

1994

# Lawrence Scott Robertson v. Utah Fuel Company : Brief of Appellee

Utah Court of Appeals

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John L. Black, Jr. .

Jathan W. Janove.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

940147 CA

LAWRENCE SCOTT ROBERTSON,  
Plaintiff-Appellant,  
vs.  
UTAH FUEL COMPANY,  
Defendant-Appellee.

94-0147-CA

Case No. ~~930610~~

Priority No. 15

**BRIEF OF APPELLEE**

APPEAL FROM SUMMARY JUDGMENT  
OF THE SEVENTH JUDICIAL DISTRICT COURT  
OF CARBON COUNTY  
HONORABLE BRYCE K. BRYNER

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**FILED**  
Utah Court of Appeals

APR 11 1994

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### JURISDICTION

The Court of Appeals of the State of Utah has jurisdiction over this case pursuant to Utah Code Ann. § 78-2-2(4) and § 78-2a-3(2)(k).

### STANDARD OF APPELLATE REVIEW

Determination of whether the moving party is entitled to summary judgment is a question of law, which is reviewed for correctness. Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1000 (Utah 1991). If a reasonable jury could not find that an implied contract existed, then it is appropriate for courts to reject employee claims as a matter of law. Sanderson v. First Security Leasing, 844 P.2d 303, 306 (Utah 1992); Johnson, 818 P.2d at 1001. This same standard of review applies to tort claims for intentional infliction of emotional distress. Retherford v. AT&T Communications, 844 P.2d 949, 958 (Utah 1992).

### STATEMENT OF THE CASE

Appellant Lawrence Scott Robertson ("Robertson") worked for Appellee Utah Fuel Company ("Utah Fuel") from 1981 to July 28, 1991. He began as a laborer and was subsequently promoted to miner-trainee, miner-operator, "A-Pay" or leadman, "fire boss" -- also a leadman position, Junior Foreman and then Senior Foreman, working underground. (Deposition of Lawrence Scott Robertson, pp.

10, 12, 15, 17-19, 22, attached hereto as Appendix 1)<sup>1</sup> At no time during Robertson's employment did he have a conversation with a member of management concerning the length of employment he could expect, guarantees of job security, a right to continued employment absent dismissal for just cause or in compliance with certain procedures, or other terms or conditions of continued employment with Utah Fuel Company. (App. 1, pp. 41, 53-54, 109, 145)

In the Summer of 1987, the Utah Fuel Company Employee Handbook (the "Handbook") was distributed to all employees, including Robertson. (Relevant portions of the Handbook are attached hereto as Appendix 4.) As a supervisor, Robertson was responsible for implementing Handbook provisions in dealing with his crew members. Robertson attended meetings in which the Handbook provisions were discussed; he also had input into the development of policies and procedures expressed in the Handbook. He understood that the Handbook's provisions accurately stated Company policy. (App. 1, pp. 36, 86-88, 94, 109)

Sometime prior to the termination of his employment, Robertson developed an addiction to cocaine. (App. 1, pp. 111-12)

In mid-June 1990, Robertson was the subject of an act of inappropriate horseplay involving members of his crew. At the

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<sup>1</sup>Robertson filed an Amended Designation of Record on Appeal dated March 1, 1994 requesting that the depositions of Robertson, Glen Zumwalt, and William Shriver be indexed and added to the record on appeal. Relevant portions of these depositions are contained in the Appendices attached hereto.

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**ORIGINAL**

April 15, 1994

Sheri Knighton, Clerk  
UTAH COURT OF APPEALS  
230 South 500 East, Suite 400  
Salt Lake City, UT 84102

RE: Robertson v. Utah Fuel Company  
Appellate Case No. 930610 940147-0A

Dear Ms. Knighton:

It has come to my attention that Page 3 of the Brief of Appellee which was recently filed with the Utah Court of Appeals contains three errors. References to the record indicate "Deposition" rather than "Affidavit" of Lee R. Sorenson, Dan Mills, and Roger Goold. Please accept my apology and insert the enclosed corrected Page 3 into the briefs on file with the Court.

Your assistance is greatly appreciated.

Very truly yours,

JANOVE & ASSOCIATES



Monica Whalen Pace  
Attorney for Defendant-Appellee

MWP:pb  
cc: John L. Black, Jr. (w/encl.)  
Enclosures  
Coastal.Rob\Knighton.ltr

time, Robertson held a temporary position on the surface as a foreman. That assignment was coming to an end, and he was to be reassigned underground. During his last week, a few members of his crew grabbed him and squirted a tube of industrial grease down his pants. Although Robertson told his supervisor, William Shriver, about the incident, the matter was never reported to senior management, including the General Manager, Glen Zumwalt. (App. 1, pp. 64, 84-85; Deposition of Glen Zumwalt, p. 148, attached hereto as Appendix 2; Affidavit of Lee R. Sorenson, Record at 280, para. 4-5; Affidavit of Dan Mills, Record at 276, para. 2-3)

Approximately a day or two later, Robertson was involved in an altercation with a mechanic, Dick Lloyd. This occurred after Lloyd teased him about having been "greased." The confrontation turned physical although no punches were thrown. Robertson then left the work place after cleaning out his locker, stating that he was quitting and threatening to strike another employee who approached him. (App. 1, p. 65-66, 83; R. at 280, para. 7-9; Affidavit of Roger Goold, R. at 302, para. 4-5)

Various members of management contacted Robertson and persuaded him to return to work. Upon his return, Robertson apologized for his behavior and met with Zumwalt. He agreed that his actions in the Lloyd incident were inappropriate; also, he did not inform Zumwalt of the greasing incident. (App. 1. pp. 83-85; App. 2, pp. 27, 29) Zumwalt asked him at that time whether he was using drugs. Robertson denied doing so. Zumwalt indicated that if



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he was, he should seek treatment and that the treatment, or a portion of it, would probably be covered under the Company's health plan. There was no discussion in this conversation, or at any other time, as to what effect seeking treatment would have on Robertson's job status at Utah Fuel. (App. 1, p. 78; App. 2, pp. 30-31, 53-54)

In May 1991, approximately 11 months after the Lloyd incident and six months after Robertson was reassigned as a surface foreman, he entered Charter Canyon Hospital for treatment of his drug and alcohol problems. There was no advance notice given to Utah Fuel, and there was no discussion with anyone concerning the effect of this hospitalization on Robertson's job status. (App. 1, p. 111; Deposition of William Shriver, pp. 54-55, attached hereto as Appendix 3)

While in Charter Canyon for a 28-day stay, Robertson had several conversations with his supervisor, a department head, William Shriver. Shriver encouraged Robertson to remain in the treatment program, especially after Robertson suffered a setback and was considering leaving the hospital prematurely. However, there was no discussion concerning the effect that this hospitalization or his drug addiction would have on Robertson's employment status until the end of his stay when Shriver directed Robertson to address his questions to Glen Zumwalt. Robertson had become anxious about his job status by this time and his anxiety

increased after he raised the issue. (App. 1, pp. 109, 111, 119, 120, 122-24, 127-28, 130-31; App. 2, p. 54; App. 3, pp. 51, 53)

During the period that Robertson was hospitalized, several discussions took place among members of management as to the appropriate action that should be taken upon Robertson's return. The three possibilities discussed were (1) restoring Robertson to his former position as a foreman on the surface, (2) sending him underground as a foreman, or (3) demoting him to an A-pay or leadman miner position underground. (App. 1, p. 158; App. 3, pp. 59-60)

Upon returning to work, Robertson met with Zumwalt and Shriver who informed him of the decision to reassign him underground in a leadman position. Robertson expressed his feeling that he could not continue to work for Utah Fuel under those conditions but was given some time to think about it. The next day, company management reconsidered its options and restored Robertson to his former position after he pledged to meet with each of his crew members in order to regain their confidence in his leadership. (App. 1, pp. 132-33; App. 2, pp. 66, 68, 77; App. 3, pp. 59-60, 62, 64)

Approximately six weeks later, and after receiving reports of safety and morale problems, Zumwalt and Operations Support Manager, Lou Mele, conducted a series of interviews with surface workers. These interviews revealed a great deal of discontent among employees, much of it directed at Robertson, and that serious

problems existed on the surface. Following these interviews, Zumwalt decided to reassign Robertson underground in a leadman position. (App. 2, pp. 91-94, 99-100, 104, 147)

When Zumwalt informed Robertson of the demotion, he also stated that Robertson would have an opportunity to be promoted to foreman in the future and that Zumwalt wanted him to succeed as an employee at Utah Fuel. Robertson, although he disagreed with the decision, felt Zumwalt was sincere in these representations and he felt that he had the support of upper management. (App. 1, pp. 151-52, 158; App. 2, p. 104) The problem from Robertson's perspective lay with his crew members whom he felt were hostile to him in part because of the drug problem, but also because of their resentment over Robertson's having been brought from underground and given the foreman position as opposed to an existing surface crew member being given the job. (App. 1, pp. 142-43, 152)

Robertson informed Zumwalt that the reassignment was not acceptable and that he would not continue working under such circumstances. As a result, Robertson's employment was terminated effective July 28, 1991. (App. 1, p. 157-58)

Robertson then filed his first complaint in the Fourth Judicial District Court, Utah County, naming as defendants, Utah Fuel Company, Vernal Mortensen, Glen Zumwalt and Lou Mele. (R. at 2) He alleged a single cause of action that defendants had retaliated against him because of his substance abuse problem and had violated the Company's employment policies. (Id.) On his own

motion, Robertson sought and received a change of venue to the Seventh Judicial District Court, Carbon County. (R. at 11)

Following a change of counsel, Robertson filed an Amended Complaint in May 1992 against The Coastal Corporation, Utah Fuel Company, and Coastal States Energy Company. (R. at 14) The Amended Complaint contained three causes of action: (1) breach of "implied-in-fact contract", (2) breach of the implied covenant of good faith and fair dealing, and (3) intentional infliction of emotional distress. (Id.) Defendants removed the matter to the United States District Court for the District of Utah based on diversity of citizenship, whereupon Robertson filed a Motion to Remand. (R. at 30 and 68)

A round of briefing and oral argument ensued, following which the federal district court ordered additional discovery, briefing and argument. The parties then reached an agreement in which Robertson stipulated to dismissal of his complaint against The Coastal Corporation and Coastal States Energy Company. Utah Fuel Company agreed to the matter being remanded to the Seventh Judicial District. This agreement is reflected in Judge Thomas Greene's Order of October 13, 1992. (R. at 27)

In April 1993, Robertson filed a Motion for Leave to Amend Complaint in which he sought to add as defendants company employees Darol Hawkins, Tate Tatton, Ray Christensen, Gary Peterson, and John Does I - X. (R. at 232 and 225) He also sought to add five

additional causes of action stating various contract and tort claims relating to the greasing incident of June 1990. (Id.)

Utah Fuel opposed this motion (R. at 239) and on or about the same time filed a Motion for Summary Judgment seeking dismissal of the three existing causes of action. (R. at 260) Following additional discovery, briefing and oral argument before the Honorable Bryce K. Bryner, the district court issued rulings on these motions on November 15, 1993 and November 16, 1993, respectively. In the first ruling, the court denied Robertson's Motion for Leave to Amend Complaint. (R. at 508) In the second, the court granted Utah Fuel's Motion for Summary Judgment. (R. at 512) Robertson then appealed the November 16, 1993 ruling on December 14, 1993. (R. at 516)

#### RESPONSE TO ROBERTSON'S STATEMENT OF RELEVANT FACTS

In his brief, Robertson lists 32 assertions of fact. Many of these are addressed below regarding whether the record contains evidence of a genuine issue of material fact. A number of these "facts" are based on Robertson's speculation concerning Company policies and practices. As explained infra., his unsubstantiated opinions and conclusions are insufficient. Moreover, a review of his citations to the record concerning issues such as whether he had a contract of continued employment or whether Utah Fuel intentionally inflicted emotional distress on him, reveals that they do not support the propositions he urges. Indeed, Robertson

continues to rely on allegations of his Amended Complaint notwithstanding that the parties are here on appeal of the district court's entry of summary judgment.

In Utah Fuel's Statement of the Case, the factual background of this matter is addressed with appropriate citations to the record. Utah Fuel has attempted to state only the agreed facts in this lawsuit or facts which cannot be rebutted by competent evidence of record. It therefore does not discuss the issue of whether Robertson was treated fairly by the Company. This should not, however, be considered a concession as to the veracity of any of Robertson's allegations on this subject. As described in detail in the deposition of Glen Zumwalt, Robertson was given adequate prior notice and warning of the problems on the surface, the safety concerns, the drug and alcohol issues, his moodiness, erratic behavior and hostility to other employees. By July 1991, removing him from his foreman position had become not merely justifiable but necessary. Utah Fuel believes there are compelling substantive justifications for its treatment of Robertson; however, these justifications are neither necessary nor relevant to deciding the issue of whether the lower court's entry of summary judgment should be affirmed. Such facts are thus not detailed in this brief.

#### SUMMARY OF ARGUMENT

Robertson claims a right to trial on the issues of breach of contract and intentional infliction of emotional distress.

However, in the proceedings below, Robertson was unable to produce evidence of any promise or representation by an authorized Company representative, whether oral or in writing, which expressed the intent to offer employment other than at-will, or evidence that he reasonably believed such an offer had been made. The statements Robertson cites -- his supervisor encouraging him to remain in the treatment program, the General Manager saying that there is insurance to help pay for treatment, a company drug policy issued after Robertson's hospitalization which encourages employees to come forward with drug and alcohol problems, and the corrective action procedures in the Handbook -- do not on their face evince an offer of continued employment. Nor were they ever understood, reasonably or otherwise, by Robertson to constitute an offer of employment status other than at-will. Moreover, the Handbook on which he relies expressly and unambiguously disclaims its contractual status, establishes that Utah Fuel employees can be fired for any or no reason, and provides that management can bypass the corrective action steps in its discretion.

Robertson's emotional distress claim has no support in the record. He has not even alleged, much less adduced evidence of, conduct on the Company's part which is outrageous and the cause to him of severe emotional distress. Moreover, even were he able to make such a claim, his relief would be confined to what is provided under the Workers' Compensation Act.



## ARGUMENT

### I. THE DISTRICT COURT RULED CORRECTLY THAT NO CONTRACT OF CONTINUED EMPLOYMENT EXISTED AS A MATTER OF LAW.

#### A. Introduction.

The disclaimer language in the Handbook negates Robertson's contract claim as a matter of law. Summary judgment also is appropriate, however, because Robertson presented no evidence of a promise or communication which would support a finding that a commitment of job security had been made. Most of Robertson's brief addresses the effect of the disclaimers. He devotes comparatively little space to the alleged promises he believes give rise to a contract of continued employment. Yet without evidence of promises sufficient to create a unilateral contract under Utah law, Robertson's attempt to minimize the disclaimers is moot -- in this case, there is no promise, representation, commitment or understanding to disclaim.

#### B. Utah Law Requires a Clear and Definite Communication of an Intent to Offer Employment Other Than At-Will.

Although the Utah Supreme Court has joined other jurisdictions in recognizing that an employer's promises or representations may constitute binding contractual commitments, its approach is conservative. Before an employee's at-will status will be deemed to have changed, an employer's promises, statements or representations "must be sufficient to satisfy the requirements of a unilateral offer." Johnson, at 1002.

To make such a showing,

The employer must communicate the intent to offer employment other than at will, the communication must be sufficiently definite to act as a contract provision, and the communicated intent must be such that the employee may reasonably believe that the employment offered is other than at-will.

Hodgson v. Bunzl Utah, Inc., 844 P.2d 331, 334 (Utah 1992).

Courts are empowered to screen claims and reject them as a matter of law if no reasonable trier of fact could find that this standard has been met. Id. Thus, in responding to an employer's summary judgment motion, the plaintiff must set forth specific, material and admissible facts sufficient to support a finding at trial of a contract of employment other than at-will. Johnson, 818 P.2d at 1001. See also, Sanderson v. First Security Leasing, 844 P.2d 303, 306 (Utah 1992).

General statements or assurances, even on the subject of continued employment, are insufficient to change an employee's at-will status. See, Evans v. GTE Health Systems Inc., 857 P.2d 974, 977 (Utah App. 1993) (assurance that plaintiff's "employment would be a long-term relationship" was insufficient as a matter of law to establish a contract term). "General expressions of long term employment or job advancement do not convert an at-will employment contract to a termination only for cause contract." Id., (quoting Vancheri v. GNLV Corp., 777 P.2d 366, 369 (Nev. 1989)). The court in Evans also stated, "Mere oral promises or assurances of job security are insufficient to rebut an at will

presumption." Evans, 857 P.2d at 977 (quoting Sullivan v. Snap-On Tools Corp., 708 F.Supp. 750, 751 (E.D. Va. 1989), aff'd., 896 F.2d 547 (4th Cir. 1990)).

By contrast, a "clear and unequivocal" promise made by an authorized company representative which is sufficiently definite to act as a contract provision as opposed to being "vague encouragement" or "hyperbolic optimism" may raise a triable issue of fact. Sanderson, 844 P.2d at 307 (promise of corporation's president that "he would not fire [the employee] for being unable to work because of his current illness" raised a triable issue of fact). However, a statement that so long as the plaintiff sold the company's products, he "would have a job" is insufficient as a matter of law since these words are "couched in general terms, more akin to stating a policy as opposed to offering an express contract . . . these words do not clearly indicate an intent to form a contract of permanent employment." Rowe v. Montgomery Ward & Co., Inc., 473 N.W.2d 268, 274-275 (Mich. 1991) (cited with approval in Sanderson at 307.)

C. The Record Lacks Evidence of Any Promise or Understanding of Employment Other Than At-Will.

1. Robertson's Reliance on Company Policy and Practice Concerning Drug and Alcohol Abuse is Misplaced.

Robertson relies on a written statement of company policy on drug and alcohol abuse, the "Approved Policy on Alcohol, Drugs and Controlled Substances" (the "Approved Policy"), as an alleged promise of continued employment. (R. at 312, Ex. 1) However,

Robertson neglects to mention the uncontradicted fact that this document was prepared and distributed after he decided to seek treatment for his cocaine addiction and entered Charter Canyon Hospital. In his deposition, Robertson admitted that the document did not exist at the time he sought treatment and that he did not see it until he came out of the treatment center. (App. 1, p. 105-06)

Reasonably or otherwise, this policy was never understood by Robertson as an offer to change his employment to something other than at-will; nor could it have been. It is a general policy statement containing no reference to job status, continued employment, job guarantees or anything of the like.

Robertson also relies on statements of the General Manager, Glen Zumwalt, (Brief of Appellant, p. 16) that it was his intention to help employees with substance abuse problems and that "we would be willing to help" if Robertson came forward and acknowledged his drug problem. However, such statements cannot be deemed clear and definite promises to change Robertson's at-will status into a binding, contractual right to continued employment. The words and assurances were general. No reference was made to job security or job status. There was nothing approaching the promise made in Sanderson. There were no "negotiations regarding security" and no "testimony suggesting that plaintiff inquired about job security" and received assurances in that regard. Rowe, 473 N.W.2d at 274. Zumwalt's words, "couched in general terms, . . . do not clearly

indicate an intent to form a contract of permanent employment." Id., at 275.

Robertson's reliance on statements of his supervisor and department head, William Shriver, fails for the same reasons. Even assuming that Shriver made the statements, "Don't worry about a thing, get your problem taken care of," and "Goddamnit, don't you be leaving. Stay in there," (Brief of Appellant, p. 17) they likewise fall in the category of "vague encouragement" or "hyperbolic optimism" deemed insufficient in Sanderson, 844 P.2d at 307. Or, at best, they constitute "general expressions of long-term employment" which Evans deemed insufficient to "convert an at-will employment contract to a termination only for cause contract." 857 P.2d at 977. Judge Bryner thus correctly ruled that these statements do not rise to "the level required for a jury to conclude that [they form] the basis of finding an implied contract exception to the at-will rule."<sup>2</sup> (R. at 512, p. 513)

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<sup>2</sup>Another problem with Robertson's reliance on Shriver's statements is the fact, which he made no attempt to contradict or rebut below, that Shriver lacked authority to make a binding promise of continued employment. Shriver testified that hiring and firing authority was vested in the General Manager; Shriver could make recommendations, but the final say was Glen Zumwalt's: "[My] understanding is that I've never had the authority to fire anyone up there. I can present the case and the general manager would be the only one that would make the final decision that this person should be fired." (App. 3, p. 41) Moreover, plaintiff never understood Shriver to have such authority. (App. 1, pp. 123-24, 127-30) See Goldman v. First National Bank of Boston, 7 IER Cases 1165, 1167 (D. Mass. 1992) and Lever v. Northwestern University, 6 IER Cases 1748, 1753 (N.D. Ill. 1990) (dismissing plaintiffs' implied contract claims where the alleged promises of continued employment were made by people who lacked authority to make such promises).

In his Brief, Robertson makes a couple of references to alleged Company practices which he apparently believes support a finding of a contractual guarantee of continued employment. However, he fails to cite any authority or articulate a basis for believing that such alleged practices meet the threshold required to create a binding contract. Moreover, his "evidence" of these practices is not competent or does not support the proposition he cites. He asserts: "No disciplinary action was to be taken against those employees who voluntarily came forward to seek treatment." (Brief of Appellant, p. 16) Although he refers to the Approved Policy in this context, he does not cite any language within it that supports such a proposition. Rather, his sole authority consists of two pages in Shriver's deposition where Shriver expressed his understanding that "on a case by case basis" a person who had sought treatment would normally be allowed to return to work provided "that the job [was not] filled during the absence." (App. 3, pp. 45-46) This testimony hardly amounts to a clear and definite expression of an intent to guarantee a job to someone who is seeking treatment for drug abuse.

Robertson's assertion that "[o]ther employees had been allowed to obtain substance abuse treatment and return to their same job and same rate of pay" (Brief of Appellant, p. 16), similarly lacks support in the record. Robertson cites his own deposition and that of Shriver discussing the single instance of a particular mechanic with a drinking problem. Neither Shriver nor Robertson could

testify with any clarity as to the circumstances surrounding this mechanic's treatment, much less supply evidence of a Company policy or practice regarding the employment status of employees with drug or alcohol problems. (App. 1, p. 38; App. 3, at p. 49) As their own testimony reveals, neither man had knowledge of Company practice with respect to employees with substance abuse problems, or even if there was a practice.

The General Manager's deposition testimony in no way evinces a policy or practice of guaranteed employment. Zumwalt simply testified that in that particular instance and under those particular circumstances, a mechanic with a drinking problem was subsequently reinstated; nothing more. (App. 2, p. 38)

2. Robertson Never Understood or Believed that He Possessed a Right or Guarantee of Continued Employment.

The fact that no promise, representation or even suggestion of a job guarantee was ever made to Robertson is dramatically underscored by his own perception of his employment status. Notwithstanding his contentions as to assurances concerning his hospitalization for drug abuse, in his deposition, Robertson was quite specific and direct as to what he understood his job status was during this time. After expressing that he felt a great deal of anxiety over his future with Utah Fuel while in Charter Canyon Hospital, Robertson testified:

Q. Was your anxiety over a fear that you might be assigned underground?

A. No.

Q. Did it have a particular focus?  
A. Yes.  
Q. What was that?  
A. Losing my job.  
Q. Just losing the job completely?  
A. Yes.

(App. 1, p.124)

Along these same lines, Robertson testified that he was aware of the fact that other employees had been replaced while they were out on medical or disability leave and that he would thus not be the first. (App. 1, pp. 196-97)

Robertson understood that Shriver never made a promise of continued employment to him. The anxieties described above occurred simultaneously with the "don't worry" and "get your problem taken care of" statements on which he purports to rely. Shriver himself testified that "I made no promises" to Robertson concerning having a job upon his return from Charter Canyon Hospital. (App. 3, p. 53) As was pointed out to the court below, and without contradiction by Robertson, the thrust of Shriver's conversations with Robertson was to "encourage" him in staying with the treatment program and not to promise or guarantee him job security. (Id.)

Indeed, at no point during his entire employment history did Robertson understand or believe that a commitment or job guarantee had been made to him. Throughout his deposition, he answered "No" and "I don't recall" to questions covering the various phases of his employment and as to whether anyone had ever promised, offered



or represented that he would have the right to continue in his job unless fired for good cause or according to specified procedures.

See e.g.:

Q. Did you have any discussions with anyone concerning the length of your employment or circumstances under which you could lose your job?

A. No.

(App. 1, p. 41, 53)

Q. Was there any discussion at all in terms of how long you might expect that assignment to continue or that job to continue [referring to the last position plaintiff held before termination of his employment]?

A. Not that I recall.

(App. 1, p. 145)

In short, the evidence is clear and consistent as to the understanding of both parties to the alleged contract: No promise or guarantee of continued employment was ever made and none was ever understood as having been made. Paraphrasing Hodgson, Utah Fuel Company never communicated an "intent to offer employment other than at-will," much less made such a communication "sufficiently definite to act as a contract provision;" and there was never any communicated intent from which Robertson could (or did) "reasonably believe that the employment [was] other than at-will." 844 P.2d at 334.

D. The Handbook Contains No Promise or Guarantee of Continued Employment.

Robertson relies on a corrective action procedure set forth in the "Improvement and Progress Program" section of the Handbook. However, in addition to such reliance being negated by the

disclaimers discussed below, there are several reasons why this provision cannot be construed as constituting a contractual commitment.

1. Management Reserved the Right to Bypass Corrective Action Steps.

On its face, this section establishes that the four-step procedure described in it is only optional. Management has the discretion to bypass these steps if it chooses: "While the above steps will be followed in most routine situations, flagrant violations of normally acceptable behavior may require by-passing one or more steps." (App. 4, pp. 13-15)

This provision is analogous to the one in Sanderson, which provided: "In situations where employee behavior warrants immediate termination the stages of this process do not need to be followed." The Utah Supreme Court held that this provision alone negated plaintiff's contract claim. It gave management "unbounded discretion to discharge employees without following the [disciplinary] guidelines." 844 P.2d at 306 (emphasis in original).

Robertson attempts to circumvent this provision by arguing that management's discretion is limited by a separate section of the Handbook entitled "General Rules and Regulations" (the "General Rules"). (App. 4, pp. 15-16) However, nothing in either section refers to the other. Nothing in the Handbook supports the contention that the "acts and conditions or situations" described

in the General Rules are intended to define the term "flagrant violations of normally accepted behavior" in the corrective action procedure section and thereby limit management's discretion. There is no discussion as to the consequences of violating the General Rules. There is also no attempt to categorize the "acts and conditions or situations" in terms of whether certain ones such as "theft" or "use of firearms" would result in bypassing disciplinary steps in contrast to other ones such as "horseplay." The General Rules provide no basis from which to infer a Company promise to limit its discretion in determining whether or not to invoke the corrective action procedure in the separate "Improvement and Progress" section of the Handbook.

Robertson refers to Shriver's deposition testimony in support of his argument. However, beginning on the same page that he disclaims any authority to fire employees, Shriver merely states his belief as to what he understands "flagrant violations" to mean; he makes no reference to the acts listed in the General Rules; he does not purport to state that the General Rules limit, modify or define anything in the "Improvement and Progress" section; and he does not purport to state that management ever agreed or communicated to employees a definition of "flagrant violations" which was limited to any set of specified offenses. (App. 3, pp. 41-42) Robertson's references to Zumwalt's deposition reveal the same thing. There is no established definition of "flagrant

violations." Management considers each matter on a case-by-case basis. (App. 2, pp. 181, 186)

2. The Corrective Action Procedure Does Not Apply To Demotions or to Supervisors.

The evidence is un rebutted that the corrective action procedure was not used for demotions and was used only for hourly, not supervisory, employees. The text of the Handbook supports these points. Step Four makes explicit reference to "termination" of employment. There is no reference or suggestion that this step applies to other forms of discipline or employment action such as demotions.<sup>3</sup> (App. 4, p. 15) Moreover, repeated references are made to "your supervisor." Employees participate in corrective action with their supervisor which includes discussion of the problem, a commitment to correct it, and, if necessary, a written

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<sup>3</sup>It was uncontradicted in the proceedings below that Robertson was not discharged, but instead demoted to a leadman position he had formerly held and that he chose to quit rather than accept this demotion. Robertson did not offer evidence that he was constructively discharged, and the record does not support such a notion. See, e.g., Derr v. The Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986) (to establish a claim of constructive discharge, plaintiff must show that the employer rendered "work conditions intolerable" such that a "reasonable person in [the employee's] position would feel compelled to resign" and that the plaintiff must meet an objective standard, not one based "upon the subjective view of the employee-claimant"). See also, Flanagan v. McKesson Corp., 48 FEP Cases 343 (N.D. Ga. 1988); Garner v. Wal-Mart Stores, Inc., 807 F.2d 1536, 1539 (11th Cir. 1987); Cherchi v. Mobile Oil Corp., 693 F.Supp. 156 (D. N.J. 1988) (all rejecting constructive discharge claims where plaintiff had been demoted or had supervisory responsibilities taken away).

plan for improvement to be signed by "your supervisor." (App. 4, pp. 14-15)

Again, Robertson attempts to circumvent this language through testimony as to alleged "understandings" of what it meant. He cites pages 39-41 of Shriver's Deposition. (Brief of Appellant, p. 19) However, they contain no reference to the issue of supervisory vis-a-vis hourly employees. So far as the issue of demotions vis-a-vis terminations is concerned, Shriver merely expressed his "opinion" that the four-step procedure "should" be applied to demotions and, without providing any explanation, he expressed his belief that such is the Company's policy. (App. 3, p. 41)

In this same vein, Robertson refers to his own deposition in which he stated his "assumption" and "general feeling" that the corrective action procedure applied to demotions and supervisory staff. (App. 1, pp. 37, 97) However, Robertson was unable to articulate any specific policies, discussions, directions, or other evidence supporting his assumptions and feelings.<sup>4</sup> (See App. 1, pp. 37, 97-101, 194-95) Addressing the difference between a

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<sup>4</sup>"Unsubstantiated opinions and conclusions" are insufficient to defeat a motion for summary judgment. Treloggan v. Treloggan, 699 P.2d 747, 748 (Utah 1985). See also, Winter v. Northwest Pipeline Corp., 820 P.2d 916, 919 (Utah 1991) ("allegations of a pleading or factual conclusion of an affidavit are insufficient to raise a genuine issue of fact"). See also, Branson v. Price River Coal Co., 627 F.Supp. 1324, 1329 (D. Utah 1986), aff'd, 853 F.2d 768 (10th Cir. 1988) (conclusory, speculative or unsubstantiated assertions will not suffice to defeat a summary judgment motion).

demotion and termination as applied in specific situations, Robertson testified:

- Q. Did you ever inquire of anyone at Utah Fuel whether Mackey's and Freeman's demotions were done in accordance with the step disciplinary policy?
- A. No, I did not, because I assumed they was.
- Q. Did you have any knowledge that it was?
- A. No, I did not.

(App. 1, pp. 194-95)

By contrast, Utah Fuel presented to the court below the deposition and affidavit testimony of all persons with responsibility for the Company's personnel policies -- Zumwalt, the General Manager; Lou Mele, the Operations Support Manager with overall responsibility for personnel; and Karl Kelley, the Personnel Supervisor. All of them testified that the policy and practice was that the four-step procedure did not apply to demotions or to supervisory staff such as Robertson. (See, App. 2, pp. 89, 95, 162-63; Affidavit of Lou Mele, R. at 295, para. 6; Affidavit of Karl Kelley, R. at 278, para. 6)

3. The "Improvement and Progress" Section is a General Policy Statement and Contains No Clear or Definite Promises of How Employees Will Be Treated.

Unlike cases from other jurisdictions cited by Robertson in his brief, discussed infra, the Handbook in this case contains no promises or guarantees that an employee will not be fired (much less demoted) absent the steps being followed. The language is general. It describes an approach to employee problems as opposed

to a rigid, definite set of mandatory procedures. The approach described will "normally" be followed. (App. 4, p. 14)

Nothing in this section approaches the standard under Utah law requiring communication of an intent to offer employment other than at-will, a communication sufficiently definite to act as a contract provision, and a communication which is such that an employee could reasonably believe he was being offered employment other than at-will. At best, this section contains an expression of "general policy" concerning job security which, according to Evans, is insufficient. The language comes nowhere near the threshold necessary to convert it into a contractual commitment that a supervisor who seeks treatment for drug addiction will not be demoted absent prior discussions, commitments, development of a written improvement plan, suspension, or other steps described in the corrective action procedure. See, Sullivan v. Snap-On Tools Co., supra.:

The mere availability of suggested disciplinary procedures, where no limit is placed on an employer's discretion in their application, does not imply that an employer may discharge an employee only for just cause. . . . Glaringly absent is any enumeration of the grounds for dismissal with cause and there is no mention of termination with cause.

708 F.Supp. at 753.

In summary, Robertson has articulated no statement, promise, representation, policy or practice, written or oral, sufficient to support a claim that a contractual commitment was made to him of a right to continued employment with Utah Fuel or to remain in his

position on the surface. The district court's entry of summary judgment was thus appropriate even without consideration of the Handbook's disclaimers, which, as discussed infra., make the lower court's ruling all the more compelling.

E. The Handbook's Disclaimers Negate Robertson's Claim as a Matter of Law.

1. Introduction.

Utah Fuel's Handbook contains not one but two disclaimers. The first appears on page one and explicitly disclaims contractual rights or obligations:

This handbook is prepared to give you a general overview of the Company and existing procedures and benefits. Please keep in mind that this handbook is general in nature and does not constitute terms and/or conditions of an employment contract. The procedures, policies and benefits summarized in this handbook will be reviewed periodically and changed as circumstances warrant.

(App. 4, p. 1)

The second provision, establishing that employment at Utah Fuel is at-will, is on page 28:

Please remember, however, that you have the right to terminate your employment at any time and the company retains a similar right to terminate your employment for any reason or for no reason.

(App. 4, p. 28)

In addition to this unambiguous language, Utah Fuel employees are directed to review carefully all of the provisions of the Handbook and to present any questions or concerns they have concerning its provisions. (App. 4, p. 1) It is uncontradicted that the Company held meetings and provided training in which the



provisions of the Handbook were reviewed in detail. In his deposition, Robertson admitted that as a member of management, he had input into the development of the policies and procedures expressed in the Handbook, that he understood that the Handbook accurately expressed Company policy and that he recalls reading and being part of a discussion of the Handbook provision that it does "not constitute terms and/or conditions of an employment contract." (App. 1, pp. 36, 86-88, 94, 109)

2. In Light of Hodgson and Johnson, the Handbook's Disclaimers Mandate Entry of Summary Judgment.

These two decisions leave no doubt but that Judge Bryner's ruling is correct. In Hodgson, supra., the Utah Supreme Court upheld summary judgment, ruling that as a matter of law, an employment manual's statement of the at-will rule overcame plaintiff's contract claim which was based on the manual's disciplinary procedures as well as representations that she would be entitled to a warning before being terminated.<sup>5</sup> In Johnson, supra., the Court held that summary judgment was appropriate because the employee handbook contained a statement disclaiming its contractual status and that employees could be terminated for any or no reason. These "objective manifestations of the party's intent" meant that "no reasonable jury" could find the existence of

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<sup>5</sup>See also, Federal Express Corp. v. Dutschmann, 846 S.W.2d 282 (Tex. 1993) (disclaimer in employee handbook negates claim that procedures restrict at-will relationship).

a contract limiting the employer's right to terminate its employees. 818 P.2d at 1001.<sup>6</sup>

Robertson makes reference to a number of facts in Hodgson, apparently suggesting that they distinguish it from the instant case. However, a comparison of Hodgson's discussion of the disclaimer with the circumstances of this case, including the disclaimer language as well as Robertson's understanding that he had no job guarantees, shows that the result in the two cases should be the same -- summary judgment for the employer.

Robertson makes no attempt to distinguish Johnson. He merely describes the facts of the case, quotes the relevant language and then moves on. (Brief of Appellant, pp. 28-29) He does not argue, and Utah Fuel does not believe he could argue, that the disclaimer language in Morton Thiokol's handbook is materially different from Utah Fuel's or that there is any ambiguity in the latter's handbook on this subject.

Robertson attempts to draw meaning from the word "conspicuous" in these two opinions. He reasons that the disclaimers in Utah Fuel's Handbook, although they may be "clear," are not "conspicuous." The reasons he cites are that the section headings do not necessarily indicate the subject matter of a disclaimer and

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<sup>6</sup>The present case is an even stronger candidate for summary judgment because, unlike the handbook in Johnson, Utah Fuel's Handbook allows management to bypass disciplinary steps at its discretion (discussed supra.).

the language is not placed in prominent positions in the Handbook. However, nothing in Hodgson or Johnson suggests that it is the placement of the disclaimers which determines their conspicuousness. Rather, it is whether the words themselves are such that they would stand out in the mind of someone reading them. See e.g., the Court's repeated references to clear and conspicuous "language" in Johnson, 818 P.2d at 999, 1003.<sup>7</sup>

3. The At-Will Disclaimer Is Not Out Of Context And Thereby Ambiguous.

Robertson argues that the Handbook provision on the at-will rule, while not vague in and of itself, nevertheless becomes ambiguous when considered in context with other provisions. (Brief of Appellant, pp. 32-33) First, he argues there is ambiguity because a separate section entitled "Right to Review" expresses the Company's desire to treat employees "fairly" and in an "equitable" manner.<sup>8</sup> The inference Robertson draws is that an employer cannot

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<sup>7</sup>Utah Fuel does not suggest that the placement of disclaimers could never under any circumstances be relevant. Certainly, a Caligula-like footnote buried in an innocuous section which bears no connection to the subject matter (e.g., a Company dental plan), could justly be criticized. However, there is no such suggestion in this case. Indeed, the contract disclaimer appears on the very first page.

<sup>8</sup>Robertson apparently never regarded this section as a contract. It contains procedural steps for addressing employee grievances. In his deposition, Robertson admitted that he chose not to avail himself of its procedures. (App. 1, pp. 90-93) It thus seems ironic that Appellant would rely on this section to allege that the Handbook is a contract and that he considered it to be one when he chose not to comply with its "contractual" procedures.

reserve its traditional managerial discretion to make employment decisions without necessarily contradicting itself by expressing a desire to be fair and equitable. This inference is not supported by common sense, work place realities or the text of the Handbook itself. Robertson cites no authority for this proposition and, to Utah Fuel's knowledge, none exists. It is not unfair or improper for an employer to desire and express both aims, namely, that it wishes to be fair and equitable in the way it treats employees, but that it also wishes to reserve its traditional right to make management decisions in its sole discretion. In essence and in effect, this is what the at-will rule allows.

Robertson also argues that the at-will language is ambiguous because it appears in a section containing references to probationary employees. An employee could "easily assume" that the at-will provision "applies only to the probationary employee." (Brief of Appellant, p. 33) However, this argument is counter-textual. Neither the section heading nor the text itself purports to be limited to probationary employees. The section language and the accompanying diagram clearly refer to the period of time occurring after the "trainee" or probationary period. In fact, the at-will disclaimer immediately follows a statement that employees will be advanced to an operator classification upon successfully completing the trainee period. (App. 4, p. 28) Thus, the only reasonable interpretation of this language is that successfully passing the probationary period does not create a job guarantee;

the Company continues to reserve its right to discharge its employees at any time and "for any reason or for no reason." (Id.) The placement of the at-will language eliminates any possible ambiguity or misunderstanding over the effect of an employee's successfully completing the trainee program.

4. Case Law Cited by Robertson Does Not Support Overturning the District Court's Decision.

Robertson cites a plethora of cases within and outside Utah in urging this Court to rule that a genuine issue of triable fact exists. However, examination of these cases reveals that none of them support the proposition he advances.

In Utah, Robertson cites: Arnold v. B.J. Titan Service Co., 783 P.2d 541 (Utah 1989); Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044 (Utah 1989); Brehany v. Nordstrom, Inc., 812 P.2d 49, 56 (Utah 1991); Caldwell v. Ford, Bacon & Davis Utah, Inc., 777 P.2d 483, 486 (Utah 1989); and Lowe v. Sorensen Research Co., Inc., 779 P.2d 668 (Utah 1989). However, none of these cases involve company statements disclaiming the contractual status of the company's employment policies, statements preserving management's right to fire for any or no reason, statements giving management discretion to bypass disciplinary steps, or uncontroverted evidence that the employee knew he had no guarantee of continued employment.

For cases outside of Utah, he cites: Allabashi v. Lincoln National Sales Corp., 824 P.2d 1 (Colo. App. 1991); Arellano v. Amax Coal Co., 56 FEP Cases 1519, 6 IER 1399 (D. Wyo. 1991); Jones

v. Central Peninsula General Hospital, 779 P.2d 783 (Alaska 1989); Landro v. Glendening Motorways, Inc., 625 F.2d 1344 (8th Cir. 1980); Leikvold v. Valley View Community Hospital, 688 P.2d 170 (Ariz. 1984); Loffa v. Intel Corp., 738 P.2d 1146 (Ariz. App. 1987); McDonald v. Mobil Coal Producing Inc., 789 P.2d 866 (Wyo. 1990); McGinnis v. Honeywell, Inc., 791 P.2d 452 (N.M. 1990); Morris v. Coleman Co., Inc., 738 P.2d 841 (Kan. 1987); Swanson v. Liquid Air Corp., 826 P.2d 664 (Wash. 1992); Toussaint v. Blue Cross and Blue Shield of Michigan, 292 N.W.2d 880 (Mich. 1980); and Wagonseller v. Scottsdale Memorial Hospital, 710 P.2d 1025 (Ariz. 1985).<sup>9</sup>

None of these cases help Robertson's cause on appeal. Each is materially distinguishable. They fall largely into two categories of difference: (1) there was evidence of specific, definite and explicit promises that employees had the right not to be fired

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<sup>9</sup>Several of these cases make reference to the doctrine of promissory estoppel. Appellant has not listed this as an issue and does not explicitly argue that the doctrine should be applied in this case. In any event, promissory estoppel should not be considered. First of all, it was never pled or raised in the court below. See Espinal v. Salt Lake City Board of Education, 797 P.2d 412, 413 (Utah 1990); James v. Preston, 746 P.2d 799, 801 (Utah App. 1987). Second, Appellant has adduced no evidence satisfying the elements of promissory estoppel such as a promise which induced action or forbearance on his part and Utah cases indicate that the doctrine of promissory estoppel will not serve employees who cannot show the existence of an express or implied contract of continued employment. See Weese v. Davis County Commission, 834 P.2d 1, 4 (Utah 1992); Rose v. Allied Development Co., 719 P.2d 83, 87 (Utah 1986). See also, Vancheri, supra.: "The doctrine of promissory estoppel, which embraces the concept of detrimental reliance, is intended as a substitute for consideration, and not as a substitute for an agreement between the parties." 777 P.2d at 369.

except for just cause or in accordance with specified procedures; and (2) their jurisdictions, unlike Utah, do not follow the unilateral contract approach and do not require a clear and definite communication of an intent to offer employment other than at-will, but instead apply a more general "totality of circumstances" test in order to determine whether or not the employee had a reasonable expectation of continued employment.<sup>10</sup>

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<sup>10</sup>See: Allabashi (although handbook contained an at-will disclaimer, employees were furnished with other documents expressly providing that "just cause" was required for involuntary termination and that specific procedures must be "followed in the event of such a dismissal"); Arrellano (the employee booklet contained no reference to the at-will rule and provided for "binding arbitration" as the final step of the company's grievance procedure); Jones (employment manual did not make reference to the at-will rule "but provided that all non-probationary employees would be terminable only for good cause"); Landro (addressing issues of employee's entitlement to ERISA plan benefits, not issues of right to continued employment); Leikvold (employee manual contained neither disclaimer of contractual status nor statement of the at-will rule and listed the specific offenses for which no prior notice was required for termination); Loffa (an employment agreement separate and apart from the disciplinary policy contained only a statement that it did not restrict the company's right to terminate the employee's employment; the court found that this statement was insufficient because it did not address the question of whether a separate document such as the company's disciplinary policy might restrict the company's rights; also, there was no statement of the right to terminate for any or no reason or for any or no cause); McDonald (handbook contained no statement of the at-will rule but instead referred repeatedly to "job security", listed "fundamental obligations" of the employer, provided a disciplinary step procedure and stated that "union representation" was therefore unnecessary); McGinnis (although employment agreement stated that plaintiff's employment could be terminated at any time, this agreement was made "subject to" the company's "personnel practices"; evidence existed that these practices included a policy that employees would not be laid off except in accordance with a written procedure); Morris (supervisor's manual said only that it should not be construed "as an employment contract or guarantee of employment" and separate company bulletin stated that the company

F. Conclusion.

Robertson was never promised a right to continued employment or a right not to be terminated or demoted except for good cause or in accordance with specified procedures. No such representations were made to him orally or in writing and no offer of a unilateral contract was ever presented or implied. As the uncontradicted evidence shows, Robertson never understood, much less "reasonably believed," that such an offer had been made or that he had a binding right to continued employment. Although not dependent upon it, this conclusion is reinforced by the existence of clear and conspicuous Handbook disclaimers. Accordingly, the district court ruled correctly that there was no genuine issue of triable fact on Robertson's contract claim and that summary judgment for Utah Fuel was proper.

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"will only discharge its employees for good cause"); Swanson (although employee manual contained disclaimers, in response to a union drive, the company subsequently issued a "Memorandum of Working Conditions" which stated that only probationary employees could be terminated at-will and that except for specified instances of misconduct, "at least one warning shall be given to non-probationary employees"; evidence also existed that management promised employees that "the company would abide by the rules in the [Memorandum -- characterized by the company as an "agreement"] and that no union representation would be necessary"); Toussaint (no contract disclaimer or statement of the at-will rule; personnel manual stated that non-probationary employees would be terminated "for just cause only"); and Wagonseller (although employee manual stated that listed offenses were only "guidelines", there was no disclaimer of contractual status or of the at-will rule and the manual also provided that except for listed infractions, company employees "must be given a verbal warning, a written performance warning, a letter of formal reprimand and a notice of dismissal" prior to being terminated).



II. DISMISSAL OF ROBERTSON'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM IS PROPER.

A. Robertson Has Adduced No Facts Supporting Such a Claim.

On the issue of whether Robertson demonstrated that there was a genuine issue of material fact on his claim of intentional infliction of emotional distress, the lower court ruled:

After examining all of the pleadings on file the Court finds that there is no evidence in the record which could support a finding that the demotion of the Defendant [sic], even if it were a constructive discharge, was done with the intention of causing the Plaintiff emotional distress or that the demotion would be deemed 'extraordinarily vile', 'atrocious', and 'utterly intolerable in a civilized community'.

(R. at 512, p. 2)

A review of Robertson's brief on this issue confirms the accuracy of the district court's ruling. (Brief of Appellant, pp. 36-37) The "facts" he cites consist of the following:

1. A reiteration of an allegation in his Amended Complaint.

2. Unsupported, generalized and obviously speculative assertions in his deposition that unidentified "them" desired "to run me off" and that his drug problem meant they would "finally have something" in which to accomplish this end. (App. 1, p. 149)

3. After he returned from Charter Canyon Hospital, he was asked whether he would be willing to meet with each of his crew members in an attempt "to win those people over to earn their trust"; although he did not think this was a good idea, he did not say so and agreed to the meetings. (App. 1, pp. 142-143)

4. His supervisor believed that there was a "general feeling of the hourly people" that Robertson should be punished for his drug problem and that it would therefore be inappropriate to restore him to his former position as foreman; also, one member of management, Lou Mele, had stated that Robertson needed to start over at the bottom and "work his way back up and earn respect." (App 3, pp. 67-68)

5. Robertson suffered emotional distress as a result of the greasing incident and confrontation with Dick Lloyd which occurred almost a year prior to his enrolling in Charter Canyon Hospital, and he continues to suffer from emotional distress. In listing the causes of work place distress, he does not include his demotion, the alleged wrongful termination, or knowledge or communication of his drug problems in the work place. After describing the distress suffered from the greasing, Robertson answered: "No, sir" to the question whether there was "anything else from the work place at Utah Fuel that you believed caused you emotional distress." (App. 1, pp. 215-17)

Such "evidence" hardly supports a finding that there is an issue of material fact requiring trial. His "allegations", "factual conclusions", "unsubstantiated opinions" and absence of "evidentiary facts" make summary judgment appropriate. Winter, 820 P.2d at 919; Treloggan, 699 P.2d at 748. The deposition testimony he cites reveals no facts from which a reasonable person could conclude that Utah Fuel's actions were "extraordinarily vile",

"atrocious and utterly intolerable in a civilized community." Retherford v. AT&T Communications, 844 P.2d 949, 978 n. 19 (Utah 1992).

In his brief, Robertson argues that the manner in which the Company dealt with his drug problem caused him distress yet in his deposition he provided a very different theory of causation. It was not his drug problem but rather the preexisting resentment of his crew who felt he should not have been allowed to transfer from an underground position to surface foreman which was the root source of his trouble. (App. 1, pp. 142-143) Also, it was the prior greasing incident including the confrontation with Lloyd that caused him the severe emotional distress. (App. 1, pp. 215-217)

Robertson may have suffered emotional distress in the course of his employment with Utah Fuel. However, there is no evidence that the Company "intended to cause [it], or acted in reckless disregard of the likelihood of causing, emotional distress" or that the Company's "conduct proximately caused [his] emotional distress." Retherford, 844 P.2d at 970-971.<sup>11</sup>

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<sup>11</sup>From his brief, it does not appear that Robertson is arguing that his demotion or loss of employment themselves establish an emotional distress claim; nor could he. See e.g., Sperber v. Gallager Ash Co., 747 P.2d 1025, 1028-1029 (Utah 1987) (even lying to an employee about the reasons for his termination does not meet the threshold of outrageous conduct); Larsen v. SYSCO Corp., 767 P.2d 557, 561 (Utah 1989) (affirming summary judgment dismissing employee's emotional distress claim which was based on his having been fired).

B. Any Emotional Distress Claim Would Be Barred by the Workers' Compensation Exclusive Remedy.

Even assuming Robertson articulated a viable emotional distress claim, it would be barred by Utah Code Ann. § 35-1-60 which provides that the compensation under the Workers' Compensation Act is the exclusive remedy of an employee against his employer and is "in place of any and all other civil liability whatsoever, at common law or otherwise", with respect to any injury "contracted, sustained, aggravated or incurred by such employee in the course of or because of or arising out of his employment." The only exception is where the employer "directed or intended the injurious act." Mounteer v. Utah Power & Light Co., 823 P.2d 1055, 1056 (Utah 1991).

As in this case, the plaintiff in Mounteer brought an intentional infliction of emotional distress claim against his employer based on plaintiff's suspected drug use allegedly being "broadcast" in the work place. The Utah Supreme Court upheld dismissal of Mounteer's claim as a matter of law. Employing the "indispensable element test", the Court held that mental harm is a necessary element of an emotional distress claim and it therefore is subject to the exclusive remedy provision. The Court also held that dismissal was proper in light of the complaint's allegation that the broadcast of the drug problem was in violation of "company

policy." As a result, "the broadcast could not have been directed or intended by [the employer]." Id., at 1059.<sup>12</sup>

The present case is indistinguishable from Munteer. A mental injury is an indispensable element of Robertson's emotional distress claim against Utah Fuel. Like Munteer, he argues that his alleged adversaries who tried to humiliate him acted "in direct violation of Utah Fuel's Approved Policy that required confidentiality." (Brief of Appellant, p. 36) There is no allegation, much less evidence, that the Company directed or intended the infliction of emotional distress or that any managerial employee inflicted a tortious act upon Robertson while acting within the scope of his authority or with a motive of furthering Utah Fuel's business. See, Hodges v. Gibson Products, Co., 811 P.2d 151, 157 (Utah 1991) (noted in Retherford, 844 P.2d at 965, n. 8).

#### CONCLUSION

Robertson has failed to show any facts sufficient to support a finding that his former employer breached an express or implied contract with him or committed the tort of intentional infliction of emotional distress. The district court's ruling is thus correct


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<sup>12</sup>Munteer was subsequently reaffirmed by the Court in Retherford, 844 P.2d at 963, 965-967.

in all respects and summary judgment for Utah Fuel Company should be affirmed.

Respectfully submitted this 11<sup>th</sup> day of April, 1994.

JANOVE & ASSOCIATES

By 

Jathan W. Janove

Monica Whalen Pace

Attorneys for Utah Fuel Company

CERTIFICATE OF SERVICE

I hereby certify that on this 11<sup>th</sup> day of April, 1994, a true and correct copy of the foregoing Brief of Appellee was delivered by hand to the following:

John L. Black, Jr., Esq.  
10 West 300 South, Suite 500  
Salt Lake City, UT 84101



## APPENDIX



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COPY

IN THE SEVENTH JUDICIAL DISTRICT COURT

STATE OF UTAH, CARBON COUNTY

-O-

LAWRENCE SCOTT ROBERTSON, :

Plaintiff, : Civil No. 92-21  
(Judge Boyd Bunnell)

-v- :

UTAH FUEL COMPANY, : Deposition of:  
Defendant. : LAWRENCE SCOTT ROBERTSON

-O-

Place: JANOVE & MILLER  
1350 Walker Center  
175 South Main Street  
Salt Lake City, Utah 84111

Date: January 27, 1993  
10:00 a.m.

Reporter: Kerry J. Sorensen, CSR/RPR

-O-



1 Q. Do you recall any discussions at that time  
2 with anyone concerning what circumstances under which  
3 you might lose your job?

4 A. Not at that time, sir.

5 Q. At the time that you first became employed  
6 at Utah Fuel Company, do you recall receiving any  
7 documents, letters, handbooks, manuals, that talked in  
8 any way about the length of your employment?

9 A. I do not.

10 Q. When you first went to work at Utah Fuel  
11 Company, do you recall having a discussion with anyone  
12 from the personnel department?

13 A. I do not.

14 Q. How long did you work as a laborer?

15 A. It seems like about a month.

16 Q. What was the next position you held?

17 A. Miner trainee.

18 Q. How did it come about that you went from  
19 laborer to miner trainee?

20 A. It seems like somebody just come up and said  
21 "You're the miner trainee."

22 Q. It wasn't an opening that you applied for?

23 A. Not at that time, no.

24 Q. How long were you a miner trainee?

25 A. About a month.

1 communication between miner transfer and buggy driver,  
2 watch the top, watch the sides, remain safe.

3 Q. You held the position of miner training for  
4 about a month, is that right?

5 A. Right.

6 Q. What was the next position you held?

7 A. Again, miner operator.

8 Q. Is that a miner operator B-pay?

9 A. A-pay.

10 Q. Who was your supervisor at that time?

11 A. Again, Larry Freeman.

12 Q. What were your duties and responsibilities  
13 in that position?

14 A. To properly cut and load coal safely and  
15 legally.

16 Q. Was that an underground position?

17 A. Yes, sir.

18 Q. Was the department superintendent the same  
19 also, Doug Johnson?

20 A. Yes.

21 Q. Around the time that you became an A-pay  
22 miner, was there any discussion concerning the length  
23 of your employment at Utah Fuel Company?

24 A. No.

25 Q. Was there any discussion about under what

1 circumstances you might lose your job?

2 A. No.

3 Q. Do you recall any discussions with anyone in  
4 the personnel department around the time that you  
5 became A-pay miner?

6 A. I do not.

7 Q. How long did you work as an A-pay miner?

8 A. Again, about a month.

9 Q. What was your next position?

10 A. Fire boss.

11 Q. How did it come about that you went from  
12 A-pay pipe miner to fire boss?

13 A. As I recall, I was asked if I was  
14 interested, and I said yes, and it seemed like within  
15 a week I was just appointed the job. There wasn't  
16 very many papered people on the property at that time.

17 Q. Do you recall who asked you if you'd be  
18 interested in that job?

19 A. As I recall, Doug Johnson.

20 Q. What were your duties as fire boss?

21 A. To be the aid of the foreman in charge, to  
22 ensure that the crew operated safely, professionally,  
23 and to be in charge if the foreman wasn't around.

24 Q. Did you receive a raise in pay when you  
25 became fire boss?

1           A.    No, sir, I did not.

2           Q.    How long were you a fire boss?

3           A.    Approximately six months.

4           Q.    Who was your supervisor while you were a  
5 fire boss?

6           A.    Doug Johnson -- no, Larry Freeman.

7           Q.    And Johnson was your department head?

8           A.    Yes.

9           Q.    During the time that you were fire boss, was  
10 there any discussion about the length of your  
11 employment or circumstances under which you could lose  
12 your job?

13          A.    No.

14          Q.    During that time did you have any  
15 discussions with anyone from the personnel department,  
16 that you can recall?

17          A.    No.

18          Q.    What was the next position you held?

19          A.    Junior foreman.

20          Q.    How did this change of job status come  
21 about?

22          A.    As I recall, again, I put in for the job.

23          Q.    There was an opening and you applied for it?

24          A.    Yes, sir.

25          Q.    How did you become aware of the opening?

1 Q. All miners, is that what you mean?

2 A. Yes.

3 Q. Any other categories of employee that you  
4 would have supervised during that time?

5 A. Not that I recall.

6 Q. During the time that you were junior foreman  
7 did you have any discussions with anyone concerning  
8 the length of your employment or circumstances under  
9 which you might lose your job?

10 A. I did not.

11 Q. Do you recall having any discussions with  
12 anyone from the personnel department during that time  
13 period?

14 A. I do not.

15 Q. What was the next position you held?

16 A. Senior foreman.

17 Q. How did that change come about?

18 A. It seems as though, as I recall, I was  
19 giving a coaching review, and it was around an  
20 anniversary of my employment, and my supervisor told  
21 me that I had been promoted to senior foreman.

22 Q. Was this Doug Johnson that told you that?

23 A. I don't recall.

24 Q. Would it have been either Johnson or Heath?

25 A. Yes.

1 to where the person would have the right to review.  
2 In other words, if he was receiving discipline from  
3 one supervisor, which sometimes may not seem just,  
4 that he had the right to go on up the ladder to seek a  
5 different answer. And at that time we were told that  
6 we could call Houston, Texas as long as we stayed in  
7 the proper channels.

8 Q. At this course was the employee handbook  
9 that was in effect at the time included as part of the  
10 training materials?

11 A. I don't recall.

12 Q. So you don't recall whether the written  
13 material that you received included the handbook or  
14 sections of the handbook or whether it was other  
15 material generated by Ray Stave or others?

16 A. As I recall, as a team we were writing  
17 certain pages of the handbook.

18 Q. ~~So during this course you actually worked on~~  
19 ~~writing what would or could become part of the~~  
20 ~~employee handbook?~~

21 A. ~~As I recall.~~

22 Q. Do you recall anything else being discussed  
23 at this course that concerned under what circumstances  
24 a employee could lose their job?

25 A. Not that I haven't already stated.

1 Q. Was there any discussion at this course  
2 about discipline for supervisors, as opposed to  
3 supervisors imposing discipline on hourly employees?

4 A. ~~I was under the assumption that they did not~~  
5 ~~differ~~

6 Q. ~~And what's the basis of that assumption?~~

7 A. ~~Well, basically because he was never told~~  
8 ~~there was any difference.~~

9 Q. ~~Was there any discussion one way or another~~  
10 ~~on the subject?~~

11 A. ~~No~~

12 Q. Following this course in 1985, were there  
13 any other meetings or group discussions in which the  
14 subject of disciplinary policy or procedure was  
15 addressed?

16 A. Not that I remember.

17 Q. Was that course the only training with Ray  
18 Stave that you participated in that addressed  
19 disciplinary policy or procedure?

20 A. As far as I recall, yes.

21 Q. So there were two group discussions or  
22 meetings, then: One was the one-half-hour meeting in  
23 which the changes to the handbook was addressed, and  
24 then the other was the course in the Richfield hotel  
25 with Ray Stave; is that right?

Robertson (Examination by Mr. Janove)

1 A. As I remember.

2 Q. Can you think of any other occasions?

3 A. I cannot.

4 Q. What was the next position you held after  
5 junior foreman?

6 A. Senior foreman.

7 Q. Just so that I'm on track here, during that  
8 '84 to '88 period that you've described, you actually  
9 held the position of senior foreman?

10 A. What is that time, again?

11 Q. 1984 to 1988.

12 A. Not all of it, no.

13 Q. Okay. Approximately what point did you go  
14 from junior foreman to senior foreman?

15 MR. BLACK: Objection, asked and answered.  
16 Are you asking a specific date?

17 MR. JANOVE: Yeah. If you can recall a  
18 specific date, just tell me. I don't recall that he  
19 gave me a specific date.

20 MR. BLACK: I don't see that -- his  
21 testimony was he was in a junior foreman position for  
22 two years, approximately, after which he was promoted  
23 to senior foreman, which he testified he was during  
24 the time period of '84 to '88.

25 Q. (By Mr. Janove) What was the next position



1 Q. Who did you report to during that time  
2 period?

3 A. Bill Shriver.

4 Q. Who did you supervise during that time  
5 period?

6 A. All surface employees.

7 Q. Approximately how many were there during  
8 that time?

9 A. 21.

10 Q. All of these employees at one point or  
11 another would have been under your supervision during  
12 that time frame?

13 A. Yes.

14 Q. During the time that you were on that  
15 temporary assignment, did you have any discussions  
16 with anyone concerning the length of your employment  
17 or circumstances under which you could lose your job?

18 A. No.

19 Q. Did you report to anyone else other than  
20 Bill Shriver during that time period?

21 A. No.

22 Q. Let's take a two-minute break.

23 (There was a short break taken.)

24 Q. (By Mr. Janove) After your temporary  
25 assignment on the surface, do you go back to your

1           A.    I believe his was a little bit less than  
2 what I was, because he had to schedule trains and  
3 trucks to be loaded, and it was kind of impossible to  
4 do that scheduling on the back shift.

5           Q.    Is this person Gary Peterson?

6           A.    Yes, it is.

7           Q.    Was Bill Shriver working any of the back  
8 shifts?

9           A.    As I recall he did a couple.

10          Q.    Per week or just period?

11          A.    Period.

12          Q.    Going back to the time that you were awarded  
13 the job of senior surface foreman, was there any  
14 discussion --

15               (There was a short break taken.)

16          Q.    (By Mr. Janove) Did you have any  
17 discussions with anyone concerning the length of your  
18 employment or circumstances under which you would lose  
19 your job or could lose our job?

20          A.    No, I did not.

21          Q.    From the time that you first went on the  
22 surface on temporary assignment, to the termination of  
23 your employment in 1991, were there any further group  
24 discussions or meetings in which disciplinary policy  
25 or procedure was discussed?

Robertson (Examination by Mr. Janove)

1 A. Not that I recall.

2 Q. From the time you first went on the surface  
3 temporarily to the termination of your employment in  
4 1991, and setting aside any discussions concerning  
5 your hospitalization at Charter Canyon, did you have  
6 any discussions with anyone concerning the length of  
7 your employment or circumstances under which you might  
8 lose your job?

9 A. Not that I recall.

10 Q. After you were awarded the position of  
11 senior surface foreman, you reported to Bill Shriver,  
12 correct?

13 A. Yes.

14 Q. Was he the only person you reported to, up  
15 to the termination of your employment?

16 A. Yes.

17 Q. Over that period of time did your  
18 responsibilities change in any way?

19 A. Yes.

20 Q. How so?

21 A. At first I was just over the operations of  
22 the upper surface facilities, and then I got to where  
23 I was responsible for all environmental concerns in  
24 that area. And I was also assigned to buy some heavy  
25 equipment for the company, and I was also assigned to

1 when I decided Dick Lloyd was not going to do it to me  
2 again. And that's what caused me great frustration to  
3 quit.

4 Q. Okay. Let me just take one step back to the  
5 conversation with Shriver the day before. Was it just  
6 the two of you that were present?

7 A. Yes.

8 Q. Between the time of the first greasing  
9 incident and then the incident with Dick Lloyd, did  
10 you have any discussions with anyone else concerning  
11 that greasing incident?

12 A. Not that I recall.

13 Q. Do you know if Shriver reported it to  
14 ~~anyone?~~

15 A. ~~I have no idea.~~

16 Q. Am I correct that the greasing incident took  
17 place on day one, you met and discussed it with Bill  
18 Shriver on day two, and then the Dick Lloyd incident  
19 occurred on day three? Is that the sequence?

20 A. I'm not 100 percent sure if the days were  
21 that consecutive or not.

22 Q. Were they all close in time?

23 A. Say within a week, yes.

24 Q. Why don't you describe, then, the Dick Lloyd  
25 incident, from the beginning. What was the first

1 thing that happened?

2 MR. BLACK: Taking about the second  
3 incident?

4 MR. JANOVE: Yes.

5 A. We had broke for lunch. There was myself,  
6 Dan Coccharan -- I'm trying to think of his real  
7 name. Lee -- Lee R. Sorensen, and Dick Lloyd eating  
8 lynch in the Tipple office. And Dick and Lee R.  
9 started joking around about it, and it was quite  
10 evident that they was trying my patience, and when  
11 just mere words and stuff didn't rattle me, Dick Lloyd  
12 thought he would come towards me again, which Dick  
13 loves to do to, kind of physically handle people. And  
14 as he did so, I physically handled him back. And  
15 that's when I got mad and I went upstairs and I packed  
16 my clothes and I was going home, as I recall.

17 Q. Okay. Backing up from just before there was  
18 some contact to when the subject of the first greasing  
19 incident first arose, who said what?

20 A. I don't recall exactly, but just to the best  
21 of my memory I can recall Dick Lloyd walked in the  
22 lunchroom, "There's old Scott. How do you like what  
23 you got the other day?"

24 "Well, I didn't, Dick."

25 "Well, how would you like some more?"

1 "Well, I don't think I would."

2 As I recall, that's the way it went.

3 Q. There were what other people present; Lee R.

4 Sorensen and Dan --

5 A. -- Coccharan.

6 Q. What did Coccharan or Sorensen say, if  
7 anything?

8 A. Dan was just minding his own business, as  
9 Dan does, and Lee got into the spirit of harassing me.

10 Q. Was Lee R. involved in the greasing incident  
11 before?

12 A. Yes.

13 Q. He participated in it?

14 A. Yes.

15 Q. And so he joined in teasing you about it?

16 A. Yes. That's why after he found out that  
17 he'd tried my patience and I was going home, that's  
18 why he come out to me in the parking lot. And I  
19 assumed that he was trying to apologize, but I didn't  
20 want anything to do with him. That's why I told him,  
21 "If you come one step closer to me ~~I'll lay you~~  
22 ~~out.~~"

23 And he says, "Scott, I just want to talk to  
24 you."

25 And I said, "I don't want to talk to you."

1 you and Glen?

2 A. Yes.

3 Q. In this meeting did you tell Glen about the  
4 greasing incident?

5 MR. BLACK: Which meeting are you talking  
6 about?

7 MR. JANOVE: The first meeting, at which the  
8 two of you were present.

9 A. I don't believe so, no, the different topic.

10 Q. (By Mr. Janove) What do you recall being  
11 discussed in that first meeting with Glen?

12 A. Glen asked me if I had a substance abuse  
13 problem or if I had ever had, and I told him that I  
14 had in the past, that I wasn't at that time, and  
15 that -- I remember Glen saying in that meeting that if  
16 we ever needed that, they had a substance abuse policy  
17 and that the insurance would paid for it, and that if  
18 by chance that I ever did need any help, that the  
19 insurance was there to pay for it.

20 Q. Did Glen ask you what had happened between  
21 you and Lloyd?

22 A. At that meeting?

23 Q. Yes.

24 A. No.

25 Q. Was the only subject discussed this question

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Robertson (Examination by Mr. Janove)

1           A.    I apologized for being out of control and I  
2   told him that I didn't like the way I had just brushed  
3   him off, and just pretty much I gave him an apology  
4   for the way I acted towards him.

5           Q.    What did Ben say?

6           A.    I don't recall.

7           Q.    At any point in time did you ever have a  
8   conversation with Ben Bringham in which the greasing  
9   incident was specifically discussed?

10          A.    Yes, I believe so.

11          Q.    When was that?

12          A.    Right after the greasing, as I recall. The  
13   exact time, I don't know.

14          Q.    Was it prior to the Lloyd incident?

15          A.    No, sir, I believe it was after.

16          Q.    Was it that conversation when you were on  
17   your way out?

18          A.    No, I don't believe so.

19          Q.    Okay. So let me see if I can place it.  
20   It's after the Lloyd incident but before you left the  
21   premises?

22          A.    No, because when I -- the Lloyd incident  
23   happened, and then I left. There was no discussion  
24   with anybody; I left the property,, other than just  
25   what I was saying as I walked out the door.

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Robertson (Examination by Mr. Janove)

1 Q. So the conversation with Bringham, where  
2 the greasing incident was addressed, occurred after  
3 you returned to work?

4 A. I -- sir, I'm not 100 percent sure when it  
5 did. I'm sorry.

6 Q. Somewhere in that general time frame?

7 A. Somewhere in that general time frame, yes.

8 Q. What do you recall telling Ben about the  
9 incident?

10 A. I don't remember -- recall telling him. I  
11 can't remember that much about it. I'm sorry.

12 Q. Do you recall if he brought it up to you or  
13 if you brought it up to him?

14 A. I do not.

15 Q. So your recollection is simply that it  
16 was --

17 A. It had taken place.

18 Q. Anything else you recall about that  
19 conversation?

20 A. No, sir.

21 Q. At any point in time did you ever have a  
22 conversation with Lou Mele in which the greasing  
23 incident was discussed?

24 A. Not that I recall.

25 Q. At any point in time did you have a

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Robertson (Examination by Mr. Janove)

1 conversation with Glen Zumwalt in which the greasing  
2 incident was discussed?

3 A. Not that I recall.

4 Q. What about with respect to Doug Johnson?

5 A. Not that I recall. The only person I  
6 recalling bringing that up to was -- reporting it to,  
7 was my immediate supervisor, because that was the line  
8 of communications. That's the way it should have been  
9 handled. If anybody else needed to know, I didn't  
10 think it was my responsibility to inform them.

11 Q. So to the best of your recollection Bill  
12 Shriver is the only one you brought it up to?

13 A. Yes.

14 Q. And that goes for both the greasing incident  
15 and the Lloyd incident?

16 A. Yes.

17 MR. JANOVE: Let's go off the record for a  
18 second

19 (There was a discussion held off the record.)

20 (Exhibit 2 was marked  
21 for identification.)

22 Q. (By Mr. Janove) Mr. Robertson, I'm about to  
23 hand you Deposition Exhibit 2, which I'll represent to  
24 you are a select set of pages from a Utah Fuel Company  
25 employee handbook dated June 1987. What I'd like you

0086

Robertson (Examination by Mr. Janove)

1 to do is take a moment and look through that and tell  
2 me if you agree with that.

3 Those are pages from the Utah Fuel Company  
4 handbook of June 1987?

5 A. Yes.

6 Q. Turning to Page 1 of Exhibit 2, which is the  
7 numbered page from the handbook, do you recall reading  
8 this page before?

9 A. Number 1 page.

10 Q. Yes.

11 A. Yes.

12 Q. When was that?

13 A. I don't remember exactly.

14 Q. Prior to the termination of your employment?

15 A. Yes.

16 Q. Do you believe that it would have been  
17 around the time that the handbook was given to you?

18 A. This first page? As I recall the first book  
19 we had was not like this.

20 Q. Now, the first handbook you had, was that  
21 given to you early on in your employment with Utah  
22 Fuel Company?

23 A. Yes.

24 Q. Sometime in 1981?

25 A. Yes.

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0087

Robertson (Examination by Mr. Janove)

0087

Robertson (Examination by Mr. Janove)

1 Q. And later you received a revised handbook?

2 A. Yes.

3 Q. And approximately when did you receive that?

4 A. I have no idea.

5 Q. Do you know if you received more than one  
6 revised handbook?

7 A. It seems like to me that we had the one  
8 meeting where it was handed out, a change of pages,  
9 and then another time we just got change of pages in  
10 our foreman's box that we was to hand out to our  
11 crews.

12 Q. Does the June 1987 date that's noted there  
13 refresh your recollection in any way as to when you  
14 would have received the handbook?

15 A. No. I'm sorry. I can't remember.

16 Q. Your recollection is that this page reflects  
17 a change from the first handbook that you received?

18 A. Yeah.

19 Q. Do you have any idea of how long after you  
20 received the first handbook that you would have  
21 received this page?

22 A. No, sir, I don't.

23 Q. Turning to the fifth paragraph, it begins,  
24 "The handbook is prepared to give you a general  
25 overview." I'd like you to read that and then tell me

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0088

Robertson (Examination by Mr. Janove)

1 if you recall that paragraph ever being discussed.

2 A. "This handbook is prepared to give you  
3 a general overview of the company and  
4 existing procedures, and benefits.  
5 Please keep in mind that this handbook  
6 is in general is nature and does not  
7 constitute terms and/or conditions of  
8 an employment contract. The  
9 procedures, policies, and benefits  
0 summarized in this handbook will be  
1 revised periodically and changed as  
2 circumstances warrants. Review this  
3 handbook carefully and let us know if  
4 you have any questions."

5 Q. And so my question is: Do you recall that  
6 paragraph being discussed?

7 A. Yes.

8 Q. When was this?

9 A. I don't recall when.

0 Q. Do you know if it was at the meeting that  
1 you described in which personnel presented changed  
2 pages to the handbook?

3 A. I don't recall.

4 Q. Is it possible that would have been  
5 discussed at the course that you described?

0090

Robertson (Examination by Mr. Janove)

1 A. That's as far as I know.

2 Q. Why don't you turn to Page 12. It's  
3 actually marked as Page 12 in the handbook, concerning  
4 the right to review. Do you recall having any  
5 discussions as to what was meant by this section under  
6 "Right to Review"?

7 A. Yes, I do.

8 Q. What do you recall?

9 A. That -- as I stated earlier, that from time  
10 to time there'll be personality conflicts or maybe one  
11 person may not be hearing your side of the story, so  
12 you always had the right to review. And if your  
13 supervisor's answer he gave you was not sufficient or  
14 wasn't what you thought it ought to be, you had the  
15 right to go above his head. And if that person wasn't  
16 hearing you or he didn't feel like he was being  
17 listened to, he had the right to go above his head.

18 It was my understanding he could use it, as  
19 I stated earlier, all the way up to employee relations  
20 in Houston, Texas.

21 Q. Do you know if any employee ever used the  
22 right to review procedure to complain about a problem  
23 that he or she had about you?

24 A. Yes.

25 Q. And when was this?

0091

Robertson (Examination by Mr. Janove)

1 A. I believe when I come back from the  
2 treatment center. I believe it was kind of a cluster  
3 of them that had meetings with Glen and Lou Mele.

4 Q. Do you recall any other time where the right  
5 to review procedure was used, and which was based on  
6 someone having a complaint about you?

7 A. Not that I'm aware of, no.

8 Q. Did you yourself ever use the right to  
9 review procedure?

10 A. I tried.

11 Q. When was this?

12 A. When I was terminated I tried to talk to  
13 Vernal Mortensen, and that got me nowhere.

14 Q. Did you actually talk to him?

15 A. Yes, I did.

16 Q. What was said in that conversation?

17 A. As I recall, it was "Yes, that's too bad."  
18 I said, "I'd like to talk about it."

19 "Well, I've heard all I need to hear about  
20 it."

21 And that was basically it, end of  
22 discussion.

23 Q. Nothing else was said?

24 A. Nope.

25 Q. Did you go to the next step above Mortensen?

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0092

Robertson (Examination by Mr. Janove)

1           A.    No, I did not.

2           Q.    Why didn't you?

3           A.    Because I wasn't exactly sure what that

4 would be, and I didn't feel like calling Glen or

5 whoever to find out what it was.

6           Q.    Did you have a copy of this handbook at the

7 time of your termination?

8           A.    No, I did not. I'd left it at work.

9           Q.    Did you ask for any information about the

10 right to review procedure from anyone in personnel,

11 such as Karl Kelly?

12          A.    Not at that time, no. The only one I had

13 discussed that with was Vernal. I felt that I needed

14 to let him know that I was using my official right to

15 review and, like I say, it didn't get me anywhere.

16          Q.    Did Vernal indicate to you that you had the

17 right to go up higher than himself?

18          A.    No, he did not.

19          Q.    Did you have an understanding at the time

20 that you could go higher than Vernal Mortensen if you

21 chose?

22          A.    Not 100 percent, no. I was -- somewhat

23 believed I did, but I had no resource to find out what

24 that was.

25          Q.    Did you consider Vernal to be part of the

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Robertson (Examination by Mr. Janove)

1 Houston corporate that you described before?

2 A. No.

3 Q. Would he come in at a level below the  
4 Houston corporate level?

5 A. As of -- the way I seen Vernal, was he  
6 worked for Coastal Corporation, but conducted the day  
7 to day running -- helping run and protecting the mine  
8 business, and not so much of the house than employee  
9 relations.

10 Q. Was it your feeling, after talking to  
11 Vernal, that Houston employee relations probably  
12 wouldn't be helpful even if you contacted them?

13 A. Correct.

14 Q. Was that a motivating reason in not trying  
15 to find out who to call in Houston?

16 A. Yes, it was.

17 Q. Did anyone discourage you from calling  
18 Houston employee relations?

19 A. No, sir, they did not.

20 Q. Did anyone discourage you in any way from  
21 utilizing the right to review?

22 MR. BLACK: What do you mean by  
23 "discourage?"

24 Q. (By Mr. Janove) Did anyone recommend that  
25 you not use the right to review?

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0094

Robertson (Examination by Mr. Janove)

1 A. Let's put it this way: The feeling that I

0094

Robertson (Examination by Mr. Janove)

1           A.    Let's put it this way: The feeling that I  
2 got after I talked to Vernal is I had a distinct sense  
3 that it was useless to proceed any farther.

4           Q.    And that sense came from what?

5           A.    My conversation with Vernal Mortensen.

6           Q.    At any other point in time did you ever use  
7 the right to review procedure?

8           A.    No, I did not.

9           Q.    At any point in your employment did anyone  
10 in management ever indicate to you that it's not  
11 appropriate for supervisors to use the right to  
12 review?

13          A.    No, they did not.

14          Q.    At any point during your employment did  
15 anyone in management ever indicate to you that any  
16 provision of the handbook did not state company  
17 policy?

18          A.    Run that by me one more time.

19          Q.    Did anyone in management ever say to you or  
20 indicate to you that what was said in the employee  
21 handbook was not company policy?

22          A.    What was said in the employee handbook was  
23 not company policy?

24          Q.    Right.

25          A.    No, sir.

1 Q. Were you ever advised one way or another  
2 whether this step system applied to all forms of  
3 discipline or whether it applied only to termination  
4 of employment?

5 Do you want me to take another crack at  
6 that?

7 A. Please.

8 Q. Were you ever told that this particular step  
9 system applied to any form of discipline?

10 A. Unless that was a serious safety concern,  
11 somebody blatantly put themselves or another in  
12 immediate jeopardy.

13 Q. Were you ever advised that this procedure is  
14 what you should follow in cases of demotions, as  
15 opposed to firing somebody?

16 A. I was under that assumption, yes.

17 Q. What did that come from?

18 A. Just a general feeling that that's the way  
19 we did things, because it was my understanding that  
20 Utah Fuel's attitude was to encourage the employee, to  
21 give that employee every chance, which that's why we  
22 come up to the step program.

23 Q. Are you aware of any circumstances in which  
24 this step system was used, in which the ultimate  
25 discipline was a demotion as opposed to somebody being

1 fired?

2 A. I ~~know of people~~ being demoted, but whether  
3 or ~~not the step~~ process was used I do not know.

4 Q. Do you recall whether there was any  
5 discussion in which the issue of demotion as opposed  
6 to a firing was discussed?

7 MR. BLACK: Objection, vague and ambiguous.  
8 What are you talking about; any demotion, any  
9 discussion, at any time?

10 MR. JANOVE: I'll ask it more precisely.

11 Q. Was there any discussion involving the issue  
12 of whether a demotion should be treated differently  
13 from a firing?

14 A. With who?

15 Q. Just as a matter of company policy.

16 A. Not that I'm aware of.

17 Q. Do you recall any discussion involving  
18 whether this step system applied to supervisors?

19 A. I do not recall any discussion. I was under  
20 the impression we was all treated the same and  
21 equally.

22 Q. So your understanding was that this step  
23 procedure would be something that you would use with  
24 your employees, but would that also be something your  
25 supervisors would use with respect to you personally?

1           A.     Yes.

2           Q.     Did that understanding come from -- well,  
3 why don't you tell me. What did that understanding  
4 come from?

5           A.     Well, because I have heard through the rumor  
6 mill of more members getting letters in their files.  
7 Actual knowledge, it's, hey, someone's not going to  
8 come up and tell me so-and-so's problems.

9           Q.     You mentioned earlier that Roland Heath had  
10 lost his job, correct? Was that a disciplinary  
11 action?

12          A.     I have no idea what went on there.

13          Q.     Do you know if it was based on poor  
14 performance on his part?

15          A.     Again, I don't know.

16          Q.     Did you have an opinion at the time that his  
17 performance was subpar?

18                 MR. BLACK: Objection. He's answered the  
19 question that he doesn't know.

20                 MR. JANOVE: I think it was a different  
21 question.

22          Q.     When you were working for Roland, what was  
23 your opinion of his job performance?

24          A.     I felt like Roland was very capable and was  
25 doing the best he could.

1 Q. You didn't observe anything in him that in  
2 your mind would justify discipline?

3 A. No, sir, I did not.

4 Q. Do you know whether a disciplinary step  
5 procedure was used prior to his losing his job?

6 A. I do not know that. I can only assume.

7 MR. BLACK: We don't want you to assume  
8 anything.

9 MR. JANOVE: Whatever you have knowledge of.

10 Q. Are you aware of any foreman or supervisor  
11 or other management person -- supervisor or other  
12 management position going through a disciplinary step  
13 procedure?

14 A. Yes.

15 Q. Who are you aware of?

16 A. It seems like to me -- I'm not 100 percent  
17 sure, but it seems like to me Gaylen Steiner was.

18 Q. What was his position?

19 A. Foreman.

20 Q. That was his supervisor?

21 A. I believe. I'm not 100 percent sure.

22 Q. Was he underground?

23 A. Yes.

24 Q. And who do you believe it to be?

25 A. I believe -- he told me not to assume. I'm

1 assuming again.

2 Q. Well, if you have a basis to -- you don't  
3 have to be 100 percent sure, but as long as you're  
4 qualifying it's what your belief is, it's okay.

5 A. Ray Christensen.

6 Q. What makes you think that a disciplinary  
7 step procedure was used in his case?

8 A. Because I can remember him talking about it.

9 Q. He told you what level he was at?

10 A. Yeah. He had received a letter.

11 Q. What happened to him?

12 A. I don't know. I guess -- I'm assuming  
13 again.

14 Q. Well, did he stay employed?

15 A. Yes.

16 Q. Did he tell you "I got this problem revolved  
17 at Step Such-and-such"?

18 A. No.

19 Q. Any words to that effect?

20 A. No.

21 Q. Turning to Page 15, the second paragraph  
22 below Step 4, it states:

23 "While the above steps will be  
24 followed in most routine situations,  
25 fragrant violations of normally

1 A. Yes.

2 Q. And what is that?

3 A. I had the verbal commitment of Glen Zumwalt  
4 that if anybody needed help they could go get it.

5 (Exhibit 3 was marked  
6 for identification.)

7 Q. (By Mr. Janove) Why don't you take a moment  
8 to read to yourself Deposition Exhibit 3.

9 A. Three?

10 Q. Yes.

11 MR. BLACK: I wonder if it would help if we  
12 went off the record for a minute or two so I could  
13 read it with him.

14 MR. JANOVE: Fine.

15 (There was a discussion held off the record.)

16 Q. (By Mr. Janove) Have you seen Deposition  
17 Exhibit 3 before?

18 A. Yes.

19 Q. When was the first time you saw it?

20 A. When I come out of the treatment center.

21 Q. Was that about the time that you understood  
22 it was prepared?

23 A. No. I thought it was as is prior to that.

24 Q. Okay. My question just went to the actual  
25 preparation of the document as opposed to any of the



1 substantive policies underneath it. Do you have an  
2 understanding as to when this document was written?

3 A. As to when it was written? No, I do not.

4 Q. Having read it, is there anything in it that  
5 you think was not company policy in 1991?

6 A. No.

7 Q. Is there any company policy on alcohol,  
8 drugs, or controlled substances that is not expressed  
9 in this document, to your understanding?

10 A. Not that I'm aware of.

11 Q. Comparing Deposition Exhibit 3 to the  
12 statement in the handbook, is Exhibit 3 a more  
13 complete statement of company policy on the subject?

14 A. Yes, I believe so.

15 Q. Turn to Page 28 and 29 of Exhibit 2, the  
16 employee handbook. Go ahead and take a look at  
17 those. Have you read that part of the handbook  
18 before?

19 A. Yes, I have.

20 Q. Do you recall reading this language at the  
21 time of the Ray Stave's course that you attended?

22 A. I don't recall whether this was discussed  
23 then or not.

24 Q. Do you recall reading this language around  
25 the time of the other meeting you've described, in

Robertson (Examination by Mr. Janove)

1 starts talking about right to employment and  
2 employment benefit packages, it seems like you're  
3 asking for a legal conclusion beyond the scope of this  
4 witness' ability.

5 MR. JANOVE: All right. Okay. I'll come at  
6 it another way.

7 Q. Do you recall any discussions in which the  
8 company's health plan and what it provided was  
9 addressed?

10 A. Yes.

11 Q. ~~In these discussions do you recall anything~~  
12 ~~concerning issues of length of employment?~~

13 ~~A. No, I don't.~~

14 Q. To your knowledge did the company provide  
15 all that was required under the employed benefit plan  
16 concerning your treatment for substance abuse?

17 A. No.

18 Q. Was there some benefit that you believe the  
19 company was supposed to provide you that it did not?

20 MR. BLACK: Let me object to this on this  
21 basis: If your question is concerning the terms of an  
22 insurance contract, I object on the basis of calling  
23 for a legal conclusion. If you're question is  
24 something other than that, you'd better restate it.

25 MR. JANOVE: Okay. It may be a question you

1 employee handbook?

2 A. Not that I'm aware of.

3 Q. What led up to your decision to enter  
4 Charter Canyon Hospital in May of 1991?

5 A. What led to my decision?

6 Q. Yes.

7 A. I finally realized that I was addicted.

8 Q. To alcohol and cocaine?

9 A. Yes.

10 Q. Anything else?

11 A. No, sir.

12 Q. Was there any triggering incident or episode  
13 that brought you to that conclusion?

14 A. No, sir.

15 Q. Throughout the time of your employment at  
16 Utah Fuel Company, did you ever consume cocaine or  
17 alcohol on company premises?

18 A. No, I did not.

19 Q. Did you ever sell these things on company  
20 premises?

21 A. No, I did not.

22 Q. Did you ever come to work under the  
23 influence of those substances?

24 MR. BLACK: Do you understand the question?

25 A. Yes. I would have to say in so much as --

1 not any more than anybody coming to work with a  
2 hangover.

3 Q. So what does that mean?

4 A. ~~That means to me~~ that if you would probably  
5 ~~have taken a blood sample,~~ yes, it would have showed  
6 ~~up in my bloodstream.~~ To where it affected me, the  
7 way I acted or the way I conducted my business, no.

8 Q. Do you think that your addiction to these  
9 substances affected the way you act in general?

10 MR. BLACK: I'm going to object to that. It  
11 seems like the relevance of the question concerns  
12 behavior on the job, but --

13 MR. JANOVE: Well, let me ask it in other  
14 ways.

15 Q. Do you think that your addiction affected  
16 how you dealt with people?

17 A. I don't believe so.

18 Q. Did it make you ~~high strung?~~

19 A. ~~Sometimes, yes.~~

20 Q. Was that all the time or just when you were  
21 actually using alcohol or cocaine?

22 A. Well, being high-strung or --

23 Q. In terms of its affect on you.

24 A. Run it by me one more time.

25 Q. Okay. What I meant was: In respect to your

1 A. Right at the first of it.

2 Q. Going back to the second conversation you  
3 had with Bill Shriver, in that conversation did you  
4 tell him that it was a 28-day program?

5 A. Yes, I did.

6 Q. Did you have any discussions about your  
7 plans or desires for returning to work?

8 A. I was assuming I was covered and there would  
9 be no problem. The only thing that Bill said to me  
10 was "Don't worry about a thing. Get your problems  
11 taken care of."

12 Q. This is in the second conversation?

13 A. Yes.

14 Q. Was anything else said in the second  
15 conversation?

16 A. Not that I remember.

17 Q. So what was the next conversation you had  
18 with someone at Utah Fuel Company?

19 A. I believe it was the third day.

20 Q. Also with Bill Shriver?

21 A. Yes.

22 Q. Also by telephone?

23 A. Yes.

24 Q. What was said in this conversation?

25 A. That he didn't see any sense in us keeping

1 touch daily any longer, that he wanted to know if he  
2 could talk to my doctor.

3 I assured him he could, and he wanted us to  
4 keep in touch once a week. And as I recall that was  
5 about it.

6 Q. In that third conversation, was anything  
7 said about your plan or desire with respect to  
8 returning to work?

9 A. No, sir.

10 Q. When was the next conversation that you had  
11 with someone at Utah Fuel Company?

12 A. I think it was about a week on down the  
13 road.

14 Q. With Shriver again?

15 A. Yes.

16 Q. By telephone again?

17 A. Yes.

18 Q. What was said in this conversation?

19 A. "How are you doing?"

20 Q. Just basic things you do and what they're  
21 telling you to do?

22 A. Yeah. Oh, it seems like Bill had found out  
23 I was coming off the bout with drugs. I had a blowup  
24 and I was going to leave, and I asked if my doctor had  
25 talked to him about that. He told me, "Goddamn it,

1 Don't be giving me any more."

2 And he kept telling me, "You're going to  
3 blow up if you don't," and I kept telling him "I don't  
4 want them." So after I blew up, I agreed to take  
5 them.

6 Q. Any other change in the program?

7 A. No, sir.

8 Q. Going back to the conversation with Bill  
9 Shriver, in which he encouraged you to stay in the  
10 program, was ~~there any discussion at that point about~~  
11 ~~your plans or desires concerning returning to work?~~

12 A. ~~No. I was under the assumption that~~  
13 ~~everything was fine.~~

14 Q. When was the next conversation you had with  
15 a Utah Fuel person?

16 A. I believe it was just before I got out,  
17 maybe a week before I got out.

18 Q. With whom did you talk?

19 A. Bill Shriver.

20 Q. In person or by phone?

21 A. By phone.

22 Q. What was said in this conversation?

23 A. He was wishing me well, wanted to know how  
24 things was going, but ~~I sensed a bit of uneasiness in~~  
25 ~~his voice or something, and he wouldn't say what it~~

1 was.

2 Q. What was your sense?

3 A. Something -- there was trouble in paradise.

4 Q. Something about the job or with the company?

5 A. That's what I sensed.

6 Q. Did you ask him directly?

7 A. Yes.

8 Q. What did he say?

9 A. Nothing.

10 Q. One way or the other?

11 A. Huh-uh.

12 Q. Did he say he just didn't want to talk about  
13 it?

14 A. No, he just brushed it off.

15 Q. Did you feel reassured at that point?

16 A. No, I did not.

17 Q. Did that conversation create some anxiety on  
18 your part?

19 A. Yes, it did.

20 Q. And what was that anxiety?

21 A. That maybe Bill wasn't telling me the full  
22 scoop of what was going on at the mine while I was in  
23 Charter Canyon.

24 Q. Did he indicate that there was a possibility  
25 that you would come back to a different job?



1 A. No.

2 Q. Did he say anything about the possibility  
3 that you'd go underground?

4 A. No, not that I recall.

5 Q. Was your anxiety over a fear that you might  
6 be reassigned underground?

7 A. No.

8 Q. Did it have a particular focus?

9 A. Yes.

10 Q. What was that?

11 A. ~~Losing my job.~~

12 Q. ~~Just losing the job completely?~~

13 A. ~~Yes.~~

14 Q. And did you tell Bill that in the  
15 conversation, that it was specific what your anxiety  
16 was?

17 A. No.

18 Q. How long did that conversation take place?

19 A. How long? Maybe a five-, ten-minute  
20 conversation.

21 Q. Just the two of you were involved?

22 A. Yes.

23 Q. Was there anything else said in that  
24 conversation?

25 A. I said "I think you ought to talk to Glen."

1 Q. What do you recall was said on that subject?

2 A. I just -- what I recall -- like I say, it's  
3 kind of like -- it wasn't anything abrupt or anything,  
4 it was just a hint that Glen put it just like "We're  
5 going to need to talk about this when you get out," or  
6 something along those lines. I don't remember his  
7 exact words.

8 Q. Did he indicate that he didn't want to  
9 really deal with the situation now but wanted to wait  
10 until you actually got out of the hospital?

11 A. Yes.

12 Q. Did you accept that?

13 A. Yes, I accepted it, but it was very  
14 troublesome, yes.

15 Q. Did your anxiety about ~~losing your job go up~~  
16 ~~or down or stay the same after the conversation with~~  
17 ~~Glen?~~

18 A. ~~Escalated.~~

19 Q. ~~A lot?~~

20 A. ~~A lot.~~

21 Q. Did you talk to Bill again after you talked  
22 to Glen?

23 A. Yes.

24 Q. Well, before I get to it, was there anything  
25 else said you can recall in the conversation with

1 Glen?

2 A. Not that I recall.

3 Q. So when did you next talk to Bill?

4 A. Just before I got out. I called him to tell  
5 him when I was getting out and that I needed a day to  
6 get my kids taken care of, if he would allow me to  
7 have it, and that I'd be back to work. And at that  
8 time he told me to call him when I got home.

9 Q. Did he say anything else?

10 A. Not at that time.

11 Q. Did you bring up your anxiety about losing  
12 your job?

13 A. Yeah.

14 Q. What did you tell him on that subject?

15 A. I told him -- I says -- I told him I talked  
16 to Glen and that everything wasn't all right.

17 Q. What did Bill say in response to that?

18 A. That we'd talk about it when I come on work.

19 Q. ~~So he was noncommittal about it?~~

20 A. ~~Pretty much, yes.~~

21 Q. Did you press him for the explanation?

22 A. At this period I was very vulnerable and I  
23 was not pressing anyone for anything.

24 Q. And so Bill just said, "We'll deal with it  
25 after you're out"?

## Robertson (Examination by Mr. Janove)

1 A. Uh-huh.

2 MR. BLACK: Yes?

3 A. Yes.

4 Q. (By Mr. Janove) Anything else in that  
5 conversation?

6 A. No, sir.

7 Q. And then when was your next conversation  
8 with a Utah Fuel person?

9 A. When I got home I called Bill on the phone  
10 to tell him I was home and I had things taken care  
11 of. I wanted to know when and what shift he wanted me  
12 to come to work on.

13 Q. What did he say?

14 A. He said, "We'd like you here" -- I believe  
15 it was Monday, "but don't come in until about noon."

16 Q. Did he say why?

17 A. No, he did not.

18 Q. I take it noon wouldn't be a normal  
19 reporting time?

20 A. No, it was not.

21 Q. When he said to come in at noon, what did  
22 that mean to you?

23 A. It meant to me he was so damn embarrassed of  
24 me he didn't want anybody to see me, and I had to  
25 sneak in when nobody was around.

1 Q. Did you tell him that?

2 A. No, I did not.

3 Q. What made you think he'd be embarrassed of  
4 you?

5 A. I don't know if it was him or everybody in  
6 management, in general, that -- I didn't know what was  
7 going on.

8 Q. Did he say what your duties would be on that  
9 first day?

10 A. Nope.

11 Q. Did you ask him what your duties would be?

12 A. No.

13 Q. Did he say what would happen at noon when  
14 you came?

15 A. No.

16 Q. Was there any more talk about some kind of  
17 meeting when you got back?

18 A. No.

19 Q. Did you say to Shriver "What does it mean  
20 about my job," or words<sup>to</sup> to that effect?

21 A. I asked him, "What the hell is going on,"  
22 and "I just want you to tell me."

23 "Don't worry about it. We'll take care of  
24 it when you get up here."

25 Q. So where was your anxiety level at that

1 point?

2 A. ~~Sky~~ high.

3 Q. And then was anything else said in that  
4 conversation?

5 A. No.

6 Q. When was the next conversation?

7 A. When I got up to work that day at noon.

8 Q. Who did you meet with first?

9 A. Bill Shriver.

10 Q. Just the two of you?

11 A. Yes.

12 Q. What was said at that meeting?

13 A. Well, that's kind of when the world come  
14 crashing down around my shoulders. That's when --  
15 "Well, before you go back to work, we've got to get  
16 Glen in here and we've got to sit down and make some  
17 decisions and talk this deal over with Glen." So that  
18 was it.

19 Q. Was anything else said in that initial  
20 meeting with Bill?

21 A. Not that I can recall.

22 Q. How long after that did you meet with -- did  
23 the meeting with Glen Zumwalt take place?

24 A. I think he went right in to get Glen, and  
25 Glen was tied up with something for about a half hour,

1 and Glen come in right around there.

2 Q. So did you just wait for the half hour? You  
3 didn't start doing any work?

4 A. No.

5 Q. You weren't in shape to?

6 A. I was ready to, yes.

7 Q. So then a meeting took place about a half  
8 hour later with you, Bill, and Glen?

9 A. Yes.

10 Q. Anything else?

11 A. Not at that time, no.

12 Q. And what was said at the outset of the  
13 meeting?

14 A. In that meeting?

15 Q. Yes.

16 A. Just as a general -- Glen asked me what I  
17 felt like I could do and what I could handle, and I  
18 expressed that I would like to stay in the management  
19 position and I'd like to go right on trucking where I  
20 was at.

21 Q. And what did Glen say?

22 A. He was listening, and he didn't feel like --  
23 he had some questions there, I could tell. And we  
24 discussed some of my recovery and discussed the rumor  
25 mill process at the mine. And I think a couple times

1 Glen asked me if that's where I felt I should be, and  
2 I told him yes.

3 And then Glen left the room for awhile. I  
4 think he went to talk to Lou Mele, I don't know.

5 And then Glen come back in and he told me he  
6 was sorry, that -- if I recall correctly, that he  
7 couldn't offer me a foreman's job back, that I was  
8 going to have to go back underground to A-pay.

9 And going back underground wasn't no  
10 problem, but I worked hard for my foreman's job, and I  
11 told him that wasn't acceptable and I went home.

12 Q. Was Lou Mele present at any of this?

13 A. I don't recall.

14 Q. Do you want to take a short break?

15 A. Yeah.

16 (There was a short break taken.)

17 Q. (By Mr. Janove) Going back to the first day  
18 you returned to work, in the meeting in which Glen  
19 informed you about going underground as an A-pay  
20 miner, did he say why that's what he wanted to do?

21 A. It was pretty evident, because I admitted  
22 that I had a drug problem.

23 Q. Did Glen say that?

24 A. As I recall, yes.

25 Q. And as best you can recollect, what words



1 Q. Was anything asked of you in return?

2 A. I don't recall.

3 Q. Was there any discussion about what kind of  
4 problems, if any, might exist in you going back out as  
5 foreman for the surface operators?

6 A. Yes.

7 Q. What was that discussion?

8 A. That I would have to win those people over  
9 to earn their trust.

10 Q. What did you say?

11 A. I said I would try.

12 Q. Did you tell them how you planned to do  
13 that?

14 A. I can't recall if I did then or not.

15 Q. Was there any discussion about you meeting  
16 one-on-one with each of the operators?

17 A. I believe I said I would.

18 Q. Did that strike you as a good idea at the  
19 time?

20 A. At the time, no.

21 Q. Why not?

22 A. Because I felt like these guys wanted me out  
23 of there because I was not one of them, irregardless  
24 of whether I had a drug problem or not, and it didn't  
25 matter what I said to them or what I did, or it didn't

1 matter what kind of a manager I was with them or what  
2 I had ever done with them or around them, they were  
3 not going to accept me as a foreman and they would not  
4 have peace until they had run me off.

5 Q. And this goes back to the resentment that  
6 you, coming from underground, had gotten the position  
7 of foreman on the surface?

8 A. Correct.

9 Q. And this made you think that no matter what,  
10 those people weren't going to support you?

11 A. Right.

12 Q. So that meeting one-on-one wouldn't produce  
13 any value?

14 A. No.

15 Q. Did you say that in the meeting?

16 A. No, I did not. I was willing to try to do  
17 anything to save my job.

18 Q. Did you talk about doing anything else aside  
19 from the one-on-one?

20 A. Yes.

21 Q. What was that?

22 A. As I recall, I think the biggest problem  
23 that those people ever had was, like I said,  
24 self-esteem and nobody to stick up for them and nobody  
25 to help them with their problems. I went around and

1 Bill in which you were told that you'd get your old  
2 job back, was there anything else said in terms of  
3 what you would do specifically to try to get the trust  
4 of the work force back?

5 A. Not that I recall.

6 Q. Was there any other discussion in terms of  
7 whether this would be on a trial basis or whether  
8 there was an experiment or anything of that nature?

9 A. Not that I recall.

10 Q. Was there any discussion at all in terms of  
11 how long you might expect that assignment to continue  
12 or that job to continue?

13 ~~A. Not that I recall.~~

14 Q. Can you think of anything else that was said  
15 in that conversation?

16 A. No, sir, I can't recall anything.

17 Q. Did you acknowledge any mistake on your part  
18 as far as supervising the work force at Utah Fuel?

19 A. I owned up to some, yes. Whether what was  
20 just all minor or not is debatable.

21 Q. What was that, that you owned up to?

22 A. ~~Not being around for those guys.~~ They've  
23 been there on their own for years. They had nobody to  
24 talk to, nobody to address their concerns.

25 The reason being is that department was so

1 department was organized and run you couldn't give  
2 them as much support as they needed?

3 A. Partially, yes. Sometimes they just  
4 needed -- a listening ear would have took care of 90  
5 percent of these problems those guys have, but when  
6 you're not there you can't give them that.

7 Q. And that goes back to what you described  
8 before, that you aren't able to because of the way  
9 things were structured?

10 A. Correct.

11 Q. Any other reasons that you felt part of that  
12 opposition?

13 A. Not that I can recall.

14 Q. Did you form any impression at that time,  
15 based on those one-on-one meetings, to what extent, if  
16 any, your drug use in and of itself played a role?

17 A. The way I see that right there is that it  
18 was a chance for them to finally have something that  
19 they could get somebody to listen to, to run me off,  
20 yes.

21 Q. So it wasn't so much that it was that they  
22 were concerned about the fact that you had had a drug  
23 problem, as much as they had had some dirt against you  
24 that they could exploit?

25 A. That's the way I see it, yes.

1 real pro or real con?

2 A. No, sir.

3 Q. What about at the department-head level,  
4 superintendent level? What's your impression of that  
5 group?

6 A. I believe that they were very supportive of  
7 me, you know, probably -- what they told me and what  
8 they told Glen are two different stories. I don't  
9 know. They said, "We're proud of you. We're glad you  
10 did it. We're behind you," that type of stuff.

11 Q. So at least in terms of what you could  
12 perceive, the superintendents all seemed supportive of  
13 you?

14 A. Yeah.

15 Q. What about with respect to Glen? What was  
16 your impression at the time?

17 A. My impression?

18 Q. What did you feel in terms of whether Glen  
19 was supportive of you, whether he wanted you to  
20 succeed or not to succeed?

21 A. On face value I think Glen wanted me to  
22 succeed, but on the other hand, I knew that -- well, I  
23 shouldn't say I knew, but I had a real good gut  
24 feeling that things were going to happen in order to  
25 take care of the problem.

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Robertson (Examination by Mr. Janove)

1 I probably was causing a heck of a lot of  
2 headache, I know. I understand that.

3 Q. Was this problem, then, in your opinion,  
4 generated from the top down or from the bottom up?

5 A. I feel from the bottom up.

6 Q. And, again, because of that group of surface  
7 operators that resented that fact that you had that  
3 position?

7 A. That's the way I see it, yes.

8 Q. And so they made problems for Glen Zumwalt  
in terms of their agitating; is that accurate?

A. Yes.

Q. Do you believe it was that agitation on the  
part of those surface operators that ultimately led  
Glen to come in to you and say you were going to be  
demoted to an A-pay miner underground?

A. Yes.

Q. Do you think there was other factors?

A. Yes.

Q. What were those?

A. I feel like Glen Zumwalt was probably  
also -- this is just my feeling -- taking some  
pressure from corporate, and the fact he may have been  
directed from corporate on how to get rid of me in  
what month's time, I was allowed back.

1 Q. Is there anything else that gave you an  
2 impressions at the time that Mele was not supportive  
3 of you?

4 A. No, just that he avoided me.

5 Q. Anything else?

6 A. No.

7 Q. Now, when Glen informed you that you were  
8 going to be reassigned as an A-pay miner underground,  
9 did he tell you why that decision had been made?

10 A. Yes.

11 Q. What reason or reasons did he give you?

12 A. As I recall, he said, "With your cocaine  
13 problem and some of the excess baggage you've acquired  
14 outside, that's the reason why."

15 Q. Was this in the face-to-face meeting?

16 A. Yes.

17 Q. Was anyone else present?

18 A. No.

19 Q. Was this on the last day that you actively  
20 worked at Utah Fuel?

21 A. Yes.

22 Q. What was your response to him?

23 A. My response was put into a form -- or the  
24 question that was given to me was not given in such a  
25 way that I even had to answer.

1 Q. He just told you the decision was made; was  
2 that how it happened?

3 A. And if I didn't like it, just not to show up  
4 to work.

5 Q. Did he say that to you?

6 A. Yes.

7 Q. And in those words?

8 A. Yes.

9 Q. Did you say anything at all in response?

10 A. ~~I said I would call him if I decided not to~~  
11 ~~show up Monday.~~

12 Q. Anything else said in that conversation?

13 A. Yes.

14 Q. What?

15 A. He told me I had two options. He says --  
16 no, two options. Excuse me. They originally had had  
17 three: One was to leave me where I was at, one was to  
18 put me back underground as a foreman, and one was to  
19 put me at A-pay. He'd made the decision to put me at  
20 A-pay, and if I didn't like that, there wasn't any  
21 other option.

22 Q. ~~Did he say that you'd have an opportunity to~~  
23 ~~be promoted to foreman in the future?~~

24 A. ~~He suggested that yes.~~

25 Q. And did you say anything in response to that



1 that.

2 Q. Did he acknowledge he had made some  
3 mistakes?

4 A. Yes, he had.

5 Q. Do you know if he ever used the right of  
6 review to grieve the demotion?

7 A. I have no idea.

8 Q. Do you know if the disciplinary step  
9 procedure was used in Mackey's demotion?

10 A. I think it was, because of the repeated  
11 offenses that he'd done.

12 Q. Do you know whether the documentation called  
13 for in the disciplinary step procedure was used?

14 A. I have no idea.

15 Q. Was he suspended prior to being demoted?

16 A. I don't recall.

17 Q. Did you discuss with anyone in personnel  
18 Mackey's demotion?

19 A. No, I did not.

20 Q. Did you discuss with anyone in a management  
21 position Mackey's demotion?

22 A. No, I did not.

23 Q. Did you ever inquire of anyone at Utah Fuel  
24 whether Mackey's and Freeman's demotions were done in  
25 accordance with the step disciplinary policy?

Robertson (Examination by Mr. Janove)

1 A. No, I did not, because I assumed they was.

2 Q. Did you have any knowledge that it was?

3 A. No, I did not.

4 Q. What was the reason for that assumption?

5 A. Just that I'd seen them -- knew of times  
6 when they had messed up, and I assumed that their  
7 supervisor was working with them to correct them. The  
8 only way that their supervisor could have worked with  
9 them to correct it was to sit down and talk to them  
10 about it and work something out as to how they were  
11 going to correct it. If their supervisor was not  
12 doing that, then maybe there should have been another  
13 demotion.

14 Q. Anything else that gave you that assumption?

15 A. No, sir.

16 Q. Do you recall Wayne Olsen taking medical  
17 leave?

18 A. Yes, I do.

19 Q. Do you recall that he was replaced?

20 A. Yes, I do.

21 Q. Do you know why he was replaced?

22 A. No, I do not.

23 Q. Did you ever direct his being replaced with  
24 anyone?

25 A. Not that I recall. The only thing that I

1 can recall about that was someone -- one of my  
2 supervisors, and I can't recall which one, come in and  
3 told us that Wayne had been replaced, and that was it.

4 Q. At the time did you think that it was a  
5 wrong decision?

6 A. No, I did not.

7 Q. Did you feel it was violating company policy  
8 in any way?

9 A. No, sir, I did not.

10 Q. Why was that?

11 A. Well, because Wayne had been repeatedly off  
12 work for a prior condition that existed before his  
13 employment at Utah Fuel Company, as I recall, and as I  
14 recall we needed to fill his position while he was  
15 off. We needed the manpower, so the decision was made  
16 that we needed to fill that slot.

17 Q. Do you know if that decision was made based  
18 on a specific company policy or whether it was a  
19 case-by-case type of decision?

20 A. The way I understand it it's a case-by-case  
21 decision.

22 Q. Are you aware of any other situations in  
23 which someone was out on a medical leave or  
24 disability, and the decision came up on whether to  
25 fill or job or not?

1           A.    Yes, I do.  I believe Bruce Sherman -- he  
2 was a warehouseman -- broke his leg skiing.  Again, we  
3 needed manpower, and he was replaced.

4           Q.    Were you involved in that decision?

5           A.    No, sir, I was not.

6           Q.    Did that decision strike you as appropriate?

7           A.    That one there has been so long ago I can't  
8 recall how I felt about it.

9           Q.    Do you recall whether you had an opinion as  
10 to whether it violated company policy or not?

11          A.    No, I do not.

12          Q.    Was it your understanding that that decision  
13 was made on a case-by-case basis?

14          A.    As I recall, this was my understanding.

15          Q.    Are you aware of any other occasions  
16 involving a medical leave or disability, someone being  
17 out for physical problem and the issue coming up about  
18 whether their job should be filled?

19          A.    No, sir.

20                I would like to add something to that, if I  
21 may  I believe it was -- Jimmy Poulson (phonetic) I  
22 believe was replaced for a time.

23           Q.    And this was when he was out on some sort of  
24 sick leave or disability?

25           A.    If I recall, he was in jail.

1 Q. Other than Bill Shriver reporting it up the  
2 line, are you aware of any other way that that  
3 information would have gotten back to Lou Mele?

4 A. Me? I'm not.

5 Q. How about with respect to Glen Zumwalt?

6 A. No, I'm not.

7 Q. Did this incident cause you distress?

8 A. Yes.

9 Q. Describe that.

10 A. Well, when you're in a position when you're  
11 trying to do the best job you can, and you know that  
12 this department has absolutely no support and you have  
13 a bunch of guys that know they've got you on the run,  
14 that they can do something like this to you, and you  
15 can sit there and watch two shift supervisors laughing  
16 about it as it's happening, it causes you great  
17 distress.

18 Q. Did you experience any symptoms from this  
19 distress?

20 MR. BLACK: What do you mean by "symptoms"?

21 MR. JANOVE: Nausea, lack of sleep or  
22 appetite.

23 A. Yes.

24 Q. (By Mr. Janove) Describe those.

25 A. Loss of sleep, and I've lost appetite during

1     that period, for awhile. And it was just great mental  
2     pressure.

3             Q.     Any other symptoms: depression, paranoia,  
4     loss of self-esteem, anxiety, nervousness?

5             A.     Yes.

6             Q.     All of the above?

7             A.     Yes. Part of that distress is anxiety and  
8     stuff. I think that I needed to go to Charter Canyon  
9     to relieve some of that, a lot more than I needed to  
10    go to relieve my cocaine addiction.

11            Q.     So you believe that incident was a factor in  
12    your enrolling in Charter Canyon?

13            A.     What I knew was that I was under great  
14    mental distress, whether or not just from addiction or  
15    from some of these things happening to me. And all I  
16    knew was that I needed some help, so I sought help.

17            Q.     Other than these things you've mentioned,  
18    the greasing incident and the Dick Lloyd incident,  
19    were there any other incidents that you would put in  
20    that category of things that cause you distress --  
21    emotional distress from the workplace?

22            A.     Yes. I could see what was happening with  
23    this department and I could see exactly where the  
24    needs were, and I could see that the company could  
25    have helped this department out. And every time I

1 turned around to try to help out, or --

2 It wasn't like anything -- I was used to the  
3 mining department. You see a problem and you flag it,  
4 you get help. The maintenance department, after they  
5 get a problem you flag it, you get help. Tipple  
6 department, you've got a problem, you flag it, go fix  
7 it yourself. It was like being in a whole 'nother  
8 world.

9 Q. Anything else from the workplace at Utah  
10 Fuel that you believe caused you emotional distress?

11 A. No, sir.

12 Q. Did you receive treatment for your emotional  
13 distress that was separate from the treatment you were  
14 receiving for the cocaine and alcohol problems?

15 A. No.

16 Q. Was there some point in time that you  
17 overcame those symptoms of emotional distress?

18 A. I think this was -- I still suffer from it  
19 today. I have no way to get rid of it.

20 Q. And you were talking about the loss of  
21 appetite and sleep problems and those things?

22 A. Yes.

23 Q. Are you currently receiving treatment of any  
24 kind for those problems?

25 A. Antidepressants.

IN THE SEVENTH JUDICIAL DISTRICT COURT  
IN AND FOR CARBON COUNTY, STATE OF UTAH

LAWRENCE SCOTT ROBERTSON, )

CIVIL NO. 92-21

)

Plaintiff, )

vs. )

DEPOSITION OF:

UTAH FUEL COMPANY, DARYL )

HAWKINS, TATE TATTON, RAY )

CHRISTENSEN, GARY PETERSON, )

and JOHN DOES 1-10, )

Defendants. )

TAKEN: APRIL 29, 1993

REPORTED BY: SHARRON COLLIER, CSR

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(801) 224-9992



1 wasn't going to recur.

2 After he had left the property and after Friday, I  
3 was also told that Scott had been using drugs. I asked  
4 specifically how that knowledge was there. It was in my  
5 opinion hearsay at that point because it wasn't directly  
6 observed by people who were telling me that, and that  
7 that might have entered into his reaction.

8 So with Doug and Ray both telling me that Scott  
9 wanted to come back to work, that he wanted to apologize  
10 for his actions, and that he felt that they were  
11 inappropriate, I felt I had to confirm that.

12 And number two, after I got past that hurdle and we  
13 felt comfortable there, that I had to investigate the  
14 drug accusation. I wanted to do that privately. Didn't  
15 want that to be a public knowledge.

16 I had not talked to anybody else about that issue  
17 other than the person that brought it forward to me. So  
18 I did. And the first question that I asked Scott was in  
19 regards to what happened on Friday, why did it happen.

20 And he explained that -- his story was that he flew  
21 off the handle, that there was some things said. It was  
22 the straw that broke the camel's back, I think is my  
23 recollection of what I heard happened.

24 And he reacted and he wanted to -- he assured me  
25 that I didn't have to worry about that in the future,

1           A.    I believe that a straw may break the camel's  
2 back in Scott's instance. Scott was known to be  
3 impulsive and reactive. And I didn't try to put together  
4 in my mind at that time nor do I now that Scott -- there  
5 was a whole series of events that occurred.

6           It was conversations that were going on at that  
7 time that he reacted to. That's what I felt he was  
8 communicating to me.

9           Q.    So you didn't ask him about any other events  
10 that occurred prior to this?

11          A.    Had no reason to.

12          Q.    Okay. So then the conversation turned to the  
13 drug issue; is that right?

14          A.    Yes.

15          Q.    Tell me about that.

16          A.    I basically accused Scott of using drugs at  
17 that time. I did that for the reason of not beating  
18 around a bush about the issue. I just said -- I did it  
19 in this manner. I said: Did you react as you did  
20 because of your drug use?

21          Q.    So you didn't ask him first if he used drugs?

22          A.    No. I put it to him in a very -- I didn't want  
23 to put it out in a manner in which we could find reasons  
24 to say that -- or deny the questions. So I put it out  
25 as: Did you do it because of your drug use.

1           Q.    Let me stop you there. At that time were you  
2 just probing or had you determined in your own mind that  
3 Scott was using drugs or had a drug problem?

4           A.    I was probing. I had not made any  
5 determination as to whether he was but I was probing in  
6 that manner. And I probed -- that was my statement. And  
7 that led to the conversation about the drugs and Scott  
8 vehemently denied not only that his reaction was because  
9 of drug use, he also denied that he had ever used drugs  
10 while employed with Utah Fuel.

11          Q.    Did he say while employed?

12          A.    While employed.

13          Q.    While working or --

14          A.    No, he did not say that. He said the last time  
15 -- he said a couple of things. He said: The only time I  
16 ever played with anything was when I worked, with drugs,  
17 was when I worked with Deer Creek. I have not used them  
18 since.

19          Q.    Where did the conversation go from there?

20          A.    I told him that I would accept that  
21 explanation and I was glad to hear that. And I also told  
22 Scott if there was ever a problem that he needed help,  
23 we would be willing to help him. I wasn't referring  
24 directly to drugs at that time.

25                I was referring to drugs or alcohol or any other

1 issues, that we couldn't help him unless he could come  
2 forward or he would ask for help. I didn't know how else  
3 to do it. So we left that issue behind us.

4 Q. So when you were talking about that you were  
5 basically telling him that if you've got a problem,  
6 maybe you didn't use the specific words or maybe you  
7 did, drug, alcohol, whatever, come to me, we will talk  
8 about it. Is that basically the gist of that  
9 conversation?

10 A. Gist of that conversation is the company could  
11 not help him with a problem unless he could talk to us  
12 about it.

13 Q. And by coming to you and talking about it,  
14 what would the company do for somebody that would come  
15 to that?

16 A. Whatever the company could do. I didn't -- I  
17 did not explore that with him or talk to him about it or  
18 talk about any specific responses to any specific  
19 problems.

20 Q. At that time, the company insurance policy did  
21 cover substance abuse treatment, did it not?

22 A. It had some coverage, yes. It wasn't full  
23 coverage, unlimited.

24 Q. Maybe they cover eighty percent or up to a  
25 limit?

1 Q. What position does he hold now?

2 A. He's a mechanic.

3 Q. What position did he hold prior to his  
4 substance abuse treatment?

5 A. Mechanic.

6 Q. Same position?

7 A. Yes.

8 Q. Any reduction in pay?

9 A. Same pay.

10 Q. So he got his old job back, it sounds like,  
11 after he completed the treatment; is that right?

12 A. There was a period of time where he was not --  
13 that he was not employed.

14 Q. He was fired by the company?

15 A. He was -- I can't remember exactly how it fit.  
16 He was off work for a while and he did come back to work  
17 and was reinstated. I believe that period of time was  
18 recorded as absent without pay.

19 Q. Well, he was fired, wasn't he? He didn't quit  
20 voluntarily, did he?

21 A. He was not available to come back to work  
22 voluntarily. We had a period of time we talked to Jimmy  
23 about the issues and he did come back to work. I don't  
24 recall all of the steps that were taken between the time  
25 he left and the time he came back to work.

1     awaiting Scott's return?

2           A.     It would be a permanent foreman's position on  
3     the surface and then we would evaluate -- we wouldn't  
4     fill the third foreman's position until we see the  
5     results of the program and whether he would be out in  
6     thirty days or take longer or whether there was another  
7     issue that had to be addressed. But it would buy time to  
8     get somebody in a foreman's job.

9           Q.     The other foreman position, was that also a  
10    surface foreman's position?

11          A.     Yes, it was a surface foreman's position. We  
12    wouldn't have jeopardized our ability to bring Scott  
13    back in that position.

14          Q.     So the plan was still to try to bring Scott  
15    back at his same position though be it a little  
16    different --

17          A.     May not have been any different. We didn't  
18    know. It depended on some things. We had those issues on  
19    the surface that were there and I was very concerned  
20    about. But we didn't do that. We did not fill that  
21    position.

22          Q.     You didn't fill either one of the positions?

23          A.     No.

24          Q.     What was the reason for that?

25          A.     Bill didn't want to at that time.

1 Q. What did Bill want to do?

2 A. Wanted to wait to see what would happen with  
3 Scott's treatment.

4 Q. And if things went successfully then you  
5 wanted to bring Scott back to his same position?

6 A. Yes. Bill kept informing me -- he was very  
7 cautious in his discussion with Scott because he didn't  
8 know exactly whether Scott would be prepared to come  
9 back in a foreman position or not. And depending on the  
10 results of the treatment -- but he wanted to keep that  
11 option open.

12 Q. Did you ever talk to Scott while he was in  
13 treatment?

14 A. I don't believe I did while he was in  
15 treatment.

16 Q. Did you ever talk to any of his physicians or  
17 the other people at the hospital concerning Scott while  
18 he was in the hospital?

19 A. I talked to Dr. Brown, I believe, the day --  
20 or when Scott was released, at the end of his treatment.

21 Q. And tell me about that conversation.

22 A. Dr. Brown told me several things. The reason I  
23 talked to Dr. Brown is I knew Scott was coming back to  
24 work and that we needed to have some knowledge as to his  
25 feeling and Scott's abilities to do work and whether or

1     because they can be promoted to the second level based  
2     upon experience and years of service, their abilities to  
3     act as a foreman. But it's still the same type of  
4     position.

5           Q.     I understand. But he was at the second level  
6     of foreman?

7           A.     He was a senior foreman.

8           Q.     And the senior foremen receive a higher pay  
9     than the first level of foreman?

10          A.     That's correct.

11          Q.     So if Scott were to be demoted down to "A-pay"  
12     miner, what would that mean as far as a drop in pay for  
13     him?

14          A.     That would be a very significant drop in pay.  
15     I don't know the exact number. Probably be twenty-five  
16     percent or so in this case or maybe more. The question  
17     that we were dealing with is whether he could serve  
18     effectively as a foreman at whatever assignment. Not the  
19     issue of whether he should be first level, second level  
20     foreman, whether he could serve effectively as a  
21     foreman.

22          Q.     Who in the meeting was the proponent of  
23     demoting Scott to an "A-pay" miner? Was that your idea?

24          A.     I brought up the options that I thought should  
25     be explored. We discussed various options of where he



1           A.    He agreed with me and he agreed with Lou and  
2 he agreed with Doug. We all agreed together that was the  
3 right thing to do. So that's why I made the offer to  
4 Scott.

5           Q.    When you say you made the offer, what do you  
6 call an offer?

7           A.    I didn't give him an option but I made him the  
8 offer.

9           Q.    What was the offer?

10          A.    He came back in that afternoon. I don't think  
11 I can't remember if Bill was there at that meeting or  
12 not but I know since it was going to come out of Bill's  
13 -- it was no longer a job that would be in Bill's  
14 department, I took the lead on it.

15          And I told Scott that I felt real good about our  
16 conversation that morning, that I felt he could be  
17 successful and I felt the best place for him was in the  
18 mine as an "A-pay" miner and that's what I wanted him to  
19 do.

20          Q.    What did he say?

21          A.    He said: I understand why you're telling me  
22 that but, he says, I don't believe I can accept that.  
23 And I asked him why.

24          And he said: Well, I don't think my ego can stand  
25 it. I don't believe I can survive on the reduction in

1 next day. It was not that afternoon. And it was what I  
2 remember being told about what Lloyd Healey had said.  
3 And it certainly was his advice.

4 But by that time we had already -- by that time we  
5 already had talked, I had already talked to Scott and he  
6 didn't want to go underground. And I had to reconsider  
7 where we were going to go and I had to ask Scott to  
8 rethink it overnight.

9 Q. Why is it that Healey felt that Scott should  
10 be put back in his old job?

11 A. I don't know that exactly. I would be  
12 speculating because I didn't talk to him directly.

13 Q. What did Mele tell you about the conversation?

14 A. I believe that's all he told me, that he had  
15 talked to Lloyd about the whole process and that his  
16 advice was to put him back in the job. Because I don't  
17 recall that being a significant issue at the time. That  
18 was the next morning.

19 Q. I'm trying to find out the reasons why he  
20 advised you or told you to put Scott back.

21 A. I guess Lloyd Healey could tell you that but I  
22 don't think I can.

23 Q. Well, you were the one that had to implement  
24 this change?

25 A. Yes.

1 be adhered to in any corrective action proceedings.

2 Q. Let me ask you this. Is it your testimony that  
3 this does not apply to supervisory people in general or  
4 it doesn't apply to anybody or I'm just trying to  
5 understand is it your position on this --

6 MR. JANOVE: By this you mean the specific steps as  
7 opposed to the handbook as a whole?

8 MR. BLACK: I am talking about the step-wise  
9 Proceedings of improvement and progress program, I guess  
10 is what we are talking about here.

11 MR. JANOVE: Pages 13 through 15?

12 BY MR. BLACK:

13 Q. Yeah.

14 A. This is a step -- the step-wise procedure is  
15 what would generally be used in an hourly corrective  
16 action program.

17 Q. Hourly corrective action program? You mean  
18 hourly employees?

19 A. Yeah. Basically the non exempt work force.

20 Q. Is there a statement in there that  
21 specifically states that it does not refer to  
22 supervisory people or only applies to hourly?

23 A. It's evident how this is set up when you look  
24 at the first page of what you've given me. In the right  
25 to review procedure it talks about talking to the

1 he treated his hourly people during a period of time in  
2 1991 were very flagrant.

3 Q. Give me a specific example. What specifically  
4 was a flagrant violation?

5 A. His admission to me of very specifically how  
6 he treated his people, treated them like shit is what he  
7 said. And I took him at his word and I verified it with  
8 many conversations with people that that was in fact the  
9 way he treated them.

10 Q. Do you consider that to be a flagrant  
11 violation?

12 A. A flagrant violation of his responsibilities  
13 and duties as a supervisor.

14 Q. Are there any other flagrant violations that  
15 you can tell me about?

16 A. He hid activity that was against our rules and  
17 against the law.

18 Q. What was that?

19 A. The incident where a Cat went into a feeder on  
20 a stockpile was specifically hidden from me and  
21 management.

22 Q. Cat into a feeder. You didn't mention that  
23 this morning. Did you just think about this over lunch?

24 A. You didn't ask me.

25 Q. I asked you about the step-wise progression

1 and you listed three things.

2 A. No, I did not address this with Scott. This  
3 was never a disciplinary action but these were  
4 incidences that show that he did not -- at the time I  
5 talked to him about going back on "A-pay", in the  
6 interim I found out there were problems and I didn't  
7 think he could correct them.

8 We didn't go through them. I didn't list them and I  
9 felt that there had to be a change.

10 Q. Well, but what is this incident, the Cat into  
11 a feeder? You're going to have to explain that to me  
12 because when you say Cat I'm thinking of a little animal  
13 with fur on it. Can you be a little more specific?

14 A. The Cat is the Caterpillar tractor that we use  
15 on our stockpile to move coal around. Feeders were the  
16 draw points underneath that were used to reclaim coal.

17 Q. So what was Scott's involvement in this thing?  
18 What happened?

19 A. We had put a new system on the surface to  
20 stockpile and reclaim coal. And Scott had a specific  
21 responsibility of developing a safe work procedure for  
22 operation of the Cat and activities on the stockpile.

23 I think we were all aware of the seriousness of the  
24 potential of the problems out there so it was a priority  
25 to develop a procedure that we felt was safe to guard

1 against hazards that were out there. Feeders that feed  
2 the coal are large open cavities.

3 If you or a person or piece of equipment falls in  
4 one of them, it is life threatening. And so there was an  
5 incident where a Cat fell in a feeder and people that  
6 were involved with that were told not to tell anybody.  
7 They worked for Scott.

8 Scott told them not to tell anybody. Hidden. And we  
9 will solve our own problems and nobody else needs to  
10 know about this. To me that was very very significant.

11 Q. Did this happen under Scott's command?

12 A. Scott was the foreman at that time on the  
13 surface.

14 Q. Was it his crew?

15 A. At that time the entire surface would have  
16 been -- he would have had authority. He had authority in  
17 that area. I don't know if a person that directly was  
18 driving the Cat reported directly to Scott at that time  
19 or not. I can't answer that.

20 Q. If the person didn't report directly to Scott,  
21 then why is it somehow Scott's fault?

22 A. Scott was the one that directly suppressed the  
23 information.

24 Q. When did this event take place?

25 A. Took place sometime in the spring of '91.

1 Q. When did you hear about it?

2 A. I heard about it in June of '91.

3 Q. Did you say anything to Scott about it at the  
4 time?

5 A. This was after Scott was continuing on the  
6 surface. I found that it was an issue that was history  
7 and we were trying to make it succeed on the surface. It  
8 was after he came back to work.

9 Q. So you didn't talk to Scott about it?

10 A. No, I did not.

11 Q. You didn't tell him that this was a violation  
12 of company policy?

13 A. No, I did not.

14 Q. You didn't tell him that he was on warning for  
15 this incident?

16 A. No.

17 Q. Is there anything in his personnel file? Did  
18 you submit anything into his personnel file regarding  
19 this?

20 A. No. There is not.

21 Q. Is there anything in your diaries or your  
22 notes about this feeder incident?

23 A. There is in the notes.

24 Q. I still don't know if I understand you  
25 correctly. Are you telling me that this step proceedings

1 program, they call it the improvement in progress  
2 program, are you telling me that in your opinion this  
3 does not apply to anyone other than hourly employees?

4 A. It does not apply -- its specific format is  
5 not used specifically in a four-step process in our  
6 supervisory group.

7 Q. Is it used with the hourly people?

8 A. Yes. With the exceptions that are stated in  
9 it.

10 Q. With the exception of flagrant violations of  
11 normally acceptable behavior. Is that the exception?

12 MR. JANOVE: I think that mischaracterizes the  
13 language in the handbook. I think it says that it's used  
14 in most routine situations.

15 BY MR. BLACK:

16 Q. Most routine situations. Flagrant violations  
17 of normally acceptable behavior may require bypassing  
18 one or more steps. Now with regard to Scott, I guess  
19 you're telling me that your company didn't have to  
20 follow this with regard to Scott because he wasn't  
21 hourly but your testimony earlier today is that it did  
22 follow this procedure?

23 A. I didn't say I followed this procedure  
24 earlier. I said I used -- there were some steps  
25 involved.



1           And I felt that was a good approach. I don't  
2       remember that there was any more detail laid out at the  
3       meeting with Scott. I do remember working with Bill  
4       specifically on issues that still needed to be addressed  
5       on the surface.

6           Q.    Earlier you made mention of talking to people  
7       about Scott and the way he treated people and whatnot.  
8       What were you referring to then?

9           A.    What I referred to specifically was what his  
10      first comment was and how he characterized how he  
11      treated people. I think he was the one that led me down  
12      to recognize that I might have had a bigger problem than  
13      I initially thought.

14          Q.    What I am talking about, you mentioned talking  
15      to people?

16          A.    I did.

17          Q.    Who did you talk to and when?

18          A.    I talked to approximately half of the people  
19      that work for Scott on the surface directly. I talked to  
20      some of the maintenance people that had worked on  
21      surface activities. I talked with the shift supervisors  
22      about their interface with Scott. I believe those notes  
23      have been furnished to you.

24          Q.    Yes, they have. Were these one on one meetings  
25      or were they group meetings or both?

1 I did know there were still issues out there that  
2 had dealt with the same things we talked about before.  
3 And I wanted to find out if those were getting taken  
4 care of or whether we needed more attention.

5 Q. What did you conclude from these interviews?

6 A. Well, I think my words to Bill and Scott both  
7 is: Things are in a lot worse shape than I thought they  
8 were and I don't know what I am going to do about them.  
9 It took us a while to do it.

10 Q. Did you not know what you were going to do  
11 about it?

12 A. I didn't at the time I said that to Bill and  
13 Scott, I didn't.

14 Q. When did you decide what you were going to do  
15 about it?

16 A. In the following week I spent about a week  
17 looking at all kinds of options and things that we could  
18 do to correct it, including giving support to Bill and  
19 Scott to help correct it because that's where the focus  
20 ended up.

21 Q. Well, let's focus on Scott now. What  
22 specifically did you find with regard to Scott Robertson  
23 as a result of these interviews? You said the problem  
24 was a lot worse than you suspected. Can you describe  
25 that? Can you be more specific?

1           So they knew that we were wrestling the way we were  
2 going to go with this and I am sure it was an anxious  
3 period for all of us. And so I got back to the mine that  
4 afternoon and I told both Bill and Scott that we were  
5 going to remove them from their positions that they had  
6 and then I talked to Bill separately and told Bill the  
7 options I had with him.

8           And I talked to Scott separately and told him the  
9 options I had open for Scott. I said: Scott, I had  
10 arranged -- I want you to go back to work underground  
11 with "A-pay." Doug is the person that you should report  
12 to. And he told me again just like he did the first time  
13 that he didn't think he could handle that.

14           I said -- I tried to encourage him to do that and  
15 asked him to think about it again over the weekend. And  
16 he called me and left a message for me. He said he had  
17 called and I called him back I think it was on Sunday. I  
18 called him back and he told me he wasn't going to come  
19 to work on Monday. I wasn't happy about that.

20           Q.    I guess you weren't surprised by it either?

21           A.    No, I wasn't really surprised. I suspected  
22 Scott would have a difficult time accepting "A-pay" job.  
23 He had given me two reasons and I thought they were  
24 valid reasons. I probably would have felt similar.

25           Q.    And I take it Scott didn't come in to work the

1 next day or thereafter?

2 A. No. He did ask me about a benefit and I think  
3 I asked him to talk to Carl. That was about it.

4 Q. I am going to change the topic now. Of course,  
5 you were present during the last two depositions of  
6 Daryl Hawkins and Dick Lloyd?

7 A. Yes.

8 Q. And you heard Daryl Hawkins talk about the  
9 greasing and admit that he did it and he put a tube of  
10 grease in Scott's underwear in the crotch of his  
11 underwear. Is that an accurate representation of Daryl  
12 Hawkins' testimony or at least that portion of his  
13 testimony?

14 A. Yeah. I heard that.

15 Q. When was the first time you learned that Scott  
16 Robertson had been greased?

17 A. When Scott gave his deposition.

18 Q. You had no knowledge of that prior to that  
19 time?

20 A. No, sir.

21 Q. No one ever said anything to you about it  
22 prior to then?

23 A. No.

24 Q. And I guess subsequent to that I take it you  
25 are now convinced that it did in fact occur?

1 not going to use them as a depo exhibit. That's all the  
2 questions I have for you, Mr. Zumwalt. I appreciate your  
3 patience today.

4

5 E X A M I N A T I O N

6 BY MR. JANOVE:

7 Q. I just have a couple. Mr. Zumwalt, you  
8 testified earlier concerning company policy and practice  
9 involving employee discipline and steps or stages in it  
10 and I believe you talked about it with respect to hourly  
11 employees and with respect to supervisory employees.

12 My question is whether policies or practices differ  
13 between a disciplinary policy or practice involving  
14 discharge and one involving demotion. Is there any  
15 difference in how the two operate under the company's  
16 disciplinary policies and practices?

17 A. Specifically I think the four-step procedure  
18 talks about termination. And I think that procedure that  
19 we follow in the hourly ranks, probably that's where  
20 it's used.

21 In a demotion situation, in the hourly ranks, or we  
22 have had demotions take place in areas where people have  
23 received a job that they don't have the skills like an  
24 "A-pay" job, "A-pay" electricians job, we would -- the  
25 skills were evidently lacking after they were awarded.

1           Upon that review it may be a one time process: The  
2 employee would be moved back out of that job where he  
3 couldn't fill it. That might be an example of how we  
4 would handle it within the work force.

5           Q.   What about with respect to supervisory  
6 employees? Any difference in the situation of demotion  
7 as opposed to a discharge?

8           A.   We've had a number of demotions in the past, a  
9 couple of them involving foreman back to "A-pay."  
10 Specifically they were not done in a four-step manner.  
11 They were done in a sequential manner where there was a  
12 concern raised about the supervision that was addressed  
13 with the employee and action taken when we didn't get  
14 satisfactory resolution.

15          Q.   I have nothing further.

16

17                           E X A M I N A T I O N

18          BY MR. BLACK:

19          Q.   Well, now you've opened a whole new door. We  
20 can't wrap this up yet. You say you didn't follow --  
21 with regard to supervisory employees in a demotion you  
22 didn't follow the four-step but you followed a  
23 sequential method. You used the word sequential. Wasn't  
24 that your word?

25          A.   Yes.

1 that he was demoted. And there was reasons for doing it.

2 Q. Wasn't for repeated safety violations?

3 A. That's not my recollection.

4 Q. What is your recollection?

5 A. He had a problem, I know, of one evening of  
6 sleeping on ship. That was one of the issues that was  
7 significant.

8 Q. Was he fired after that incident?

9 MR. JANOVE: Object. He wasn't fired.

10 THE WITNESS: He was not fired.

11 BY MR. BLACK:

12 Q. I am sorry. Was he demoted after being found  
13 sleeping on the job?

14 A. It was sometime after that. It was fairly  
15 close to that period of time. I don't have the dates in  
16 my mind.

17 Q. Sounds like sleeping on the job is not a  
18 flagrant violation then if you didn't demote him right  
19 away or fire him right away?

20 A. It was not intentional, I don't believe. I had  
21 occasion where I have had a lapse of eye opening  
22 unintentionally.

23 Q. Were you fired?

24 A. No.

25 Q. Were you demoted?

1 place at the wrong time, I would say, yeah, it could be  
2 but not necessarily. I think that is true with an awful  
3 lot of that. It's not a black and white issue.

4 Q. I see. Working under the influence of  
5 intoxicants on company property, flagrant violation?

6 A. It would likely be. What is the influence and  
7 what type of intoxicants? Even some medications are  
8 intoxicants.

9 Q. You would want to look at that closer, I  
10 guess?

11 A. Yeah, you would and understand it.

12 Q. All right. Falsifying company records?

13 A. Could very well be. Could be fairly simply not  
14 filling out a form completely and EMSHAW (sic.) might  
15 look at that as falsifying your records, maybe not as  
16 deliberate as it would warrant a flagrant type of  
17 response. So those are all subjective.

18 Q. Theft?

19 A. The eraser versus the --

20 Q. How much?

21 A. Well, it depends on if it's flagrant, willful,  
22 the derived special benefit. Somebody takes pencils home  
23 to use at the Girl Scout meeting, I am not too sure I am  
24 going to fire somebody over that.

25 Q. With regard to Scott's circumstances at the



IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY  
STATE OF UTAH

\* \* \*

LAWRENCE SCOTT ROBERTSON,	:	
Plaintiff,	:	Civil No. 92-21
vs.	:	Deposition of:
UTAH FUEL COMPANY,	:	WILLIAM W. SHRIVER
Defendant.	:	

\* \* \*

BE IT REMEMBERED that on the 16th day of December, 1992, the deposition of William W. Shriver, produced as a witness herein at the instance of the Plaintiff in the above-entitled action now pending in the above-named court, was taken before Larene Pearce, a Certified Shorthand Reporter (License No. 153) and Notary Public in and for the State of Utah, commencing at the hour of 11:40 a.m. of said day at the law offices of John L. Black, 10 West 300 South, Suite 500, Salt Lake City, Utah.

\* \* \*

Reporter: Larene Pearce



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1           A       It would normally mean the first three steps have  
2 failed, yes.

3           Q       All right. Now, what about -- and this is before  
4 someone is terminated, I take it, before you would fire  
5 somebody, is that right?

6           A       Yes. Actually, my understanding is that I've never  
7 had the authority to fire anyone up there. I can present the  
8 case and the general manager would be the only one that would  
9 make the final decision that this person should be fired. I  
10 have never attempted to fire anyone at the Skyline Mine.

11          Q       Who's the general manager?

12          A       Glen Zumwalt.

13          Q       What about demoting an employee? Demoting them such  
14 that their pay is decreased 20 percent or more? Should this  
15 process be followed in that situation also?

16          A       In my opinion, it should.

17          Q       All right. Well, beyond your opinion, do you know if  
18 that's the policy of Utah Fuel?

19          A       I believe it is.

20          Q       All right. Now, I'm going to turn your attention  
21 once again to step four, the very last paragraph prior to the  
22 subheading of General Rules and Regulations. It states, "While  
23 the above steps will be followed in most routine situations,  
24 flagrant violations of normally acceptable behavior may require  
25 by-passing one or more steps." Do you understand that

1 statement?

2 A Yes, I do.

3 Q Do you know what is meant by "flagrant violations"?

4 A The example that is usually used is smoking in the  
5 return at the mine.

6 Q Now, why is that so important?

7 A Well, coal mines can have gas in them and explosive  
8 coal. And the example that's frequently cited as an example is,  
9 "If we catch you ever smoking in the return, we're not going to  
10 go to step one, we're going to go to step four because you could  
11 blow up the mine and ruin your livelihood plus kill a lot of  
12 people."

13 Q Is that something is that every coal miner would  
14 know, about the smoking?

15 A Yes, yes. This would be a very dramatic violation of  
16 company rules, state law, federal law, good common sense, just a  
17 number of things. It would be a very bad act.

18 Q Can you think of any other flagrant violations that  
19 would warrant an immediate termination of employment or  
20 by-passing of this Improvement and Progress Program?

21 A Theft.

22 Q All right. Anything else?

23 A There may be others.

24 Q Serious safety violations of some kind or another?

25 A Yes. You wouldn't have to be just smoking in the

1 treat this as a medical problem.

2 Q And how would it be treated?

3 A Well, the same as any other medical problem. A  
4 person would seek treatment and they would have some benefits  
5 from the company, some medical benefits. The same as any other  
6 medical problem such as a broken leg.

7 Q Well, okay. Let's say an employee comes to you and  
8 acknowledges that he or she has a substance abuse problem. How  
9 would you deal with that situation? Would you fire them on the  
10 spot or would you -- what would you do?

11 A I would encourage them to seek treatment. I would  
12 not fire them.

13 Q What would happen to their job?

14 A Their job would be treated, in my opinion, the same  
15 as any other medical emergency. It seems to be handled on a  
16 case by case basis. A person who's to incur a long-time illness  
17 may be treated a little different than someone who has a short  
18 illness.

19 MR. BLACK: Go ahead and mark that.

20 (WHEREUPON, Exhibit 2 was  
21 marked for identification.)

22 Q (By Mr. Black) Now, would there be any consequences  
23 to that person, assuming that that person successfully completed  
24 the program, the treatment program, regarding that person's job?

25 MR. JANOVE: I'm going to object to that question on

1 a lack of foundation based on what Bill's personal authority  
2 would be with respect to that. It's not clear to me whether  
3 you're asking what he would do or whether what the company would  
4 do based on his position. And I think he had testified earlier  
5 that he didn't personally have the authority to fire people. So  
6 I'm just kind of asking is it what he would personally do or  
7 what he believes the company would do based on it's policy.

8 Q (By Mr. Black) All right. What I'm trying to get at  
9 is: If a person did come to you or another supervisor, admits  
10 to a substance abuse problem and then you recommend treatment  
11 and then the person completes the treatment successfully, would  
12 that person, to your understanding, be able to return to his or  
13 her job?

14 A In my understanding, the person would be able to  
15 return to his or her job with the one provision, that the job  
16 could have been filled during the absence. And, again, suppose  
17 you were to break a leg and be laid up for six, eight, ten  
18 months while this is healing, it might not be possible to hold  
19 that job open for a person. So on a case by case basis, what's  
20 been the practice at Skyline Mine is some jobs will be filled  
21 and some jobs will be retained for the person when they come  
22 back from medical leave.

23 Q Let me show you a document that's entitled Approved  
24 Policy on Alcohol, Drugs and Controlled Substances. I would  
25 like you to take a look at this and take your time and read the

1 employee relations representative, Company medical  
2 representative or the Corporate Employee Relations Office. Some  
3 financial assistance for treatment of substance abuse is  
4 presently available through the Company provided medical plan."

5 Again, do those statements accurately reflect your  
6 understanding of the company's policy?

7 A They do.

8 Q In your understanding, whether in writing or not,  
9 does this express your understanding of the company's policy as  
10 it existed prior to Scott Robertson seeking treatment?

11 A It does reflect my understanding of what our policy  
12 was.

13 Q Were there others in the company who took advantage  
14 of this policy, aside from Scott Robertson, prior to Scott  
15 Robertson, to your knowledge?

16 A I'm not sure -- Jimmy Paulsen, who had a drinking  
17 problem, took some -- I think his treatment was largely  
18 incarceration. I'm not sure he --

19 Q Well, did he get his job back with Utah Fuel?

20 A Yes, he's back as an employee now.

21 Q All right. Do you know if he's doing the same thing  
22 he was doing prior to getting treatment for the problem?

23 A He's a mechanic. He was a mechanic before.

24 Q Do you know if he's getting the same pay --

25 A I don't know.

1           A       Well, yes, I knew that it treated people for  
2       depression and substance addiction.

3           Q       Did Scott give you anymore specifics as to what he  
4       was seeking treatment for at that time?

5           A       Not in that conversation. It was a day or two later,  
6       when I was able to talk with Scott, that he told me about his  
7       problem.

8           Q       What did you say to Scott during that first  
9       conversation?

10          A       I can't recall exactly.

11          Q       Well, to the effect, did you tell him that if he  
12       missed work, he was going to lose his job or --

13          A       No. I accepted his statement that he was getting  
14       medical treatment. As a matter of fact, I thought it was  
15       probably a depression problem, is what I thought at the time.

16          Q       All right.

17          A       Told him to get better and I'll talk with you later.  
18       I was not in a position to carry on a confidential conversation  
19       with him right at the time he called.

20          Q       Okay. Did you say anything with regard to his job  
21       security as to whether or not he was in any kind of trouble for  
22       not coming into work that day or anything like that?

23          A       No, I gave him no indication that he was in any  
24       trouble.

25          Q       Okay. And when did you talk to Scott Robertson next?

1 bit by that time. Gave me the name of his doctor.

2 Q Anything else?

3 A No, that was about the size of what information he  
4 gave me.

5 Q Okay. What did you say to him, if anything?

6 A Tried to give him some encouragement. Told him to  
7 stay in there and whip this problem.

8 Q And then what? He whips the problem and?

9 A I made no promises, in my memory, that -- overt  
10 promises that he would have a job when he returned. I indicated  
11 that -- in that conversation and subsequent conversations, that  
12 I would do everything I could to retain his job, see to it he  
13 had a job when he came back. I indicated that I didn't know if  
14 that was going to be a decision that would be totally mine to  
15 make.

16 Obviously, if a person goes into a hospital for  
17 treatment of an addiction, comes out and hasn't cured the  
18 problem, why, obviously we can't agree to continue to employ  
19 him.

20 The whole thrust of my talking with Scott was to  
21 encourage him to hang in there, to take some treatment, whip the  
22 problem and come back.

23 Q Come back to Utah Fuel?

24 A I indicated that I would do everything I could to  
25 preserve his job. I did indicate that to Scott.



1           Q       All right. Now, did you report the substance of that  
2 conversation to anybody concerned with or employed by Utah Fuel?

3           A       Yes, I did, to our general manager, Glen Zumwalt, and  
4 our administrative manager, Lou Meli.

5           Q       What did they say to you, if anything, regarding this  
6 problem?

7           A       Well, I think that there was agreement -- I think we  
8 were all focusing on helping Scott solve the problem.

9           Q       Was it suggested by anyone that Scott's employment be  
10 terminated at that time?

11          A       No.

12          Q       Was it suggested by anyone that you start looking for  
13 a replacement for Scott at that time?

14          A       That was considered. We discussed it. One of the  
15 options that you have when someone seeks medical treatment is  
16 that you can fill their position. Then they will return to Utah  
17 Fuel in a -- when their medical treatment is complete and if  
18 there is a job available.

19                 It was discussed by myself and Glen Zumwalt, Lou  
20 Meli, whether we should or should not fill Scott Robertson's  
21 position.

22          Q       Was a decision made at that time?

23          A       The decision was made -- what we did -- I don't know  
24 whether there was a consensus or I made the decision or what,  
25 but what we did was we did not fill Scott Robertson's position.

1 We left his position open. We upgraded one of our hourly people  
2 to serve as a foreman to help me out with some of our  
3 supervision.

4 Q Was that person upgraded on a temporary basis?

5 A On a temporary basis.

6 Q Like Scott was earlier?

7 A Well, Scott was not upgraded earlier. Scott accepted  
8 a lateral from the mine to the surface area.

9 Q But it was a temporary placement, I guess?

10 A Yes, it was a temporary upgrade to a foreman's  
11 position.

12 Q All right. And then did there come a time when Scott  
13 Robertson reported back to work?

14 A Yes, he did.

15 Q Okay. Do you know approximately when that would have  
16 been?

17 A Oh, 12th of June sticks in my mind. But, forgive me,  
18 I did not go check all my dates and prime myself for this.

19 Q I understand. But does it stick in your mind that it  
20 was approximately 30 days later?

21 A It was about 30 days later, yes.

22 Q All right. Did Scott call you in advance or just  
23 report to work? Tell me how that occurred.

24 A Well, I think Scott and I talked in advance. I knew  
25 when he was getting out. As I recall, I got a call from Scott's

1           A       After careful considerations, yes, that was my  
2 decision of what I wanted to do.

3           Q       All right. Do you know if that decision was shared  
4 by others in the organization such as Mr. Zumwalt, or Vernal  
5 Mortensen, or Lou Meli, or others?

6           A       Mr. Zumwalt suggested we consider some alternatives.  
7 He felt that we should consider very carefully whether we filled  
8 Scott's position.

9                   He felt that we should consider very carefully  
10 whether Scott came back to work as a foreman for me on the  
11 surface or, as Glen suggested, it might be better and ease the  
12 transition if he went back in the mine as a foreman underground.  
13 A foreman underground works much closer with his crew and it  
14 probably would have been an easier transition.

15                   Also, it was considered that perhaps Scott should be  
16 -- and it was suggested and discussed that Scott should be  
17 reduced in rank to an hourly employee and work his way back up,  
18 earning the trust that it was feared that he had lost.

19           Q       Who made that suggestion?

20           A       As I recall, Lou Meli suggested that, made that  
21 suggestion.

22           Q       Okay.

23           A       I don't think that was solely Lou's idea, but he  
24 seemed to be the proponent.

25           Q       Was some agreement reached or some decision reached

1 in that regard?

2 A Not to my knowledge. We met with Scott, and I can't  
3 recall the date, but perhaps the 12th, when he came back. We  
4 had a discussion on these three basic alternatives the evening  
5 before we met on the 12th, Glen Zumwalt and myself, and had a  
6 discussion with Scott.

7 Q All right.

8 A I went into that meeting not knowing what decision  
9 had been made.

10 Q Was this the first day that Scott had returned to  
11 work?

12 A It was, yes.

13 Q All right. Tell me about that meeting?

14 A We met in my office. Glen Zumwalt, Scott Robertson  
15 and myself. Discussed his treatment.

16 Scott was exuberant and looking forward to the  
17 future. Felt he had whipped the problem.

18 Discussed, I think at length, what his attitude on  
19 the situation was, what he was going to have to do to win and  
20 regain the trust of the hourly employees, workmen at Skyline.  
21 Because even though we treated this as a confidential matter,  
22 why, there's no secrets at an organization the size of ours. I  
23 think everybody pretty well knew what the problem was. And --

24 Q Now, you talk about lack of trust. What do you mean  
25 by that?

1                   And at the conclusion of the meeting, Glen said, Glen  
2                   Zumwalt said, "Well, I'll tell you what, Scott. I want you to  
3                   go back in the mine and start over as an A-Pay miner." And  
4                   tears weld up in Scott's eyes and he said, "I'm sorry, Glen, but  
5                   I can't accept that. I guess I'll have to leave." And he got  
6                   up and left.

7                   Q           Was that the end of the meeting?

8                   A           As I recall, it was pretty much the end of the  
9                   meeting, yes.

10                  Q           Do you recall in that conversation any discussion  
11                  about Scott's knowledge of other drug users that are employed by  
12                  Utah Fuel? Do you know if that topic came up?

13                  A           Yes, yes; that topic came up. Scott was specifically  
14                  asked if he knew of any other drug users, particularly at Utah  
15                  Fuel, and he answered yes. Did he know of any management people  
16                  who used drugs. He named two individuals that he, as I  
17                  remember, thought used drugs.

18                  Q           Any other statements by Scott Robertson regarding  
19                  that?

20                  A           No. I don't think it was -- it certainly was not  
21                  pushed to "name everyone you know". I think our concern was, do  
22                  we have a problem here at Utah Fuel and how big of a problem  
23                  might it be. And are there any other management people in on  
24                  it.

25                  Q           With regard to the people that he identified, do you

1 just couldn't get out of. And we had no opportunity to discuss  
2 this, Scott's refusal to go back in the work force at all. And  
3 Glen went on to his other meeting.

4 About the middle of the day, why, I talked with Lou  
5 Meli and told him that Scott had quit. And Lou and Glen came  
6 back and asked that I call Scott and arrange for Scott to come  
7 back the next morning. So I did. I called Scott at home that  
8 day and he came back the next morning. So we met at about the  
9 same time, about -- I don't recall, 8:00, 9:00 the next morning.

10 Q Tell me about that meeting. Who was present?

11 A Glen Zumwalt, and I, and Scott Robertson were present  
12 at that meeting again. And Glen had had a change of heart,  
13 change of mind and decided that we would put Scott back to work  
14 for me as a Surface Foreman. So told him.

15 And then I think the rest of the meeting -- Scott was  
16 pleased with this decision. I think the rest of the meeting,  
17 which was a short one, was taken up with, gee, how can we get  
18 our arms around this acceptance problem.

19 Q How did you feel about that decision to allow Scott  
20 to resume his former job?

21 A I felt it was a proper decision. I think that -- I  
22 very easily could have accepted providing Scott a foreman's job  
23 underground. I felt that it was wrong to demote him.

24 Q All right. Do you know what brought about this  
25 change of heart in Glen Zumwalt?

1           Q       Okay. Go on.

2           A       These problems escalated, got to the place where some  
3 of the employees went beyond Scott, beyond me, went to Lou Meli  
4 and to Glen Zumwalt, lodged complaints. These complaints were  
5 investigated by Glen Zumwalt and Lou Meli. And that's what led  
6 to the action on the 26th of July.

7           Q       All right. Now, what part did Scott's prior drug use  
8 play in all of this?

9           A       I think it played a pretty important part. The thing  
10 that I heard repeatedly from hourly people was, "I don't think  
11 he ought to lose his job, but, gosh, you can't give him his job  
12 back as a foreman. He needs to be -- there's no punishment  
13 whatsoever. He needs to be punished somehow."

14          Q       Who said that?

15          A       Specifically, a person named Todd Paulsen, one of our  
16 employees, one of our --

17          Q       Who else shared in this feeling that Scott ought to  
18 be punished for his prior drug use?

19          A       I hate to put names on it because it seemed to be a  
20 general feeling of the hourly people. I think Dan Mills was  
21 another one, another surface employee who felt strongly that by  
22 restoring Scott to his former position as a Surface Foreman,  
23 that we were doing the wrong thing. There was no punishment.

24          Q       Do you know if anyone at a management level felt the  
25 same way, felt that Scott ought to be punished for his drug use?

1           A       In my opinion, Lou Meli did. I don't know as I heard  
2 him say the word "punishment". What I heard him say was, "This  
3 is not going to work. Scott's got to start over at the very  
4 bottom and work his way back up and earn respect."

5           Q       What about an employee by the name of Bringhurst?

6           A       Ben Bringhurst felt that Scott should be reduced in  
7 rank to an hourly employee and should work his way back up.

8           Q       Did he ever express this idea of punishment?

9           A       I can't recall Ben using that word specifically.

10          Q       And what is his position at the company or was it  
11 then?

12          A       Ben is the Safety Supervisor of the company.

13          Q       All right. But he was of the opinion or he felt that  
14 Scott should be demoted, what did you say again, all the way to  
15 what level?

16          A       He felt that he should be demoted to an A-Pay, to an  
17 hourly miner, work his way back up.

18          Q       Was that because of his drug use or because of  
19 something else?

20          A       I don't know that Ben ever told me specifically what  
21 it was. He felt that Scott had done things that would -- the  
22 only way he could make right would be to be demoted and start  
23 back over. I would be speculating to tell you exactly what Ben  
24 Bringhurst's motives were.

25          Q       Now, Scott returned to work, according to my records,



WELCOME TO UTAH FUEL COMPANY  
(Skyline Mines)  
(UFCo)

UFCo is a wholly-owned subsidiary of Coastal States Energy Company, a subsidiary of The Coastal Corporation. The Skyline properties were acquired in the summer of 1978. Utah Fuel Company's mines were opened in October, 1981 and produce quality coal at a relatively modest rate for the Utah market. The current production is two million tons of high-grade coal per year with a maximum capacity of five million tons per year. This coal is marketed to a broad range of utilities and industrial users in the West.

We believe that our Company is the best place to work in the industry. We hope that you, as a member of the UFCo team, will find your job here rewarding and enjoyable.

Teamwork is very important to us. Mutual appreciation and respect builds better employees, better jobs and a better company. To have a successful mining operation, all of us must accept our share of the responsibility and do our part.

We are a safety-oriented company. We place SAFETY FIRST. Each of us has to do our part to maintain a safe work environment.

This handbook is prepared to give you a general overview of the Company and existing procedures and benefits. Please keep in mind that this handbook is general in nature and does not constitute terms and/or conditions of an employment contract. The procedures, policies and benefits summarized in this handbook will be reviewed periodically and changed as circumstances warrant. Review this handbook carefully and let us know if you have any questions.

**REMEMBER: THE ONLY DUMB QUESTION IS ONE THAT IS NOT ASKED.**

If you have followed through with all the steps noted above and feel that you have not received a satisfactory answer, then you may contact Coastal's Corporate office.

CORPORATE OFFICERS...If you feel that it is necessary to go higher, you may contact the Division Senior Vice President, (703)342-1801 or Corporate Employee Relations (713)877-6261. Your problem will be investigated and you will be given an answer.

If you need help in any of the above discussions, you may ask a member of the Personnel Department to help you prepare or present your problem.

Initiating this right to review procedure will not adversely affect your job or chances for promotion. Supervisors are not permitted to suppress the review procedure or to punish an employee for using the procedure.

#### **IMPROVEMENT AND PROGRESS PROGRAM**

Improvement and progress is a lifelong course that everyone should follow. At work the desire to improve performance and be prepared for other opportunities and challenges is extremely important. The need to know how we are doing is critical to all of us and is the basis for all career development. In order for you to have the information you need, your supervisor will meet with you to periodically discuss your performance. These meetings will include discussions regarding your strengths and, if appropriate, areas that need improvement.

We firmly believe that employees want to do a good job and that, if they understand what is expected of them, they will make every effort to perform satisfactorily. However, in any large organization, situations arise which are occasionally detrimental to the unit as a whole. When these situations develop, it is very important that they be handled fairly. To accomplish this, we have implemented the following procedures:

**STEP ONE:** If there is a problem with your workmanship, safety, attendance, relationships with others or other similar matters, your supervisor will discuss the problem with you. This will be a private explanation of what is and/or is not acceptable and why. You will be encouraged to discuss your understanding of the problem and plans to correct or improve the situation. A written record to go in your personnel file will not normally be part of the first discussion unless the problem is of an immediately serious nature.

**STEP TWO:** If the problem is not corrected or if another significant problem arises shortly after the first discussion, a second discussion is called for. This will be done in the same serious but nonthreatening way as the first, and will include a reference to the previous problem. The second reminder should, like the first, solicit a commitment from you to correct the problem. The second reminder will be followed up by a written statement from you as to how you will correct the problem, which will go into your file. If Step Two is successful, you can request that the written record be removed from your file after six (6) months or some other agreed upon period of time.

**STEP THREE:** If the action taken in Step Two does not correct the problem(s), your supervisor will take you aside and, with your department head, have a third discussion regarding your failure to correct the situation. Unless some extenuating circumstance or fact is uncovered in this discussion, normally you

will be told to take off the rest of the shift. You will be instructed to go home and decide whether you can, or want, to continue to work here. This, of course, would mean working by the rules and/or achieving at least an acceptable standard of performance. You will be told to report your decision at the beginning of the next regularly scheduled shift.

If you decide to continue your employment, the supervisor will sit down with you and have you make a plan for improvement and correction. This plan should identify the specific problems which led to the Step Three discussion and suspension.

This plan must be specific about the problem and how it can be corrected. The plan may require your supervisor or staff support. This plan must be written by you and signed by you and your supervisor. This plan will be placed in your permanent record and will stay there for 12 months or some other agreed upon time period. If this step is successful, you may request the written record be removed at the end of that time period.

**STEP FOUR:** If Step Three does not correct the problem, termination will result because of your inability or unwillingness to bring your behavior and/or performance up to the minimum standards which the Company expects from all employees.

While the above steps will be followed in most routine situations, flagrant violations of normally acceptable behavior may require by-passing one or more steps.

#### **GENERAL RULES AND REGULATIONS**

All employees are expected to follow a reasonable code of conduct for the mutual welfare and safety of themselves and others. Simply expressed, this means conducting one's self with courtesy, dignity and consideration.

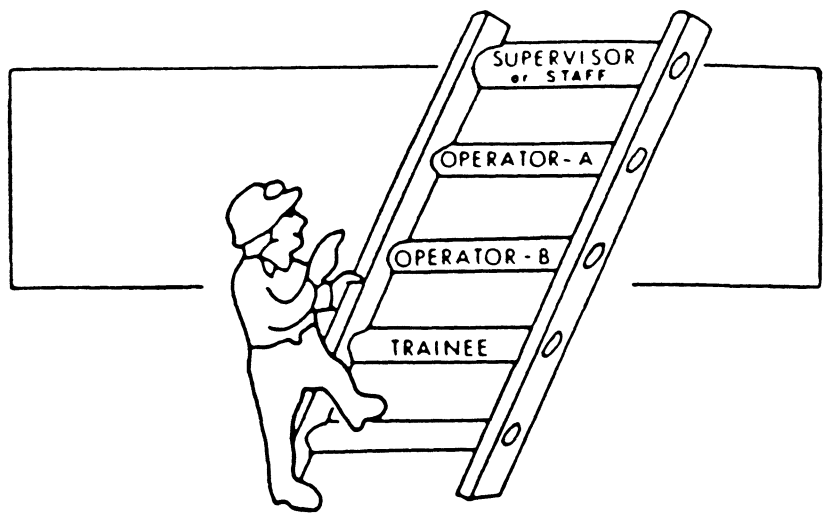
Listed below are some acts and conditions or situations which are not allowed on Company property:

- Possession or use of intoxicating beverages, narcotics or illegal drugs, working under the influence of intoxicants, narcotics, or illegal drugs, sexual harassment, dishonesty, falsifying Company records, theft, sleeping on duty, handling or use of firearms, unauthorized use of Company equipment, fighting, the use of abusive language, insubordination, horseplay, disregard of safety rules, gambling, or conduct which is detrimental to the Company.
- Specific rules and regulations which are not included in this booklet will be posted and discussed by your supervisor.
- Any questions you might have should be referred to your supervisor or the Personnel Department.

Acts which are detrimental to other employees must be avoided whether on or off the job. This would include intimidation or coercion of one employee by another employee or employees because of membership or nonmembership in any church, society, fraternity or labor organization, or because of race, color, age religion, sex, national origin or handicap.

#### **CHANGE IN ADDRESS OR STATUS**

Keep your supervisor and the Personnel Department informed of such things as change of address, phone number, marital status and dependents. Current information is necessary since your taxes and insurance may be affected, or we may want to reach you quickly in an emergency.



### **JOB PROGRESSION PLAN FOR MINING EMPLOYEES**

As a new mining employee, you will normally enter into a 12-month training and trial period. With good performance, new employees may be advanced to Operator or Repairman "B" at the conclusion of the 12-month period, regardless of the job they are in. Please remember, however, that you have the right to terminate your employment at any time and the company retains a similar right to terminate your employment for any reason or for no reason. Occasionally, a specially qualified employee may be hired at a rate above the trainee level. The following chart is an outline of the job progression plan indicating promotional opportunities which may exist beyond "B" pay.