

1994

Lee K. Shuster v. Applied Computer Techniques, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LEE K. SHUSTER

Plaintiff and Appellee

V.

Case No. 940375-CA

APPLIED COMPUTER TECHNIQUES, INC.

COURT OF APPEALS

Defendant and Appellant

Priority Classification 15

NO. 940375

BRIEF OF APPELLEE

**An Appeal from the Judgment of the Circuit Court, State of Utah,
Salt Lake County, Salt Lake Department,
Honorable Dennis M. Fuchs**

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Utah Court of Appeals

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**Marilyn M. Branch
Clerk of the Court**

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Statement of Jurisdiction

Appellee Mr. Shuster agrees with the brief of Applied Computer Techniques, Inc. (ACT) that this Court has jurisdiction to hear this appeal from a final judgment of the Circuit Court pursuant to Utah Code Ann. § 78-2a-3(2)(d)(1952, as amended).

Statement of the Issues Presented for Review

Appellee Mr. Shuster does not agree with ACT's statement of the issues in its brief.¹ The issue set forth in ACT's Docketing Statement(s) was:

"Whether or not the trial court properly interpreted Appellee's employment agreement."

Appellee Shuster agrees with this statement of the issues on appeal and agrees that ACT preserved this issue for appeal.

¹ ACT's brief contends that the issue is "whether or not Shuster was a commissioned salesman or worked for wages." (Br. 2) This reframing of the issue leads appellant ACT to argue one point (III) which was not disputed before the trial court and was not preserved for appeal. ACT also seeks the remedy of vacating the judgment for Shuster on all counts and granting summary judgment for ACT. This remedy is not available given ACT's prior failures to contest ACT's liability under the Utah Payment of Wages Act and to contest ACT's liability for attorneys fees. See *infra*.

Standard or Review

Appellee Shuster agrees with ACT's statement of the standard of review. This Court should review for correctness the trial court's conclusions of law regarding the unambiguous nature of and the meaning of the contract, since there were no issues of material fact in dispute. *Alf v. State Farm Fire & Casualty Co.*, 850 P.2d 1272, 1274 (Utah, 1993).

Statutory Provisions

The following statutes and regulations are important to portions of this appeal, and they are set forth in *Addendum A*:

Utah Attorney's Fees for Suits for Wages, Utah Code Ann. § 34-27-1

Utah Payment of Wages Act,
Utah Code Ann. § 34-28-1, § 34-28-2 and § 34-28-5

Utah Minimum Wage Act,
Utah Code Ann. § 34-40-101 - 103 and § 34-40-104(1)(a)

United States Fair Labor Standards Act,
29 U.S.C.A. § 206(a)(1) and § 213(a)(1)

29 C.F.R. § 541.5(a)

Utah Administrative Code R572-1-3

Statement of the Case

Nature of the Case

The case concerns the interpretation of an Employment Agreement

(R 8-13; *Addendum B*) between ACT (the employer) and Mr. Shuster (the employee). The sole question on appeal is whether this contract required ACT to pay Mr. Shuster \$750 for his final two weeks of work for ACT.

Course of the Proceedings

Appellee Shuster accepts ACT's Statement regarding the Course of Proceedings except to augment it as follows:

Proceedings Before the Trial Court

Shuster's Motion for Summary Judgment (R 62-64) relied only upon the Complaint (with attachments, including the contract) (R 1-17; *Addendum B*) and the Answer. (R 20-22; *Add. C*) Shuster's Memorandum (R 65-76 *Add. D*) set forth undisputed material facts relying upon these pleadings alone; Defendant ACT did not identify any of these facts as disputed. (R 91-96 ACT's Response; *Add. E*) Shuster contended in the trial court that there were no issues of material fact in dispute; and defendant ACT did not disagree.² (R 108-116 Reply Memorandum *Add. G*)

ACT's Motion for Summary Judgment (R 105-106) was supported by the Affidavit of ACT's President (R 97-98; *Add. F*). It was filed

² Rule 4-501(2)(b) of the Code of Judicial Administration provides: "All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement."

together with ACT's Response (R 91-96; *Add. E*) which argued for Summary Judgment for ACT and which contained various statements of fact that Shuster disputed. Shuster submitted his Affidavit (R 117-121; *Add. H*) disputing these facts as well as the Memorandum specifically controverting the "facts" he disputed. (R 108-116; *Add. G*)

Based upon these pleadings and after oral argument, the Circuit Court denied ACT's Motion for Summary Judgment and granted Mr. Shuster's Motion for Summary Judgment. (R 141-142, Memorandum Decision; *Add. J*)

Proceedings Before the Court of Appeals

After ACT filed its Docketing Statement with this Court, Appellee Shuster filed a Motion for Summary Disposition, Dismissal and Sanctions. This Court denied the Motions for Summary Disposition or Dismissal. This Court ordered that ruling on the other issues (sanctions) be deferred until plenary presentation and consideration. (Order August 8, 1994)

Statement of Facts

Appellee Shuster does not agree with the Statement of Facts set forth in ACT's brief. The trial court relied upon Shuster's undisputed Statement of Material Facts and upon the pleadings (the Complaint, the admitted documents attached thereto--including the contract--and the Answer), and the Circuit Court made the following Findings of Fact.

Appellee Shuster presents the trial court's Findings of Fact to this Court as a proper and undisputed Statement of Facts on appeal:

1. The parties entered into a valid contract for employment on or about February 26, 1992, a copy of which is attached to the Complaint as Exhibit A.
2. From February 26, 1992 to October 14, 1992 the plaintiff Mr. Shuster worked for the defendant ACT, "devoting all his time and energy during normal business hours" to ACT's business.
3. From February 26, 1992 to September 30, 1992, ACT paid Mr. Shuster the "gross pay" provided for under Paragraph 6 of the Employment Agreement, since the commissions earned never exceeded such "gross pay."
4. The employment relationship ended on October 15, 1992. At that time Mr. Shuster made written demand to ACT for payment of wages for his work from October 1, 1992 through October 14, 1992.
5. On October 19, 1992 ACT wrote Mr. Shuster and refused to pay any wages whatsoever for this two-week period, on the grounds that "no commissions were earned" during that period. ACT paid no wages at all at that time for that two-week period of work.

6. On November 19, 1992, Mr. Shuster again wrote and demanded the "gross pay" of \$750 provided for in the Employment Agreement. Mr. Shuster further informed ACT that its failure to pay him any amount whatsoever not only violated the Agreement but violated state and federal minimum wage law.

7. On or about December 1, 1992 ACT paid Mr. Shuster gross pay of \$340, representing minimum wage for 80 hours of work; but again failed and refused to pay the full gross pay totalling \$750 as demanded in accordance with the Employment Agreement.

(R 148-151 Findings of Fact and Conclusions of Law; *Addendum K*)

Summary of Arguments

The contract between the employer ACT and its employee Mr. Shuster is unambiguous and required ACT to pay Mr. Shuster "gross pay" of \$750 for his final two weeks of full-time work for ACT.

ACT's argument that Mr. Shuster was paid "commissions" and not "wages" is wrong and improperly raised for the first time on appeal.

If this Court affirms the judgment for appellee Shuster, this Court should remand the case for calculation of attorneys' fees for legal work on appeal.

This Court should sanction appellant ACT for its failure to comply with Appellate Rules of Procedure; its improper and erroneous statements

of facts (both here and in the Docketing Statement); and its attempt to raise issues in its brief which have not been preserved for appeal.

Argument

I. THE EMPLOYMENT AGREEMENT UNAMBIGUOUSLY REQUIRED ACT TO PAY MR. SHUSTER GROSS PAY OF \$750 FOR HIS FINAL TWO WEEKS OF WORK.

The Employment Agreement itself is admitted to by both parties. The only issue is the interpretation of this employment contract.

A. This Contract Should be Interpreted According to its Plain Meaning.

The interpretation of the Employment Agreement is a matter of law. *Zions First Nat'l Bank v. National Am. Title Ins. Co.*, 749 P.2d 581, 582 (Utah, 1988). Whether this contract is ambiguous and requires parol evidence to understand is itself a question of law. *Faulkner v. Farnsworth*, 665 P.2d 1292, 1293 (Utah, 1983). The Circuit Court was correct in finding that this contract is not ambiguous.

The terms of this contract should be interpreted "according to their plain and ordinary meaning." *Equitable Life & Casualty Ins. Co. v. Ross*, 849 P.2d 1187, 1192 (Utah. App., 1993) cert. denied 860 P.2d 943

(Utah, 1993). The plain and ordinary meaning of this contract is that the plaintiff was entitled to the "gross pay" of \$750 for his final two weeks of work.

B. The Contract Unambiguously Required ACT to Pay Mr. Shuster \$750 Each Pay Day.

Paragraph 5 of the Agreement states that the Employer will pay the employee "a commission" for "all services." (R 9-10; in *Addendum B*) Paragraphs 5A - 5D set forth a complicated structure for calculating when "commissions" are due and how to calculate them. Paragraph 5D even provides that the employee will be paid commissions *after his employment ends* if a sale is made during the 30 days following his termination which was "attributable" to his efforts. (R 10)

Paragraph 6 (R 10) sets forth provisions for paying a "draw against future commissions." It states (emphasis added):

6. DRAW: Employee *will be paid* a draw against future commissions *according to the following schedule*:

<u>Days Following Employment</u>	<u>Draw</u>
1 through 60 days	\$2,800 per month
61 through 90 days	\$2,200 per month
91 days <i>on</i>	\$1,500 per month

From "91 days on" the draw amount is \$1500 per month or \$750 every pay period. Paragraph 6 further provides:

"If commissions earned do not equal the draw per month as outlined above, *Employer shall add that amount necessary to cause Employee's gross pay to equal the monthly amount shown*, such amount to be considered a draw against future commissions." (R 10 Employment Agreement ¶ 6. Emphasis added.)

There is no contingency or ambiguity regarding the Employer's obligation to pay the employee, at a minimum, this gross pay each pay period. While the Employer can recapture the "draw" in certain circumstances, the Agreement never permits the employer to pay the employee less than the "gross pay" defined in Paragraph 6. There is no suggestion that an employee might arrive at pay-day and find that he gets \$0 dollars in his envelope. There is, no where, any mention of paying an employee minimum wage for some particular two weeks of work.

Moreover, this contract is not ambiguous. This is an integral contract. All the provisions regarding wages--commissions, draw, gross pay, and recapture of draw from commissions--are consistent with one another. While no provisions exist for paying less than the minimum "gross pay," the contract does provide for the Employer to recapture "draw" in particular circumstances. When commissions earned rise above a certain level (\$2500 per month) and a "draw balance" exists, any commissions over \$2500 will go to the Employer to pay off the "outstanding draws." (R 10-11 Employment Agreement ¶6) After

termination, the Employer is required to pay commissions for 30 days. However, if there are "*any* outstanding draws", they will be paid off in total by any post-termination "commissions" before the ex-employee gets any commission earned during the 30 days following termination. (R 10 Employment Agreement ¶5.D; *Addendum B*) In fact, the contract obviously labels all pay as either "commissions" or "draw against future commissions" to facilitate the recapture of the maximum total "draw" amount when sales are made and commissions earned.

None of these provisions for paying back "draw" out of "commissions" earned suggests any ambiguity in the employer's obligation to pay the "gross pay" provided for in Paragraph 6 each and every pay day.

C. Undisputed Facts and Law are Consistent with the Interpretation that ACT Owed Mr. Shuster Gross Pay of \$750.

During the entire term of employment (except for the last pay day), ACT behaved consistently with this plain meaning of the contract. Each pay day for seven months ACT paid Mr. Shuster the "gross pay" amount. (R 149 Findings ¶ 3, in *Addendum K*)

However, on Mr. Shuster's final pay day, ACT's ignored the "gross pay" provision and paid Mr. Shuster no wages whatsoever since he had not closed any sales during his final two weeks of full-time labor for ACT.

(R 3 Complaint ¶ 10, R 15 Complaint Exhibit C; in *Addendum B*. R 20 Answer ¶ 3; in *Addendum C*). ACT argues that this is sensible for the final pay period. But this interpretation is unconscionable. It would make the wages owed an employee entirely dependent upon the date when employment ended. If the employee resigned the day after "pay day," he would have received the "gross pay" and he would have been fully compensated. If, as in this case, the employment terminated the day the pay period ended, the employer might obtain two weeks of free labor. Surely a contract cannot set up such a "lottery" for wages. Since this employment contract could be terminated with no notice (R 12 Agreement ¶ 13; *Add. B*), there must be a fixed wage owed no matter which day in the month the employment ends.

ACT's initial position (that the contract required no payment of any wages to Mr. Shuster) was also illegal. If an employee works full-time, for two weeks, at his employer's offices under his employer's direction the employer must pay him at least minimum wage. Both the federal Fair Labor Standards Act, the Utah Minimum Wage Act and related regulations require employers to pay their employees at least minimum wage for their work. See 29 U.S.C.A. § 206; Utah Code Ann. § 34-40-101 et. seq.; and U.C.A. R572-1-3. See also *Pierce v. Anagnostakis*, 394 P.2d 74, 75-76 (Utah, 1964) (Even though waitress agreed to work

for "tips" only she was entitled to minimum wage under Utah statute). There is an exception to minimum wage law for "outside sales persons" which is irrelevant to this case.³ This exception makes common sense, as the employer will not be able to oversee an "outside sales person," and will not be certain how many hours he devotes to the employer's business. However, Mr. Shuster was not an "outside sales person" but was contractually obligated to "devote all his time and efforts during normal business hours of Employer to the performance and duties on behalf of Employer." (R 8 Agreement ¶ 4; *Add. B*) And he did so. (R 149 Findings ¶ 2; *Add. K*). He worked *at ACT's offices* and called customers by telephone, demonstrated products by modem, mailed solicitations and developed marketing plans, all at ACT's business office. (R 118-121 Shuster Affidavit ¶ 6-9, 12; *Add. H*). For such work for ACT, at ACT's offices, ACT was required to pay Mr. Shuster at least minimum wage.

In Mr. Shuster's second written demand for payment, he referenced minimum wage law. (R 16 Complaint Exhibit D; *Add. B*). After that, ACT sent him minimum wage. (R 3 Complaint ¶ 11 & 12 and R 17 Complaint

³ The exception to minimum wage law for "outside sales persons" is irrelevant to this case as it was contractually required and factually undisputed that Mr. Shuster worked full-time at ACT's place of business. Since he was not "customarily and regularly engaged away from his employer's place or places of business" he was, under minimum wage law, an "inside salesman." 29 C.F.R. § 541.5(a). See 29 U.S.C.A. § 213 and Utah Code Ann. § 34-40-104.

Exhibit E; *Add. B.* R 20 Answer ¶ 3; *Add. C*). There is nothing whatsoever in the Employment Agreement regarding minimum wage.

D. ACT's Arguments are Unpersuasive.

ACT argues that it is illogical to pay a worker something called "pre-paid commissions" if he "no longer calls on potential customers, therefore, there is no way he can earn additional commissions." (Br. 10) ACT again ignores the plain language of the contract. For thirty days following termination the employee CAN EARN ADDITIONAL COMMISSIONS. (See R 10 Employment Agreement ¶ 5D; *Add. B*). There is nothing illogical about paying "draws against future commissions" to an employee who is leaving the job but yet might earn additional commissions during the 30 days after his termination.

Even if the contract didn't have the provision for earning commissions after termination, it would be completely logical to interpret the provisions in Paragraph 6 for paying a set "gross pay" each month in a legal manner.

Today ACT's other argument focuses upon a word count. ACT contends that the Agreement "uses the word 'commissions' 19 times, the words 'draw against future commissions' once and 'commissionable' 6 times." (Br. 9). By force of numbers, all ACT had to pay Mr. Shuster was "commissions."

Word counts are not a respected way to interpret contracts.⁴ Rather "it is axiomatic that a contract should be interpreted so as to harmonize all of its provisions and all of its terms, which terms should be given effect if it is possible to do so." *LDS Hospital v. Capitol Life Ins. Co.*, 765 P.2d 857, 858 (Utah, 1988). Here, when one reads all the words--including the provisions for paying "gross pay" in ¶ 6--the contract is integral, unambiguous, and legal.

Moreover, ACT's word-count argument that "commissions" were all that was owed would render the Employment Agreement patently illegal in failing to require even minimum wage. Presumably this Court should ignore that illegality. Presumably, this Court should enforce such an illegal contract since Mr. Shuster was, after all, finally paid minimum wage.

This contract should not be considered ambiguous simply because the defendant "ascribes a different meaning to it to suit his or her own interests." *Equitable Life & Casualty Ins. Co. v. Ross* 849 P. 2d 1187, 1192 (Utah. App., 1993) citing *Larson v. Overland Thrift and Loan*, 818 P.2d 1316, 1319 (Utah App. 1991) *cert. denied*, 832 P.2d 476 (Utah,

⁴ Moreover, ACT fails to count all the words. ACT ignores entirely the words "gross pay" which are used one time, thus tying the usage rate of "draw against future commissions." R 10 ¶ 6; in *Addendum B*.

1992). The only plain, sensible and legal interpretation of the contract that ACT drafted and Mr. Shuster signed is that Mr. Shuster is entitled to the "gross pay" amount (here \$750) for his last two weeks in ACT's employ.

II. ACT'S ARGUMENT THAT MR. SHUSTER WAS PAID "COMMISSIONS" AND NOT "WAGES" IS WRONG AND IMPROPER.

In its Brief, and for the first time, ACT reframes the issue as "whether Mr. Shuster was a commissioned salesman or worked for wages." (Statement of Issues, Br. 2) For the first time ACT argues that statutes protecting wage earners do not apply to this case. (Br. 9, Point III) Hence, ACT argues, the trial court's order of a civil penalty for ACT's violation of the Utah Payment of Wages Act, and for payment of plaintiff's attorneys fees under the Attorneys' Fees in Suits for Wages Act should all be vacated; and this Court should "reverse the trial court's ruling that granted Shuster's motion for summary judgment and grant ACT's motion for summary judgment." (Br. 11)

ACT's position that these laws do not apply to it is not only wrong, but frivolously wrong. ACT's attempt to raise this argument on appeal, having never made any such argument to the trial court, is improper and merits sanctions.

A. Whatever ACT Paid or Should Have Paid Mr. Shuster was "Wages" under Utah Law.

While ACT can draft a contract that calls all payments "commissions" or "draws against future commissions," ACT's artful use of language does not bind legislative bodies. "Wages" is a term of art used in various laws to cover any and all payments made by "employers" to "employees" for their work.

In the Utah Payment of Wages Act the Utah legislature set forth what it meant by the term "wages;" and "wages" explicitly includes "commission(s)":

§ 34-28-2 Definitions.

As used in this chapter:. . .

(2) The word "*wages*" means all amounts due the employee for labor or services, *whether the amount is fixed or ascertained on a time, task, piece, commission basis or other method of calculating such amount.* (emphasis added)

Thus, by the terms of this statute, whatever ACT was obligated to pay Mr. Shuster--whether commissions or draw or minimum wage or gross pay--is "wages" and is covered by the Payment of Wages statute.

It is worth noting that in various statutes the word "wages" is regularly used to refer to whatever an "employer" pays an "employee." Thus, the "Utah Minimum *Wage* Act" requires the payment of "minimum *wage* for all private and public employees" with certain specific

exemptions. Utah Code Ann. § 34-40-103(1)(a) and §34-40-104. (emphasis added). The federal Fair Labor Standards Act section on "Minimum *Wage*" similarly requires that "every employer shall pay to each of his employees. . . *wages* at [particular] . . . rates" 29 U.S.C.A. § 206. (emphasis added). Neither statute excludes "commissions" from the definition of wages.⁵ Similarly, the Utah law which makes wages a preferred debt defines "*wages*" to include "all amounts due an employee for labor or services, whether the amount is fixed or ascertained on a . . . commission basis." Utah Code Ann. § 34-26-4.

The chapter of Utah law entitled Attorneys' Fees in Suits for Wages applies "whenever a . . . employee shall have cause to bring suit for wages earned and due according to the terms of his employment." Utah Code Ann. § 34-27-1. This one-section chapter does not itself contain a definition of "wages." However, this chapter was enacted together with the preceding chapter (Wages a Preferred Debt § 34-26-1 et seq.) and the succeeding chapter (Payment of Wages Act § 34-28-1 et. seq.); and both of these chapters clearly define "wages" to include all payments

⁵ Both minimum wage statutes exempt employees who are "outside sales persons" Utah Code Ann. § 34-40-104(1)(a) or "outside salesman" 29 U.S.C.A. § 213 from coverage. Although many outside sales persons are paid commissions, it does not logically follow that if an employee is paid a commission he is an outside sales person.

and specifically to include "commissions."⁶ (See above.) The only sensible way to read the Attorneys' Fees chapter is to understand it as providing a procedural remedy (attorney fees) for enforcing the rights to wages set forth in the Payment of Wages Act which follows immediately. And the one case on point, *Bennett v. Robinson's Medical Mart Inc.*, 417 P.2d 761, 765 (Utah, 1966) holds that a salesman who brought suit to collect unpaid commissions was entitled to attorneys fees under the (predecessor) statute.

B. The Utah Payment of Wages Act Applies to this Case

The Utah Payment of Wages Act (UPWA) requires that an employer promptly pay an employee final wages after the employment relationship ends. Utah Code Ann. § 34-28-5.⁷ "If the employer fails to do so upon the employee's written demand for payment, the employee's wages continue to accrue from the date of written demand until payment is made, but no longer than sixty days." *Smith v. Batchelor*, 832 P.2d 467,

⁶ Utah Code Ann. § 34-26-4 which defines "wages" was enacted by L. 1969 ch. 85 § 80; Utah Code Ann. § 34-27-1 regarding attorneys fees was enacted by L. 1969 ch. 85 § 81; and Utah Code Ann. § 34-28-2 which defines wages under the UPWA was enacted by L. 1969 ch. 85 § 83.

⁷ The time periods vary slightly depending upon whether the employer "separates" an employee from the payroll (24 hours) or the employee "resigns" (72 hours). In this case, these differences are irrelevant, since ACT failed to pay any wages for 45 days, violating the statute irrespective of which subsection applies.

469 (Utah, 1992)(dicta).⁸

The statute provides that the "wages of the employee **shall continue. . .at the same rate** which the employee received at the time of separation." Utah Code Ann. § 34-28-5(2) (emphasis added). The statutory word "shall" indicates that this is a mandatory penalty. Indeed, the trial court in *Smith v. Batchelor* saw this penalty as mandatory.⁹

ACT's brief erroneously and improperly argues:

"This section does not apply, however, to earnings of sales agents employed on a commission basis. See paragraph (b) if that section. (sic)" (Br. 9)

It is true that this section does not apply to a commissioned sales agent "who has custody of accounts, money or goods of his principal if the net amount due the agent is determined only after an audit or verification of sales accounts, funds, or stocks." Utah Code Ann. § 34-

⁸ In the trial court it was undisputed that ACT failed to pay any wages at all to Mr. Shuster for 45 days. (R 66-67 Memorandum of Points and Authorities Statement of Material Facts ¶ 8, relying upon R 5 Complaint ¶ 18 admitted in R 21 Answer ¶ 5.) It was similarly undisputed that Mr. Shuster gave written demand for his wages on the day his employment ended, and that he filed this action within 60 days of that date. (R 66-67 Memorandum's Statement of Material Facts ¶ 8 and 10; in *Addendum D*).

⁹ In *Smith v. Batchelor*, the trial court denied recovery under the federal Fair Labor Standard's Act given the recovery awarded under the UWPA. The Supreme Court reversed: "The trial court found. . . that equity prohibits both state and federal recovery for the same violation. This is incorrect. Equity follows the law. It cannot abridge an explicit statutory requirement." *Smith v. Batchelor* at 471.

28-5(1)(b). But Mr. Shuster did not have custody of ACT's accounts, money or goods on the date his employment ended. And there was no audit needed to discover the commissions owed. In fact, the Complaint specifically plead these facts:

¶ 16. Defendant ACT has at all relevant times maintained and had custody of all sales records necessary to determine commissions and gross pay owed to Plaintiff Lee Shuster.

¶ 17. On October 15, 1992 Defendant ACT knew that no sales had occurred during the period from October 1 through October 14, 1992 and thus knew that no commissions were owed to Plaintiff Lee Shuster at the time of separation from employment. (R 4-5 Complaint; in *Addendum B*)

And ACT's Answer specifically admitted to these facts:

¶ 5. Admits the allegations contained in paragraph sixteen, seventeen and eighteen. (R 21 Answer; in *Addendum C*)

ACT improperly cites the law by quoting only a portion of the statute. ACT improperly raises an argument which is not grounded in fact or law, given the Complaint and Answer filed.

C. Utah Statute Mandates Payment of Attorneys' Fees in this Case

Utah statute provides for attorneys fees "whenever a . . . employee shall have cause to bring suit for wages earned and due according to the terms of his employment." Utah Code Ann. § 34-27-1. If the court finds "that the amount for which he has brought suit is justly due" then:

"it shall be the *duty* of the court. . . to allow to the plaintiff a reasonable attorneys' fee in addition to the amount found due for wages, to be taxed as costs of suit." Utah Code Ann. § 34-27-1. (emphasis added)

Here again, this statute uses mandatory, not discretionary language. An employee who prevails in a suit for wages must get attorneys' fees.

ACT's use of the terms "commissions" and "draw against future commissions" does not make this law inapplicable. "Wages" as used in this act includes any payment--whether salary or commissions--an employer owes its employees. The case on point is *Bennett v. Robinson's Medical Mart, Inc.* 417 P.2d 761, 765 (Utah, 1966). In *Bennett v. Robinson's Medical Mart Inc.* a salesman was awarded attorneys' fees under this act for proving that he was entitled to be paid a certain amount in *commissions*. The Utah Supreme Court quoted the definitional language¹⁰ of the next section on wages and held:

The fact that plaintiff was paid on a commission basis does not preclude him from coverage under this section. *Bennett* at 765.

Not only do the plain words of the statutes establish that attorneys fees are mandated in this case, but the only authority on point definitively hold

¹⁰ "Wages shall mean all amounts at which the labor or service rendered is recompensed, whether the amount is fixed or ascertained on a time, task piece, *commission basis* or other methods of calculating such amount." Emphasis added by Court. *Bennett* at 765. quoting then Section 34-10-3(b), U.C.A. 1953.

that when an employee is paid "commissions" those are nevertheless "wages" under the statute that allows him to collect attorneys fees when he has to sue to collect his wages. ACT's argument has no support.

D. ACT's Argument that these Statutes Do Not Apply is Improper Since No Such Argument was Ever Presented to the Trial Court.

ACT never previously raised any argument that either the Utah Payment of Wages Act or the Attorneys' Fees statutory provisions do not apply.

Mr. Shuster raised and briefed the issue of civil penalties under the UPWA in his Motion for Summary Judgment and Memorandum in support. (R 70-72 Pt. II, p.6-8; in *Addendum D*) ACT did not say one word to contest this argument in its Response.(R 91-96; in *Addendum E*) In Shuster's Reply Memorandum he confirmed that the issue as to the penalty under the UPWA was undisputed:

III. PLAINTIFF'S CLAIM FOR CIVIL PENALTIES UNDER THE UTAH PAYMENT OF WAGE ACT IS NOT DISPUTED.

Plaintiff's second cause of action is based upon ACT's violation of the Utah Payment of Wages Act. The UPWA requires prompt payment of wages at termination. This cause of action does not depend upon the interpretation of the Employment Agreement.¹¹ If ACT owed Mr. Shuster any wages at all (even "minimum wages") ACT violated the UPWA for paying nothing for

¹¹ The amount of the civil penalty depends upon whether this Court finds the plaintiff entitled to wages under the Agreement or entitled to minimum wage.

45 days.

Defendant ACT's Response and Memorandum does not controvert this point at all. Accordingly, this Court should order judgment for the Plaintiff under Count II for ACT's violation of the Utah Payment of Wage Act.

(R 114-115 Reply Memorandum; in *Addendum G*)

Even at oral argument ACT did not dispute the applicability of the UPWA to this case. (R 245-246; in *Addendum I*) ACT did argue that its failure to pay Mr. Shuster anything at all for 45 days was not in "bad faith." (R 245-246; *Add. I*) In response, Mr. Shuster urged not only that the penalty was mandatory but that it was also equitable under all the circumstances.¹² Finally, at the hearing Judge Fuchs indicated his view that the UPWA was mandatory and ACT's counsel seemed to concede that point. (R 260-261; *Add. I*) The only argument made--regarding "bad faith" and the reasonableness of penalties--does not hint at an argument that the UPWA does not apply in this case.

Similarly, Shuster raised and briefed his entitlement to attorneys' fees under the act in his Motion (R 62-63) and Memorandum (R 72-76 Pt.

¹² When Mr. Shuster notified ACT that its actions violated minimum wage law, he also informed ACT of the UPWA penalties and the Attorneys' Fees provisions. However, in his letter Mr. Shuster offered to settle the entire dispute ("to consider myself paid in full for all claims that could exist between us") if ACT paid the contractual wages of \$750 even at that late date. (R 16 Complaint Exhibit D; *Add. B*) Instead, ACT chose to send the minimum wage amount (R 19 Complaint Exhibit E; *Add. B*), and Mr. Shuster did what he promised in his letter--brought this action raising all available claims.

III.; *Add. D*) Again, ACT's Response to Plaintiff's Motion for Summary Judgment never addresses the applicability of the Attorneys' Fees statute to this case. Nor did ACT raise any arguments as to attorneys' fees during oral argument. (R 261-262; *Add. I*) Moreover, when the trial court entered its Memorandum Decision, Judge Fuchs specifically allowed ACT an opportunity to challenge the attorneys' fees:

Plaintiff is awarded attorney fees as prayed for by the affidavit. Defendant shall have 10 days to challenge the attorney fees and request a hearing if appropriate. (R 141-142 Memorandum Decision p.2; in *Addendum J*)

ACT did not avail itself of the court's invitation to challenge attorneys' fees at that timely point.

It is improper for ACT to raise and seek to dispute these legal issues before this appellate court, having never raised them in the trial court. "[I]t is axiomatic that matters not presented to the trial court may not be raised for the first time on appeal." *Franklin Financial v. New Empire Development Co.*, 659 P.2d 1040, 1044 (Utah, 1983) (sufficiency of affidavit not challenged in trial court prior to summary judgment). See also *Ong International (USA) v. 11th Ave. Corp.*, 850 P.2d 447, 455 (Utah, 1993) (jury instruction). Even constitutional challenges may not be presented on appeal if they were not "timely presented to the trial court in a manner sufficient to obtain a ruling

thereon." *Salt Lake County v. Carlston*, 776 P.2d 653, 655 (Utah App. 1989) (equal protection challenge to jury selection). See also *Espinal v. Salt Lake City Board of Education*, 797 P.2d 412, 413 (Utah 1990) (Utah Constitution). "Issues not raised in the trial court in timely fashion are deemed waived, precluding [the Court of Appeals] from considering their merits on appeal." *Salt Lake County v. Carlston* at 655. (emphasis added).

This Court has fully explained the rationale for such issue preclusion: "To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits." *LeBaron & Assoc. v. Rebel Enterprises*, 823 P.2d 479, 483 (Utah App. 1991)--issue of mitigation was not raised "to the level of consciousness . . . sufficient to allow the trial judge to consider it." *Id.* Even "obliquely" raising an issue in the complaint or answer is not sufficient to preserve it for appeal where the issue was not argued and the trial court was not asked to rule on the issue. *Id.* citing *James v. Preston*, 746 P.2d 799, 801-2 (Utah App. 1987) (issue of equitable mortgage "obliquely raised" in complaint, but trial court made no ruling and plaintiff did not object or provide legal authority on issue, thus not properly before Court on Appeal); and *Turtle Management Inc. v. Haggis Management Inc.*, 645 P.2d 667, 672 (Utah,

1982) (issue of covenant not to compete's legality raised in answer, but "no argument was made to the district court on this issue" and trial court had no opportunity to make findings or rulings on issue, thus it was not properly before Utah Supreme Court on appeal.)

Here ACT's arguments (that the Utah Payment of Wage Act and the Attorneys' Fees statute do not apply to this case) were never made, argued, briefed or even hinted at in the trial court. The trial judge never had any opportunity to consider and to rule on them. ACT should not now be permitted to raise these arguments in the Court of Appeals. They have not been preserved for appeal. Making them now ignores the legal standards for appeals and is frivolous. ACT should be sanctioned.

III. IF THIS COURT AFFIRMS THE JUDGMENT FOR SHUSTER, IT SHOULD REMAND THE CASE FOR CALCULATION OF ATTORNEYS' FEES FOR THIS APPEAL.

Utah statute mandates that an employee be allowed "reasonable attorneys fees" for any action brought to collect wages justly due.

A. Attorneys' Fees Are A Matter of Right Under the Statute.

As set forth above, Utah statute provides for attorneys fees in suits for wages. Utah Code Ann. § 34-27-1. If the court finds "that the amount" for which Mr. Shuster has brought suit "is justly due" then:

"it shall be the *duty of the court. . . to allow to the plaintiff a*

reasonable attorneys' fee in addition to the amount found due for wages, to be taxed as costs of suit." Utah Code Ann. § 34-27-1. (emphasis added)

The public policy behind enforcement of wage laws supports this mandatory award of attorneys' fees, even if they are large in comparison with the wages recovered:

As a general rule, the amounts recoverable under the FLSA and the UPWA are so small that attorney fees will exceed any potential recovery. Hence, unless an award of attorney fees is available, workers would be unable to enforce their rights under these statutes. *Smith v. Batchelor*, 832 P.2d at 474 (J. Stewart, concurring and dissenting).

The general rule in awarding attorneys' fees is consistent with this principle. The legal work necessary to enforce a contract for a small amount may be just as time-consuming as enforcing a contract for a large amount:

Although the amount in controversy can be a factor in determining a reasonable fee, care should be used in putting much reliance on this factor. It is a simple fact in a lawyer's life that it takes about the same amount of time to collect a note in the amount of \$1000 as it takes to collect a note for \$100,000." *Dixie State Bank v. Bracken*, 764 P.2d 985, 990 (Utah App., 1988).

Similarly, the legal work necessary to defend a small judgment on appeal will relate more to the maneuvers and arguments made by the appellant than it will to the dollar amount of the judgment.

B. Where Attorneys' Fees are Mandated, they Should Be Awarded to a Successful Appellee for Work on Appeal.

If this Court affirms the Circuit Court's judgment, it should order that the appellee's attorneys' fees in defending the Judgment through appeal be paid by the appellant-defendant ACT. Since 1980 it has been the rule of law in Utah that if attorneys' fees are mandated, this should include "attorneys' fees incurred by the prevailing party on appeal as well as at trial." *Management Services v. Development Associates*, 617 P.2d 406, 409 (Utah, 1980).¹³ In that case the parties had signed a contract which provided for attorneys' fees to the prevailing party in an action to enforce the contract. The Utah Supreme Court explained the principle behind the new rule of law it adopted:

"The purpose of a provision for attorney's fees is to indemnify the creditor or the prevailing party against the necessity of paying an attorney's fee and to enable him to recover the full amount of the obligation. . . . If plaintiff is required to defend its position on appeal at its own expense plaintiff's rights under the contract are thereby diminished. at 409 quoting *Zambruk v. Perlmutter Third General Builders, Inc.*, 510 P.2d 472 (Colo.App. 1973).

This principle and policy applies equally in this case where state law provides for attorneys' fees. The public policy behind allowing a worker

¹³ On this point this case overruled *Swain v. Salt Lake Real Estate & Investment Co.*, 3 Utah 2d 121, 279 P.2d 709 (1955) and *Downey State Bank v. Major-Blakeney Corp.*, 556 P.2d 1273 (Utah, 1976).

to recover attorneys' fees for successfully defending a wage claim on appeal is as strong (if not stronger) than the principle of enforcing parties' contracts¹⁴ as to attorneys' fees.

The general rule of law in Utah regarding attorneys fees on appeal is that "attorneys fees, when awarded as allowed by law, are awarded as a matter of legal right." (emphasis added) *Cabrera v. Cottrell*, 694 P.2d 622, 625 (Utah, 1989) This Court has enunciated the "general rule" in these word:

[W]hen a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal. *Utah Dept. of Social Services v. Adams*, 806 P.2d 1193, 1197 (Utah App. 1991)

In that case this Court recognized that fees for appeal were properly awarded based not only upon contractual provisions, but also "when fees

¹⁴ Since the landmark decision of *Management Services v. Development Associates, supra* there have been numerous cases in which the Utah Supreme Court and this Court have affirmed that holding where the attorneys fees were based upon contractual provisions. See *Alexander v. Brown*, 646 P.2d 692, 695 (Utah, 1982) (purchasers of subdivision lot rely upon Earnest Money Agreement); *Bushnell Real Estate Inc. v. Nielson*, 672 P.2d 746 (Utah, 1983) (promissory note); *Cabrera v. Cottrell*, 694 P.2d 622, 625 (Utah, 1985) (uniform sales contract); *G.G.A. Inc. v. Leventis*, 773 P.2d 841, 846 (Utah App. 1989) (lessee enforcing right to first refusal); *Saunders v. Sharp*, 840 P.2d 796, 809-810 (Utah App. 1992) (purchasers of property seeking specific performance); *Cobabe v. Crawford*, 780 P.2d 834, 836 (Utah App. 1989) (attorneys fees to defendants in contract action after dismissal with prejudice).

in a divorce were awarded below to the party who then prevailed on appeal" citing *Burt v. Burt*, 799 P.2d 1166, 1171 (Utah App. 1990), and "where basis for award of fees was mechanic's lien statute" citing *Martindale v. Adams*, 777 P.2d 514, 518 (Utah App. 1989). *Utah Dept. of Social Services v. Adams* at 1197.

In this case attorneys' fees are based upon a statute which mandates¹⁵ the award of those fees to a wage earner who proves he was entitled to the wages claimed. The award of attorneys fees on appeal should be a matter of "legal right."

Whenever a successful appellee is entitled to attorneys' fees for defending the Judgment, the proper remedy is for this Court to remand the case for the trial court to award reasonable fees for the appeal. *Management Services v. Development Associated*, 617 P.2d 406, 109 (Utah, 1980); *GGA Inc. v. Leventis*, 773 P.2d 841, 847 (Utah App. 1989); *Cobabe v. Crawford*. 780 P.2d 834 (Utah App. 1989).

¹⁵ Certain of the opinions dealing with attorneys fees under a contract have, in *dicta*, distinguished between contractual cases in which attorneys fees were a matter of right and cases of "applying a statute which allows the discretionary award of such fees." *Saunders v. Sharp, supra* at 809, *Cobabe v. Crawford, supra* at 836, both quoting *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 226 (5th Cir. 1975). This *dicta* is not relevant to this case since the statutory award of fees to an employee enforcing a wage claim is NOT discretionary, but mandatory.

IV. APPELLANT ACT AND ITS COUNSEL SHOULD BE SANCTIONED FOR VIOLATION OF RULE 33 OF THE UTAH RULES OF APPELLATE PROCEDURE.

This Court should sanction appellant ACT and its counsel for its failure to comply with the Rules of Appellate Procedure, for its improper and erroneous statements of facts (both in its Brief and its Docketing Statement) and for its attempt to raise issues in its brief which have not been preserved for appeal and which are patently frivolous.

Rule 33 of the Utah Rules of Appellate Procedure provides that this Court "shall award just damages" for a "frivolous appeal, . . . or other paper. . . . not grounded in fact, nor warranted by existing law. . . . or . . . interposed for purpose of delay." Utah R. App. Pro. 33 (a) and (b).

A. The Docketing Statement Violated Rule 9 of the Utah Rules of Appellate Procedure by Failing to Include Necessary Attachments and by Failing to State the Standard of Review.

ACT failed to include as "necessary attachments" to its Docketing Statement the trial court's Memorandum Decision and its Findings of Fact and Conclusions of Law, although these documents clearly fell within the category of "any opinion or findings" required to be attached. Rule 9(d)(2) Utah R. App. P. The appellee Shuster pointed out this failure in his Motion for Summary Disposition, Dismissal and Sanctions. Then Appellant ACT

filed a Motion for Leave to File Amended Docketing Statement (August 1) and appellee Shuster filed a Response asking that all corrections--not just those admitted to in the Motion--be made. (August 4). Before ACT's Motion was acted upon, ACT filed an Amended Docketing Statement (August 4). As noted by this Court, that Amended Docketing Statement "still does not include the Findings of Fact and Conclusions of Law." Order August 15, 1994. This Court ordered that ACT have:

leave to amend the Docketing Statement. . . to include the addition of the trial court's Findings of Fact and Conclusions of Law dated March 21, 1994 if such a document exists and to state the applicable standard of review. (Order August 15, 1994).

Ultimately ACT did file all these "necessary attachments" and did state the standard of review. But getting this accomplished required additional and unnecessary work by appellee and by this Court.

Even if ACT's failure to attach the proper documents was the result of negligence or inadvertence, it is nevertheless sanctionable. In *Taylor v. Estate of Taylor*, 770 P.2d 163, 171-172 (Utah App. 1989) this Court held that attaching the wrong document--a will--to a complaint violated Rule 11 Utah R. Civ. P. and merited sanctions. The court explained that reasonable inquiry would have resulted in the proper document being attached. Here, too, a reasonable inquiry by ACT's counsel would have resulted in the proper documents being attached the first time. In *Taylor*

the court based its holding upon the further fact that plaintiff's error caused the opponent to incur legal costs. Here, too, damages are appropriate since ACT's failure to comply with Rule 9 the first time caused appellee and this Court additional legal work.

B. ACT's "Statement of Facts" is Not "Grounded in Fact" and Merits Sanctions.

Both in its Docketing Statement and in its Brief, ACT has included "facts" which were not "material" to the trial court's grant of summary judgment for the plaintiff. Moreover, many of these alleged "facts" were not ever plead or averred by anyone in the trial court. The inclusion of these alleged "facts" is not grounded in fact or law. Where the evidence is "mischaracterized and misstated" to the appellate court, sanctions are appropriate. *Eames v. Eames*, 735 P.2d 395, 397 (Utah App. 1987).

ACT falsely sets forth the following in its Brief:

Statement of Facts

The facts material to the issue presented in this appeal are:

2. 80% percent of ACT's revenues come from new sales

3. ACT is only able to stay in business by seeking out and selling its products to new customers. (Brief p. 4)

These same "facts" were set forth in ACT's Docketing Statement, Statement of Fact p. 2.¹⁶ These "facts" were not alleged in the Affidavit

¹⁶ The misstatements of "facts" material to the issues on appeal were made in the original, the Amended, and the Second Amended Docketing Statement.

of ACT's president (R 97-98; *Add. F*), were not reproduced in the contract, and were disputed (in part) by Mr. Shuster's Affidavit (R 119-120 ¶ 10; *Add. H*). More significantly, they formed no basis for the Circuit Court's grant of summary judgment for plaintiff, so they are clearly not "facts material to the issue presented in this appeal." Thus, these allegations are inappropriately cited as "facts" in both the Brief and the Docketing Statement.

Second, ACT's "Statement of Facts" includes the following allegations which were disputed in part by plaintiff and which, moreover, were not material to plaintiff's motion for summary judgment:

1. ACT is in the business of selling computer hardware and accounting software to beer, wine, soda and bottled water distributors throughout the United States. . . .
4. On March 2, 1992 ACT hired Shuster as a commissioned salesman to call on potential new customers and attempt to sell ACT's products to them. (Brief p. 4-5)

These same "facts" were set forth in the Docketing Statement, Statement of Fact -- Introduction p. 2. While the contract sets forth the nature of the business (R 8), it also allowed ACT to assign Mr. Shuster to particular duties within that business.¹⁷ The Affidavit of ACT's

¹⁷ The contract reads in relevant part: "Employer reserves the right to modify the . . . nature or type of prospective clients from whom Employee shall solicit business." R 8 Employment Agreement ¶ 1; *Add. B*.

president said nothing about what Mr. Shuster was hired to sell (R 97-98; *Add. F*); and Mr. Shuster's Affidavit (R 118 ¶ 4; *Add. H*) and Reply Memorandum (R 109; *Add. G*) asserted that his duties were limited as permitted by the contract.¹⁸ Moreover, these disputed "facts" formed no basis for the Circuit Court's grant of summary judgment for plaintiff. Thus they, too, were inappropriately cited as "facts" to the Court of Appeals.

Thirdly, ACT's Statement of Facts sets forth the following "facts" which ACT's president had averred in support of ACT's Motion for Summary Judgment, but which plaintiff Shuster had disputed:

9. During the period of Shuster's employment with ACT, 8 1/2 months, he earned commissions of \$1,831.30 but received prepaid commissions of \$11,632.86. (Brief p. 5)

These same "facts" are set forth as "facts" in the Docketing Statement p. 3. Although these "facts" were alleged by ACT's President, they were disputed by Plaintiff (R 120 Affidavit ¶ 11; *Add. H*). Moreover, these disputed facts were irrelevant to plaintiff's Motion for Summary Judgment. (R 109 Reply Memorandum; *Add. G*).

None of the "facts" set forth above were found by the trial court.

¹⁸ The employee, Mr Shuster, was hired to sell only a portion of ACT's products to on certain clients (software and hardware to bottled water distributors) and in only certain states.

These were not "facts" relied upon by the trial court in finding that the contract was unambiguous, in interpreting that contract, or in granting the plaintiff summary judgment. Therefore, they are not facts "material" to this appeal. Thus, they are improperly included as "facts" in ACT's Brief and in ACT's Docketing Statement.

What these allegations are is parole evidence ACT would like to present in a trial of this case. IF the contract is ambiguous, then ACT should have its chance to present parole evidence about the operation of its business and the plaintiff's conduct. IF the contract is ambiguous, then the plaintiff, too, should have an opportunity to present evidence about ACT's business and ACT's conduct toward him. But if (as the trial court found) the contract is unambiguous; then parole evidence should not be considered. ACT should not be permitted to surreptitiously present parole evidence on appeal when the only issue on appeal is whether the contract is unambiguous and what that contract says.

ACT's improper attempts to present evidence in this case may tend to confuse the case. The likelihood is that these misstatements of law were made for the purposes of obfuscation and delay. This Court should award "just damages" for a this frivolous and improper statements of "fact" which are "not grounded in fact," are improper under the legal standard for reviewing the judgment of the trial court, and were most

probably interposed to confuse of delay the resolution of this case. Rule 33 (a) and (b), Utah R. App. Pro.

C. ACT's Brief Presents Arguments and Seeks Relief Not Grounded in Law Because the Issues were Not Raised before the Trial Court, the Arguments are Patently Frivolous, and the Relief is Procedurally Unavailable.

ACT's arguments that the Utah Payment of Wages ACT (UPWA) and the Attorneys Fees Act do not apply because Mr. Shuster was paid "commissions" and not "wages" are patently erroneous and frivolous. (See II.A. B. and C. *supra*). These arguments are further "not grounded in law" because they were never raised before the trial court and are improperly made for the first time on appeal. (See II. D. *supra*)

The relief ACT seeks--vacate the Judgment for Shuster and grant Summary Judgment for ACT--is similarly not grounded in law for two reasons. First, ACT has waived any objection to a judgment for Mr. Shuster under the UPWA. In addition, ACT's Motion for Summary Judgment included as "material facts" matters that were disputed by Mr. Shuster (R 117-129 Affidavit; *Add. H*). (There alleged facts continue to be presented by ACT as "material facts" in this appeal. (See IV.B. *supra*.) Therefore, the only appropriate remedy for ACT to seek on appeal is to vacate the judgment and remand the case for further proceedings (a trial)

before the trial court.

This panoply of frivolous legal maneuvers merits sanctions under Rule 33. Utah R. App. Pro. The Utah Supreme Court found that Rule 33 was violated and sanctions appropriate when there was "a complete lack of merit" to a cause of action. *Hunt v. Hurst*, 785 P.2d 414, 417 (Utah, 1990). In that case the defendant dentist had obtained summary judgment in a malpractice action by presenting affidavits denying his treatment caused plaintiff's injuries and averring his treatment met the standard of care. Plaintiff-appellant had failed to present affidavits controverting those of appellee. Instead, she appealed. That appeal, like ACT's arguments on the UPWA and on the Attorneys' Fees Act, lacked any legal merit.

This Court made clear that a "frivolous" appeal under Rule 33 does not require a showing of bad faith. *O'Brien v. Rush*, 744 P.2d 306, 310 (Utah App. 1987). Rather, an appeal is "frivolous" if it has "no reasonable legal or factual basis." *Id.* ACT's arguments regarding the UPWA and Attorneys Fees Act are totally frivolous under this standard. Rules sanctioning frivolous pleadings do "not impose a duty to do perfect or exhaustive research. The appropriate standard is whether the research was objectively reasonable under all the circumstances." *Barnard v. Sutliff*, 846 P.2d 1229, 1236 (Utah, 1992) (Sanctions inappropriate

under Rule 11 Utah R.Civ.Pro.) Here ACT's research seems nonexistent. ACT did not even read the complete statute before arguing in its brief that the UWPA and the Attorneys Fees Act do not apply to employees who are paid commissions. (See II.A-C above). ACT similarly did not read *Bennett v. Robinson's Medical Mark Inc.*, 417 P.2d 761, 765 (Utah, 1966), the case which holds salesmen are entitled to rely upon the Attorneys' Fees Act in collecting commissions wrongly withheld them. ACT did not read or ignored the complete language of the statute, despite the fact that it was set forth and explained in Plaintiff's Memorandum (R 70-71, fn. 6; *Add. D*). ACT ignored the case on point despite the fact that it, too, was cited in appellee's Memorandum to the trial court. (R 72; *Add. D*) Such absence of research is unreasonable under any set for circumstances.

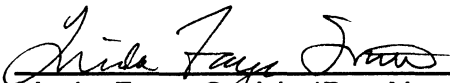
An "appeal brought for delay is one marked by dilatory conduct or conduct designed to mislead the court and which benefits only the appellant." *O'Brien v. Rush*, at 310. The omission of the trial court's Order and Findings both delays and misleads the court. The misstatement of facts misleads the court. The attempt to raise issues on appeal that were never raised before the trial court improperly delays the case and misleads the court. The prayer for relief that is unavailable misleads the court.

"[W]hen there is no basis for the argument presented and when the evidence or law is mischaracterized and misstated" sanctions are appropriate. *Eames v. Eames*, 735 P.2d 395, 397 (Utah App. 1987). In this case, too, the number of statements and arguments made which have no basis in fact or law should lead this Court to sanction the appellant ACT and ACT's counsel.

CONCLUSION

For the reasons set forth above, appellee Lee Shuster asks this Court to affirm the Judgment of the Circuit Court, to award the appellee costs pursuant to Rule 34 of the Utah Rules of Appellate Procedure, to remand the case to the trial court for the calculation of reasonable attorneys' fees in defending the Judgment, to find the appellant and its counsel to have violated Rule 33 of the Utah Rules of Appellate Procedure and to order just damages pursuant to Rule 33 beyond the attorneys' fees otherwise provided for by statute.

Respectfully submitted,


Linda Faye Smith (Bar No. 4460)

PROOF OF SERVICE

This is to certify that two copies of the Brief of Appellee were served on Defendant/Appellant's counsel Thomas R. Blonquist by delivering them by hand on this 9th day of November, 1994 to:

Thomas R. Blonquist (0369)
40 South 600 East
Salt Lake City, UT 84102


Linda Faye Smith (Bar No. 4460)

Tab A

CHAPTER 27

ATTORNEYS' FEES IN SUITS FOR WAGES

Section

34-27-1. Reasonable amount — Taxed as costs.

34-27-1. Reasonable amount — Taxed as costs.

Whenever a mechanic, artisan, miner, laborer, servant, or other employee shall have cause to bring suit for wages earned and due according to the terms of his employment and shall establish by the decision of the court that the amount for which he has brought suit is justly due, and that a demand has been made in writing at least fifteen days before suit was brought for a sum not to exceed the amount so found due, then it shall be the duty of the court before which the case shall be tried to allow to the plaintiff a reasonable attorneys' fee in addition to the amount found due for wages, to be taxed as costs of suit. 1969

CHAPTER 28

PAYMENT OF WAGES

34-28-1. Public and certain other employments excepted.

None of the provisions of this chapter shall apply to the state, or to any county, incorporated city or town, or other political subdivision, or to employers and employees engaged in farm, dairy, agricultural, viticultural or horticultural pursuits or to stock or poultry raising, or to household domestic service, or to any other employment where an agreement exists between employer and employee providing for different terms of payment, except the provisions of Section 34-28-5 shall apply to employers or employees engaged in farm, dairy, agricultural, viticultural, horticultural or stock or poultry raising. 1973

34-28-2. Definitions.

As used in this chapter:

(1) The word "employer" includes every person, firm, partnership, association, corporation, receiver or other officer of a court of this state, and any agent or officer of any of the above-mentioned classes, employing any person in this state.

(2) The word "wages" means all amounts due the employee for labor or services, whether the amount is fixed or ascertained on a time, task, piece, commission basis or other method of calculating such amount. 1969

UTAH CODE

34-28-5. Separation from payroll — Resignation — Cessation because of industrial dispute.

(1) (a) Whenever an employer separates an employee from his payroll the unpaid wages of the employee become due immediately, and the employer shall pay the wages to the employee within 24 hours of the time of separation at the specified place of payment.

(b) This section does not apply to the earnings of a sales agent employed on a commission basis who has custody of accounts, money, or goods of his principal if the net amount due the agent is determined only after an audit or verification of sales, accounts, funds, or stocks.

(2) In case of failure to pay wages due an employee within 24 hours of written demand, the wages of the employee shall continue from the date of demand until paid, but in no event to exceed 60 days, at the same rate which the employee received at the time of separation. The employee may recover the penalty thus accruing to him in a civil action. This action must be commenced within 60 days from the date of separation. Any employee who has not made a written demand for payment is not entitled to any penalty under this subsection.

(3) If an employee does not have a written contract for a definite period and resigns his employment, the wages earned become due and payable not later than 72 hours after the resignation, unless the employee gave 72 hours previous notice of his intention to resign, in which case the employee shall receive his

wages at the specified place of payment at the time of resignation.

(4) If work ceases as the result of an industrial dispute, the wages earned and unpaid at the time of this cessation become due and payable at the next regular payday, as provided in Section 34-28-3, including, without abatement or reduction, all amounts due all persons whose work has been suspended as a result of the industrial dispute, together with any deposit or other guaranty held by the employer for the faithful performance of the duties of the employment. 1969

UTAH CODE

34-40-101. Short title.

This chapter is known as the "Utah Minimum Wage Act."

1990

34-40-102. Definitions.

(1) This chapter and the terms used in it, including the computation of wages, shall be interpreted consistently with 29 U.S.C. Sec. 201 et seq., the Fair Labor Standards Act of 1938, as amended, to the extent that act relates to the payment of a minimum wage.

(2) As used in this chapter:

(a) "Commission" means the Industrial Commission of Utah.

(b) "Minimum wage" means the state minimum hourly wage for adult employees as established under this chapter, unless the context clearly indicates otherwise.

1990

34-40-103. Minimum wage — Commission to review, modify minimum wage.

(1) (a) The minimum wage for all private and public employees within the state shall be \$3.35 per hour.

(b) Effective April 1, 1990, the minimum wage shall be \$3.80 per hour.

(2) (a) Subsequent to July 1, 1990, the commission may by rule establish the minimum wage or wages as provided in this chapter which may be paid to employees in public and private employment within the state.

(b) The minimum wage, as established by the commission, may not exceed the federal minimum wage as provided in 29 U.S.C. Sec. 201 et seq., the Fair Labor Standards Act of 1938, as amended, in effect at the time of implementation of this section.

(c) The commission:

(i) may review the minimum wage at any time;

(ii) shall review the minimum wage at least every three years; and

(iii) shall review the minimum wage whenever the federal minimum wage is changed.

(3) The commission may provide for separate minimum hourly wages for minors.

1990

34-40-104. Exemptions.

(1) The minimum wage established in this chapter does not apply to any employee who is entitled to a minimum wage as provided in 29 U.S.C. Sec. 201 et seq., the Fair Labor Standards Act of 1938, as

amended. In addition, the minimum wage does not apply to the following:

(a) outside sales persons;

UNITED STATES CODE

ANNOTATED

Title 29 Labor

FAIR LABOR STANDARDS

§ 206. Minimum wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than \$3.35 an hour during the period ending March 31, 1990, not less than \$3.80 an hour during the year beginning April 1, 1990, and not less than \$4.25 an hour after March 31, 1991;

§ 213. Exemptions

(a) The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

29 CFR Ch. V (7-1-93 Edition)

§ 541.5 Outside salesman.

The term *employee employed* * * * in the capacity of outside salesman in section 13(a)(1) of the Act shall mean any employee:

(a) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in:

(1) Making sales within the meaning of section 3(k) of the Act, or

(2) Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(b) Whose hours of work of a nature other than that described in paragraph (a)(1) or (2) of this section do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer: *Provided*, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work.

UTAH ADMINISTRATIVE CODE

R572-1-3. Coverage.

A. All employers employing workers in the State of Utah, except those exempted by Section 34-40-104, shall pay the established minimum hourly wage of \$4.25 for all hours employed, effective April 1, 1991.

B. As per Sections 34-23-301 and 34-40-103, a minor employee may not be paid less than 85% of the state minimum hourly wage in effect for adult employees as delineated in R572-1-3(A).

C. Any employer claiming exemption under Subsection 34-40-104(1)(j) shall provide to the Division a statistical report of the average wage paid within 60 days of the end of the regular operating season. The Division may, upon notice, perform an on-site inspection to verify the report in accordance with Sections 34-40-201 and 34-40-203.

Tab B

FILED

90 DEC 14 PM 2:00

CLERK OF THE COURT
SALT LAKE DEPARTMENT

LINDA FAYE SMITH, #4460
Attorney for Plaintiff
C/O University of Utah
College of Law
Salt Lake City, UT 84112
Telephone: 581-4077

CIRCUIT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

LEE K. SHUSTER,

Plaintiff,

vs.

APPLIED COMPUTER TECHNIQUES
INC.

Defendant.

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COMPLAINT

Civil No. 920016945 cv

Judge Fuchs

Plaintiff Lee K. Shuster complains of Defendant Applied
Computer Techniques, Inc. ("ACT") as follows:

JURISDICTION AND PARTIES

1. Plaintiff Lee K. Shuster is an individual residing in Salt
Lake County, Utah.

2. Defendant Applied Computer Techniques, Inc. (hereinafter
"ACT") is a corporation incorporated in the state of Utah, with its

principal place of business at 772 East 3300 South, Suite 200, Salt Lake City, in Salt Lake County, Utah.

3. The amount claimed is less than \$10,000, exclusive of costs.

FACTS

4. On or about February 11, 1992 and again on or about March 2, 1992 Plaintiff Lee K. Shuster entered into an Employment Agreement with Defendant Applied Computer Techniques, Inc., (ACT) which Agreement is attached hereto as Exhibit "A" and incorporated herein.

5. From February 26, 1992 through October 14, 1992 Plaintiff Lee Shuster worked pursuant to said Employment Agreement, "devoting all of his time and energy during normal business hours" to ACT's business (Agreement paragraph 4).

6. From approximately February 26, 1992 through September 30, 1992 Defendant ACT paid Plaintiff Lee Shuster the "gross pay" provided for under Paragraph 6 of said Employment Agreement, since the commissions earned never exceeded such "gross pay."

7. On or about October 14, 1992 Defendant ACT, through its President Vaughn Christensen, terminated the Employment Agreement with Plaintiff Lee K. Shuster.

8. On or about October 14, 1992 Defendant ACT offered Plaintiff Lee Shuster a new contract for employment, including a

provision to pay Plaintiff on a straight commission basis.

9. On October 15, 1992 Plaintiff Lee Shuster confirmed ACT's termination of the Employment Agreement, declined to enter into a new contract for compensation on a straight commission basis, and gave written demand to ACT for payment of wages for his all work from October 1 through October 14, 1992. Said response and written demand is attached as Exhibit "B".

10. On or about October 19, 1992 Defendant ACT failed and refused to make any payment to Plaintiff Lee Shuster for work performed from October 1 through October 14, 1992, on the ground that "no commissions were earned" during that period. ACT's letter refusing to pay Plaintiff any wages is attached as Exhibit "C".

11. On or about November 19, 1992 Plaintiff Lee Shuster again made written request for payment of the wages owed, requested "gross pay" under the Employment Agreement (Paragraph 6) in the amount of \$750.00, and informed Defendant ACT that its failure and refusal to pay any wages not only violated the Agreement, but violated state and federal minimum wage law and Utah Code Ann. § 34-28-5 (Supp. 1992). Plaintiff's second written request is attached as Exhibit "D".

12. On or about December 1, 1992 Defendant ACT paid Plaintiff minimum wage for 80 hours of work from October 1 to October 14, 1992, totalling \$340; and again failed and refused to pay the

"gross pay" due under paragraph 6 of the Employment Agreement. ACT's letter admitting Plaintiff's entitlement to minimum wage and refusing to pay the "gross pay" under the Agreement is attached as Exhibit "E."

COUNT I

13. On or about October 15, 1992 Defendant ACT owed Plaintiff Lee Shuster "gross pay" of \$750.00 under Paragraph 6 of the Employment Agreement, for the two weeks of work from October 1 through October 14, 1992.

14. Defendant ACT's refusal to pay the "gross pay" of \$750.00 to Plaintiff Lee Shuster for his work from October 1 through October 14, 1992 is a violation of said Employment Agreement.

COUNT II

15. Plaintiff Lee Shuster repeats and realleges Paragraphs 4 through 12.

16. Defendant ACT has at all relevant times maintained and had custody of all sales records necessary to determine commissions and gross pay owed to Plaintiff Lee Shuster.

17. On October 15, 1992 Defendant ACT knew that no sales had occurred during the period from October 1 through October 14, 1992 and thus knew that no commissions were owed to Plaintiff Lee

Shuster at the time of separation from employment.

18. Despite Plaintiff Shuster's written demand on October 15, 1992, to be paid for his work from October 1 through October 14, 1992 Defendant ACT failed and refused to pay Plaintiff Lee Shuster any wages at all for over forty-five (45) days, in violation of Utah Code Ann. § 34-28-5 (Supp. 1992).

19. Despite Plaintiff Lee Shuster's second written demand on November 19, 1992, Defendant ACT failed and refused to pay Plaintiff Lee Shuster the wages due under the Employment Agreement, and paid wages based upon minimum wage law over forty-five (45) days after Plaintiff's separation (and 12 days after the second demand), in violation of Utah Code Ann. §34-28-5 (Supp. 1992).

20. Given Defendant's failure to pay the wages owed under the Agreement, Plaintiff Shuster's wages continue as a civil penalty for sixty (60) days at the rate under the Agreement (\$1500 per month) pursuant to Utah Code Ann. § 34-28-5(2) (Supp. 1992).

COUNT III

21. Plaintiff Lee Shuster repeats and realleges Paragraphs 4 through 12.

22. Plaintiff Lee Shuster repeats and realleges Paragraphs 15 through 19.

23. Given Defendant's failure to pay even minimum wage as

wages owed Plaintiff for over forty-five (45) days following separation and demand, Plaintiff Shuster's entitlement to minimum wage continues as a civil penalty from October 15 to December 1, 1992 pursuant to Utah Code Ann. § 34-28-5(2) (Supp. 1992).

COUNT IV

24. Plaintiff repeats and realleges Paragraphs 4 - 12.

25. Plaintiff repeats and realleges Paragraphs 15 - 19.

26. On or about November 19, 1992, at least 15 days before filing this action, Plaintiff Lee Shuster made written demand for \$750.00 in gross pay, the wages due under the Employment Agreement.

27. On or about November 19, 1992, at least 15 days before filing this action, Plaintiff Lee Shuster offered to settle his claim to any civil penalty under Utah Code Ann. § 34-28-5 (Supp. 1992) for \$750 in gross pay.

28. Plaintiff Lee Shuster is entitled to reasonable attorneys' fee in addition to the amount due for wages and penalties, to be taxed as costs of suit, pursuant to Utah Code Ann. § 34-27-1 (Repl.Vol.1988).

WHEREFORE, Plaintiff Lee Shuster prays for judgment against Defendant Applied Computer Techniques, Inc. as follows:

a. an award of damages for gross pay due and owing under the

Employment Agreement in the amount of \$410.00; and

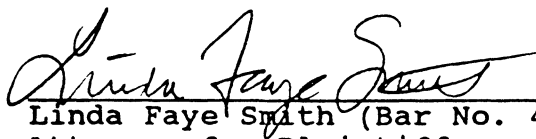
b. an award of damages as a civil penalty for ACT's failure to pay wages owed in a timely fashion, such penalty to equal the wage rate to which Plaintiff was entitled at the time of separation until paid or for 60 days, in an amount not less than \$1020.00 if the Court finds Plaintiff entitled to wages at the minimum wage rate and not less than \$3000.00 if the Court finds Plaintiff entitled to gross pay under the Employment Agreement; and

c. reasonable attorneys' fees; and

d. such other relief as is just and equitable.

DATED this 14th day of December, 1992.

LINDA FAYE SMITH



Linda Faye Smith (Bar No. 4460)

Attorney for Plaintiff

Lee K. Shuster

c/o University of Utah

College of Law

Salt Lake City, UT 84112

Telephone: (801) 581-4077

Plaintiff's Name: Lee K. Shuster
Plaintiff's Address: 1337 Yale Avenue
Salt Lake City, UT 85105

EXHIBIT A

EMPLOYMENT AGREEMENT

This Agreement is made this 2nd day of MARCH, 1992 by and between Applied Computer Techniques, a Utah corporation (hereinafter called "Employer") and LEE K. SAUSTER (hereinafter called "Employee"), witnesseth:

WHEREAS, Employer is engaged in the business of marketing computer data processing and information handling systems to end-users, including beer, wine, soda and bottled water distributors, and other distribution-oriented businesses;

WHEREAS, Employer desires to engage Employee to market its goods and services primarily to beer, wine, soda and bottled water distributors, and other distribution-oriented businesses located throughout the world;

WHEREAS, Employee desires to be employed by Employer subject to the terms and conditions contained in this Agreement;

NOW, THEREFORE, in consideration of the mutual warranties, covenants and conditions herein contained, Employer and Employee hereby agree as follows:

1. **PURPOSE:** Employer engages Employee to market its goods and services to beer, wine, soda and bottled water distributors, and other distribution-oriented businesses located throughout the world.

It is *not* intended that the entire world shall be the exclusive territory of Employee. Employer reserves the right to modify the geographic scope of Employee's territory as well as the nature or type of prospective clients from whom Employee shall solicit business.

2. **TERM:** The term of employment under this Agreement shall begin on FEBRUARY 26 1992 and continue until terminated as herein provided.

3. **DUTIES AND OBLIGATIONS:** Employer hereby employs Employee to act as a sales representative whose duties shall include, but not be necessarily limited to the following:

A. Identify and contact prospective users of products of Employer in designated geographical areas;

B. Meet in person or by telephone with management representatives of such prospective users and survey their present and future data processing and information handling needs and recommend products of Employer where applicable;

C. Produce and provide to prospective customers timely written proposals detailing the costs, functions, and benefits of the proposed products and services of Employers;

D. Meet in person or by telephone with the decision-making representatives of prospective customers in an effort to obtain orders for products and services of Employer;

E. When directed by management, assist in the collection of all sums due from persons to whom the goods and merchandise of Employer are sold and in the adjustment of any complaints or disputes that may arise in connection with any sales made by him.

4. **PERFORMANCE:** Employee agrees to devote all of his time and efforts during normal business hours of Employer to the performance and duties on behalf of Employer in the role of sales representative. In carrying out his duties, Employee has no authority to incur obligations or make financial

representations or financial commitments on behalf of Employer, except as approved by Employer prior to such commitments.

5. **COMPENSATION:** For all of the services to be rendered by Employee in any capacity hereunder, Employer agrees to pay Employee a commission based upon Employee's sales of the goods and services offered by Employer.

A. The commission rate shall be:

1) Twenty (20) percent of the gross profit on each sale to a new customer which is attributable to Employee.

"New customer" is defined to be any firm or party who has not previously purchased from Employer.

"Gross profit" shall mean the difference between the total revenue actually received by Employer for each sale attributable to Employee, less the actual cost to Employer of the goods sold by Employee, less any charges to the customer for custom programming and/or training, less the actual cost to Employer of Employee's travel, meals and lodging attributed to each sale on a sale-by-sale basis, less any charge backs.

"Charge backs" shall mean products returned to Employer from customer for any reason and in any time frame, or products which are not fully paid for by buyer after a period of sixty (60) days. Charge backs to Employee due to failure by the buyer to remit payment in full will become commissionable to Employee once full payment has been received by Employer from buyer.

By way of example, if gross sales by Employee and cost of product related to such sales are \$25,000 and \$12,500 respectively, and the gross sale includes \$1,000 of custom programming and/or training, and the cost of Employee's travel, meals and lodging associated with the sale is \$1,000, and a customer returned a \$1,000 product for which the Employee had previously been paid a commission, the gross profit would be computed as follows:

\$ 25,000	Gross sales
- 12,500	Cost of product
- 1,000	Custom programming and/or training
- 1,000	Cost of travel, meals, and lodging
- <u>1,000</u>	Charge back for returned product
\$ 9,500	Gross profit

$$\$9,500 \times .20 = \$1,900$$

Any sale which is deferred because of the unavailability of required custom programming to be performed by Employer will be considered to be a sale to a "New Customer" for the purpose of determining the commission rate.

2) Sales of products or services to an existing customer will be commissionable to Employee under the following conditions and according to the following commission schedule:

(a) The sale is directly attributable to Employee's efforts;

(b) Employee was responsible for the initial sale made to the customer;

(c) The sale to the existing customer is made within one year of customers' initial purchase. The following schedule will be made to determine the commission percentage paid to Employee:

<u>Days Following Initial Purchase</u>	<u>Commission rate</u>
1 through 90 days	Twenty (20) percent
91 through 270 days	Fifteen (15) percent
271 through 365 days	Ten (10) percent

"Existing customer" is defined as any firm or party who has previously purchased from Employer.

3) Sales to a multiple system customer will be commissionable to Employee at eleven (11) percent of the gross profit on each sale, provided that:

- (a) The sale is directly attributable to Employee's efforts;
- (b) Employee was responsible for the initial sale made to the customer.

"Multiple system customer" is defined to be any firm or party who purchases more than one software license for the same software module(s).

B. The commission provided for herein shall be payable to Employee on the next occurring regular payday of Employer immediately after becoming a commissionable sale.

"Next occurring regular payday" shall mean the earliest of either the sixteenth day of the current month or the first day of the following month.

"Commissionable sale" shall mean a sale for which Employee has received the Employer's Purchase Agreement from the prospect, properly signed and executed by a duly authorized representative of the prospect firm or institution, and a deposit of not less than seventy-five (75) percent of the total purchase price.

C. Employer shall furnish Employee upon request the data and computations used in arriving at the commission amount.

D. In the event Employee ceases to be employed by Employer for any reason, Employee shall be entitled to commissions as described herein for commissionable sales received by Employer which are attributable to Employee's efforts for a period of thirty (30) days following Employee's termination, less any charge backs arising from previous sales by Employee which may occur during the above 30-day period following termination, less any outstanding draws which may exist.

6. **DRAW:** Employee will be paid a draw against future commissions according to the following schedule:

<u>Days Following Employment</u>	<u>Draw</u>	
1 through 60 days	\$2,800 per month	02/24/92 - 04/26/92
61 through 90 days	\$2,200 per month	04/27/92 - 05/26/92
91 days on	\$1,500 per month	05/27/92 -

If commissions earned do not equal the draw per month as outlined above, Employer shall add that amount necessary to cause Employee's gross pay to equal the monthly amount shown, such amount to be considered a draw against future commissions. In any month in which commissions earned exceed

,500 and a draw balance exists, the excess over \$2,500 shall be used to recover any outstanding draws previously paid to Employee.

7. **PRODUCT PRICING AND POLICIES.** All prices, discount policies, sales and service policies will be established by Employer and adhered to by Employee. Employer shall promptly notify Employee all price and policy changes and new product availability.

8. **SALES ACCEPTANCE.** Employer reserves the right of final decision on any sales, including acceptance of any orders. Employee will obtain written approval in advance on all proposals offered in written form to prospective customers.

9. **INSURANCE:** Employee shall be entitled to coverage under Employer's existing health and accident plan if he qualifies thereunder and is in accordance with the terms of such written insurance policy and program. Coverage shall be provided at no cost beginning 90 days after employment date. Should Employee elect to cover dependents, Employer shall deduct the premium from Employee's check on a monthly basis and at the then-current rates. Employer shall advise Employee of any changes in the insurance policies and company policies with respect thereto prior to the effective date of any such change.

10. **VACATION:** Employee shall be entitled to receive vacation pay according to the following schedule:

first year	1/52 of total earned commission during the first year of employment
second through eighth year	2/52 of total earned commission during each year of employment
ninth year and on	3/52 of total earned commission during each year of employment

"Earned commission" shall mean the commission amount paid to Employee for sales directly attributable to Employee.

Pay will be paid as a bonus each year on the anniversary date of Employee's employment as stipulated in paragraph 2, Terms.

11. **EXPENSES:** Employer shall reimburse Employee for all expenses incurred by Employee in furtherance of his duties and obligations under this Agreement contingent upon prior approval of such expenses by Employer and receipt of proper documentary evidence in support of such expenses. In that regard, Employee agrees to report his expenses on a weekly basis in a daily diary format. Expenses shall be broken down by client and shall be on forms acceptable to Employer.

Only the following items shall be reimbursable:

A. Actual travel and lodging expense directly related to sales and marketing efforts.

B. Meals expense while out-of-town overnight, to a maximum of \$25 per day.

C. In the event Employee must use his own automobile, a mileage allowance of 25.5 cents per mile will be paid, provided Employee submits a mileage log identifying actual odometer readings and other documentary evidence as may be required by Employer.

In addition, Employer shall furnish Employee with a telephone credit card and/or other means of covering the costs associated with making long-distance, business-related telephone calls.

12. ITEMS FURNISHED BY EMPLOYER:

A. Employer shall provide Employee with computer hardware and software for demonstration purposes and for use in preparing presentation material for clients and prospective clients as deemed necessary by Employer. Hardware and software furnished Employee shall remain the property of Employer and shall be returned to Employer promptly upon termination of this Agreement. Employee shall be liable to Employer for the loss, theft or damage to the software and/or hardware while in employee's personal possession. When necessary to release software and/or hardware to any third party, Employee shall exercise utmost judgment and insure the equipment wherever possible.

B. Employer shall furnish Employee with client and prospective client information which shall include but not be limited to mail and telephone lists, as well as proprietary, demographic information pertaining to clients and prospective clients. Upon termination of this Agreement, Employee shall promptly return all of such data and information to Employer.

13. TERMINATION: Either party may terminate this Agreement at any time, without cause and without advance notice.

14. DEATH: In the event Employee's death occurs during the term of this Agreement, the Agreement shall terminate immediately and Employee's legal representative shall be entitled to receive any compensation due to Employee under the provisions outlined above.

15. CONFIDENTIALITY: Since Employee will have access to the information which a customer of Employer may deem to be confidential, Employee agrees that he will keep all such information, data, and materials of such customers fully confidential and shall not disclose such information or data to anyone who is not an employee or employer of the customer except on specific order of a court of a competent jurisdiction. Employee further agrees that all written materials, software programs, tapes, card decks, or other physical embodiment of any software program relating to the business of Employer and its customer, whether prepared by Employee or received by Employee during his employment or thereafter, and any copies thereof all belong solely to Employer.

Employee further agrees that all company information including contracts, customer lists, prospect lists, proprietary product information, company procedures and policies, etc. shall be deemed to be confidential and all such material shall belong solely to Employer despite the fact that they may have been prepared in part or wholly by Employee or Employee may have received copies thereof during the course of his employment. At any time during or after the employment period, Employee will upon the request of Employer deliver all of such items to Employer and shall retain no copies. All of such materials written or produced by Employee or under his supervision at any time during his employment shall be and are owned by Employer if they relate in any manner to the business of Employer either now or in the future. Employee will not during or after the term of his employment furnish to any individual, firm or corporation any list of customers or other information relating to Employer's business. He will at all times protect all proprietary information of Employer and will not disclose or use any of the computer programs and materials related to it which are used by Employer in its business which are proprietary to Employer.

16. COVENANT NOT TO COMPETE: Employee agrees that during his employment and for a period of two years immediately following the termination of his employment for any reason he will not either alone or with or on behalf of any other person, firm, partnership, or corporation undertake to compete with Employer or seek to divert business or destroy or affect the business relationship that exists between Employer and its customers.

17. NO INTERFERENCE OF EMPLOYMENT: Following Employee's termination of employment, Employee will not solicit for hire any current employee of Employer.

18. REPRESENTATIONS AND WARRANTIES OF EMPLOYEE: Employee represents and warrants as follows:

A. That by entering into this Agreement and performing the duties and obligations outlined herein, Employee is not in violation of any contract of employment previously entered into with another employer;

B. That during the term of this Agreement, Employee will not misrepresent any of the products or services offered by Employer;

C. That during the term of this Agreement, Employee will not violate the copyright or trade secret provisions of any software license agreement, non-disclosure agreement, or confidentiality agreement, which Employer has executed or may be required to execute during the course of Employee's employment.

In the event a legal action is threatened or maintained against Employer arising out of or related to Employee's warranties and representations, Employee agrees to indemnify and hold harmless Employer from all legal costs and expenses associated with the defense of such actions, as well as any monetary judgments taken against Employer as a result of such actions.

19. EFFECT OF WAIVER: The waiver of any party of a breach of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach thereof.

20. NOTICE: Any and all notices required herein shall be sufficient if furnished in writing, sent by registered mail, to the respective parties at their address described below following their signatures to this Agreement. Such other addresses as needed may hereinafter be supplied by either party.

21. ENTIRE AGREEMENT: This Agreement contains the entire agreement of the parties and supersedes all prior written and oral communications.

22. AMENDMENT: Any amendment, modification or change shall be in writing and signed by both parties and shall be amended hereto.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first above-written.

EMPLOYEE

Lee K. Shuster
Employee signature

LEE K. SHUSTER
Employee name printed

1337 E. YALE AVE
SALT LAKE CITY, UT
84105-1612
Employee address

EMPLOYER

Vaughn J. Christensen
Vaughn J Christensen
Applied Computer Techniques
772 East 3300 South, #200
Salt Lake City, UT 84106

EXHIBIT B

1337 East Yale Avenue
Salt Lake City, UT 84105-1612

October 15, 1992

Dear Vaughn:

Attached you will find the letter I have been preparing to memorialize and to respond to our meetings of October 7 and 8, 1992. That letter gives you the response you asked for regarding your offer of employment on a straight commission basis and it responds to your request for ideas about ACT's sales and marketing strategy.

I am writing this additional letter to clarify the situation in light of the memo you handed me yesterday.

Gene Castle (the other salesman) and I both understood you and Linda to announce a termination of our Employment Agreements effective November 15, 1992. I believe that is what Gene's letter sets forth (to which your memo is a response). I also understood that to be the situation in light of the Draw and Commission Report which included Linda's handwritten calculations of future compensation to be paid to me into November, (Linda's notes indicated a cap on draw of \$13,464.16, now your memo gives a cap which has inexplicitly changed to \$13,000.00.)

Now your written memo states that you are terminating my Agreement immediately. Accordingly, I will be removing my property today (October 15).

Your October 14 memo states that the termination of the Agreement "will become effective Wednesday October 7, 1992" since it was your "intention to terminate the Employment Agreement . . . and execute a new one. . . as of that same date." It is not profitable to dispute what your intention may have been or what we remember you saying last week.

The Agreement entitles you to "terminate this Agreement at any time, without cause and without advance notice" (Para. 13). However, the Agreement also requires that "Any amendment, modification, or change shall be in writing and signed by both parties. . . ." (Para. 22) and "Any and all notices required herein shall be sufficient if furnished in writing. . . ." (Para. 20). Accordingly the Agreement was not terminated on October 7, and no new agreement went into effect on October 7. Rather, you have terminated my employment as of today. Please let me know when I may come in to pick up my final pay check for my work (including the preliminary market analysis you requested) through October 14, 1992.

I think it should be abundantly clear to you that I have absolutely no interest or desire to accept the totally unreasonable contractual terms that you have presented. The precipitous action you have taken yesterday only reconfirms my conclusion that your firm has very little ability to engage in fiscal analysis or sound business planning. Best of luck to you!

Sincerely,



Lee K. Shuster
Account Representative

EXHIBIT C



772 East 3300 South
Suite 200
Salt Lake City, Utah 84106
(801) 486-0073

October 19, 1992

Lee Shuster
1337 East Yale Avenue
Salt Lake City, Utah 84105-1612

Dear Lee:

In your resignation letter of October 15, 1992, you asked me to let you know when you could come in to pick up your final pay check "for my work...through October 14, 1992." In response I would like to remind you that your compensation is not based upon 'your work' during the pay period, but instead, it is based upon commissions earned on ACT goods and services you sell.

Paragraph 5 of the Employment Agreement that you and I signed plainly states that "Employer agrees to pay Employee a commission based upon Employee's sales of the goods and services offered by Employer." As you didn't have any sales during the pay period, no commissions were earned.

Further, per the Agreement in paragraph 5D, you are "entitled to commissions as described herein for commissionable sales received by Employer which are attributable to Employee's efforts for a period of thirty (30) days following Employee's termination, less any charge backs arising from previous sales by Employee which may occur during the above 30-day period following termination, less any outstanding draws which may exist."

Accordingly, a final settlement between us will be made on November 14, 1992, at which time, you will be paid for all commissions earned between October 15 and November 14, 1992, less any charge backs which may arise, less the outstanding draws issued you to date of \$11,632.86.

Sincerely,

Vaughn J Christensen
President

EXHIBIT D

1337 East Yale Avenue
Salt Lake City, UT 84105-1612

November 19, 1992

Vaughn Christensen
Applied Computer Techniques, Inc.
772 East 3300 South
Suite 200
Salt Lake City, UT 84106

Re: Wages Due

Dear Vaughn:

I had hoped to hear from you at mid-month to receive the commissions or gross pay due me for the period I worked for ACT from October 1 through October 14, 1992. I believe the terms of our Agreement (dated March 2, 1992) entitle me to be paid a minimum of \$750.00 for that period, whether or not you ultimately obtained any commissionable sales from my prospective customers. The legal advice that I have received confirms this interpretation of the Agreement, and I had hoped that you too might have checked and discovered this to be the case.

If you have had a chance to look into this issue, I would appreciate your forwarding that payment (\$750.00) to me within the week. If I receive it, I will consider myself to be paid in full for all claims that could exist between us; and I will wish you and Linda well in your business.

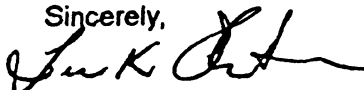
I understand that your failure to pay me for that two-week period of work may violate both state and federal minimum wage laws. (The U. S. Department of Labor and the Utah Industrial Commission are charged with investigating such violations, and should be able to confirm this interpretation).

My lawyer has advised me that Utah law required you to pay me within 24 hours of the end of my employment. Given your failure to do so, despite my written request of October 15, 1992, Utah law provides that the contractual wages continue from the date of my request until the wages are paid, for up to 60 days. (I enclose a copy of the relevant statute, U.C.A. 34-28-5).

I do intend to insist upon your payment to me of the gross wages due me. If I am forced to file suit to do so, I will request not only the \$750 wages for October 1 - 14, but also the full amount due under the law (an additional \$3000 for 60 days past October 14). I will also seek attorneys' fees under U.C.A. 34-27-1.

I hope you will be able to confirm with your legal counsel my right to receive gross pay of \$750.00 under the Agreement, so that we may have an amicable conclusion of our business relationship.

Sincerely,



Lee K. Shuster

enc.

EXHIBIT E



772 East 3300 South
Suite 200
Salt Lake City, Utah 84106
(801) 486-0073

December 1, 1992

Lee K. Shuster
1337 East Yale Avenue
Salt Lake City, UT 84105-1612

Dear Lee:

According to paragraph 5D of your Employment Agreement dated March 2, 1992, Applied Computer Techniques is obligated to pay commissions for sales received which are attributable to your efforts for a period of thirty days following your termination. This thirty-day period ended November 14, 1992. During this period, no additional sales were received. Hence, no additional commissions are due you. A concluding Draw and Commission Report is enclosed.

In regard to the disputed payment of \$750 for the period October 1 through 14, I have learned from the Industrial Commission that because your semimonthly checks were draws against future commissions when no commissions were earned, I am not obligated to advance you additional draws. However, according to the Commission, federal and state statutes require that I compensate you for your time at minimum wage for the period of October 1-14, 1992. Accordingly, I have enclosed a check for 80 hours of pay at \$4.25 per hour, less applicable taxes.

As I was preparing this check, a question arose concerning the \$90.15 deduction taken from your checks for dependent insurance coverage. In researching the matter, I found that \$631.05 had been deducted to date, but dependent premiums from 7/16/92 through 10/15/92 were only \$540.90. Hence, a reimbursement of \$90.15 is included on the check.

I hope that you will consider this an amicable conclusion of our business relationship. Linda and I both wish you well in your future business pursuits.

Sincerely,

A handwritten signature in cursive script, reading 'Vaughn J. Christensen'.
Vaughn J. Christensen
President

Enclosures

Tab C

FILED

1993 FEB -8 PM 4: 27

Thomas R. Blonquist, Esq., (0369)
Attorney for Defendant
40 South 600 East
Salt Lake City, UT 84102
Telephone: (801) 533-0525

CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

LEE K. SHUSTER,)	
Plaintiff,	)	ANSWER
v.	)	Civil No. 920016945 CV
APPLIED COMPUTER	)	Judge Dennis M. Fuchs
TECHNIQUES, INC.,)	
Defendant.)	

Answering the Complaint of Plaintiff, Defendant admits, denies and avers as follows:

FIRST DEFENSE

Avers that Plaintiff's Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

1. Admits the allegations contained in paragraphs one, two, three, four, five and six.

2. Denies each and every allegation contained in paragraph seven.

3. Admits each and every allegation contained in paragraphs nine, ten, eleven and twelve.

4. Denies each and every allegation contained in paragraphs

thirteen, fourteen and Plaintiff incorporates by reference hereat its answers to paragraphs four through twelve incorporated by reference at paragraph fifteen.

5. Admits the allegations contained in paragraph sixteen, seventeen and eighteen.

6. Denies each and every allegation contained in paragraph nineteen and twenty.

7. Defendant repeats, realleges and incorporates by reference hereat its answers to paragraphs four through twelve incorporated by reference at paragraphs twenty one and paragraph twenty two.

8. Denies the allegations contained in paragraph twenty three.

9. Defendant repeats, realleges and incorporates by reference hereat its answers to paragraphs four through twelve set forth at paragraph twenty four and paragraphs fifteen through nineteen set forth at paragraph twenty five.

10. Admits that on or about December 12, 1992, Plaintiff made written demand for \$7,750 in gross pay but denies that said wages were due Plaintiff under the employment agreement.

11. Admits the allegations contained in paragraph twenty seven.

12. Denies the allegations contained in paragraph twenty

eight.

13. Denies each and every allegation of Plaintiff's Complaint not specifically admitted herein.

THIRD DEFENSE

Avers that all sums owed by the Defendant to the Plaintiff under the Agreement between the parties and under Title 34 of the Utah Code Annotated have been paid by the Defendant in full.

WHEREFORE, having fully answered Plaintiff's Complaint, Defendant demands that the same be dismissed and that he be awarded its costs incurred herein and such other and further relief as the Court deems just in the premises.

DATED this 7th day of February, 1993.



Thomas R. Blonquist

MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing to Linda Faye Smith, Esq., C/O University of Utah, College of Law, Salt Lake City, UT 84112 this 7th day of February, 1993.



Thomas R. Blonquist

Tab D

FILED
1993 OCT 26 AM 7:55
CLERK OF THE CIRCUIT COURT
SALT LAKE COUNTY

LINDA FAYE SMITH, #4460
Attorney for Plaintiff
C/O University of Utah
College of Law
Salt Lake City, UT 84112
Telephone: 581-4077

CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

LEE K. SHUSTER,
Plaintiff,

vs.

APPLIED COMPUTER
TECHNIQUES, INC.

Defendant.

* AMENDED MEMORANDUM OF
*
* POINTS AND AUTHORITIES
*
* IN SUPPORT OF
*
* PLAINTIFF'S MOTION
*
* FOR SUMMARY JUDGMENT
*
* Civil No. 920016945
*
* Judge Dennis M. Fuchs
*
*

STATEMENT OF MATERIAL FACTS

The material facts are undisputed:

1. On or about February 26, 1992 plaintiff Mr. Shuster and Applied Computer Techniques, Inc. (hereinafter "ACT") entered into to an Employment Agreement attached as Exhibit A. (Complaint ¶ 4, admitted in Answer ¶ 1, Exhibit A to Complaint, copy also attached hereto as Exhibit A.)

2. From February 26, 1992 to October 14, 1992 Mr. Shuster worked for ACT, "devoting all his time and energy during normal business hours" to ACT's business. (Complaint ¶ 5, admitted in Answer ¶ 1,

Agreement ¶ 4.)

3. From February 26, 1992 to September 30, 1992, ACT paid Mr. Shuster the "gross pay" provided for under Paragraph 6 of the Employment Agreement, since the commissions earned never exceeded such "gross pay." (Complaint ¶ 6, admitted in Answer ¶ 1).

4. The employment relationship ended on October 15, 1992. At that time Mr. Shuster made written demand to ACT for payment of wages for his work from October 1, 1992 through October 14, 1992. (Complaint ¶ 9, admitted in Answer ¶ 3, Exhibit B).

5. On October 19, 1992 ACT wrote Mr. Shuster and refused to pay any wages whatsoever for this two-week period, on the grounds that "no commissions were earned" during that period. (Complaint ¶ 10, admitted in Answer ¶ 3, Exhibit C).

6. On November 19, 1992, Mr. Shuster again wrote and demanded the "gross pay" of \$750 provided for in the Employment Agreement. Mr. Shuster further informed ACT that its failure to pay him any amount whatsoever not only violated the Agreement but violated state and federal minimum wage law. (Complaint ¶ 11, admitted in Answer ¶ 3. Exhibit D)

7. On or about December 1, 1992 ACT paid Mr. Shuster gross pay of \$340, representing minimum wage for 80 hours of work; but again failed and refused to pay the gross pay of \$750 as demanded pursuant to the Employment Agreement. (Complaint ¶ 12, admitted in Answer ¶ 3, Exhibit E.)

8. ACT failed and refused to pay Mr. Shuster any wages whatsoever for Mr. Shuster's last two week of work; and this failure continued for

approximately forty-five (45) days after the end of his employment and after his written demand for payment of wages, in violation of Utah Code Ann. § 34-28-5 (Supp. 1992). (Complaint ¶ 18, admitted in Answer ¶ 5).

9. Mr. Shuster made written demand for "gross pay" of \$750 under the Agreement on or about November 19, 1992 which was more than 15 days before bringing this action on December 14, 1992. (Complaint ¶ 26 & 27, admitted in Answer ¶ 10 & 11.)

10. Mr. Shuster commenced this action on December 14, 1992 which is within 60 days of his separation from ACT's employment. (Complaint as filed, Complaint ¶ 9 admitted in Answer ¶ 3).

POINTS AND AUTHORITIES OF LAW

Plaintiff Lee Shuster is entitled to judgment as a matter of law for the wages owed him under the party's employment contract, for statutory civil penalties due to his former employer's failure to pay wages in a timely fashion, and for reasonable attorneys' fees to be taxed as statutory costs of this suit.

I. THE PARTIES' EMPLOYMENT AGREEMENT ENTITLES PLAINTIFF LEE SHUSTER TO THE CONTRACTUAL "GROSS PAY" OF \$750 FOR HIS FINAL TWO WEEKS OF WORK.

The employee Mr. Shuster was and is entitled, under the Employment Agreement, to wages of \$750 for his final two weeks of work.

The interpretation of the Employment Agreement is a matter of law. *Zions First Nat'l Bank v. National Am. Title Ins. Co.* 749 P.2d 581, 582 (Utah, 1988). This contract is not ambiguous. *Faulkner v. Farnsworth* 665

P. 2d 1292, 1293 (Utah, 1983) (whether the contract is ambiguous and requires parol evidence to understand is itself a question of law). This Court should interpret the terms of this contract "according to their plain and ordinary meaning." *Equitable Life & Casualty Ins. Co. v. Ross* 849 P. 2d 1187, 1192 (Utah. App., 1993).

Paragraph 5 of the Agreement sets forth a compensation structure involving "commissions" to be based upon the employee's sales of goods. Paragraph 6 sets forth provisions for paying a "draw against future commissions" (also called "gross pay"). Following 91 days of employment, that amount of gross pay is \$1500 per month. (§ 6), There is no contingency or ambiguity regarding the Employer's obligation to pay the employee, at a minimum, this gross pay each pay period. And until the final pay period, ACT did always pay this "gross pay." (Statement of Material Facts ¶ 3, above.)

In two circumstances the Agreement does cap the amount of commissions the employee can earn based upon the outstanding "draw." Paragraph 6 provides that in any month in which commissions earned exceed \$2500 and a "draw balance" exists, "the excess [commissions] over \$2500 shall be used to recover any outstanding draws previously paid to the Employee." Paragraph 5D addresses what occurs when the employment relationship ends: the employee is entitled to commissions for 30 days "following termination. . . less any outstanding draws." The only provision dealing with the termination of employment gives the employer greater rights to recapture "draws" from "commissions." The contract does not begin to suggest that the employee is entitled to anything less than the

contractual "gross pay" for his last weeks on the job.

The employer's initial interpretation¹ of the contract--that Mr. Shuster was entitled to no wages whatsoever for his final two weeks of full-time labor for ACT--was, of course, illegal. The federal Fair Labor Standards Act, the Utah Minimum Wage Act and state regulation require employers to pay their employees at least minimum wage for their work. See 29 U.S.C.A. § 206; Utah Code Ann. § 34-40-101 et. seq.; and Utah Reg. 572-1-3. See also *Pierce v. Anagnostakis* 394 P.2d 74, 75-76 (Utah, 1964) (waitress's agreement to work for only tips did not bar suit under Utah statute for minimum wage).

The employer's interpretation(s)² of this contract are also unconscionable. ACT's interpretation(s) would make the wages owed an employee entirely dependent upon the date when employment ended. If the employee resigned the day after "payday," he might be fully compensated. If, as in this case, the employment terminated the day the pay period ended, the employer would have obtained two weeks of free (or "half-priced") labor. Surely that cannot be the meaning of any employment contract which can be terminated with no notice. (Agreement ¶ 13)

This contract should not be considered ambiguous simply because the defendant "ascribes a different meaning to it to suit his or her own interests." *Equitable Life & Casualty Ins. Co. v. Ross* 849 P. 2d 1187,

¹ See Exhibit C, Letter from ACT.

² ACT's ultimate payment of minimum wage may indicate that ACT's current position is that the contract requires the payment of minimum wage.

1192 (Utah. App., 1993) citing *Larson v. Overland Thrift and Loan* 818 P. 2d 1316, 1319 (Utah App. 1991) cert. denied, 832 P.2d 476 (Utah, 1992). The only plain, sensible and legal interpretation of the contract that ACT drafted and Mr. Shuster signed is that Mr. Shuster is entitled to the "gross pay" amount (here \$750) for his last two weeks in ACT's employ.

II. ACT'S FAILURE TO PAY ANY WAGES FOR OVER 45 DAYS AFTER MR. SHUSTER'S EMPLOYMENT HAD CEASED VIOLATED STATE STATUTE AND ACT MUST PAY THE STATUTORY CIVIL PENALTY.

The defendant ACT has admitted that it failed to pay any wages at all to Mr. Shuster for 45 days, in violation of Utah Code Ann. § 34-28-5.³ It is similarly undisputed that Mr. Shuster gave written demand for his wages on the day his employment ended, and that he filed this action within 60 days of that date.⁴

The Utah Payment of Wages Act (UPWA) requires that an employer promptly pay an employee final wages⁵ after the employment relationship ends. Utah Code Ann. § 34-28-5.⁶ "If the employer fails to do so upon

³ See Statement of Material Facts ¶ 8 above, relying upon Complaint ¶ 18 admitted in Answer ¶ 5.

⁴ See Statement of Material Facts ¶ 8 and 10 above.

⁵ Although the Employment Agreement speaks of "commissions", as well as "gross pay," the statute defines the term "wages" to include "commissions." Utah Code Ann. § 34-28-2.

⁶ The time periods vary slightly depending upon whether the employer "separates" an employee from the payroll (24 hours) or the employee "resigns" (72 hours). In this case, these differences are irrelevant, since ACT failed to pay any wages for 45 days, violating the statute irrespective of which subsection applies. The statutory

the employee's written demand for payment, the employee's wages continue to accrue from the date of written demand until payment is made, but no longer than sixty days." *Smith v. Batchelor* 832 P. 2d 467, 469 (Utah, 1992) (dicta).

The statute provides that the "wages of the employee **shall continue**. . . **at the same rate** which the employee received at the time of separation." Utah Code Ann. § 34-28-5(2) (emphasis added). The statutory word "shall" indicates that this is a mandatory penalty. Indeed, the trial court in *Smith v. Batchelor* saw this penalty as mandatory.⁷

Irrespective of whether Mr. Shuster was owed the contractual wage (See Point I) or minimum wage, ACT violated the UWPA by failing to pay **any** wages to Mr. Shuster within the statutory time period. The only issue for this Court to determine is which wage rate--and thus which penalty--applies. If this Court finds that Mr. Shuster was owed \$1500 per month under the Agreement, then the penalty must be ordered for the statutory period of 60 days, or for \$3000. If this Court determines that Mr. Shuster was owed only minimum wage for his final two weeks of work for ACT, then

exception for certain "sales agent[s] employed on a commission basis" does not apply here because Mr. Shuster did not have "custody of accounts" and the net amount due him was not determined "only after an audit or verification of sales, accounts, funds or stocks." Utah Code Ann. § 34-28-5 (1)(b). See Complaint ¶ 16 & 17 admitted in Answer ¶ 5.

⁷ In *Smith v. Batchelor*, the trial court denied recovery under the federal Fair Labor Standard's Act given the recovery awarded under the UWPA. The Supreme Court reversed: "The trial court found. . . that equity prohibits both state and federal recovery for the same violation. This is incorrect. Equity follows the law. It cannot abridge an explicit statutory requirement." *Smith v. Batchelor* at 471.

this Court must award his \$1021 as the mandatory penalty at that minimum wage for the 45 days Mr. Shuster received no payment at all.

III. IF THIS COURT FINDS MR. SHUSTER ENTITLED TO WAGES UNDER THE EMPLOYMENT AGREEMENT, THIS COURT MUST ALSO ORDER REASONABLE ATTORNEYS' FEES.

The Employment Agreement provided for "gross pay" of \$750 per pay period, and Mr. Shuster has been paid only \$340 for the final two-week period. (See Point I, *supra*.) If this Court holds that Mr. Shuster is entitled to wages under the Agreement, this Court should also award reasonable attorney's fees.

Utah statute provides for attorneys fees in suits for wages. Utah Code Ann. § 34-27-1. Three criteria must be met: there must have been a written demand for wages "at least 15 days before suit." There has been here. (See Statement of Fact ¶ 9). The demand must "not exceed the amount so due." Mr. Shuster's claim has consistently been that wages of \$750 were owed. If this Court finds "that the amount for which he has brought suit is justly due" then:

"it shall be the duty of the court. . . to allow to the plaintiff a reasonable attorneys' fee in addition to the amount found due for wages, to be taxed as costs of suit." Utah Code Ann. § 34-27-1.

Here again, this statute uses mandatory, not discretionary language. The possibility of some confusion between "commissions" and "gross pay" should not preclude recovery under this section. See *Bennett v. Robinson's Medical Mart, Inc.* 417 P.2d 761, 765 (Utah, 1966) (salesman awarded attorneys' fees for commissions he had demanded.) Also see *Pierce*

v. Anagnostakis 394 P.2d 74, 75-76 (Utah, 1964) (attorney's fees not awarded because waitress had demanded more than court awarded, but minimum wage ordered despite evidence waitress agreed to "tips only" to defraud IRS) The public policy behind enforcement of wage laws supports the award of attorneys' fees even if they are large in comparison with the wages recovered:

As a general rule, the amounts recoverable under the FLSA and the UPWA are so small that attorney fees will exceed any potential recovery. Hence, unless an award of attorney fees is available, workers would be unable to enforce their rights under these statutes. *Smith v. Batchelor* 832 P.2d at 474 (J. Stewart, concurring and dissenting).

Calculation of attorneys' fees is in the sound discretion of the trial court. *Jenkins v. Bailey* 676 P.2d 391, 393 (Utah, 1984). An award of attorneys' fees must be supported by evidence in the record. See *Cabrera v. Cottrell* 694 P.2d 622, 624 (Utah, 1985). Here Mr. Shuster submits and relies upon the Affidavit of Counsel Linda Faye Smith.

The factors which should be considered include: "the efficiency of the attorneys in presenting the case"⁸ (here, without any unnecessary discovery, this Court may dispose of this case entirely on the pleadings); "the reasonableness of the number of hours"⁹ (the Affidavit sets forth the time and tasks); "the expertise and experience"¹⁰ (the Affidavit sets forth counsel's background); the "necessity of bringing a law suit to

⁸ See *Dixie State Bank v. Bracken* 764 P.2d 985, 989 (Utah App., 1988) quoting *Cabrera* at 622.

⁹ *Id.*

¹⁰ *Id.*

vindicate the rights under the contract"¹¹ (this seems clear from the case itself).

The Utah Court of Appeals in the leading *Dixie State Bank v. Bracken* case has stated that "as a practical matter" in awarding reasonable attorneys' fees this Court should answer the following four questions:

"1. What legal work was actually performed?"¹²

Here there has been legal research on the issues of contract law, and federal and state wage law; drafting of pleadings; and drafting the Motion and Memorandum for Summary Judgment.

"2. How much of the work performed was reasonably necessary to adequately prosecute the matter?"

All of the work was reasonably necessary. No unnecessary discovery or investigation had taken place.

"3. Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services?"

Counsel bills at a modest rate of \$80.00 in the unusual event that she is engaged in private practice for a fee. Counsel believes it is reasonable in this case to award attorneys' fees for all hours spent at rate of \$60. This is a rate consistent with that of a first-year associate, and is appropriate given the difficulty of the case and that counsel needed to become familiar with certain local rules and procedures.

¹¹ See *Dixie Bank* at 989 quoting *Trayner v. Cushing* 688 P.2d 856 (Utah, 1984).

¹² *Id.* at 990. The following numbered quotes 2 - 4 are also found therein.

"4. Are there circumstances which require the consideration of additional factors?"

The additional factors which merit some consideration are 1) the fact that the *ad damnum* in this case is low as compared with the attorneys' fees sought and 2) the policy reason that supports the award of attorneys' fees under this statute in order to ensure employers pay the wages owed to their employees. The Court of Appeals has stated:

Although the amount in controversy can be a factor in determining a reasonable fee, care should be used in putting much reliance on this factor. It is a simple fact in a lawyer's life that it takes about the same amount of time to collect a note in the amount of \$1000 as it takes to collect a note for \$100,000." *Dixie State Bank* at 990.

In *Dixie State Bank* the Court of Appeals determined attorneys' fees of \$4847.50 to be reasonable based upon the attorney's billing rate of \$75 per hour and the fact that the attorney had done no unnecessary work. This recovery was permitted even though the principal amount on the note to be collected was only \$7695.

Here counsel has similarly not spent unnecessary time pursuing nonmeritorious claims and has not engaged in unnecessary discovery. The hours spent have been the minimum amount of time counsel believed necessary to competently present the legal arguments to this Court to resolve the matter entirely by Summary Judgment. As Justice Stewart recognized, "attorney fees will exceed any potential recovery" in many wage claim cases. *Smith v. Batchelor* at 474 (J. Stewart concurring and dissenting) Accordingly, this Court should award attorneys fees for all time reasonably spent (28.5 hours) at a reasonable rate (\$60 per hour)

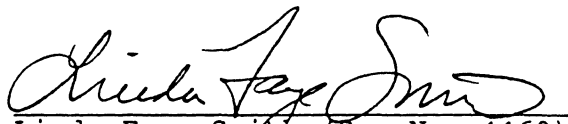
even though that amount (\$1710) exceeds the wages recovered. This is proper under the wage statutes to enforce the important policy goals of ensuring that employers pay the workers who depend upon them.

CONCLUSION

For the reasons set forth above, the Plaintiff Mr. Lee Shuster requests this Court enter Judgment for him in accordance with the Complaint for unpaid wages of \$410, civil penalties under the Utah Wage Payment Act of \$3000 (or of \$1020 if only minimum wage was owed), attorneys' fees of \$1710 and costs of \$51.07.

DATED this 25th day of October, 1993.

LINDA FAYE SMITH


Linda Faye Smith (Bar No. 4460)
Attorney for Plaintiff
Lee K. Shuster
c/o University of Utah
College of Law
Salt Lake City, UT 84112
(801) 581-4077

Tab E

Thomas R. Blonquist, Esq., (0369)
Attorney for Defendant
40 South 600 East
Salt Lake City, UT 84102
Telephone: (801) 533-0525

CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

LEE K. SHUSTER,	)	DEFENDANT'S RESPONSE TO
	)	PLAINTIFF'S MOTION FOR
Plaintiff,	)	SUMMARY JUDGMENT and
	)	AMENDED MEMORANDUM OF
v.	)	POINTS AND AUTHORITIES IN
	)	SUPPORT THEREOF
APPLIED COMPUTER)	
TECHNIQUES, INC.,	)	Civil No. 920016945CV
)	
Defendant.	)	Judge Dennis M. Fuchs

Responding to Plaintiff's motion for summary judgment and his amended memorandum of points and authorities in support thereof, Defendant submits the following:

FACTS

The facts material to Plaintiff's motion for summary judgment are as follows:

1. Defendant is in the business of selling computer hardware and accounting software to beer, wine, soda and bottled water distributors throughout the United States.
2. 80% of Defendant's revenues come from new sales and 20% from revenues received from existing customers.
3. Defendant is only able to stay in business by seeking out and selling its products to new customers.

4. On March 2, 1992, Defendant hired Plaintiff as a commissioned salesman to call on potential new customers and attempt to sell Defendant's products to them.

5. At the time the Plaintiff was hired, Defendant's sales staff comprised two outside salesmen.

6. By agreement, Plaintiff received commissions in the amount of 20% of the gross profit on each sale made by Plaintiff to a new customer.

7. Also by agreement, Plaintiff received a draw or prepaid commissions based upon the length of time of his employment.

8. At the time Plaintiff terminated his employment, he was receiving prepaid commissions at the rate of \$1,500 per month.

9. During the period of Plaintiff's employment with the Defendant, 8 1/2 months, he earned commissions of \$1,831.30 but received advanced commissions of \$11,632.86.

10. From October 1, 1992 to October 14, 1992, Plaintiff made no sales and, therefore, earned no commission.

11. During the thirty (30) days following Plaintiff's termination of employment, none of his prospects purchased products from the Defendant.

ARGUMENT

POINT I: PLAINTIFF WAS EMPLOYED AS A COMMISSIONED SALESMAN.

Defendant is in the business of selling computer hardware and

accounting software and the life blood of its business is seeking out new customers and selling them Defendant's products. This is so because 80% of the Defendant's revenues come from new sales and 20% come from existing customers.

The Defendant hired two outside salesmen, the Plaintiff being one of them, to solicit new sales, i.e., make telephone contacts travel to the business locations of potential customers, demonstrate Defendant's products and attempt to convince said potential customers that it would be to their advantage to buy computer hardware and software from the Defendant. Because large revenues are made by the Defendant at the time of the sale of products to a new customer, all outside salesmen receive, as commission, 20% of the gross profit of each sale they close.

All sales persons employed by the Defendant since it began doing business in 1978 have been employed on a commissions basis. In the instant case, Plaintiff signed an agreement that clearly spelled out that he was to be paid a commission based upon his sales of Defendant's goods and services.

The basis of Plaintiff's compensation is set forth in the agreement* between the parties at:

1. The opening paragraph of paragraph 5.
2. Paragraph 5A which states "the commission rate shall be".

* The agreement is attached hereto and the areas referred to have been highlighted in yellow.

3. The "charge backs" paragraph at page 2 talks about when a sale is "commissionable".

4. The example paragraph on page 3 refers to a "commission" and explains how the amount of commission is calculated.

5. Paragraph 5A 2) defines which goods and services are "commissionable".

6. Paragraph 5A 2)(c) defines what the commission percentage will be.

7. Paragraph 5A 3) defines the commission to be received when a sale is made to a customer who buys multiple systems.

8. Paragraph 5B defines when commissions are payable.

9. Paragraph 5C requires the Defendant to provide Plaintiff with the computation showing how the amount Plaintiff's commission was determined.

10. Paragraph 5D provides that the employee is entitled to a commission for any sales that occur within thirty (30) days after termination, if the Plaintiff was working with the purchasing customer.

11. Paragraph 6 defines the schedule for prepayment of commissions.

POINT II: A COMMISSIONED SALESMAN CANNOT RECEIVE PREPAID COMMISSIONS UPON TERMINATION.

Because Plaintiff was a salesman paid on a commissions basis, who made no sales between October 1 and October 14, 1992 and

voluntarily terminated on October 14, 1992, he is not entitled to receive additional prepayment of future commissions. Upon termination, the salesman no longer calls on potential customers, therefore, there is no way he can earn commissions. When the salesman has no potential to earn future commissions he is not entitled to receive nor is his employer obligated to pay him any prepayment of future commissions. There is nothing in the employment agreement that gives Plaintiff that right nor is there a business practice that justifies such a policy.

The Plaintiff terminated his employment on October 14, 1992. No prospective, with whom he had been dealing, bought products from the Defendant during the period October 1 - 14, 1992, nor during the thirty (30) day period that followed. Therefore, there is nothing owed to the Plaintiff on this account.

After being advised that commissioned salesman were entitled to receive minimum wage, the Defendant paid Plaintiff for 80 hours work at the minimum wage, minus applicable taxes.

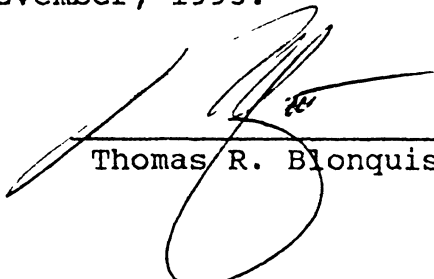
Based upon the foregoing, it is the position of the Defendant that there is nothing owed to the Plaintiff as a result of his employment with the Defendant.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that Plaintiff's motion for summary judgment be denied and that the

Defendant's motion for summary judgment filed herewith be granted.

DATED this 18th day of November, 1993.



Thomas R. Blonquist

MAILING CERTIFICATE

I hereby certify that on this 15th day of November, 1993, I mailed, postage prepaid, a true and correct copy of the foregoing to:

Linda Faye Smith
Attorney at Law
c/o University of Utah
College of Law
Salt Lake City, UT 84112



Thomas R. Blonquist

Tab F

Thomas R. Blonquist, Esq., (0369)
Attorney for Defendant
40 South 600 East
Salt Lake City, UT 84102
Telephone: (801) 533-0525

CIRCUIT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

LEE K. SHUSTER,	)	AFFIDAVIT
Plaintiff,)	
v.)	
APPLIED COMPUTER	)	Civil No. 920016945CV
TECHNIQUES, INC.,	)	Judge Dennis M. Fuchs
Defendant.)	

STATE OF UTAH)
 ss
COUNTY OF SALT LAKE)

Vaughn Christensen, being first duly sworn on oath, deposes and states as follows:

1. At all times material to matters pending in the above entitled matter, affiant was the president and chief executive officer of the Defendant.

2. In said position, affiant has access to all of Defendant's business records.

3. Among said business records, are the records showing sales made and commissions earned by Plaintiff as well as all advanced commissions paid to the Plaintiff.

4. Said records show that during his employment with the

Defendant, Plaintiff earned commissions of \$1,831.30 and was paid advanced commissions of \$11,632.86.

5. The business records of Defendant further show that no sales were made during the period of October 1, through October 14, 1992, therefore, no commissions were earned by the Plaintiff during the period.

6. After Plaintiff terminated his employment, affiant was informed by the Industrial Commission of Utah that Plaintiff was entitled to minimum wage for the period October 1, through October 14, 1992, even though he was paid on a commission basis.

7. As a result, on December 1, 1992 Defendant sent Plaintiff a check for 80 hours of work at \$4.25 an hour, less applicable taxes.

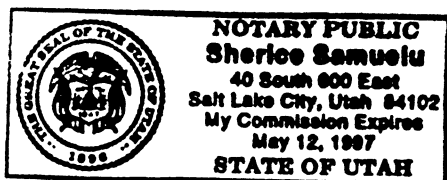
8. During the thirty (30) days following Plaintiff's termination of employment, none of his customers purchased products from the Defendant.

9. Further affiant sayeth naught.

DATED this 18th day of November, 1993.

Vaughn Christensen
Vaughn Christensen

Subscribed and sworn to before me this 18th day of November, 1993.



Sherice Samuelu
Notary Public
Residing in Salt Lake County

Tab G

LINDA FAYE SMITH, #4460
Attorney for Plaintiff
C/O University of Utah
College of Law
Salt Lake City, UT 84112
Telephone: 581-4077

CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

LEE K. SHUSTER,	*	REPLY MEMORANDUM IN SUPPORT
	*	
Plaintiff,	*	OF PLAINTIFF'S MOTION
	*	
	*	FOR SUMMARY JUDGMENT
	*	
VS.	*	AND MEMORANDUM IN
	*	
	*	OPPOSITION TO DEFENDANT'S
	*	
APPLIED COMPUTER	*	MOTION FOR SUMMARY JUDGMENT
	*	
TECHNIQUES, INC.	*	Civil No. 920016945
	*	
Defendant	*	Judge Dennis M. Fuchs

MATERIAL FACTS -- ADMITTED AND DISPUTED

Plaintiff's Memorandum of Points and Authorities sets forth numbered paragraphs (10) of undisputed material facts, with references to the record (pleadings, exhibits, contract). Defendant ACT does not identify any of these facts as disputed.¹ The Plaintiff's Statement of

¹ Defendant ACT does set forth "facts" it deems "material," but none appear to specifically controvert Plaintiff's Statement of Material Fact.

Material Facts should be deemed admitted by this Court.²

Defendant ACT has also filed a cross Motion for Summary Judgment. Plaintiff Lee Shuster disputes certain of the facts set forth as "material" in ACT's Response and Memorandum. However, Plaintiff Shuster does not believe that any of the facts he disputes are material to the issues presented in his Motion for Summary Judgment. In response to Defendant's Motion for Summary Judgment, plaintiff submits his Affidavit and notes he disputes the following:

1. Plaintiff disputes Fact ¶2 and ¶3 regarding the source of ACT's revenues as contrary to the information he was given during his employment and unsupported by the record. (See Affidavit of Lee Shuster ¶10.)

2. Plaintiff agrees that Fact ¶1 describes ACT's business, but disputes that he was employed to sell "Defendant's products" as stated in Fact ¶4. Plaintiff Lee Shuster was employed only to sell the accounting software to bottled water distributors, ACT having limited his duties in accordance with the Employment Agreement ¶ 1. (See Shuster Affidavit ¶4).

3. Plaintiff disputes that he was hired "as a commissioned salesman" (Fact ¶4) and that ACT's staff comprised "two outside salesmen" (Fact ¶5). The Employment Agreement sets forth the nature of

² Rule 4-501(2)(b) of the Code of Judicial Administration provides: "All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless *specifically controverted* by the opposing party's statement." (emphasis added)

the employment relationship, and its interpretation is a matter of law. (See Agreement Exhibit A). There is no support in the record for characterizing Mr. Shuster as an "outside salesman" and none is cited. Mr. Shuster worked at ACT's offices under ACT's direction during his employment. (Shuster Affidavit ¶ 6-9, 12).

4. ACT's Facts ¶6 - ¶8 state that "by agreement" plaintiff received "commissions" a "draw" or "prepaid commissions", but ACT does not reference the written Employment Agreement. Plaintiff would dispute that there was any "agreement" beyond the written Employment Agreement. The interpretation of the Employment Agreement is a matter of law (not fact). (See Employment Agreement, Exhibit A.)

5. Plaintiff would dispute the figures set forth for the "commissions earned" and "advanced commissions" (Facts ¶9) if these amounts were material. (Shuster Affidavit ¶ 11 and Attachment #2).

6. Plaintiff would dispute the statement that "plaintiff terminated his employment" (Facts ¶8) if it were material. Plaintiff contends that ACT terminated the Employment Agreement (as provided for in the Agreement ¶ 13) on October 14, 1992. ACT offered plaintiff Lee Shuster a new contract that would have involved working for commissions only, which plaintiff declined. (See Shuster Affidavit ¶ 5 and correspondence Exhibit B and Affidavit Attachment #2.)

POINTS AND AUTHORITIES

I. THE FACTS IN DISPUTE ARE NOT MATERIAL TO THE LEGAL QUESTION IN COUNT I REGARDING THE EMPLOYMENT AGREEMENT

The defendant ACT describes a company whose "life blood" is new sales and contends that a salesman who has failed to make sales shouldn't be paid. Mr. Shuster's Affidavit and letter (Attachment #2) to Vaughn Christensen, president of ACT, provides a different, complex picture of the product, pricing, and seasonal sales patterns of ACT. However, it is not necessary for this Court to decide if ACT's sales-force was incompetent or if ACT's accounting software for the bottled water distribution industry was poorly conceived, overpriced and only marginally marketable. The only question for this Court is what the Employment Agreement means.

II. THE EMPLOYMENT AGREEMENT IS UNAMBIGUOUS, AND AS A MATTER OF LAW ENTITLES MR. SHUSTER TO OUTSTANDING GROSS PAY AS PRAYED FOR IN COUNT I OF THE COMPLAINT

The Employment Agreement itself is admitted to by both parties. If it is unambiguous (which the Plaintiff believes it is), the Court may enter judgment as a matter of law.³ *Faulkner v. Farnsworth* 665 P.2d 1292, 1293 (Utah, 1983).

Defendant ACT seeks to characterize any and all payments to be made

³ If the contract is ambiguous, then this Court should deny summary judgment and await a trial where parol evidence can be considered in understanding it.

to Mr. Shuster as "commissions" or "prepaid commissions" dependent upon sales. Nevertheless, the Agreement unambiguously provides a schedule of guaranteed monthly payments:

"If commissions earned do not equal the draw per month as outlined above, *Employer shall add that amount necessary to cause Employee's gross pay to equal the monthly amount shown*, such amount to be considered a draw against future commissions." Employment Agreement ¶ 6, Exhibit A (emphasis added).

While the Employer can recapture the "draw" in certain circumstances, the Agreement never permits the employer to pay the employee less than the defined "gross pay." When commissions earned rise above a certain level (\$2500 per month) the Employer is permitted to recapture the "draw." (Employment Agreement ¶6) After termination, the Employer is entitled to recapture any "commissions" earned during the 30 days following termination to repay any outstanding draws which may exist. (Employment Agreement ¶5.D.) But there is no provision for paying the employee less than the "draw" or "gross pay" provided for on the schedule. The Agreement never sets forth an exception to the Employer's obligation to pay this monthly amount.

Defendant ACT argues that it is illogical to require ACT to make "prepayment of future commissions" upon a salesman's termination, since "there is no way he can earn future commissions." Memorandum p.5. But this is incorrect. The Agreement allows the salesman to receive commissions on sales made for 30 days after he ceases to be employed. (Employment Agreement ¶ 5.D). So a "prepayment" of future commissions which might be earned on sales during the month following termination is

perfectly logical; and it is required under this Agreement.

Not only is this the only logical, plain and unambiguous interpretation of the contract--it is the only interpretation that would render the contract legal. If an employer pays nothing to an employee who worked full-time, at the employer's offices under the employer's direction for two weeks, simply because the employee sold none of the employer's \$4000 accounting packages during that two weeks; the Employer will violate state and federal minimum wage law. See 29 U.S.C.A. §201 *et. seq.* (Fair Labor Standards Act) and Utah Code Ann. §34-40-101 *et. seq.* (Utah Minimum Wage Act). Contrary to ACT's arguments, Mr. Shuster is entitled to be paid for his two weeks of work.

ACT's Memorandum refers to Mr. Shuster as one of two "outside salesmen" but makes no reference to anything in the record to support this characterization.⁴ There is no support in the record or elsewhere to characterize Mr. Shuster (or the other salesman) as an "outside salesman." Federal law, which exempts "outside salesmen" from minimum wage law, defines an "outside salesman" as an employee "who is customarily and regularly engaged away from his employer's place or places of business. . . ." 29 C.F.R. §541.5(a). The federal regulatory interpretations (Part B) state:

"This requirement is based on the obvious connotation of the word 'outside' in the term 'outside salesman.' It would obviously lie beyond the scope of the Administrator's authority that "outside salesman" should be construed to include inside salesmen. . . .29

⁴ Both federal and state law exempt an "outside salesman" from the minimum wage law. See 29 U.S.C.A. §213 and Utah Code Ann. §34-40-104.

C.F.R. §541.502(a) "

"Characteristically the outside salesman is one who makes his sales at his customer's place of business. This is the reverse of sales made by mail or telephone. . . ." 29 C.F.R. §541.502(b)

Mr. Shuster worked full-time, every week, for ACT at ACT's place of business, 772 East 330 South, Salt Lake City, Utah. Not only was he regularly present, but he was required to be present at the employer's place of business during normal business hours. He called customers by telephone, demonstrated products via modem, mailed solicitations and developed marketing plans all at ACT's business offices. (Shuster Affidavit ¶ 6-9, 12 and Attachment #2.) The unsupported mischaracterization of Mr. Shuster as an "outside salesman" should not be permitted to confuse the issue.

The plain meaning--and the only legal interpretation--of the Employment Agreement is that ACT was required to and failed to pay Mr. Shuster the "gross pay" for his full-time work during his final two weeks of employment at ACT.

III. PLAINTIFF'S CLAIM FOR CIVIL PENALTIES UNDER THE UTAH PAYMENT OF WAGE ACT IS NOT DISPUTED.

Plaintiff's second cause of action is based upon ACT's violation of the Utah Payment of Wages Act. The UPWA requires prompt payment of wages at termination. This cause of action does not depend upon the

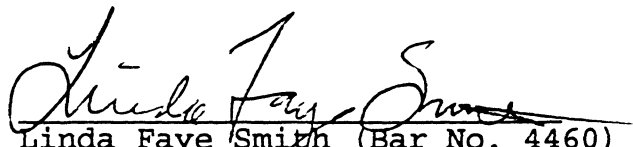
interpretation of the Employment Agreement.⁵ If ACT owed Mr. Shuster any wages at all (even "minimum wages") ACT violated the UPWA for paying nothing for 45 days.

Defendant ACT's Response and Memorandum does not controvert this point at all. Accordingly, this Court should order judgment for the Plaintiff under Count II for ACT's violation of the Utah Payment of Wage Act.

CONCLUSION

For the reasons set forth above and set forth more fully in the Amended Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment, Plaintiff Lee Shuster requests this Court to enter Judgment for him on all counts in accordance with the Complaint and his Motion for Summary Judgment.

LINDA FAYE SMITH


Linda Faye Smith (Bar No. 4460)
Attorney for Plaintiff


Lee K. Shuster
c/o University of Utah
College of Law
Salt Lake City, UT 84112
Telephone: (801) 581-4077

⁵ The amount of the civil penalty depends upon whether this Court finds the plaintiff entitled to wages under the Agreement or entitled to minimum wage.

CERTIFICATE OF MAILING

THIS IS TO CERTIFY that a true and correct copy of the Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment and Memorandum in Opposition to Defendant's Motion for Summary Judgment, and Affidavit of Plaintiff Lee Shuster (together with Attachments #1 and #2) were mailed, postage prepaid, on this 1st day of December, 1993, to:

Thomas R. Blonquist (0369)
Attorney for Defendant
40 South 600 East
Salt Lake City, UT 84102


Linda Faye Smith

Tab H

FILED
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SALT LAKE COUNTY

LINDA FAYE SMITH, #4460
Attorney for Plaintiff
C/O University of Utah
College of Law
Salt Lake City, UT 84112
Telephone: 581-4077

CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

LEE K. SHUSTER,	*	
	*	
Plaintiff,	*	AFFIDAVIT OF
	*	
vs.	*	PLAINTIFF
	*	
	*	LEE K. SHUSTER
	*	
APPLIED COMPUTER	*	Civil No. 920016945
TECHNIQUES, INC.	*	
	*	Judge Dennis M. Fuchs
Defendant.	*	
	*	

STATE OF UTAH)
 SS
COUNTY OF SALT LAKE)

I, Lee K. Shuster, being first duly sworn on oath, hereby state as follows:

1. I am the plaintiff in the above-named case.
2. Prior to my employment at ACT I had been employed as a sales person in the computer industry for over 5 years, earning between \$35,000 and \$50,000 annually.

3. I was employed by ACT from on or about March 2, 1992 until October 15, 1992 in accordance with the Employment Agreement attached to the Complaint. No separate or different agreement existed between myself and ACT.

4. I was employed solely to market ACT's accounting software (and related hardware) to bottled water distributors. Although ACT sold other products and services to new and existing customers, my sales responsibilities were limited by ACT to marketing the accounting software packages to bottled water distributors in certain geographical areas.

5. My employment at ACT ended when Mr. Christensen, ACT's president, informed me that ACT was revoking the existing Employment Agreement. ACT's President, Mr. Christensen, offered me a new agreement which I understood to involve working for "straight commissions." I declined this offer as set forth in my letters. (See Exhibits B and Attachment #2.)

6. During my employment I worked on a full-time basis at ACT's offices at 772 East 3300 South, Salt Lake City, UT 84106. I was required, by the terms of my employment and by ACT's president Vaughn Christensen, to be present at ACT's offices during normal business hours; and I was not permitted to work at my home or elsewhere except as specifically approved by Mr. Christensen.

7. I can recall only three occasions when I did leave ACT's

offices on business: once to call upon a local customer, once to complete some promotional materials on my computer at home, and during the final two weeks of my employment to accompany Mr. Christensen to a trade show in Cincinnati, Ohio.

8. The sales solicitation work I performed for ACT was at Mr. Christensen's direction and in accordance with Mr. Christensen's marketing scheme, and included primarily telephone solicitation and selling.

9. In addition to the sales solicitation work, I performed other services to improve ACT's ability to market its accounting software to bottled water distributors. Certain of the other services I performed for ACT are discussed in my letter to ACT, attached here as Attachment #2. During my employment my co-salesman and I undertook a comprehensive analysis of ACT's sales and marketing strategies, pricing, and prospects. This analysis had been requested by Mr. Christensen, as mentioned in the final paragraph of his Memorandum attached hereto as Attachment #1. The initial analysis of ACT's product and marketing strategy is also contained in my Letter to Mr. Christensen dated October 14, 1992 and attached hereto as Attachment #2. This letter is a true and accurate statement of my activities and my observations.

10. My understanding of ACT's revenues and expenses, based upon Mr. Christensen's statements to me, is contained in my letter, Attachment #2, page 5. On information and belief I dispute that ACT

received 80% of its income from new sales. However, I do not think this is relevant to my claim for unpaid wages.

11. My objections to ACT's accounting of "my" sales and "commissions" is set forth on page 6 of the letter Attachment #2. On information and belief, ACT made sales to customers in the territory ACT had assigned to me pursuant to the Agreement. ACT did not refer these customers to me and ACT gave me no credit for such sales. I believe these actions were in violation of the Employment Agreement. However, this dispute makes no difference in this case for unpaid wages.

12. During the last two weeks I worked for ACT (October 1 to October 15), I worked more than full-time, and well over 80 hours. During most of that period I worked at ACT's offices conducting telephone solicitation. However, at ACT's direction I also accompanied Mr. Christensen and the other salesman, Gene Castle, to Cincinnati, Ohio to a trade show of bottled water distributors. This involved being away from home for approximately three days, including Friday evening, all day Saturday and Saturday evening, and returning to Salt Lake City on a Sunday. During this period I prepared for this trade show, met prospects at the show, and followed up prospective sales after the show. During this time I also learned that a prospective customer had selected a competing product, based solely upon lower cost and faster installation and training. (See letter Attachment #2, p. 3). In addition, in consultation with my fellow salesman I completed a draft

analysis of ACT's marketing of its accounting software to the bottled water distribution industry. This analysis is contained in my letter of October 14, 1992, Attachment #2. This summarizes the work I did for ACT during my final two weeks of employment for which ACT originally paid me nothing, and now has paid me only minimum wage for 80 hours of work.

DATED this 1st day of December, 1993

Lee K Shuster

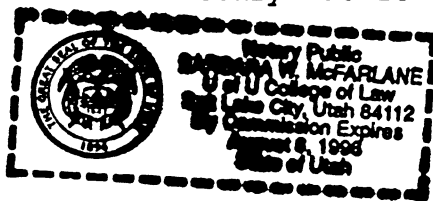
Lee K. Shuster

The foregoing Affidavit was subscribed and sworn before me on this 1st day of December, 1993.

Barbara W McFarlane
Notary Public

My Commissions Expires:

August 8, 1996



ATTACHMENT #1

MEMORANDUM

To: Lee Shuster
From: Vaughn Christensen
Date: October 14, 1992
Subject: Employment Agreement

Lee, Gene wrote me a letter today regarding our conversations last Wednesday and Thursday. As Gene is still unsure of the changes Linda and I are making to the agreement, I thought a memo to you clearly explaining these changes would be in order. Thus, the following is a recap of the conversation on October 7, 1992, between you, Linda, and me regarding the changes to your Employment Agreement, which we feel are necessary due to your inadequate sales results to date:

1. Draw cap. The provisions in paragraph 6 for issuing you draws against future commissions earned will be modified such that the maximum amount issued to you in the form of draws against future commissions will be established at \$13,000.00. If the rate of sales has not substantially changed by November 15, 1992, we should meet again to determine what other measures we can employ to correct this situation.

2. Recovery of outstanding draws. The provisions in paragraph 6 for recovering the outstanding draw balance will be modified such that earned commissions which exceed \$750.00 in any semi-monthly pay period will be applied as a credit to the outstanding draw balance, thus reducing it.

3. The above changes will become effective Wednesday, October 7, 1992. Thus, it was our intention to terminate the Employment Agreement as it existed on October 7, and execute a new one incorporating the above changes as of that same date. As Linda was unable to make the changes prior to her departure for Bermuda, I will make the changes and incorporate them into a new agreement which will go into effect today, October 14.

Further, I suggested that you spend some time contemplating the potential sales in the bottled water market, our sales and marketing strategy, pricing, etc., with the goal of suggesting ways in which this undesirable condition of inadequate sales may be rectified. I asked you to get back with Linda and me at your convenience, but no later than Wednesday, October 14, with your suggestions. If needed you could discuss these issues with Gene. I await your input.

ATTACHMENT #2

1337 East Yale Avenue
Salt Lake City, UT 84105-1612

October 14, 1992

Dear Vaughn:

I am writing this to confirm your actions of last week, and to respond to your request that I propose a "counter-offer" or give you my suggestions about your business and my relationship with it.

First, during meetings on Wednesday and again on Thursday, you informed me that as of November 15, 1992, Applied Computer Techniques was terminating the Employment Agreement (dated March 2, 1992) with me. (See paragraph 13). You further offered to re-employ me, effective November 15, 1992, provided that I would agree to a major change in my compensation. Basically, you informed me that you would no longer guarantee a gross pay of \$1500 per month, as Paragraph 6 of the Employment Agreement does. Rather, you would pay me additional monies only after and if I made new commissionable sales.

You also gave me a Draw and Commission Report which indicated the following regarding my 8 1/2 months of employment (as of November 15, 1992):

ACT Gross Income from my sales (est.)	\$12,208.00
ACT Gross Profit from my Sales	\$9,156.00
(after 25% "costs" subtracted)	
Compensation paid to me	\$13,464.16
"Loss" you calculate from my employment	\$(4307.91)
Commissions (@20% of Gross Profits)	\$1,831.30

You explained that under the proposed new arrangement, after I made a new sale I would be entitled to commission at the existing rate (20%) up to \$1500.00 per month, but that any commission over \$1500.00 per month would be retained by ACT to repay the "draw" I have received. (In the existing contract, commissions are recaptured by ACT only when they exceed \$2500.00 per month.) You further explained that after I had made sales, earned commissions, and paid some of the draw back to ACT, I would again be entitled to "draw" on future commissions, but a permanent cap on draw of \$13,464.16 (the total amount paid to me as of November 15) would be placed on any amount advanced to me in this way. In the short run, I could expect to receive payments only when and to the extent I earned commissions.

You also took the same steps (terminating the Employment Agreement and offering this new agreement) with the other salesman ACT employs, Gene Castle. In neither instance did you indicate that we salesmen had failed to carry out our obligations under the contract in a competent manner, (nor had you previously so indicated). You did not offer any new benefit to us in consideration for the financial sacrifice you are asking us to make. In fact, your offer to "re-employ" us indicated that you believe we are competent sales people, and you told Gene and me that we were the best sales people you have ever had. Rather, your stated concern was that ACT's expenses were too high in light of its income, and your desire was to cut the expense of paying the personnel that perform sales work or to "motivate" higher sales by the new straight commission compensation arrangement.

Let me explain how this situation appears from my perspective, and why your offer to re-employ me is unrealistic and unreasonable. In summary, the commissions I would likely earn (given an unchanged product mix, pricing structure and marketing strategy, and in light of ACT's sales history) total between \$5000 and \$10,000 annually. It does not seem a reasonable or suitable plan for my dependents or me to pursue a chance of earning between \$2.50 per hour and minimum wage, as is the most likely scenario if I remain at ACT.

Let me explain how I have come to these conclusions. First, when I was a candidate for this job in November and December, 1991, I asked you about the sales prospects, the company's history, and my potential earnings. As I told you, I had earned between \$35,000 and \$65,000 annually (averaging \$49,000) over the past 4 years as a salesperson in the computer industry and I would require such earnings to meet child support obligations, debt obligations, relocation expenses and to provide for basic living expenses. You assured me that it was quite possible for me to realize earnings in that range. I asked about the company's sales history, and learned that I would need to sell five to six times as many systems as the prior salesmen for my previous average earnings to be matched. You indicated that the prior salesperson was not making enough telephone contacts, and you explained that such increase in sales and earnings was possible by making more contacts each day and because the market for your product was expanding. You also told me you had purchased a data base of prospective customers, which would make telephone sales a viable approach. As you know, I accepted a position with your firm (leaving a job whose base salary was \$35,000 guaranteed, plus 40% commissions on all products sold nationally) in order to relocate to Utah for personal reasons. I hoped your predictions about your business and its prospects were accurate.

Now that I have been employed by ACT for seven months, I am in a better position to analyze your marketing needs and your business's prospects.

It now appears that during the first 24 months (October 1989 to October 1991) after introducing the product, ACT sold approximately 30 units. This averages 15 units per year. You told me that the average new sale grossed \$5000 for ACT, so 15 units per year would yield ACT \$75,000 in income. If I have correctly understood this history it seems that sales over the last 12 months (September 1991 to September 1992) are consistent with historical patterns, with approximately 15 units sold, despite a 33% increase in the cost of the standard system during this past year. The conclusion I draw from this analysis is: despite the fact that Gene and I have followed your instructions for calling dozens of prospects each day, overall sales have not increased, but are in fact on track with respect to historical performance of the product. My conclusion is that the market for this product is more of a factor in determining sales potential than strictly increasing the number of calls made per month in sales prospecting activities.

If this historical pattern continues unaltered (as it appears it will), the commissions available for new sales will be approximately \$15,000.00 per year. (If this is divided between two salespeople, it will be \$7,500 per year for each.) It is your belief that we can influence customers to buy our product by

following the "procedure/needs/criteria" selling method, and doing so with large numbers of prospects. You hired two salesmen (instead of one) thinking that twice as much telephoning would result in three to four times as many sales. To date, this has not been the result.

Unfortunately, the economics of the market are more complicated. Basic marketplace economics teaches that as a product's price is increased, fewer purchases will be made. There is an ideal price for a product which will maximize income. I am not clear how you have determined the pricing of our products to new customers (particularly how you determined that a 33% increase in entry level pricing during this year was prudent.) However, I know that our product's comparatively high price substantially reduces the number of potential customers who are willing and able to buy our product.

The current targeted market (Route-based bottled water distributors) is a narrowly defined niche. The largest segment of the market are distributors owned by producer/bottlers; and typically they have previously obtained accounting packages from their corporate MIS departments. So, without a vastly different approach and product, they are rarely prospects. The other companies that distribute bottled water are small to medium-sized companies.

The small companies often are "one-person" operations. They are not computerized, consider the purchase of a computer a major expenditure, and are shocked with the \$4000.00 price for accounting software plus an additional \$1500.00 for training. They will not purchase our product until they are convinced of the value of a computer, assisted to fully utilize the computer in their business (e.g. word processing as well as accounting and route management), and then will only buy an accounting system such as ours if they have the money and it is cost effective given the size of their business. Thus far, we have not tried to offer a "full-service" computer consulting business to introduce these customers to cost-effective benefit of computerized accounting and route management functions. Without such an approach, these companies are not realistic prospects.

Then there are the medium-sized distributors who usually have computerized. Many already have accounting packages. Some use "off-the-shelf" general accounting or spreadsheet products available for as little as \$50.00. While ours is more industry-specific and does include route management functions, our product can be 100 times more expensive, and many of these potential customers are not convinced that the greater efficiency we offer them will translate into savings, while others simply do not have the capital to purchase our package, even when they are convinced of the potential savings and want to purchase our product.

Finally, there are a very few firms who have sufficient capital and appreciation for a fully automated accounting and route management system. But they are also doing their homework and looking closely at our competition. Mountain Valley Water, of Miami, Florida was such a potential customer. Yet at the last moment, Robert Levin, a very respected and influential leader in the bottled water industry, decided to purchase a package from one of our competitors. Although our prices were the same (after our \$1590 "free" software promotion), Mr. Levin openly told me our competitor was willing to train his people on-site at no additional cost. In contrast, your policy is to charge the customer the cost of your wife's travel and per diem expenses to Florida and \$200 per day for training, (or under my contract I could take the cost of air travel and living expenses out of my \$750.00 commissions.) Basically, purchasing our competitor's product saved this customer about \$1500.00 -- our product cost about 38% more than our competitor's did. Moreover, our competitor was willing to install the system immediately, where our policy is to tell the customer it will take one or two months to arrange installation and a training visit by your wife. Furthermore, Mr. Levin told me "Lee, you conducted the product demonstrations in a highly professional manner and answered all my questions about the product and services in a way that directly showed me how your product would meet my needs." In a nutshell, Mr. Levin went elsewhere based on the higher start-up cost, not my role in the direct selling process.

Accordingly, even the prospects who are very motivated to buy, may choose to buy from a competitor because the package we offer costs more for what the customer gets. Similarly, there are customers who are willing and able to spend significant sums for accounting software, but who have requested design differences from our package. These requests have included (but are not limited too): Assets and Depreciation module, Work Order/Service module. Manufacturing modules, and Telemarketing module. (My potential customers whose needs we could not accommodate included Vermont Hidden Spring, Serve-A-Care, K and K Water, and of course the entire Culligan Treatment and Conditioning family of companies.) If we will not accommodate these desires as product enhancements at a reasonable price and time frame, the customer will (and does) simply go elsewhere.

This has been a rather extended way of saying that sales are not directly, proportionally or linearly related to time and effort spent selling over the telephone. From having spoken to hundreds of potential customers, it is my impression that our product will only appeal to a certain niche segment of the route-based, bottled water industry. It would seemingly make sense for ACT to have a business plan that accurately defines and describes that "target market." If ACT were to perform such analysis, you may be able to establish a coherent plan to increase sales and/or profitability. I am firmly convinced that your present approach of requiring a high volume of calls and of paying the sales force a straight commission to "incent" more sales will have no positive effect upon sales.

A marketing director would certainly study the prospect database ACT has at hand, and which our contract requires you to furnish. (Para. 12.) As you know, that data base had 1200 prospects in my territory, all of whom had been contacted by mid-August. However, over 50% of that database were not prospective customers (because they were out-of-business, branch offices, etc). This leaves 600 to 800 prospects per sales person to now re-contact. Since I averaged 25 calls a day, I could re-contact all the customers on this list once every six weeks to see if they were now interested in our product. Despite repeated requests from Gene and me, you have not provided additional, updated marketing resources in this area. (Commercially available lists, based on U.S. and Canadian listings of S.I.C Code 5499-03; Bottled and Bulk Water companies equal 4000 listings; with another 4000 listings for Office Coffee Service companies.

A marketing director would also study the competitive products in the market, and assess our product (as to characteristics, price, etc.) in light of its competition. Since you have been selling this product for three years (and I have been with ACT for seven months), I expected that you would be able to inform me of the unique qualities of our product in comparison with our competition. Nevertheless, most of the information on file about our competition has been acquired during the past months through my voluntary efforts.

A marketing director would also analyze the sales history of the company. It appears that there were few (3) sales in the first year of operation, and then a flurry of sales clustered in September 1990 - January 1991. The same level of sales did not occur from September 1991 - January 1992. What was conducive to these sales in autumn of 1990 and has not been as conducive since? It could be our change in pricing. It could be a competitor's reduction of price. It could be a national economic downturn. It could be that the market is saturated. It could be that customer lists were fresh two years ago, and are played out now. In the fast-paced computer industry, it could be the recent availability of low-cost, off-the-shelf, simple-to-use accounting packages coupled with the drastic reduction in the price of hardware. Since I had not been asked to analyze this phenomenon until last week, I relied upon your analysis and complied with your strategy of high- volume "telsell" calling. I do not know how ACT operated in fall, 1990 (e.g. price and training costs, customer lists, method of contact, advertising), but it would be wise to ask what is different today. Moreover, ACT should carefully survey and analyze the reasons prospects have given for not being interested in our product. ACT needs to understand the reasons for sales currently being lost to competitors. A statistical analysis of the market using our own data would assist ACT to better target customers and perhaps redesign or repackage the product and services sold.

A marketing director should also study the reasons why many of our customers prefer not to buy computer hardware from us along with the software package (whether they already own a computer or can simply acquire one more cheaply than at our prices). ACT should also study the profitability of "add-on" sales or consulting services to existing customers, compared with new sales to new customers. Presently, there is little or no concerted effort (or marketing focus) to promote sales and the high cost effectiveness of additions (e.g. handheld terminals) to current customers. Moreover, the fact that the salesman may receive NO commission for such sales discourages the development of this highly profitable market.

Gene Castle and I have been instructed to make a large volume of calls to prospective customers, to avoid the issue of price, and to convince the customers that our product is "better." We have not been previously asked to perform a market analysis and we have not been provided with the relevant data to do so. Nevertheless, we have suggested new marketing ideas. And our ideas have generally been met with resistance or rejection. Gene studied the sales history, and learned that ACT has rarely sold a new system during the summer months. (It is the busy season for the bottled water industry.) With this information Gene and I designed a "summer special" where a "free computer or software" was sold with the accounting package and delivery and payment were deferred until fall. As a result, ACT enjoyed significant (5 or 6 units) "summer sales." We also got free public relations coverage from Mountain Valley Water, a major nationwide distributor of bottled water. However, this marketing approach was financed by Gene and me -- the "free computer" was paid for out of our commissions.

I have personally tried to expand and diversify our sales approach by loaning ACT three modems for conducting long-distance telephone-based product demonstrations and avoiding expensive travel to prospect sites. Gene and I designed a demoguide booklet to assist in the demonstration process. We saved the company time and money by making available a complete desktop publishing system including: computer scanner, clip art and graphics software, fonts and high-quality graphic laser printing producing an innovative marketing mailer for promoting hand-held sales. When you said you could not afford a commercial spreadsheet program for faster preparations of proposals and cost justification studies, I gladly donated a registerable copy of a leading spreadsheet program. All these efforts seem to have been unrecognized.

Frankly, it appears that ACT has been pursuing the same sales approach for some time, with the same pricing structure (albeit having increased entry-level prices 33% this past year). If ACT continues the same marketing patterns, it is likely to get the same sales results. ACT needs to analyze the facts and to creatively consider a variety of new and innovative ways to service the industry if its profits and growth rate are to increase.

Of course, ACT's fiscal analysis should encompass more than the market for increasing new sales. It should also consider ACT's costs and better ways to be more cost effective. You have told me that ACT's gross income for the past three years has been approximately: \$200,000 in 1989, \$225,000 for 1990, and \$310,000 for 1991. If I have understood these figures accurately, it seems that the majority of ACT's earnings have not been from new sales, but from sales to existing customers (annual support fees, income from the sales of accounting forms, custom programming, sales of add-on peripherals and network components). Thus, ACT's gross income from new sales over this period (approximately \$160,000) has represented less than 30% of ACT's total income. While new sales may be necessary to support future growth, it does not appear that new sales of the current product have ever been the major source of income for ACT. It also appears that the new sales-to-date in 1992 are entirely consistent with the sales record in prior years at this point of the year, as I believe you said earnings were only down 3% over last year.

Although I certainly cannot make sense of everything you told us in this regard, you clearly informed Gene and me that the changes in the contract were necessitated by a budget crisis. You explained that it cost you almost \$16,000.00 per month "just to keep the doors open," that you and your wife Linda had

not paid yourselves but \$1500.00 salary all year, and that you only had a bit over \$100.00 in your personal checking account. Surely, if sales to new customers were your only income, you would be in debt well over \$100,000 for 1992 alone. If circumstances are actually that desperate, perhaps a major scale-back is in order: a return to the mom-and-pop style operation, with you and your wife doing all sales and marketing, technical support, business and financial planning, and secretarial support; and hiring the needed programming staff on a contracted basis. On the other hand, it seems that if your gross sales this year are similar to your gross sales last year (\$300,000), having expenses of \$16,000 per month (\$192,000/year) will still leave a net profit of \$108,000. Similarly, I must wonder about your decision to recently hire a secretary at an annual salary of nearly \$20,000 while you are laying off salesmen who work for as little as \$18,000. I also question the wisdom under such financial conditions of spending several thousand dollars recently to attend an industry trade show that yielded, very few, if any new qualified prospects. Finally, I wonder why you are focusing upon cutting expenses at a time when your time might be more productively spent helping Gene close an historic sale.

As you know, Gene's soon-to-be-accomplished sale in Chicago is a unique and very desirable customer. That customer is a very large distributor (probably one of the largest independent distributors in the nation) who has focused on down-sizing their route management and accounting system and is seeking to change to a networked PC-based system with hand-held terminals. Accordingly, our largest competitor (who sells similar accounting packages for mainframes, not PC-based networks) was not an issue. Because of the prospect's size, the price of our system is not a disadvantage. And the customer will be buying not only our software, but also additional high-margin products (hand-helds) and services (custom programming). If Gene succeeds in landing this sale, its size and profitability will be of historical dimension for ACT, possibly grossing more in one sale than all of fiscal year-1990 earnings. Therefore, I am baffled that contract termination and lay-offs are the topic of the week, rather than a company-wide celebration for Gene's (and the entire ACT team's) truly amazing accomplishment.

I find myself wondering if your desire to terminate Gene's and my contracts in the autumn (when sales historically pick up) isn't part of a disturbing pattern. I have been told that all prior sales people have worked less than a year and have left in the autumn. After they are gone, you close any sales that may be pending. Since salesmen are not entitled to any commissions for sales made more than 30 days after the end of their employment, you need not pay them anything further for the contacts they had made. Being understaffed every fall when sales pick up may be a good way to save paying both draw and commissions to the sales force.

Another questionable practice is your failure to provide new salespeople with all appropriate "client and prospective client information" (Para. 12.A) in the "designated geographical area" (Para. 3.A.) you have assigned to that salesperson. For example, there were three sales made in my territory during my employment at ACT to clients I had no knowledge or information about. I believe that under the Agreement those clients should have been referred to me so that I could have had or shared responsibility for those sales and for follow-up sales to this "existing customer."

In conclusion, you should understand that I will consider myself to have been laid off by ACT for purely economic reasons as of November 15, 1992. For the reasons set forth above, I do not believe that I can accept your new offer of providing me the opportunity to work for whatever commissions I may earn after that date, since the likelihood is that I will earn less than minimum wage under that scenario. I do believe you need to hire or contract with a marketing director and/or small business financial planner. I would be willing to discuss or undertake a market analysis of ACT on a short-term, independent contract.

Since I have based my decision on the facts as I understand them (and as I have set forth above), please let me know whether I have misunderstood any facts. I would appreciate a prompt, written response.

Sincerely,

A handwritten signature in black ink, appearing to read 'L. Shuster', with a long horizontal line extending to the right.

Lee K. Shuster

Account Representative

Tab I

1 doors open. For example, you saw our affidavit showing
2 that he'd received \$11,000 in advance commissions.

3 THE COURT: Right.

4 MR. BLONQUIST: And he's earned commissions of a
5 thousand.

6 THE COURT: I saw that.

7 MR. BLONQUIST: And you just can't stay in
8 business under those terms and conditions. And so what we
9 did was suggest that these, that there be a change and as
10 a result of that, this man terminated, and our position is
11 that when he terminated, then his advance against
12 commissions terminated and we don't owe him anything
13 further as an advance.

14 In answer to the Court's question, the question
15 then arose, do we owe him for the period of time that he
16 did work even though he didn't make any sales? And the
17 Industrial Commission advised my clients -- I wasn't
18 involved at the time -- that even though there was an
19 agreement and even though it provides commissions, if the
20 man did work for you, you'll owe him minimum wage. So we
21 paid him the minimum wage for the two-week period minus
22 the taxes, and as far as we were concerned, that should
23 have resolved the matter. But their position is, of
24 course, that that isn't the case.

25 THE COURT: How do you get around the penalty

1 though, even if you say it should be minimum wage, how do
2 you get around the penalty that it wasn't paid on time
3 according to the statutes?

4 MR. BLONQUIST: Well --

5 THE COURT: Why isn't there a penalty there?

6 MR. BLONQUIST: Well, all we can say is
7 ignorance in the law is no excuse, Your Honor, but as soon
8 as we were told by the Industrial Commission that that was
9 the case, we paid it. Now if you want to slap our hands
10 for that, hey, we didn't do it right, but we certainly did
11 take care of the matter as promptly as we were advised by
12 the commission and actually informed as to the status, the
13 position that the Industrial Commission took in those
14 matters, but prior to that time my client didn't know.

15 THE COURT: Okay, that helps me better
16 understand your position. Okay thank you.

17 Did you find something?

18 MS. SMITH: Well, no, I don't find it in the
19 statute, but I did bring a complimentary -- courtesy copy
20 to The Court of the Smith v. Batchelor case which is --

21 THE COURT: I'm looking at the --

22 MR. BLONQUIST: -- which is a, a case that the
23 Supreme Court decided just a couple of years ago and it
24 was filed in the District Court --

25 THE COURT: Do you think I can read this without

1 regard to subsection D or 5D; or whether the Court feels
2 that plaintiff really has shown, based on the affidavits
3 and the motion and the memorandum, grounds for summary
4 judgment.

5 In regard -- I have to be honest with you -- in
6 regard to who was bad in the company and whose fault it
7 was, I'm not sure that that has any bearing on the Court's
8 decision whatsoever. The question is an employment
9 contract that existed between the parties. Some bearing
10 may be whether defendant quit or was forced to resign
11 based on all of the sudden a unilateral changing of
12 employment contract from gross sales, you know, subject to
13 commission versus straight commission, depending on the
14 affidavits. Obviously that seems to be a point of
15 dispute. I'm not sure that that's a point here that the
16 Court has to consider.

17 What I want to do is go back over the employment
18 contract, go back over this, make sure that I do feel that
19 I have jurisdiction in the matter. If anybody else -- if
20 either of you can find anything that either says
21 positively I do or I don't, I'd be interested in that, and
22 give you ten days to provide that to the Court. But other
23 than that, I want to go back over it and make a
24 determination as to whether the Court, you know, it's
25 almost my opinion that partial summary judgment can be

1 granted, although I'm not doing that, I'm just trying to
2 give you an idea of where I am, and it would be a question
3 of whether the Court feels that a partial summary judgment
4 should be based on minimum wage or should be based on the
5 guaranteed gross income as per the contract.

6 I'm a little hesitant to say that this court can
7 find that the employee -- or the employer had no
8 responsibility to pay and acted in good faith. There was
9 nothing in 3428 or section 34 that appears to me as if
10 good faith has anything to do with the penalties. It's
11 just, really it gets paid or it doesn't get paid and these
12 are the penalties that are imposed if it isn't paid.

13 MR. BLONQUIST: I understand that, Your Honor,
14 and I was being very candid with the Court in answering
15 your question.

16 THE COURT: YES.

17 MR. BLONQUIST: Those are the facts.

18 THE COURT: So the biggest question in the
19 Court's mind is maybe an interpretation of the contract in
20 looking at what figure the Court should be looking at.

21 MR. BLONQUIST: And our position is as I stated
22 that we think it's the minimum wage, and we paid, we paid
23 late, and if we're entitled to be penalized, so be it.

24 THE COURT: I understand that. The other issue
25 would be the Court will reserve the issue of attorney's

Tab J

**CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT**

LEE SHUSTER,)	
	)	MEMORANDUM DECISION
Plaintiff,)	
	)	Case No. 920016945 CV
VS.)	
	)	Judge Dennis M. Fuchs
APPLIED COMPUTER TECHNIQUES,)	
INC.,)	
Defendant.)	

This matter having come before the Court on both Plaintiff's and Defendant's Motions for Summary Judgment and the Court having heard arguments and reviewed the memorandums as submitted hereby:

A) Denies Defendant's Motion for Summary Judgment and

B) Grants Plaintiff's Motion for Summary Judgment for the following reasons:

1. There was a valid contract between the parties.

2. The contract called for wages to be paid to Plaintiff in the amount of \$1,500 per month.

3. That at the time Plaintiff terminated his employment he was due wages as per the contract.

4. That Section D of the employment contract would only apply if commissions were due and owing.

5. That Defendant wrote the contract and therefore is bound by its terms and its interpretation.

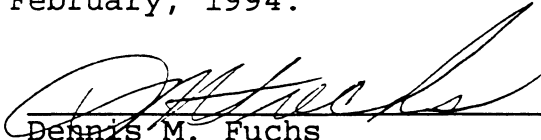
6. That Plaintiff did not pay the wages due Defendant upon termination.

7. That Plaintiff is entitled to a penalty of 60 days wages as per the statute.

8. That Plaintiff is entitled to the contract amount and not minimum wage.

Therefore the Court grants judgment in the amount of \$410.00 prayed for in the complaint and the penalty of \$3,000.00 as prayed for in the complaint and attorneys fees as provided in the statute. Plaintiff is awarded attorney fees as prayed for by the affidavit. Defendant shall have 10 days to challenge the attorney fees and request a hearing if appropriate. Plaintiff is to submit a judgment for the Court's signature.

Dated this 12 day of February, 1994.

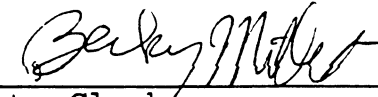

Dennis M. Fuchs
Circuit Court Judge

CERTIFICATE OF MAILING

I certify that I mailed a copy of the above Memorandum Decision on this 18th day of February, 1994, to:

THOMAS R. BLONQUIST
40 South 600 East
Salt Lake City, UT 84102

LINDA FAYE SMITH
C/O UNIVERSITY OF UTAH
COLLEGE OF LAW
Salt Lake City, UT 84112


Deputy Clerk

Tab K

FILED

MAR 21 1994

Third Circuit Court
Salt Lake Department

CIRCUIT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

LEE K. SHUSTER,

Plaintiff,

vs.

APPLIED COMPUTER
TECHNIQUES, INC.

Defendant.

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FINDINGS OF FACT AND

CONCLUSIONS OF LAW

Civil No. 920016945

Judge Dennis M. Fuchs

The above-captioned matter came for hearing on both the Plaintiff's and the Defendant's Motions for Summary Judgment on February 2nd, 1994, the Honorable Dennis M. Fuchs presiding. The parties having filed motions and affidavits, and the court having reviewed the files and the pleadings contained therein and having heard oral argument; the Court makes and enters the following:

FINDINGS OF FACT

These material facts have not been contested by the defendant ACT and are undisputed. Accordingly, this Court makes the following findings:

1. The parties entered into a valid contract for employment

on or about February 26, 1992, a copy of which is attached to the Complaint as Exhibit A.

2. From February 26, 1992 to October 14, 1992 the plaintiff Mr. Shuster worked for the defendant ACT, "devoting all his time and energy during normal business hours" to ACT's business.

3. From February 26, 1992 to September 30, 1992, ACT paid Mr. Shuster the "gross pay" provided for under Paragraph 6 of the Employment Agreement, since the commissions earned never exceeded such "gross pay."

4. The employment relationship ended on October 15, 1992. At that time Mr. Shuster made written demand to ACT for payment of wages for his work from October 1, 1992 through October 14, 1992.

5. On October 19, 1992 ACT wrote Mr. Shuster and refused to pay any wages whatsoever for this two-week period, on the grounds that "no commissions were earned" during that period. ACT paid no wages at all at that time for that two-week period of work.

6. On November 19, 1992, Mr. Shuster again wrote and demanded the "gross pay" of \$750 provided for in the Employment Agreement. Mr. Shuster further informed ACT that its failure to pay him any amount whatsoever not only violated the Agreement but violated state and federal minimum wage law.

7. On or about December 1, 1992 ACT paid Mr. Shuster gross pay of \$340, representing minimum wage for 80 hours of work; but again

failed and refused to pay the full gross pay totalling \$750 as demanded in accordance with the Employment Agreement.

8. Mr. Shuster made written demand for "gross pay" of \$750 under the Agreement on or about November 19, 1992 which was more than 15 days before bringing this action on December 14, 1992.

9. Mr. Shuster commenced this action on December 14, 1992 which is within 60 days of his separation from ACT's employment.

CONCLUSIONS OF LAW

1. The interpretation of the contract between defendant employer ACT and plaintiff employee Mr. Shuster is a matter of law.

2. The Employment Agreement is unambiguous. In paragraph 6 it calls for wages to be paid to Mr. Shuster in the minimum amount of \$1500 gross pay per month.

3. At the time Mr. Shuster's employment ended he was entitled to wages due under the Employment Agreement, paragraph 6, for two weeks of work, or \$750 gross pay. Paragraph 5 D limited ACT's obligation to pay commissions to Mr. Shuster after his employment ended; it did not alter ACT's obligation to pay wages as per Paragraph 6.

4. Mr. Shuster is today entitled to \$410 wages under the contract.

5. Because ACT did not pay Mr. Shuster the wages due and owing

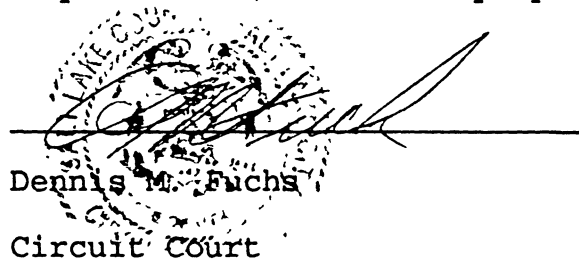
upon termination, Mr. Shuster is entitled to a penalty of 60 days wages under the Utah Payment of Wages Act (Utah Code Ann. 34-28-5) of \$3000.

6. Mr. Shuster made a written demand for wages at least 15 days before bringing this action and the demand did not exceed the amount justly due; but ACT did not pay Mr. Shuster the wages due him. Accordingly, pursuant to Utah Code Ann. 34-27-1 Mr. Shuster is entitled to reasonable attorneys fees for prosecuting this action.

7. It is reasonable, in light of the time, effort, difficulty, and other relevant factors to award Mr. Shuster attorneys fees and costs as requested in his attorneys' affidavit of \$1761.07.

Therefore the Court grants judgment in the amount of \$410 prayed for in the complaint and the penalty of \$3000 as prayed for in the complaint and the attorneys' fees as provided for in the statute. Plaintiff is awarded attorney fees of \$1761.07 as prayed for by the affidavit.

Dated: March 21, 1994


Dennis M. Fuchs
Circuit Court

Tab L

FILED

MAR 21 1994

Third Circuit Court
Salt Lake County

CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

LEE K. SHUSTER,

Plaintiff,

vs.

APPLIED COMPUTER
TECHNIQUES, INC.

Defendant.

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JUDGMENT

Civil No. 920016945 CV

Judge Dennis M. Fuchs

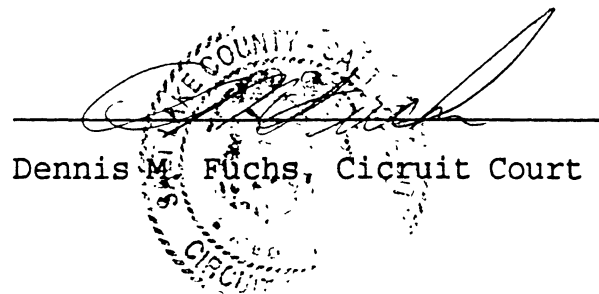
This action came before the Court, Honorable Dennis M. Fuchs, Circuit Judge, presiding, on both Defendant's and Plaintiff's Motions for Summary Judgment pursuant to Rule 56 of Utah Rules of Civil Procedure. For the reason that there are no disputed issues of material fact and Plaintiff is entitled to Judgment as a matter of law on all counts,

It is ordered and adjudged:

That Plaintiff, Lee Shuster recover of the defendant Applied Computer Techniques, Inc. the sum of \$5171.07, (representing

\$410.00 for contract damages, \$3000.00 for civil penalties and the sum of \$1761.07 for attorneys' fees and costs) with interest thereon at the rate of ^{5.41%}~~12%~~ as provided by law.

Dated at Salt Lake City, UT, this 21st date of March, 1994.


Dennis M. Fuchs, Circuit Court Judge

Clerk of Court

CERTIFICATE OF MAILING

THIS IS TO CERTIFY that a true and correct copy of the foregoing Judgment were mailed, postage prepaid, on this ____ th day of March, 1994, to:

Linda Faye Smith (4460)
Attorney for Plaintiff
c/o University of Utah
College of Law
Salt Lake City, UT 84112

Thomas R. Blonquist (0369)
Attorney for Defendant
40 South 600 East
Salt Lake City, UT 84102

Clerk