

1993

# Joe D. Trembly v. Mrs. Fields Cookies : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

DOCKET NO. 93-06350

JOE D. TREMBLY,

Plaintiff and Appellant,

vs.

MRS. FIELDS COOKIES,

Defendant and Appellee.

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Case No. 930635-CA

Priority No. 15

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

The Honorable David S. Young  
District Judge

BRIEF OF APPELLEE

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**FILED**  
Utah Court of Appeals

NOV 12 1993

  
Mary T. Noonan  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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|                          | : |                    |
| Plaintiff and Appellant, | : | Case No. 930635-CA |
|                          | : |                    |
| vs.                      | : |                    |
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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 Mrs. Fields Cookies ("MFC") summary judgment on Joe Trembly's ("Trembly") 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 MFC summary judgment on Trembly'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). "[W]hen reviewing an order granting summary judgment, the evidence and all inferences that may be reasonably drawn from the evidence must be liberally construed in favor of the party opposing the motion." Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1000 (Utah 1991). "However, 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." Id. at 1001. "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), MFC has reproduced these rules at tab "A" of the attached Addendum.

## **STATEMENT OF THE CASE**

This action grows out of Trembly's discharge from employment with MFC. In a five-count complaint, filed August 22, 1990, Trembly alleged that MFC (1) breached an implied-in-fact employment contract to terminate him only "for cause", (2) breached a written contract to terminate him 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 1-5.

On December 17, 1990, MFC moved to dismiss Trembly'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 38-39. The trial court granted MFC's motion by order dated April 10, 1991. R. at 96-97.

Shortly thereafter, MFC moved for summary judgment on the four remaining claims. R. at 119-20. The trial court originally granted MFC summary judgment on the tort claims and denied MFC summary judgment on the contract claims. R. at 317 & 320. Upon



reconsideration, however, the trial court granted MFC summary judgment on the breach of written contract claim. R. at 321-22, 360 & 374-75.<sup>1</sup>

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, as well as a memorandum decision filed by the trial court in Power v. Riverview Financial Corp., Case No. 10741, MFC requested relief from the trial court's prior order denying it summary judgment on the implied "for-cause" employment contract claim. R. at 657-658. The trial court granted MFC's motion and, on May 25, 1993, entered a formal order awarding MFC summary judgment on that claim (tab "B"). R. at 781 & 858-59.

On June 24, 1993, Trembly filed a notice of appeal from the trial court's May 25th order (tab "C"). R. at 862. Trembly has not appealed the dismissal of his 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. MFC employed Trembly, for an indefinite term, in a staff and managerial capacity from November 26, 1986, to March 13, 1990. R. at 2, 125 & 142-44.

---

<sup>1</sup>MFC also filed a motion in limine to preclude Trembly "from introducing into evidence statements relating to a corporate outlook of 'fairness'" or MFC's "nonbinding disciplinary policy." R. at 435. MFC, however, never submitted the motion for decision. Consequently, the trial court did not rule on it and, contrary to Trembly's representation, did not deny the motion finding "Trembly's evidence of an implied-in-fact contract sufficient to require jury considerations." Brief of Appellant at 4.

2. On November 13, 1986, Trembly completed and signed an Application for Employment with MFC (tab "D"). 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 Trembly'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 125, 148 & 172-73.

3. The MFC Policy and Procedures Manual in place during Trembly's employment is filled with plain language declaring that employment with MFC 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, 186-90 & 196.

4. The MFC Employee Handbook, which went into effect in November 1989 and which Trembly used to train a store manager, repeatedly proclaims in the simplest of terms that all employment with MFC 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 126-27, 145-50, 170 & 178-84.

5. Trembly understood from the day he began working for MFC to the day he was discharged that he was an at-will employee:

Q. You understood from the day you were employed until the day you were terminated that you were an employee at-will, did you not?

A. I understood that it was at-will, but understood that I would be treated fairly.

R. at 126 & 147. Indeed, even following his discharge, Trembly acknowledged that he understood employment with MFC was at will:

I do understand that Mrs. Fields is an at-will Company but I do believe that my termination should be removed from the at-will reference because I believe I was fired without good reason.

R. at 126 & 175.

### **SUMMARY OF ARGUMENT**

This court must affirm the trial court in all respects. First, Timm v. Dewsnap, 851 P.2d 1178 (Utah 1993), makes it clear that the trial court acted correctly when it reconsidered its previous decision denying MFC summary judgment on Trembly's implied-in-fact contract claim. Second, because no reasonable jury could have found that Trembly had overcome the presumption of at-will employment, the trial court also acted correctly when it granted MFC summary judgment on that claim.

## ARGUMENT

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

Trembly argues that MFC relied upon Utah R.Civ.P. 60(b)(7) in bringing its Motion for Relief from Order, that rule 60(b)(7) requires that "MFC must show that the reasons it gave for relief . . . were extraordinary, and that "[t]here was nothing extraordinary for . . . [the trial court] to consider." Brief of Appellant at 14-15. Trembly'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. Dewsnup'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,'<sup>2</sup> 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).

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<sup>2</sup>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)).

Here, as in Timm, MFC asked the trial court to reconsider its disposition of a summary judgment that was "subject to revision."<sup>3</sup> The trial court granted MFC'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:

[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, Trembly 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 Trembly's claim—would have been the same except that all of the parties would have unnecessarily spent thousands of additional dollars in litigation costs.

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<sup>3</sup>That MFC'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 Trembly and the trial court treated MFC's motion as one for reconsideration. R. at 853-56 & 873-76.

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

Trembly next argues that he introduced sufficient "evidence of MFC's intent and Trembly's reasonable expectation of 'for cause' contract terms" to avoid summary judgment.<sup>4</sup> Brief of Appellant at 19. Trembly's position is without merit.<sup>5</sup>

### **A. Trembly Is Bound by the Provisions in the MFC 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

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<sup>4</sup>Trembly, in the opening of his brief, phrases the issue at hand in terms of whether he had an implied-in-fact employment contract "whereby he could only be terminated after disciplinary counseling and an opportunity to correct deficiencies." Brief of Appellant at 2. That is an incorrect statement of the issue. A correct statement is: Whether Trembly had an implied-in-fact employment contract whereby he could only be terminated "for cause"? To this end, MFC notes (1) that Trembly's claim in his complaint for breach of an implied employment contract centers on whether "he was a 'for cause' employee;" (2) that Trembly is only appealing the trial court's decision granting MFC summary judgment on his implied "for-cause" employment contract claim; (3) that Trembly's docketing statement defines the issue presented on appeal in terms of the "for-cause" standard (tab "E") and (4) that the substantive argument in Trembly's brief addresses itself to the "for-cause" standard. R. at 2, 858-59 & 862; Brief of Appellant at 19.

<sup>5</sup>Trembly also argues that because "no one at MFC ever claimed that Trembly was terminated for anything other than cause," MFC may not now "claim absolution" under the at-will presumption. Brief of Appellant at 20-21. Trembly's position is absurd; by definition an at-will employer, like MFC, has the right to terminate employment at any time, for any reason or for no reason at all.

contractual provision providing for employment at will. See Johnson, 818 P.2d at 1004 (citing Brehany v. Nordstrom, Inc., 812 P.2d 49, 55 (Utah 1991)); Berube, 771 P.2d at 1044.

Here, Trembly and MFC expressly memorialized in the Application for Employment Trembly signed when he applied for work with MFC their understanding that Trembly's employment with MFC was at will. Trembly'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.<sup>6</sup> MFC 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.

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 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 other

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<sup>6</sup>In his brief, Trembly informs this court that at the time he was hired Mitchell Dorin, another MFC employee, made certain statements regarding the MFC disciplinary process. Brief of Appellant at 6 & 20. Trembly, however, testified that he was hired by Nabil Dijani and that his alleged conversation with Mr. Dorin did not occur until February-March 1987. R. at 142; Trembly deposition (tab "F") at 153. Additionally, Trembly has acknowledged that he was hired as an at-will employee. Brief of Appellant at 17.



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"); 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. Trembly Had No More than a Mere Subjective Expectancy that He Would Be Terminated Only "For Cause".**

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

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) Trembly'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) MFC's Policy and Procedures Manual affirms the at-will nature of employment with MFC. 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) MFC'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.<sup>7</sup> (D) Following his termination, Trembly acknowledged in his communications with MFC that his employment was at will:

I do understand that Mrs. Fields is an at-will Company but I do believe that my termination should be removed from the at-will reference because I believe I was fired without good reason.

Fact ¶ 5. (E) Trembly, in his deposition, reaffirmed that he understood that he was an at-will employee:

Q. You understood from the day you were employed until the day you were terminated that you were an employee at-will, did you not?

A. I understood that it was at-will, but understood that I would be treated fairly.

Id. (F) Trembly also admitted in his deposition that he understood that "everything that you could possibly do except for combing your hair" was an immediately terminable offense. R. at 150.<sup>8</sup>

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<sup>7</sup>Notwithstanding the explicit statements in the Policy and Procedures Manual and the Employee Handbook to the contrary, Trembly 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 MFC's right to discharge at will. See Fact ¶¶ 3-4.

<sup>8</sup>Trembly has taken some liberties with the record in an attempt to escape the fact that, at most, he only had a subjective expectancy of "for-cause" employment. By way of example, Trembly claims that Daniel Murphy, an MFC manager, testified that the company's "at-will policy was limited by the terms that no employee be terminated arbitrarily and capriciously, nor without reason." Brief of Appellant at 9. Mr. Murphy actually testified that MFC was an at-will employer, with the power to terminate with or without cause, that did not act arbitrarily and capriciously. R. at 282; Murphy deposition (tab "G") at 87, 93 & 95. By way of further example, Trembly alleges that the testimony of Craig Atnip, another MFC

(continued...)

No reasonable jury faced with these facts could conclude that Trembly reasonably believed that MFC had offered him 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 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, 997 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,

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<sup>8</sup>(...continued)

manager, "showed that Trembly's expectations were reasonable and consistent with objective reality within the Company." Brief of Appellant at 22. In fact, Mr. Atnip, like Mr. Murphy, testified that MFC was an at-will employer that had the right to terminate "at any time for any reason or no reason." Atnip deposition (tab "H") at 48 & 50. Nothing in Mr. Murphy's or Mr. Atnip's testimony provides a reasonable basis for the conclusion that Trembly was terminable only "for cause" or detracts in any way from the reality that MFC employed Trembly at will. See Palmer v. Women's Christian Ass'n, 7 IER Cases 313, 315-16 (Iowa App. 1982) (in light of disclaimer in employee handbook, employer's practice or policy mandating "just cause for dismissal" did not evidence an actionable, contractual term of the employment relationship).

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 Nat. Trust and Sav., 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);<sup>9</sup> Shapiro v. Wells Fargo Realty Advisors, 152 Cal. 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).<sup>10</sup>

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<sup>9</sup>Courts have had little trouble in rejecting such indefinite concepts as "fairness" 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., 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).

<sup>10</sup>The decision in Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984), upon which Trembly relies, fails to support his position. There, an employee sued for wrongful termination claiming, among other things, that language in the employer's policy manual "that terminations 'will be processed in a manner which will at all times be fair, reasonable and just'" created an implied contract limiting the employer's right to terminate "for cause". The Washington Supreme Court disagreed:

The St. Regis Policy and Procedural Guide states that terminations will be handled in a fair, just and equitable manner and, thus, merely implements a company policy to treat employees in a fair and consistent manner. Our examination of the Policy and Procedural Guide and the entire record shows no evidence of an implied contract that appellant was to be discharged only for cause. The appellant only had a subjective understanding that he would be discharged only for cause which is insufficient to establish an implied contract to that effect.

(continued...)

Second, at a minimum, no reasonable jury could conclude that Trembly reasonably believed that any implied "for-cause" employment contract continued in force following the issuance of the Employee Handbook. 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 MFC issued its Employee Handbook in November of 1989, (B) that Trembly understood that the Employee Handbook was in effect as of that date, (C) that Trembly was familiar with the Employee Handbook and used it in training a store manager, (D) that the Employee Handbook superseded "all prior handbooks, manuals, policies and procedures issued" by the company and (E) that the Employee Handbook clearly, conspicuously and repeatedly insists that all employment with MFC is at will. See Fact ¶ 4; R. at 145-150, 170 & 178-84. The facts in this case also establish that all of the conduct that Trembly alleges gives rise to an implied "for-cause" employment contract (including the alleged statements made by Mr. Dorin, Cindy Reisner and Randy

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<sup>10</sup>(...continued)

Id. at 1085. Put differently, the Thompson court specifically held that promises of fair treatment set forth in the employer's policy manual were "no evidence" of an implied-in-fact employment contract limiting the employer's right to discharge to only "for cause", the very claim Trembly is pressing before this court. Moreover, the Thompson court also held that a disclaimer can preclude such statements from being interpreted as modifications of the at-will relationship, even where the statements involve specific promises of specific treatment. Id. at 1088. In this case, MFC, through its Application for Employment, Policy and Procedures Manual and Employee Handbook, provided Trembly with a baker's dozen worth of clear and conspicuous disclaimers. See Fact ¶¶ 2-4.

Fields, as well as those contained in the Policy and Procedures Manual and the video *What We Stand For*) precede the issuance of the Employee Handbook. See R. at 150, 170 & 223; Trembly deposition (tab "F") at 16, 26, 153 & 312-13.

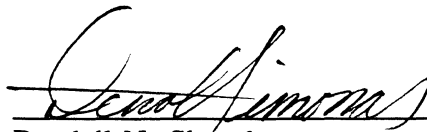
MFC exercised its right to unilaterally amend its employment relationship with Trembly to eliminate any implied "for-cause" provision. Consequently, Trembly's claim for breach of that provision cannot stand as a matter of law for whatever reasonable expectations Trembly "may have harbored . . . became unreasonable" when MFC circulated its Employee Handbook definitively expressing its at-will policy. 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"); 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).

### CONCLUSION

As a matter of law, Trembly cannot rebut the presumption of at-will employment. Therefore, MFC respectfully requests that this court affirm the order of the trial court granting MFC summary judgment on Trembly's claim for breach of an implied "for-cause" employment contract.

DATED this 12th day of November, 1993.

JONES, WALDO, HOLBROOK &  
McDONOUGH

A handwritten signature in cursive script, appearing to read "Deno G. Himonas", is written over a horizontal line.

Randall N. Skanchy  
Deno G. Himonas  
1500 First Interstate Plaza  
170 South Main Street  
Salt Lake City, Utah 84101

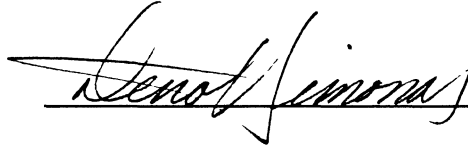
Attorneys for Appellee



### **CERTIFICATE OF SERVICE**

I certify that on this the 12th day of November, 1993, I caused two (2) true and correct copies of the Brief of Appellee to be hand-delivered to:

Russell C. Fericks  
Nathan R. Hyde  
Gerald J. Lallatin  
RICHARDS, BRANDT, MILLER & NELSON  
700 Key Bank Tower  
50 South Main Street  
Salt Lake City, Utah 84144



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Tab 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.

Tab B

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

---

|                      |   |                             |
|----------------------|---|-----------------------------|
| JOE D. TREMBLY,      | : |                             |
|                      | : |                             |
| Plaintiff,           | : | ORDER ON DEFENDANT'S MOTION |
|                      | : | FOR RELIEF FROM ORDER       |
|                      | : |                             |
| vs.                  | : |                             |
|                      | : |                             |
| MRS. FIELDS COOKIES, | : | Civil No. 10756             |
|                      | : |                             |
| Defendant.           | : |                             |

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Defendant's Motion for Relief for Order came on for argument on April 15, 1993. The Plaintiff was represented by Russell C. Fericks 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".



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

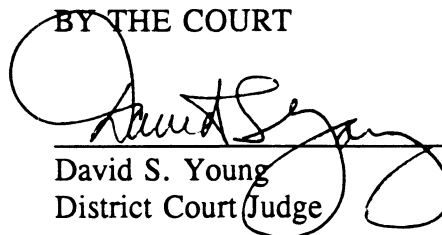
FURTHER ORDERS, ADJUDGES, AND DECREES that the Court's prior ruling denying Defendant summary judgment on plaintiff's claim for breach of an alleged implied-in-fact employment contract to be terminated only "for cause" (Count I) is vacated;

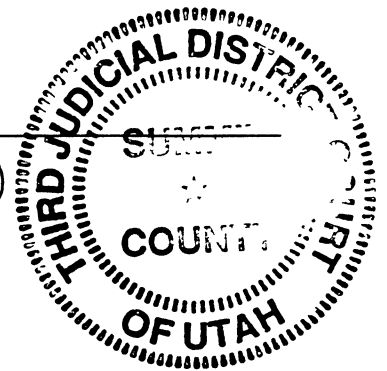
FURTHER ORDERS, ADJUDGES, AND DECREES that Defendant's Motion for Summary Judgment is granted in its entirety; and

FINALLY ORDERS, ADJUDGES, AND DECREES that Defendant's counterclaims be dismissed without prejudice.

DATED this 25<sup>th</sup> day of May, 1993.

BY THE COURT

  
David S. Young  
District Court Judge



Tab C

3/160  
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

|  |  |
|--|--|
| JOE D. TREMBLY<br><br>Plaintiff,<br><br>vs.<br><br>MRS. FIELDS COOKIES<br><br>Defendant. | <b>NOTICE OF APPEAL</b><br><br><br><br>Civil No. 10756 |
|--|--|

Plaintiff Joe D. Trembly, by and through his counsel of record, hereby gives notice pursuant to Rule 3, Utah R. App. P. that he 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

000862

**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 23<sup>rd</sup> 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

*Randall N. Skanchy*

gjl\trembly.nop

000863

Tab D



## APPLICATION FOR EMPLOYMENT



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 anytime with or without cause.

### PERSONAL INFORMATION

Date: 11-17-85 Social Security No. 123-45-6789

Name: John Doe

Present Address: Last John First Doe Middle

608 E Lakeshore Dr. 32701  
Street City State Zip

Permanent Address: 608 E Lakeshore Dr. 32701  
Street City State Zip

Phone Number: 277-7115 Referred By: Lori Carr

Please list names and location of any relatives, other than spouse, already employed by company:

### EMPLOYMENT DESIRED

Position: Store Date you can start:

Salary Desired: open Are you currently employed?: Yes X No

Have you ever applied to this company before? Yes  No X When

### EDUCATION

| Name and Location                 | Last Year Completed | Did you Graduate?  | Subjects Studied Degree(s) Received |
|-----------------------------------|---------------------|--|-------------------------------------|
| Grammar School                    | 51                  | <input checked="" type="radio"/> Yes<br><input type="radio"/> No |                                     |
| High School                       | 12                  | <input checked="" type="radio"/> Yes<br><input type="radio"/> No |                                     |
| College                           | 1985<br>2 yrs       | <input type="radio"/> Yes<br><input checked="" type="radio"/> No |                                     |
| Trade, Business or Correspondence |                     | <input type="radio"/> Yes<br><input checked="" type="radio"/> No |                                     |

Subjects of Special Study or Research Work:

What Foreign Languages Do You Speak, Write or Read Fluently?

Activities Other Than Religious (Civic, Athletic, Etc.)

## FORMER EMPLOYERS

Please list former employers, beginning with the most current. Attach additional sheets if necessary.

| Date<br>Month and Year           | Name and Address of Employer  | Salary               | Position    | Reason<br>For Leaving |
|----------------------------------|-------------------------------|----------------------|-------------|-----------------------|
| From Jan 1 1955<br>To Jan 1 1956 | 1234 5th St<br>New York, N.Y. | \$250.00<br>per week | Chief Clerk |                       |
| From Jan 1 1956<br>To Jan 1 1957 | 567 8th St<br>New York, N.Y.  | \$300.00<br>per week | Clerk       | Dismissed             |
| From<br>To                       |                               |                      |             |                       |
| From<br>To                       |                               |                      |             |                       |
| From<br>To                       |                               |                      |             |                       |

## REFERENCES

Give the Names of Three Persons Not Related to You, Whom You Have Known At Least One Year

| Name       | Address                      | Phone    | Business  | Years Known |
|------------|------------------------------|----------|-----------|-------------|
| John Doe   | 123 4th St<br>New York, N.Y. | 876-5432 | Teacher   | 5           |
| Jane Smith | 456 7th St<br>New York, N.Y. | 234-5678 | Librarian | 3           |
|            |                              |          |           |             |

## PHYSICAL RECORD

Do you have any physical condition which may limit your ability to perform the job applied for? If so, please indicate how the Company may accommodate any physical limitation.

In Case of Emergency Notify:

|          |                              |           |
|----------|------------------------------|-----------|
| Name     | Address                      | Phone No. |
| John Doe | 123 4th St<br>New York, N.Y. | 876-5432  |

I authorize investigation of all statements contained in this application. I understand that misrepresentation or omission of facts called for is cause for dismissal. 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 at any time without any previous notice.

Date

Signature

Tab E



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

---

IN THE SUPREME COURT

STATE OF UTAH

---

|   |   |
|---|---|
| JOE D. TREMBLY<br><br>Plaintiff and Appellant,<br><br>vs.<br><br>MRS. FIELDS COOKIES<br>CORPORATION,<br><br>Defendant and Appellee. | <b>APPELLANT'S<br/>DOCKETING STATEMENT</b><br><br>(May be assigned to Court of<br>Appeals)<br><br>Case No. 930290 |
|---|---|

---

Appellant Joe D. Trembly ("Trembly"), 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 Trembly'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 Trembly was hired by Defendant and Appellee Mrs. Fields Cookies ("MFC") on November 26, 1986 and was subsequently promoted to a number of responsible positions in the organization. After having been off work because of an extended illness, Trembly was placed in a temporary assignment in 1990, and then was terminated. Trembly brought an action against MFC in the Third Judicial District Court for Summit County, State of Utah alleging that he had been improperly terminated in violation of an implied-in-fact agreement that he would only be terminated for cause.

In various pleadings, Trembly alleged that statements in the company documents and explicit statements and actions by company executives created an implied-in-fact agreement that he would not be terminated without cause.

On November 27, 1991, a hearing was held in the Third Judicial District, Judge Homer Wilkinson presiding, on MFC's Motion for Summary Judgement in which it asked for dismissal of all causes of action. Judge Wilkinson dismissed some of Trembly's causes of action but denied the motion to dismiss the claims of an implied-in-fact contract.

Before an order was entered, MFC 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.

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

6. ISSUES PRESENTED ON APPEAL:

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

b. Was the District Court in error in allowing MFC's motion to be heard since 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 16<sup>th</sup> 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 15<sup>th</sup> 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

Lance M. Jones

gjl\trembly.ds

Tab F

# ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT FOR SUMMIT COUNTY

STATE OF UTAH

\* \* \*

JOE TREMBLY,

:

: Civil No. 10756

Plaintiff,

:

vs.

: Deposition of:

MRS. FIELDS COOKIES,

:

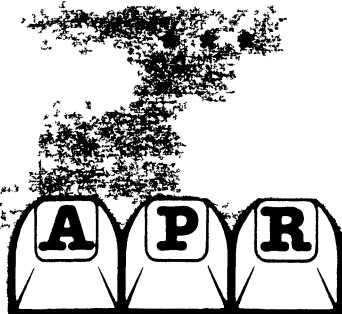
JOSEPH D. TREMBLY

Defendant.

:

\* \* \*

Deposition of JOSEPH D. TREMBLY, taken at the instance and request of the Defendant, at the law offices of Jones, Waldo, Holbrook & McDonough, 1500 First Interstate Plaza, Salt Lake City, Utah, on the 14th and 16th days of November, 1957, at the hour of 10:00 a.m. and 1:30 p.m., respectively, before LYNNE SHINDURLING, a Certified Shorthand Reporter, holding Utah License No. 135, Registered Professional Reporter, and Notary Public in and for the State of Utah.



Associated Professional Reporters  
10 West Broadway / Suite 400 / Salt Lake City, Utah 84101

1           Q     You became a store manager in April of 1987. Which  
2 store did you manage?

3           A     The Florida Mall in Orlando.

4           Q     Did Bill move on to some additional store someplace  
5 else?

6           A     He was terminated.

7           Q     Okay. Do you know what the reason for the  
8 termination was?

9           A     Failure to lock the safe in the store.

10          Q     Did you participate at all in the discussions  
11 concerning his termination?

12          A     What do you mean by that?

13          Q     Were you advised by Fields' representatives before  
14 the termination took place to give input about the termination  
15 of Bill?

16          A     I was advised that he was on discipline prior  
17 because of the safe. The day that he was to be fired -- well,  
18 the day he was fired I was told that since he failed to lock  
19 the safe again, it was like the third time or second time,  
20 that it constituted his termination.

21          Q     Okay. And you immediately became at that point  
22 promoted to this store manager of that store?

23          A     I believe it was a couple days between that time. I  
24 was still a manager or still an assistant manager and I was  
25 just -- I needed to take the tests and things to become a



1 I had been learning all of the duties of a manager. When this  
2 manager got terminated, Nabil Dijani, I was more left to  
3 battle on my own. Through telephone conversations, you know,  
4 with my district manager I would ask questions on how do I do  
5 this or how do I do that. Okay? I had taken the tests, but  
6 there were still questions, you know, that were not  
7 answerable, you know, in the documentation that was given to  
8 me. So the training was basically done on the phone until she  
9 came to visit me to do on-the-job training.

10 Q Okay. How long were you at the Bloomingdale's  
11 store?

12 A From May or June, whatever it would have been, the  
13 end of May, first of June, until it was in late August of that  
14 same year.

15 Q Where did you go?

16 A I got promoted.

17 Q And what was your promotion?

18 A To a district sales manager.

19 Q Did you have to go through any certification or  
20 testing process before the promotion?

21 A No, I did not.

22 Q And who promoted you?

23 A Mitchell Dorin, D-o-r-i-n.

24 Q Okay. How did your responsibilities as a district  
25 sales manager change?

1           A     Yes.

2           Q     Okay. You filed in your Complaint a claim for  
3 misrepresentation to Fields' employees indicated to you  
4 certain things about the job which caused you to leave Disney  
5 and come to Mrs. Fields. Who was it that made representations  
6 to you?

7           A     Mitchell Dorin.

8           Q     What did Mr. Dorin say? Well, excuse me. When did  
9 this take place in terms of --

10          A     This would have taken place maybe in February,  
11 March. I don't, you know, I don't have an exact time frame  
12 for that.

13          Q     Okay. February-March of '87. What did Mr. Dorin  
14 say?

15          A     That he was going to be promoted, he was working to  
16 become a regional director, and that he wanted to keep me on  
17 so that I could be in his -- you know, on his team as a  
18 district manager in Florida.

19          Q     Okay. Anything else that he said to you?

20          A     Other than that I would be -- you know, I would have  
21 a chance for, you know, for upward movement.

22          Q     He didn't guarantee you upward movement, though, did  
23 he?

24          A     Yes, he did.

25          Q     Oh, he did?

1           Q     All right. When you have an occasion to terminate  
2 an individual, did you refer to some manual?

3           A     Usually the discipline section of the training  
4 manual. It's usually listed in there, procedures for  
5 discipline. It's always under discipline. It's never under  
6 termination.

7           Q     And so when you do that, instead of reviewing the  
8 policies and procedures manual, you'd look at a training  
9 manual?

10          A     To look -- you know, I knew the policy, so I didn't  
11 have to look to anything. You know, I knew what the stages of  
12 discipline were that resulted in termination. That was the  
13 discipline policy. I knew that very well. I didn't have to  
14 refer to a manual that Randy claims was no good. So I didn't  
15 do that.

16          Q     Let's get to that conversation. When did you have  
17 this conversation with Randy?

18          A     Well, Randy made conversations about the manuals in  
19 his --

20          Q     I want the conversation that you had with Randy.

21          A     Well, it's not a conversation that I would have.  
22 It's a video that he gave me to look at. Now, that is a  
23 conversation that he wanted me to see that he had. I saw that  
24 conversation. In addition --

25          Q     When was this?

1           A     It would have been sometime, I'm sure, when I was --  
2     early when I was a district manager. I received copies of  
3     videos of Randy and his conversations.

4           Q     Do you have a copy of that video in your possession?

5           A     No, I do not.

6           Q     Okay. Do you know what that video was entitled?  
7     Did it have a title or a name?

8           A     Yes, "Good Enough Never Is."

9           Q     Okay.

10          A     "What We Stand For" I think may have been another  
11     one that had that.

12          Q     Which one was it that had this discussion?

13          A     They both may have had it, something that they  
14     stressed very often. So --

15          Q     I take it you don't know which one had it?

16          A     I would be better to say probably "What We Stand  
17     For" better would have that in there.

18          Q     Okay.

19          A     In addition to his conversation in Park City, Utah,  
20     when we talked about terminations.

21          Q     Okay. Now let's deal with the video first. You  
22     don't recall when you saw it?

23          A     I've seen it probably 20, 30, 40 times. Be  
24     difficult to say when.

25          Q     When was the last time you saw this video?

Tab G

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

-oOo-

PEDRO TIRADO,

Plaintiff,

vs.

MRS. FIELDS COOKIES,

Defendants.

Deposition of:

Daniel Murphy

No. 10755

-oOo-

BE IT REMEMBERED that on the 11th day of January, 1991, the deposition of Daniel Murphy was taken pursuant to notice, given at 11:00 a.m. of said day at 50 South Main Street, #700, Salt Lake City, Utah, before Diana Kent, a Certified Public Notary and Notary Public in and for the State of Utah.

COPY



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1           Q.     Okay. Mr. Murphy, what do you understand the  
2 term "at will" to mean?

3           A.     It means that the company reserves the right to  
4 terminate a person at any time, with or without cause. And  
5 also, the employee can terminate employment with or without  
6 notice.

7           Q.     Is that concept demonstrated in Exhibits Four  
8 and Two of the Tirado deposition?

9           A.     Excuse me.

10          Q.     Is the at will concept reflected in what has  
11 been previously marked as deposition Exhibit Two of the  
12 Tirado deposition?

13          A.     Yes.

14          Q.     And is it reflected in what has previously been  
15 marked as deposition Exhibit Four in the Tirado deposition?

16          A.     Yes.

17          Q.     Is the concept of at will employment, to your  
18 mind, that's reflected in these documents, inconsistent with  
19 the statement, on what was previously marked as deposition  
20 Exhibit 24 in the Power deposition, of quality products?

21          A.     At will employment is not contradictory with  
22 quality products.

23          Q.     Is it inconsistent with the notion of quality  
24 customer service?

25          A.     No.

1 I will leave it at that for now.

2 Q. (By Mr. Fericks) Can you terminate somebody for  
3 the purpose of causing them emotional distress?

4 MR. HIMONES: Same objections.

5 Q. As an at will employer?

6 MR. HIMONES: If you don't understand the question,  
7 tell him so.

8 A. Well, at will employer means, and it states in  
9 the company's literature, that the company can terminate  
10 with or without cause.

11 Q. Was Mariamercedes Power terminated without  
12 cause?

13 MR. HIMONES: I object to lack of foundation. Go  
14 ahead. Give him your understanding.

15 A. She was not terminated for cause at all. Her  
16 position was eliminated.

17 Q. Isn't economic circumstances cause for  
18 terminating somebody?

19 MR. HIMONES: Asked and answered.

20 A. Well, it is true that the economic conditions  
21 did cause that position to be eliminated and that resulted  
22 in her leaving the company.

23 Q. So that was your cause; right?

24 A. I guess that is true.

25 Q. So you didn't terminate Mariamercedes Power at



1 Q. That was your cause; right?

2 A. It refers to the business, not to her.

3 Q. It was your cause; right?

4 MR. HIMONES: Go ahead and answer the question.

5 A. In my mind, the issue of with or without cause  
6 relates to the individual. In this particular case, the job  
7 was eliminated because of the conditions of the business.

8 MR. HIMONES: If we answer that was our reason for  
9 doing it, Russ, if that makes any difference, I don't know.  
10 If you ask him that, I think it clears up the problem that  
11 Dan and I have with the question. And I know you don't care  
12 what my problem is with the question.

13 A. We terminated her because the needs of the  
14 business dictated that the position be eliminated.

15 Q. And at will means you can terminate a person  
16 even if the needs of the business don't dictate it. Right?

17 A. That would be without cause.

18 Q. Right. And that is at will. Right?

19 A. Both are at will.

20 Q. But at will allows you to terminate somebody  
21 without cause. Right?

22 A. It allows you to terminate with or without  
23 cause.

24 Q. And you had cause to terminate Mariamercedes  
25 Power.

Tab H

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

JOE TREMBLY,  
Plaintiff,

vs.

MRS. FIELDS COOKIES,  
Defendant.

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Civil No. 10756

TELEPHONE DEPOSITION OF CRAIG ATNIP  
Taken for Plaintiff

REPORTED BY: William Shelton, CSR

DATE TAKEN: April 17, 1992



DOLORES STEWART & ASSOCIATES  
222 W. EXCHANGE, SUITE 105C  
FORT WORTH, TEXAS 76106  
(817) 626-2401

COPY

1           A.       Yes.

2           Q.       Now you knew Mrs. Fields was an at-will company,  
3       didn't you?

4           A.       Yes, I did.

5           Q.       And I believe you testified earlier that you  
6       understood that meant that Mrs. Fields could terminate at any  
7       time for any reason or no reason?

8           A.       Yes.

9           Q.       Did you ever terminate or were you ever involved  
10      in a termination of any employee for theft?

11          A.       Yes, I was.

12          Q.       And did you put that employee on a stage one  
13      disciplinary process, Craig?

14                   MR. FERICKS: Objection, relevance.

15                   THE WITNESS: No.

16      BY MR. HIMONAS:

17          Q.       So when you told Mr. Fericks then that anyone that  
18      was ever terminated by the company had to go through steps  
19      one, two, three and four, that wasn't an accurate statement,  
20      was it, Craig?

21          A.       I would have to say what you just said is correct.  
22      It depended on the action by the employee. Again, there were  
23      certain actions that required a stage-four termination.

24          Q.       I see. But what my question was -- it's not  
25      necessarily true that you go through each separate stage; that

1 guidelines and procedures for terminating an individual. If  
2 that meant starting at stage one, it meant starting at stage  
3 one. If it was an immediate termination, we would go straight  
4 to stage four which is termination.

5 Q. And those grounds for immediate termination that  
6 you're referring to are set forth in the policy and procedures  
7 manual we spoke about?

8 A. That's correct.

9 Q. And again that's where your understanding of this  
10 process comes from, Craig?

11 A. Yes, sir.

12 Q. You understood that that was a goal that  
13 Mrs. Fields had?

14 A. I understood it was a goal of Mrs. Fields -- I  
15 don't understand.

16 Q. Well, probably because it was a very unartfully  
17 phrased question. Let me try again.

18 if I understand your testimony correctly, you  
19 understood that Mrs. Fields was an at-will employer?

20 A. Yes.

21 Q. And you understood at will to mean you can be  
22 terminated at any time for any reason or no reason at all,  
23 correct?

24 A. Yes.

25 Q. You also understood, however, that Mrs. Fields