

1993

Mariamercedes Power v. Riverview Financial Corporation : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

MARIAMERCEDES POWER,

Plaintiff and Appellant,

vs.

RIVERVIEW FINANCIAL
CORPORATION,

Defendant and Appellee.

:
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: Case No. 930535-CA
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Priority No. 15

FILED

On Appeal from the Third District Court
Summit County, State of Utah

The Honorable David S. Young
District Judge

930535

BRIEF OF APPELLEE

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JUN 2 1994

Salt Lake City

June 1, 1994

COURT OF APPEALS

Ms. Mary T. Noonan
Clerk of the Court
Utah Court of Appeals
230 South 500 East, Suite 400
Salt Lake City, Utah 84102

Re: Joe D. Trembly v. Mrs. Fields Cookies, Appeal No. 930635-CA;
Mariamercedes Power v. Riverview Financial Corporation, Appeal No.
930535-CA.

Dear Ms. Noonan:

As counsel for appellees in the above-referenced appeals, I believe it is appropriate to bring the following cases to the Court's attention. I do so pursuant Utah R.App.P. 24(j), which provides, in part, that "[w]hen pertinent and significant authorities come to the attention of a party after that party's brief has been filed, . . . , a party may promptly advise the clerk of the appellate court, by letter setting forth the citations."

These cases are: Dubois v. Grand Central, 237 Utah Adv. Rep. 18 (Utah App. 4/13/94); Sorenson v. Kennecott-Utah Copper Corp., 236 Utah Adv. Rep. 36 (Utah App. 4/8/94); and Kirberg v. West One Bank, 236 Utah Adv. Rep. 20 (Utah App. 4/1/94). All three decisions are relevant to appellees' argument that the trial court's grant of summary judgment was proper (Brief of Appellee in the Trembly matter at pp. 9-18; Brief of Appellee in the Power matter at pp. 9-17).

Very truly yours,

JONES, WALDO, HOLBROOK & McDONOUGH


Randall N. Skanechy

CC: Russell C. Fericks, Esq.

IN THE UTAH COURT OF APPEALS
STATE OF UTAH

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|--------------------------|---|--------------------|
| MARIAMERCEDES POWER, | : | |
| | : | |
| Plaintiff and Appellant, | : | Case No. 930535-CA |
| | : | |
| vs. | : | |
| | : | |
| RIVERVIEW FINANCIAL | : | Priority No. 15 |
| CORPORATION, | : | |
| | : | |
| Defendant and Appellee. | : | |

On Appeal from the Third District Court
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STATEMENT OF JURISDICTION

Utah Code Ann. § 78-2a-3(2)(k) provides this court with appellate jurisdiction.

STATEMENT OF THE ISSUES

1. Whether the trial court erred in reconsidering its prior decision denying Riverview Financial Corporation ("Riverview")¹ summary judgment on Mariamercedes Power's ("Power") claim for breach of an implied "for-cause" employment contract?

Questions of whether a trial court complied with the rules of civil procedure are questions of law. See Avila v. Winn, 794 P.2d 20, 22 (Utah 1990). This court accords "no particular deference to the determinations of law made by the trial court but review[s] them for correctness." Id.

2. Whether the trial court erred in granting Riverview summary judgment on Power's claim for breach of an implied "for-cause" employment contract?

Summary Judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). "As a question of law, this decision is reviewed for correctness." Evans v. GTE Health Systems Inc., 857 P.2d 974, 976 (Utah App. 1993).

DETERMINATIVE RULES

A determination of the issues presented requires an analysis of Utah R. Civ. P. 54(b), 56, 60(b) and 61. Pursuant to Utah R. App. P. 24(a)(6) and (f), Riverview has reproduced these rules at tab "A" of the attached Addendum.

¹ Riverview was, at all times relevant, a parent company of Mrs. Fields Cookies and the actual employer of the corporate personnel working within the Mrs. Fields' organization.

STATEMENT OF THE CASE

This action grows out of Power's discharge from employment with Riverview. In a five-count amended complaint filed in September of 1990, Power alleged that Riverview (1) breached an implied-in-fact employment contract to terminate her only "for cause", (2) breached a written contract to terminate her only in accordance with "express written company policies and procedures," (3) breached the covenant of good faith and fair dealing, (4) committed fraudulent misrepresentation and (5) committed intentional infliction of emotional distress. R. at 8-14.

On December 18, 1990, Riverview moved to dismiss Power's claim for breach of the covenant of good faith and fair dealing for failure to state a claim upon which relief can be granted. R. at 51-52. The trial court granted Riverview's motion by order dated April 10, 1991. R. at 109-10.

Shortly thereafter, Riverview moved for summary judgment on the four remaining claims. R. at 119-21. The trial court originally granted Riverview summary judgment on the tort claims and denied Riverview summary judgment on the contract claims. R. at 407-08. Upon reconsideration, however, the trial court granted Riverview summary judgment on the breach of written contract claim, leaving only Power's claim for breach of an implied-in-fact "for-cause" employment contract for trial. R. at 452 & 461-62.²

² Riverview also filed a motion in limine to preclude Power "from introducing into evidence statements relating to a corporate outlook of 'fairness'" or Riverview's "nonbinding disciplinary policy." R. at 500. Power represents that this is "the very evidence on which Judge Wilkinson relied in denying Riverview summary judgment." Brief of Appellant at 5. The problem with Power's representation is that Judge Wilkinson never even remotely suggested why he denied Riverview summary judgment on the implied "for-cause"

(continued...)

Nearly a year later, the Utah Supreme Court handed down its decisions in Sanderson v. First Security Leasing, 844 P.2d 303 (Utah 1992), and Hodgson v. Bunzl Utah, Inc., 844 P.2d 331 (Utah 1992). Based upon these decisions, Riverview requested relief from the trial court's prior order denying it summary judgment on the implied "for-cause" employment contract claim. R. at 812-13. The trial court granted Riverview's motion in a Memorandum Decision dated March 18, 1993 (tab "B"), and, on May 25, 1993, entered a formal order awarding Riverview summary judgment on that claim (tab "C"). R. at 980-84 & 986-87.

On June 24, 1993, Power filed a notice of appeal (tab "D") from the trial court's May 25th order. R. at 989. Power has not appealed the dismissal of her claim for breach of a written contract, breach of the covenant of good faith and fair dealing, misrepresentation or intentional infliction of emotional distress.

STATEMENT OF FACTS

1. On November 30, 1988, Power began working for Riverview as the administrative assistant to the three Senior Regional Directors of Operations. R. at 9, 126 & 145.

²(...continued)

employment contract claim. Power then represents that, Judge Noel denied the motion in limine, "specifically finding that Power's evidence of an implied-in-fact contract was sufficient to require jury consideration." Id. That never happened. Judge Noel actually ruled that while the evidence Riverview sought to exclude "may not, without something further, constitute a contract, they may have relevance when viewed together with all the facts and circumstances." R. at 709. Judge Noel then went on to note that Judge Wilkinson had ruled that there existed "a question of fact sufficient to submit the matter to a jury." Id. Judge Noel, however, was not asked to, and did not, reconsider the propriety of Judge Wilkinson's determination.

2. The next day, December 1, 1988, Power filled out and signed an Application for Employment with Riverview. The beginning of the application provides in relevant part:

All employees of the Company are "at-will" employees subject to termination at anytime with or without cause.

And immediately above Power's signature, the application reads:

Further, I understand and agree that my employment is for no definite period and may, regardless of the date of payment of my wages and salary, be terminated without any previous notice.

R. at 126 & 141-42.

3. In April of 1989, Power became the administrative assistant to Paul Baird, Director of Operations. R. at 126 & 146-48.

4. The Riverview Policy and Procedures Manual that Power reviewed during her employment is replete with plain language declaring that employment with Riverview is at will:

In addition, the Company reserves the right to terminate any employee at will.

* * *

At THE COMPANY all employees are "at-will" employees subject to termination at any time with or without cause.

* * *

GROUND FOR IMMEDIATE TERMINATION

As noted, THE COMPANY reserves the right to terminate immediately. The following are violations that are Grounds for Immediate Termination:

* * *

The above list is not all inclusive. It by no means covers all violations that could occur during employment, and THE COMPANY reserves the right to terminate at will.

R. at 127, 151-55 & 167-71.

5. The Riverview Employee Handbook, which Power also reviewed, repeatedly proclaims in the simplest of terms that all employment with Riverview is at will:

This handbook is provided as a guide which you may use to familiarize yourself with The Company. It is provided and is intended only as a helpful guide. It does not constitute, nor should it be construed to constitute an agreement or contract of employment, express or implied, or as a promise of treatment in any particular manner in any given situation. This handbook states only general Company guidelines. The Company may, at any time, in its sole discretion, modify or vary from anything stated in this handbook.

This handbook supersedes all prior handbooks, manuals, policies and procedures issued by the Company.

* * *

The Company is an "at-will" employer which means that any and all team members are subject to termination at anytime with or without cause. Although we generally will follow a disciplinary process because we are an at-will employer, The Company reserves the right to terminate a team member immediately

* * *

As stated earlier, The Company is an "at-will" employer.

* * *

II. Termination of Employment

Every employee is free to terminate his or her employment at any time, with or without cause.

* * *

Likewise, The Company is free to terminate an employee's employment at any time with or without cause.

* * *

As stated earlier, the Company is an "at will" employer. Therefore the above list is not all-inclusive. The Company will deal with each case individually, and this information should not be construed as a promise of a specific treatment in a given situation.

These are some of the grounds for immediate termination. Of course, this list by no means covers all violations that could occur during employment, and Mrs. Fields reserves the right to terminate at will.

R. at 127-28, 156-58 & 173-201.

6. On June 20, 1989, Power reviewed and signed a one-page Acknowledgment of Receipt expressly recognizing that her employment relationship with Riverview was at will.

The Company reserves the right to transfer, promote, demote, or terminate me with or without cause at any time. With or without notice; and I reserve the right to resign at any time with or without notice.

II. HANDBOOK

Today I received a copy of The Company's Employee Handbook which has been prepared to give me some general information about company policy. 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.

R. at 128 & 203.

7. Riverview discharged Power on January 8, 1990, as part of a reduction in force necessitated by economic circumstances. More specifically, Riverview eliminated Power's administrative assistant position as part of an effort to cut costs and improve productivity at the corporate level. This effort resulted in the elimination of approximately 60 positions (37.5% of the corporate personnel) over a three-year period. R. at 9, 128, 205-08, 210-12, 214, 390 & 403-04; Reisner deposition (tab "E") at 6 & 54-55.

8. Power's duties were spread among the remaining administrative assistants and her position, once eliminated, has never been subsequently filled. R. at 128 & 205-08; tab "E" at 6 & 84.

9. Tellingly, Power, in order to secure unemployment benefits, certified under penalty of fine and imprisonment that she had been laid off by Riverview. R. at 128 & 216.

SUMMARY OF ARGUMENT

This court must affirm the trial court in all respects. First, Timm v. Dewsnup, 851 P.2d 1178 (Utah 1993), makes it clear that the trial court acted correctly when it reconsidered its previous decision denying Riverview summary judgment on Power's implied-in-fact contract claim. Second, because no reasonable jury could have found that Power had overcome the presumption of at-will employment, the trial court also acted correctly when it granted Riverview summary judgment on that claim; alternatively, summary judgment was appropriate because the undisputed facts establish that Riverview terminated Power for good cause in a reduction in force.

ARGUMENT

I. The Trial Court's Reconsideration of its Prior Decision Denying Riverview Summary Judgment on Power's Claim for Breach of an Implied "For-Cause" Employment Contract Was Entirely Appropriate.

Power argues that Riverview relied upon Utah R. Civ. P. 60(b)(7) in bringing its Motion for Relief from Order, that "Riverview had to show unusual and exceptional circumstances" to prevail on that motion, and that Riverview presented "nothing extraordinary for . . . [the trial court] to consider." Brief of Appellant at 15. Power's analysis of this issue is wrong.

"Any judge is free to change his or her mind on the outcome of a case until a decision is formally rendered." Bennion v. Hansen, 699 P.2d 757, 760 (Utah 1985). Timm, 851 P.2d 1178, is directly on-point. There, defendant, Althea Dewsnup, appealed the trial

court's denial of several motions including one to reconsider a summary judgment. Id. at 1179. "The trial court denied Mrs. Dewsnap's motion to reconsider the summary judgment, stating that 'no such motion exists under the Utah Rules of Civil Procedure.'" Id. at 1184. The Utah Supreme Court reversed and ordered "the trial court to address the motion on its merits" holding "that pursuant to the provisions of rule 54(b), because the summary judgment was 'subject to revision,'³ a motion to reconsider is a reasonable means of requesting such a revision and is therefore permitted." Id. at 1185. See also Kennedy v. New Era Indus., Inc., 600 P.2d 534, 536-37 (Utah 1979); Salt Lake City Corp. v. James Constructors, 761 P.2d 42, 44-45 (Utah App. 1988).

Here, as in Timm, Riverview asked the trial court to reconsider its disposition of a summary judgment that was "subject to revision."⁴ The trial court granted Riverview's request; the trial court would have erred if it had not done so. There it stands.

Alternatively, even if the trial court did err in reconsidering the summary judgment, a remand for this reason would be inappropriate under the harmless error standard. Rule 61 of the Utah Rules of Civil Procedure is controlling; it provides in pertinent part:

³ A summary "judgment is 'subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties'" unless certified as a final judgment. Timm, 851 P.2d at 1184 (quoting Utah R. Civ. P. 54(b)).

⁴ That Riverview's request for reconsideration was styled *Defendant's Motion for Relief from Order* and originally brought pursuant to rule 60(b) is of no consequence. First, the motion was properly brought under that rule. See Rees v. Albertson's, Inc., 587 P.2d 130, 131-32 (Utah 1978) (use of 60(b) as a mechanism for reconsidering denial of summary judgment upheld). Second, regardless, both Power and the trial court treated Riverview's motion as one for reconsideration. R. at 942, 955 & 983-84.

[N]o error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for . . . disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

An error substantially affects the rights of a party when "there is reasonable likelihood that in its absence there would have been a different result." Joseph v. W.H. Groves Latter-Day Saints Hospital, 348 P.2d 935 (Utah 1960). In light of the trial court's ruling that, as a matter of law, Power could not make out a claim for breach of an implied "for-cause" employment contract, there was no such error here for the result—dismissal of Power's claim—would have been the same except that all of the parties would have unnecessarily spent thousands of additional dollars in litigation costs.

II. The Trial Court Properly Granted Riverview Summary Judgment on Power's Claim for Breach of an Implied "For-Cause" Employment Contract.

Power next argues that she introduced sufficient "evidence of Riverview's intent and Power's reasonable expectation of 'for cause' contract terms" to avoid summary judgment.⁵ Brief of Appellant at 20. Power's position is without merit.

⁵ Power, in the opening of her brief, phrases the issue at hand in terms of whether she had an implied-in-fact employment contract "whereby she could only be terminated for cause, after disciplinary counseling, and an opportunity to correct deficiencies." Brief of Appellant at 1-2. That is an incorrect statement of the issue. A correct statement is: Whether Power had an implied-in-fact employment contract whereby she could only be terminated "for cause"? To this end, Riverview notes (1) that Power's claim in her complaint for breach of an implied employment contract centers on whether "she was a 'for cause' employee;" (2) that Power is only appealing the trial court's decision granting Riverview summary judgment on her implied "for-cause" employment contract claim and (3) that Power's docketing statement (tab "F") defines the issue presented on appeal in terms of the "for-cause" standard. R. at 2 & 989.

A. Power Is Bound by the Provisions in the Riverview Employment Application and Handbooks Stating that Employment is Terminable At Will.

Utah law presumes that employment for "no specified term of duration" is at will. Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044 (Utah 1989) (Durham, J , joined by Stewart, J.); see also id. at 1051 (Zimmerman, J., concurring in the result). An employee may overcome this presumption by proving the existence of an implied agreement with his or her employer to terminate the employment relationship only "for cause". Id. at 1044 & 1051. An implied agreement to terminate "for cause", however, cannot contradict an express contractual provision providing for employment at will. See Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1004 (Utah 1991) (citing Brehany v. Nordstrom, Inc., 812 P.2d 49, 55 (Utah 1991)); Berube, 771 P.2d at 1044.

Here, Power and Riverview expressly memorialized in the Application for Employment Power signed when she began working for Riverview their understanding that Power's employment with Riverview was at will. Power's application reads:

All employees of the Company are "at-will" employees subject to termination at anytime with or without cause.

* * *

Further, I understand and agree that my employment is for no definite period and may, regardless of the date of payment of my wages and salary, be terminated without any previous notice.

Fact ¶ 2. Power and Riverview then expressly reaffirmed this understanding in the Acknowledgment Power signed in June of 1989:

The Company reserves the right to transfer, promote, demote, or terminate me with or without cause at any time. With or without notice; and I reserve the right to resign at any time with or without notice.

II. HANDBOOK

Today I received a copy of The Company's Employee Handbook which has been prepared to give me some general information about company policy. 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.

Fact ¶ 6.⁶ Additionally, Riverview also unequivocally disclaimed in its Policy and Procedures Manual and Employee Handbook any intent to fetter its right to discharge employees at will. See Fact ¶¶ 2-3. Evidence of express recognition of at-will status by both employer and employee just does not get any better than Power's signed application and Acknowledgment and Riverview's disclaimers.

Because the law bars the consideration of implied contractual terms that are inconsistent with express contractual terms where, as here, the express terms are laid out in a signed employment application or acknowledgment or in clear and conspicuous disclaimers, the trial court properly entered summary judgment. See Hodgson, 844 P.2d at 334 ("when an employee handbook contains a clear and conspicuous disclaimer of contractual liability, any

⁶ Power disputes that she acknowledged her at-will status by signing this one-page form as she "did not stop and think and analyze specific sentences." Brief of Appellant at 22. Power's assertion is irrelevant. It is an elementary principle of contract jurisprudence that parties cannot avoid the consequences of what they have signed by later claiming that they did not read or understand it. See Lewis v. Penthouse Intern. Ltd., 825 F. Supp. 131, 133 (S.D. Texas 1992).

other agreement terms must be construed in light of the disclaimer"); Basich v. Target Stores, Inc., 1992 U.S. Dist. LEXIS 16336, *7 (Or. 1992) (disclaimer prevented "as a matter of law, the formation of an implied contract"); Bykonen v. United Hospital, 479 N.W.2d 140, 142 (N.D. 1992) ("presence of a clear and conspicuous disclaimer in the employee handbook" preserved the presumption of at-will employment); Johnson, 818 P.2d at 1003 ("We also note that a number of jurisdictions have held that a clear and conspicuous disclaimer, as a matter of law, prevents employee manuals or other like material from being considered as implied-in-fact contract terms"); Schloz v. Montgomery Ward & Co., Inc., 468 N.W.2d 845, 849 (Mich. 1991) (signed acknowledgment of at-will status prevented enforcement of contrary implied contract); Grimes v. Allied Stores Corp., 768 P.2d 528, 528-29 (Wash. App. 1989) (employee's "specific agreement in her application preempt[ed] the arguably inconsistent policy manual"); Reid v. Sears, Roebuck and Co., 790 F.2d 453, 460-62 (6th Cir. 1986) (at-will provision in employment application constituted express contract barring any contrary implied contract).

B. Power Had No More than a Mere Subjective Expectancy that She Would Be Terminated Only "For Cause".

Even if Power had not agreed to an express term of employment at will, Riverview would still be entitled to summary judgment for two independent reasons. First, no reasonable jury could conclude that Power and Riverview ever settled upon an implied "for-cause" agreement restricting the company's right to discharge Power. And "if the evidence presented is such that no reasonable jury could conclude that the parties agreed to limit the employer's

right to terminate the employee, it is appropriate for a court to decide the issue as a matter of law." Johnson, 818 P.2d at 1001.

In order for an implied "for-cause" term to exist, "it must meet the requirements for an offer of a unilateral contract." Johnson, 818 P.2d at 1002. Accordingly, there must be an objective "manifestation of the employer's intent that is communicated to the employee and sufficiently definite to operate as a contract provision. Furthermore, the manifestation . . . must be of such a nature that the employee can reasonably believe that the employer is making an offer of employment other than employment at will." Id. A subjective expectation of "for-cause" employment does not create an enforceable contractual obligation. See Duncan v. Rolm-Spec Computers, 917 F.2d 261, 265 (6th Cir. 1990) (quoting Sepanske v. Bendix Corp., 384 N.W.2d 54, 58 (Mich App. 1985)).

The facts of this case do not raise a triable issue as to the existence of an implied "for-cause" employment contract. (A) Power's employment application distinctly states in two separate places that the employment is at will and that an employee may be terminated at any time with or without notice. See Fact ¶ 2. (B) Riverview's Policy and Procedures Manual affirms the at-will nature of employment with Riverview. For example, the Policy and Procedures Manual provides:

In addition, the Company reserves the right to terminate any employee at will.

* * *

At THE COMPANY all employees are "at-will" employees subject to termination at any time with or without cause.

Fact ¶ 3. (C) Riverview's Employee Handbook insists upon the employee's at-will status in even greater detail. It provides, by way of example, that:

The Company is an "at-will" employer which means that any and all team members are subject to termination at anytime with or without cause. Although we generally will follow a disciplinary process because we are an at-will employer, The Company reserves the right to terminate a team member immediately.

* * *

Every employee is free to terminate his or her employment at any time, with or without cause.

* * *

Likewise, The Company is free to terminate an employee's employment at any time with or without cause.

Fact ¶ 4.⁷ (D) Finally, Power's signed Acknowledgment presents an unassailable, written testament of her understanding of the at-will nature of her employment relationship with Riverview. See Fact ¶ 6.

No reasonable jury assessing these facts could conclude that Power reasonably believed that Riverview had offered her an implied-in-fact employment contract to be discharged only "for cause". Consequently, summary judgment was appropriate. See Hodgson, 844 P.2d at 332-34 (despite statement by employer's manager to employee during preemployment interview that employer "followed disciplinary procedures to give employees a

⁷ Notwithstanding the explicit statements in the Policy and Procedures Manual and the Employee Handbook to the contrary, Power asks this court to indelibly cast the disciplinary policy as an inviolate procedure and to ignore the plain language that delineates the policy as only a guideline that is not to be construed as a contract of employment, promise of specific treatment, or limitation on Riverview's right to discharge at will. See Fact ¶¶ 3-4.

chance to correct deficiencies," employee "could not have reasonably concluded that employment was other than at will" given disclaimers and fact that employee signed a "'New Employee Checklist' which stated that employment was at will"); Johnson, 818 P.2d at 1003 ("the only reasonable conclusion an employee or a juror could reach" given handbook's disclaimer is that employer "intended to retain the right to discharge for any reason"); Duncan, 917 F.2d 263-65 (in light of signed employment application specifying that employment was at will, statement by manager that employee "would never be terminated" as long as he "maintained his sales and met his quota each year" and existence of written performance improvement plan did not provide employee with "a reasonable basis for concluding that he would be terminated only for just cause"); Vollrath v. Georgia-Pacific Corp., 899 F.2d 533, 535 (6th Cir. 1990) (because company had issued disclaimer providing for at-will employment, employee could not have reasonably relied upon statements by plant manager that employee "would continue in employment as long as he continued to do his job"); De Horney v. Bank of America, 879 F.2d 459, 466 (9th Cir. 1989) (employee could not have reasonably relied upon personnel policies promising "all employees fair treatment" in light of express acknowledgement of at-will status);⁸ Shapiro v. Wells Fargo Realty, 152 Cal.

⁸ Courts have had little trouble in rejecting the generalized assertions of job security and fairness on which Power relies as objective manifestations of an employer's intent to create an implied "for-cause" employment contract upon which an employee could reasonably rely. See, e.g., Evans, 857 P.2d at 977 ("assurances of long-term employment" are "inadequate to create an implied contract" to terminate "for cause"); Fleming v. AT & T Information Services, Inc., 878 F.2d 1472, 1474 (D.C. Cir. 1989) (statement in employer's documents promising "fair and consistent treatment" deemed irrelevant); Ellis v. El Paso Natural Gas Co., 754 F.2d 884, 886 (10th Cir. 1985) (statement in employer's personnel manual promising that "the company 'will sever the employment relationship in a fair and consistent manner' and 'will establish a fair and consistent method' to resolve employee disputes relating to employment'" too indefinite to form an implied contract).

App. 3d 467, 482 (Cal. App. 1984) (employee "could not have reasonably relied on any implied promise . . . which contradicted" the at-will provision contained in signed stock option agreement).

Second, at a minimum, no reasonable jury could conclude that Power reasonably believed that any implied "for-cause" employment contract continued in force following the issuance of the Employee Handbook and her subsequent execution of the attached Acknowledgment. To this end, to the extent that written or oral representations form an implied "for-cause" term of an employment contract, it is a term of a unilateral contract. See Johnson, 818 P.2d at 1002; Brehany, 812 P.2d at 56. As a result, an employer may unilaterally amend or abolish that term. Id.; Pratt v. Brown Mach. Co., 855 F.2d 1225, 1235 (6th Cir. 1988).

The facts in this case establish: (A) that Power signed the Acknowledgment on June 20, 1989; (B) that the Acknowledgment denotes Power's and Riverview's understanding that Power was an at-will employee; (C) that the Employee Handbook superseded "all prior handbooks, manuals, policies and procedures issued" by the company; and (D) that the Employee Handbook clearly, conspicuously and repeatedly insists that all employment with Riverview is at will. See Fact ¶¶ 4 & 6. The facts in this case also establish that the principal conduct that Power alleges gives rise to an implied "for-cause" employment contract (including the alleged statements made by Ms. Perry and those contained in the Policy and Procedures Manual and the video *What We Stand For*) precede her signing of the Acknowledgment. R. at 1070 & 1077-79; Brief of Appellant at 8.

Riverview exercised its right to unilaterally amend its employment relationship with Power to eliminate any implied "for-cause" provision. Consequently, Power's claim for breach of that provision cannot stand as a matter of law for whatever reasonable expectations Power "may have harbored . . . became unreasonable" when Riverview circulated its Employee Handbook definitively expressing its at-will policy and when Power acknowledged her at-will status. Pratt, 855 F.2d at 1235 (circulation of handbook including at-will disclaimer precluded employee from reasonably relying upon earlier statement made to him by manager that he would not be fired "without just cause").

Schloz, 468 N.W.2d 845, is illustrative. There, plaintiff brought a claim for, among other things, wrongful termination, alleging that she "had a contract not to be terminated for refusing to work on Sundays." Id. at 846. Specifically, plaintiff was told by her manager, through the personnel director, that she would not required to work on Sundays. Id. Based upon these representations, plaintiff accepted employment with defendant. Yet, for the next 12 years, defendant, on a sporadic basis, asked plaintiff to work on Sundays and plaintiff refused, citing her belief that she was not required to do so. Id. In 1982, defendant issued a policy manual. Attached to the manual was an acknowledgment, which plaintiff signed, that provided:

I have read and fully understand the rules governing my employment with Montgomery Ward. I agree to employment with Montgomery Ward under the conditions explained. I understand these conditions can be changed by the Company, without notice, at any time. I also understand and agree that my employment is for no definite period and may, regardless of the time and manner of payment of any wages and salary, be terminated at any time, with or without cause, and with or without notice.

Id. In 1983, plaintiff was terminated for refusing to work on Sunday and, as a result, brought suit. Id. After a jury verdict in plaintiff's favor, defendant brought a motion for judgment notwithstanding the verdict, which was denied. The Michigan Supreme Court reversed with regard to plaintiff's wrongful termination claim holding that "regardless of whether an express oral contract actually existed at the time of her hiring, as a matter of law, plaintiff and Montgomery Ward later reached a mutual understanding with regard to termination through the sign-off sheet" and "that plaintiff's employment with Montgomery Ward was, as a matter of law, an employment-at-will relationship." Id. at 849. See also Butler v. Portland General Electric, 54 FEP Cases 357, 365 (Or. 1990) (employer's distribution of handbook with at-will disclaimer eliminated any just cause requirement arising out of prior statements made to employee by various managers and statements contained in previous handbook).

C. Riverview Terminated Power As Part of a Reduction in Force.

Finally, even assuming that Power had an employment contract permitting termination only "for cause", the trial court correctly concluded that summary judgment was appropriate. Discharging an employee in a reduction in force brought on by economic conditions constitutes a "for-cause" dismissal. See Coombs v. Gamer Shoe Co., 778 P.2d 885 (Mont. 1989); Malmstrom v. Kaiser Aluminum, 231 Cal. Rptr. 820 (Cal. App. 1986); Clutterham v. Coachmen Industries, Inc., 215 Cal. Rptr. 795 (Cal. App. 1985).

The undisputed facts establish that Riverview terminated Power as part of a reduction in force occasioned by business conditions. To this end, it is undisputed that

Riverview eliminated Power's position as part of a reorganization campaign meant to cut costs and that, as a result of this effort, Riverview eliminated 60 positions over a three-year period. Fact ¶ 7. It is also undisputed that Riverview distributed Power's duties among the remaining administrative assistants and has never filled Power's position. Fact ¶ 8. Indeed, Power admitted under threat of significant penalty for perjury that Riverview discharged her as part in a lay off. Fact ¶ 9.⁹

On the strength of these undisputed facts, the trial court was obligated to find that Riverview had terminated Power with good cause as part of a reduction in force and that summary judgment was therefore appropriate. Linn v. Beneficial Commercial Corp., 543

⁹ Power has taken some liberties with the record in an attempt to escape the fact that she was terminated as part of a reduction in force. By way of example, Power asserts that Mr. Baird testified "that Power was terminated for poor performance" and that, based upon that fact, a jury could "conclude that there was . . . no reduction in force. Brief of Appellant at 25. Mr. Baird actually testified that he had received a directive in mid December 1989 to cut his staff by two positions, that he made the decision on which positions to cut based upon relative performance and that Power's administrative assistant position was one of the two lowest performing positions. R. at 205-08; Baird deposition (tab "G") at 4-11 & 139-40. Put simply, Mr. Baird decided to keep his most productive positions and to eliminate his least productive positions; common sense would not have a company downsize in any other way. By way of further example, Power claims that Mr. Baird "admits that people under his direction were reassigned to other positions, . . . and that he made no attempt to reassign Power." Brief of Appellant at 26. What Mr. Baird actually said is that (1) when the position of Senior Regional Director of Operations for Mrs. Fields was later eliminated, the three Senior Regional Directors of Operations went into different positions and (2) he made a decision not try to place Power into another position "[b]ased on the company's position of overhead expenses for the upcoming year and the fact that there were no budgeted positions." R. at 342-43; tab "G" at 6. By way of final example, Power alleges that Daniel Murphy, Riverview's Director of Human Resources, testified "that changes in the number of personnel at Riverview were primarily the result of attrition and not as the result of any study." Brief of Appellant at 26. In fact, Mr. Murphy testified that over a three-year period, Riverview had downsized from 160 positions to 100 and that while the company "tried to handle it primarily by attrition" there were "several instances where work [was] . . . consolidated." R. at 404.

A.2d 954 (N.J. Super. 1988), is analogous. There, the New Jersey Superior Court affirmed the grant of summary judgment on plaintiff's claim "that he was fired without good cause contrary to an implied promise of indefinite employment." Id. at 955. In reaching its determination, the court wrote: "We thus hold that an action for wrongful discharge does not generally lie for one whose loss of work is actuated by elimination of the job itself due to legitimate economic or business reasons," Id. at 957. See also Coombs, 778 P.2d 885; Malmstrom, 231 Cal. Rptr. 820; Clutterham, 215 Cal. Rptr. 795.

Power, like the plaintiff in Linn, was terminated as a result of a decision to eliminate her position for valid economic reasons. Power has failed to offer a single piece of evidence suggesting otherwise.¹⁰ Summary judgment in favor of Riverview was not only proper, it was required.

CONCLUSION


As a matter of law, Power cannot rebut the presumption of at-will employment; additionally, Power cannot overcome the fact that she was terminated due to a reduction in force. Therefore, Riverview respectfully requests that this court affirm the order of the trial

¹⁰ Power finally asserts that Riverview failed to provide discovery on the reduction in force issue. Brief of Appellant at 2 & 26. What Power neglects to tell this court is that Riverview objected to this discovery as propounded primarily because it was unduly burdensome, oppressive and interposed to harass, that Power then brought a motion to compel and that the trial court denied her motion. R. at 653-63 & 808-09. Power has not appealed the trial court's denial of her motion to compel.

court granting Riverview summary judgment on Power's claim for breach of an implied "for-cause" employment contract.

DATED this 30th day of March, 1994.

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CERTIFICATE OF SERVICE

I certify that on this the 30th day of March, 1994, I caused two (2) true and correct copies of the Brief of Appellee to be hand-delivered to:

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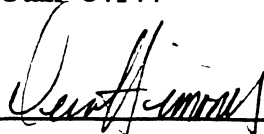


Exhibit A

ness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) **Report.**

(1) **Contents and filing.** The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) **In non-jury actions.** In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) **In jury actions.** In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) **Stipulation as to findings.** The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) **Draft report.** Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(f) **Objections to appointment of master.** A party may object to the appointment of any person as a master on the same grounds as a party may challenge for cause any prospective trial juror in the trial of a civil action. Such objections must be heard and disposed of by the court in the same manner as a motion.

(Amended effective Jan. 1, 1987.)

PART VII.

JUDGMENT.

Rule 54. Judgments; costs.

(a) **Definition; form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) **Judgment upon multiple claims and/or involving multiple parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) **Demand for judgment.**

(1) **Generally.** Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(2) **Judgment by default.** A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) **Costs.**

(1) **To whom awarded.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(2) **How assessed.** The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(3), (4) [Deleted.]

(e) **Interest and costs to be included in the judgment.** The clerk must include in any judgment signed by him any interest on the verdict or decision

from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.

(Amended effective January 1, 1985.)

Rule 55. Default.

(a) Default.

(1) **Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter his default.

(2) **Notice to party in default.** After the entry of the default of any party, as provided in Subdivision (a)(1) of this rule, it shall not be necessary to give such party in default any notice of action taken or to be taken or to serve any notice or paper otherwise required by these rules to be served on a party to the action or proceeding, except as provided in Rule 5(a), in Rule 58A(d) or in the event that it is necessary for the court to conduct a hearing with regard to the amount of damages of the nondefaulting party.

(b) **Judgment.** Judgment by default may be entered as follows:

(1) **By the clerk.** When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, and the defendant has been personally served otherwise than by publication or by personal service outside of this state, the clerk upon request of the plaintiff shall enter judgment for the amount due and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) **By the court.** In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) **Setting aside default.** For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) **Plaintiffs, counterclaimants, cross-claimants.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) **Judgment against the state or officer or agency thereof.** No judgment by default shall be entered against the state of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

(Amended effective Sept. 4, 1985.)

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expi-

ration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party em-

playing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 57. Declaratory judgments.

The procedure for obtaining a declaratory judgment pursuant to Chapter 33 of Title 78, U.C.A. 1953, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Rule 58A. Entry.

(a) **Judgment upon the verdict of a jury.** Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be forthwith signed by the clerk and filed. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.

(b) **Judgment in other cases.** Except as provided in Subdivision (a) hereof and Subdivision (b)(1) of Rule 55, all judgments shall be signed by the judge and filed with the clerk.

(c) **When judgment entered; notation in register of actions and judgment docket.** A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) **Notice of signing or entry of judgment.** The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision.

(e) **Judgment after death of a party.** If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be rendered thereon.

(f) **Judgment by confession.** Whenever a judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant, to the following effect:

(1) If the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefor is justly due or to become due;

(2) If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefor does not exceed the same;

(3) It must authorize the entry of judgment for a specified sum.

The clerk shall thereupon endorse upon the statement, and enter in the judgment docket, a judgment of the court for the amount confessed, with costs of entry, if any.

(Amended effective Sept. 4, 1985; Jan. 1, 1987.)

Rule 58B. Satisfaction of judgment.

(a) **Satisfaction by owner or attorney.** A judgment may be satisfied, in whole or in part, as to any or all of the judgment debtors, by the owner thereof, or by the attorney of record of the judgment creditor where no assignment of the judgment has been filed and such attorney executes such satisfaction within eight years after the entry of the judgment, in the following manner: (1) by written instrument, duly acknowledged by such owner or attorney; or (2) by acknowledgment of such satisfaction signed by the owner or attorney and entered on the docket of the judgment in the county where first docketed, with the date affixed and witnessed by the clerk. Every satisfaction of a part of the judgment, or as to one or more of the judgment debtors, shall state the amount paid thereon or for the release of such debtors, naming them.

(b) **Satisfaction by order of court.** When a judgment shall have been fully paid and not satisfied of record, or when the satisfaction of judgment shall have been lost, the court in which such judgment was recovered may, upon motion and satisfactory proof, authorize the attorney of the judgment creditor to satisfy the same, or may enter an order declaring the same satisfied and direct satisfaction to be entered upon the docket.

(c) **Entry by clerk.** Upon receipt of a satisfaction of judgment, duly executed and acknowledged, the clerk shall file the same with the papers in the case, and enter it on the register of actions. He shall also enter a brief statement of the substance thereof, including the amount paid, on the margin of the judgment docket, with the date of filing of such satisfaction.

(d) **Effect of satisfaction.** When a judgment shall have been satisfied, in whole or in part, or as to any judgment debtor, and such satisfaction entered upon the docket by the clerk, such judgment shall, to the extent of such satisfaction, be discharged and cease to be a lien. In case of partial satisfaction, if any execution shall thereafter be issued on the judgment, such execution shall be endorsed with a memorandum of such partial satisfaction and shall direct the officer to collect only the residue thereof, or to collect only from the judgment debtors remaining liable thereon.

(e) **Filing transcript of satisfaction in other counties.** When any satisfaction of a judgment shall have been entered on the judgment docket of the county where such judgment was first docketed, a certified transcript of satisfaction, or a certificate by the clerk showing such satisfaction, may be filed with the clerk of the district court in any other county where the judgment may have been docketed. Thereupon a similar entry in the judgment docket shall be made by the clerk of such court; and such entry shall have the same effect as in the county where the same was originally entered.

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or

abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) **Time for motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment

has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 61. Harmless error.

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 62. Stay of proceedings to enforce a judgment.

(a) **Stay upon entry of judgment.** Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs.

(b) **Stay on motion for new trial or for judgment.** In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of, or any proceedings to enforce, a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) **Injunction pending appeal.** When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such conditions as it considers proper for the security of the rights of the adverse party.

(d) **Stay upon appeal.** When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay, unless such a stay is otherwise prohibited by law or these rules. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

(e) **Stay in favor of the state, or agency thereof.** When an appeal is taken by the United States, the state of Utah, or an officer or agency of either, or by direction of any department of either, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

Exhibit B

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.

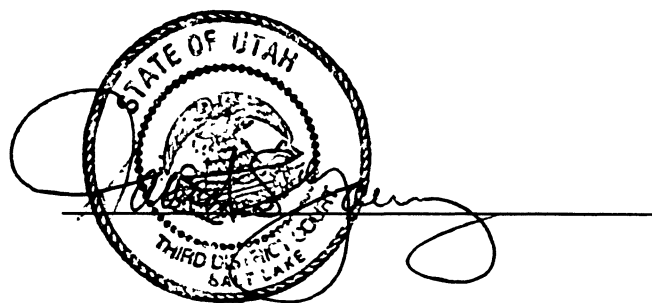
In the instant case, the court finds that reasonable minds cannot differ as to the fact that

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.)

Exhibit C

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.

:
:
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:
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:
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:

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.

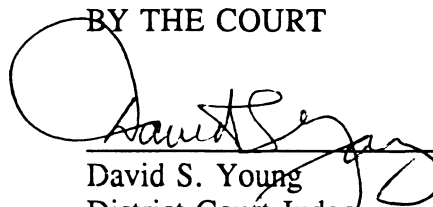
THEREFORE, THE COURT HEREBY ORDERS, ADJUDGES, AND DECREES that Defendant's Motion for Relief from Order is granted;

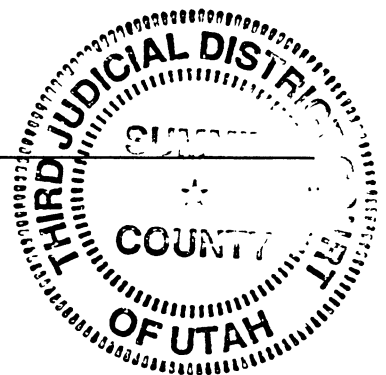
FURTHER ORDERS, ADJUDGES, AND DECREES that the Court's prior ruling denying Defendant summary judgment on plaintiff's claim for breach of an alleged implied-in-fact employment contract to be terminated only "for cause" (Count I) is vacated; and

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



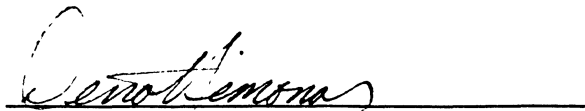
APPROVED AS TO FORM:

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 ~~25~~ 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

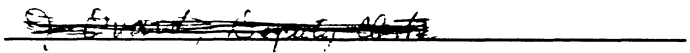


Exhibit D

RUSSELL C. FERICKS [A3793]
NATHAN R. HYDE [A5489]
GERALD J. LALLATIN [A5986]
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Defendant
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-1777
Fax No.: (801) 532-5506

No.

FILED

JUN 24 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 CORPORATION, Defendant. | NOTICE OF APPEAL Civil No. 10741 |
|---|--|

Plaintiff Mariamercedes Power, by and through her counsel of record, hereby gives notice pursuant to Rule 3, Utah R. App. P. that she appeals to the Supreme Court of Utah the "Order on Defendant's Motion for Relief from Order" entered by this District Court of the Third Judicial District in and for Summit County, State of Utah on May 25, 1993 by the Honorable David S. Young.

Dated this 23rd day of June, 1993.

RICHARDS, BRANDT, MILLER & NELSON


RUSSELL C. FERICKS
NATHAN R. HYDE
GERALD J. LALLATIN
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument, having been executed and entered by the Court, has been mailed, first-class, postage prepaid, on this 23rd day of June, 1993, to the following:

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

Lawrence M. Skanchy

Exhibit E

STATE OF UTAH

PEDRO TIRADO,

vs.

MRS. FIELDS COOKIES,

Deposition of:

Cindy Reisner

No. 10755

-ooo-

COPY



**Rocky Mountain
Reporting Service, Inc.**

**Statewide Reporting
National and Merit Certified Reporters
Expedited Delivery
Computerized Transcription
IBM Compatible Disks
Litigation Support Software
Video Depositions**

1 A. A year and-a-half.

2 Q. And then you were promoted to ---

3 A. Personnel Manager.

4 Q. How does Personnel Manager differ from Human
5 Resources, Director of Human Resources?

6 A. I'm over the entire department now.

7 Q. How long were you the Personnel Manager?

8 A. Two and-a-half years, I believe. No. Three
9 years. From 1987 to 1990.

10 Q. So at the time of the events involved in these
11 cases, you were the Personnel Manager?

12 A. That's correct.

13 Q. When did you become the Director of Human
14 Resources?

15 A. Officially, January 2, 1991.

16 Q. Unofficially?

17 A. I was told December 31, 1990.

18 Q. Are you a department head?

19 A. Yes, I am.

20 Q. As the Personnel Manager, who was your
21 department head?

22 A. Dan Murphy.

23 Q. Have you taken over Dan Murphy's duties?

24 A. Yes, I have.

25 Q. Is that a result of his moving onto other

1 A. Being laid off is when there is no need for the
2 position or there are too many employees in a store or the
3 store is closing. That type of thing. And being
4 terminated, I usually think if we are terminating someone,
5 we are firing someone.

6 Q. Termination means firing to you?

7 MR. HIMONES: Let me offer --- go ahead first.

8 A. Not totally. Termination is terminating one's
9 employment, regardless of the reason. That's why it is
10 called "termination".

11 MR. HIMONES: Let me offer a clarification, and this
12 might help you. There is one spot in one of the
13 Interrogatory answers that we need to correct where it ends
14 with the word "termination". There is an omission there.
15 It should be "for cause" afterwards, to make it consistent
16 with all the other pleadings. If that did or didn't spark
17 your inquiry, I don't know.

18 Q. Well, I'm just wondering in your professional
19 field of Human Resources, "termination" means to end the
20 employment. Right?

21 A. That's correct.

22 Q. And "firing" is ending the employment because
23 the employee did something wrong?

24 A. That's correct.

25 Q. And "laid off" is ending the employment because

1 the company's economic circumstances justify it?

2 A. That's correct.

3 Q. Is "laid off" synonymous with "reduction in
4 force", in your mind?

5 A. Yes.

6 Q. Okay. Does "reduction in force" mean something
7 other than "laid off"?

8 A. No.

9 Q. Was Miss Power terminated for a reduction in
10 force?

11 A. Yes.

12 Q. Or was she fired for bad job performance?

13 A. No.

14 Q. Was Pedro Tirado terminated for bad job
15 performance?

16 A. Yes.

17 Q. So he was fired?

18 A. Yes.

19 Q. Was Joe Trembly fired?

20 A. Yes.

21 Q. He wasn't laid off?

22 A. No.

23 Q. Do you know who Mariamercedes Power is?

24 A. Yes.

25 Q. When did you first become aware of her?

1 department to the Training Department in early '89. I don't
2 remember the exact date. Once she transferred to the
3 Training Department, she did no further work for me.

4 Q. Is she still with the company?

5 A. Yes, she is.

6 Q. In the Park City office?

7 A. Yes.

8 Q. Do you know who absorbed the responsibilities
9 that Miss Power was performing before her termination?

10 A. E. G. Perry and her assistant.

11 Q. Who is E. G.'s assistant?

12 A. Lisa Richards.

13 Q. Were you involved in Amanda Aratta's
14 termination?

15 A. No, I wasn't.

16 Q. You weren't consulted on that before it was
17 done?

18 A. Not me personally, no.

19 Q. Who was?

20 A. I believe Dan Murphy may have been.

21 Q. Who would he have been consulted by?

22 MR. HIMONES: Objection. Lack of foundation.

23 A. I really don't know for sure who would have
24 consulted him. It could have been Paul or the RDO. They
25 talked to all of us, to both of us, on occasion. But I

Lisa M. Bernardo, C.S.R., R.P.R.
License #182



Rocky Mountain Reporting Service, Inc.

322 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Phone (801) 531-0256

Susan K. Hellberg, C.S.R., R.F.
License #190

DEPOSITION CORRECTION SHEET

DATE: February 15, 1991 CASE NO: 10755

Pedro Tirado vs Mrs. Fields Cookies

DEAR Cynthia Reisner,

AFTER REVIEWING THE TRANSCRIPT OF YOUR DEPOSITION, PLEASE
FILL OUT THIS CORRECTION SHEET INDICATING ANY CHANGES YOU
DEEM NECESSARY.

THIS IS A VERBATIM RECORD OF WHAT WAS ACTUALLY SAID AND NO
GRAMMATICAL CORRECTIONS SHOULD BE MADE. IF THERE ARE CORRECTIONS
OR INSERTIONS, PLEASE INITIAL THE CORRECTION SHEET AND BRIEFLY
STATE YOUR REASONS THEREFORE. FOR EXAMPLE, SPELLING ERROR,
CLARIFICATION, TRANSCRIBER ERROR, ETC.

PLEASE DO ALL CORRECTIONS WITH TYPEWRITER OR BLACK INK.

| PAGE | LINE | CORRECTION | REASON | INITIALS |
|-----------|-----------|------------------------|-----------------------|-----------|
| <u>14</u> | <u>18</u> | <u>KARA LODEN</u> | <u>Spelling Error</u> | <u>CR</u> |
| <u>14</u> | <u>18</u> | <u>KRIS Hoffman</u> | <u>Spelling Error</u> | <u>CR</u> |
| <u>14</u> | <u>24</u> | <u>KARA LODEN</u> | | <u>CR</u> |
| <u>15</u> | <u>1</u> | <u>KRIS Hoffman</u> | | <u>CR</u> |
| <u>16</u> | <u>1</u> | <u>KARA LODEN</u> | | <u>CR</u> |
| <u>16</u> | <u>3</u> | <u>KRIS Hoffman</u> | | <u>CR</u> |
| <u>31</u> | <u>1</u> | <u>NANETTE Mathieu</u> | | <u>CR</u> |
| <u>31</u> | <u>20</u> | <u>NANETTE Mathieu</u> | | <u>CR</u> |
| <u>31</u> | <u>22</u> | <u>NANETTE Mathieu</u> | | <u>CR</u> |
| <u>45</u> | <u>20</u> | <u>KARA LODEN</u> | | <u>CR</u> |
| <u>70</u> | <u>25</u> | <u>NINA MACHEE</u> | | <u>CR</u> |
| <u>16</u> | <u>23</u> | <u>TJTC</u> | | <u>CR</u> |
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SEE ATTACHMENTS

FILED PURSUANT TO RULE 30 (E)

(CONTINUE ON BACK IF
NECESSARY)

Exhibit F

RUSSELL C. FERICKS [A3793]
NATHAN R. HYDE [A5489]
GERALD J. LALLATIN [A5986]
RICHARDS, BRANDT, MILLER & NELSON
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Salt Lake City, Utah 84110-2465
Telephone: (801) 531-1777
Fax No.: (801) 532-5506

IN THE SUPREME COURT

STATE OF UTAH

| | |
|-------------------------------------|--|
| MARIAMERCEDES POWER | APPELLANT'S DOCKETING STATEMENT |
| Plaintiff and Appellant, | (May be assigned to Court of Appeals) |
| vs. | Case No. 930315 |
| RIVERVIEW FINANCIAL CORPORATION, | |
| Defendant and Appellee. | |

Appellant Mariamercedes Power ("Power"), by and through her counsel of record and pursuant to Rule 9, Utah Rules of Appellate Procedure, submits the following Docketing Statement.

1. JURISDICTION: The jurisdiction of the Supreme Court of Utah is conferred by U.C.A. § 78-2-2(3)(j) 1992.

2. NATURE OF PROCEEDINGS: This is an appeal from a summary judgment in the Third Judicial District Court of Summit County, State of Utah, Judge David S. Young presiding.

3. DATE OF JUDGMENT: The "Order on Defendant's Motion for Relief From Order" which is the subject of this appeal was entered by the Trial Court on May 25, 1993 and resulted in

dismissal of all of Power's claims and causes of action.

4. DATE OF NOTICE OF APPEAL: Notice of Appeal was filed with the Third Judicial District Court of Summit County on June 24, 1993, and with the Utah Supreme Court on June 25, 1993.

5. STATEMENT OF FACTS: Plaintiff and Appellant Power was hired by Defendant and Appellee Riverview Financial Corporation ("Riverview") on December 1, 1988 and 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 she had been improperly terminated in violation of an implied-in-fact agreement that she would only be terminated for cause.

In various pleadings, Power alleged that statements in the company documents and explicit statements and actions by company executives created an implied-in-fact agreement that she would not be terminated without cause. She further alleged that she was terminated without cause and not as part of a reduction in force.

On November 27, 1991, a hearing was held in the Third Judicial District, Judge Homer Wilkinson presiding, on Riverview's Motion for Summary Judgement in which it asked for dismissal of all causes of action. Riverview alleged that Power was an at-will employee who had been terminated as part of a reduction in force. Judge Wilkinson dismissed some of Power's causes of action but denied the motion to dismiss the claims of an implied-in-fact contract.

Before an order was entered, Riverview filed a Motion for Reconsideration of the court's denial of its requested summary judgment. In March 1992, Judge Wilkinson, having considered the Motion For Reconsideration, entered an order leaving the implied-in-fact contact claim intact.

Trial on the implied-in-fact contract claims was commenced in Summit County, Judge Frank G. Noel presiding. As part of the trial proceedings, Riverview presented a motion in limine, again asking that Power's proffered evidence of an implied-in-fact contract cause of action not be allowed into evidence. Judge Noel denied the motion, ruling that the existence of an implied-in-fact contract was a question of fact for the jury based on the totality of the evidence. On the second day of the trial after plaintiff had commenced presentation of her case, a mistrial occurred due to the disqualification of one of the jurors.

On February 25, 1993, Riverview filed a Motion for Relief From Order asking the Third District Court to again reconsider the court's Judge Wilkinson's denial of Riverview's Motion For Summary Judgment on Power's claim of an alleged implied-in-fact employment contract. Riverview cited the publication of two cases decided by the Utah Supreme Court as the basis for reconsideration. Power objected to the motion 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.

On April 25, 1993, Judge Young entered an order vacating Judge Wilkinson's March 1992 order, thereby granting MFC's Motion

For Summary Judgment for dismissal of the implied-in-fact contract claims, stating that "the undisputed facts establish as a matter of law" that Power's employment was at-will.

6. ISSUES PRESENTED ON APPEAL:

a. Was summary dismissal of Power's claims in error because disputed issues of material facts, when considered in a light most favorable to Power, establish an employment relationship terminable for cause only.

b. Was the District Court in error in arriving at a summary decision that Power was terminated as part of a "reduction in force" when that fact was controverted by Power.

c. Was the District Court in error in allowing Riverview's motion to be heard since it no new facts were presented and such a motion is contrary to the "law of the case" doctrine, and because a District Court judge may not vacate the prior decision of another District Court judge.

Standard of Review: All issues are challenges to conclusions of law and are therefore reviewable without according deference to the Trial Court's conclusions of law, and viewing the facts in the light most favorable to Appellants. Blue Cross & Blue Shield v. State, 779 P.2d 634 (Utah 1989).

7. CITATIONS:

Thurston v. Box Elder County, 835 P.2d 165 (Utah 1992).

Heslop v. Bank of Utah, 839 P.2d 828 (Utah 1992).

Sanderson v. First Security Leasing, 844 P.2d 303 (Utah 1992).

Hodgson v. Bunzl Utah, Inc., 844 P.2d 331 (Utah 1992).

Berube v. Fashion Ctr. Ltd., 771 P.2d 1033 (Utah 1989).

Johnson v. Morton Thiokol, Inc., 818 P.2d 997 (Utah 1991).

Harward v. Harward, 526 P.2d 1183 (Utah 1974)


Peay v. Peay, 607 P.2d 841 (Utah 1980)

Salt Lake City Corp. v. James Contractors, Inc., 761 P.2d 42 (Utah App. 1988).

8. PRIOR APPEALS: There have been no prior appeals in this case.

DATED this 10th day of July, 1993.

RICHARDS, BRANDT, MILLER & NELSON



RUSSELL C. FERICKS
NATHAN R. HYDE
GERALD J. LALLATIN
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument, having been executed and entered by the Court, has been mailed, first-class, postage prepaid, on this 15th day of July, 1993, 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

Therese M. Turner

gjl\power.ds

Exhibit G

STATE OF UTAH

-ooo-

PEDRO TIRADO,

Plaintiff,

vs.

MRS. FIELDS COOKIES,

MRS. FIELDS COOKIES,

Defendants.

Deposition of:

Paul Baird

No. 10755

-oOo-

BE IT REMEMBERED that on the 10th day of January, 1991, the deposition of Paul Baird was taken pursuant to notice, commencing at 1:30 p.m. of said day at 50 South Main, #700, Salt Lake City, Utah, before Diana Kent, a Certified Shorthand Reporter and Notary Public in and for the State of Utah.

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1 for Diana to be able to take down the answer.

2 A. All right.

3 Q. State your full name and address for the
4 record.

5 A. My name is Paul Richardson Baird and I reside
6 at 3006 East Dickens Place in Salt Lake City.

7 Q. Why did you terminate Mariamercedes Power?

8 A. Maria's position was eliminated and, as a
9 result of that, her employment with the company was severed.

10 Q. It had nothing to do with her job performance?

11 A. No.

12 Q. So her performance was fine for you?

13 A. Her performance was not germane to the
14 position.

15

16 (Discussion off the record was held.)

17

18 A. I eliminated the position as a budgetary issue.
19 The decision of which position to eliminate was based on the
20 way the position had performed for me in the eight months
21 that I had it.

22 Q. The way the position had performed or the way
23 Maria had performed?

24 A. I think they are one and the same. She is the
25 only person who had been in the position.

1 Q. So, in your mind, it was both her performance
2 and the need to eliminate the position that caused her
3 termination?

4 A. No. The need to eliminate the position was one
5 separate event. And then I had to, as an executive and a
6 department head, make a decision as to which position got
7 eliminated. Based on the amount of productivity and
8 assistance that I was getting, I made the decision that the
9 Administrative Assistant position is the one I would
10 eliminate.

11 Q. What were the other choices?

12 A. Two positions in technical support. These are
13 people who write computer programs, deal with computers, et
14 cetera.

15 Q. So you kept the technical and let the
16 operational go?

17 A. Right. The Administrative Assistant position.

18 Q. Before you terminated Mariamercedes, you also
19 terminated Amanda Aratta.

20 A. Correct.

21 Q. And you terminated her on the last day of
22 December, I think, 1989?

23 A. I don't recall the date.

24 Q. It was before Miss Power was terminated.

25 A. Yes, that is correct.

1 Q. Did you terminate Miss Aratta's position or did
2 you terminate Miss Aratta?

3 A. We reduced the position. We had two
4 Administrative Assistants. We went to one, and subsequently
5 went to zero.

6 Q. So you eliminated Miss Aratta's position, as
7 well?

8 A. Correct.

9 Q. Now, did you make any effort to transfer Miss
10 Power to another position in the company?

11 A. No.

12 Q. Why not?

13 A. Based on the company's position of overhead
14 expenses for the upcoming year and the fact that there were
15 no budgeted positions, I felt there was no point in trying
16 to place her inside the company.

17 Q. Same thing with Miss Aratta?

18 A. Yes.

19 Q. Is that the company's policy, to eliminate
20 people and positions simultaneously?

21 A. I don't know that there is any such policy.

22 Q. Is that your practice, Paul Baird?

23 A. I would have to say that each situation is
24 unique, depending on the particulars of the business at the
25 point in time. There's a lot of factors to be involved. In

1 this situation, given that it was a corporate office
2 position and the relative number of available positions was
3 limited, in that case it was a very good decision. There
4 are times, in field operations positions, where you may have
5 twelve district sales managers in a city and you may offer a
6 person a position as a store manager because they are
7 available. So given the availability, I think that that
8 predominantly drives it.

9 Q. Okay. So you think that you had good cause to
10 terminate her; Miss Power.

11 MR. HIMONES: Object. That's vague and ambiguous.
12 "Good cause" could mean something else in the employment
13 setting.

14 A. As an employer who clearly employees at will,
15 we have the right to terminate at any point in time. So the
16 issue of cause was not entered into.

17 Q. Let's review what you just testified to, Paul.
18 You eliminated Mariamercedes Power because of economic
19 circumstances, apparently. Correct?

20 A. Correct.

21 Q. And because her performance was such that you
22 didn't feel like it would be beneficial to the company to
23 transfer her to another position. Is that correct?

24 A. No. I stated, I believe, that the decision to
25 eliminate a position in the company was economic. The

1 decision of which position was eliminated was based on the
2 relative benefit each position would bring me in the new
3 year, with the reduced assistance from all areas of the
4 business.

5 Q. So it didn't have anything to do with
6 Mariamercedes's performance, per se, but the fact that that
7 position hadn't been a constructive part of your line-up.

8 MR. HIMONES: I object to that characterization. His
9 testimony is what it is. That casts it in a slightly
10 different light.

11 Q. Well, I intended to. And I'm testing the
12 limits of his fairly obscure explanation. So my question,
13 again, is, your decision to eliminate the position, and
14 consequently Miss Power, was because the position had not
15 been profitable for you and, therefore, it was a position
16 you wanted to eliminate in the line-up.

17 MR. HIMONES: Objection. Asked and answered. Go
18 ahead.

19 A. The position --- the decision to eliminate
20 head count in the office as to number of positions working
21 for me was one decision. Once that decision was made, then
22 the decision of which position was eliminated was based on
23 my judgment as to which one would provide me the most
24 assistance in the upcoming year. That decision and judgment
25 are based on the performance of all the individuals

1 involved.

2 Q. Okay. Now, you didn't terminate Mariamercedes
3 because you don't like her personally?

4 A. No. I like her very well. I think she is a
5 good person.

6 Q. And you didn't terminate her because you don't
7 like women; did you?

8 A. Certainly not. I work for a woman.

9 Q. And you didn't terminate her because you got up
10 on the wrong side of the bed that morning; did you?

11 A. No.

12 Q. And you didn't terminate her because you just
13 felt like making an example of your power to the other
14 people in the company; did you?

15 A. Absolutely not.

16 Q. And you didn't terminate her because somebody
17 else told you to; did you?

18 A. No.

19 Q. It was your decision. Right?

20 A. Correct.

21 Q. So you didn't terminate her at will. You
22 terminated her for a reason. Right?

23 A. The reason was that the position was
24 eliminated.

25 Q. Okay.

1 A. And being an at will employer, then we could
2 make the decision to terminate.

3 Q. Are you claiming that you terminated her at
4 will or are you claiming you terminated her because of
5 economic circumstances? That's two different things, Paul.
6 Which one?

7 A. I'm not sure I understand the question.

8 Q. Did you terminate her because of economic
9 circumstances?

10 A. Yes.

11 Q. Do you believe that you are immune from this
12 lawsuit because you are an at will employer?

13 A. I believe that the company, as an at will
14 employer, is in a position that this lawsuit is groundless.

15 Q. So you think no matter what the reason the
16 company has, this lawsuit is groundless?

17 A. Yes. Just as I believe that my superiors could
18 walk in today and terminate me, and pursuing this action
19 would have no beneficial effect.

20 Q. I assume you wouldn't want them to do that?

21 A. I would --- there are days where I might
22 prefer that they did, quite honestly. But no, not as a
23 general course, I would prefer they didn't.

24 Q. The record should reflect that Mr. Baird has a
25 wink in his eye and a grin on his face in having said that.

1 A. Yes.

2 Q. It is two different things, Paul, and I want
3 you to make a distinction for me. You believe that this
4 suit is groundless because Mrs. Fields is an at will
5 employer. Right?

6 A. Correct.

7 Q. But you are claiming that you terminated
8 Mariamercedes for a reason, and that was the economic
9 circumstances. Right?

10 A. The underlying circumstances behind her
11 position being eliminated and her subsequent termination
12 from Mrs. Fields was economic.

13 Q. Thank you. Now, where did those economic
14 circumstances develop?

15 A. The origination of the Administrative Assistant
16 position to me came about in April of 1989 when I added the
17 position, that was not in the budget originally for the
18 year, as a new director. As a new Director of Operations
19 with the company, I felt I needed administrative support and
20 I felt the field people who reported to me would need
21 administrative support. So I formed, with my supervisor's
22 permission, an unbudgeted position for the balance of the
23 year in both the Administrative Assistant to me, and the
24 Assistant to the Administrative Assistant to me. It sounds
25 complex. So there were two additional people who were, in



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DEPOSITION CORRECTION SHEET

DATE: January 31, 1991 CASE NO: 10755

Pedro Tirado vs Mrs. Fields Cookies

DEAR Paul Baird,

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| <u>1</u> | <u>14</u> | <u>EMPLOYEES</u> | <u>SPELLING</u> | <u>PRB</u> |
| <u>27</u> | <u>3</u> | <u>FROM 1975 until 1978</u> | <u>CORRECT DATES</u> | <u>PRB</u> |
| <u>36</u> | <u>13</u> | <u>DELETE THE WORD "EITHER"</u> | <u>CLARIFICATION</u> | <u>PRB</u> |
| <u>53</u> | <u>23</u> | <u>SHOULD READ "WENT ON MATERNITY LEAVE"</u> | <u>CLARIFICATION</u> | <u>PRB</u> |
| <u>72</u> | <u>3</u> | <u>"I REMEMBER IT A LITTLE BIT"</u> | <u>CLARIFICATION</u> | <u>PRB</u> |
| <u>78</u> | <u>3</u> | <u>"MA, IS SHE A LITTLE BIT"</u> | <u>GRAMMAR</u> | <u>PRB</u> |
| <u>82</u> | <u>1</u> | <u>"TIME FRAMES"</u> | <u>SPELLING</u> | <u>PRB</u> |
| <u>96</u> | <u>19</u> | <u>"CREATED"</u> | <u>SPELLING</u> | <u>PRB</u> |
| <u>112</u> | <u>5</u> | <u>"READ BARRETT"</u> | <u>SPELLING</u> | <u>PRB</u> |
| <u>112</u> | <u>9</u> | <u>"</u> | <u>"</u> | <u>PRB</u> |
| <u>114</u> | <u>14</u> | <u>"SAR BARRETT'S"</u> | <u>"</u> | <u>PRB</u> |
| <u>114</u> | <u>15</u> | <u>"ERIC CUNY"</u> | <u>"</u> | <u>PRB</u> |
| <u>123</u> | <u>21</u> | <u>"LEAVING BEFORE"</u> | <u>"</u> | <u>PRB</u> |
| <u>133</u> | <u>7</u> | <u>"READ BARRETT"</u> | <u>"</u> | <u>PRB</u> |
| <u>137</u> | <u>18</u> | <u>"AND POINTING THE CAMERA"</u> | <u>CLARIFICATION</u> | <u>PRB</u> |
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