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John R. Chatterley, Et Al v. Omnico, Inc. And Interface Computer, Inc. : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN R. CHATTERLEY, ET AL,
Plaintiffs and Respondents.

vs.

OMNICO, INC. and INTERFACE COMPUTER, INC.,
Defendants and Appellant.

Case No. 12122

BRIEF OF APPELLANT

Appeal from the Judgment of the Third Judicial District Court of Salt Lake County, Utah
Honorable Emmett L. Brown, Judge

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TABLE OF CONTENTS

AUTHORITIES CITED

CASES

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STATEMENT OF THE CASE

This is an action by the Plaintiffs to recover from the Defendant, Interface Computer, Inc., unpaid wages, expenses, prepaid insurance premiums and vacation benefits incurred and earned while in the employ of Interface, to recover said amounts from the Defendant, Omnico, Inc., as having controlled and regulated the business of Interface to such an extent as to be liable for the obligations of Interface and to collect from said Defendants, alleged damages to Plaintiffs' credit reputation, together with penalty wages and attorney fees as provided by Sections 34-28-5(1) and 34-27-1, UCA, 1953.

TABLE OF CONTENTS (continued)

STATUTES

OTHER AUTHORITIES

to the Defendant, Omnico, Inc., a Washington based holding company, with the remaining 20% of the stock being retained by McKay Smith (R. 395). On April 28, 1969, the Omnico Board of Directors, representing the Interface shares held by Omnico, and McKay Smith, representing the remaining outstanding Interface shares, met in a shareholders' meeting and therein elected McKay Smith and the membership of the Executive Committee of the Omnico Board of Directors to serve as the Interface Board of Directors for the ensuing year. (Ex. 27-P, Part 3 of 19, pp. 3, 4). The newly elected Interface Board did immediately thereafter and during the course of that meeting, elect Eddie M. Peterson as Chairman of the Interface Board and McKay Smith as President and Chief Executive Officer of Interface. (Ex. 27-P, Part 3 or 19, pp. 3, 4). Peterson was also serving at this particular time as Chairman of the Omnico Board of Directors and as Chairman of the Board of each Omnico subsidiary company (Ex. 27-P, Part 3 of 19; R. 619).

The Plaintiffs, Chatterley, Hayward, Robert Hill, Park and Foxley were employees of Interface at the date that Omnico acquired its interest therein (R. 338, 205, 245, 315, 325). The remaining Plaintiffs were employed by Interface on or after that date. (R. 216, 278, 302, 358, 363, 382). All Plaintiffs were hired by Interface officers and personnel (R. 463).

Formerly elected Interface officers were initially limited to Peterson and Smith who were elected during the April 28, 1969 board meeting as Chairman of the Board and President, respectively. However the Co-

DISPOSITION OF CASE BY LOWER COURT

The trial court granted to Plaintiffs a Judgment against the Defendant, Interface Computer, Inc., for unpaid wages, expenses, prepaid insurance premiums, vacation benefits and penalty wages totaling $35,411.00, and against the Defendant, Omnico, Inc., for unpaid wages, specific expenses, prepaid insurance premiums and vacation benefits totaling $14,441.00. Defendants subsequently moved the Court for a new trial and the motion was denied.

RELIEF SOUGHT ON APPEAL

Defendant, Omnico, Inc., seeks a determination that the evidence before the Trial Court was not sufficient to support the Trial Court's decision that Omnico is liable for unpaid wages, expenses and benefits earned and incurred by Plaintiffs while in the employ of Interface Computer, Inc., and, further, seeks a reversal of the court's judgment against Omnico.

Defendant seeks to sustain that part of the judgment denying Plaintiffs' claim against it for penalty wages as provided by Section 34-28-5(1), UCA, 1953.

STATEMENT OF FACTS

The Defendant, Interface Computer, Inc., is a Utah corporation, incorporated on December 16, 1968 (Ex. 21-P) with the majority of its outstanding stock then held by McKay Smith (R. 395). In April of 1969, (R. 392) 80% of the outstanding Interface shares were sold

was responsible for the Interface employees and their performance (R. 143) and for determining the nature of the work which Interface would accept and the services it would render to its customers (R. 587). He reported to Peterson, (R. 512) but was personally responsible for Interface operations and decisions with regard thereto (R. 629, 652). He directed sales (R. 447) and had authority to hire and establish salaries, considering the recommendations of an Omnico Compensation Committee, as to any monthly salaries of $1,000.00 or more (R. 139, 628). He had authority to terminate Interface employees and did so on occasion (R. 155) without submitting the matter for approval (R. 170). Peterson never hired nor terminated an Interface employee (R. 628), set any of the Plaintiffs' salaries or directed Chatterley to hire or terminate a given individual (R. 575, 588), although on one occasion and incident to a directive received from the Omnico Board of Directors, he inquired of Chatterley whether Interface could cut its work force by 20% and still function, was advised it could and requested that Chatterley and Robert Hill proceed to effect their planned cutback (R. 624, 625). Chatterley effected some of the planned terminations and withheld others because of objections received from McKay Smith (R. 573, 574). Peterson inquired as to the reason why all terminations were not affected, but did not at any time insist that they be made (R. 575).

Interface funds were handled and deposited by Lorin "Bill" Anderson (R. 514), Comptroller of Omnico (R.

Plaintiff, John Chatterley, served as, and considered himself to be, the Executive Vice President and General Manager of Interface(R. 135) and Peterson recognized and confirmed that he so held and was responsible for this particular office (R. 588). The Co-Plaintiff, Robert Hill, also served as a Vice President (R. 140, 260). Initially, neither Chatterley nor Hill were formally elected as officers by the Interface Board but, rather, served with the consent and recognition of the Board as evidenced by their direct dealings with Board Chairman, Peterson (R. 543, 588, 624, 625, 629). However, on August 27, 1969, Chatterley was formally elected by the Interface Board to the office of Vice President and General Manager of Interface (Ex. 27-P, Part 5 of 19, p. 2).

As Chairman of the Board of Directors of Omnico and of Interface and each of the other Omnico subsidiary companies, Peterson was responsible for the maintenance of Board policy and for assisting the President of each subsidiary where advisable (R. 619-620). Smith, as President of Interface, correlated Interface policy between Peterson and the Co-Plaintiff, Chatterley, (R. 437) who was functioning as Vice President and General Manager of Interface. Sometime between June and July, 1969, Smith and Peterson agreed that Smith would devote his time to research and development and that Chatterley would report directly to Peterson (R. 426-428, 471). Chatterley functioned as Vice Presdent and General Manager of Interface, reporting to Smith initially and, thereafter, directly to Peterson incident to the agreement between Smith and Peterson (R. 122, 534). Chatterley

companies, Omnico sought to coordinate activities between and centralize staff services for the subsidiary companies in order to generate a greater combined company profit (Ex. 29-P; R. 582) which would, in turn, increase its return from the stock in which it had invested. Incident thereto, various written memoranda were issued by Peterson in his capacity as Chairman of the Omnico Board of Directors and the boards of Interface and the other subsidiary companies (R. 645, 650). These memoranda dealt with printing requirements (Ex. 31-P), a meeting of the chief executives of each subsidiary company (Ex. 32-P), legal services (Ex. 36-P) and outside purchases and hiring of new employees (Ex. 37-P). Such were written under the Omnico letterhead or under none at all, since all executive officers of the subsidiaries knew that Peterson functioned as Chairman of the Board for each company and the utilization of separate letterheads, with separate designations as to Peterson's office, would have been cumbersome and impractical (R. 649-650). Peterson had conferred with Chatterley as to each memorandum before mailing the same (R. 630), except as to that regarding legal procedures and his failure to here confer was unusual (R. 580). An additional memorandum, relating to automobile telephones (Ex. 30-P) was issued by the Omnico Comptroller, then serving as Comptroller for Interface (R. 514, 650, 665), after having first gained the approval of Chatterley, Peterson and McKay Smith (R. 576, 577, 665).

Interface did not meet the salaries of its employees for the first two weeks in October, 1969 (R. 142, 546). On approximately October 17, 1969 (R. 142), Plaintiffs met

563, 650) who initially performed comptroller duties for Interface and the other Omnico subsidiary companies and on August 27, 1969, was elected by the Interface Board to serve as Comptroller of Interface (Ex. 27-P, Part 5 of 19, p. 2; R. 644, 645). Anderson looked directly to the Interface Vice President, John Chatterley, for supervision (R. 670 - 671). Interface checks written against the Interface bank account were signed by Chatterley, along wth either Smith, Peterson or Anderson (R. 161, 513) all of whom were authorized signatories, (Ex. 39-P). No portion of the income or profits generated by Interface were ever paid or deposited to the account of Omnico (R. 631).

During the period of time in which Omnico was an Interface shareholder, Interface maintained its own offices and place of business in Salt Lake City, Utah (R. 135), hired its own employees and set their salaries (R. 463) and paid those salaries only by checks issued on Interface accounts (R. 152). During this period, certain loans were made by Omnico to Interface, including those in amounts of $9,000.00 (R. 602), $11,065.00 (R. 562) and $15,000.00 (R. 595, 596) and were reflected in the Omnico financial statements as interest drawing accounts receivable (R. 665-666) and in the Interface statements as notes payable (R. 679). Although these loans were not reduced to promissory notes, Omnico's Treasurer had been, on numerous occasions, instructed to so reduce them, but had failed to do so (R. 669).

In its capacity as a holding company retaining a majority interest in Interface and the other subsidiary

On or about November 6, 1969, Plaintiffs, Chatterley and Hill, together with their attorney, met with Richard Simon (R. 475, 490, 507) the recently elected Chairman of the Omnico Board of Directors (R. 475; Ex. 27-P, Part 17 of 19, p. 3) and presented to him a written claim for wages, vacation benefits, certain specified expenses, and prepaid insurance premiums allegedly owing by Interface to Plaintiffs (R. 475; Exhibit 28-P), which claim did not properly reflect the correct amounts due and owing from Interface (R. 475, 476) and was not honored or paid by either Omnico or Interface. This action was thereafter filed by Plaintiffs on November 21, 1969, to recover a different amount of wages, vacation benefits, expenses and prepaid insurance premiums (Ex. 1-P).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANT, INTERFACE COMPUTER, INC., DID NOT HAVE A VALID BOARD OF DIRECTORS AND VALIDLY ELECTED OFFICERS.

Shortly after acquiring its 80% interest in Interface, the Omnico Board of Directors, representing the Interface shares held by Omnico, met in a shareholders' meeting with McKay Smith who held the remaining Interface shares then outstanding. Together, and representing all outstanding Interface stock, they therein elected the Omnico Board Executive Committee, of which McKay

with other Interface employees and formulated certain demands set down in writing under the direction of the Co-Plaintiff, Robert E. Hill, (Ex. 5-D) and mailed by him to Mack Call, the acting President of Omnico (R. 547, 549) and to Peterson and the Co-Plaintiff, Chatterley (R. 549). No response was received from either Peterson or Omnico (R. 549).

On approximately October 24, 1969, (R. 440) McKay Smith, assuming himself to be the President of Interface and thereby duly authorized (R. 443) and asserting some contractual violation of the Omnico-Interface Purchase Agreement (R. 662), proceeded without direction or authority of the Omnico or Interface Boards of Directors (R. 443, 444) and assumed operational control of Interface and requested and obtained the resignation of the Co-Plaintiff, Chatterley (R. 440, 110, 111, 158). Thereafter, Mack Call, temporary President of Omnico and a member of the Interface and Omnico Boards of Directors, (Ex. 27-P, Part 9 of 19, p. 2; R. 482) mailed out written notices, dated October 29, 1969, advising the Co-Plaintiffs, Robert Hill, Hayward, Perry, Watts and Morrey, that their employment with Interface was terminated (Ex. 8-P, 9-P, 13-P, 18-P, 19-P). Such action was taken without the consent or knowledge of McKay Smith (R. 470) or the Omnico and Interface Boards of Direcors, (R. 481). The remaining Plaintiffs, except for Cathy Walters, who had voluntarily quit her job a few days earlier (R. 373), all requested and received "blue slip" separation notices from Interface (R. 679, 680, Ex. 7-P, 11-P, 15-P, 16-P, 20-P).

constituted and that its decisions were valid, the Court held:

> "The amendment increasing the number of the directors from seven to nine did not alter the character of the corporation, or in the least add to or diminish the scope of its powers . . . and *is not,* therefore, *fundamental.*" (Emphasis added) 21 Utah 10.
>
> "Any amendment which changes the character of the corporation, increases its powers, or is fundamental in other respects, must be likewise filed as required by statute, but we fail to perceive any reason why the failure to file an amendment which is not fundamental, which in no way changes the character of the corporation or the scope of its powers, but simply increases the number of the agents, who shall act as directors in carrying out the object of its creation, should invalidate the acts of such agents, which are within the scope of the corporate power of the company . . . . " 21 Utah 12.

In electing the seven new directors for Interface, the Omnico Board and McKay Smith were voting 100% of the Interface shares. By increasing the size of the Interface Board, they did by their vote, automatically amend the Interface Articles, an amendment which was not fundamental and, therefore, was not invalidated by the corporation's failure to file its Articles of Amendment with the Utah Secretary of State. The new directors functioned as the duly elected and constituted Board of Interface and their election of a Board Chairman and President vested these officers with the legal rights and authority to function as the legal officers of Interface Computer, Inc.

Smith was a member, to serve as the Board of Directors for Interface. These Interface directors did thereafter and during the course of the same meeting, elect Eddie Peterson, the Omnico Board Chairman, as Chairman of the Interface Board, and McKay Smith as President of Interface (Ex. 27-P, Part 3 or 19, pp. 3, 4).

The Omnico Executive Committee which then served as the Interface Board, consisted of seven members (R. 620), three more than the four member Board of Directors provided for by Article IX of the Interface Articles of Incorporation (Ex. 21-P). The Trial Court determined that since the directors elected to the Interface Board exceeded the number provided in the Interface Articles, that they did not constitute a valid Board and could not validly transact business or elect officers for the corporation and, therefore, that Interface of necessity was guided and directed by the officers of Omnico (R. 70, 694, 695).

In the case of *Jackson v. The Crown Point Mining Company,* 21 Utah 1, 59 P. 238, this court was called upon to determine whether an excessive number of directors invalidated the actions taken by the Board. In that case, the shareholders elected a total of nine directors while the corporate articles provided for only seven. The plaintiff-respondent petitioned the Court to invalidate the actions of the newly constituted board, since the corporation had failed to comply with statutes and file an amendment to its Articles increasing the permitted number of directors. In determining that the Board was legally

primarily predicated upon the existence of common officers and directors.

The general consensus of the courts in this country is that the existence of common officers and directors is not alone sufficient to render a holding company liable on the contracts of its subsidiaries. 19 Am Jur 2d, Corporations, Secs. 17, 716. This position is emphasized in the case of *American Trading and Production Corporation v. Fischback and Moore, Inc.*, 311 F. Supp. 412 (N.D. Illinois, E. D.), wherein the Court said:

> "Neither ownership of all of the stock of a subsidiary, nor identity of officers and directors, nor both combined are sufficient to justify 'piercing the corporate veil.' Such factors are common business practice and exist in most parent and subsidiary relationships." 311 F. Supp. 415

Clearly in order to justify piercing the corporate veil of the subsidiary, the influence exercised by the parent corporation over the subsidary must be something other than that which it may properly exercise pursuant to its majority control of shares and the existence of common officers and directors.

The Court in the *American Trading and Prod. Corp.* case observed:

> "The additional factors which must be present have been variously described as direct intervention in the subsidiary's affairs, the act of operation of the subsidiary's business, or the exercise of control, not the opportunity to exercise control." 311 F. Supp 415.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANT, OMNICO, INC., CONTROLLED THE DEFENDANT, INTERFACE COMPUTER, INC.

The universally recognized presumption is that the corporation and its stockholders are separate and distinct entities. Fletcher, Cyclopedia of Corporations, Vol. 1, Section 41.3. Therefore, a parent or holding company is generally not liable for the obligations of its subsidiary companies. 19 Am Jur 2d, Corporations, Sec. 716. However, and as stated by this Court in *Shaw v. Bailey-McCune Company,* 11 Utah 2d 93, 355 P.2d 321:

> "Under some circumstances the corporate entity may be disregarded in the interest of justice, in such cases as *fraud, contravention of law or contract or public wrong. However, great caution should be exercised by the Court in disregarding the entity.*" (Emphasis added) 11 Utah 2d 95

In the instant case, the Interface directors were also directors of Omnico, its Board Chairman was also Chairman of the Omnico Board and 80% of its shares were held by Omnico. As a result, Interface shareholder and board meetings were held in conjunction with Omnico board meetings for convenience purposes. Such meetings, although serving a real practical purpose, were confusing to the Trial Court and persuaded it to determine that the Interface directors and officers, even if validly elected, had not functioned during the period in question (R. 70, 71, 694, 695). In other words, the trial court's decision that Omnico controlled Interface appears to have been

of its General Manager, Interface directed its own sales, negotiated for and determined the nature of the work it would accept and the services it would render to its customers. In short, it controlled its own business and operations. No portion of Interface income and profits were ever deposited or paid to Omnico. Interface maintained separate bank accounts and retained the authority to draw checks thereon under the signature of its General Manager, together with the signatures of either its President or Board Chairman. Loans made by Omnico to Interface were reflected on the books of both companies as amounts owing by Interface to Omnico. Such loans would have been reduced to promissory notes, but for the omissions of the Omnico Treasurer. Chatterley, by his own admission, was responsible for Interface operations, reporting and looking to the Interface Board Chairman, Peterson, only for counsel and advice. Peterson properly functioned as the Interface Board Chairman and any advice and counsel given to Chatterley was properly within the scope of Peterson's responsibility as an Interface officer. However, and even assuming that Peterson functioned only as an officer of Omnico, the record fails to disclose that any directive or order was ever given by him to Chatterley, with the exception of certain written memoranda which he periodically issued. These memoranda to Chatterley and the other subsidiary heads related to consolidation of printing and legal services, an Executive Council meeting of subsidiary heads, and future outside purchases and hiring of personnel by the subsidiary companies. All were directed in an attempt to centralize accounting and to decrease

In *Lowendahl v. Baltimore and Ohio R. Co.*, 247 App. Div. 144, 287 N.Y.S. 62, affirmed 272 N. Y. 360, 6 N.E. 2d 56, rehearing denied 273 N.Y. 584, 7 N.E. 2d 704, the Court determined that:

> "Liability (of the parent corporation) must depend upon a domination and control (of the subsidiary) so complete that the (latter) may be said to have no will, mind, or existence of its own and to be operated as a mere department of the business of the parent corporation." (bracketed phrases added) 287 N.Y.S. 73

The record evidences that Interface handled the employment, supervision and termination of its own employees through the offices of its General Manager, the Co-Plaintiff, John Chatterley. No Interface employee was ever hired or terminated by Omnico, although in August, 1969, a memorandum from the Omnico and Interface Board Chairman, Peterson, indicated that all future hirings of personnel would require the approval of Omnico officers. However, there is no evidence that compliance with this memorandum was ever required or that Omnico ever supervised or attempted to influence the hiring of any Interface employee. Chatterley established all employee salaries, although Peterson did request that he consider the recommendation of the Omnico Board's Compensation Committee as to the more substantial salaries paid. However, Chatterley retained the right of final decision in this matter. All Interface salaries were paid from Interface funds, none of said salaries having been paid by Omnico. Through the office

POINT III

THE RELATIONSHIP OF THE DEFENDANTS, OMNICO, INC. AND INTERFACE, COMPUTER, INC., DID NOT RESULT IN FRAUD, INJUSTICE OR UNFAIRNESS TO THE PLAINTIFFS.

Even if Omnico had, in fact, exercised control over Interface, such control did not perpetrate any unfairness or injustice upon Plaintiffs sufficient to obligate Omnico on Plaintiffs' claims against Interface. As observed by the Court in *Steven v. Roscoe Turner Aeronautical Corporation,* 324 F.2d 157, 160 (7th Cir. 1963):

> "In order to establish that a subsidiary is the mere instrumentality of its parent, three elements must be proved: control by the parent to such a degree that the subsidiary has become its mere instrumentality; fraud or wrong by the parent through its subsidiary . . . ; and unjust loss or injury to the claimant, such as insolvency of the subsidiary."

In the *American Trading and Prod. Corp.* case, *supra,* the necessity of finding more than just "control" was also stressed. Therein, the Court said:

> " . . . even if it could be said that the subsidiary were the mere instrumentality of the parent, that circumstance by itself would not justify imposition of liability. For it has long been the law that the corporate entity is only ignored when the ends of justice require it. Some element of unfairness, something akin to fraud or deception, or the existence of a compelling public interest must be present in order to disregard the corporate fiction." 311 F. Supp. 416.

expenses common to all companies and represented areas of proper concern to any shareholder and which Omnico, as a majority shareholder, was able to enforce at least in part. Again, there is no indication that Omnico ever directed, supervised or disallowed any purchases by Interface or the employment of Interface personnel or made any attempts in this direction. The only other purported directive issued by Omnico was the July 1st memorandum on automobile telephones which was issued by Bill Anderson, the acting Comptroller of Interface, and which reflected the prior decision of the Interface officers, Chatterley, Smith and Peterson.

The record evidences that, at most, Omnico only attempted to exercise supervision and guidance of the general performance of Interface but did not operate the Interface business as such. Omnico did not negotiate contracts, formulate bids or jobs, hire or fire or pay the salaries of Interface employees or supervise the manner in which Interface performed its jobs or services for customers. In other words, there was no direct intervention in the affairs of Interface, no operation of its business and no domination and control so complete that Interface retained no will, mind or existence of its own. At most, Omnico enjoyed only the opportunity to exercise control. There in fact was no control.

any way or to any extent generated or enhanced by the activities fo Omnico or its officers.

The record contains testimony both alleging and denying that Richard Simon, the newly elected Omnico Board Chairman, had represented to Plaintiff's representatives that Omnico was responsible for and would, in fact, pay Plaintiffs' claims against Interface. Simon himself denied such representations (R. 476). In any event, the conversations in question occurred after the Plaintiffs' claims had arisen and after their employment with Interface was terminated. Plaintiffs, therefore, could not possibly have sustained any part of the claimed damages as a result of any reliance on these alleged representations.

There was nothing before the trial court which would indicate that any part of Plaintiffs' claimed damages were sustained incident to activities of the Defendant, Omnico, or incident to reliance upon any of its representations. The activities engaged in by Omnico did not to any extent constitute a fraud upon Plaintiffs or a contravention of law or contract or public wrong.

The Defendant, Omnico, Inc., respectfully submits that its activities and relationship with Interface Computer, Inc. did not represent any injustice or unfairness to Plaintiffs nor result in any damage to them and that the Trial Court erred in awarding to Plaintiffs a Judgment against said Defendant.

This Court has itself limited the disregard of the corporate entity to " . . . such cases as fraud, contravention of law or contract or public wrong" *Shaw v. Bailey, supra* at 95, and has conditioned such disregard upon the necessity " . . . to prevent fraud and accomplish justice . . . . " *Geary v. Cain,* 79 Utah 268, 273, 9P.2d 396, 398.

The record evidences that all of the Plaintiffs herein were either employees of Interface at the time Omnico acqured its interest therein or were employed shortly thereafter by Interface officers and personnel. None were hired by Omnico nor at its request or directive. None accepted employment by Interface on the pretext that Omnico would pay their salaries or benefits or guarantee payment of the same. The record is completely devoid of any evidence that Omnico ever suggested, let alone agreed, that it would cover Plaintiffs' salaries. Obviously, the Plaintiffs were aware of Omnico's majority interest in and opportunity to control Interface and, therefore, may well have assumed that Omnico would meet their salaries if Interface was not able to do so. This is indicated by the "demands" formulated by Plaintiffs in their October, 1969, employees' meeting and subsequently forwarded to Omnico and Interface officers. The Co-Plaintiff, Robert Hill, prepared and forwarded that list of demands and himself testified that no response was ever received from Peterson or Omnico (R. 549). Not one of the Plaintiffs worked a day or remained on the job incident to a request from Omnico. In short, the damages sought by the Plaintiffs were not in

In the instant case, Omnico refused Plaintiffs' demands for payment, not merely because of a dispute as to the amount owing, but because Omnico entertains a bona fide belief that there existed no employer-employee relationship between it and the Plaintiffs. Neither of the Plaintiffs had at anytime been interviewed, hired or paid a salary by Omnico. They at no time rendered labor or services to, or for, Omnico or operated under the supervision of Omnico personnel. Only the Plaintiff, John Chatterley, testified that he reported or answered to an Omnico official, and this particular official, Eddie Peterson, was the Interface Board Chairman, properly functioning as an Interface officer. The "termination letters" received by certain of the Plaintiffs from the acting Omnico President, Mack Call, were intended to prevent Plaintiffs from continuing their employment with Interface under the misunderstanding that their future salaries would be paid by Omnico (R. 666, 667). In short, there did not exist any of the factors characteristic of an employer-employee relationship which would have indicated to Omnico that it was, in fact, liable to Plaintiffs on the claims presented. Omnico, therefore, was justified in withholding payments on Plaintiffs' claim while awaiting a judicial determination of the nature of its relationship with Plaintiffs.

Defendant, Omnico, Inc., respectfully submits that the penalty provisions of the subject Statute apply only to circumstances in which there exists no bona fide dispute as to the existence of an actual employer-employee relationship and that the decision of the Trial Court

POINT IV

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT JUDGMENT AGAINST THE DEFENDANT, OMNICO, INC., FOR PENALTY WAGES PROVIDED BY SECTION 34-28-5(1), UCA, 1953.

The Trial Court refused to award judgment aginst Omnico for the penalty wages provided by Section 34-28-5(1), UCA, 1953 (erroneously cited in Plaintiffs' Complaint as Section 34-10-6, UCA, 1953, then repealed), determining that the Statute was intended only to impose a penalty upon an employer refusing to pay wages which that employer knew to be due and owing to his employee, and that the record did not evidence that such knowledge had been entertained by the officers or agents of Omnico (R. 699).

In *State v. J. B. & R. E. Walker,* 100 Utah 523, 116P. 2d 766, this court was required to consider the application and purpose of a similar statute, since repealed, imposing a penalty on an employer for failure to pay wages due, owing and demanded. The Court said:

> "The evident purpose of the act is to assure to employees prompt payment . . . of the wages they are *entitled to receive.*" (Emphasis added) 100 Utah 531.

Conversely, the Court appears to have been saying, that the Statute is not intended to assure prompt payment of that which *is merely claimed* but rather that which is a *just obligation of the employer.*

should be affirmed insofar as it denies the application of the Statute to said Defendant.

POINT V

THE TRIAL COURT ERRED IN AWARDING JUDGMENT TO CERTAIN OF THE PLAINTIFFS FOR WAGES AND VACATION BENEFITS IN EXCESS OF THAT SUPPORTED BY THE EVIDENCE.

Authorities agree that an employee is bound to exercise faithful, loyal and honest service to his employer. *Chiodo v. General Waterworks Corporation,* 17 Utah 2d 425, 427, 413 P.2d 891; 3 Am Jur 2d, Agency, Sec. 199. It is further agreed that it is the duty of an employee to be obedient to the directions of his employer. *Evans v. Stuart,* 17 Utah 2d 308, 313, 410 P. 2d 999; 35 Am Jur, Master and Servant, Sec. 83.

The record evidences that on approximately October 17, 1969, Plaintiffs met together as Interface employees and formulated certain "demands" which were forwarded to Interface and Omnico officers (R. 142, 547, 549). These demands were set forth in the recorded minutes of that meeting and were before the Trial Court as Exhibit 5-D. Therein, the Plaintiffs indicated that all were taking a temporary leave of absence until their designated conditions were met, and that they would thereafter put in only that time on the job as necessary to complete the work then in production (Exhibit 5-D). No response was received to the "demands" as submitted (R. 549) and Plaintiffs proceeded to report to work and perform

their respecitve employment responsibilities as outlined in ther "demands." The Plantiff, Hayward, testified that between October 17th and his alleged termination date, that he worked only 95% of his regular working days, having solicited two separate job interviews with other prospective employers during this time (R. 208). John Hill only worked approximately one-half of the regular working day, reporting only to work those particular jobs "needing to be run" (R. 288, 289). Perry did not work a full eight hours each day, only being there to "take care of the work that had to be done" and, in fact, failed to report at all on October 30th (R. 311, 312). Foxley worked all but three hours of the last Friday in October, his absence being attributed to a job interview with another prospective employer (R. 329). Watts failed to report for work every day, but rather only when called in by his supervisor (R. 362). The record further evidences that Plaintiffs, Park and Johnson, also participated in interviews for new employment during the course of the last week of their employment by Interface (R. 320, 321, 384), and that Robert Hill traveled to Los Angeles on company time for the principle purpose of demonstrating to Plaintiffs that he was working in their best interests (R. 250, 251).

Interface had established a policy, requiring that timeslips be prepared by certain of its employees engaged in direct programming work for customers. These timeslips were used to report the time spent on each programming job in order that the company could more accurately bill its customers for the work performed (R.

ployees busy (R. 157) and that this work was not getting done (R. 158). Plaintiffs were obviously prejudicing their company's attempts to operate at a profit and, in fact, constituted obstacles to the attaining of that purpose. The further failure of certain of the employees to prepare the required timeslips clearly constituted a default in their responsibilities as employees and at least, to some extent, must have complicated the billing of customers and may well have reduced the amounts for which the company could bill. These particular activities properly constituted a breach of the conditions of employment under which these Plaintiffs were employed, and are sufficient to deny Plaintiffs any right to compensation or vacation benefits after the date of the October 17, 1969 meeting. Even in the event that this Court should determine that the hereinabove described activities were not sufficient to deny Plaintiffs' claims for wages and vacation benefits accruing after October 17th, such wages and benefits are properly payable only for the time on the job actually spent by the Plaintiffs and, therefore, the Trial Court erred in awarding the Plaintiffs, Hayward, Robert Hill, John Hill, Perry, Foxley, Watts and Walters full wage and vacation benefits for the period following the October 17th meeting, since such employees worked less than the full time contemplated by the terms of their employment agreement.

CONCLUSION

Appellant respectfully submits that this Court should reverse the Judgment of the Trial Court to the extent that it awards damages against Appellant and,

376, 380, 381). If these slips were not prepared, it would be necessary for the company to estimate its billings (R. 381). Logically, if timeslips were not prepared, the company could well have difficulty in determining its cost of programming, and the amount to be properly billed and, therefore, could lose substantial revenues. Although timeslips were required of Plaintiffs, Hayward (R. 208), Morrey (R. 368), Johnson (R. 384), Perry (R. 312), Foxley (R. 329) and Watts (R. 362), Hayward, Morrey and Johnson prepared them only for the first week following the October 17th employee meeting (R. 209, 368, 384), Perry was not sure he ever prepared them after the meeting (R. 312), Foxley failed to prepare them for the last week of October (R. 329) and Watts did not prepare them at all after the date of the employee meeting (R. 362).

Section 469 of the Restatement of Agency (second) provides as follows:

> "An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constituted a willful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned."

In taking their "temporary leave of absence" after the October 17th meeting, Plaintiffs were refusing to render a full days work to their employer as was obviously contemplated by their employment agreement. The Plaintiff, Chatterley, testified that at this time, Interface did have sufficient business to keep all of its em-

further, should sustain that Judgment insofar as it determines that Appellant is not subject to the penalty provisions of Section 34-28-5(1), UCA, 1953.

Respectfully submitted,

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