plaintiff to apply progressive discipline to Plaintiff's supervisory subordinates. (Trans. p. 545-547) Hansen also testified that he made it clear to Plaintiff that the implementation of this

disciplinary policy was not discretionary because Defendant's purpose was to achieve "uniformity in how discipline was applied throughout the organization". (Trans. p. 547) Hansen went on to state that Plaintiff's failure to provide other supervisors with progressive discipline could have caused Plaintiff to have been disciplined himself. (Trans. p. 547-548)

Hansen testified that, during his employment with Defendant, he was personally aware that progressive discipline had been received by the following employees: (1) maintenance foreman, Bryan Booth, given a verbal warning by general foreman, Bob Houser, in 1981-82; (Trans. p. 559-560), (2) service foreman, Steve Poulsen, given verbal and written warnings for poor performance by his general foreman in 1987; (Trans. p. 560-561), (3) anode foreman, Lynn Belka, given verbal and written warnings by his general foreman, Ken Britton, in 1987, 1989; (Trans. p. 561), (4) maintenance foreman, Don Cottrell, suspended by maintenance superintendent, Al Supulveda; (Trans. p. 565), (5) maintenance foreman, Ron Carlson, given a verbal warning by Gerald Hansen for poor performance; (Trans. p. 563), and, (6) maintenance foreman, Clyde Andrus, given a verbal warning by Gerald Hansen in 1982-83. (Trans. p. 563)

Hansen stated that the discipline of supervision was done quietly and not generally publicized or announced plant wide

for fear of jeopardizing respect for supervisors and impairing their ability to lead subordinate employees. (Trans. p. 556)

Plaintiff's and Hansen's testimony was corroborated by that of former smelter general foreman, Tracy Johnson.

Mr. Johnson testified that he was employed by Defendant from between February 5, 1979, to July 25, 1989. (Trans. p. 626) He worked in the Magna smelter during two periods; initially from between February 1979 to October 1981 and again from October 1986 to the time of his discharge in July 1989. (Trans. p. 627) While in the smelter, Johnson held the positions of maintenance engineer and material handling general foreman, (Trans. p. 628) both roles requiring the discipline of subordinates when necessary. (Trans. p. 628)

During his examination, Johnson was asked whether Defendant applied a policy of progressive discipline to supervisory personnel. (Trans. p. 630) Johnson responded affirmatively and stated that he gained such a knowledge through attendance in a series of management courses and observing the "general procedures that were utilized in the plant". (Trans. p. 631, 636)

With respect to management training, Johnson testified that he was required to attend two company seminars, one at the Airport Hilton in February 1979, (Trans. p. 631), and another in 1988. (Trans. p. 633) At both seminars Johnson received instruction on the nature and use of progressive discipline and

recalled no mention made that progressive discipline was solely limited to hourly employees. (Trans. p. 635)

Johnson testified to specific instances when progressive discipline was applied to supervisory employees.

The first involved Johnson having to discipline one of his subordinate foremen, Ben Smith, for inadequate performance in September 1988. (Trans. p. 639-641) The matter was discussed with Smith and Johnson's supervisor, Ken Britton. (Trans. p. 639, 640) Britton instructed Johnson to initially issue Smith a verbal warning and, if ineffective, to follow it up with a written warning stating Smith's performance problem. (Trans. p. 640-641)

Johnson further testified that, in a regularly scheduled meeting, he participated in a discussion relating to the progressive discipline of a foreman under the supervision of Steve Bailey. (Trans. p. 641)

Johnson stated that he had been progressively disciplined in December 1988 by being given a written warning of inadequate job performance. (Trans. p. 643-644) Johnson additionally testified to being present during discussions relating to the progressive discipline of Don Cottrell, (Trans. p. 644-645) and being told by Gerald Hansen that progressive steps of discipline would be applied to supervisory personnel. (Trans. p. 646)

5. Defendant's use of annual performance evaluations

Plaintiff testified that one means used to provide warning to salary employees of inadequate or unsatisfactory performance was through Defendant's use of performance evaluations. (Trans. p. 179, 555) Management employees could expect to be evaluated on an annual basis and the results used for such things as notification of performance problems, raises in salaries and promotions. (Trans. p. 178-179, 555) At trial, Plaintiff introduced into evidence as Plaintiff's Exhibits 7, 8, and 9, his performance evaluations for the years 1982, 1987 and 1988. (Plaintiff's 1982, 1987 and 1988 Performance Evaluations, attached hereto as Exhibit 3, Trans. p. 181-182, 277) All reflected satisfactory performance including Plaintiff's 1988 evaluation conducted approximately three months before his termination. When asked how he rated his own performance while employed by Defendant, Plaintiff testified that he had not once been disciplined for violations of the rules and at all times believed his performance to have been "excellent". (Trans. p. 185-186)

Plaintiff's testimony regarding the use of performance evaluations to notify management employees of performance problems was corroborated in the testimony of witness, Gerald Hansen. Hansen testified that, in the application of progressive discipline of electrical general foreman, Glenn Whitehouse, Hansen included statements in Whitehouse's performance evaluation that, "he had to improve his performance

in order to retain his current position". (Trans. p. 555)

SUMMARY OF ARGUMENTS

In dismissing Plaintiff's Complaint, the trial Court erred in finding that, (1) no discussion occurred at the time of Plaintiff's hiring rebutting the presumption that Plaintiff was hired at-will; and, (2) that the 1973 General Rules of Conduct failed to establish an implied term and condition of Plaintiff's employment. (Order and Judgment of Dismissal, Findings of Fact, paras. 1(a) and 4, attached hereto as Exhibit 4).

The trial Court failed to properly consider Plaintiff's testimony regarding his conversations with human resources employees, Charles Bird and Gene Bryant, which were engaged in at or about the time of Plaintiff's firing. The representations by Bird and Bryant relating to the use and application of the 1973 General Rules of Conduct can only be interpreted as providing Plaintiff with protection from arbitrary discipline or discharge and promising something other than at-will employment.

The trial Court failed to properly interpret the Defendant's policy statement entitled "General Rules of Conduct", signed by Plaintiff and his supervisor, D.A. Kinneberg. The trial Court should have construed the General Rules of Conduct as an offer and acceptance to limit Defendant's right to discipline Plaintiff or terminate his

employment for any or no reason. The effect of such a finding would have precluded dismissal of Plaintiff's Complaint under Rule 41(b) of the URCP.

The trial Court erred in finding that Defendant's long time practice of applying the principles of progressive discipline to Plaintiff and other mid-level supervisory employees was simply "good management" as opposed to constituting a binding contractual term of Plaintiff's employment. (Exhibit 4, Findings of Fact, para. 1(b))

Defendant's practice, which was consistent with the language contained in the 1973 General Rules of Conduct, was required to be implemented by Plaintiff and applied to Plaintiff's supervisory subordinates.

The lower Court found that the disciplinary procedures applicable to supervisory employees were less formally applied than those for hourly employees under the collective bargaining agreement. (Exhibit 4, Findings of Fact, para. 1(b)) This finding is irrelevant and misses the point when analyzed against the testimony of Plaintiff, Gerald Hansen and Tracy Johnson. Even if the procedures used with respect to supervisory employees were somewhat different than those contained in the collective bargaining agreement, there nevertheless existed a separate procedure limiting Defendant's right to terminate Plaintiff's employment for any or no reason. Plaintiff has never claimed that he was entitled to the

progressive discipline procedure found in the collective bargaining agreement. Rather, Plaintiff's claim is based on Defendant's historical course of conduct, and its unilateral decision to extend and apply progressive discipline to supervisory employees.

Moreover, Plaintiff's failure to apply principles of progressive discipline to other salary employees under his supervision could have subjected him to discipline for failure to follow company policy. Under all the circumstances, the belief that he was entitled to progressive discipline prior to termination can hardly be construed as a subjective figment of Plaintiff's imagination.

In reaching its conclusions, the trial Court inexplicably disregarded the testimony of Plaintiff's supervisor, Gerald Hansen, which included that, (1) it was Defendant's historical practice to apply progressive discipline to Plaintiff and other supervisory personnel; (2) Hansen had told Plaintiff that he was entitled to progressive discipline prior to discipline or discharge; (3) Plaintiff was required to apply the progressive discipline policy to Plaintiff's subordinates; and, (4) Plaintiff could have been disciplined for failure to implement the policy of progressive discipline as instructed.

In reaching its conclusions, the trial Court also disregarded the credible testimony of witness, Tracy Johnson, which included knowledge that progressive discipline was

applied to supervisory personnel and that he had experienced such discipline himself.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT WITH PREJUDICE UNDER RULE 41 (b) OF THE URCP.

A. INTRODUCTION AND SUMMARY OF EXISTING LAW

In the seminal case of Berube v. Fashion Centre, Ltd, 771 P.2d 1033, 1044 (Utah 1989), this Court recognized that the existence of an implied-in-fact contract can rebut the presumption that an employee is hired at-will. "The at-will rule, after all, is merely a rule of contract construction and not a legal principle." Id. "The rule creates a presumption that any employment which has no specified term of duration is an at-will relationship." Id.

"This presumption can be overcome by an affirmative showing by the plaintiff that the parties expressly or impliedly intended a specified term or agreed to terminate the relationship for cause alone." Id. "Such evidence may be found in employment manuals, oral agreements, and all circumstances of the relationship which demonstrate the intent to terminate only for cause or to continue employment for a specified period." (emphasis added) Id.

The course of the parties' performance can be significant

in determining the terms or meaning of an [implied] agreement, Id. at 1342, (obtain cite) and in employment termination cases, the mere claim of an employer that it did not intend to be bound contractually has been found insufficient to prevent contract formation. Courts will therefore measure the employer's intent by the reasonable interpretation of its words and actions under all the circumstances. Rose v. Allied Development Co., 719 P.2d 83, 86 (Utah 1986).

Courts have been hesitant to limit the spectrum of circumstances that may support the formation of an implied-in-fact contract, Berube, supra, at 1045, and factors which have been found relevant include, the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged. Berube, supra at 1045, [Berube court citing, Pugh v. See's Candies, Inc., 171 Cal.Rptr. 917 (App. 1981)].

In cases since Berube, the Utah Supreme Court has specifically held that implied contracts can arise from employee manuals and bulletins containing policies for employee termination, Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1000 (Utah 1991); employment manuals and unilateral statements of policy practice and procedure, Caldwell v. Ford, Bacon & Davis, 777 P.2d 483 (Utah 1989); oral statements, Sanderson v.

First Security Leasing, 201 Utah Adv. Rep. 18 (Utah 1992); and oral statements and conduct of the employer, Hodgson v. Bunzi Utah, Inc., 202 Utah Adv. Rep. (Utah 1993).

Significantly, in the recent case of Thurston v. Box Elder County, 191 Utah Adv. Rep. 27, 29 (Utah 1992) the Court recognized that intangible as well as tangible circumstances should be examined to determine the intent of the parties:

Therefore we hold that if an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and an employee is induced to thereby remain on the job and not actively seek other employment, those promises are components of the employment relationship.
(Emphasis added).

In the case of Thurston v. Box Elder County, 191 Utah Adv. Rep. 27, 29 (1992), this Court firmly established that, "employees have the right to rely on the layoff and termination procedures advanced by their employers". This right arguably stems from inequities frequently found in the relationship between employee and employer.

Within the confines of existing law, employers are acknowledged to possess the right to organize and operate their business as they see fit. Because most employees work at-will, this clearly includes, with some limitation, the right to hire and fire for any reason or no reason in accordance with the

vagaries of the marketplace. Though perhaps grounded in economic necessity, treatment of at-will employees is often unfair and can result in extraordinary economic hardship.

A growing number of courts have decided that, where contractual rights and obligations are created, whether expressed or implied, at-will status is rebutted and the parties will be bound accordingly. This position rests on the assumption that it is the employer who has control to either create or abolish at-will status. If the employer, unilaterally or otherwise, establishes policies that are justifiably relied upon by the employee the employer cannot later disavow the same without incurring legal liability.

This viewpoint is recognized in Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1087 (Wash. 1984), a case cited with approval in Thurston v. Box Elder County, 191 Utah Adv. Rep. 27, 29 (1992). The Thompson court observed:

"Where the employment relationship is not evidenced by a written contract and is indefinite in duration the parties have entered into a contract whereby the employer is essentially obligated to only pay the employee for any work performed. In this contractual relationship the employer exercises substantial control over both the working relationship and his employees by retaining independent control of the work relationship. Thus the employer can define the work relationship. Once the employer takes unilateral action it is bound . . . "

In support of its dismissal of Plaintiff's Complaint, the trial Court relied on the findings that, (1) there was no

discussion at the time of hiring which rebutted the presumption that Plaintiff was hired at-will; (Exhibit 4, Findings of Fact, paras. 1(a)), (2) the provisions of the 1973 General Rules of Conduct were insufficient to rebut the presumption that Plaintiff was hired at-will; (Exhibit 4, Findings of Fact, para. 4), (3) that Defendant's long term practice of applying the principles of progressive discipline to Plaintiff and other supervisory employees was simply "good management" and never part of an employment contract; (Exhibit 4, Findings of Fact, para. 1(b)), and, (4) that Plaintiff otherwise failed to bear its burden of proof in establishing the existence of an implied contract requiring progressive discipline prior to termination. (Exhibit 4, Conclusions of Law, paras. 1 and 2)

The lower Court's findings and dismissal in this regard are erroneous because they are contrary to existing law and ignore this Court's admonition in Berube, supra, at 1044, that "rigid adherence to the at-will principle is no longer advisable".

At trial, Plaintiff had the burden of establishing the existence of an implied-in-fact contract of employment and that his employment was something other than "at-will". Berube, supra at 1044. Plaintiff presented a wealth of evidence supporting its contention that Defendant had unilaterally obligated itself to discharge him only for cause and only after

exhausting a process of progressive discipline. Plaintiff maintains that significant portions of its evidence were ignored by the trial Court in dismissing Plaintiff's Complaint and in otherwise finding that Plaintiff failed to satisfy its burden of proof.

In the case of Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1002 (Utah 1991) this Court identified the specific elements necessary to establish the requisite "affirmative showing". The Court held that "for an implied-in-fact contract term to exist, it must meet the requirements for an offer of a unilateral contract". The Court additionally held that such an offer includes, (1) a manifestation of intent; (2) communicated to the employee; (3) sufficiently definite to operate as a contract provision; and, (4) the manifestation must be of a sort that causes the employee to reasonably believe that his employment is something other than "at-will".

During trial, and as hereinafter set forth, Plaintiff presented evidence which clearly satisfied all of the requirements identified in Johnson, supra, needed to establish an implied-in-fact contract and to avoid dismissal under Rule 41(b) URCP.

In the case before this Court, manifestations of the parties intent include, (1) Defendant's 1973 General Rules of Conduct, signed by the parties; (2) Defendant's management training and materials received by Plaintiff during his

employment; (3) specific oral instruction from Defendant that progressive discipline was applicable to Plaintiff and other supervisory personnel; (4) Defendant's historical application of progressive discipline to supervisory personnel; and, (5) Defendant's use of annual performance evaluations.

When the specifics of the above conduct and behavior are analyzed in the context of Plaintiff's fifteen year employment, it is inconceivable that Defendant can now claim that its termination of Plaintiff, in summary fashion and without warning, was consistent with its announced policy. This Court should therefore reverse the lower Court's dismissal of Plaintiff's Complaint and find that the parties intended to be contractually bound to an implied-in-fact contract of employment guaranteeing Plaintiff a procedure of progressive discipline before termination for poor performance.

1. THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT'S 1973 "GENERAL CODE OF CONDUCT", FAILED TO CONSTITUTE AN IMPLIED TERM AND CONDITION OF EMPLOYMENT AND REBUTTED THE PRESUMPTION THAT PLAINTIFF WAS HIRED AT-WILL.

Plaintiff was hired by the Defendant on March 25, 1974. (Trans. p. 50) Contemporaneous with his hiring, Plaintiff was interviewed by Defendant's director of human resources, Charles Bird. (Trans. p. 51) Mr. Bird presented Plaintiff with several company documents requiring Plaintiff's signature. (Trans. p. 53-55) One was a statement of company policy dated

July 1, 1973, and entitled "General Rules of Conduct". (Trans. p. 53) Plaintiff was required to sign the General Rules of Conduct to evidence that he read and understood its contents. (Trans. p. 53) The policy statement was additionally signed by Plaintiff's supervisor and smelter plant superintendent, D.A. Kinneberg. (Trans. p. 53, Exhibit 1)

Relevant language in the document states that the enumerated rules, although "not all-inclusive", are "the general rules of conduct that apply to all Kennecott personnel while on company operating property". (Emphasis added). the document also states that, "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, layoff or discharge, depending upon the seriousness of the offense." (Exhibit 1)

Bird explained to Plaintiff that the General Rules of Conduct was the means by which violations of company rules would be addressed. (Trans. p. 54) In subsequent interview by employee relations representative, Gene Bryant, the same instruction was given, i.e., Plaintiff was expected to follow the provisions of the Rules of Conduct and that failure to do so could lead to discipline or discharge. (Trans. p. 57-58)

In the field of labor relations, the type of disciplinary scheme as set forth in the General Rules of Conduct, and utilized by Defendant is commonly known as "progressive

discipline". As the name implies, progressive discipline is implemented in steps which are normally applied in graduated fashion. With respect to problems like poor performance, its overall objective is to correct behavior not to punish the employee, i.e., by inflicting unreasonably harsh discipline. (Trans. p. 489-497)

At trial, Plaintiff argued that the provisions contained in the Rules of Conduct, added to the way in which the policy was presented to Plaintiff, constituted a clear manifestation that Plaintiff's employment status was something other than at-will and that, during his employment, Plaintiff would not be subject to arbitrary discipline and discharge. (Trans. p. 352-356)

It is settled law in Utah that policy statements of the employer, such as Defendant's General Rules of Conduct, can rebut the presumption of at-will employment. Lowe v. Sorenson Research Co. Inc., 779 P.2d 668, 670 (Utah 1989), Caldwell v. Ford, Bacon & Davis Utah, Inc., 777 P.2d 483, 485 (Utah 1989), and Brehany v. Nordstrom, Inc., 812 P.2d 49, 54 (Utah 1991).

In the case of Caldwell v. Ford, Bacon & Davis Utah, Inc., 777 P.2d 483, 485 this Court held that a policy manual containing "operations bulletins" setting forth specific termination procedures could be construed as an implied promise limiting the employer's right to discharge for any or no reason. In the Court's decision it was noted that the

employer's unilateral promises can be binding even in the absence of a manifestation of mutual assent. Id. at 485-486. The facts in the instant case are stronger than those in Caldwell, supra, because Defendant's General Rules of Conduct were accompanied with clear expressions of mutual assent.

First, the language in the General Rules of Conduct is clear and unequivocal and as such constitutes a definite offer; second, acceptance of the terms contained in the Rules of Conduct is evidenced by Plaintiff's signature and that of D.A. Kinneberg; third, Defendant's intended meaning of the provisions of the Rules of Conduct was communicated to Plaintiff on two separate occasions by Defendant's human resources representatives, Charles Bird and Gene Bryant; fourth, Plaintiff testified that, from the time of his hiring, he believed he was entitled to a policy of progressive discipline prior to being terminated from employment; and, finally, Defendant's subsequent practice in applying progressive discipline to supervisory personnel was in all ways consistent with the representations contained in the General Rules of Conduct.

On the witness stand, Plaintiff testified that there was never one instance, orally or in writing, which ever contradicted his understanding that the disciplinary and termination procedures contained in the 1973 General Rules of Conduct and the fifteen year practice of applying progressive

discipline to him and others in like positions had ceased or been discontinued. (Trans. p. 110-111, 116-117, 120, 122-123, 130, 140, 144-145, 149-151, 167-168, 171-172, 174-177, 390)

The trial Court's specific finding that there was no discussion at the time of Plaintiff's hiring that rebutted the presumption that he was hired at-will is clearly contrary to the undisputed evidence and ignores Plaintiff's conversations with Charles Bird and Gene Bryant. "The construction of contract terms is an issue of law to be determined by the court." Hodgson v. Bunzi Utah, Inc., 202 Utah Adv. Rep. 22, 23 (Utah 1992). A reviewing court, however, will not automatically defer to the trial court's conclusions of law but instead will review them for correctness. Southern Title Guar. Co. v. Bethers, 761 P.2d 951, 954 (Utah 1988).

Plaintiff respectfully submits that this Court reverse the trial Court's conclusion, find that said policy statement rebuts the presumption that Plaintiff was hired at-will, and remand this matter for further proceedings as prayed for herein.

2. THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANT'S ORAL REPRESENTATIONS AND HISTORICAL CONDUCT OF APPLYING THE PRINCIPLES OF PROGRESSIVE DISCIPLINE TO PLAINTIFF AND OTHER SUPERVISORY PERSONNEL WAS MERELY "GOOD MANAGEMENT" RATHER THAN AN IMPLIED TERM AND CONDITION OF PLAINTIFF'S EMPLOYMENT.

It is Plaintiff's contention that he was never an employee

at-will because, at the time of his hiring, Defendant promised to follow a procedure of progressive discipline as outlined under the 1973 General Rules of Conduct and at all times thereafter applied a disciplinary policy which was consistent with the 1973 Rules of Conduct.

In the alternative, even if the circumstances surrounding the 1973 General Rules of Conduct did not rebut the presumption that Plaintiff was hired at-will, Plaintiff's status was subsequently defined through Defendant's practice of applying progressive discipline to Plaintiff and other salary/supervisory employees. (For sake of brevity, Plaintiff will not repeat the extensive body of evidence presented at trial and contained in the "Relevant Facts" section of Plaintiff's brief herein.)

The trial Court found that Defendant's historical practice in this regard was merely "good management". With this, Plaintiff does not take issue. The implementation of an orderly and "corrective" disciplinary policy vis-a-vis Defendant's supervisory personnel no doubt created a positive effect of the stability and morale of Defendant's salary work force.

The trial Court's additional finding however, that Defendant's management policy did not create an implied term of Plaintiff's employment, is disputed. The question is whether the Defendant engaged in a course of oral representations and

conduct that estops it from now alleging that Plaintiff was employed at-will. In the recent case of Sanderson v. First Security Leasing, 201 Utah Adv. Rep. 18, 20 (Utah 1992) this Court observed that,

At-will employment is a bundle of different privileges, any or all of which an employer can surrender through an oral agreement. In addition to a promise for a specified term or a for-cause requirement for termination, an employer can, for example, agree to use a certain procedure for firing employees or promise not to fire employees for a certain reason, thereby modifying the employee's at-will employment.

Defendant's oral representations and conduct caused Plaintiff to reasonably believe that progressive discipline was included as a term and condition of his employment. It does not follow that a good management practice cannot also constitute an implied term and condition of one's employment. Defendant's extensive history of applying progressive discipline to supervisory employees constitutes a clear "surrender" of the presumption that Plaintiff was employed at-will.

3. THE TRIAL COURT ERRED IN FAILING TO PROPERLY CONSIDER THE TESTIMONY OF GERALD HANSEN IN FINDING THAT PROGRESSIVE DISCIPLINE DID NOT CONSTITUTE A TERM AND CONDITION IN PLAINTIFF'S EMPLOYMENT.

During trial, Plaintiff testified to his attendance at a number of meetings and seminars where smelter superintendent,

Gerald Hansen, communicated company policy and procedure to those present. (Trans. p. 116-117, 139-140, 144, 149-151, 174, 176-177) Many of the meetings referred to by Plaintiff were also attended by senior smelter management, such as smelter general manager, Stewart Smith, and his predecessor, Bob Anderson. (Trans. p. 135-137, 139-140) These upper echelon managers tacitly or otherwise ratified the representations made by Hansen to those in attendance. (Trans p. 519, 548)

The Defendant's employment environment is not significantly different than most others, in that the Plaintiff was not free to question the instructions given him by his superiors. Likewise, neither could he interrogate his superiors in order to determine whether an announced policy had been approved by top level corporate management and/or issued pursuant to his supervisor's authority.

In the work place, it is generally assumed that one's supervisor possesses that authority reasonably necessary to effectively administer and control the tasks at hand. It is therefore axiomatic that most employees do what they are told, must rely on what they are told, and cannot question the authority of their supervisors without fear of being disciplined for insubordination. Plaintiff was no exception.

In all aspects, Plaintiff's testimony was credibly supported and corroborated by smelter superintendent, Gerald Hansen. Hansen testified that he had spent years developing

and teaching disciplinary policy to Defendant's employees in Defendant's Utah Division, Nevada Mines Division and to Defendant's employees in Tucson, Arizona. (Trans. p. 509)

Hansen additionally testified that the practice of applying progressive discipline to salary employees was in existence at the time he was assigned full-time employment in the Magna smelter in 1970, that, over the years, either as Plaintiff's immediate supervisor or as senior management, he had personally represented that Plaintiff and other supervisors were entitled to progressive discipline prior to being disciplined or discharged, and that Plaintiff was required to apply the procedures to his supervisory subordinates or else risk discipline himself. (Trans. p. 497-502, 532, 536-537, 545, 547-548, 553)

In further testimony, Hansen stated that his instructions to Plaintiff and other management employees were based on his extensive experience in developing Defendant's management training materials and procedures, and with the overt acquiescence of the Defendant. (Trans. p. 541-542, 566-567) Hansen also stated that he was never told that Plaintiff or other mid-level supervisors were employed at-will or were not otherwise entitled to the principles of progressive discipline. (Trans. p. 519-520, 583-584)

The oral representations, through Hansen and others, together with the consistent application of progressive

discipline to Plaintiff's salaried co-employees, (Trans. p. 537-539, 558-565) served to continually reinforce Plaintiff's belief that he was entitled to progressive discipline. At the very least, Defendant's course of conduct created the "atmosphere" of protected employment referred to by the Court in Thurston v. Box Elder County, 191 Utah Adv. Rep. 27, 29 (Utah 1992).

Under principles of agency, the statements and representations made by Plaintiff's superiors, in the scope and course of employment, were sufficient to bind the Defendant to terms of an implied-in-fact contract.

As a senior manager in the Magna smelter, Hansen clearly had the actual, apparent or ostensible authority to bind Defendant to an implied-in-fact and/or unilateral contract of employment with Plaintiff. The apparent or ostensible authority of an agent can be inferred only from the acts and conduct of the principal. City Electric v. Dean Evans Chrysler-Plymouth, 672 P.2d 89, 90 (Utah 1983).

Where corporate liability is sought for acts of its agent under apparent authority, liability is premised upon the corporation's knowledge of and acquiescence in the conduct of its agents which has led third parties to rely upon the agent's actions. Id. at 90. Apparent authority vanishes when the third party has actual knowledge of the real scope of the agent's authority. Id. at 90.

In this case, smelter general managers, Stewart Smith, and Smith's predecessor, Bob Anderson, delegated actual authority to Hansen to communicate the representations made to Plaintiff and others regarding the application of progressive discipline to salaried personnel. Even if actual authority was not delegated or otherwise transmitted, Hansen was certainly clothed with apparent authority and his representations to Plaintiff and others were, in fact, ratified by the smelter manager, Stewart Smith, and therefore binding. Plaintiff was therefore fully entitled to rely on the representations of his superiors because there was literally no evidence produced which refuted their statements or the policy of progressive discipline communicated by them.

REQUEST FOR ORAL ARGUMENT

In order to assist the Court in deciding the issues raised herein, Plaintiff respectfully requests the opportunity to present oral argument.

CONCLUSION AND RELIEF SOUGHT

The trial Court erred in dismissing Plaintiff's Complaint under Rule 41(b) URCP. At trial, Plaintiff's evidence established a right to relief by affirmatively rebutting the presumption that Plaintiff was hired at-will and otherwise entitled to a procedure of progressive discipline prior to being terminated.

Plaintiff respectfully requests that this Honorable Court reverse the decision of the trial Court, vacate its Order and Judgment of Dismissal pursuant to Rule 41(b) URCP and remand this case for further proceedings in accordance with its decision. Inasmuch as trial Court Judge, Scott Daniels, has permanently left the Bench, remand for further proceedings would necessitate a completely new trial. Plaintiff, finally requests reimbursement of his costs on appeal as provided by Rule 34 of the Utah Rules of Appellate Procedure.

DATED this 20 day of February, 1993.

RESPECTFULLY SUBMITTED

A handwritten signature in black ink, appearing to be 'R. C. Davis', written over a horizontal line.

REID C. DAVIS
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE


STATE OF UTAH)
 : ss.
County of Salt Lake)

KAREN L. KNUTSON, being duly sworn, says:

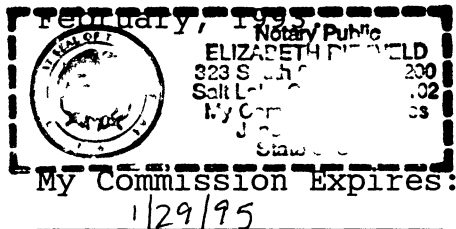
That she is employed in the offices of Reid C. Davis, of the law firm COOK & DAVIS, attorney for Plaintiff herein; and that she served the attached BRIEF OF APPELLANT upon:

Barbara Polich
PARSONS, BEHLE & LATIMER
201 South Main Street, Suite 1800
Post Office Box 11898
Salt Lake City, Utah 84147-0898

by hand-delivering a true and correct copy thereof in an envelope on the 2 day of February, 1993.


KAREN L. KNUTSON

Subscribed and sworn to before me this 2nd day of




Notary Public

EXHIBIT 1

KENNECOTT COPPER CORPORATION
UTAH COPPER DIVISION

July 1, 1973

TO: ALL UTAH SMELTER EMPLOYEES

SUBJECT: GENERAL RULES OF CONDUCT

FORWARD

All organizations require rules by which to operate efficiently. Without them, an individual in that organization would be unable to work effectively toward the organization's goals.

We expect you to observe those "common sense" rules of honesty, common decency, and general conduct always necessary when a large group is working together, so that the actions of one individual will not be detrimental to other employees, or to the company.

Listed below are the general rules of conduct that apply to all Kennecott personnel while on company operating property. These rules are not all-inclusive, but serve as a guide to good company citizenship.

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 layoff or discharge, depending upon the seriousness of the offense.

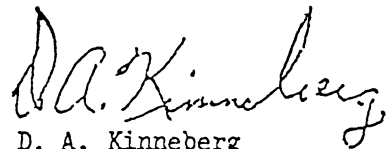
1. Insubordination is prohibited.
2. Drinking or being under the influence of or possessing intoxicants is prohibited.
3. Sleeping during working hours is prohibited.
4. Fighting is prohibited.
5. Stealing or hiding of property, materials, or supplies of the company or of another employee with malicious intent is prohibited. Borrowing, without permission, is prohibited.
6. Leaving the job (work place) during working hours without supervisory permission is prohibited.
7. Distributing literature without permission is prohibited.
8. Violation of safety and operating rules is prohibited.
9. Personal weapons or firearms of any type are prohibited.

EXHIBIT

1

KS000569

10. Soliciting funds or money, without managerial authorization, is prohibited.
11. Interfering with the work of others is prohibited.
12. Taking pictures without management authorization is prohibited.
13. Destruction or defacing of company property or that of another employee by willful intent or neglect is prohibited.
14. Reading during working hours without permission is prohibited.
15. Gambling is prohibited.
16. Playing cards or other games during working hours is prohibited.
17. Falsification of records or reports is prohibited.
18. Horseplay is prohibited.
19. Loafing or malingering is prohibited.

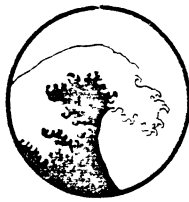


D. A. Kinneberg
Smelter Plant Superintendent



KS000512

EXHIBIT 2



Tempest
Reporting, Inc.

Post Office Box 3474
Salt Lake City, Utah 84110

Telephone
(801) 521-5222

COPY

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

-O-

KELLY SORENSON, : Civil No. 890905608
Plaintiff, : (Judge Scott Daniels)

-v-

:
KENNECOTT - UTAH COPPER : Deposition of:
CORPORATION, a Delaware : STEWART BUTCHART SMITH
corporation, :
Defendant. :

-O-

Place: PARSONS, BEHLE & LATIMER
Utah One Plaza
201 South Main Street
Suite 1800
Salt Lake City, Utah

Date: August 7, 1991
10:05 a.m.

Reporter: Ariel Mumma, CSR/RPR

-O-

Smith (Examination by Mr. Lee)

1 A. Mr. Hansen's assignment I believe was
2 senior in charge. His last substantive position was
3 maintenance superintendent.

4 Q. And did Mr. Hansen start to work under your
5 guidance right after you came?

6 A. Yes, he did.

7 Q. With respect to Mr. Sorenson, did
8 Mr. Sorenson come to work in the smelter under --
9 when you were smelter manager?

10 A. Yes, he did.

11 Q. Do you recall about when?

12 A. I believe it was round about the end
13 of '86.

14 Q. And what kind of assignment did
15 Mr. Sorenson have, if you recall?

16 A. Mr. Sorenson at that time would be given
17 responsibilities in the material handling area,
18 again, to the best of my recollection.

19 Q. After you first came to Kennecott in 1986,
20 did you have a meeting with your supervisor --
21 supervisory personnel, to discuss your management
22 concepts and how you would manage the smelter?

23 A. Yes, I did.

24 Q. Do you recall about when that meeting might
25 have been; not an exact date, but --

Smith (Examination by Mr. Lee)

1 A. Oh, I would guess within the first couple
2 of months of my arrival at Kennecott.

3 Q. So that would have been in the summer
4 of '86?

5 A. Yes.

6 Q. And do you recall who attended the
7 meeting -- I mean, types of people who would be at
8 the meeting.

9 A. The people who attended the meeting were
10 the senior staff who had been retained to operate the
11 smelter after start-up, people who had worked in the
12 smelter, and who would continue to work in the
13 smelter after start-up.

14 Q. And these would have been people that would
15 be under your supervision --

16 A. Yes.

17 Q. -- at the smelter?

18 A. Yes.

19 Q. During that meeting, do you recall if there
20 were discussions concerning discipline?

21 A. Yes.

22 Q. Was there discussions concerning the
23 discipline procedure relating to represented
24 employees, those employees under union contracts?

25 A. It's unlikely there would be any specific

Smith (Examination by Mr. Lee)

1 discussion regarding union employee discipline,
2 because that is predetermined by a labor agreement
3 between the unions and the government.

4 Q. And you were aware of those agreements?

5 A. I knew the agreement existed, yes.

6 Q. Did you have a discussion at that time,
7 with the people in the meeting, about discipline with
8 respect to supervisors?

9 A. I had a discussion regarding behavioral
10 correction with supervisory people at that time.

11 Q. Would these discussions encompass your
12 ideas of how people should be taken care of, if there
13 were behavior problems among supervisors?

14 A. Yes.

15 Q. At that time were you aware of any written
16 policies that Kennecott had with respect to
17 supervisors and how they would be disciplined?

18 A. I was not aware of any written policy at
19 all.

20 Q. Had you had any discussions with the people
21 that supervised you -- I guess in this case, the
22 general manager of the Utah Copper concerning --

23 MR. DAVIS: Objection.

24 MR. LEE: -- dis- -- excuse me.

25 MR. DAVIS: Excuse me. Objection,

1 foundation.

2 Q. BY MR. LEE: Okay. Who was your immediate
3 supervisor, when you started to work in June of '86,
4 for Kennecott?

5 A. James Burgess Winter.

6 Q. And when you came to Kennecott, did you
7 have any discussions with Mr. Winters about how
8 supervisors would be disciplined?

9 A. No, I did not.

10 Q. Can you tell us what you said at that
11 meeting concerning your concept of how -- how
12 behavior problems should be handled?

13 A. Yes. Again, to the best of my
14 recollection, the message I communicated to the
15 people in attendance at the meeting was that should
16 somebody be not performing properly, they deserve to
17 be told about their shortcomings, and they likewise
18 should be given the opportunity to mend their ways.
19 So I suggested that once the initial counseling was
20 over, if it was no correction to the problem, then it
21 would be followed up by a written communication with
22 the employee.

23 Q. And at that time did you have the authority
24 to terminate a supervisor?

25 A. No, I did not.

1 Q. What was the procedure you had to follow if
2 you wanted to terminate a supervisor?

3 A. I would have to get clearance from my
4 immediate superior, the vice president, general
5 manager, and also the approval of the director of
6 human resources.

7 Q. If the supervisor had committed a serious
8 offense, did you describe in this meeting what action
9 would be taken in the event of a serious offense?

10 A. No.

11 Q. What was your -- your -- you said you
12 didn't talk to them about that, but what would you do
13 in the event of a serious offense?

14 A. If a serious offense occurred, the
15 individual would be sent home, and I would have then
16 taken the opportunity to review the circumstances
17 with my superior and with the human resource people,
18 to decide on an appropriate course of action.

19 Q. And are there some serious offenses, in
20 your view, that would result in termination?

21 A. Yes.

22 Q. What offenses would those be?

23 A. Theft, alcohol consumption on the jobsite,
24 to name but two.

25 Q. All right. Were there anything else in

EXHIBIT 3

EMPLOYEE'S NAME K. M. Sorenson TITLE Anode General Foreman
NT Smelter DEPT. Hot Metals
SUPERVISOR'S NAME D. L. Mikich TITLE Hot Metals Superintendent

I. OVERALL ACCOMPLISHMENT RATING. Check the statement that best describes how well the individual accomplished his goals.

- ☐ "Outstanding" performance - exceeds expected goals accomplishment in practically every respect. Performance Category 5.
- ☒ "Above expected" performance - consistently exceeds expected goals accomplishment. Performance Category 4.
- ☐ "Expected" performance - competent goals accomplishment. Performance Category 3.
- ☐ "Below expected" performance - near average goals accomplishment; needs improvement. Performance Category 2.
- ☐ Significant goals accomplishment improvement required for retention in present position. Performance Category 1.
- ☐ Insufficient time for goals accomplishment review in present position.

II. OVERALL ACCOMPLISHMENT RESULTS. Specify significant accomplishments and/or inadequate performance results for regular and problem-solving, special project or improvement goals:

Safety Performance

Anode department experienced two lost time injuries in 1982 compared with two in 1980 and one in 1981. The lost time injury rate was 2.72 in 1982 compared with 2.77 in 1980 and 1.52 in 1981.

Supervisors held 100% of scheduled monthly safety meetings; 19 JSA's were reviewed.

Cost and Production

Anode costs were 5.8% below the Phase III budget (4.4% below 1981 actual), a savings of \$257,000. Cost per ton anodes produced was 99% of budget (\$36.485 vs \$36.884).

Anode manpower was reduced by 23 hourly (28 percent) and four supervisory (40 percent) employees through job combinations during the year. At the same time overtime rate was reduced 13% from 3.58% premium hours/total hours worked to 3.13% and absenteeism was reduced 2.2% from 5.75% to 5.65%.

Anode production was 9.3% below budget. Anodes produced per day was 7.4% below budget.

Anode casting reject rate was reduced 33% to 4.6% from 6.9% in 1981.

EXHIBIT

7

Reviewer

D L Mikich

Date

11/11/82

1982

Exempt

Grade 16 and Below

Merit Increase Guide Chart

Performance Rating	Percent thru Range and Timing			Percent of Population
	1/3	2/3	3/3	
5	13.0 - 15.0 10 Months	12.0 - 14.0 11 Months	11.0 - 13.0 12 Months	10
4	11.0 - 13.0 11 Months	10.0 - 12.0 12 Months	9.0 - 11.0 13 Months	30
3	9.0 - 11.0 12 Months	8.0 - 10.0 13 Months	7.0 - 9.0 14 Months	50
2	6.0 - 8.0 16 Months	5.0 - 7.0 18 Months	-0-	8
1	-0-	-0-	-0-	2

Guide designed to produce a 10.1% increase in base salaries.

BP AMERICA
BP MINERALS AMERICA
MANAGEMENT PERFORMANCE APPRAISAL
AMR 2

PRIVATE

LAST NAME SORENSEN		INITIALS K. M.	EMPLOYEE ID. 42111	PRINT DATE 15 Feb. 88
ORGANIZATION UTAH COPPER	LOCATION SMELTER			UNIT
CURRENT JOB TITLE/CODE/GRADE ENGINEER SENIOR METALLURGICAL GRADE 17				DATE ON JOB
SUPERVISOR (PRINT NAME) D. B. GEORGE		SUPERVISOR (SIGNATURE)		DATE
REVIEWER (PRINT NAME) S. B. SMITH		REVIEWER (SIGNATURE)		DATE

INSTRUCTIONS FOR COMPLETING APPRAISAL

- Check preprinted ID information for accuracy. Report any error to Human Resources. Print your name and that of the reviewer in the appropriate space.
- Analyze prior twelve month performance by using the objectives for the position. In the absence of objectives, performance is evaluated against specific key responsibilities or components of the job. Compare expected performance with obtained results.
- Complete Parts 1 (only Sections A, B, C and D) and 2 using black pen. Sign the appraisal in designated space at the top of this page and at the bottom of Part 2 when complete.
- Review the appraisal with the next level of management. Obtain reviewer's comments in Part 1, Section E and in Part 2, Section C. Obtain their signature in designated space at the top of this page and at the bottom of Part 2.
- Discuss Part 1 with employee. Complete Sections F and G with the employee. Have the employee complete Section H and sign the appraisal.
- Return to Human Resources.

EXHIBIT

8

<u>RATING</u>	<u>DEFINITION</u>
E	Exceptional or outstanding performance which consistently exceeds all objectives of the position.
S	Superior performance which is consistently better than normally expected and produces results which exceed the objectives of the position.
G+	Good performance which consistently meets all normal objectives of the position and exceeds objectives in one or more major aspects of the work.
G	Good performance which meets the normal objectives of the position.
G-	Good performance which approaches what is normally expected in the position, but which requires improvement in one or more aspects of the work.
U	Unsatisfactory performance which does not consistently meet the normal objectives of the position.
P	Poor performance which seldom meets normal objectives of the position.
N	New on job but competent to date.

PART 1: SUPERVISOR'S APPRAISAL OF JOB PERFORMANCE

A. ACHIEVEMENT OF OBJECTIVES

In the absence of objectives, performance is evaluated against specific key responsibilities or components of the job.

OBJECTIVES SET FOR REVIEW YEAR (Including any key responsibilities not covered in objectives)	COMMENTS ON ACHIEVEMENT OF OBJECTIVES / KEY RESPONSIBILITIES	RATING
1. PROVIDE SUPPORT TO THE OPERATIONS DURING <u>SMELTER START-UP</u>	Successfully supervised the anode plant operations as acting general foreman.	G
2. SUPERVISE SMELTER <u>RENOVATION PROJECTS</u>	Supervised a number of renovation projects which were completed on-time and within budget.	G
3. PARTICIPATE ON THE <u>FRESH START TEAM</u>	Successfully participated on the Fresh Start Team.	G+

OBJECTIVES SET FOR REVIEW YEAR (including any key responsibilities not covered in objectives)	COMMENTS ON ACHIEVEMENT OF OBJECTIVES / KEY RESPONSIBILITIES	RATING
3. LEAD THE START-UP EFFORT FOR THE <u>FILTER PLANT</u>	Has demonstrated good understanding of the filter plant system and is successfully coordinating start-up activities. Communications and planning for this job have improved recently but further improvement is required. Attention to detail and close follow-up of delegated responsibilities needs some improvement.	G
4. PROVIDE SPECIALIZED TECHNICAL SUPPORT TO <u>THE PLANT OPERATIONS</u>	Needs to improve technical breadth and demonstrate more initiative in identifying and acting on specific opportunities for improvement.	G-

If specific skills or abilities are relevant to the position, rate them below.

SKILLS/ABILITIES		RATINGS					COMMENTS
		E	S	G	U	P	
SUPERVISORY	LEADERSHIP - Ability to develop in others the willingness and desire to work towards common objectives			X+			Good skills in line functions
	DEVELOPING PEOPLE - Ability to select, train, coach and appraise staff, set standards of performance and provide the motivation to encourage staff to grow in their jobs and accept greater responsibility			X			Good skills. Fresh Start was a good experience.
	DELEGATION - Effectiveness in delegating work by assigning responsibility to subordinates and establishing appropriate controls			X			Needs to improve follow-up when delegating.
INTERPERSONAL	COMMUNICATION - Effectiveness in both oral and written communications to insure clarity and comprehension				X		Needs to improve, recently shown good improvement.
	INTERPERSONAL SENSITIVITY - Ability to modify behavior in a sensitive manner in order to interact effectively with different people			X+			Particularly good with foremen and day pay.
	INFLUENCE/IMPACT - Ability to influence others thinking or actions and gain commitment to ideas, plans or actions			X-			Communications limit his influence and impact.
CONCEPTUAL	JOB KNOWLEDGE - Demonstrated knowledge of required techniques, methods and technical skills and their effective application			X			Good knowledge of operations needs to expand technical base.
	JUDGMENT - Ability to analyze problems, recognize the priorities involved, then make sound conclusions and take effective action			X ₁			Generally good but would benefit from a more open, team approach.
	PLANNING AND ORGANIZING - Ability to organize and produce realistic plans for accomplishing objectives to meet work priorities			X			Skills could be improved.
PERSONAL	INITIATIVE - Effectiveness in making necessary decisions and taking appropriate action to achieve results			X-			Needs to improve and communicate actions.
	ADAPTABILITY - Ability to adapt to new or changing circumstances and ambiguous or pressured situations			X			Has worked successfully in a wide range of areas.
COSTS	PROFIT AND COST SENSITIVITY - Ability to assess business opportunities and risks, to identify and meet customer needs, and to generate and implement ideas that either maximize profits or minimize costs			X			
OTHER							

C. OVERALL PERFORMANCE APPRAISAL RATING

G-

Refer to page 2
for rating scale.

D. SUPERVISOR'S COMMENTS

The supervisor has the option to comment on the employee's overall performance.

Mr. Sorenson is an experienced, senior staff member with a good knowledge of the smelter operations. He needs to improve his communication skills and exercise greater initiative in planning and organizing work. Mr. Sorenson has demonstrated he is a capable supervisor in line jobs and he should be considered as a candidate for supervisory jobs in the company.

E. REVIEWER'S COMMENTS

The reviewer has the option to comment on parts A and B before signing the appraisal on page 1.

F. RECOMMENDATIONS FOR THE NEXT YEAR

The supervisor completes this with the employee to include objectives, training or development recommendations intended to address a developmental need identified in the appraisal.

G. RECOMMENDED FUTURE DEVELOPMENT

The supervisor completes this section with the employee

	COMMENTS (including timing and specific position(s))
(1) Line Management - Commercial	
(2) Line Management - Technical	
(3) Staff Specialist - Technical	
(4) Staff Specialist - Professional	
(5) Other - Identify	
GENERAL COMMENTS:	

H. VIEWS OF EMPLOYEE

The employee completes this section. If more space is required, attach an additional page.

(1) MOBILITY: Indicate your willingness to relocate within BP America and BP world-wide.	
MOBILITY (Please check where appropriate)	EXPLANATION
<input type="checkbox"/> NOT MOBILE	
<input type="checkbox"/> MOBILE WITHIN U.S.A.	
<input type="checkbox"/> NO LIMITATIONS INCLUDING INTERNATIONAL ASSIGNMENTS	
(2) EMPLOYEE CAREER INTEREST: Indicate your future career interests, e.g. type of position or specific job assignment desired.	
(3) EMPLOYEE REVIEW: Make any comments concerning the performance evaluation.	

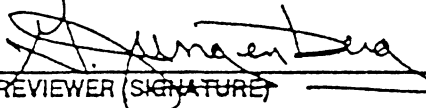
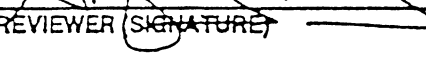
I have reviewed this document and discussed the contents with my manager. My signature means that I have been advised of my performance status and does not necessarily imply that I agree with this evaluation.

Employee's Signature _____

Date _____

BP AMERICA
BP MINERALS AMERICA
MANAGEMENT PERFORMANCE APPRAISAL
AMR 2

D2015A#1
PRIVATE

LAST NAME Sorenson, Kelly M.		INITIALS	EMPLOYEE LD. 42111	PRINT DATE 10-19-88
ORGANIZATION Utah Copper	LOCATION North Concentrator			UNIT
CURRENT JOB TITLE/CODE/GRADE Crushing and Grinding General Foreman Grade: 18				DATE ON JOB 07-22-88
SUPERVISOR (PRINT NAME) G. A. Jungenberg		SUPERVISOR (SIGNATURE) 		DATE 10-26-88
REVIEWER (PRINT NAME) R. J. Ramsey		REVIEWER (SIGNATURE) 		DATE

INSTRUCTIONS FOR COMPLETING APPRAISAL

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 - Return to Human Resources.

EXHIBIT

9

RATING	DEFINITION
E	Exceptional or outstanding performance which consistently exceeds all objectives of the position.
S	Superior performance which is consistently better than normally expected and produces results which exceed the objectives of the position.
G+	Good performance which consistently meets all normal objectives of the position and exceeds objectives in one or more major aspects of the work.
G	Good performance which meets the normal objectives of the position.
G-	Good performance which approaches what is normally expected in the position, but which requires improvement in one or more aspects of the work.
U	Unsatisfactory performance which does not consistently meet the normal objectives of the position.
P	Poor performance which seldom meets normal objectives of the position.
N	New on job but competent to date.

PART 1: SUPERVISOR'S APPRAISAL OF JOB PERFORMANCE

A. ACHIEVEMENT OF OBJECTIVES

In the absence of objectives, performance is evaluated against specific key responsibilities or components of the job.

OBJECTIVES SET FOR REVIEW YEAR (Including any key responsibilities not covered in objectives)	COMMENTS ON ACHIEVEMENT OF OBJECTIVES / KEY RESPONSIBILITIES			RATING
<u>SAFETY & HOUSEKEEPING</u>	<u>ACTUAL</u>	<u>PLAN</u>		
Lost Time Accidents Bonneville Operation	2	2		G
MSHA Citations Bonneville Operation	1 (non serious & substantial)			G-
Housekeeping	Has improved dramatically in the last quarter.			G+
<u>PRODUCTION</u>	<u>ACTUAL</u>	<u>PLAN</u>	<u>% PERFORMANCE</u>	
Throughput (TPD)	29,175	30,000	97.3	G+
Grind + 100 mesh (%)	21.7	24.0	110.0	
<u>COST</u>				
July/Sep \$/ton ore milled	1.12	1.32	117.9	S

A. ACHIEVEMENT OF OBJECTIVES (cont'd)

OBJECTIVES SET FOR REVIEW YEAR (Including any key responsibilities not covered in objectives)	COMMENTS ON ACHIEVEMENT OF OBJECTIVES / KEY RESPONSIBILITIES			RATING
<u>EFFECTIVE RUNNING TIME</u>	<u>ACTUAL</u>	<u>PLAN</u>	<u>% PERFORMANCE</u>	G-
Primary Crusher	33.1	50.0	66.2	
Standard Crusher	70.4	76.0	92.6	
Tertiary Crusher	81.6	81.0	100.7	
Rod Mills	90.8	92.0	98.7	
Ball Mills	89.2	92.0	97.0	
<u>OTHER</u>	General			
				Kelly has made the transition to the concentrator and became a key figure in meeting the safety and production needs at Bonneville. He has shown a desire to improve housekeeping throughout the plant.

B. MANAGERIAL SKILLS AND ABILITIES

If specific skills or abilities are relevant to the position, rate them below.

SKILLS/ABILITIES		RATINGS					COMMENTS
		E	S	G	U	P	
SUPERVISORY	LEADERSHIP - Ability to develop in others the willingness and desire to work towards common objectives			X			Has the respect of others to achieve a common goal.
	DEVELOPING PEOPLE - Ability to select, train, coach and appraise staff, set standards of performance and provide the motivation to encourage staff to grow in their jobs and accept greater responsibility			X			
	DELEGATION - Effectiveness in delegating work by assigning responsibility to subordinates and establishing appropriate controls			G+			Assigns tasks and jobs to subordinates as their ability permits.
INTERPERSONAL	COMMUNICATION - Effectiveness in both oral and written communications to insure clarity and comprehension			X			Has good skills in passing on and initiating directions to subordinates and superiors.
	INTERPERSONAL SENSITIVITY - Ability to modify behavior in a sensitive manner in order to interact effectively with different people			X			
	INFLUENCE/IMPACT - Ability to influence other's thinking or actions and gain commitment to ideas, plans or actions			X			
CONCEPTUAL	JOB KNOWLEDGE - Demonstrated knowledge of required techniques, methods and technical skills and their effective application			G-			Has only had a short exposure to current job. Expect to improve with time.
	JUDGMENT - Ability to analyze problems, recognize the priorities involved, then make sound conclusions and take effective action			G-			Should work on increasing job knowledge to gain confidence in decision making.
	PLANNING AND ORGANIZING - Ability to organize and produce realistic plans for accomplishing objectives to meet work priorities			X			Very good at planning and scheduling a job to complete in a minimum time.
PERSONAL	INITIATIVE - Effectiveness in making necessary decisions and taking appropriate action to achieve results			X			
	ADAPTABILITY - Ability to adapt to new or changing circumstances and ambiguous or pressured situations			X			Has had to move into a new position under adverse conditions.
COSTS	PROFIT AND COST SENSITIVITY - Ability to assess business opportunities and risks, to identify and meet customer needs, and to generate and implement ideas that either maximize profits or minimize costs			X			
OTHER							

EMPLOYEE NAME enson, Kelly M.

C. OVERALL PERFORMANCE APPRAISAL RATING

G

Refer to page 2
for rating scale.

D. SUPERVISOR'S COMMENTS

The supervisor has the option to comment on the employee's overall performance.

Kelly was transferred from the Smelter to the Bonneville concentrator in July of this year. He has had to learn the plant, its people and operation as well as adapt to a new operating environment. He has done well in all aspects. During this time extensive mechanical problems and operational difficulties existed, especially in July and early August. He has succeeded in managing his area and placing it on a course of improvement. The area of housekeeping has shown exceptional gains.

E. REVIEWER'S COMMENTS

The reviewer has the option to comment on parts A and B before signing the appraisal on page 1.

F. RECOMMENDATIONS FOR THE NEXT YEAR

The supervisor completes this with the employee to include objectives, training or development recommendations intended to address a developmental need identified in the appraisal.

The continuation of learning more about the operation of Bonneville is of prime concern. With increased job knowledge the ability to make better judgement decisions and therefore improved planning will follow.

The importance of cost reduction will be paramount in the future operation of the Bonneville concentrator.

EMPLOYEE NAME Sorenson, Kelly M.

G. RECOMMENDED FUTURE DEVELOPMENT

The supervisor completes this section with the employee.

	COMMENTS [Including timing and specific position(s)]
(1) Line Management - Commercial	
(2) Line Management - Technical	
(3) Staff Specialist - Technical	
(4) Staff Specialist - Professional	
(5) Other - Identify	
GENERAL COMMENTS:	

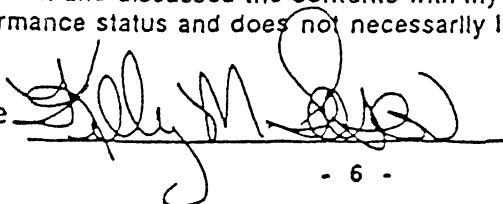
H. VIEWS OF EMPLOYEE

The employee completes this section. If more space is required, attach an additional page.

(1) MOBILITY: Indicate your willingness to relocate within BP America and BP world-wide.	
MOBILITY (Please check where appropriate)	EXPLANATION
<input type="checkbox"/> NOT MOBILE	
<input type="checkbox"/> MOBILE WITHIN U.S.A.	
<input checked="" type="checkbox"/> NO LIMITATIONS INCLUDING INTERNATIONAL ASSIGNMENTS	
(2) EMPLOYEE CAREER INTEREST: Indicate your future career interests, e.g. type of position or specific job assignment desired.	
(3) EMPLOYEE REVIEW: Make any comments concerning the performance evaluation.	

I have reviewed this document and discussed the contents with my manager. My signature means that I have been advised of my performance status and does not necessarily imply that I agree with this evaluation.

Employee's Signature



Date

10-26-88

1989 Goals - K. M. Sorenson

- Meet or exceed all 1989 safety and health and operating goals.
- Continue improvement in grinding to achieve a 21.0% + 100 mesh level at year end. (90%)
- Finish plant cleanup by March 1989 and maintain a 90% standard throughout year.
- Install and optimize cyclone overflow box screens by May 1989.
- Continue plant painting program with expected completion of major operating areas by May 1989.
- Become familiar with Magna flotation operation to the extent that short term supervision would be possible. Complete a major part of this goal by June 1989.
- Analyze and implement what is required to place the tertiary crushers in automatic control by July 1989.
- Be prepared to fill in as acting plant superintendent during temporary vacancies.

EXHIBIT 4

APR 2 1992

BARBARA K. POLICH (2620)
 T. PATRICK CASEY (0591)
 of and for
 PARSONS BEHLE & LATIMER
 Attorneys for Defendant
 201 South Main Street, Suite 1800
 P.O. Box 11898
 Salt Lake City, Utah 84147-0898
 Telephone: (801) 532-1234

SALT LAKE COUNTY
 By K. S. Polich
 Deputy Clerk

IN-THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

KELLY SORENSON,)	
	)	ORDER AND JUDGMENT OF
Plaintiff,	)	DISMISSAL
)	
vs.)	
)	
KENNECOTT UTAH COPPER)	
CORPORATION, a Delaware	)	Civil No:} 890905608
corporation,	)	Judge Scott Daniels
)	
Defendant.)	

* * * * *

This matter came before the court on March 10, 1992, the Honorable Scott Daniels presiding, on defendant's Motion for Involuntary Dismissal dated and filed herein February 28, 1992. Plaintiff was represented by his counsel, Stephen W. Cook and Reid C. Davis of and for Cook & Davis, and defendant was represented by its counsel, Barbara K. Polich and T. Patrick Casey of and for Parsons Behle & Latimer. Plaintiff completed the presentation of his evidence at the trial herein on January 27 through 30, 1992, and defendant properly moved the Court for involuntary dismissal of this action pursuant to Rule 41(b) of the Utah Rules

of Civil Procedure. Having fully heard and considered the evidence presented to the Court and the arguments of counsel herein and being fully advised in this matter, the Court hereby enters the following:

FINDINGS OF FACT

1. Based upon the evidence presented thus far, the Court would find as follows:

(a) that at the time the plaintiff was hired by Kennecott, there was no particular discussion as to whether he would be an at-will employee or whether he could be terminated for cause only, whether he was employed for any particular term, or whether he was entitled to any kind of progressive discipline.

(b) that a policy of progressive discipline had been in place at the Kennecott plant for some time; it was required by contract for the union represented employees and it was applied in a much less formal manner to management employees, but for the most part, progressive discipline was practiced just as a matter of good management.

(c) that, although there is some evidence to the contrary, during the course of plaintiff's employment, his performance was good.

(d) that when plaintiff was assigned to the Bonneville Concentrator, there were significant maintenance problems there due to the fact that there had been a considerable amount of deferred maintenance as a result of shut-down, and it

was necessary to try to keep production levels up, and at the same time catch up on the deferred maintenance; that was a difficult thing to do and there were significant problems.

(e) that there were also problems with scheduled time off and a number of things which made plaintiff's success at the Bonneville Concentrator quite difficult.

(f) that, although plaintiff made sufficient or significant improvements in the condition of the Bonneville Concentrator while he was there and some of the maintenance was caught up and production levels were for the most part maintained, his performance was clearly not satisfactory to management for one reason or another, and he was terminated for that reason.

2. Based upon the evidence presented, the Court finds that plaintiff has failed to meet his burden of proof that there existed a contract between Kennecott and the plaintiff for either continued employment or for progressive discipline.

3. Based upon the evidence presented, the Court also finds that, although progressive discipline was being practiced, it was never part of a contract.

4. The Court does not find either Exhibit 1 (the General Rules of Conduct dated July 1, 1973), the seminars, or any of the subsequent documents to be sufficient evidence to convince the Court that there was ever an implied-in-fact contract between plaintiff and Kennecott.

CONCLUSIONS OF LAW:

1. The presumption is that plaintiff was an employee at-will and that presumption has not been rebutted.

2. Based upon that presumption and plaintiff's failure to prove the existence of an implied-in-fact contract of employment, Kennecott management had the right to terminate plaintiff at its discretion.

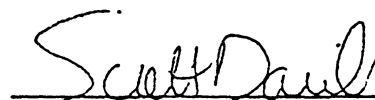
ORDER

Based upon the foregoing findings of fact and conclusion of law, and good cause appearing,

IT IS HEREBY ORDERED AND ADJUDGED that the above-entitled action be and hereby is dismissed with prejudice and on the merits. Defendant is awarded its taxable costs incurred herein.

DATED this 2 day of April, 1992.

BY THE COURT



SCOTT DANIELS
District Judge

APPROVED AS TO FORM:



STEPHEN W. COOK
REID C. DAVIS
COOK & DAVIS
Attorneys for Plaintiff

TPC/031192C

EXHIBIT 5

RECEIVED

AUG 29 1990

BARBARA K. POLICH (2620)
T. PATRICK CASEY (0591)
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Defendant
185 South State Street, Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147-0898
Telephone: (801) 532-1234

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

KELLY SORENSON,)	
	)	MEMORANDUM IN SUPPORT OF
Plaintiff,	)	DEFENDANT'S MOTION FOR
	)	SUMMARY JUDGMENT
vs.)	
)	
KENNECOTT UTAH COPPER)	
CORPORATION, a Delaware)	
corporation,	)	Civil No. 890905608
	)	Judge Daniels
Defendant.)	

* * * * *

Defendant Kennecott Utah Copper Corporation, by and through counsel, submits the following Memorandum of Points and Authorities in Support of its Motion for Summary Judgment filed herein. Affidavits of Donald L. Babinchak, P. Drew Hunter, Louis J. Connelos, Billie Newton Burke, and C. Dale Sharp are filed herewith and establish the uncontroverted facts set forth below. Portions of the Deposition of Kelly Sorenson cited herein are attached hereto as Appendix A.

Rather, this motion is made on the grounds that, based upon the undisputed facts set forth below, as a matter of law, Mr. Sorenson has no basis for alleging either the breach of an implied covenant of good faith and fair dealing or the existence of the implied promise alleged in his complaint requiring cause for termination, advance notice of unsatisfactory job performance, and progressive discipline.

STATEMENT OF UNDISPUTED FACTS

Based upon the pleadings, the depositions, and the affidavits filed herein, the following facts are not in dispute:

1. This action is based solely upon allegations that the termination of Mr. Sorenson's employment was in breach (1) of an implied covenant of good faith and fair dealing and (2) of an implied promise that he could be terminated only for cause, and only with advance notice of inadequate work performance and progressive discipline. (Complaint, ¶ 7, 9).

2. The sole basis alleged in the Complaint for Mr. Sorenson's claim of an implied promise that he could be

Footnote continued from previous page.

facility was unacceptable and that Kennecott was dissatisfied with Mr. Sorenson's performance in dealing with the problem. Mr. Sorenson claims he adequately performed his duties and received no criticisms, warning or notice of the fact that Kennecott management was dissatisfied with his performance prior to his termination.

EXHIBIT 6

REID C. DAVIS, USB #4475
Attorney for Plaintiff
COOK & DAVIS
323 South 600 East, Suite 200
Salt Lake City, Utah 84102
Telephone: (801) 595-8600

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

KELLY SORENSON,)	
Plaintiff,	)	ORDER
)	
vs.)	
)	
KENNECOTT UTAH COPPER)	
CORPORATION, A Delaware	)	Civil No. 890905608
Corporation,)	
Defendants.	)	Judge Scott Daniels

Hearing was held on Defendant's Motion for Summary Judgment, Plaintiff's Motion to Amend its Complaint, Defendant's Motion to Strike Portions of the Affidavit's of David Dea, Larry Dea, and Jerry Hansen, Defendant's Motion to Strike the Affidavit of Kelly Sorenson and the Supplemental Affidavit of David Dea, and Defendant's Motion to Seal Record, the 16th day of November, 1990 in the above-entitled Court, the Honorable Scott Daniels presiding. Plaintiff was present represented by his counsel Reid C. Davis, Esq. Defendant was present represented by its counsel Barbara Polich, Esq. The Court

having reviewed the Memoranda submitted by the parties,
the argument of respective counsel in open court, and
based upon other pleadings and papers on file herein and
for good cause shown, now therefore

IT IS HEREBY ORDERED ADJUDGED AND DECREED:

1. That material issues of fact exist in this matter
and therefore Defendant's Motion for Summary Judgment is
denied.

2. Defendant's Motion to Strike the Affidavit
testimony in the Affidavit's of David Dea, Larry Dea,
Tracy Johnson and Jerry Hansen is denied.

3. Plaintiff's Motion to Amend its Complaint is
granted.

4. Defendant's Motion to Strike the Affidavit of
Kelly Sorenson as untimely is granted.

5. Defendant's Motion to Strike the Supplemental
Affidavit of David Dea as untimely is denied.

6. Defendant's Motion to Seal the Record in
connection with the Affidavit of Kelly Sorenson and the
Supplemental Affidavit of David Dea is granted.

DATED this _____ day of _____, 1990.

BY THE COURT:

SCOTT DANIELS
District Court Judge

DATED this _____ day of _____, 1990.

APPROVAL AS TO FORM:

BARBARA POLICH
Attorney for Defendant

CERTIFICATE OF SERVICE

STATE OF UTAH)
 :s.
County of Salt Lake)

AMY J. HOFHEINS, being duly sworn, says:

That she is employed in the office of Cook & Davis,
Attorneys at Law, Reid C. Davis, attorney for the
Plaintiff, herein; and that she served the attached
ORDER, upon:

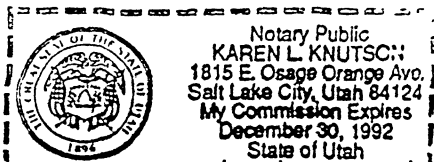
Barbara Polich
PARSONS, BEHLE & LATIMER
Attorneys for Defendant
185 South State Street
Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147-0898

by placing a true and correct copy thereof in an envelope
and depositing the same, sealed, with first-class postage
prepaid thereon, in the United States Mail at Salt Lake City,
Utah, on the 20TH day of November, 1990.



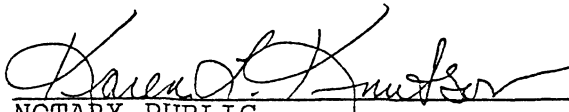
AMY J. HOFHEINS

Subscribed and sworn to before me this 20TH day of
November, 1990.



~~My Commission Expires:~~

12-30-92



NOTARY PUBLIC

Residing at Salt Lake County