

1993

Mariamercedes Power v. Riverview Financial Corporation : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Russell C. Fericks; Nathan R. Hyde; Gerald J. Lallatin; Richards, Brandt, Miller & Nelson; Attorneys for Appellant.

Randall N. Skanchy; Deno G. Himonas; Jones, Waldo, Holbrook & McDonough; Attorneys for Appellee.

Recommended Citation

Brief of Appellant, *Mariamercedes Power v. Riverview Financial Corporation*, No. 930535 (Utah Court of Appeals, 1993).
https://digitalcommons.law.byu.edu/byu_ca1/5452

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

MARIAMERCEDES POWER

Plaintiff and Appellant,

vs.

RIVERVIEW FINANCIAL
CORPORATION,

Defendant and Appellee.

Case No. 930535-CA

Priority No. 15

BRIEF OF APPELLANT

Appeal From Summary Judgment Entered
in the Third District Court Salt Lake County, State of Utah
The Honorable David S. Young

UTAH

U
D
K F U

930535

RUSSELL C. FERICKS
NATHAN R. HYDE
GERALD J. LALLATIN
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Appellant
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465

RANDALL N. SKANCHY
DENO G. HIMONAS
JONES, WALDO, HOLBROOK & McDONOUGH
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101

FILED
Utah Court of Appeals

JAN 26 1994


Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

MARIAMERCEDES POWER

Plaintiff and Appellant,

vs.

RIVERVIEW FINANCIAL
CORPORATION,

Defendant and Appellee.

Case No. 930535-CA

Priority No. 15

BRIEF OF APPELLANT

Appeal From Summary Judgment Entered
in the Third District Court Salt Lake County, State of Utah
The Honorable David S. Young

RUSSELL C. FERICKS
NATHAN R. HYDE
GERALD J. LALLATIN
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Appellant
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465

RANDALL N. SKANCHY
DENO G. HIMONAS
JONES, WALDO, HOLBROOK & McDONOUGH
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION	1
STATEMENT OF THE ISSUES	1
DETERMINATIVE STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
I. Nature of Case	3
II. Course of Proceedings	4
STATEMENT OF FACTS	8
SUMMARY OF ARGUMENT	12
POINT I: THERE WAS NO JUSTIFICATION FOR JUDGE YOUNG TO GRANT RELIEF FROM THE LAW OF THIS CASE	12
POINT II: THE EXISTENCE OF AN IMPLIED-IN-FACT EMPLOYMENT CONTRACT IS A FACT QUESTION FOR THE JURY	12
POINT III: WHETHER THERE WAS A REDUCTION-IN-FORCE IS A QUESTION OF FACT FOR THE JURY . . .	13
ARGUMENT	14
POINT I	
THERE WAS NO JUSTIFICATION FOR JUDGE YOUNG TO GRANT RELIEF FROM THE LAW OF THIS CASE	14
POINT II	
THE EXISTENCE OF AN IMPLIED-IN-FACT EMPLOYMENT CONTRACT IS A FACT QUESTION FOR THE JURY . .	16

POINT III

EVIDENCE OF RIVERVIEW'S INTENT AND POWER'S REASONABLE EXPECTATION OF "FOR CAUSE" CONTRACT TERMS	19
---	----

POINT IV

WHETHER THERE WAS A REDUCTION-IN- FORCE IS A QUESTION OF FACT FOR THE JURY	24
---	----

CONCLUSION	27
----------------------	----

ADDENDA

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Berube v. Fashion Center, Ltd.,</u> 771 P.2d 1033 (Utah 1989)	16, 17
<u>Blue Cross & Blue Shield v. State,</u> 779 P.2d 634 (Utah 1989)	2, 3
<u>Caldwell v. Ford, Bacon & Davis Utah, Inc.,</u> 777 P.2d 483 (Utah 1989)	18
<u>Coelho v. Posi-Seal Int'l.,</u> 544 A.2d 170 (Conn. Sup. Ct. 1988)	25, 26
<u>Flanigan v. Prudential Federal Savings & Loan Assoc.,</u> 720 P.2d 257 (Mont. 1986)	26
<u>Gilmore v. Salt Lake Area Community Action Program,</u> 775 P.2d 940 (Utah App. 1989)	17, 23
<u>Harlan v. Sohio Petroleum C.,</u> 677 F. Supp. 1021 (N.D. Cal. 1988)	26
<u>Harward v. Harward,</u> 526 P.2d 1183 (Utah 1974)	1
<u>Heslop v. Bank of Utah,</u> 839 P.2d 828 (Utah 1992)	18, 21
<u>Hodgson v. Bunzl Utah, Inc.,</u> 844 P.2d 331 (Utah 1992)	13, 15, 28
<u>Jackson v. Dabney,</u> 645 P.2d 613 (Utah 1982)	2
<u>Johnson v. Morton Thiokol, Inc.,</u> 818 P.2d 997 (Utah 1991)	16, 20
<u>Laub v. South Cent. Utah Tel. Ass'n,</u> 657 P.2d 1304 (Utah 1982)	14
<u>Lincoln Benefit Life Ins. Co. v. D.T. Southern Properties,</u> 838 P.2d 672 (Utah App. 1992)	14

<u>Linn v. Beneficial Commercial Corp.,</u> 543 A.2d 954 (N.J. Super. A.D. 1988)	26
<u>Sanderson v. First Sec. Leasing,</u> 844 P.2d 303 (Utah 1992)	13, 15, 18
<u>Thurston v. Box Elder County,</u> 835 P.2d. 165 (Utah 1992)	18
 Rules and Statutes	
Utah Code Annotated § 78-2a-3(2)(k)	1

JURISDICTION

The jurisdiction of the Utah Court of Appeals is conferred by Utah Code Annotated § 78-2a-3(2)(k) and by Order of the Supreme Court of Utah dated August 18, 1993 pouring-over this case.

STATEMENT OF THE ISSUES

FIRST ISSUE - (POINT I):

1. Did the District Court err by hearing the defendant/appellee's Motion for Relief from Order either because no new facts were presented in support or because the motion was contrary to the "law of the case" doctrine (i.e., a District Court judge may not vacate the prior decision of another District Court judge)?

Standard of Review

Trial Judge David Young reviewed the determination of his predecessor, and determined, as a matter of law, that Judge Wilkinson's decision was incorrect. This exercise of appellate review is entitled to no deference. Harward v. Harward, 526 P.2d 1183 (Utah 1974).

SECOND ISSUE - (POINT II AND III):

2. Was summary dismissal of plaintiff/appellant's causes of action in error because employment policy statements and conduct, when considered in a light most favorable to Power, establish an implied-in-fact employment relationship whereby she

could only be terminated for cause, after disciplinary counseling, and an opportunity to correct deficiencies?

Standard of Review

Because summary judgment was granted as a matter of law, this Court may review the trial court's conclusions of law without according them any deference, viewing the facts in the light most favorable to Appellant. Blue Cross & Blue Shield v. State, 779 P.2d 634 (Utah 1989).

Summary judgment is not appropriate where a genuine issue of material fact exists and where, on the basis of the facts in the record, reasonable minds could differ. Jackson v. Dabney, 645 P.2d 613 (Utah 1982).

THIRD ISSUE - (POINT IV):

Did the trial court err in concluding that plaintiff/appellant's termination was part of a reduction in force and "when it became necessary to reduce employees, the plaintiff was let go for that reason alone" [March 18, 1993 Memorandum Decision, p. 5, R. at 984.] when that finding is inconsistent with competent evidence and when defendant/appellee failed to provide any documentation of a reduction in force in response to discovery requests by Power.

Because summary judgment was granted as a matter of law, this Court may review the trial court's conclusions of law without according them any deference, viewing the facts in the light most favorable to Appellant. Blue Cross & Blue Shield v. State, 779 P.2d 634 (Utah 1989).

DETERMINATIVE STATUTORY PROVISIONS

Rules 56 and 60(b)(7), Utah Rules Civil Procedure.

STATEMENT OF THE CASE

I. Nature of Case.

Plaintiff and Appellant, Mariamercedes Power, was hired by Defendant and Appellee, Riverview Financial Corporation ("Riverview" a/k/a Mrs. Fields Cookies) on December 1, 1988. She was terminated after approximately 13 months of employment. Power brought an action against Riverview in the Third Judicial District Court for Summit County, State of Utah alleging that her termination violated an implied-in-fact agreement that she would only be terminated for cause.

Passages in Riverview's documents and explicit statements and actions by company executives created an implied-in-fact agreement that Power would not be terminated without cause and then only after remedial and disciplinary procedures had been followed. Power claims that she was terminated without cause, not as part of a reduction in force, as claimed by

Riverview. Power was given no warning of performance difficulties and no corrective instruction or opportunity to improve.

II. Course of Proceedings.

Significantly, this case is pending in the Third Judicial District Court in and for Summit County. As such, it has been subject to the revolving trial judge arrangements prevailing on that bench. On November 25, 1991, a hearing was held before then-sitting Judge Homer Wilkinson on Riverview's Motion for Summary Judgment. (R. at 407.) Judge Wilkinson denied summary judgment on Power's claim of an implied-in-fact contract. (R. at 408.)

Before an order was entered, Riverview filed a Motion for Reconsideration of the court's denial of summary judgment on the implied-in-fact contract issue. (R. at 409-424.) Power opposed reconsideration. (R. at 425-429.) On February 19, 1992, Judge Wilkinson, having considered Riverview's Motion for Reconsideration, entered a Minute Entry allowing the implied-in-fact contract claim to remain. (R. at 453.)

Between July 1, 1992 and December 31, 1992, the presiding trial judge was Frank G. Noel. On July 13, 1992, he entered a Scheduling Order setting jury trial for November 10 through 12, 1992. (R. at 496.) On August 11, 1992, Riverview

filed a Motion in Limine seeking to preclude evidence at trial of Riverview's specific promises of fairness and Riverview's stated discipline policy. (R. at 500-526.) Riverview claimed these statements and standards were irrelevant to the jury question of whether it had abandoned or waived the at-will presumption. Yet, this was the very evidence on which Judge Wilkinson relied in denying Riverview summary judgment (and reconsideration) on the implied-in-fact employment contract issue.

Power opposed the Motion in Limine, again with extensive citation to the depositions, documents and affidavits supporting a "for cause" employment agreement and the right to notice of concerns and an opportunity to remediate before termination. (R. at 544-595.) Judge Noel denied the Motion in Limine (R. at 709) specifically finding that Power's evidence of an implied-in-fact contract was sufficient to require jury consideration, and citing to Judge Wilkinson's earlier decisions on the matter. (See Judge Noel's November 20, 1992, Minute Entry at Addendum.)

While Riverview's Motion in Limine was pending, a scheduling conflict arose on the Court's calendar. By Minute Entry dated November 10, 1992, Judge Noel moved the trial to December 15, 1992, in place of the trial scheduled in the companion case of Joe Trembly v. Mrs. Fields Cookies (District

Court Case No. 10756; now pending on appeal in this Court as Case No. 930635-CA). (R. at 705.) The parties proceeded to trial on December 15th, selected a jury, presented opening statements, started Power's direct testimony, and screened Riverview's training video "What We Stand For." Unfortunately, on the morning of the second day of trial, a difficulty arose with one of the jurors who first claimed economic hardship from jury duty, and then claimed that he had made up his mind and could not hear the rest of the trial fairly. It was eventually determined that the juror was intoxicated and could no longer participate in the proceedings. The parties were unable to agree on how to proceed with just seven jurors, and so a mistrial was ordered. Judge Noel rescheduled trial for March 23, 1993.

On January 1, 1993, Judge David S. Young took the Summit County District Court bench. On January 15, 1993, he signed a Minute Entry confirming the trial date of March 23, 1993 (R. at 807), but on February 26, 1993, he postponed the trial to April 15, 1993. (R. at 811.)

On March 1, 1993, Riverview filed a Motion for Relief From [Judge Wilkinson's] Order which had denied summary judgment on Power's claim of an implied-in-fact employment contract. (R. at 812-813.) In support of its Motion for Relief (f/k/a a "motion to reconsider"), Riverview cited the publication of two

Utah Supreme Court opinions as the basis for reconsideration. No new facts were offered in support of the Motion for Relief. In fact, Riverview's 122-page supporting memorandum consisted principally of copies of its legal memorandums supporting prior motions. Power objected to the Motion for Relief both on the merits and on the propriety of a district court judge overruling the "law of the case" as established by another district court judge. (R. at 938-943.)

Judge Young heard the motion on March 18, 1993 (R. at 1091-1132, copy of transcript in Addendum). The hearing was in Judge Young's Third District courtroom in Salt Lake City without benefit of the file, which was in the Clerk's Office in Coalville, Summit County. Judge Young granted the Motion to Reconsider that same day. In his Memorandum Decision Judge Young usurped the jury's function by concluding that "[i]n the instant case, reasonable minds cannot differ as to the fact that the evidence was not strong enough to overcome the presumption that an "at will" relationship continued and that the company had done nothing to change the "at-will" relationship with this plaintiff. All assurances remained consistent with the "at-will" status and when it became necessary to reduce employees, the plaintiff was let go for that reason alone." (R. at 983-984, emphasis supplied.)

An Order granting Riverview summary judgment on the claim for breach of an implied-in-fact employment contract was entered on May 25, 1993. (R. at 986-988, copy in Addendum.) In the Order, Judge Young reiterated his conclusion that "the undisputed facts establish as a matter of law that Plaintiff's employment relationship with Defendant was 'at-will' and that, regardless, Defendant terminated Plaintiff 'for cause' as part of a reduction-in-force." This appeal followed.

STATEMENT OF FACTS

1. In November 1988, Power quit her job, cancelled a job interview with another company and accepted employment with Riverview after having the policies of the company explained to her by E.G. Perry, the personal assistant and secretary to Debbi Fields. (See Amended Complaint at ¶ 3; Power Depo., p. 34, R. at 322-333.) Ms. Perry's introductory explanation was:

[I]t was a wonderful company to work for. That there would be many opportunities for advancement. That with my experience, I would go far with the company. I was given the company policy and procedures manuals that indicated that it was a fair company. That if you were a hard worker, conscientious worker, you would be there until you chose to terminate the employment.

(R. at 323.)

2. During Power's employment, Riverview's Policy and Procedures Manual contained the following words of limitation to the company's right to terminate employment at-will:

Philosophy. . . .

For example, no person should be terminated if he or she did not know, or should not have known, what was expected. . . .

If an employee, for some reason is not performing to expectations, you should verify that he/she understands what he/she must do to be performing successfully.

(Personnel Section 7.0 - Disciplinary Process - R. at 335.)

3. Personnel Section 7.0 also describes as General

Rules:

DID THE EMPLOYEE KNOW OR SHOULD HE/SHE HAVE KNOWN OF THE DISCIPLINARY CONSEQUENCES OF HIS/HER CONDUCT? . . .

A trivial offense does not merit harsh discipline unless the employee was guilty of the same or similar offense a number of times in the past.

(R. at 336, emphasis in original.)

4. Personnel Section 7.0 enumerates "Violations that are Grounds for Immediate Termination." (R. at 338-339.) All of the listed grounds for termination involve misfeasance on the part of the employee. Power was not terminated for any misfeasance.

5. During Power's employment, she saw the video film "What We Stand For", in which Riverview founders and principal officers Randy and Debbi Fields declare the overriding philosophy of the company. Debbi Fields says, "The fourth component: fair treatment of all--this is part of our foundation." And then Randy Fields explains what this principle means:

We mean to treat people fairly. . . . Treat somebody that reports to you exactly the way you would want to be treated. Let me give you an example of what's not fair. Let's suppose you have somebody that's not a good performer. . . . Here's what's not fair: not saying anything to them, then scheduling them out of the company. . . . That's not fair. Let me tell you what else is not fair. Without warning, you walk in for some relatively minor infraction of the rules and firing them. They never knew that they were doing something wrong--they had no communication on the subject whatsoever. That's not fair. . . .

On the other hand, you understand that it is perfectly fair to fire someone? There is a fair way to do that? Absolutely a fair way to do that. And what we mean by fair is in some sense a communication issue. . . . "Hold accountable" means something really simple. That once I've instructed you as to how you are to be or to behave . . . and once you have got that and demonstrated that you understand it, then my expectation is that that's how it will be, and failure to do that results in discipline and ultimately continued failure to do it results in leaving the job at our request. That's a polite way of describing being fired. (Randy Fields, Transcript - "What We Stand For," pp. 14-15.)

Debbi Fields corroborates Randy's explanation:

I want to make sure that people are treated fairly. That this company represents a code of ethics and that we will work to make sure that everybody in this organization is told how to be better, how to be more effective. . We're not perfect. . . . I'm going to make mistakes. So I always need correction or need direction and if I need it, I can guarantee you'll need it. (Debbi Fields, Transcript -"What We Stand For", pp. 16-17).

(R. at 298-299.)

6. In April 1989, Power was promoted to the Position of Administrative Assistant to Paul Baird, Director of Operations. (R. at 299.)

7. While Power was his Administrative Assistant, Paul Baird terminated several employees. In every termination of which Power was aware, each employee received a written Performance Improvement Plan, and was then given a chance to correct that performance. (Power Depo., p. 71, R. at 330.)

8. Baird recommended and gave Power a 10% Bonus because her performance exceeded expectations in the third quarter of 1989, her first full quarter as his Administrative Assistant. (Baird Depo., p. 65, R. at 345; and Performance Evaluation -3rd Qtr., R. at 353.)

9. In the fourth quarter of 1989, Baird told Power she was going to be elevated to management of Riverview's \$15 million Mail Order operation. (Power Depo., p. 158, R. at 333.) This

plan was announced at the November 1989 "Top Gun" meeting in Park City. Id.

10. Then, on January 8, 1990, Baird terminated Power without warning, claiming at the termination interview that her performance had "dramatically fallen off." Baird did so without previously informing Power of her alleged lack of performance, or determining that she knew what was expected of her, and then giving her a chance to improve her performance. (Baird Depo., p. 71, R. at 347; Performance Evaluation - 4th Qtr., R. at 358-359; Power's January 19, 1990, letter to Debbi Fields, R. at 367, et seq.)

11. In spite of Riverview's written standards for disciplinary due process; and in direct contradiction to Riverview's stated company principle of fairness which prohibits "not saying anything to [a poor performer], then scheduling them out of the company;" Baird terminated Power (or supposedly her position) because of poor performance which he never discussed with her before termination: "This lack of performance resulted in the position being eliminated on 12/31/89." (Performance Evaluation - 4th Qtr., R. at 359.)

SUMMARY OF ARGUMENT

POINT I: THERE WAS NO JUSTIFICATION FOR JUDGE YOUNG TO GRANT RELIEF FROM THE LAW OF THIS CASE.

Rule 60(b)(7), Utah Rule of Civil Procedure, should be applied only in unusual or exceptional circumstances. Because Riverview did not introduce any new evidence and the cases cited by Riverview as support for its Motion did not change implied-in-fact employment contract law, Judge Young was not justified in "vacating" Judge Wilkinson's prior determination and entering summary judgment in its place. (R. at 986-988.)

POINT II: THE EXISTENCE OF AN IMPLIED-IN-FACT EMPLOYMENT CONTRACT IS A FACT QUESTION FOR THE JURY.

The question of whether the at-will employment presumption has been overcome is a question of fact reserved for the jury. The two cases cited by Riverview as justification for its motion, Hodgson v. Bunzl Utah, Inc., 844 P.2d 331 (Utah 1992) and Sanderson v. First Sec. Leasing, 844 P.2d 303 (Utah 1992), do not change the requirement that courts should interpret employment contracts by harmonizing the overall meaning of the contract within the totality of the employment circumstances.

Power has alleged facts, which if true, would establish her reasonable expectation that her employment was not at-will. Riverview has not and cannot deny the existence of Power's evidence. Judge Young concluded in his Memorandum Decision that

Riverview "had done nothing to change the 'at-will' relationship" with Power. (R. at 984.) This conclusion simply is not correct, and it improperly invades the province of the jury.

POINT III: WHETHER THERE WAS A REDUCTION-IN-FORCE IS A QUESTION OF FACT FOR THE JURY.

Riverview claims that the reduction-in-force was its "cause" to terminate Power. Power claims that this was a pretext which is not borne out by the facts and which is inconsistent with Riverview's other conduct and representations. But even if Riverview did have a legitimate reduction-in-force, Riverview's Director of Operations, Paul Baird, admitted that elimination of Power's job was inextricably linked to performance concerns. (R. at 359.) And it is undisputed that Riverview failed to fulfill Randy Field's pledge to apprise Power of performance problems, provide corrective instruction, and allow an opportunity for improvement before "scheduling" Power out of the company. These disputed factual issues are jury questions. Judge Young erred by focusing solely on Riverview's evidence and treating Riverview's invocation of reduction-in-force as per se cause, without evaluating the underlying circumstances and the overall context of the employment relationship.

ARGUMENT

POINT I

THERE WAS NO JUSTIFICATION FOR JUDGE YOUNG TO GRANT RELIEF FROM THE LAW OF THIS CASE

Riverview relied on Rule 60(b)(7), Utah Rules of Civil Procedure for its Motion for Relief from [Judge Wilkinson's] Order. (R. at 812.) The Supreme Court of Utah follows the admonition that Rule 60(b)(7) "should be very cautiously and sparingly invoked by the Court only in unusual and exceptional circumstances." Laub v. South Cent. Utah Tel. Ass'n, 657 P.2d 1304, 1307-1308 (Utah 1982) (quoting Hughes v. Sanders, 287 F. Supp. 332, 334 (E.D. Okla. 1968); See Lincoln Benefit Life Ins. Co. v. D.T. Southern Properties, 838 P.2d 672, 674 (Utah App. 1992)). This is not such a case.

In order to obtain relief from Judge Wilkinson's two prior denials of summary judgment on the implied-in-facts employment contract issues, Riverview had to show unusual and exceptional circumstances. Laub, 657 P.2d at 1306; Lincoln Benefit, 838 P.2d at 674. Yet, there was nothing extraordinary for Judge Young to consider. In its Memorandum supporting reconsideration, Riverview simply deferred to its prior pleadings: "Rather than rehashing those facts, however, and in the interest of judicial economy, defendant simply refers the Court to the facts and analysis" in its memorandums supporting

motion for summary judgment. (R. at 816-817.) Riverview's motion was nothing more than an attempt for a third bite of the apple -- an attempt motivated by what Judge Young admitted was "the undesirable nature of the master calendar system now followed in Summit County where the Judge will change as the assignment changes." (R. at 982.)

The two new cases cited by Riverview to Judge Young did not justify the relief he granted. Sanderson v. First Sec. Leasing, 844 P.2d 303 (Utah 1992) and Hodgson v. Bunzl Utah, Inc., 844 P.2d 331 (Utah 1992) did not change the implied-in-fact employment contract analysis. If anything, Sanderson and Hodgson bolstered Judge Wilkinson's ruling that a reasonable jury could find that Riverview breached its implied-in-fact contract with Power, so the case could not be disposed of on summary judgment.

Finally, Judge Young's Memorandum Decision was issued in Salt Lake City on the same day as oral argument and without benefit of the file which was in the Summit County Court Clerk's Office in Coalville. (R. at 1093.) Judge Young's only reference to Power's evidence was a summary of the extemporaneous review given by her counsel during oral argument in response to the trial court's inquiry. In reaching its conclusion the Court virtually ignored the voluminous record evidence of "for cause" employment drawn from documentary, video, oral, and

course-of-dealing sources. (R. at 68-73; and 295-316 with supporting evidence at 322-378.) Thus, not only did Judge Young grant the Motion to Reconsider without adequate demonstration of unusual and exceptional circumstances, he impermissibly reversed the law of the case by vacating Judge Wilkinson's prior decisions, disregarding Judge Noel's important ruling on Riverview's Motion in Limine (R. at 709, see Addendum), and entered summary judgment without giving Power's evidence the liberal inferences to which it is entitled. Berube v. Fashion Center, Ltd., 771 P.2d 1033, 1039 (Utah 1989).

POINT II

THE EXISTENCE OF AN IMPLIED-IN-FACT EMPLOYMENT CONTRACT IS A FACT QUESTION FOR THE JURY

The existence of an implied-in-fact contract "is a question of fact which turns on the objective manifestations of the parties' intent. As a question of fact, the intent of the parties is primarily a jury question." Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1001 (Utah 1991). Neither Hodgson nor Sanderson change the requirement that courts should interpret employment contract terms by harmonizing the overall meaning of the contract. Judge Wilkinson's denial of summary judgment reflects his understanding of that point.

Justice Zimmerman in Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989) holds that "the representations made by

the employer in employee manuals, bulletins, and the like are legitimate sources for determining the apparent intentions of the parties." 771 P.2d at 1052. The same conclusion was reached in Gilmore v. Salt Lake Area Community Action Program, 775 P.2d 940 (Utah App. 1989), "In order to determine the nature of the employment contract, the court should consider the intent of the parties and the totality of the circumstances." 775 P.2d at 943. In Gilmore, summary judgment was not appropriate, even though the plaintiff was hired as an at-will employee, because the employer later changed the employment contract terms by issuing a manual that outlined appeal and discipline procedures. Id.

The same thing happened with Power in the present case, but several times over. Through company manuals; the foundational video, "What We Stand For"; conduct of Power's boss, Paul Baird; and verbal representations of other company officials, Power was given repeated and consistent assurances of a "for cause" employment relationship. If anything, Sanderson and Hodgson reinforce principles which supported Judge Wilkinson's prior orders: "The existence of an implied-in-fact contract is a factual question committed to the sound discretion of the jury." Sanderson, 844 P.2d 303 (Utah 1992); "Summary judgment is appropriate only if a reasonable jury cannot find

that an implied contract exists." Id., citing Caldwell v. Ford, Bacon & Davis Utah, Inc., 777 P.2d 483, 486 (Utah 1989).

In addition to Hodgson and Sanderson, the Utah Supreme Court also issued another employment law opinion between Judge Wilkinson's denial of summary judgment and Judge Young's reconsiderations. The opinion was Thurston v. Box Elder County, 835 P.2d 165 (Utah 1992) where the Court held that an employer could create an "atmosphere" of fairness upon which employees may justifiably rely, and which creates implied-in-fact contract terms. In other words, private employers do not need to make specific implied contract promises to specific employees to create implied-in-fact contract terms, Id. Accord, Heslop v. Bank of Utah, 839 P.2d 828, 835-36 (Utah 1992) ("Berube works no substantial injustice by requiring employers who expressly or impliedly promise employment for other than at-will to stand by that promise.")

This standard was specially briefed by Power (R. at 955-979) after oral argument on Riverview's Motion for Relief because it had seemed to be a sticking point in Judge Young's analysis. (R. at 1128-1129.) Judge Young received that supplementary brief before issuing his March 18, 1993, Memorandum Decision. (R. at 984.) He decided incorrectly anyway.

POINT III

THERE IS SUBSTANTIAL EVIDENCE OF RIVERVIEW'S INTENT AND POWER'S REASONABLE EXPECTATION OF "FOR CAUSE" CONTRACT TERMS

Riverview did not dispute any of the factual citations in Power's memorandum to Judge Wilkinson opposing summary judgment (R. at 194-284) or in Power's memorandum to Judge Noel opposing Riverview's Motion in Limine (R. at 477-551) or her memorandum to Judge Young opposing Riverview's Motion for Relief (R. at 782-852). Rather, Riverview argued that in spite of Power's extensive documentary, video, and deposition evidence, no reasonable jury could find that Riverview relinquished the "at-will" presumption. Riverview's Motion for Relief was a pure fact-finding invitation. It would be hard to articulate a case with clearer issues of material fact.

A. Examination of Riverview's Factual Claims:

Riverview's Handbook equivocates and suggests reliance on higher authorities for the actual terms and conditions of employment. "We do not expect this handbook to answer all of your questions. Your supervisor will be your major source of information." (R. at 176.) Power's supervisors and Riverview's owners themselves explained numerous times that termination required compliance with the disciplinary process:

I was told by the company or a representative
of the company that it was a fair place,

secure place to work, and that if there were any problems with performance or breaking one of their policies, that person would be notified and steps would be taken to remedy that situation and the employees would be given a fair chance to remedy whatever the situation was before they would be terminated. That a person would know fairly what was expected of them and what the performance was.

(Power Depo., p. 69, lines 1-9, R. at 329.) Power understood this to be the policy from statements made by Debbi and Randy Fields, (discussed above) and from statements in the Policy and Procedures Manual. (Power Depo., p. 69, lines 10-22, R at 329.)

While the handbook does "supersede all prior handbooks, manuals, policies and procedures issued by The Company," it also allows that "The Company" may, at any time, in its sole discretion, modify or vary from anything stated in this handbook." (R. at 176.) The conduct and oral representations of Riverview's management, Power's direct and higher supervisors, and the very owners of the Company did vary from the Handbook's equivocal reservation of the at-will presumption.

These facts distinguish the case from the holding of Johnson v. Morton Thiokol, 818 P.2d 997 (Utah 1991), where the Supreme Court carefully determined that the employer complied with its procedures for termination of the plaintiff. In this case, Ms. Power's termination was improper because it did not

comply with the procedures for staged discipline and it was inconsistent with Riverview's express policies of fairness.

B. Riverview's Handbook Is Not Dispositive:

Riverview contends that Power admitted her at-will status on June 6, 1989 when she signed an "Acknowledgement of Receipt" (R. at 378.) for a "Mrs. Fields Team Member Handbook." The Acknowledgement of Receipt contained the statement, "The company reserves the right to . . . terminate me with or without cause at any time." However, this statement is part of a "Checklist" expressly requiring Power to acknowledge with her initials, and she didn't. There are only check marks in the space provided for initials. Power does not recall making or seeing the check marks on the form, and she disputes that she acknowledged her at-will status:

To the best of my recollection, I signed this paper as an acknowledgement that I had received the handbook. I did not stop and think and analyze specific sentences. . . . But I know that it's just an acknowledgement of the handbook, not a specific area." (Power Depo., pp. 65-66, attached as "Exhibit A.")

Even if Power did inadvertently acknowledge her initial at-will status, she did so with the understanding that Riverview's at-will policy included the constraint that she not be terminated without being informed of performance problems and being given a chance to improve her performance. (Power Depo.,

p. 67, R. at 328.) In any event, the facts about the Acknowledgement of Receipt for the handbook are in dispute and for purposes of summary judgment they must be construed in Power's favor.

C. Conduct Of The Parties:

The conduct of Riverview executives, including Power's immediate superior, Paul Baird, are also acceptable sources of evidence to determine intent. Berube 771 P.2d at 1044; Gilmore 775 P.2d at 942. In Johnson v. Morton Thiokol, Inc., 818 P.2d 997 (Utah 1991), Justice Stewart explains how contract law principals apply to determine the weight to be given to conduct of the parties in interpreting implied-in-fact contract terms.

Contract terms implied from the conduct of the parties ordinarily stand on equal footing with express contract terms. Restatement (Second) of Contracts §§ 4, 19 (1981) The actual conduct of the parties may modify an express statement in an employment manual that employment is only on an at-will basis, just as any contract term may be modified by the conduct of the parties.

(Stewart, J. concurring in the result).

The conduct of Paul Baird is evidence of the company policy that if performance was lacking, an employee would be notified and given the opportunity for correction. As Baird's Administrative Assistant, Power observed Baird follow this disciplinary procedure for several employees ("probably more than

a dozen"). Power knows of no instance when Baird discharged an employee without first writing a performance improvement plan for the person, and giving the employee an opportunity to improve, except when he terminated her. (Power Depo., p. 71, R. at 330.) These facts are evidence that an implied-in-fact contract existed limiting Riverview's ability to terminate Power at-will.

POINT IV

WHETHER THERE WAS A REDUCTION-IN- FORCE IS A QUESTION OF FACT FOR THE JURY

Judge Young concluded, on the weight of Riverview's claim, that Power's termination was a Reduction in Force and "the plaintiff was let go for that reason alone." (R. at 984.) There is no record support for this, other than the unsupported characterization of the termination as a RIF by Paul Baird and by Riverview's personnel officer, Cindy Reisner. To the contrary, the pretext of the RIF claim is shown in Paul Baird's own deposition where he testified that Power was terminated for poor work performance. (Baird Depo., pp. 70-71 and 85, R. at 346-47 and 349; Performance Evaluation Form 4th Qtr. '89, R. at 359.)

If there was a true RIF, Power's performance would have been irrelevant. And, if Paul Baird was only just cutting staff in his department, Power had valid claim to the management position in the mail order facility which she had been promised. If performance concerns were legitimate, Power was entitled to

notice of deficiencies, instruction on expectations, and an opportunity to perform -- that was Debbi and Randy Fields' promise to Power! Power got neither the anticipated transfer or the company's promised fairness. Riverview cannot have it both ways.

Based on Baird's statements that Power was terminated for poor performance, a jury should conclude that there was, in fact, no reduction in force. Coelho v. Posi-Seal Int'l., 544 A.2d 170, 178, (Conn. Sup. Ct. 1988). The RIF allegation is a pretext to cover up Riverview's failure to follow its disciplinary procedure by terminating Power without any warning or opportunity to correct job performance. It begs the question to claim that Power's job position was eliminated because of poor performance, but that Power was not entitled to Riverview's contractual due process because the termination was a reduction-in-force, rather than "for cause."

Even if the termination could be characterized as a RIF, it is not necessarily "just cause," as a matter of law. Harlan v. Sohio Petroleum C., 677 F. Supp. 1021, 1030 (N.D. Cal. 1988). It is a matter for the trier-of-fact to determine whether an employee has been terminated as a result of a legitimate RIF or because of other factors. Flanigan v. Prudential Federal Savings & Loan Assoc., 720 P.2d 257, 261 (Mont. 1986). An

employer's contention that some employees were terminated as a result of a legitimate RIF does not necessarily establish that all employees were discharged for the same reason. An employer may not use a RIF as a pretext to terminate other employees in violation of contractual obligations. Coelho 544 A.2d at 178; see also Linn v. Beneficial Commercial Corp., 543 A.2d 954, 956 (N.J. Super. A.D. 1988) (elimination of job must be due to legitimate, economic or business reasons and not as a bad faith pretext to arbitrarily terminate an employee).

Riverview did not produce any documents in response to Power's discovery directed at this very point. On the contrary, Riverview's Director of Human Resources claimed that changes in the number of personnel at Riverview were primarily the result of attrition and not as the result of any study. (Daniel Murphy Depo., p. 32, R. at 404.) All of the evidence points to a highly fluid company structure in which positions were created, shifted, changed and eliminated ad hoc. Baird admits that people under his direction were reassigned to other positions during the period he claims the company wanted to eliminate positions and that he made no attempt to reassign Power. (Baird Depo., pp. R. at 342-343.)

In essence, reduction-in-force is an affirmative defense to a claim for breach of employment contract. In order

to merit summary judgment on that affirmative defense, Riverview would have to show that Power was eliminated solely as a result of economic circumstances which necessitated laying off otherwise satisfactory employees. That situation would truly present "no genuine issue as to material fact." Rule 56(c), U. R. Civ. P. But where, as here, an employer specifically ties the decision to eliminate a position to the performance of the person in that position, after having pledged to provide notice, instruction, and an opportunity to improve, the reduction in force can no longer be a purely economic rational. At that point, company standards for training, discipline, and performance retention merge with analysis of the employee's specific circumstances. The result is a fact-intensive problem which should be entrusted to the jury for resolution based on all the evidence.

CONCLUSION

In the first instance, this case should be remanded because Judge Young failed to follow the law of the case doctrine. In essence, he second-guessed Judge Homer Wilkinson's denial of Motion for Summary Judgment and denial of Motion for Reconsideration. In so doing, he also bypassed the determination of Judge Frank Noel that Power's evidence of an implied-in-fact contract was substantial and relevant, thus justifying denial of

Riverview's Motion in Limine to exclude that evidence from trial. This appeal can be disposed of completely on this issue, with remand for trial on the merits.

With regard to Judge Young's entry of summary judgment against Power, the Utah Supreme Court and the Utah Court of Appeals have reaffirmed numerous times that the question of whether the at-will presumption has been overcome is a question of fact reserved for the jury. It is only when no reasonable jury could find "for cause" terms of employment that the court is authorized to bypass the constitutional right to jury trial and to direct entry of judgment in favor of the employer. In conducting its analysis, the trial court must look to the employer's conduct and oral representations to determine the intent of the parties, and to judge the "circumstances as a whole." Hodgson v. Bunzl Utah, Inc., 844 P.2d 331, 334 (Utah 1992). Judge Young didn't do that.

Typically, summary judgment motions are defeated (or reversed on appeal) by the plaintiff showing one or two material facts which support its case. The extensive reference and recitation to facts supporting Power's case goes far beyond the usual requirement. Even so, it is not exhaustive. Power is entitled to present all of her evidence in a comprehensive

manner, as previously and correctly authorized by Judge Wilkinson.

Similarly, Riverview's claim to have terminated Power through a reduction-in-force is a fact-intensive question on which the evidence is in dispute. For both this issue, and the primary issue of rebutting the "at-will" presumption, Judge Young did not provide Power's evidence with the favorable inferences to which they are entitled. Instead, he accepted Riverview's claims as per se defenses, almost as if there was any evidence to support them, Riverview was entitled to win. This was error.

Power respectfully asks this Court to set aside Judge Young's Memorandum Decision granting Riverview relief from Judge Wilkinson's Order denying motion for summary judgment.

DATED this 26th day of January, 1994.

RICHARDS, BRANDT, MILLER & NELSON



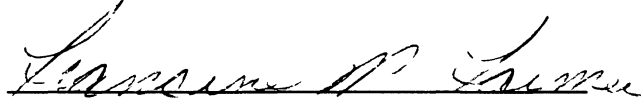
RUSSELL C. FERICKS

NATHAN R. HYDE
GERALD J. LALLATIN
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two (2) true and correct copies of the foregoing instrument, having been executed and entered by the Court, have been mailed, first-class, postage prepaid, on this 2nd day of January, 1994, to the following:

Randall N. Skanchy, Esq.
Deno G. Himonas, Esq.
JONES, WALDO, HOLBROOK & McDONOUGH
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101



gj1\power2.app

ADDENDA

1. Memorandum Decision - March 18, 1993 -- Record at 980-984.
2. Judge Noel Minute Entry on Motion in Limine - November 12, 1992 -- Record at 709.
3. Transcript of March 18, 1993 hearing on Motion for Relief -- Record at 1091-1132.
4. Order on Defendants Relief from Order -- Record at 986-988.

FILED

MAR 18 1993

Clerk of Summit County

By
Deputy Clerk

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

MARIAMERCEDES POWER,
Plaintiff,
vs.
RIVERVIEW FINANCIAL CORP.
Defendant.

MEMORANDUM
DECISION

CASE # 10741

The above matter came on for argument on the defendant's "Motion for Relief from Order." The Plaintiff was represented by Russell c. Fericks and Nathan R. Hyde. The Defendant was represented by Randall N. Skanchy and Deno G. Himonas. The court heard the argument of counsel, reviewed the pleadings on file and now renders this it's

MEMORANDUM DECISION

This action arises out of the alleged termination of the employment of the plaintiff by the defendant. Discovery has been concluded and the information relating to the parties employment relationship has been developed and is essentially undisputed for the purposes of this decision.

The plaintiff prepared and submitted an employment application December 1, 1988. She was hired and worked for approximately thirteen (13) months. When seeking employment she completed the application which stated as follows:

We are an equal opportunity employer dedicated to a policy of non-discrimination in employment on any basis including race, creed, color, age, sex, religion, or national origin. All employees of the Company are at-will employees subject to termination at any time with or without cause. (emphasis added)

000980

Later, on June 20, 1989 while employed and after some initial indoctrination as to the company's policies and procedures, the plaintiff was given an Employee's Handbook which contained additional and lengthy instructions as to the company's expectations and the employee's expectations. In the "Acknowledgement of Receipt" signed by the plaintiff is this language in standard size and consistently obvious location:

I understand that neither this Handbook nor any other representation by a management official of The Company are intended to create a contract of employment. I understand that The Company and I have the same right to end my employment at any time for any reason. (emphasis added)

In addition, in the Employee's Handbook states, "Every employee is free to terminate his or her employment at any time, with or without cause."

It is clear from the foregoing that the company and the employee intended to and did create an "at-will" employment relationship.

Thereafter, Ms. Power was terminated as a result of a "reduction in force." She has sued claiming that the employment relationship had been modified from "at-will" to an "implied-in-fact" employment.

The court inquired of counsel as to what facts occurred to render the change. The defendant, naturally, said the relationship remained "at will." The plaintiff said that the relationship had changed due to the following alleged facts: 1. The company had engaged in a course of conduct that indicated it felt otherwise than an "at will" relationship. This course included a lengthy video tape in which the principals stated among other things that

they would be fair in dealing with employee mistakes and errors etc. 2. The plaintiff had been promised a "new position," if she continued to work out. 3. The plaintiff was promised consideration for a future job with a mail order facility. 4. The plaintiff was given positive job reports and was even used to train other new employees. 5. The plaintiff, when terminated, had not been previously warned of impending termination or deficient work performance but was told only that there was a reduction in force. Assuming each of the above to be true, the company could still reduce it's force and release the plaintiff "at will." None of the above give the plaintiff a basis to conclude that her employment had been modified from "at will."

The plaintiff feels that the issue now before the court had twice been considered by Judges Wilkinson and Noel when previously assigned to Summit County. There is some dispute on that since the defendant indicates that Judge Noel only considered matters in Limine and not the matter of Summary Judgment and Judge Wilkinson did not have the benefit of recent decisions of the Supreme Court. (Sanderson v. First Security Leasing Company 201 Ut Adv Rep 18 [Dec. 1992] and Hodgson v. Bunzi Utah, Inc., 202 Ut Adv Rep 22 [Dec. 1992])

This court recognizes the undesirable nature of the master calendar system now followed in Summit County were the Judge will change as the assignment changes. However, it is incumbent on the Judge assigned to do the best he or she can in dealing with a case to see that the matter is handled consistent with the Judge's best judgment under the circumstances.

With that in mind, it is my opinion that the Motion for Relief from Order should be and the same is hereby granted.

Considering the above cases, the undersigned feels that had the cases been available to Judge Wilkinson, his decision would have been otherwise. I submit my reasoning as follow:

While this court recognizes, as stated by Justice Zimmerman in Sanderson, that:

the existence of an implied-in-fact contract is a factual question committed to the sound discretion of the jury. (p. 19)

the question must be buttressed by some clear action to deviate from the "at-will" relationship. In Sanderson it was the promise to allow Mr. Sanderson, while ill, to "take all the time...needed, (and) do what needed to (be) done" to recover. Thus the "at-will" employment was changed to allow Mr. Sanderson to remain off work while recovering and further to allow him to retain the confidence that he would not be fired for doing so. The subsequent question of fact at trial was whether Mr. Sanderson had been terminated for absence or some for some other reason.

In the Hodgson case, Justice Howe stated the issue to be whether the defendant had "modified" the "at-will employment status" to this plaintiff by "issuing warnings to four (other) employees" prior to termination. The court then stated:

In order for conduct and oral statements to establish an implied-in-fact contract, such evidence must be strong enough to overcome the presumption of at-will employment and any inconsistent written policies and disclaimers.

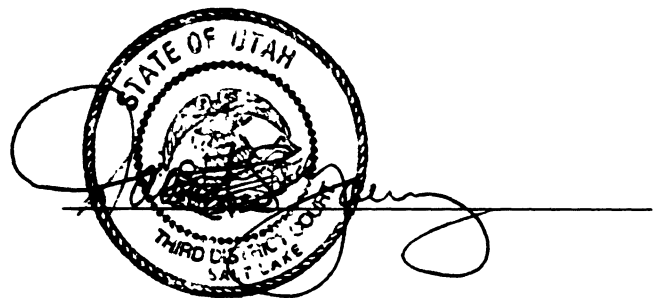
In the instant case, the court finds that reasonable minds cannot differ as to the fact that

the evidence was not strong enough to overcome the presumption that an "at will" relationship continued and that the company had done nothing to change the "at-will" relationship with this plaintiff. All assurances remained consistent with the "at-will" status and when it became necessary to reduce employees, the plaintiff was let go for that reason alone.

The court grants the defendant's motion for Summary Judgment finding that the plaintiff was an "at-will" employee and the alleged "facts" claimed by the plaintiff are insufficient as a matter of law to allow the matter to go to the jury for consideration.

Mr. Himonas is requested to prepare Findings and a Judgment consistent herewith and with the record as plead and argued.

Dated this 18th day of March 1993.



C.C. to counsel

(Following the preparation of the foregoing, the plaintiff's counsel submitted a "Supplemental Brief to Hearing on Defendant's Motion for Relief from Order." The court has reviewed the pleading with the accompanying cases and finds that the record fails to reveal sufficient information for the court to conclude that the plaintiff could have "justifiably" relied on additional expressed or implied policies being applicable to her employment. The fact that employees may have been dealt with on disciplinary matters in a different way does not change the fact that the plaintiff's position was illiminated due to a reduction in force.)

THIRD JUDICIAL DISTRICT
SUMMIT COUNTY
STATE OF UTAH

FILE NO. 10741

TITLE: (✓ Parties Present)

MARIAMERCEDES POWER

V

RIVERVIEW FINANCIAL CORP

COUNSEL: (✓ Counsel Present)

RUSSELL C. FERICKS

P O BOX 2465

SLC 84110

RANDALL N. SKANCHY, DENO G. HIMONAS

1500 FIRST INTERSTATE PLAZA

170 S MAIN, SLC 84101

JOYE D. OVARD

CLERK

HON. FRANK G. NOEL

REPORTER

JUDGE

DATE: 11-12-92

BAILIFF

Now before the court is ~~Deft's~~ motion
in limine. The court has reviewed the
record and now rules as follows: While
statements of "fairness" and "fair treatment"
and statements regarding a nonbinding
disciplinary policy may not, without
something further, constitute a contract,
they may have relevance when viewed
together with all the facts and
circumstances in the case. It should be
noted in this regard that Judge Wilkinson
has ruled that there is a question of
fact sufficient to submit the matter
to a jury. Deft's motion is denied.
Counsel for ptf to prepare an order.

11-12-92

1 IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

2 IN AND FOR SUMMIT COUNTY, STATE OF UTAH

3 #930315

4 * * *

5 Original

6 MARIAMERCEDES POWER,)

7 PLAINTIFF,) CIVIL NO. 10741

8 VS) DEFENDANT'S MOTION FOR
RELIEF FROM ORDER.....

9 RIVERVIEW FINANCIAL CORPORATION,)

FILED

10 DEFENDANT.)

11 JUL 26 1993

12 * * *

Clerk of Summit County

By Deputy Clerk

13 BE IT REMEMERED THAT ON THURSDAY, THE 18TH DAY

14 OF MARCH, 1993, COMMENCING AT THE HOUR OF 8:55 O'CLOCK

15 A.M., THE ABOVE-ENTITLED MATTER CAME ON FOR HEARING IN THE

16 COURTROOM OF THE THIRD JUDICIAL DISTRICT, IN AND FOR SUMMIT

17 COUNTY, STATE OF UTAH; SAID CAUSE BEING HELD BY THE HONOR-

18 ABLE DAVID S. YOUNG, JUDGE IN THE THIRD JUDICIAL DISTRICT

19 COURT, STATE OF UTAH.

20 * * *

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S

FOR THE PLAINTIFF: RUSSELL C. FERRICKS,
 NATHAN R. HYDE
 RICHARDS, BRANDT, MILLER & NELSON
 50 SOUTH MAIN STREET
 KEY BANK TOWER, SUITE #700
 P.O. BOX 2465
 SALT LAKE CITY, UTAH 84110-246

FOR THE DEFENDANT: RANDALL N. SKANCHY,
 DENO G. HIMONAS
 JONES, WALDO, HOLBROOK &
 MC DONOUGH
 1500 FIRST INTERSTATE PLAZA
 170 SOUTH MAIN STREET
 SALT LAKE CITY, UTAH 84101

* * *

I N D E X

	<u>PAGE</u>
MR. HIMONAS' ARGUMENT	4
MR. HYDE'S ARGUMENT	6
MR. FERRICK'S ARGUMENT	23
MR. HIMONAS' REPLY ARGUMENT	27
MR. HYDE'S REPLY ARGUMENT	34

* * *

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

JUDGE YOUNG: THIS IS THE TIME SET TO CONSIDER
ORAL ARGUMENT ON THE MATTER OF MARIAMERCEDES POWER VERSUS
RIVERVIEW FINANCIAL CORPORATION.

THIS IS THE MOTION OF THE DEFENDANT FOR THE COURT
TO CONSIDER THE ISSUE OF RELIEF FROM JUDGMENT OR ORDER
THAT DEALS WITH THE IMPLIED-IN-FACT PORTION OF THE LITIGATION
THAT'S REMAINING PENDING.

MR. HIMONAS?

MR. HIMONAS: THAT'S CORRECT, YOUR HONOR.

JUDGE YOUNG: WOULD EACH OF YOU STATE YOUR
APPEARANCES FOR THE RECORD, PLEASE?

MR. HIMONAS: DENO HIMONAS WITH RANDY SKANCHY
ON BEHALF OF THE DEFENDANT, RIVERVIEW FINANCIAL CORPORATION.

MR. HYDE: YOUR HONOR, NATHAN HYDE AND RUSSELL
FERRICKS ON BEHALF OF MARIAMERCEDES POWER.

JUDGE YOUNG: THANK YOU. IT IS YOUR MOTION,
MR. HIMONAS. YOU MAY PROCEED. I WILL INDICATE TO YOU THAT
I'VE READ YOUR MATERIALS. AND THE RECORD SHOULD ALSO SHOW,
THAT AS WE ALL KNOW, THAT THIS IS A SUMMIT COUNTY CASE.

I'M CURRENTLY ASSIGNED TO SUMMIT COUNTY. THE FILE IS IN
SUMMIT COUNTY SO THE MATTER IS BEING HEARD HERE FOR ARGU-
MENT AND THE ORDERS AND OTHER MATTERS WILL BE SUBMITTED
TO SUBMIT COUNTY.

MR. HIMONAS: I WILL BE BRIEF, YOUR HONOR.

1 JUDGE YOUNG: ALL RIGHT.

2 MR. HIMONAS: MAY IT PLEASE THE COURT. THE SOLE
3 ISSUE BEFORE YOU TODAY IS WHETHER JUDGE WILKINSON'S PRIOR
4 ORDER DENYING DEFENDANT'S SUMMARY JUDGMENT ON PLAINTIFF'S
5 IMPLIED-IN-FACT EMPLOYMENT CONTRACT CLAIM SHOULD BE VACATED
6 IN LIGHT OF SOME RECENT DECISIONS BY THE UTAH SUPREME COURT.
7 THE ANSWER FROM DEFENDANT, OF COURSE, IS AN EMPHATIC YES.
8 I THINK THE GUIDING LIGHT IS HODGSON V. BUNZL UTAH, INC..
9 THE SUPREME COURTS MOST RECENT PRONOUNCEMENT IN THE AREA
10 WAS RELEASED FOR PUBLICATION IN LATE JANUARY OF THIS YEAR,
11 YOUR HONOR. I'D LIKE TO TAKE A BRIEF MOMENT AND DISCUSS
12 HODGSON.

13 THE PLAINTIFF ARGUED THAT THE AT-WILL PRESUMPTION
14 HAD BEEN OVERCOME BY AN ORAL STATEMENT, OF DEFENDANT'S
15 DISTRICT MANAGER, QUOTE, "THAT THE COMPANY FOLLOWED DISCI-
16 PLINARY PROCEDURES TO GIVE EMPLOYEES A CHANCE TO CORRECT
17 DEFICIENCIES." PLAINTIFF ALSO ARGUED THAT THE COMPANY
18 FOLLOWED SUCH DISCIPLINARY PROCEDURES WITH RESPECT TO FOUR
19 OTHER EMPLOYEES DURING THE TIME OF HER EMPLOYMENT AND, AGAIN,
20 THIS OVERCAME THE AT-WILL PRESUMPTION.

21 THE COURT SHOULD ALSO NOTE IN THAT CASE THE
22 PLAINTIFF WAS GIVEN A DOCUMENT OUTLINING THE DISCIPLINARY
23 POLICIES AS WELL.

24 THE TRIAL COURT DISAGREED WITH THE PLAINTIFF'S
25 ANALYSIS AND GRANTED THE EMPLOYER SUMMARY JUDGMENT AND ON

1 APPEAL THE SUPREME COURT DEFERRED. IN REACHING ITS CONCLU-
2 SION, YOUR HONOR, THE SUPREME COURT REALLY RELIED UPON TWO
3 FACTS. ONE, THE PLAINTIFF WAS INFORMED AT ABOUT THE TIME
4 HER EMPLOYMENT BEGAN WITH THE COMPANY THAT IT WAS AN AT-WILL
5 COMPANY AND, TWO, THE EXISTENCE OF CLEAR DISCLAIMERS IN
6 THE EMPLOYEE HANDBOOK WHICH WAS PREPARED AND DISSEMINATED
7 TO THE EMPLOYEES AFTER THE EMPLOYMENT, PLAINTIFF'S PREEMPLOY-
8 MENT BEGAN, AND THOSE DISCLAIMERS STATED EMPLOYMENT WAS
9 AT-WILL AND STATEMENTS TO THE CONTRARY BY COMPANY OFFICIALS
10 SHOULD NOT BE INTERPRETED IN GIVING RISE TO AN EMPLOYMENT
11 CONTRACT.

12 HERE, YOUR HONOR, THE FACTS ARE VERY CLOSE TO
13 THOSE IN BUNZL. THE PLAINTIFF ESSENTIALLY ARGUES THAT THE
14 AT-WILL PRESUMPTION HAS BEEN OVERCOME BASED UPON, PRIMARILY
15 UPON AN ORAL REPRESENTATION MADE BY RANDY FIELDS IN THE
16 TRAINING VIDEO, "WHAT WE STAND FOR," TO THE EFFECT THE
17 COMPANY FOLLOWS A GRIEVANCE OR DISCIPLINARY PROCESS. THE
18 UNDISPUTED FACTS IN THIS CASE, HOWEVER, ALSO INCLUDE THE
19 FOLLOWING. (1), AT THE TIME SHE COMMENCED WORKING FOR THE
20 DEFENDANT THE PLAINTIFF WAS INFORMED IN WRITING THAT "ALL
21 EMPLOYEES," AND I QUOTE, "OF THE COMPANY ARE AT-WILL
22 EMPLOYEES SUBJECT TO TERMINATION AT ANY TIME WITH OR WITHOUT
23 CAUSE"; (2), THE COMPANY DISSEMINATED A HANDBOOK THAT CON-
24 TAINED A SERIES OF EXPLICIT DISCLAIMERS, YOUR HONOR.

25 FOR EXAMPLE, ONE SUCH DISCLAIMER GOES AS FOLLOWS.

1 "THE COMPANY IS AN 'AT-WILL' EMPLOYER WHICH MEANS THAT ANY
2 AND ALL TEAM MEMBERS ARE SUBJECT TO TERMINATION AT ANY TIME
3 WITH OR WITHOUT CAUSE" AND, (3), PERHAPS MOST IMPORTANTLY,
4 THE PLAINTIFFS SIGNED AN ACKNOWLEDGEMENT EXPRESSLY NOTING
5 THE FOLLOWING, "THE COMPANY RESERVES THE RIGHT TO TRANSFER,
6 PROMOTE, DEMOTE, OR TERMINATE ME WITH OR WITHOUT CAUSE AT
7 ANY TIME."

8 AND "I UNDERSTAND THAT NEITHER THIS HANDBOOK
9 NOR ANY OTHER REPRESENTATION BY A MANAGEMENT OFFICIAL OF
10 THE COMPANY ARE INTENDED TO CREATE A CONTRACT OF EMPLOYMENT.
11 I UNDERSTAND THAT THE COMPANY AND I HAVE THE SAME RIGHT
12 TO END MY EMPLOYMENT AT ANY TIME AND FOR ANY REASON."

13 IN LIGHT OF THESE FACTS, AND THEIR STRIKING
14 SIMILARITY TO THE FACTS, THAT ARE PRESENTED IN BUNZL, IN
15 PARTICULAR, SUMMARY JUDGMENT IS CLEARLY NOT WARRANTED, YOUR
16 HONOR; CONSEQUENTLY WE ASK YOU TO VACATE JUDGE WILKINSON'S
17 PRIOR ORDER DENYING A SUMMARY JUDGMENT ON THE IMPLIED-IN-
18 FACT CONTRACT CLAIM AND HELPING US AVOID THE COSTS THAT
19 ARE ATTENDANT TO A FOUR-DAY JURY TRIAL SCHEDULED IN THIS
20 MATTER TO TAKE PLACE NEXT MONTH. THANK YOU, YOUR HONOR.

21 JUDGE YOUNG: THANK YOU, MR. HIMONAS.

22 MR. HYDE?

23 MR. HYDE: YOUR HONOR, IN ORDER TO PREVAIL ON
24 THEIR MOTION DEFENDANTS MUST MEET A PARTICULARLY HIGH
25 STANDARD TO OBTAIN RELIEF FROM A SUMMARY JUDGMENT ORDER.

1 SUCH RELIEF MUST BE INVOKED ONLY IN UNUSUAL AND EXCEPTIONAL
2 CIRCUMSTANCES. SUCH RELIEF IS TO BE USED CAUTIOUSLY AND
3 SPARINGLY AND PLAINTIFF'S SUBMIT THIS IS NOT AN UNUSUAL
4 OR EXCEPTIONAL CIRCUMSTANCE. THERE IS NOTHING EXCEPTIONAL
5 OR UNUSUAL ABOUT THESE TWO NEW CASES IN THIS AREA OF THE
6 LAW.

7 DEFENDANT'S MOTION AND MEMO IN SUPPORT INITIALLY
8 SAID THAT THAT CLARIFIES THIS AREA OF THE LAW AND LATER,
9 I THINK OUR MEMORANDUM IN OPPOSITION ILLUSTRATES THAT IS
10 NOT THE CASE, THAT THE LAW STATED IN THESE TWO CASES IS
11 JUST REITERATING SEVERAL OTHER CASES THAT LED UP TO THESE
12 MOST RECENT CASES.

13 AND IN ITS REPLY, PLAINTIFF THEN, OR DEFENDANT
14 THEN STATES, WELL, IT'S REALLY THE FACTUAL NATURE OF THESE
15 CASES THAT'S SO UNIQUE. WELL, WE SUBMIT THAT IN PARTICULAR
16 THE CASE OF JOHNSON V. MORTON THIOKOL IS VERY CLOSE TO THESE
17 CASES AND, IN FACT, THE SCENARIO THAT DEFENDANT IN THIS
18 CASE ARGUES IS SO UNIQUE AND SHOULD BE APPLIED TO OUR CASE
19 IT'S REALLY JUST A REITERATION OF THE SAME PRINCIPALS.

20 JUDGE YOUNG: LET ME SEE IF I CAN UNDERSTAND,
21 MR. HYDE, YOUR POSITION. ISN'T IT TRUE THAT WHEN SOMEONE
22 IS EMPLOYED IN AN AT-WILL POSITION, WHICH THE COMPANY CLEARLY
23 STATED AND CLEARLY DID IN THEIR EMPLOYMENT OF MS. POWER,
24 IT WAS CLEAR THAT IT WAS AT-WILL, THEN THE QUESTION OF FACT-
25 ARE YOU DISPUTING EVEN WHETHER THE EMPLOYMENT WAS AT-WILL?

1 MR. HYDE: ABSOLUTELY, YOUR HONOR. WE'RE SAYING
2 THAT THEIR MANUAL HAS AT-WILL TERMS IN IT BUT THE MANUAL
3 ALSO--BUT THEY ARE NEGATED BY OTHER INHERENT TERMS AND
4 PROMISES MADE IN THAT VERY SAME MANUAL.

5 JUDGE YOUNG: WHAT THEN WOULD THE LANGUAGE MEAN
6 WHERE SHE ACKNOWLEDGES IN HER OWN DISCLAIMER THAT SHE
7 ACKNOWLEDGES SHE'S AT-WILL?

8 MR. HYDE: WELL, THAT'S ABSOLUTELY CORRECT.
9 AT THAT TIME WHEN SHE FIRST MAY BE HIRED ON SHE MAY HAVE
10 AGREED THAT THAT MAY HAVE BEEN HER SITUATION. WE STATE,
11 FIRST OF ALL, THAT IT WASN'T EXPLAINED WHAT AT-WILL IS.

12 IT IS SURPRISING HOW MANY EMPLOYERS AND EMPLOYEES IN THIS
13 STATE HAVE NO IDEA WHAT THAT CONCEPT IS WITHOUT IT BEING
14 EXPLAINED TO THEM. AND THEN SHE COULD RELY ON THE MANUAL
15 FOR AN EXPLANATION AS TO WHAT THAT IS. AND IT'S INHERENTLY
16 AMBIGUOUS IN THE MANUAL.

17 SECOND, EVEN IF THE CASES ARE CLEAR ON THIS IN
18 UTAH, THAT IF, EVEN IF YOU HAVE AT-WILL AT THE OUTSET, THERE
19 ARE SEVERAL THINGS THAT CAN CHANGE THE NATURE OF THAT EMPLOY-
20 MENT CONTRACT. ONE IS ORAL ASSURANCES, COURSE OF CONDUCT
21 AND OTHER WRITTEN OR OTHER REPRESENTATIONS BY THE EMPLOYER.
22 AND THAT'S WHAT WE ASSERT HAS HAPPENED HERE. AND THAT'S
23 WHAT JUDGE NOEL AND JUDGE WILKINSON HAVE DETERMINED, THAT
24 IS SUBSEQUENT TO THIS AT-WILL LANGUAGE. THEY'VE ALL SEEN
25 THIS AT-WILL LANGUAGE, AND KNOWLEDGE OF THAT IS IN THE

1 DOCUMENTS, BUT AS TO WHAT THE AT-WILL MEANING HAS TO MRS.
2 POWER IS AT ISSUE AND IS A QUESTION OF FACT AS STATED--

3 JUDGE YOUNG: WELL, I KNOW JUSTICE ZIMMERMAN
4 SAID THAT THE EXISTENCE OF AN IMPLIED-IN-FACT CONTRACT IS
5 A FACTUAL QUESTION THAT IS SUBJECT TO SOUND DISCRETION OF
6 THE JURY. SO THIS IS--I AM SENSITIVE, PARTICULARLY SENSITIVE
7 TO THE IDEA THAT THIS CASE NOW, EVEN POTENTIALLY THE LAW
8 OF THE CASE IS SUCH THAT THE COURT NEEDS TO ALLOW THIS TO
9 GO TO THE JURY, BUT I THINK I NEED TO ALLOW THIS TO GO TO
10 THE JURY ONLY IF I CAN CONCLUDE THAT REASONABLE MINDS COULD
11 NOT DIFFER.

12 MR. HYDE: THAT'S TRUE.

13 JUDGE YOUNG: IN OTHER WORDS, IF I FIND THAT
14 REASONABLE MINDS COULD NOT DIFFER, THAT THIS WAS AN AT-WILL
15 EMPLOYMENT, THEN I'M OBLIGATED FOR THE BENEFIT OF ALL CON-
16 CERNED TO GRANT THE MOTION--TO GRANT THE SUMMARY JUDGMENT.

17 NOW IT SEEMS TO ME THAT IF THE COMPANY SAYS AT
18 THE OUTSET IN THEIR MANUAL THAT THIS IS AT-WILL EMPLOYMENT
19 AND IF THE COMPANY THEN PUTS IN THEIR HANDBOOK THAT THIS
20 IS AT-WILL EMPLOYMENT, AND THEN IF THE INDIVIDUAL SIGNING
21 ON SAYS THIS IS AT-WILL EMPLOYMENT, THEN THE INDIVIDUAL
22 THEMSELVES MUST MAKE SOME DIFFERENT FACTUAL ALLEGATION THAT
23 CHANGES THIS FROM AT-WILL TO SOME HIGHER AND MORE PROTECTED
24 EMPLOYMENT.

25 MR. HYDE: THAT'S ABSOLUTELY THE CASE.

1 JUDGE YOUNG: OKAY. NOW, IT SEEMS TO ME THAT
2 THERE IS--DID JUDGES NOEL AND WILKINSON REVIEW--YOU ARE
3 RELYING ON THE VIDEOTAPE THAT RANDY FIELDS SAID IS A BASIS
4 FOR HIS COUNSELING THE AT-WILL EMPLOYMENT.

5 MR. HYDE: AMONG OTHER THINGS, YES.

6 JUDGE YOUNG: WELL, TELL ME WHAT IN THE RECORD--
7 I ASSUME THERE'S NO DISPUTE FACTUALLY--WHAT IN THE RECORD
8 DO YOU RELY ON TO DETERMINE THAT THE AT-WILL EMPLOYMENT
9 WAS CANCELLED?

10 AND LET ME TELL YOU THE OTHER PROBLEM I WOULD
11 LIKE YOU TO ADDRESS YOURSELF TO. I HAVE A PROBLEM IN MY
12 OWN MIND DETERMINING THAT AT-WILL EMPLOYMENT CAN BE CANCELLED
13 FOR ALL ON THE BASIS OF A GENERAL COMPANY'S STATEMENT.
14 IT LOOKED TO ME LIKE IN READING THE CASE IF AT-WILL EMPLOY-
15 MENT IS GOING TO BE CHANGED, FOR INSTANCE, THE SANDERSON
16 V. FIRST SECURITY LEASING CASE, WHERE I THINK IT WAS SANDER-
17 SON--AM I RIGHT ON THE NAME?

18 MR. HYDE: YEAH, RIGHT.

19 JUDGE YOUNG: --WHERE SANDERSON IS ILL AND HAVING
20 A MENTAL AND PHYSICAL BREAKDOWN AND THEY SAY THAT YOU TAKE
21 WHATEVER TIME IS NECESSARY--

22 MR. HYDE: YOUR JOB WILL BE HERE.

23 JUDGE YOUNG: THAT IS A PERSONAL ASSURANCE HE
24 WILL NOT BE FIRED FOR THE CONDITION ASSOCIATED WITH HIS
25 ILLNESS, BUT HE WAS FIRED FOR FAILURE TO PERFORM PROPERLY.

1 NOW, IN THIS CASE, AS I UNDERSTAND IT, MS. POWER
2 WAS FIRED FOR REDUCTION IN PERSONNEL. THEY JUST HAD A
3 REDUCTION.

4 MR. HYDE: WELL, THE DEFENDANTS HAVE SAID TWO
5 OR THREE REASONS. SHE WAS NEVER TOLD THAT AND THAT'S PART
6 OF THE RECORD. THERE'S A DISPUTE AS TO WHAT REALLY THE
7 TRUE REASON AND FACT WAS. WE CLAIM THAT'S A PRETEXT.

8 JUDGE YOUNG: I SEE.

9 MR. HYDE: THAT'S AN EASY OUT FOR AN EMPLOYER
10 TO SAY RATHER THAN DEALING WITH THE ISSUE.

11 JUDGE YOUNG: WELL, TELL ME WHAT YOU THINK THE
12 COMPANY DID TO, OR FOR MS. POWER--

13 MR. HYDE: OKAY.

14 JUDGE YOUNG: --TO CANCEL THE AT-WILL EMPLOYMENT.

15 MR. HYDE: AS THE CASE LAW SUGGESTS, EVIDENCE
16 OF THE IMPLIED CONTRACT TERMS COMES IN MANY FORMS, INCLUDING
17 COURSE OF CONDUCT, ORAL ASSURANCES AND OTHER REPRESENTATIONS,
18 WHETHER THEY BE WRITTEN OR ORAL. IN THE MANUAL ITSELF--
19 LET ME BACK UP TO SAY, THE FIELDS, IN THIS VIDEOTAPE, HAVE
20 THIS OVERRIDING PRINCIPAL--IN FACT, I'VE GOT A COPY IF YOU'D
21 LIKE THE TRANSCRIPT. IT'S PROBABLY PART OF THE RECORD.

22 JUDGE YOUNG: YES, THANK YOU.

23 MR. HYDE: AND I CAN READ FROM EXCERPTS FROM
24 THAT IF IT WOULD HELP THE COURT, BUT GENERALLY, THE FIELDS
25 SAY, WHAT WE SAY ISN'T WHAT COMPANIES NORMALLY SAY. WE

1 USE WORDS AND THEY MEAN DIFFERENT THINGS TO US.

2 FIRST OF ALL, ON PAGE 3, THE FIRST FULL PARAGRAPH
3 IT SAYS, "MANY ORGANIZATIONS HAVE PROCEDURES MANUALS AND
4 PERSONNEL MANUALS AND OPERATIONS MANUALS AND THAT SORT OF
5 THING, EIGHT TO TEN FEET HIGH, SO THAT NO MATTER WHAT DECI-
6 SION YOU HAVE TO MAKE, YOU HAVE TO GO CONSULT SOME MANUAL."

7 WELL--AND THEN THEY SAY, "WHAT HAS CHANGED ARE
8 ALMOST EVERY PROCEDURE IN THE COMPANY. EVERY ONE OF OUR
9 PROCEDURES CHANGES, BUT THE WHY OF IT NEVER DOES, AND I
10 THINK YOU'LL UNDERSTAND IT BETTER THIS MORNING."

11 AND WHAT THEY DO IN THIS TRAINING SESSION THIS
12 TRANSCRIPT IS ABOUT, IS THAT THEY SET FORTH THE COMPANY
13 VALUES AS THE BE ALL AND END ALL OF THIS COMPANY AND HOW
14 YOU OPERATE AND CONDUCT YOURSELF AS AN EMPLOYEE IN THE
15 COMPANY. VALUE NO. 4 IS FAIR TREATMENT OF ALL.

16 JUDGE YOUNG: WHERE IS THAT?

17 MR. HYDE: AND THAT'S ONE PAGE 13. TOWARDS THE
18 BOTTOM.

19 JUDGE YOUNG: OKAY.

20 MR. HYDE: THE SECOND TO THE LAST PARAGRAPH.
21 RIGHT BEFORE RANDY TAKES OVER DEBBIE SAYS, "FAIR TREATMENT
22 OF ALL. THIS IS PART OF OUR FOUNDATION. PART OF OUR
23 EXPECTATION." AND RANDY SAYS, "YEAH, LET ME DEAL WITH WHAT
24 FAIR TREATMENT MEANS BECAUSE IT MEANS SOMETHING DIFFERENT
25 THAN YOU MIGHT MEAN IN A CONVENTIONAL SENSE IN ANOTHER

1 COMPANY."

2 AND ONTO THE NEXT PAGE, A COUPLE INCHES DOWN,
3 RANDY SAYS, "LET ME GIVE YOU AN EXAMPLE OF WHAT'S NOT FAIR.
4 LET'S SUPPOSE YOU HAVE SOMEBODY THAT'S NOT A GOOD PERFORMER.
5 THEY'RE NOT VERY GOOD ON THE COUNTER. THEY DON'T TREAT
6 CUSTOMERS PROPERLY. LET ME TELL YOU WHAT'S NOT FAIR. HERE'S
7 WHAT'S NOT FAIR. NOT SAYING ANYTHING TO THEM AND SCHEDULING
8 THEM OUT OF THE COMPANY. OH, I'M SORRY, I DON'T HAVE ENOUGH
9 HOURS FOR YOU THIS WEEK. THAT'S NOT FAIR. LET ME TELL
10 YOU WHAT ELSE IS NOT FAIR. WITHOUT WARNING, YOU WALK IN
11 FOR SOME RELATIVELY MINOR INFRACTION OF THE RULES AND FIRING
12 THEM. THEY NEVER KNEW THAT THEY WERE DOING SOMETHING WRONG,
13 THEY HAD NO COMMUNICATION ON THE TOPIC WHATSOEVER. THAT'S
14 NOT FAIR. WOULD YOU LIKE TO BE TREATED THAT WAY? ABSOLUTELY
15 NOT."

16 AND PUBLISHING THIS VIDEOTAPE AND DISSEMINATING
17 IT TO EMPLOYEES THROUGHOUT THE WORLD REALLY ENHANCES WHAT
18 IS BEING SAID. THESE ARE THE FOUNDERS AND CHIEF OFFICERS
19 OF THIS COMPANY.

20 JUDGE YOUNG: OKAY. BUT IF THEY COME IN TO MS.
21 POWER AND SAY, MS. POWER, WE'RE GOING TO TERMINATE YOU
22 BECAUSE WE'RE HAVING A REDUCTION IN FORCE, WE'VE HAD A
23 FINANCIAL REVERSAL AND WE ARE REDUCING THIS, THEN THAT'S
24 EXPLAINING TO HER THE REASON, ISN'T IT? SHOULD SHE HAVE
25 A DIFFERENT STANDARD THAN THAT FOR TERMINATION?

1 MR. HYDE: WELL, NO, IF THAT IS TRULY THE CASE.

2 BUT OUR ARGUMENT IS THAT IS A MERE PRETEXT THAT SHE WAS
3 NOT TOLD THAT FACT. THAT THAT DID NOT OCCUR. BUT NOW,
4 AFTER THE FACT, THAT IS WHAT THE COMPANY IS SAYING HAPPENED.

5 JUDGE YOUNG: THEY'VE TAKEN HER DEPOSITION, I
6 ASSUME.

7 MR. HYDE: YES.

8 JUDGE YOUNG: WHAT DOES SHE CLAIM SHE UNDERSTOOD
9 FACTUALLY TO BE, ONE, THE REASON FOR HER TERMINATION AND,
10 TWO, WHAT SHE UNDERSTOOD TO BE THE CHANGE IN THE COMPANY
11 POLICY FROM AN AT-WILL EMPLOYMENT TO PUT HER IN A HIGHER
12 STANDARD?

13 MR. HYDE: WELL, THIS GENERAL OVERALL POINT THAT
14 SHE WILL BE TREATED FAIRLY. THE INCIDENT WAS OVER A DOCUMENT
15 THAT WAS MISPLACED, ALLEGEDLY, THAT WE HAVEN'T BEEN ABLE
16 TO COME UP WITH THIS DOCUMENT THAT WAS ALLEGEDLY MISPLACED,
17 BUT THEN THERE WAS HER SUPERVISOR HAD JUST GIVEN HER A GREAT
18 PERFORMANCE EVALUATION AND THEN THIS ONE INCIDENT OCCURRED
19 AND THAT WAS THE BASIS FOR HER TERMINATION.

20 JUST PRIOR TO THAT TIME SHE WAS HAVING DISCUSSIONS
21 OF BEING PROMOTED TO A SUPERVISORY POSITION IN ANOTHER AREA
22 OF THE COMPANY, BUT ALMOST AS A KNEE JERK REACTION, BECAUSE
23 A DOCUMENT COULDN'T BE FOUND ON ONE OCCASION, THAT WAS THE
24 BASIS FOR HER TERMINATION. THERE'S NO INDICATION THAT
25 THERE'S ANY OTHER, THERE WERE ANY OTHER REDUCTIONS IN THIS

1 DEPARTMENT AT THE TIME, THERE HASN'T BEEN ANY EVIDENCE TO
2 SUPPORT THE REDUCTION OF FORCE.

3 JUDGE YOUNG: WELL, AS I UNDERSTAND THE EVIDENCE
4 IT IS THAT SHE WAS AN ASSISTANT TO ONE OF THE REGIONAL
5 ADMINISTRATORS OR DIRECTORS AND THAT THAT POSITION HAS NOT
6 BEEN REPLACED.

7 MR. HYDE: WELL, THE THINGS ARE MOVED AROUND
8 SO OFTEN IT'S HARD TO MEASURE WHETHER OR NOT THAT, IN FACT,
9 IS THE CASE. I MEAN, SHE WAS BEING REQUESTED BY OTHER PEOPLE
10 IN THAT FIRM TO BE A PART OF THEIR TEAM, TO COME WORK WITH
11 THEM AT THE SAME TIME, SO THERE'S CONFLICTING EVIDENCE ON
12 THAT FACT.

13 JUDGE YOUNG: SO HER POSITION IS I WAS FIRED
14 BECAUSE THEY COULD NOT FIND A DOCUMENT THAT WAS IN MY CHARGE
15 AND NOT BECAUSE THERE WAS A REDUCTION IN FORCE.

16 MR. HYDE: THAT IS RIGHT.

17 JUDGE YOUNG: AND THAT IS THE QUESTION OF FACT.

18 MR. HYDE: THAT'S CORRECT. THAT'S CORRECT.

19 AND THE NATURE OF THIS RELATIONSHIP BY THIS VIDEOTAPE--
20 TO GET THE REAL ESSENCE OF IT, YOUR HONOR, I'D ESTIMATE
21 THAT IT WOULD BE WISE FOR YOU TO REVIEW THE VIDEOTAPE.

22 I THINK IT IS A PART OF THE FILE IN COALVILLE. IF NOT,
23 I CAN PROVIDE AN EXAMPLE, BUT THIS IS DRAMATIC STUFF. THIS
24 IS HEARTFELT PLEADING TO GIVE US YOUR SUPPORT, EMPLOYEES,
25 AND WE WILL TREAT YOU FAIRLY. IT SAYS YOU CAN HOLD US

1 ABSOLUTELY 100 PERCENT TO THESE STANDARDS. IT'S MORE THAN
2 JUST WELL, YOU'RE AT-WILL, WE CAN DO ANYTHING WE WANT.
3 IF THEY ARE BARGAINING FOR THE GOOD WILL OF THESE EMPLOYEES
4 THEY'RE ERODING THEIR ABILITY TO TERMINATE AT-WILL. AND
5 THAT'S A QUESTION OF FACT FOR THE JURY.

6 JUDGE YOUNG: SO WHAT YOU'RE SAYING--BUT AS I
7 UNDERSTAND YOUR POSITION, YOU'RE SAYING THAT THE STANDARD
8 OF EMPLOYMENT FOR MS. POWER WHEN SHE WAS EVEN EMPLOYED WAS
9 NOT CONSISTENT WITH AT-WILL EMPLOYMENT.

10 MR. HYDE: THAT'S ABSOLUTELY RIGHT.

11 JUDGE YOUNG: SO SHE WAS NEVER EMPLOYED AT-WILL.

12 MR. HYDE: SHE MAY HAVE BEEN AT THE VERY OUTSET
13 BUT AS SHE--AS HER--IT'S NOT REAL SENIORITY, BUT AS HER
14 TERM OF EMPLOYMENT CONTINUED OR THINGS HAPPENED WHICH ERODED
15 THEIR ABILITY TO TERMINATE HER AT-WILL, INCLUDING STATEMENTS
16 BY THE FIELDS THEMSELVES OF WHAT THE NATURE OF THE EMPLOYMENT
17 RELATIONSHIP IS AT MRS. FIELDS AS WELL AS PROMISES OF PROMO-
18 TION AND PROMISES THAT SHE WOULD BE TREATED FAIRLY AND GIVEN
19 A CHANCE, A WARNING AND OPPORTUNITY TO IMPROVE.

20 THERE ARE STATEMENTS IN THE MANUAL ITSELF THAT
21 BACK UP THIS VIDEOTAPE. THIS VIDEOTAPE IS NOT AN EXCLUSIVE
22 STATEMENT OF THESE PRINCIPALS. THE SAME PRINCIPALS ARE
23 STATED THROUGHOUT THE EMPLOYMENT MANUAL WHICH IS INCHES
24 THICK.

25 AND SO THERE ARE SEVERAL THINGS--THE CASE LAW

1 IS THAT YOU LOOK AT THE TOTALITY OF THE CIRCUMSTANCES.
2 THAT THE AT-WILL DISCLAIMER IN JOHNSON V. MORTON THIOKOL,
3 THE REASON THAT EMPLOYER PREVAILED THERE IS BECAUSE THERE
4 WASN'T ANYTHING ELSE TO REBUTT THE AT-WILL. THAT'S WHAT
5 SANDERSON SAYS. I THINK IT'S INTERESTING NOW THAT SUDDENLY
6 SANDERSON DOESN'T HELP THEM WIN, IN THEIR MEMORANDUM IT
7 DID, BECAUSE THEY REALIZE THE WEAK STATEMENT THAT YOUR JOB
8 WILL BE HERE WHEN YOU GET BACK WAS ENOUGH TO SEND THE MATTER
9 TO THE JURY. YOU KNOW, THAT'S A PRETTY ILLUSORY STATEMENT
10 ON ITS FACE. THAT SEEMS LIKE TO ENCOURAGE SOMEONE TO GET
11 WELL AND WE WILL SEE WHAT'S UP.

12 JUDGE YOUNG: WELL, IT SEEMS TO ME THE QUESTION
13 OF FACT THAT WAS BEING SENT BACK TO THE JURY WAS WHETHER
14 THEY FIRED HIM FOR CAUSE FACTORS RATHER THAN FIRED HIM FOR
15 FAILURE TO RETURN TO WORK. AND THAT'S A LEGITIMATE QUESTION
16 OF FACT I CAN SEE. I THOUGHT THAT WAS WHAT WAS SENT BACK
17 TO THE JURY.

18 MR. HYDE: RIGHT.

19 JUDGE YOUNG: IT WASN'T SENT BACK TO THE JURY
20 TO DETERMINE WHETHER HIS EMPLOYMENT WAS AT-WILL OR OTHERWISE.

21 MR. HYDE: THAT'S RIGHT.

22 JUDGE YOUNG: THAT WAS, AS I UNDERSTAND IT, THAT'S
23 A QUESTION OF LAW AND I HAVE TO DECIDE--IF I DECIDE--THE
24 WAY I UNDERSTAND YOUR READING OF THESE PARAGRAPHS, FOR
25 INSTANCE THE PARAGRAPH, "ALL EMPLOYEES OF THE COMPANY ARE

1 'AT-WILL' EMPLOYEES SUBJECT TO TERMINATION AT ANY TIME WITH
2 OR WITHOUT CAUSE," YOU'RE READING THAT TO NOT BE TRUE.
3 YOU HAVE TO READ THAT, UNDER YOUR THEORY TO MEAN--
4 MR. HYDE: THAT'S RIGHT.
5 JUDGE YOUNG: --ALL EMPLOYEES OF THE COMPANY
6 ARE--
7 MR. HYDE: THAT'S RIGHT.
8 JUDGE YOUNG: --NOT AT-WILL EMPLOYEES AND MAY
9 ONLY BE SUBJECT TO TERMINATION WITH CAUSE.
10 MR. HYDE: WELL, WHAT WE SAY IS WHAT THEY SAY.
11 WHAT THEY PROMISED THEIR EMPLOYEES IN THIS VIDEOTAPE IS
12 THEY WILL TREAT THEM FAIRLY, WHICH MEANS YOU DON'T GO AND
13 FIRE THEM FOR SOME RELATIVELY MINOR INFRACTION OF THE RULES.
14 JUDGE YOUNG: BUT YOU CAN FIRE THEM FOR REDUCTION
15 IN FORCE WITHOUT ANY INQUIRY.
16 MR. HYDE: IF THAT IS THE TRUE NATURE OF THE
17 TERMINATION, THAT IS CORRECT, BUT YOU CAN'T HIDE BEHIND
18 THAT. THE EMPLOYERS CAN'T SAY AT ANY TIME THIS IS A REDUC-
19 TION IN FORCE, YOU'RE GONE, WHEN, IN FACT, IT ISN'T A TRUE
20 REDUCTION IN FORCE. ANYBODY CAN SAY THAT. THAT'S LIKE
21 SAYING, YOU KNOW, THIS IS CHARACTERIZING EVERYTHING AS
22 INSUBORDINATION AS CAUSE FOR TERMINATION. EMPLOYERS CANNOT
23 DO THAT.
24 JUDGE YOUNG: SO YOUR POSITION IS THEN THAT THE
25 QUESTION OF FACT THAT REMAINS IN THIS CASE IS WHETHER SHE

1 WAS DISCHARGED FOR FAILURE TO FIND A DOCUMENT OR FOR A LOST
2 DOCUMENT OR WHETHER SHE WAS TRUTHFULLY DISCHARGED FOR REDUC-
3 TION IN FORCE AND THAT'S A QUESTION OF FACT.

4 MR. HYDE: WELL, EVEN MORE BROADLY--THAT'S TRUE,
5 I AGREE WITH THE COURT ON THAT POINT--BUT EVEN MORE BROADLY,
6 WHAT THE NATURE OF HER EMPLOYMENT CONTRACT WAS, WHAT WERE
7 THE TERMS OF THAT CONTRACT TAKEN FROM PROMISES OF PROMOTION
8 THAT SHE WAS GOING TO BE GIVEN OPPORTUNITIES ELSEWHERE,
9 PROMISES THAT SHE WOULDN'T BE FIRED FOR A RELATIVELY MINOR
10 INFRACTION WITHOUT HAVING SOME COMMUNICATION. IT'S NOT
11 ONLY THE ABILITY TO FIRE BUT WHAT HAS TO TAKE PLACE PRIOR
12 TO THE TERMINATION IS WHAT IS A QUESTION OF FACT IN THIS
13 CASE. AND AGAIN, THE BASIS OF THIS ORDER, OR BASIS OF THIS
14 MOTION IS RELIEF FROM AN ORDER THAT JUDGE WILKINSON AND
15 JUDGE NOEL HAVE ALREADY RULED UPON. THESE ISSUES HAVE BEEN
16 BANTERED BEFORE THIS COURT ON TWO OTHER OCCASIONS AND THERE'S
17 NOTHING UNUSUAL ABOUT WHAT HAS HAPPENED THROUGH HODGSON
18 OR SANDERSON WHICH WOULD EVEN HAVE THE COURT LOOK AT THE
19 FACTS. OUR POSITION IS YOU DON'T EVEN NEED TO LOOK AT THE
20 RECORD BECAUSE THEY HAVEN'T MET THE BURDEN TO SHOW THIS
21 IS AN EXCEPTIONAL AND UNUSUAL CIRCUMSTANCE. BUT EVEN IF
22 YOU'RE INCLINED TO, THERE'S A VOLUMINOUS RECORD OF FACTS,
23 WE SUBMIT TO THE COURT, THAT CREATE ISSUES OF FACT FOR MRS.
24 POWER IN THIS CASE. THIS IS MERELY THE THIRD BITE AT THE
25 SAME APPLE.

1 JUDGE YOUNG: WELL, WHAT DO YOU THINK ARE THE
2 FACTS THAT HAVE ALTERED THE AT-WILL EMPLOYMENT?

3 MR. HYDE: WELL, I HOPE I CAN REMEMBER ALL OF
4 'EM, BUT GENERALLY THE COURSE OF CONDUCT OF HER EMPLOYMENT,
5 WHICH WE'VE SET MORE FULLY IN OUR MEMORANDUM IN PREVIOUS
6 MOTIONS, BUT GENERALLY HOW SHE WAS PROMISED CERTAIN THINGS
7 BY HER SUPERVISORS THAT SHE WOULD BE ABLE TO GO TO THIS
8 NEW JOB, THIS NEW POSITION, THE FACT THAT AT THE OUTSET
9 OF HER EMPLOYMENT SHE WAS MADE SPECIFIC PROMISES ABOUT THE
10 NATURE OF HER EMPLOYMENT, THE VIDEOTAPE HAS SIGNIFICANT
11 AND SUBSTANTIAL STATEMENTS. THEY'RE NOT ILLUSORY. THESE
12 ARE POINTED STATEMENTS ABOUT WHEN AND WHEN YOU CANNOT BE
13 FIRED. AS WELL AS OTHER FACTS I JUST CAN'T THINK OF RIGHT
14 NOW, BUT THEY ARE PART OF THE RECORD.

15 JUDGE YOUNG: RIGHT. SO YOU BELIEVE THAT THE
16 COMPANY'S COURSE OF CONDUCT--ACTUALLY, IF I FOLLOW YOUR
17 THEORY, THERE ARE NOT AT-WILL EMPLOYEES IN THE DEFENDANT
18 CORPORATION.

19 MR. HYDE: WELL, NO, 'CAUSE I DON'T KNOW WHO'S
20 SEEN THIS VIDEOTAPE. I KNOW OUR CLIENT SAW IT NUMEROUS
21 TIMES.

22 JUDGE YOUNG: SO YOUR POSITION IS THAT ANY
23 EMPLOYEE WHO SAW THAT VIDEOTAPE WAS NO LONGER AT-WILL.

24 MR. HYDE: IT DEPENDS WHAT ELSE HAPPENED. MAYBE
25 THOSE EMPLOYEES HAD SUPERVISORS THAT SAID WELL, THIS VIDEO-

1 TAPE, YOU KNOW, SAID THIS BUT REALLY THIS IS AT-WILL AND
2 THIS IS WHAT AT-WILL MEANS. IT REALLY DEPENDS ON THE NATURE
3 OF THE COMMUNICATIONS WITH THAT INDIVIDUAL EMPLOYEE. I
4 CAN'T SPEAK FOR ALL MRS. FIELDS' EMPLOYEES.

5 JUDGE YOUNG: LET ME TELL YOU WHAT MY FRUSTRATION
6 IS WITH THE CASE. IT SEEMS TO ME IF YOU'RE GOING TO CHANGE
7 AN AT-WILL CONTRACT YOU HAVE TO HAVE--IT BASICALLY IS ALMOST
8 ALWAYS CHANGED BY SOME DIRECT COMMUNICATION TO THAT EMPLOYEE
9 BY SOMEONE HAVING AUTHORITY TO ADJUST THE AT-WILL STATUS.
10 IT'S NOT JUST A GENERAL TAPE THAT GOES TO ALL EMPLOYEES.

11 MR. HYDE: IT--I'M SORRY?

12 JUDGE YOUNG: UNLESS THE TAPE SAYS WE MAY SAY
13 AT-WILL BUT WE DON'T MEAN IT, THIS IS WHAT WE MEAN--

14 MR. HYDE: IN ESSENCE, THAT'S WHAT WE'RE SAYING
15 THIS TAPE SAYS, THAT THEY SAY SPECIFICALLY, ALL COMPANIES
16 HAVE POLICIES AND PROCEDURES, THESE PROCEDURES CHANGE.
17 WHAT DO NOT CHANGE ARE OUR CORE ESSENCE VALUES. NO. 4 VALUE
18 IS FAIR TREATMENT OF ALL. AND FIRST OF ALL, WE NEED TO
19 BACK UP. WE DON'T THINK THEY--

20 JUDGE YOUNG: BUT THEN IF YOU ARE GOING TO ALLEGE
21 THIS DON'T YOU HAVE TO SAY THAT THIS IS NOT FAIR TREATMENT
22 OF HER, MS. POWER?

23 MR. HYDE: THAT'S RIGHT. THAT'S RIGHT.

24 JUDGE YOUNG: AND THAT WAS DONE ON THE BASIS
25 OF, YOU THINK, THAT SHE WAS FIRED FOR THE LOSS OF A DOCUMENT.

1 MR. HYDE: THAT'S RIGHT. THAT'S RIGHT. BUT
2 BEFORE WE EVEN GET TO THAT QUESTION, YOUR HONOR, WE DON'T
3 BELIEVE THEY ESTABLISHED AT-WILL CLEAR ENOUGH FOR AN EMPLOYEE
4 TO UNDERSTAND THEY WERE AT-WILL. THE MERE FACT THAT YOU
5 HAVE A DISCLAIMER BURIED SOMEPLACE IN THIS THICK MANUAL
6 ISN'T DISPOSITIVE, YOU NEED TO LOOK AT THE ENTIRE MANUAL
7 AND THE LANGUAGE OF ALL ISSUES ON DISCHARGING AND DISCIPLINE
8 TO READ THAT IN LIGHT OF THE AT-WILL LANGUAGE. AND OUR
9 INITIAL ARGUMENT, AND THE FIRST HURDLE THEY'VE GOT TO OVER-
10 COME IS THE FACT THAT THEY HAVE ESTABLISHED AN AT-WILL
11 RELATIONSHIP AND WE SIMPLY ARGUE THAT JUST SAYING "AT-WILL"
12 DOES NOT DO IT, YOU HAVE TO DESCRIBE AND EDUCATE PEOPLE
13 AS TO WHAT THAT DOCTRINE MEANS. THEN, IF THEY'VE DONE THAT,
14 IF THE COURT FINDS THAT'S THE CASE, THEN THEY STILL HAVE
15 TO SHOW THAT THESE OTHER MANIFESTATIONS, REPRESENTATIONS
16 DID NOT ESTABLISH AN IMPLIED-IN-FACT CONTRACT. THOSE ARE
17 TWO THINGS THAT THEY HAVE NOT DONE UP TO THIS POINT WITH
18 EITHER JUDGE WILKINSON OR JUDGE NOEL AND WE SUBMIT THERE'S
19 NOTHING DIFFERENT HERE.

20 JUDGE YOUNG: THANK YOU, MR. HYDE.

21 MR. FERRICKS: YOUR HONOR, MR. HYDE, OF COURSE,
22 IS A LITTLE BIT AT A DISADVANTAGE STANDING HERE TRYING TO
23 REMEMBER OFF THE TOP OF HIS HEAD ALL THE EVIDENCE THAT WE'VE
24 AGGREGATED FOR THIS THAT HAS BEEN VIEWED IN THE BRIEFS AND
25 WHATNOT. I WOULD BE HAPPY AT THIS POINT IN TIME TO TRY

1 TO ELABORATE ON SOME OF THOSE ELEMENTS THAT MAKE MRS. POWERS'
2 CIRCUMSTANCES SPECIAL IF THE COURT WOULD LIKE THAT ELABOR-
3 ATION AT THIS TIME?

4 JUDGE YOUNG: WELL, GIVE ME A BRIEF STATEMENT
5 OF THOSE. LET ME DO THAT, MR. HIMONAS.

6 MR. HIMONAS: MAY I MAKE A SUGGESTION BRIEFLY?

7 JUDGE YOUNG: LET ME HEAR HIM FIRST. THANK YOU.

8 MR. FERRICKS: YOUR HONOR, IN HODGSON, AS THE
9 COURT NOTES FROM READING THAT CASE, THE DISCLAIMER OF AT-
10 WILL WAS CLEARLY UPFRONT IN THE MANUAL AND IT SAID NOTWITH-
11 STANDING ANY REPRESENTATIONS OF THE COMPANY YOU ARE AT-WILL.
12 RIGHT IN THE VERY FRONT OF THE MANUAL. ALSO IN THE INTERVIEW
13 IN HODGSON THAT PERSON WAS TOLD THAT YOU ARE AN AT-WILL
14 EMPLOYEE.

15 NOW, IN CONTRAST IN THIS PARTICULAR CASE MARIA-
16 MERCEDES POWER WAS EMPLOYED BY MRS. FIELDS COOKIES BY THE
17 PERSONNEL ASSISTANT TO DEBBIE FIELDS. AND THAT PERSONNEL
18 ASSISTANT AT THE EMPLOYMENT INTERVIEW TOLD HER THAT THIS
19 IS A WONDERFUL PLACE TO WORK, THAT THERE ARE CAREER OPPOR-
20 TUNITIES FOR YOU AND NEVER SAID ANYTHING ABOUT AT-WILL.

21 IN FACT, MARIAMERCEDES POWER NEVER SIGNED AN EMPLOYMENT
22 APPLICATION UNTIL AFTER SHE STARTED EMPLOYMENT. IT WAS
23 AN AFTERTHOUGHT TO PAPER HER FILE SO THAT THERE WOULD BE
24 A RECORD IN THERE. IT DIDN'T HAVE ANYTHING TO DO WITH THE
25 NEGOTIATION, IN HER PERCEPTION, OF HOW SHE STARTED HER

1 EMPLOYMENT WITH MRS. FIELDS COOKIES. SHE WAS NEVER TRAINED
2 ON AT-WILL BUT SHE WAS SPECIFICALLY TRAINED ON THE PRINCIPALS
3 OF THE COMPANY THAT ARE INCOMPLETE ABROGATION OF AT-WILL.

4 THE AT-WILL DISCLAIMER IN THE EMPLOYMENT MANUAL
5 IS BURIED DOWN IN SECTION 7 OF THAT MANUAL WHICH IS DOWN
6 ABOUT 123 PAGES, THE LAST TIME I COUNTED. I CAN'T REMEMBER
7 EXACTLY WHERE IT IS, AND THAT AT-WILL DISCLAIMER IN THERE
8 IS ALL WRAPPED UP AND COLLECTED IN THE SAME SECTION OF THE
9 MANUAL THAT SAYS WE HAVE STAGES OF DISCIPLINE, YOU NEED
10 TO GET NOTICE OF WHAT'S EXPECTED OF YOU, YOU'LL BE GIVEN
11 AN OPPORTUNITY TO PERFORM, IF YOU DON'T PERFORM YOU'LL BE
12 GIVEN NOTICE THAT YOU'RE NOT PERFORMING AND ADDITIONAL OPPOR-
13 TUNITIES.

14 THE ACKNOWLEDGEMENT THAT MRS. FIELDS MAKES SO
15 MUCH OUT OF--THESE MANUALS WERE PASSED OUT AFTER A WHILE,
16 NOT AT THE BEGINNING OF EMPLOYMENT, BY THE WAY, THEY WERE
17 PASSED OUT AND SHE SIGNED AN ACKNOWLEDGEMENT SUGGESTING
18 THAT SHE HAD RECEIVED THE MANUAL.

19 NOW, THERE IS A STRONG FACTUAL DISPUTE IN THE
20 CASE AS TO WHETHER SHE CHECKED THE BOX OFF OR INITIALED
21 THE BOX THAT SAID "I RECOGNIZE IN RECEIVING THIS MANUAL
22 I'M AN AT-WILL EMPLOYEE." THERE'S A QUESTION IN THAT QUES-
23 TION. IT IS A KEY PIECE OF EVIDENCE THAT THE COURT'S GOING
24 TO HEAR. SHE SAID I SIGNED THIS THING SAYING I GOT THE
25 MANUAL, IT WAS GIVEN TO ME, AND THE POINT WAS YEAH, I GOT

1 THE MANUAL, IT IS A RECEIPT FOR THE MANUAL, IT IS NOT A
2 CONTRACTUAL INTERCHANGE WITH THE COMPANY.

3 THE CONTINUED PROMISES OF HER FUTURE JOB WITH
4 THE MAIL ORDER FACILITY.

5 SHE RECEIVED POSITIVE JOB REVIEWS. SHE RECEIVED
6 BONUSES FOR EXTRA JOB PERFORMANCE.

7 AND THEN ON TOP OF ALL OF THIS, THIS VIDEOTAPE,
8 I DON'T THINK, CAN BE EMPHASIZED QUITE ENOUGH, YOUR HONOR.
9 THIS THING IS IN LIVING COLOR. THIS IS A VIDEOTAPE OF
10 THE FORMAL PRESENTATION THAT'S GIVEN BY DEBBIE AND RANDY
11 FIELDS WITH MAKE-UP, LIVING COLOR, MUSIC DUBBED IN AND OUT
12 ON THIS THING. THIS IS A PRODUCTION QUALITY PIECE OF WORK.

13 AND NOT ONLY DID MARIAMERCEDES SEE THIS VIDEOTAPE AS AN
14 EMPLOYEE BUT SHE TRAINED OTHER PEOPLE AND SHOWED THIS THING
15 A NUMBER OF TIMES BECAUSE, AS THEY SAY IN THE VIDEOTAPE,
16 THE PRINCIPALS OF OUR COMPANY NEVER CHANGE, OUR POLICIES
17 AND PROCEDURES CAN CHANGE BUT THE PRINCIPALS REMAIN CONSTANT.
18 AND IN THAT HOUR AND 15 MINUTES THE PRINCIPALS OF THE COM-
19 PANY, NEVER ONCE DO THE FIELDS SAY IN THERE THAT IN SPITE
20 OF ALL OF THESE PROMISES TO YOU THAT WE WILL BE FAIR TO
21 ALL, THAT WE HAVE OPPORTUNITY, THAT YOU ARE A TEAM MEMBER,
22 THAT YOU CAN TAKE RISK WITH OUR COMPANY AND YOU WILL BE
23 REWARDED FOR THAT, NOT ONCE DO THEY SAY IN THERE, BUT IN
24 SPITE OF ALL OF THOSE INCENTIVES, FOR YOU TO GIVE US YOUR
25 GOOD WILL, WE RESERVE THE RIGHT TO TREAT YOU AT-WILL.

1 THEY NEVER SAY THAT IN THERE. SO YOU GET ALL OF THAT AND
2 THEN ONE DAY MY CLIENT IS CALLED IN TO THE DIRECTOR OF OPER-
3 ATIONS OFFICE, MR. PAUL BAIRD, AND SHE IS PRESENTED WITH
4 AN EMPLOYMENT REVIEW.

5 JUDGE YOUNG: I DON'T APPRECIATE THE SLAMMING
6 PAPERS DOWN AND SLAPPING THE DESK.

7 MR. FERRICKS: EXCUSE ME, YOUR HONOR, I--

8 JUDGE YOUNG: I DON'T NEED ANY EMOTIONAL THINGS.
9 THIS HAS GOT TO BE A RATIONAL FORUM.

10 MR. FERRICKS: ALL RIGHT. SHE'S PRESENTED WITH
11 THE EMPLOYMENT REVIEW THAT MR. BAIRD GAVE HER. AND THAT
12 EMPLOYMENT REVIEW IS ENTIRELY AT ODDS WITH ALL OF THE
13 PREVIOUS EMPLOYMENT REVIEWS SHE'S RECEIVED, IT IS COMPLETELY
14 AT ODDS WITH EVERYTHING SHE'S BEEN TOLD BY MR. BAIRD AND
15 BY DEBBIE FIELDS AND BY DEBBIE FIELDS' ASSISTANT AND EVERY-
16 BODY ELSE. AND IT'S ON THE PREMISE OF THIS NEGATIVE PERFOR-
17 MANCE EVALUATION THAT HE SAYS, SO WE ARE TERMINATING YOU
18 WITHOUT ANY WARNING WHATSOEVER, CONTRARY TO THE PRINCIPALS
19 THAT SHE'S BEEN INSTRUCTED ON.

20 NOW, THAT'S MY EFFORT TO KIND OF SUMMARIZE THE
21 EVIDENCE THAT WE ARE GOING TO PRESENT TO, AS MR. HYDE SAYS,
22 THE TOTALITY OF THE EMPLOYMENT CIRCUMSTANCES. THOSE ARE
23 THE SORTS OF THINGS IN THE EVIDENCE THAT ARE GOING TO COME
24 IN. THE SUGGESTION THAT YOU CAN LIFT A LINE OR TWO OUT
25 OF THESE VOLUMINOUS DOCUMENTS AND THAT THAT IS THE ESSENCE

1 WITHOUT ANY CONSIDERATION OF THE OTHER CONTEXT IS REALLY
2 AN EXERCISE IN LIFTING OUT OF CONTEXT AND IT DOES NOT PRESENT
3 THE TRUE NATURE OF THE RELATIONSHIP.

4 JUDGE YOUNG: ALL RIGHT. THANK YOU, MR. FERRICKS.
5 MR. HIMONAS?

6 MR. HIMONAS: YOUR HONOR, WHAT I WAS GOING TO
7 SUGGEST IS I BESEECH THE COURT TO READ THE RESPONSE FOR
8 OUR SUMMARY JUDGMENT MOTION BECAUSE HALF OF WHAT YOU HAVE
9 HEARD IS NOT IN THE RECORD AND NOT SUPPORTED BY THE RECORD
10 AND I THINK THE COURT NEEDS TO TAKE A COLD, HARD LOOK AT
11 THE FACTS AND NOT AT AN IMPASSIONED ARGUMENT OF WHAT THE
12 LAWYERS BELIEVE THE FACTS ARE. TAKE A LOOK AT THEIR RESPONSE
13 TO OUR SUMMARY JUDGMENT MOTION AND YOU'LL SEE THAT THE RELA-
14 TIONSHIP BETWEEN THIS COMPANY AND MARIAMERCEDES POWER WAS
15 AND ALWAYS HAS BEEN AN AT-WILL RELATIONSHIP. I WANT TO
16 TAKE ABOUT FIVE MINUTES AND RUN THROUGH THE FACTS.

17 JUDGE YOUNG: LET ME JUST GIVE YOU MY CONCERNS
18 NOW FROM HAVING HEARD THEIR FACTS.

19 MR. HIMONAS: SURE.

20 JUDGE YOUNG: IF THEY SAY THAT, FIRST OF ALL,
21 AN OVERALL COURSE OF CONDUCT CAN CHANGE AN AT-WILL EMPLOYMENT
22 THEN ISN'T THAT A QUESTION OF FACT?

23 MR. HIMONAS: NO, YOUR HONOR. NOT IN THIS
24 PARTICULAR CASE.

25 JUDGE YOUNG: WHY?

1 MR. HIMONAS: MAY I APPROACH THE BENCH?

2 JUDGE YOUNG: YOU MAY, YES.

3 MR. HIMONAS: LET ME SHOW YOU THE ACTUAL ACKNOWLEDGEMENT SHE SIGNED. NOW A PARTY IS CHARGED WITH UNDERSTANDING DOCUMENTS THEY SIGN. IGNORE THE CHECKMARKS, JUST
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
LOOK AT THE SIGNATURE AND LOOK AT THE TWO PARAGRAPHS THAT IMMEDIATELY PRECEDE THAT, YOUR HONOR.

8 JUDGE YOUNG: BUT IF THIS DOCUMENT IS NOT SIGNED BEFORE EMPLOYMENT DOES IT CREATE A VARYING EFFECT?

10 MR. HIMONAS: ABSOLUTELY. WE HAVE THE RIGHTS UNDER JOHNSON AND ITS PROGENY TO UNILATERALLY MODIFY THE
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
TERMS OF THE EMPLOYMENT RELATIONSHIP. EVEN IF SHE SIGNED IT AND IT WASN'T AN AT-WILL RELATIONSHIP WE MAY UNILATERALLY MODIFY. AND UNDER THE LAW IN THIS STATE HER CONTINUED EMPLOYMENT PROVIDES THAT CONSIDERATION FOR THAT.

16 YOUR HONOR, THAT VIDEO WAS VIEWED BEFORE THAT
17
18
19
20
21
22
23
24
25
WAS SIGNED AS WELL. YOU CANNOT HAVE A CLEARER STATEMENT OF AN AT-WILL RELATIONSHIP AND THE COMPANY, YOUR HONOR, THEY DIDN'T HIDE IT, THEY GAVE IT TO HER, SHE SIGNED THE PAPER, YOUR HONOR, AND SHE DIDN'T USE TERMS AT-WILL, THEY TRIED TO FIND EXACTLY WHAT IT MEANT IN THE DOCUMENT. FOR EXAMPLE, AT THE VERY BOTTOM, "I UNDERSTAND THAT THE COMPANY AND I HAVE THE SAME RIGHT TO END MY EMPLOYMENT AT ANY TIME FOR ANY REASON." IT'S NOT LEGAL EASE, IT'S NOT HIDDEN, IT'S THE LAST THING SHE READS.

1 IN THE MIDDLE PARAGRAPH, YOUR HONOR, "THE COMPANY
2 RESERVES THE RIGHT TO TRANSFER, PROMOTE, DEMOTE OR TERMINATE
3 ME WITH OR WITHOUT CAUSE AT ANY TIME."

4 ALSO, YOUR HONOR, THERE'S BEEN A BIT OF A MISSTATE-
5 MENT AS TO THE APPLICATION ITSELF AND WHEN SHE WAS INFORMED
6 AT THE COMMENCEMENT OF HER RELATIONSHIP OF THE COMPANY THAT,
7 IN FACT, THE RELATIONSHIP WAS AT-WILL. AGAIN, IF I MAY
8 APPROACH, THIS IS THE FIRST PAGE OF THE EMPLOYMENT APPLI-
9 CATION. AND THIS IS THE SECOND PAGE WITH HER SIGNATURE.

10 SHE DIDN'T GET THAT AT THE TIME THAT SHE WAS INTERVIEWED
11 BUT SHE GOT IT ON THE FIRST DAY OF HER EMPLOYMENT, OR THE
12 DAY AFTER, BUT ANYWAY, YOUR HONOR, IT'S AT THE VERY COMMENCE-
13 MENT OF THE EMPLOYMENT RELATIONSHIP. THEY STICK IT AT THE
14 VERY TOP. THEY DON'T HIDE IT. THEY EMPHASIZE IT. AND
15 SHE SIGNS THE DOCUMENT AGAIN, YOUR HONOR.

16 SHE'S GIVEN A HANDBOOK, YOUR HONOR. LET ME TELL
17 YOU WHAT THE HANDBOOK SAYS. FOR EXAMPLE--AND THIS, BY THE
18 WAY, THE ENTIRE HANDBOOK IS INCORPORATED AS ONE OF THE
19 EXHIBITS TO THE SUMMARY JUDGMENT TO OUR SUMMARY JUDGMENT
20 PAPERS THAT I HAD INCLUDED WITH OUR MOTION, SO YOU'LL HAVE
21 AN OPPORTUNITY TO SEE THE 20 TO 25 PAGES, NOT HUNDREDS OF
22 PAGES THAT COMPRISE THE ACTUAL HANDBOOK. "THE COMPANY
23 IS AN 'AT-WILL' EMPLOYER WHICH MEANS THAT ANY AND ALL TEAM
24 MEMBERS ARE SUBJECT TO TERMINATION AT ANY TIME WITH OR WITH-
25 OUT CAUSE. ALTHOUGH WE GENERALLY WILL FOLLOW A DISCIPLINARY

1 PROCESS BECAUSE WE ARE AN AT-WILL EMPLOYER, THE COMPANY
2 RESERVES THE RIGHT TO TERMINATE A TEAM MEMBER IMMEDIATELY."
3 THE POINT IS, LIKE ANY OTHER EMPLOYER IN THIS STATE OR ACROSS
4 THE COMPANY.

5 BUT WHAT RANDY FIELDS IN THE VIDEO IS DOING,
6 AND WHAT THE COMPANY IS DOING IS SAYING HEY, WE DON'T TERMIN-
7 ATE WILLY-NILLY. OF COURSE NOT, BECAUSE THAT'S NOT GOOD
8 FOR BUSINESS. WE GENERALLY HAVE A REASON. BUT THAT'S A
9 POLICY AND IT IS A VERY IMPORTANT DISTINCTION TO DRAW BETWEEN
10 A POLICY AND A CONTRACT. WHAT THEY'RE SAYING IS, WE HAVE
11 A CONTRACTUAL RIGHT TO TERMINATE YOU AT ANY TIME AND YOU
12 HAVE THE SAME RIGHT TO TERMINATE YOUR RELATIONSHIP WITH
13 US AT ANY TIME AND FOR ANY REASON BUT WE'LL GENERALLY FOLLOW
14 A DISCIPLINARY POLICY. AND IN LIGHT OF HODGSON, AND SANDER-
15 SON, AND THE REST OF THE PROGENY OF BERUBE, THAT MANDATES
16 WE INTERPRET THE ENTIRE CONTRACT CONSISTENT WITH THE DIS-
17 CLAIMERS, YOU KNOW, I THINK, THAT'S THE OUTCOME THE COURT
18 MUST REACH IN THIS PARTICULAR CASE. THE COMPANY HAS A POLICY
19 THAT IT TRIES TO FOLLOW BUT IT'S NOT CONTRACTUALLY BOUND
20 TO.

21 THE R.I.F., YOUR HONOR, MUCH OF WHAT YOU HEARD,
22 IS NOT SUPPORTED BY THE RECORD. AND THIS IS, IN PARTICULAR,
23 WHY I INVITE YOU AND BESEECH YOU TO READ THEIR RESPONSE
24 TO THE R.I.F. PORTION OF OUR MOTION FOR SUMMARY JUDGMENT.
25 SOMETHING, BY THE WAY, THEY HAVEN'T PROVIDED YOU IN WRITING

1 AND I THINK YOU SHOULD READ BECAUSE MUCH OF WHAT YOU'VE
2 HEARD IS SIMPLY NOT TRUE. WHAT HAPPENED IS SHE WAS CALLED
3 ON THE CARPET, R.I.F. ING A POSITION THAT HASN'T BEEN FILLED
4 AND HER SISTER POSITION WITHIN THE SAME DEPARTMENT WAS ALSO
5 R.I.F. ED AND NOT FILLED, YOUR HONOR. THAT IS UNDISPUTED.
6 IT WASN'T BECAUSE SHE HAD MISPLACED A PIECE OF PAPER. THERE
7 WERE FOUR OR FIVE REASONS THAT HER EMPLOYER WENT THROUGH,
8 PAUL BAIRD, SAYING YOU ARE MY LOWEST PERFORMER, THESE ARE
9 EXAMPLES OF WHY YOU'RE MY LOWEST PERFORMER, THIS IS JUST
10 BECAUSE I HAVE TO R.I.F. A POSITION. I AM R.I.F. ING YOUR
11 POSITION RATHER THAN THE COMPUTER HACKER. IT'S AN EXPLAN-
12 ATION, IT'S THE EMPLOYER SAYING I'VE GOT TO GET RID OF SOME-
13 BODY AND I'M GOING TO GET RID OF MY LOWEST PERFORMERS BECAUSE
14 I CAN'T AFFORD TO HAVE FOUR PEOPLE, I CAN ONLY AFFORD TO
15 HAVE TWO, YOUR HONOR. AND THAT IS WHAT THE RECORD WILL
16 DEMONSTRATE.

17 JUDGE YOUNG: TELL ME THIS, MR. HIMONAS. I'M
18 CONCERNED WITH WHY TWO OTHER JUDGES, IF THEY HAVE INDEED
19 CONSIDERED THIS, FELT THERE REMAINED FACTUAL QUESTIONS.

20 MR. HIMONAS: JUDGE WILKINSON DID NOT HAVE THE
21 BENEFIT--

22 JUDGE YOUNG: OF THE DISCOVERY.

23 MR. HIMONAS: NO, OF THIS PARTICULAR DECISION.
24 AND WE HAVE THESE ENORMOUS, LEGAL CONCEPTS THAT ARE HANGING
25 OUT THERE, BUT WHEN YOU GET TO SANDERSON AND HODGSON, FOR

1 THE FIRST TIME YOU HAVE SIGNED ACKNOWLEDGEMENTS IN THIS
2 CASE. THESE, AS YOU HAVE HERE, YOU HAVE A DISCLAIMER UPFRONT
3 IN HODGSON. IT WAS ORAL IN THIS CASE. IT'S THROUGH THE
4 APPLICATION THAT IT'S AN AT-WILL RELATIONSHIP. YOU HAVE
5 A NUMBER OF EXPLICIT DISCLAIMERS, BUT MOST IMPORTANTLY IN
6 HODGSON YOU HAVE A STATEMENT THAT SAYS STATEMENTS OF CONDUCT
7 BY A MANAGEMENT OFFICIAL ARE NOT INTENDED AND SHOULDN'T
8 BE RELIED UPON TO GIVE RISE TO A CONTRACT. AND YOU HAVE
9 THAT EXACT SAME DISCLAIMER IN THIS PARTICULAR INSTANCE.

10 NOW, I GRANT YOU THAT THERE'S NOTHING EARTH-
11 SHATTERING ABOUT THE LAW AS IT WAS PRESENTED IN HODGSON
12 AND SANDERSON. WHAT IS CRITICAL IN THIS PARTICULAR CASE
13 IS THE FACTUAL BACKGROUND IN WHICH IT WAS LAID. AND TO
14 SAY THAT BECAUSE WE DON'T HAVE, DON'T HAVE A BRAND NEW LEGAL
15 PRINCIPAL, WE SHOULD IGNORE THE FACT WE HAVE NEAR SISTER
16 CASES WHEN YOU MESH SANDERSON AND HODGSON TOGETHER, YOUR
17 HONOR, THERE'S SIMPLY NO REASON IN LIGHT OF THAT FACT TO
18 GO ON.

19 JUDGE NOEL WASN'T FACED WITH A MOTION FOR RECONSI-
20 DERATION. WE HAD ASKED JUDGE NOEL FOR A MOTION IN LIMINE,
21 ESSENTIALLY, TO KEEP OUT THE VIDEO AND HE DIDN'T HAVE THE
22 BENEFIT OF HODGSON AND SANDERSON AT THE TIME EITHER, YOUR
23 HONOR.

24 JUDGE YOUNG: WHAT DID HE RULE ON THE MOTION
25 IN LIMINE?

1 MR. HIMONAS: JUDGE NOEL'S RULING WAS, I AM GOING
2 TO LET ALL THE FACTS AND CIRCUMSTANCES IN BECAUSE WE WEREN'T
3 ASKING FOR THE TRIAL TO END IN THIS PARTICULAR CASE. YOU
4 UNDERSTAND, WE WERE ONLY GOING AFTER TWO PARTICULAR PIECES
5 OF EVIDENCE, NOT FOR THE TRIAL TO COME TO AN END. AND JUDGE
6 NOEL, I THINK, MADE A FAIRLY WISE DECISION SAYING, YOU KNOW,
7 THERE HAVE BEEN ISSUES OF FACT BEFORE, I'M GOING TO LET
8 EVERYTHING IN, I AM GOING TO REVIEW THE TOTALITY OF THE
9 CIRCUMSTANCES. BUT THAT WAS BEGUN BEFORE HODGSON AND
10 SANDERSON CAME DOWN.

11 JUDGE YOUNG: LET ME GO OVER SOME QUESTIONS THAT
12 I HAVE FOR YOU. IF, INDEED, THE TERMINATION IS NOT A REDUC-
13 TION IN FORCE BUT IS ON THE BASIS OF A BAD EVALUATION BY
14 MR. BAIRD, AND HE SIMPLY SAYS THIS IS A REDUCTION IN FORCE,
15 DOES THAT RAISE A QUESTION OF FACT SUFFICIENT TO GO TO THE
16 JURY ON THE QUESTION OF WHETHER THE TERMINATION'S PROPER?

17 MR. HIMONAS: IF THE RECORD BORE THAT OUT THAT
18 WOULD BE THE CASE, BUT IT DOES NOT BEAR THAT OUT. THERE
19 IS NO DISPUTE. THE POSITIONS WERE NOT FILLED. THERE IS
20 NO DISPUTE ABOUT WHAT TOOK PLACE DURING THAT. AND AGAIN,
21 I WOULD INVITE YOU TO READ OUR SUMMARY JUDGMENT PORTION
22 THAT ADDRESSES THAT ISSUE AND THEIR RESPONSE TO THE SUMMARY
23 JUDGMENT PORTION THAT ADDRESSES THAT ISSUE. NOT ARGUMENT,
24 BUT THE FACTS AS THE LAWYERS PRESENTED IN WRITING WITH PROPER
25 SUPPORT FROM DEPOSITIONS, AFFIDAVITS, WHAT HAVE YOU. NOT

1 LEGAL CONJECTURE ON BEHALF OF THE ATTORNEYS.

2 JUDGE YOUNG: ALL RIGHT. I UNDERSTAND YOUR
3 POSITION.

4 MR. HIMONAS: THANK YOU, YOUR HONOR.

5 JUDGE YOUNG: DID YOU DESIRE TO RESPOND ANY
6 FURTHER, SINCE THIS HAS BEEN KIND OF AN INFORMAL PROCEDURE?

7 MR. HYDE: JUST BRIEFLY, YOUR HONOR. UNFORTUN-
8 ATELY, I THINK THE COURT NOW IS AT A DISADVANTAGE BECAUSE
9 YOU ARE UNFAMILIAR WITH THE CASE LIKE THE OTHER PRIOR TWO
10 JUDGES WERE AND I THINK, YOU KNOW, HOW THEY CHARACTERIZE
11 THE FACT HOW WE MAY CHARACTERIZE THE FACTS REALLY ISN'T
12 THE CRUCIAL PART RIGHT HERE. ALL THE FACTS HAVE BEEN PRE-
13 VIOUSLY ADDRESSED TWICE BY JUDGE WILKINSON AND JUDGE NOEL.
14 THERE'S NOTHING UNUSUAL OR EXCEPTIONAL TO NOW THROW THIS
15 CASE OUT THAT HAS NOT BEEN ADDRESSED BEFORE.

16 HODGSON IS NOT SIMILAR TO THIS CASE. THE ONLY
17 ORAL ASSURANCE IN HODGSON WAS THE FACT THAT POLICIES AND
18 PROCEDURES EXISTED. THERE WAS NO REPRESENTATION BY THE
19 EMPLOYER WHEN THOSE POLICIES WOULD BE ADMINISTERED, THERE'S
20 JUST A BLAND STATEMENT AT THE OUTSET OF THAT CASE BY THE
21 MANAGER THAT SAID, YOU KNOW, YOU ARE AT-WILL, BUT WE HAVE
22 POLICIES AND PROCEDURES, DISCIPLINE POLICIES AND PROCEDURES.
23 THERE WAS NOT A PROMISE THAT YOU WOULDN'T BE FIRED UNTIL
24 YOU HAD AN OPPORTUNITY TO KNOW WHY YOU WERE BEING FIRED.
25 IT WAS NOT AS EXPLICIT. THE FACTS OF HODGSON ARE NOT CLOSE

1 TO THE FACTS IN THIS CASE.

2 JUDGE YOUNG: LET ME SAY THIS ABOUT THAT CASE.

3 JUSTICE HOWE SAID THAT THE ISSUE PRESENTED IS WHETHER THE
4 MANAGER MODIFIED THE AT-WILL EMPLOYMENT STATUS--

5 MR. HYDE: RIGHT.

6 JUDGE YOUNG: --BY DISCLOSING TO THE EMPLOYEE
7 AT THE EMPLOYMENT INTERVIEW THAT THE COMPANY FOLLOWED DISCI-
8 PLINARY PROCEDURES. AND BY SUBSEQUENTLY ISSUING WARNINGS
9 TO FOUR OTHER EMPLOYEES. AND THEN, AS I UNDERSTAND THE
10 ORDER OF THE COURT AND THE RULING OF THE COURT, IT DETER-
11 MINED THAT DID NOT MODIFY.

12 MR. HYDE: THAT'S ABSOLUTELY RIGHT. AND THAT'S
13 WHY IT DOESN'T COME NEAR OUR CASE BECAUSE ALL THAT MANAGER
14 SAID WAS THAT THERE WERE POLICIES AND PROCEDURES.

15 JUDGE YOUNG: WELL--

16 MR. HYDE: THERE WAS NO PROMISE THEY WOULD BE
17 FOLLOWED IN ANY CIRCUMSTANCE.

18 JUDGE YOUNG: AND THEN YOU TAKE THE SANDERSON
19 CASE AND THE SANDERSON CASE SAYS THAT IT'S GOING TO BE AT-
20 WILL, BOTH OF THESE CASES SAY AT-WILL IS AT-WILL AND IT'S
21 GOING TO REMAIN AT-WILL.

22 MR. HYDE: THAT'S RIGHT. ABSOLUTELY.

23 JUDGE YOUNG: AND IT IS GOING TO REMAIN AT-WILL
24 UNLESS THERE IS A SPECIFIC, EXPRESS PROMISE. AND IF YOU
25 TAKE THE APPROACH THAT WAS TAKEN IN THE SANDERSON CASE,

1 THERE WAS A SPECIFIC, EXPRESS PROMISE THAT YOU WON'T BE
2 TERMINATED IF YOU ARE SICK.

3 MR. HYDE: THAT'S RIGHT.

4 JUDGE YOUNG: NOW IT SEEMS TO ME THAT IF I WERE
5 TO FOLLOW YOUR THEORY OF THIS CASE THAT ANYONE COULD COME
6 INTO COURT AND SAY AT-WILL DOESN'T MEAN ANYTHING.

7 MR. HYDE: NOT AT ALL, YOUR HONOR. NOT AT ALL.
8 FIRST OF ALL, YOU HAVE TO CLEARLY ESTABLISH AT-WILL. AND
9 JOHNSON V. MORTON THIOKOL, THE COMPANY, DID THAT.

10 JUDGE YOUNG: WELL, OKAY.

11 MR. HYDE: AND THERE IS NO WAY TO OVERCOME IT.

12 JUDGE YOUNG: ALL RIGHT. IN OUR CASE WE HAVE,
13 IF THAT'S THE PREDICATE THAT YOU SAY IS THE FIRST THING,
14 MR. HYDE--

15 MR. HYDE: YES.

16 JUDGE YOUNG: --WE HAVE THE APPLICATION FOR
17 EMPLOYMENT THAT THE FIRST PARAGRAPH STATES, "ALL EMPLOYEES
18 OF THE COMPANY ARE AT-WILL." THIS IS BEFORE SHE'S FILLED
19 IN ANYTHING.

20 MR. HYDE: RIGHT.

21 JUDGE YOUNG: "SUBJECT TO TERMINATION AT ANY
22 TIME WITH OR WITHOUT CAUSE."

23 MR. HYDE: RIGHT.

24 JUDGE YOUNG: THEN LATER, ACCORDING TO THE
25 CHRONOLOGY, SHE GETS THE EMPLOYMENT MANUAL AND SHE SEES

1 DEBBIE AND RANDY FIELDS TAPE OF AN HOUR AND A HALF OF OUR
2 INTERNAL LOYALTY, THEY TRY TO CREATE A RELATIONSHIP WITH
3 THEIR EMPLOYEES, WHICH IS OBVIOUSLY VERY APPROPRIATE, BUT
4 THEN SHE ACKNOWLEDGES RECEIPT OF THAT AND STATES THERE AGAIN,
5 AND IT'S CLEAR IN THAT, THAT THE HANDBOOK ITSELF IS NOT
6 INTENDED TO MODIFY THE EMPLOYMENT RELATIONSHIP, AT-WILL
7 RELATIONSHIP, PUT IT THAT WAY. AND SO IT WOULD SEEM TO
8 ME INITIALLY THAT IF THE COURT WERE TO FIND THAT INITIALLY
9 SHE IS AN AT-WILL EMPLOYEE THAT THE TAPE, EVEN THOUGH JUDGE
10 NOEL SAID ALL THESE THINGS ARE SUBJECT TO GOING TO BE BROUGHT
11 INTO TRIAL--

12 MR. HYDE: WELL, JUDGE NOEL SAID MORE THAN THAT,
13 BUT YOU'LL BE ABLE TO SEE THAT FROM THE ORDER.

14 JUDGE YOUNG: FROM HIS ORDER?

15 MR. HYDE: YES.

16 JUDGE YOUNG: OKAY. BUT EVEN IF HE SAID THAT
17 IT SEEMS TO ME THAT THE MANUAL MAY BE SUBJECT TO A MOTION
18 IN LIMINE AFTER THE COMPANY NOTIFIES HER THAT THE MANUAL
19 IS NOT INTENDED TO CHANGE AT-WILL. AND SHE KNOWS THAT.

20 MR. HYDE: BUT THERE IS ALSO INHERENTLY AMBIGUOUS
21 STATEMENTS IN THE MANUAL ABOUT THE NATURE OF AT-WILL. WE
22 HAVE TO LOOK AT IT FROM MARIAMERCEDES POWER'S POINT OF VIEW.
23 IT IS EASY FOR US TO THEORETICALLY TALK ABOUT THE DOCTRINE
24 OF AT-WILL, BUT WHAT'S MARIAMERCEDES TO THINK OF THIS.
25 SHE WAS GIVEN THESE THINGS TO SIGN OFF ON. WHO KNOWS IF

1 AN EMPLOYER DESCRIBES WHETHER OR NOT AT-WILL OR WHAT THE
2 NATURE OF AT-WILL IS. BUT I DON'T THINK THE COURT SHOULD
3 WORRY ABOUT THEM OR THE IMPACT OF DISSEMINATING THIS VIDEO-
4 TAPE BECAUSE, OBVIOUSLY, THE COMPANY TRIED TO DO THAT WITH
5 ITS MANUAL COMPANY WIDE. I THINK THERE HAS TO BE A
6 BALANCING.

7 JUDGE YOUNG: NO, I TELL YOU WHAT I'M LOOKING
8 FOR, MR. HYDE. I'M LOOKING FOR SOMETHING THAT'S CONCRETE
9 AND SPECIFIC THAT IS INTENDED NOT TO BE A GENERAL PHILOSOPHY
10 OF THE COMPANY OR PRINCIPALS OR PRACTICES BY WHICH WE FOLLOW
11 AND LIVE OR HOW WE CONDUCT OUR BUSINESS, I'M LOOKING FOR
12 SOMETHING THAT MARIAMERCEDES POWER IS DIFFERENT, JUST LIKE
13 IN THE SANDERSON CASE, YOU'RE NOT GOING TO BE FIRED FOR
14 THIS. NOW, IF BAIRD BRINGS HER IN AND HE SAYS WE'VE GOT
15 A REDUCTION IN FORCE, WE ARE NOT GOING TO FILL THAT REDUCTION
16 IN FORCE, AND YOU ARE MY LOWEST PRODUCER, AND THAT'S SO,
17 THAT'S THE WAY IT'S GOING TO BE, I DON'T THINK A COMPANY
18 OUGHT TO BE SUED FOR THAT. I DON'T THINK THEY HAVE TO FACE
19 THE LAWSUIT FOR THAT.

20 MR. HYDE: I AGREE.

21 JUDGE YOUNG: THEY'RE AT-WILL. AND SO WHAT YOU'VE
22 GOT TO SHOW IS YOU'VE GOT TO SHOW SOME CHANGE IN RELATION
23 TO THEIR CONTRACT.

24 MR. HYDE: ABSOLUTELY. BUT AN EMPLOYEE--

25 JUDGE YOUNG: AND THAT CHANGE HAS GOT TO BE

1 DIFFERENT, IT'S GOT TO BE A PROMISE THAT'S MADE TO POWER,
2 IT'S NOT A PROMISE THAT'S MADE TO EVERYBODY, IT'S NOT THE
3 WHOLE COMPANY PHILOSOPHY, IT'S GOT TO BE A PROMISE THAT'S
4 MADE TO POWERS JUST LIKE THE ONE THAT WAS MADE TO SANDERSON.

5 MR. HYDE: THEN THE COMPANIES CAN'T RELY ON
6 EMPLOYMENT AND BOOKS THAT IT DISTRIBUTES TO EVERYONE THAT
7 SAYS WE'RE AT-WILL BECAUSE THAT'S DISTRIBUTED TO EVERYONE
8 AS WELL. IF YOU'RE LOOKING FOR, YOU KNOW, PEOPLE--EMPLOYERS
9 DON'T TELL EMPLOYEES INDIVIDUALLY WHAT AT-WILL MEANS, BUT
10 THEY DISTRIBUTE A VIDEOTAPE WITH SPECIFIC--

11 JUDGE YOUNG: I WOULD VENTURE A GUESS THAT IF
12 ALL OF US IN THIS COURTROOM WERE ASKED TO WRITE A REPORT
13 ON AT-WILL WE MIGHT COME OUT WITH SOMETHING QUITE DIFFERENT,
14 AND AN EMPLOYER, AND AN EMPLOYEE, MIGHT THINK AT-WILL REALLY
15 SIMPLY MEANS THAT I HAVE THE RIGHT TO LEAVE--IF SHE HAD
16 HAD THE RIGHT, IF SHE HAD RESIGNED HER POSITION, WOULD THE
17 COMPANY HAVE A COMPARABLE RIGHT TO SEEK SPECIFIC PERFORMANCE
18 FOR HER TO REMAIN EMPLOYED? LET'S SUPPOSE SHE'S WORKING
19 ON A MAJOR PROJECT, WOULD THE COMPANY HAVE THAT RIGHT TO
20 REQUIRE HER TO REMAIN EMPLOYED OTHER THAN THE PROTECTION
21 THAT THEY MIGHT HAVE FOR TRADE SECRETS OR PROTECTION AGAINST
22 DISCLOSURE OR COMPETITION IF THAT WERE, EXCLUDE THAT UNIQUE
23 KIND OF SITUATION, BUT WOULD THEY HAVE A COMPARABLE RIGHT
24 TO MANDATE AND GET SPECIFIC PERFORMANCE OUT OF THE COURT?

25 MR. HYDE: TECHNICALLY IN THE CASE LAW THAT'S

1 EXACTLY WHAT THE AT-WILL DOCTRINE MEANS. AND THAT'S WHY
2 JUSTICE ZIMMERMAN SAYS IT IS NOT WORTHY OF OUR CONSIDERATION
3 ANY MORE AND WHY YOU REALLY--HE SAYS THAT'S WHY THE IMBALANCE
4 IN THE EMPLOYMENT RELATIONSHIP DID NOT SUPPORT THE AT-WILL
5 NOTION BECAUSE THE AT-WILL EMPLOYERS ARE NEVER GOING TO
6 DO THAT BECAUSE IF AN EMPLOYEE LEAVES THEY'LL JUST GET
7 ANOTHER EMPLOYEE BECAUSE THERE ARE EMPLOYEES LINING UP.
8 BUT THE POINT IS, A COMPANY THAT IS AS EXPLICIT AS THEY
9 ARE IN THIS VIDEOTAPE ABOUT WHAT WE WILL NOT DO, WE WILL
10 NOT FIRE SOMEONE FOR SOME SEEMINGLY INSIGNIFICANT REASON,
11 THAT'S--I DON'T KNOW HOW AN EMPLOYER CAN BE MORE SPECIFIC
12 THAN THAT. A COMPANY LIKE MRS. FIELDS IS NOT GOING TO TELL
13 INDIVIDUAL EMPLOYEES IT'S NOT GOING TO CHANGE THE NATURE
14 OF THEIR EMPLOYMENT RELATIONSHIP BY INDIVIDUALLY TELLING
15 THEM, BECAUSE THEY COULD COME IN HERE AND SAY WELL, OF
16 COURSE, IF YOUR MANAGER SAID THAT, AT-WILL OVERCOMES THAT,
17 EVEN IF THEIR SUPERVISOR SAID YOU'RE THE BEST PERSON WE'VE
18 EVER HAD HERE, YOU'RE GOING TO BE AROUND, YOU'RE NOT GOING
19 TO BE FIRED FOR SOME STUPID MISTAKE, YOU'LL BE AROUND, TAKE
20 HEART IN THAT. THAT WOULD STILL NOT FLY.

21 JUDGE YOUNG: HOW LONG WAS MS. POWER EMPLOYED?

22 MR. HIMONAS: ONE YEAR, ONE MONTH, ONE DAY.

23 MR. HYDE: BUT HER PERFORMANCE--

24 MR. HIMONAS: A WEEK AND A DAY.

25 MR. HYDE: BUT LET'S LOOK AT THE NATURE OF WHAT

1 SHE ACCOMPLISHED IN HER BEING PROMISED TO MANAGE A COMPLETELY
2 DIFFERENT FACILITY SHOWS THE COMPANY'S CONFIDENCE IN HER.

3 JUDGE YOUNG: OKAY. WELL, THANK YOU. I APPRE-
4 CIATE THE ARGUMENTS THAT YOU'VE EACH RENDERED. I'LL TAKE
5 THE MATTER UNDER ADVISEMENT AND RENDER A DECISION.

6 MR. HIMONAS: THANK YOU, YOUR HONOR.

7 JUDGE YOUNG: COURT'S IN RECESS.

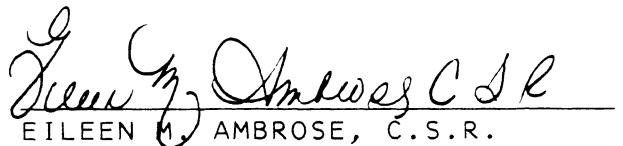
8 (WHEREUPON, THE HEARING WAS CONCLUDED).
9

10 * * *
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

STATE OF UTAH)
 : SS.
COUNTY OF SALT LAKE)

I, EILEEN M. AMBROSE, HEREBY CERTIFY THAT I AM
A CERTIFIED SHORTHAND REPORTER OF THE STATE OF UTAH; THAT
AS SUCH CERTIFIED SHORTHAND REPORTER, I ATTENDED THE
HEARING OF THE ABOVE-MENTIONED MATTER AT THAT TIME AND
PLACE SET OUT HEREIN; THAT THEREAT I TOOK DOWN IN SHORTHAND
THE TESTIMONY GIVEN AND THE PROCEEDINGS HAD THEREIN; AND
THAT THEREAFTER I TRANSCRIBED MY SAID SHORTHAND NOTES INTO
TYPEWRITING, AND THAT THE FOREGOING TRANSCRIPTION IS A
FULL, TRUE, AND CORRECT TRANSCRIPTION OF THE SAME.


EILEEN M. AMBROSE, C.S.R.

MY COMMISSION EXPIRES:
JANUARY 14TH, 1996

Randall N. Skanchy (USB #2968)
Deno G. Himonas (USB #5483)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Defendant
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 521-3200

No.

FILED

MAY 25 1993

Clerk of Summit County

By
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

MARIAMERCEDES POWER,

Plaintiff,

vs.

RIVERVIEW FINANCIAL
CORPORATION,

Defendant.

:
:
:
:
:
:
:
:
:
:

ORDER ON DEFENDANT'S MOTION
FOR RELIEF FROM ORDER

Civil No. 10741

Defendant's Motion for Relief for Order came on for argument on March 18, 1993. The Plaintiff was represented by Russell C. Fericks and Nathan R. Hyde of Richards, Brandt, Miller & Nelson. The Defendant was represented by Randall N. Skanchy and Deno G. Himonas of Jones, Waldo, Holbrook & McDonough. The Court, having heard the arguments of counsel and having reviewed the pleadings on file and the decision of the Utah Supreme Court in Sanderson v. First Security Leasing, 844 P.2d 303 (Dec. 8, 1992), and in

Hodgson v. Bunzl Utah, Inc., 844 P.2d 331 (Dec. 23, 1992), is of the opinion that the undisputed facts establish as a matter of law that Plaintiff's employment relationship with Defendant was "at-will" and that, regardless, Defendant terminated Plaintiff "for cause" as part of a reduction-in-force.

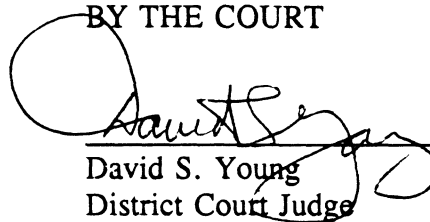
THEREFORE, THE COURT HEREBY ORDERS, ADJUDGES, AND DECREES that Defendant's Motion for Relief from Order is granted;

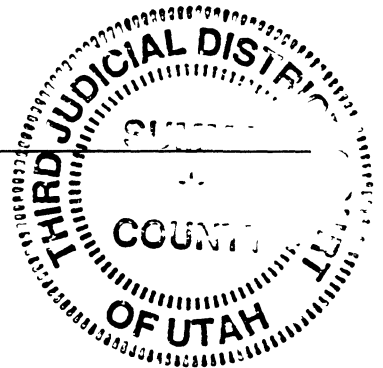
FURTHER ORDERS, ADJUDGES, AND DECREES that the Court's prior ruling denying Defendant summary judgment on plaintiff's claim for breach of an alleged implied-in-fact employment contract to be terminated only "for cause" (Count I) is vacated; and

FINALLY ORDERS, ADJUDGES, AND DECREES that Defendant's Motion for Summary Judgment is granted in its entirety.

DATED this 25th day of May, 1993.

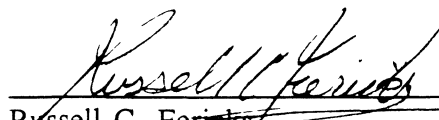
BY THE COURT


David S. Young
District Court Judge



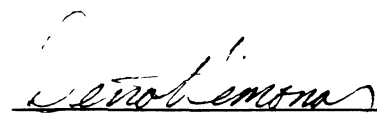
APPROVED AS TO FORM:

RICHARDS, BRANDT, MILLER & NELSON



Russell C. Fericks
Nathan R. Hyde
Attorneys for Plaintiff

JONES, WALDO, HOLBROOK & McDONOUGH



Randall N. Skanchy
Deno G. Himonas
Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that on this the 28 day of May, 1993, I caused a true and correct copy of the foregoing instrument to be hand-delivered upon:

Russell C. Fericks
RICHARDS, BRANDT, MILLER & NELSON
Key Bank Tower, Suite 800
50 South Main Street
Salt Lake City, Utah 84110