

1995

Gina Cook v. Zions First National Bank : Brief of Appellee

Utah Court of Appeals

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



Part of the [Law Commons](#)

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

Lois A. Baar; Douglas R. Davis; Michael A. Zody; Parson, Behle & Latimer; Attorneys for Appellee. Roger M. Hoole; Paul M. King; Heather E. Morrison; Hoole & King; Attorneys for Appellant.

Recommended Citation

Brief of Appellee, *Gina Cook v. Zions First National Bank*, No. 950750 (Utah Court of Appeals, 1995).
https://digitalcommons.law.byu.edu/byu_ca1/6971

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

IN THE UTAH COURT OF APPEALS

GINA COOK,

Plaintiff and Appellant,

vs.

ZIONS FIRST NATIONAL BANK,

Defendant and Appellee,

95-0750-CA

Case No. ~~950320~~

Argument Priority
Classification 15

APPELLEE'S BRIEF

Appeal from the Third Judicial District Court of
Salt Lake County, State of Utah,
The Honorable David S. Young, District Judge, Presiding

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
56
JAN
DOCKET NO.

ROGER M. HOOLE
PAUL M. KING
HEATHER E. MORRISON
HOOLE & KING, L.C.
4276 South Highland Drive
Salt Lake City, Utah 84124
Attorneys for Plaintiff
and Appellant

LOIS A. BAAR (3761)
DOUGLAS R. DAVIS (5062)
MICHAEL A. ZODY (5830)
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
P.O. Box 45898
Salt Lake City, Utah 84147-0898
Attorneys for Defendant
and Appellee

FILED

JAN 16 1996

COURT OF APPEALS

GINA COOK,)
)
)
Plaintiff and Appellant,) Case No. 950320
)
)
vs.)
)
) Argument Priority
ZIONS FIRST NATIONAL BANK,) Classification 15
)
)
Defendant and Appellee,)

Appeal from the Third Judicial District Court of
Salt Lake County, State of Utah,
The Honorable David S. Young, District Judge, Presiding

LOIS A. BAAR (3761)
DOUGLAS R. DAVIS (5062)
MICHAEL A. ZODY (5830)
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
P.O. Box 45898
Salt Lake City, Utah 84147-0898
Attorneys for Defendant
and Appellee

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION	1
STATEMENT OF ISSUES	1
CONSTITUTIONAL PROVISIONS AND DETERMINATIVE STATUTES	3
STATEMENT OF THE CASE	3
I. NATURE OF THE CASE	3
II. COURSE OF THE PROCEEDINGS	4
III. DISPOSITION OF THE COURT BELOW	6
IV. STATEMENT OF MATERIAL FACTS	6
SUMMARY OF ARGUMENT	16
ARGUMENT	19
I. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF ZIONS	19
II. THE DISTRICT COURT PROPERLY DETERMINED THAT COOK HAS NO EXPRESS EMPLOYMENT CONTRACT WITH ZIONS	22
A. Cook Failed to Establish the Elements of an Express Employment Contract	22
B. Even if Cook Were Able to Establish that the Employment Benefits Disclosure Form is a Binding Written Employment Contract, Zions did not Breach the Alleged Contract	25
III. THE DISTRICT COURT PROPERLY DETERMINED THAT COOK'S IMPLIED-IN-FACT EMPLOYMENT CONTRACT THEORY IS NOT RECOGNIZED UNDER UTAH LAW	26
IV. THE DISTRICT COURT SHOULD HAVE DISMISSED COOK'S IMPLIED CONTRACT CLAIM FOR THE ADDITIONAL REASON THAT SHE FAILED TO PROVIDE ANY LEGAL OR FACTUAL SUPPORT FOR THE CLAIM	33

V.	COOK'S IMPLIED CONTRACT CLAIM FAILS BECAUSE ZIONS CLEARLY AND CONSPICUOUSLY DISCLAIMED ANY CONTRACTUAL INTENT	39
VI.	COOK'S IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING CLAIM FAILS AS A MATTER OF LAW BECAUSE UTAH LAW DOES NOT RECOGNIZE THE IMPLIED COVENANT IN THE EMPLOYMENT CONTEXT, AND BECAUSE COOK HAS NO EMPLOYMENT CONTRACT WITH ZIONS	44
A.	The Utah Supreme Court Has Consistently Rejected An Implied Covenant Claim in the Employment Context	44
B.	Because Cook has No Employment Contract With Zions, Her Implied Covenant Claim Fails as a Matter of Law	46
	CONCLUSION	47

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<u>Bailey-Allen Co. v. Kurzet</u> , 876 P.2d 421 (Utah App. 1994)	2,3
<u>Baragar v. State Farm</u> , 860 F. Supp. 1257 (W.D. Mich. 1994)	31
<u>Barber v. SMH(US), Inc.</u> , 202 Mich. App. 366, 509 N.W.2d 791 (1994)	25
<u>Berube v. Fashion Centre, Ltd.</u> , 771 P.2d 1033 (Utah 1989)	18,25,27,28,38,44
<u>Brehany v. Nordstrom, Inc.</u> , 812 P.2d 49 (Utah 1991)	29,45,46
<u>Bunnell v. Bills</u> , 13 Utah 2d 83, 368 P.2d 597 (1962)	35
<u>Burns v. Cannondale Bicycle Co.</u> , 876 P.2d 415 (Utah App. 1994)	21
<u>Caldwell v. Ford, Bacon & Davis Utah, Inc.</u> , 777 P.2d 483 (Utah 1989)	29
<u>Celotex Corp. v. Catrett</u> , 477 U.S. 317 (1986)	19
<u>Conway v. Smith</u> , 853 F.2d 784 (10th Cir. 1988)	20
<u>Diston v. Enviropak Medical Products</u> , 893 P.2d 1071 (Utah App. 1995)	27,35,38
<u>Dubois v. Grand Central</u> , 872 P.2d 1073 (Utah App. 1994)	46
<u>Dumas v. Automobile Club Insurance Association</u> , 473 N.W.2d 652 (Mich. 1991)	31
<u>Elliott v. Board of Trustees of Montgomery County Community College</u> , 104 Md. App. 93, 655 A.2d 46 (1995)	43
<u>Grow v. General Products, Inc.</u> , 184 Mich. App. 379, 457 N.W.2d 167 (1990)	43
<u>Hamilton v. Parkdale Care Center</u> , 275 Utah Adv. Rep. 32 (Utah App. 1995)	27,29,40,41
<u>Heslop v. Bank of Utah</u> , 839 P.2d 828 (Utah 1992)	45

<u>Jespersion v. Jespersen</u> , 610 P.2d 326 (Utah 1980)	2,3
<u>Johnson v. Morton Thiokol, Inc.</u> , 818 P.2d 997 (Utah 1991)	29,34
<u>Kirberg v. West One Bank</u> , 872 P.2d 39 (Utah App. 1994)	29,34,41
<u>Knights v. Hewlett Packard</u> , 281 Cal. Rptr. 295 (Cal. App. 1991)	42
<u>Kreimeyer, et al., v. Hercules, Inc.</u> , Civ. No. 92-NC-088S (D. Utah Sept. 27, 1994)	41
<u>Loose v. Nature-All Corp.</u> , 785 P.2d 1096 (Utah 1989)	45
<u>Lowe v. Sorenson Research Co., Inc.</u> , 779 P.2d 668 (Utah 1989)	29
<u>Paddington Ptrns. v. Bouchard</u> , 34 F.3d 1132 (2d Cir. 1994)	20
<u>Rio Algom Corp. v. Jimco Ltd.</u> , 618 P.2d 497 (Utah 1980)	25
<u>Robertson v. Utah Fuel Co.</u> , 889 P.2d 1382 (Utah App. 1995)	24,29,34,37
<u>Rose v. Allied Development Co.</u> , 719 P.2d 83 (Utah 1986)	21
<u>Sanderson v. First Security Leasing Co.</u> , 844 P.2d 303 (Utah 1992)	34,45,46
<u>Schafir v. Harrigan</u> , 879 P.2d 1384 (Utah App. 1994)	19
<u>Scott v. Pacific Gas & Electric Co.</u> , 46 Cal. Rptr. 2d 427, 904 P.2d 834 (1995)	29,30
<u>Snyder v. A.G. Trucking, Inc.</u> , 57 F.3d 484 (6th Cir. 1995)	44
<u>Sorenson</u> , 873 P.2d at 1145	34
<u>Toussaint v. Blue Cross & Blue Shield</u> , 292 N.W.2d 880 (Mich. 1980)	31
<u>Transou v. Electronic Data System</u> , 767 F. Supp. 1392 (E.D. Mich. 1991)	43
<u>Trembly v. Mrs. Field's Cookies</u> , 884 P.2d 1306 (Utah App. 1994)	39

<u>Uebelacker v. Cincom System, Inc.</u> , 48 Ohio App. 3d 268, 549 N.E.2d 1210 (1988)	44
<u>Ward v. Intermountain Farmers Ass'n</u> , 277 Utah Adv. Rep. 58 (Utah Nov. 15, 1995)	1,2,3
<u>Zimmerman v. Buchheit of Sparta, Inc.</u> , 10 Indiv. Empl. Rts. Cas. (BNA) 72 (Ill. 1994)	32

JURISDICTION

Defendant-appellee Zions First National Bank ("Zions") agrees with plaintiff-appellant Gina Cook ("Cook") that this Court has jurisdiction to hear this appeal.

STATEMENT OF ISSUES

I. Did the district court correctly grant summary judgment in favor of Zions on Cook's first cause of action for breach of an express employment contract on the ground that no employment contract as to sick leave exists between the parties?

This issue was preserved in the trial court. See, e.g., Record ("R.") at 65, 68, 95, 392-93, 547-54, 577. The applicable standard of review for summary judgments is contained in Utah R. Civ. P. 56(c). This Court is "'to determine only whether the trial court erred in applying the governing law and whether the trial court correctly held that there were no disputed issues of material fact.'" Ward v. Intermountain Farmers Ass'n, 277 Utah Adv. Rep. 58, 59 (Utah Nov. 15, 1995) (quoting State v. Feree, 794 P.2d 149, 151 (Utah 1989)).

II. Should the district court have also dismissed Cook's first cause of action on the ground that, even if she were able to establish that the 1988 "Employment Benefits Disclosure Form" is a binding written employment contract, Zions did not breach the alleged contract?

This issue was preserved in the trial court. See, e.g., R. 441, 480, 515-17, 524, 528-33, 544-45, 547-48, 565-66, 584-87.

This Court may affirm the trial court's decision whenever it can do so on proper grounds. Jespersion v. Jespersen, 610 P.2d 326, 328 (Utah 1980) (footnote omitted); see also Bailey-Allen Co. v. Kurzet, 876 P.2d 421, 424 (Utah App. 1994) ("Court of Appeals may affirm a trial court's decision on any proper ground.")

III. Did the district court correctly grant summary judgment in favor of Zions on Cook's second cause of action for breach of an implied-in-fact employment contract on the ground that Utah law does not recognize such a cause of action based on an employer's alleged delay in allowing an employee to take time off pursuant to a sick leave policy?

This issue was preserved in the trial court. See, e.g., R. at 71, 393-98, 479, 552-54, 558-59, 576-79. The applicable standard or review is contained Utah R. Civ. P. 56(c). The district court's summary judgment is reviewed for correctness. Ward, 277 Utah Adv. Rep. at 59.

IV. Should the district court have also dismissed Cook's implied contract claim on the ground that she failed to provide any legal or factual support for the claim?

This issue was preserved in the trial court. See, e.g., R. at 399, 516-17, 524, 544-45, 547-48, 577-80. This Court may affirm the district court's decision on any proper ground. Jespersion, 610 P.2d at 328; Bailey-Allen Co., 876 P.2d at 424.

V. Did the district court correctly grant summary judgment in favor of Zions on Cook's implied contract claim on the

ground that Zions clearly and conspicuously disclaimed any contractual intent?

This issue was preserved in the trial court. See, e.g., 69-70, 398-401, 478-79, 548-52, 579-80, 595-96. The applicable standard of review is set forth at Utah R. Civ. P. 56(c). The district court's summary judgment is reviewed for correctness. Ward, 277 Utah Adv. Rep. at 59.

VI. Should the district court have dismissed Cook's third cause of action for breach of an implied covenant of good faith and fair dealing because Utah law does not recognize the implied covenant in the employment context, and because her implied covenant claim fails as a matter of law because she has no employment contract with Zions?

This issue was preserved in the trial court. See, e.g., R. at 71, 402-04, 559-60, 582. This Court may affirm the district court's decision on any proper ground. Jespersion, 610 P.2d at 328; Bailey-Allen Co., 876 P.2d at 424.

CONSTITUTIONAL PROVISIONS AND DETERMINATIVE STATUTES

None.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Gina Cook is currently an employee of Zions. She claims that Zions is responsible for the consequences of the delay in her taking one day off work, as authorized by Zions' attendance and leave policies, between February and April of 1994 to have a lump

removed from her lip. See R. at 2-12. In her complaint dated September 14, 1994, Cook alleged four causes of action against Zions: breach of an express employment contract; breach of an implied-in-fact employment contract; breach of an implied covenant of good faith and fair dealing; and intentional infliction of emotional distress. R. at 2-12.

II. COURSE OF THE PROCEEDINGS

On October 21, 1994, Zions filed a motion for summary judgment requesting the district court to summarily dismiss Cook's complaint because: (1) she has no express employment contract with Zions; (2) Utah law does not recognize a claim for breach of an implied-in-fact employment contract outside of the termination context, and Cook provides no legal or factual authority for her implied contract claim; (3) express disclaimers in Zions' employee handbook preclude a breach of employment contract claim in this case; (4) Cook's implied covenant of good faith and fair dealing claim fails because Utah law does not recognize the implied covenant in the employment context and because Cook has no employment contract with Zions; and (5) Cook's intentional infliction of emotional distress claim is barred by the exclusive remedy of the Utah Workers' Compensation Act. R. at 62-74, 386-87.

Prior to responding to Zions' summary judgment motion, Cook's counsel served three separate discovery requests on Zions and took the depositions of eight fact witnesses. R. at 187-89,

228-29.¹ On January 23, 1995, Cook filed a memorandum and her affidavit in opposition to Zions' summary judgment motion. R. at 250-55, 302-66. Zions filed a reply memorandum in support of its motion on January 27, 1995. R. at 386-435.

On February 21, 1995, after the summary judgment motion was completely briefed, Cook filed a supplemental affidavit. R. at 436-41. In her supplemental affidavit, Cook alleged for the first time that a "Potential Benefit" of "leave credit" for involuntary absences from work, as described in a document entitled "Employment Benefits Disclosure and Pay Agreement" dated July 28, 1988, constitutes an express employment contract between her and Zions. R. at 437-48, 441.

The district court heard oral argument on Zions' summary judgment motion on March 10, 1995. R. at 572-97. Following oral argument, Cook filed a motion to supplement oral argument or to file a supplemental memorandum. R. 446-68. On March 31, 1995, the district court issued a minute entry which stated: "[S]ince the Court desires to be sure plaintiff's counsel is satisfied that oral argument has been adequately provided, this Court sets a second oral argument [on] the defendant's Motion for Summary Judgment."

¹ Although the record demonstrates that Cook was provided more than ample opportunity to conduct discovery related to the issues raised by Zions' motion, she complains that she "has not been deposed or allowed the opportunity to testify." Appellant's Opening Brief at 40. This complaint overlooks the fact that Cook testified in two affidavits filed in opposition to Zions' motion. R. at 250-55, 436-41. Also, the lower court allowed Cook to conduct whatever discovery was necessary to address Zions' motion and Cook presumably could have noticed her own deposition.

R. at 458. The second oral argument was held on April 21, 1995, after which the district court took Zion's motion under advisement. R. at 508-71.

III. DISPOSITION OF THE COURT BELOW

On June 8, 1995, the district court issued a Memorandum Decision granting Zions' motion for summary judgment. R. at 474-81. On July 14, 1995, consistent with its Memorandum Decision, the district court entered its Judgment dismissing Cook's action on the merits and with prejudice. R. at 490-92.

Cook filed a notice of appeal on July 18, 1995. R. at 496. Cook challenges the district court's decision only with respect to her claims for breach of an express employment contract, breach of an implied-in-fact employment contract, and breach of the implied covenant of good faith and fair dealing. Appellant's Opening Brief at 2. She does not appeal the district court's dismissal of her intentional infliction of emotional distress claim. Id.

IV. STATEMENT OF MATERIAL FACTS

1. Cook was hired by Zions in May of 1988 and is still employed with Zions. Affidavit of Richard G. Crandall ("Crandall Affidavit") ¶ 3 (R. at 95).

2. Cook has never had an express employment agreement with Zions. Crandall Affidavit ¶¶ 4, 5 (R. at 95). Zions does not enter into any individual employment agreements with its employees and did not do so with respect to Cook. Id.

3. Cook claims she has an express employment contract with Zions based on the "List of Potential Benefits" section of a document entitled "Employment Benefits Disclosure and Pay Agreement" dated July 28, 1988 (hereinafter "Employment Benefits Disclosure Form"). Supplemental Affidavit of Gina Cook ¶¶ 5-8, Exhibit A thereto (R. 437-38, 441).

4. The "List of Potential Benefits" section of this document lists 21 potential benefits in which Zions' employees may be eligible to enroll:²

II. List of Potential Benefits

- A. Involuntary Absence from Work (leave credit 90-day waiting period) -- 1 day per month for full-time employees; 1 day (8 hours) per 2 months for those working at least 20 hours per week.
- B. Long-term Disability (full-time 25 years old & 1 year service) -- standard plan.
- C. Medical Insurance -- self-funded or choice of health maintenance organizations where available. 20 hours per week qualifies for employee coverage; 32 hours per week for employee-dependent coverage.
- D. Group Term Life Insurance -- 20 hours per week or 1000 hours per year.
- E. Accidental Death & Dismemberment Insurance -- 20 hours per week or 100 hours per year.

² The first section of the document, entitled "Salary Administration," lists Cook's starting rate of pay. Exhibit A to Supplemental Affidavit of Gina Cook (R. at 441). Cook does not claim that Zions violated any part of the "Salary Administration" section of the document.

- F. Retirement & Pension Plan -- 1000 hours per year, 21 years old & 1 year service.
- G. Stock Plans -- 1000 hours per year, 21 years old & 1 year service.
- H. Paid Holidays -- compensation for normally scheduled number of hours.
- I. Vacation -- compensation for normally scheduled number of hours.
- J. Service Charge Exempt -- checking account at Zions Bank.
- K. Service Charge Exempt -- travelers checks, cashier's checks & gift checks at Zions Bank.
- L. Safe Deposit Box -- rental free at Zions Bank.
- M. Reduced rates on Zions Bank MasterCard, VISA, company-sponsored installment loans and Home Equity Credit Line (min. 6 months service), and Mortgage Loans (min. 1 year service).
- N. Discount rates on special attractions periodically available. Inquire at Personnel Department.
- O. Movie Tickets -- discount prices.
- P. Educational Assistance Programs.
- Q. Savings Plans -- automatic deductions to Savings Account, IRA & Payroll Savings Bonds.
- R. Employee Money Market Plan.
- S. Automatic paycheck deposit to personal checking account.
- T. Job Posting Program.
- U. Earned Income Credit.
- V. Upon termination of employment all the above-mentioned benefits will be forfeited.

Exhibit A to Supplemental Affidavit of Gina Cook (R. at 441).

5. The "Potential Benefit" of "leave credit" for involuntary absences from work that Cook contends creates an express employment contract between her and Zions merely states that, after a 90-day waiting period, full-time employees will be

eligible to earn one day of paid leave credit per month. Exhibit A to Supplemental Affidavit of Gina Cook (R. at 441). Cook does not claim that Zions ever failed to properly accrue her leave credit or that Zions ever failed to pay her for an involuntary absence from work. Cook acknowledges that Zions applied her accumulated short-term absence credit toward a ten and one-half week paid leave of absence from May 31, 1994 through August 8, 1994. Affidavit of Gina Cook ¶ 24 (R. at 253).

6. Immediately above Cook's signature, the Employment Benefits Disclosure Form provides as follows:

III. Certification

The above documents, agreements and benefits have been explained to me. I understand them and have been given the opportunity to enroll in the programs for which I am eligible. This Agreement **does NOT constitute enrollment in the benefit programs found in Section II.**

I understand that I have the right to terminate my employment at any time and the company retains a similar right.

Exhibit A to Supplement Affidavit of Gina Cook (emphasis added) (R. at 441).

7. In January 1992, Zions issued an employee handbook which contains policy guidelines regarding, among other things, attendance and involuntary absences from work. Crandall Affidavit ¶ 6, Exhibit B thereto (R. at 95, 135-67).

8. Zions' 1992 employee handbook clearly and conspicuously advises employees that they do not have any express

or implied contract of employment with Zions, and that the handbook supersedes and replaces all other prior employee reference material:

This booklet is not intended to be an official policies and procedures manual, nor is it intended to create any expressed or implied contractual obligations on the part of Zions Bancorporation or its employees.

This booklet supersedes and replaces all other prior employees' reference material.

* * *

[N]either you, nor we, have entered into any contract of employment, express or implied.

Exhibit B to Crandall Affidavit at 3 (R. at 142).

9. The 1992 employee handbook also states, in the "Introduction" section, that the handbook explains in general terms Zions' employment guidelines:

This booklet contains a summary of Zions Bancorporation personnel policies, procedures, benefits, and other pertinent information which should serve as a valuable reference to you as an employee of the Company. It explains some of the philosophies and beliefs of Zions Bancorporation and explains in general terms some of our employment **guidelines**.

Exhibit B to Crandall Affidavit at 3 (emphasis added) (R. at 142).

10. Regarding leave credit for involuntary absences from work, the 1992 employee handbook informs full-time employees that, after a 90-day waiting period, they will earn one day of leave credit per month for "illness, accident, death in the family, or

your wedding" Exhibit B to Crandall Affidavit at 12 (R. at 151).

11. The 1992 employee handbook states that, unless an absence is "unavoidable," supervisory permission must be obtained to take time off for personal matters scheduled during working hours:

There may be unavoidable instances when employees are late or absent. In such cases the employee should contact his or her supervisor as soon as possible.

If it is absolutely impossible to schedule an appointment for personal matters (medical, dental, etc.) at any other time than during working hours, permission for absence must be obtained first from your supervisor.

Exhibit B to Crandall Affidavit at 7 (R. at 146).

12. In February 1994, Zions issued its 1994 version of the employee handbook which, in all respects relevant to this action, is exactly the same as the 1992 handbook. See Crandall Affidavit ¶ 6, Exhibit A thereto (R. at 95, 98-134). Cook received a copy of this handbook on April 8, 1994. Crandall Affidavit ¶ 7, Exhibit C thereto (R. at 95, 168).

13. The 1994 employee handbook contains clear and conspicuous contract disclaimers that are identical to those in the 1992 handbook:

This booklet is not intended to be an official policies and procedures manual, nor is it intended to create any expressed or implied contractual obligations on the part of Zions Bancorporation or its employees.

This booklet supersedes and replaces all other prior employees' reference material.

* * *

[Neither] you, nor we, have entered into any contract of employment, express or implied.

Exhibit A to Crandall Affidavit at 4 (R. at 106).

14. The 1994 handbook, like the 1992 handbook, states that it "contains basic policy and procedure **guidelines**," and "explains in general terms some of our employment **guidelines**." Exhibit A to Crandall Affidavit, first non-numbered page and p. 4 (emphasis added) (R. at 99, 106).

15. In her affidavit opposing Zions' motion for summary judgment, Cook states that her understanding of Zions' sick leave policy is confirmed by the 1994 employee handbook. Affidavit of Gina Cook ¶ 6 (R. at 251). The attendance and leave policies in the 1994 handbook which Cook relies on are identical to the policies in the 1992 handbook. See Exhibit A to Crandall Affidavit at 8, 13-14 (R. at 111, 116-17).

16. The 1994 handbook contains the same attendance policy guideline as the 1992 handbook:

There may be unavoidable instances when employees are late or absent. In such cases, the employee should contact his or her supervisor as soon as possible.

If it is absolutely impossible to schedule an appointment for personal matters (medical, dental, etc.) at any other time than during working hours, permission for absence must be obtained first from your supervisor.

Exhibit A to Crandall Affidavit at 8 (R. at 111).

17. The 1994 employee handbook also duplicates the 1992 handbook with respect to describing how credit for short-term absences may be earned, namely, full-time employees may earn up to 12 paid days off a year for "illness, accident, death in the family, or your wedding. . . ." Exhibit A to Crandall Affidavit at 13-14 (R. at 116-17).

18. Richard Crandall, Vice President and Director of Human Resources at Zions, explained that Zions' absence and short-term leave policies give management the discretion to grant or deny employee requests for time off from work. Deposition of Richard Crandall at 24-25 (R. at 409-10).

19. Consistent with the attendance guideline set forth in the employee handbook, starting in September or October of 1993 it was the practice in the Electronic Funds Transfer ("EFT") area, in which Cook worked, to have employees fill out written requests for time off in advance for approval by their immediate supervisor (in Cook's case, Pam Kennaley) and the area manager, Gaylene Kenney. Deposition of Gaylene Kenney at 65-68 (R. at 415-18). This system allowed the EFT area to keep track of vacation/absence dates and schedule employees as necessary. Kenney depo. at 65-66 (R. at 415-16.)

20. On at least ten occasions between November of 1993 and May of 1994, Cook filled out written requests for vacation, personal time and/or sick leave. Kenney depo. at 68-82 (R. at 418-

32). All were approved but a request for five days off for a family wedding. For example, on a form dated December 29, 1993, Cook requests the day of January 14, 1994 off for her "Mom's 80th birthday party." It is undisputed that Cook's supervisor and manager twice approved Cook's written requests for time off for surgery to have the lump removed from her lip: a January 29, 1994 request for a one-hour office visit on February 1 and an April 21, 1994 request for a day for outpatient surgery. Both were approved. Kenney depo. at 68-82 (R. at 418-32).³

21. In situations where an absence is "unavoidable," however, the attendance guideline in the employee handbook expressly allows an employee to simply "contact his or her supervisor as soon as possible." Exhibit A to Crandall Affidavit at 8 (R. at 146); see also Crandall depo. at 27-29 (R. at 327, 411-12).

22. Joyce Misdorn, the Operations Compliance Officer at Zions, testified that during a conversation with Cook about the lump on her lip, she told Cook that "if you need to go to the doctor, you should go to the doctor" and that Cook should simply "make an appointment and phone in sick." Misdorn depo. at 13 (R. at

³ Cook contends that in February, March and April, she made an undetermined number of additional oral requests to manager Gaylene Kenney for time off to schedule surgery and that Kenney denied her permission. Appellant's Opening Brief at 10 Facts ¶¶ 35, 36. Kenney emphatically denies that Cook made such verbal requests and denies that she ever denied any such requests. Kenney depo. at 85-86 (R. at 433-34). Although Cook's allegation is assumed to be true for purposes of Zions' motion for summary judgment, it is immaterial for the reasons discussed in Section I hereof, infra.

343). Misdom also specifically told Cook that if she would make an appointment and call in sick, Cook's supervisor, Gaylene Kenney, "wouldn't fire you." Misdom depo. at 14 (pages 13 and 14 of the Misdom deposition are attached hereto as Exhibit A).⁴

23. Richard Crandall similarly testified that if an employee were in the hospital for a scheduled medical procedure and she called her supervisor saying she was not coming to work, as opposed to receiving prior approval, that employee would not be subject to any discipline. Crandall depo at 27-29 (R. at 327, 411-12). In such a situation disciplinary action would not be administered because, as Crandall testified, "[t]hat's an illness if it was for surgery." Crandall depo. at 29 (R. at 327).

24. Zions does not distribute any other statements of policy or procedure guidelines to its employees aside from the employee handbook. Crandall Affidavit ¶ 8 (R. at 95). Cook attempts to dispute this fact by relying on a statement published in the company newsletter, "Newsbreak," dated September 20, 1994. Appellant's Opening Brief at 8, Facts ¶¶ 23-25. The publication is styled as a "news update" and contained the following statement:

⁴ Cook relies exclusively on page 13 of the Misdom deposition for her claim that she subjectively feared she would be fired if she took one day off without Kenney's prior approval. Appellant's Opening Brief at 8, Facts ¶ 37. On the very next page of this deposition, however, Misdom testified she specifically told Cook that Kenney "wouldn't fire you." Misdom depo. at 14. Zions did not include page 14 of the Misdom deposition as part of the record in the district court because Cook did not raise the "subjective fear" argument in her Memorandum in Opposition to Defendant's Motion for Summary Judgment. See Plaintiff's Memorandum in Opposition to Defendants Motion for Summary Judgment (R. at 302-20); Transcript of Summary Judgment Argument dated April 21, 1995 at 36-37 (R. at 543-44).

"Zions policies provide employees with adequate time to seek needed medical treatment." This edition of "Newsbreak" was published after Cook filed the lawsuit. As explained by Zions' President, Harris Simmons:

We had received a number of inquiries about the lawsuit in that it had been reported to the media and we had customers asking employees and employees asking managers about the case and we felt that it was important that employees generally understood what our position was.

Deposition of Harris H. Simmons at 19 (R. at 435). Simmons testified that the statement accurately reflects the Zions' position in this lawsuit. Id.

SUMMARY OF ARGUMENT

In her opening brief, Cook repeatedly characterizes her claim as one for breach of a "contract for compensation which included paid sick leave." However, Cook does not claim that she failed to receive the appropriate amount of paid leave credit or that she has not been fully compensated for her accrued sick leave. Instead, Cook contends that Zions, by simply providing its employees with paid sick leave,⁵ entered into a binding contract with her giving her the right to request and receive sick leave when needed. Cook claims that the manager of the area in which she works breached this alleged contract by delaying approval for a paid day off for a medical procedure. She alleges, without any

⁵ Other "unpaid" leave is also available to Zions' employees.

factual support, that this delay caused the progression of her medical condition and the loss of any opportunity to prevent that condition. In short, Cook is attempting to transform Zions' "leave credit" policy into a contract requiring Zions to know or foresee how "needed" a medical appointment or procedure is, and to insure the consequences of any delay in scheduling a planned absence.⁶

As the source of her alleged express employment contract, Cook relies on the "potential benefit" of "leave credit" for involuntary absences from work, as described in the 1988 Employment Benefits Disclosure Form. This statement merely advises full-time employees they will be eligible to earn one day of leave credit per month. It does not create any obligation or promise regarding the use of such leave credit. Moreover, the document on which Cook relies expressly states that it "does not constitute enrollment in the benefit programs found in Section II." Even if Cook were able to establish that this document is a binding written employment contract, Zions did not breach it because Zions never accrued Cook's leave credit at any amount less than one day per month and fully paid her for her accrued leave credit.

Cook also provides no authority for her implied-in-fact contract claim. Utah law does not recognize a claim for breach of

⁶ During oral argument, the district court stated as follows regarding Cook's claim: "So, you're saying that whenever an employer says, we're busy in this department; I would rather you didn't take time off for this surgery now. That employer assumes liability for the consequential damages that neither know about, in terms of later discovered tragic medical circumstances. Transcript of Summary Judgment Argument dated April 21, 1995 at 22 (R. at 529).

an implied-in-fact employment contract based on an employer's alleged delay in allowing an employee to take time off pursuant to a paid sick leave policy. Utah courts have never indicated an intention to extend the implied-in-fact employment contract exception to the at-will rule, created in Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989), to aspects of the employment relationship beyond termination. Cook's implied contract claim is also defective because the facts she relies on to support the alleged contract, including the "when needed" term she adds to Zions' leave credit policy, are too indefinite to provide a basis for determining its terms, the existence of a breach and resulting damages. Finally, Cook's implied contract claim fails because Zions clearly and conspicuously disclaimed any contractual intent. Zions' 1992 and 1994 handbooks both state that the handbook "supersedes and replaces all other prior employees' reference material" and that neither party has "entered into any contract of employment, express or implied."

Cook has also failed to provide any support for her breach of an implied covenant of good faith and fair dealing claim, which has not been recognized by the Utah Supreme Court in the employment context. In direct contravention of well-established Utah case law, Cook attempts to use the implied covenant of good faith to create a "new and independent right," which was not agreed upon by the parties, to hold Zions' supervisors responsible for

knowing when and how soon employees should use their paid sick leave.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF ZIONS.

As stated by this Court in Schafir v. Harrigan, 879 P.2d 1384 (Utah App. 1994), "'the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.'" Id. at 1391 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). In such a situation, the non-moving party cannot avoid summary judgment by asserting a disputed issue of material fact "'since a complete failure of proof concerning an essential element of the non-moving party's case renders all other facts immaterial.'" Schafir, 879 P.2d at 1391 (quoting Celotex, 477 U.S. at 323).⁷

To successfully challenge Zion's motion for summary judgment in the present case, Cook must therefore present sufficient evidence in specific factual form that is material to the question of whether she and Zions entered into an express or

⁷ Although Cook characterizes summary judgment as "drastic," the United States Supreme Court in Celotex stated, "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." Celotex, 477 U.S. at 327.

implied employment contract that (1) requires Zions' supervisors to foresee the "need" of a medical appointment or procedures and insure the consequences of any delay in scheduling planned absences; and (2) completely eliminates the issue of whether Cook could have, pursuant to Zions' attendance policy, scheduled the in-hospital surgery and then called her supervisor from the hospital to advise her of the same. Cook failed to meet that burden, and she should not be able to withstand summary judgment on the mere expectation that she will be able to develop the requisite evidence at some later date. See, e.g., Paddington Ptrns. v. Bouchard, 34 F.3d 1132, 1138 (2d Cir. 1994) ("In a summary judgment context, an opposing party's mere hope that further evidence may develop prior to trial is an insufficient basis upon which to justify the denial of a summary judgment motion.") (quoting Gray v. Town of Darien, 927 F.2d 69, 74 (2d Cir. 1992)); Conway v. Smith, 853 F.2d 784, 793 (10th Cir. 1988) ("In response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial.").

Cook also cannot avoid summary judgment by relying on factual disputes that are immaterial to the outcome of Zions' motion. As this Court recently stated, "only material issues of fact preclude summary judgment . . . '[T]he mere existence of genuine issues of fact . . . does not preclude the entry of summary judgment if those issues are immaterial to resolution of the

case.'" Burns v. Cannondale Bicycle Co., 876 P.2d 415, 419 (Utah App. 1994) (emphasis in original) (quoting Morgan v. Industrial Design Corp., 657 P.2d 751, 751 (Utah 1982)).

Although there is a factual dispute as to whether Cook verbally requested and was denied time off between February and April of 1994, that issue is not material for several reasons. First, Cook has failed to show that Zions entered into and breached any express or implied employment contract, let alone a contract that holds Zions' supervisors responsible for the unforeseeable effects of any delay in obtaining paid time off.⁸ The extensive evidence cited by Cook regarding the fact that Zions provides paid sick leave to its employees and its reasons for doing so is immaterial to that issue. Cook's claim is not for paid sick leave and, even if it were, there is no evidence that Zions ever failed to properly accrue her leave credit or pay her for a sick leave as accrued.

Second, Cook has not controverted the undisputed evidence submitted by Zions that she could have, pursuant to Zions' attendance guideline, scheduled the surgery and then called her supervisor. Cook's "subjective fear" that she would have been fired is not sufficient to preclude summary judgment. The evidence remains uncontroverted that Cook was specifically told by Joyce

⁸ To establish the existence of such a contract, Cook must show more than her "subjective understandings or expectations." See Rose v. Allied Dev. Co., 719 P.2d 83, 86 (Utah 1986).

Misdom that her supervisor "wouldn't fire you" and that Cook would not have been subject to any discipline, much less termination, if she had taken such a course of action. Material Facts ¶¶ 22, 23.

In sum, the district court's decision granting summary judgment in favor of Zions should be affirmed because Cook has failed to come forward with sufficient facts showing essential elements of her case, and because the alleged factual disputes she relies on are immaterial to any issue raised by Zions' motion.

II. THE DISTRICT COURT PROPERLY DETERMINED THAT COOK HAS NO EXPRESS EMPLOYMENT CONTRACT WITH ZIONS.

A. Cook Failed to Establish the Elements of an Express Employment Contract.

The district court dismissed Cook's breach of express employment contract claim "because there is no employment contract between the parties." Memorandum Decision at 5 (R. at 478). Cook contends that the district court erred because the "Potential Benefit" of "leave credit" for involuntary absences from work, as described in the 1988 Employment Benefits Disclosure Form, creates an express employment contract between her and Zions that gave her the right "to request and receive earned sick leave when needed." Appellant's Opening Brief at 17, 24, 27 (emphasis added). In other words, Cook claims that Zions, by distributing the Employment Benefits Disclosure Form describing how employees earn paid sick leave, intended to obligate its supervisors to foresee how "needed" a medical appointment or procedure is and to insure the consequences of any delay in scheduling planned absences.

The 1988 Employment Benefits Disclosure Form cannot reasonably be construed to be an employment agreement. The first section of the document, entitled "Salary Administration," lists the employee's rate and method of pay. The section on the bottom of the form, entitled "List of Potential Benefits," merely describes 21 **Potential Benefits**, ranging from reduced rates on a Mastercard to movie tickets. Material Facts ¶ 4. Cook's breach of express employment contract claim is based entirely on the "List of Potential Benefits" section of the document. Cook does not claim that Zions violated the "Salary Administration" section, which is obviously the "Pay Agreement" portion of the document.

Zions certainly did not express the intent to contractually obligate itself, for an unlimited period of time, to provide each and every one of the 21 "Potential Benefits" described in the Employment Benefits Disclosure Form. Immediately above Cook's signature, the document clearly and conspicuously states that it **"does NOT constitute enrollment in the benefit programs found in Section II,"** the very place to which Cook points to bind Zions to an employment agreement. Material Facts ¶ 5 (emphasis added).⁹

⁹ If Cook's express contract theory is accepted, all employees who received this form, regardless of their enrollment in the benefit programs, would have a claim for breach of contract if Zions ever failed to provide them with such items as service charge exemptions, free safety deposit boxes, reduced rates on credit cards and loans, discount rates on special attractions, discounted movie tickets, educational assistance programs, savings plans, and automatic paycheck deposits in checking accounts. See Material Facts ¶ 4.

Furthermore, the plain language of the statement that Cook relies on provides noting more than the right to earn one day of leave credit per month:

Involuntary Absence from Work (leave credit 90-day waiting period) -- 1-day per month for full-time employees; 1-day (8 hours) for two months for those working at least 20 hours per week.

Material Facts ¶ 4. The only "promise," if any, that could reasonably be derived from this statement is that, after a 90-day waiting period, Cook would be eligible to accrue leave credit at the rate of "one day per month." It does not tie the element of being paid for involuntary absences to any other obligation on the part of Zions, especially an obligation by Zions' supervisors to make a medically optimal decision on scheduling an employee's medical appointments and treatment. Cook asks this Court to rewrite Zions' leave credit policy to include a "when needed" contract term and then to define it in her favor. See Robertson v. Utah Fuel Co., 889 P.2d 1382, 1385-86 (Utah App. 1995) (substance abuse policy in employee handbook stating that employees who voluntarily come forward for treatment would be offered rehabilitation assistance did not create "contract term that [plaintiff] would not be demoted, terminated, or otherwise disciplined for voluntarily coming forward to seek treatment for his substance abuse problem.").

In sum, because Cook has failed to carry her burden of establishing that the "Potential Benefit" of "leave credit" for

involuntary absences from work meets the elements of an express contract, the district court's dismissal of her breach of express employment contract claim should be affirmed.

B. Even if Cook Were Able to Establish that the Employment Benefits Disclosure Form is a Binding Written Employment Contract, Zions did not Breach the Alleged Contract.

If for some reason the Employment Benefits Disclosure Form were deemed to be an express employment contract, then the provisions of that document alone would govern Cook's rights with respect to leave credit for involuntary absences. As stated by the Utah Supreme Court, "[a]n express agreement or covenant relating to a specific contract right excludes the possibility of an implied covenant of a different or contradictory nature." Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980); see also Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044 (Utah 1989) ("[a]n implied-in-fact promise cannot, of course, contradict a written contract term."); Barber v. SMH(US), Inc., 202 Mich. App. 366, 509 N.W.2d 791, 796 (1994) ("a contract will be implied only if there is no express contract covering the same subject matter.").

The statement on the Employment Benefits Disclosure Form regarding "leave credit" for involuntary absences from work simply describes how employees may accrue such leave credit -- one day per month after a 90-day waiting period. Thus, assuming the existence of an express contract based on this statement, there would be no breach by Zions because, as Cook does not dispute, Zions never accrued her leave credit at any amount less than one day per month.

In addition, if, as Cook urges, the Employment Benefits Disclosure Form expressly provided that she had the right to request and receive sick leave "when needed," Cook could have taken the time off without Zions' approval and there would be no breach until she did so and Zions failed to pay her.¹⁰

In sum, assuming the Employment Benefits Disclosure Form is an express employment contract, it alone is controlling and Zions did not breach the alleged contract. Accordingly, the district court's decision dismissing Cook's breach of express employment contract claim should be affirmed.

III. THE DISTRICT COURT PROPERLY DETERMINED THAT COOK'S IMPLIED-IN-FACT EMPLOYMENT CONTRACT THEORY IS NOT RECOGNIZED UNDER UTAH LAW.

Cook's implied-in-fact employment contract theory is a novel one. Cook has not been terminated and is not claiming that Zions breached an implied-in-fact contract that she could only be terminated for cause. Nor does she claim that Zions breached an implied agreement to pay her accumulated sick leave. Instead, Cook argues that Zions, by providing paid sick leave to its employees, entered into an implied-in-fact employment contract with her that obligated Zions' supervisors and managers to predict how "needed"

¹⁰ As the district court stated during oral argument, "The breach comes when they refuse to pay her, because they've said she couldn't be paid. . . [H]ow is there a breach of this provision until they say we refuse to pay you? You've taken the time, now we refuse to pay you for that time." Transcript of Summary Judgment Hearing dated April 21, 1995 at 10 (R. at 517).

a medical appointment or procedure is and to insure the consequences of any delay in scheduling planned paid absences.

Cook cites no authority, Utah or otherwise, in support of an implied-in-fact employment contract which involves an employer's alleged delay in allowing an employee to take time off pursuant to a sick leave policy. The Utah cases applying the implied-in-fact employment contract cause of action, from Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1988) to Hamilton v. Parkdale Care Center, 275 Utah Adv. Rep. 32 (Utah App. 1995), all involve claims related to employment termination.¹¹ Because Utah law does not recognize an implied-in-fact employment contract cause of action outside the termination context, the district court correctly granted summary judgment in favor of Zions.

A review of the historical development of the cause of action for breach of an implied-in-fact employment contract under Utah law is helpful in understanding why discharge is an essential element of the claim. The Utah Supreme Court first recognized the

¹¹ By characterizing her claim as one for breach of a "compensation agreement," Cook attempts to fit her case within the parameters of Diston v. Enviropak Medical Prods., 893 P.2d 1071 (Utah App. 1995), rather than Berube and its progeny. Diston involved an oral compensation agreement evidenced by a "Letter of Intent" in which the defendant specifically agreed to hire and pay the plaintiff an annual salary of \$72,000 for three years. Id. at 1075. Cook's reliance on Diston is misplaced because the plaintiff Diston, unlike Cook, never was an employee of the defendant, because Cook, despite self-styling her claim as one for breach of a "compensation contract," does not claim that Zions ever failed to pay her compensation owed pursuant to the terms of any contract and because both parties in Diston testified "they had reached an agreement." Id. Moreover, as discussed in Section IV hereof infra, Diston supports Zions' position that Cook's alleged contract is unenforceable because the alleged rights and obligations of the parties are too indefinite to provide a basis for determining its terms, the existence of a breach and resulting damages.

existence of implied-in-fact employment contracts in Berube, which involved an action for wrongful termination brought by a former employee. Relying upon the well-established rule that employment is at-will, the district court dismissed the case. The Supreme Court reversed, holding that there is a limited contractual exception to the at-will rule where an "implied contractual term sets forth a period of duration or limits **dismissal** to cause alone." Berube, 771 P.2d at 1047 (emphasis added). As crafted by Berube, the implied contract exception clearly requires the element of discharge. In his concurring opinion, Justice Zimmerman called for caution in creating exceptions to the at-will rule:

Because the law in this area is in a state of flux, and because the at-will doctrine has become well entrenched in our law and any change in it has the potential to affect the practices of almost every employer in Utah, we must proceed with care in recognizing exceptions to that doctrine.

Berube, 771 P.2d at 1050.

In every case since Berube involving disputes between employees and their employers, Utah appellate courts have applied the implied-in-fact exception in the context of a discharge.¹²

¹² See Caldwell v. Ford, Bacon & Davis Utah, Inc., 777 P.2d 483, 485 (Utah 1989) ("[A] majority of the Berube Court concluded that an employer's internally adopted policies and procedures concerning **discharge** can . . . become part of the contractual relationship between the employer and the employee.") (emphasis added); Lowe v. Sorenson Research Co., Inc., 779 P.2d 668, 670 (Utah 1989) ("[T]he **discharged** employee may have a claim for breach of contract if the employer **discharges** the employee without complying with the terms of the agreement under which the employee worked.") (emphasis added); Brehany v. Nordstrom, Inc., 812 P.2d 49, 54 (Utah 1991) ("[E]mployment manuals and company policy statements concerning the terms of employment may provide terms that limit (continued...)")

Likewise, the courts in these cases have consistently characterized the exception as one limiting an employer's right to discharge, not one limiting any other aspect of the employment relationship. In short, the exception for implied-in-fact employee contracts has only been recognized in discharge cases.

In Zions' reply memorandum in support of its summary judgment motion, Zions noted that Michigan and California courts had considered the existence of implied contract claims outside of the discharge context and both had expressly refused to permit an employee to maintain such a cause of action. Since the district court entered its Memorandum Decision, however, the California Supreme Court, in Scott v. Pacific Gas & Elec. Co., 46 Cal. Rptr.2d 427, 904 P.2d 834 (1995), ruled that two workers could sue their employer for demotions in violation of company disciplinary rules. The Scott case involved the demotion of two PG&E supervisors for poor supervision, conflict of interest and fabrication of their

¹²(...continued)
an employer's absolute right to discharge for any or no reason.") (emphasis added); Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1001 (Utah 1991) ("[I]f the evidence presented is such that no reasonable jury could conclude that the parties agreed to limit the employer's right to terminate the employee, it is appropriate for a court to decide the issue as a matter of law.") (emphasis added); Kirberg v. West One Bank, 872 P.2d 39, 41 (Utah App. 1994) ("[I]f the evidence is such that no reasonable jury could conclude that the parties agreed to limit the employer's right to terminate the employee, then the issue is one of law and appropriate for summary judgment.") (emphasis added); Robertson v. Utah Fuel Co., 889 P.2d 1382, 1384-87 (Utah App. 1995) (substance abuse policy in handbook did not change at-will status of employee who "refused to accept the demotion and was therefore terminated."); Hamilton v. Parkdale Care Center, 275 Utah Adv. Rep. 32, 34 (Utah App. 1995) ("Hamilton claims Parkdale's progressive discipline policy modified her at-will employment relationship and created an implied-in-fact contract term that Hamilton would not be terminated without first being given the benefit of this disciplinary procedure.") (emphasis added).

annual ethics questionnaire at a time when the company had an established disciplinary policy termed "Positive Discipline," calling for coaching and counseling before taking disciplinary action against workers. 46 Cal. Rptr.2d at 430. The court held that the plaintiffs had a contractual right to the "positive discipline" process outlined in PG&E's policy manual before being demoted. Id. at 433.

In contrast to allegations in the present case, Scott involved an adverse employment action -- a demotion. The Scott court also noted that, unlike Cook's alleged "when needed" contract, PG&E's "rules and procedures were sufficiently clear to permit a trier-of-fact to determine whether the company had complied with them." Id. at 434. Finally, the Scott court reserved the right of California courts to continue to ignore "vague promises about the terms and conditions of employment that provide no definable standards for constraining an employer's inherent authority to manage its enterprise" and noted that "many alleged employer promises will be unable to cross this threshold of definition to become enforceable contract claims." Id. at 438.

Less confident in their ability to control litigation associated with the creation of a new cause of action, the courts of Michigan, the only jurisdiction other than California to have considered this issue, have refused to extend implied contract claims outside of the termination context. In Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980), the Michigan

Supreme Court became one of the first courts in the country to recognize an exception to the at-will rule. Eleven years later, in Dumas v. Auto Club Insurance Association, 473 N.W.2d 652 (Mich. 1991), the Michigan Supreme Court refused to extend the Toussaint exception to compensation issues:

In addition to the lack of precedent extending Toussaint to facts similar to those presented here, policy considerations are in favor of containing Toussaint to the wrongful discharge scenario. Were we to extend the legitimate-expectations claim to every area governed by company policy, then each time a policy change took place contract rights would be called into question. The fear of courting litigation would result in a substantial impairment of a company's operations and in its ability to formulate policy.

473 N.W.2d at 656. See also Baragar v. State Farm, 860 F. Supp. 1257, 1262 (W.D. Mich. 1994) (rejecting claim for wrongful demotion: "The same policy considerations that prevented the extension in Dumas would prevent the extension here. We live in a very competitive age where being able to make quick management decisions and adjustments often *determines* the failure or success of a business. Therefore, absent a clear statement from the Michigan Supreme Court, this court concludes that it should not extend . . . Toussaint to 'wrongful demotion.'").¹³

¹³ Cf. Zimmerman v. Buchheit of Sparta, Inc., 10 Indiv. Empl. Rts. Cas. (BNA) 72 (Ill. 1994) (refusing to extend tort of retaliatory discharge to demotion cases: "In our view, adoption of plaintiff's argument would replace the well-developed element of discharge with a new, ill-defined, and potentially all-encompassing concept of retaliatory conduct or discrimination. The courts then would be called upon to become increasingly involved in the resolution of (continued...)")

The Michigan decisions express both the legal and practical concerns about extending the doctrine of implied-in-fact contracts to non-termination cases. The table of contents in Zions' employee handbook demonstrates the range of issues in which the courts could become involved if Cook's theory is accepted. The handbook addresses a broad range of issues, including outside employment, personal finances, participation in community affairs, pay days, compensation, salary increases, hours of work, overtime pay, salary deductions, personal appearance, personal telephone calls and visits, job posting program, education assistance, military leave, jury duty, and benefits. See Exhibit A to Crandall Affidavit (R. at 98-134). The Utah Supreme Court has never indicated an intention to extend the implied-in-fact employment contract cause of action created in Berube to such a broad range of day-to-day aspects of the employment relationship. Moreover, many of the issues addressed by Zions' policies are regulated by statute (such as jury duty and overtime compensation). This suggests that regulation of non-termination issues is best left to the legislature.

In sum, Cook asks this Court to extend the implied-in-fact contract exception beyond the boundaries specifically established by the Utah Supreme Court in Berube and its progeny.

¹³ (...continued)
workplace disputes which center on employer conduct that heretofore has not been actionable at common law or by statute.")

As the Michigan courts have held, such an extension should be rejected because it will lead to a significant intrusion in the employer-employee relationship. In any event, employer obligations based on alleged contract terms created by employees are not the place to start development of new theories of employment law. Accordingly, the district court's decision dismissing Cook's implied contract claim should be affirmed.

IV. THE DISTRICT COURT SHOULD HAVE DISMISSED COOK'S IMPLIED CONTRACT CLAIM FOR THE ADDITIONAL REASON THAT SHE FAILED TO PROVIDE ANY LEGAL OR FACTUAL SUPPORT FOR THE CLAIM.

As best as can be discerned from Cook's opening brief, it appears that, in addition to the Employment Benefits Disclosure Form, Cook is relying on the following facts to support her claim for breach of an implied-in-fact employment contract: (1) Zions' practice and policy of providing paid sick leave pursuant to which she has accumulated hours of leave credit over the years; (2) the fact that Zions provides paid sick leave to be competitive and to enhance the health of its workforce; (3) a statement published in the company newsletter, "Newsbreak" dated September 20, 1994, that "Zions' policies provide employees with adequate time to seek needed medical treatment"; and (4) Zions' policy of requiring employees to obtain supervisory permission to take time off for personal matters scheduled during working hours. See Appellant's Opening Brief at 7-9, 15-17, 24-27. What Cook does not explain, however, is how these facts constitute an offer by Zions to foresee and insure the consequences of any risks associated with an

employee's delay in obtaining medical treatment. As demonstrated below, Cook's evidence is much too vague and indefinite to be enforceable as such a contract.

"[F]or an implied in fact contract term to exist, it must meet the requirements for an offer of an unilateral contract," requiring "a manifestation of the employer's intent that is communicated to an employee and sufficiently definite to operate as a contract provision" such that "the employee can reasonably believe that the employer is making [such] an offer of employment" Johnson v. Morton Thiokol, 818 P.2d at 997, 1001 (Utah 1992); see also Robertson, 889 P.2d at 1387; Sorenson, 873 P.2d at 1145; Kirberg, 872 P.2d at 41, Hodgson, 844 P.2d at 334; Sanderson, 844 P.2d at 307. The fact that Zions provides paid sick leave to its employees and its reasons for doing so does not in any way establish an intention on behalf of Zions to offer Cook a contract holding Zion's supervisors responsible for knowing or foreseeing how "needed" a medical appointment or procedure is and insuring the consequences of any delay in scheduling planned paid absences during working hours. See Robertson, 889 P.2d at 1385-88.

Relying on this Court's recent decision in Diston, 893 P.2d 1071, Cook argues that her alleged implied-in-fact contract is "sufficiently definite" enough to be enforced. Appellant's Opening Brief at 23-24. Diston does not support Cook's argument, however. The plaintiff Diston sought to enforce a contract providing for (1) an annual salary of \$72,000 for three years, (2) a \$360 monthly car

allowance, (2) participation in the company's stock option plan, (3) participation in the company's incentive compensation program, (4) health and accident insurance, (5) reimbursement for business expenses, and (6) two weeks paid vacation. Diston, 893 P.2d at 1073-74, 1078. The only terms of the agreement the Court enforced were the \$72,000 annual salary and the \$360 monthly car allowance, holding that the additional compensation terms "too indefinite to be enforced." Id. at 1076 n.1, 1078. Regarding the requirement of sufficient definiteness, the Court stated:

The requirement that a contract be sufficiently definite is a functional requirement from the parties' perspective in terms of whether it can be performed, and the court's perspective in terms of whether it can be enforced. See Bunnell v. Bills, 13 Utah 2d 83, 86, 368 P.2d 597, 600 (1962) ("[A] contract can be enforced by the courts only if the obligations of the parties are set forth with sufficient definiteness that it can be performed."); Restatement (Second) of Contract § 33 (1979) ("The terms of a contract are reasonably certain if they can provide a basis for determining the existence of a breach and for giving an appropriate remedy.").

Id. at 1075-76.

Cook's alleged contract terms, requiring Zions' management to foresee the "need" of a medical appointment and holding Zions responsible for the consequences of any delay in scheduling a planned paid absence, are far more indefinite than the unenforceable terms in Diston. Despite Cook's allegation to the contrary, there is no evidence in the record that "what was bargained for and agreed by the parties was the ability to receive

sick leave when needed." See Appellant's Opening Brief at 27 (emphasis added). The facts Cook relies on to support this allegation show nothing more than Zions' undertaking to "pay" sick leave compensation to Cook.

Cook's alleged implied contract is also too indefinite to determine the existence of a breach. A "when needed" standard, as applied to Zions' supervisors adjudging the medical needs of employees, is so indefinite as to make it impossible to determine whether Zions complied with it. Moreover, as noted above, if Cook's alleged implied contract were a "compensation agreement," as she characterizes it on appeal, there would be no breach by Zions until she took a day off and Zions refused to pay her.

Zions also did not breach the alleged contract because it is undisputed that Cook could have scheduled the in-hospital surgery and then called her supervisor to advise her of that fact. Material Facts ¶¶ 21-23. The attendance guideline in the employee handbook expressly allows an employee, in situations where an absence is "unavoidable," to simply "contact his or her supervisor as soon as possible." Material Facts ¶ 21.

Cook argues that she subjectively "feared" she would be fired if she took one day off without the prior approval of her supervisor, Gaylene Kenney. Appellant's Opening Brief at 8, Facts ¶ 37. However, Cook does not rely on specific documentation, oral representations, or examples of other employees who have been terminated to support her subjective belief that she would have

been fired. Instead, she relies exclusively on the deposition testimony of Joyce Misdom, the Operations Compliance Officer at Zions. See id. What Cook does not tell the Court, however, is that Misdom specifically told her that she should "make an appointment and phone in sick," and that if she did so, Kenney "wouldn't fire you." Misdom depo. at 13-14 (attached as Exhibit A hereto). Cook's subjective "fear" is insufficient to controvert the evidence submitted by Zions that she would not be subject to any discipline, much less termination, for scheduling the medical procedure and simply calling her supervisor from the hospital to advise her she was not coming to work. See Robertson, 889 P.2d at 1388 n.4 ("'Unsubstantiated opinions and conclusions' are insufficient to defeat a motion for summary judgment.") (quoting Treloggan v. Treloggan, 699 P.2d 747, 748 (Utah 1985)).

Even if Cook could establish the existence and breach of an implied-in-fact employment contract, her claim is still defective because she has failed to prove, with sufficient definiteness, entitlement to any "appropriate remedy." See Diston, 893 P.2d at 1076. The "sick leave" cases cited on page 19 of Cook's opening brief do not help Cook because, unlike the plaintiffs in each of those cases, Cook is not seeking to recover unpaid accrued sick leave compensation. Despite not appealing the dismissal of her tort claim, Cook is still asserting entitlement to tort-based damages based on the contention that Zions' delay in allowing her time off work caused "a critical and significant delay

in her cancer treatment, resulting in the progression in the cancer and the loss of any opportunities to prevent that progression." Appellant's Opening Brief at 12. Cook provides no factual support for this allegation and offers no evidence that such damages are susceptible to reasonable computation or that they were "reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made." See Berube, 771 P.2d at 1050 (emphasis added).¹⁴ Because Cook has presented no evidence regarding the damages she seeks to recover, there is no basis for determining her entitlement to an "appropriate remedy."

In sum, Cook's implied-in-fact contract is unenforceable because the alleged rights and obligations of the parties are too indefinite to provide a basis for determining its terms, the existence of a breach, and resulting damages that were contemplated by the parties at the time the alleged contract was made.

V. COOK'S IMPLIED CONTRACT CLAIM FAILS BECAUSE ZIONS CLEARLY AND CONSPICUOUSLY DISCLAIMED ANY CONTRACTUAL INTENT.

Cook's implied-in-fact employment contract claim also fails because Zions clearly and conspicuously disclaimed any contractual intent. Zions' 1994 employee handbook, which Cook relies on as a source of her alleged implied contract terms, clearly and conspicuously advises employees that they do not have

¹⁴ Cook obviously cannot rely on the edition of "Newsbreak" published in September 1994, after she filed this case, to argue that the parties reasonably contemplated such damages "at the time the [alleged] contract was made." See Berube, 771 P.2d at 1050.

any express or implied contract of employment with Zions, and that the handbook supersedes and replaces all other prior employees reference material:

This booklet is not intended to be an official policies and procedures manual, nor is it intended to create any expressed or implied contractual obligations on the part of Zions Bancorporation or its employees.

This booklet supersedes and replaces all other prior employees' reference material.

* * *

[Neither] you, nor we, have entered into any contract of employment, express or implied.

Material Facts ¶¶ 13, 15.

Even if Cook had identified specific written or oral representations or a practice eliminating Zions' discretion to grant or deny employee request for time off, they would have been superseded by the employee handbook. This is clear from Trembly v. Mrs. Field's Cookies, 884 P.2d 1306 (Utah App. 1994), wherein this Court held that if an employee remains employed after being notified of the issuance of a handbook, that handbook supersedes any prior representations or agreements. Id. at 1312-13.

In Trembly, after certain oral statements were made to the plaintiff regarding disciplinary and termination policies, Mrs. Fields distributed an employee handbook which, like Zions' employee handbook, superseded all prior handbooks, manuals, policies and procedures, and contained a contract disclaimer stating that "[i]t

does not constitute, nor should it be construed to constitute an agreement or contract of employment, express or implied, or as a promise of treatment in any particular manner in any given situation." Id. at 1309. Even if the prior statements made to the plaintiff created an implied-in-fact employment agreement, the Court ruled, the handbook's disclaimer "clearly superseded and replaced that agreement" and barred the plaintiff's implied contract claim. Id. at 1313. As in Trembly, Cook's retention of employment, after receipt of the employee handbook, constituted acceptance of Zions' offer: to remain employed at Zions under the condition that the handbook superseded all other prior employees' reference material and the condition that she had no express or implied contract of employment with Zions. See id. at 1312-13.

A review of Zions' disclaimer also reveals that it is "clear and conspicuous" and therefore precludes an implied-in-fact employment contract. See Hamilton, 275 Utah Adv. Rep. at 33 ("Utah courts have held that a clear and conspicuous disclaimer in an employee handbook negates an employee's contention that the employment relationship is other than at will."); Kirberg, 872 P.2d at 41 n.3 ("[A]n implied-in-fact employment contract cannot be construed from the content of an employee handbook where 'an employee handbook contains a clear and conspicuous disclaimer contractual liability.'" (quoting Hodgson, 844 P.2d at 334)).

Here, the text of Zions' disclaimer is prominent -- it is clearly enumerated and set forth in the "Introduction" and in the

very next section of the handbook entitled "How Long Will You Be Employed With Zions?". The placement of the disclaimer is also such that a reasonable employee ought to notice it -- on the first interior page of the handbook. Finally, the language of the disclaimer is unambiguous -- it specifically informs employees that the handbook "supersedes and replaces all other prior employees' reference material" and that neither party has "entered into any contract of employment, express or implied." Under these circumstances, no contract could exist between Cook and Zions. See Hamilton, 275 Utah Adv. Rep. at 33.

The fact that the handbook repeatedly informs employees that the contents contained therein are "guidelines" for management also defeats any claim that they create contractual rights. See Material Facts ¶¶ 9, 14; Order Granting Defendants' Motion for Summary Judgment on Contract Claims of All Plaintiffs Kreimeyer, et al., v. Hercules, Inc., Civ. No. 92-NC-088S at 9-10 (D. Utah Sept. 27, 1994) (implied contract claim dismissed where procedure relied upon by plaintiffs was a "guideline": "The plaintiffs could not reasonably consider it an offer to modify the parties' at-will relationship.") (R. at 83-84); Knights v. Hewlett Packard, 281 Cal. Rptr. 295, 298 (Cal. App. 1991) (personnel policies which were intended as a "guide for supervisors involved with employment termination" held to be too discretionary to form the basis of an implied contract).

Cook attempts to escape the consequences of accepting Zions' contract disclaimer by arguing that it should not apply to her because she did not receive it until after she allegedly requested the time off. Appellant's Opening Brief at 30-31. However, even if the Court were to conclude that the contract disclaimer in the 1994 handbook is ineffective under Trembly, Cook's claim is barred by the identical disclaimer contained in Zions' 1992 employee handbook. See Material Facts ¶ 8. Although Cook denies receiving "any handbook until April 8, 1994," her actual receipt of the handbook is not necessary. See Appellant's Opening Brief at 30.¹⁵ Even when an employee denies receiving a policy statement containing a disclaimer, the statement is effective if, as in the present case, there has been a general distribution of the statement. Material Facts ¶ 7; see Elliott v. Board of Trustees of Montgomery County Community College, 104 Md. App. 93, 655 A.2d 46, 52 (1995) ("We hold that, in reference to disclaimers and employee handbooks or manuals, reasonable notification, not actual notification, is sufficient to put the

¹⁵ Since the parties briefed Zions' summary judgment motion, Zions has identified additional documents responsive to Cook's document requests pursuant to Utah R. Civ. P. 26(e). Among the documents Zions located and produced to Cook's counsel are Zions' 1990 employee handbook and the acknowledgement of receipt of the employee handbook signed by Cook on May 14, 1990, neither of which is part of the record in the district court. The 1990 handbook, which, according to the signature page, Cook received on May 14, 1990, contains contract disclaimers and policy guidelines regarding attendance and absences that are identical to those in the 1992 and 1994 employee handbooks. Material Facts ¶¶ 8, 10, 11, 13, 16, 17. In order to preserve and perpetuate Cook's testimony for trial, Cook's counsel took the deposition of Cook on January 15 and 16, 1996. If appropriate, Zions will take the necessary procedural steps to supplement the record to include these documents, along with Cook's deposition testimony relating thereto, on appeal.

employee on notice of the disclaimer. We further hold that a uniform, system-wide distribution of a disclaimer will generally constitute reasonable notice thereof."); Transou v. Electronic Data System, 767 F. Supp. 1392, 1399 (E.D. Mich. 1991) ("Though plaintiff claims that he does not recall receiving a copy of the handbook, its disclaimer is effective in light of the uniform and reasonable method of distributing the manual throughout the company."); Grow v. General Prods., Inc., 184 Mich. App. 379, 457 N.W. 2d 167, 171 (1990) (rejecting plaintiff's claim that disclaimer in policy memorandum did not apply to him, the court stated: "[a]lthough plaintiff claims he did not receive the memorandum, the method of notification of distributing written memorandums addressed to each employee at a staff meeting is reasonable and evidences no bad faith").

Cook also cannot rely on the attendance and short-term leave guidelines in the 1994 employee handbook, which are exactly the same as those in the 1992 handbook, and ignore the remainder of the handbook including the contract disclaimer. While employment policies in a handbook or other publications can be the source of implied contract terms, they must be read as a whole. See, e.g., Snyder v. A.G. Trucking, Inc., 57 F.3d 484, 491 (6th Cir. 1995) ("Plaintiff may not rely on one sentence while ignoring the rest of the manual."); Uebelacker v. Cincom Sys., Inc., 48 Ohio App. 3d 268, 549 N.E. 2d 1210, 1218 (1988) ("[Plaintiff] cannot rely on

selected passages favorable to his position and ignore those that are unfavorable.").

In sum, both the 1992 and the 1994 versions of the employee handbook clearly and conspicuously state that the handbook "supersedes and replaces all other prior employees reference material," and that neither party has "entered into any contract of employment, express or implied." By these words, Zions disclaimed any intent to enter into an express or implied employment contract with its employees. Under these circumstances, no contract could exist.

VI. COOK'S IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING CLAIM FAILS AS A MATTER OF LAW BECAUSE UTAH LAW DOES NOT RECOGNIZE THE IMPLIED COVENANT IN THE EMPLOYMENT CONTEXT, AND BECAUSE COOK HAS NO EMPLOYMENT CONTRACT WITH ZIONS.

A. The Utah Supreme Court Has Consistently Rejected An Implied Covenant Claim in the Employment Context.

The Utah Supreme Court first considered the possibility of creating a cause of action for breach of implied covenant of good faith and fair dealing in the employment context in the Berube case. Only two justices were in favor of creating such a cause of action, Justices Durham and Stewart. 771 P.2d at 1049. Accordingly, the court upheld the dismissal of this cause of action and remanded only the implied-in-fact contract claim. Id.

Since Berube, the Utah Supreme Court has, by its actions and words, consistently rejected the implied covenant claim in the employment context. In Brehany, the Supreme Court reversed and remanded the dismissal of an implied contract claim, while at the

same time it affirmed the dismissal of an implied covenant of good faith and fair dealing claim. 812 P.2d at 56-57. In Loose v. Nature-All Corp., 785 P.2d 1096 (Utah 1989), the Supreme Court stated that "[b]ecause Utah law does not recognize a violation of a covenant of good faith and fair dealing . . . we must affirm the trial court's judgment of dismissal." Id. at 1098. In Heslop v. Bank of Utah, 839 P.2d 828 (Utah 1992), the Supreme Court affirmed "the decision of the trial court dismissing plaintiff's claim for breach of the covenant of good faith and fair dealing." Id. at 840.

Any doubt that the implied covenant of good faith and fair dealing is dead in the employment context was laid to rest by the Supreme Court in Sanderson v. First Security Leasing Co., 844 P.2d 303 (Utah 1992):

Three times in the past three years, we have refused to recognize an implied-in-law covenant of good faith and fair dealing that creates a for-cause standard for dismissal. (Citations omitted.) As we explained in Brehany, although every contract is subject to an implied covenant of good faith, that implied covenant 'cannot be construed . . . to establish new and independent rights or duties not agreed upon by the parties.'" 812 P.2d at 55. We affirm that position which rejects Sanderson's argument to the contrary.

Id. at 308. As it did in Brehany, the court remanded the implied-in-fact contract claim. Id. If the implied covenant claim were viable, the Utah Supreme Court would have remanded the implied covenant claim in each instance in which it remanded an implied-in-

fact contract claim. By refusing to remand in such instances, the Supreme Court has made it clear that the implied covenant claim is not viable under Utah law.

Even if Cook's implied covenant claim were viable under Utah law, like her implied-in-fact contract theory, it has only been contemplated in the context of a termination. See Sanderson, 844 P.2d at 308 ("[W]e have refused to recognize an implied-in-law covenant of good faith and fair dealing that creates a for-cause standard for dismissal.") (emphasis added).

B. Because Cook has No Employment Contract With Zions, Her Implied Covenant Claim Fails as a Matter of Law.

Although the Utah Supreme Court has repeatedly refused to recognize a covenant of good faith and fair dealing in employment contracts, Cook contends that Utah appellate courts have not yet rejected the cause of action altogether. In so contending, Cook relies on Dubois v. Grand Central, 872 P.2d 1073 (Utah App. 1994). While it is true, as Cook correctly notes, that the Dubois court stated every contract is subject to an implied covenant of good faith, the court also reaffirmed the well-established principle that "this implied covenant cannot establish new, independent rights or duties not agreed upon by the parties." Id. at 1078.

Relying on the implied covenant "to establish new, independent rights or duties not agreed upon by the parties" is exactly what Cook is attempting to do. As explained above, Cook has failed to prove the existence of any express or implied

employment contract, much less a contract which obligates Zions to foresee the "need" of an employee's medical appointment or procedure and insure the consequences of any delay in scheduling planned paid absences.

CONCLUSION

Based upon the foregoing, Zions respectfully requests that the Court affirm the district court's summary judgment.

DATED this 16th day of January, 1996

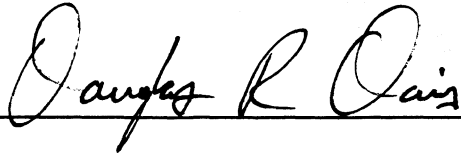
A handwritten signature in cursive script, reading "Douglas R. Davis", is written over a horizontal line.

LOIS A. BAAR
DOUGLAS R. DAVIS
MICHAEL A. ZODY
PARSONS BEHLE & LATIMER

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 1996,
I caused to be mailed, first class, postage prepaid, a true and
correct copy of the foregoing **APPELLEE'S BRIEF** to:

ROGER M. HOOLE
PAUL M. KING
HEATHER E. MORRISON
HOOLE & KING, L.C.
4276 South Highland Drive
Salt Lake City, Utah 84124



Tab A

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

-o0o-

GINA COOK,)	
)	Civil No. 940905799 CN
Plaintiff,)	Judge David S. Young
)	
vs.)	Deposition of:
)	<u>JOYCE MISDOM</u>
ZIONS FIRST NATIONAL BANK,)	
)	
Defendant.)	

CERTIFIED COPY

-o0o-

BE IT REMEMBERED that on the 25th day of October 1994, the deposition of JOYCE MISDOM, produced as a witness herein at the instance of the plaintiff, in the above-entitled action now pending in the above-named court, was taken before Rashell Garcia, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, commencing at the hour of 9:10 a.m. of said day at the offices of Roger H. Hoole, 4276 South Highland Drive, Salt Lake City, Salt Lake County, State of Utah.

That said deposition was taken pursuant to Notice.

RASHELL GARCIA
CSR No. 144

**INDEPENDENT REPORTING
SERVICE**

Certified Shorthand Reporters

1710 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
(801) 538-2333

000342

1 A. Yes.

2 Q. And that was for a surgical procedure?

3 A. Yes.

4 Q. And this would have been in the end of April
5 1994?

6 A. Right.

7 Q. Okay. Did she indicate to you how long Gaylene
8 had not allowed her to take the time off?

9 A. Not in some months or weeks or anything like
10 that, no. She said something to the effect that she'd been
11 trying for awhile, for a time, a long time, something, to get
12 the time off. And I didn't ask her a lot of details as to
13 why. I just said, "Well, you know, if you need to go to the
14 doctor, you should go to the doctor." And she seemed quite
15 upset by it, so --

16 Q. She did seem concerned?

17 A. She seemed concerned. At the time -- she said
18 she couldn't get the time off, Gaylene wouldn't let her have
19 the time off. I said, "Then make an appointment and phone in
20 sick."

21 Q. Do you recall anything else that was said either
22 by her or by you during this conversation?

23 A. Well, after I said that, she said she couldn't do
24 that, that Gaylene would fire her for it, that it's against
25 policy. And I said, "Well, I realize it's against policy but

1 she wouldn't fire you." And she said, yes, she felt that she
2 would be fired.

3 Q. Do you recall anything else that was said during
4 that conversation?

5 A. I think I just made some comment that if you have
6 to go to the doctor, whatever it takes, get to the doctor.

7 Q. And this was in -- well, you've already indicated
8 the date. Was there a second occasion after this one where
9 you again discussed with Gina the situation involving her
10 lip?

11 A. As I recall, the next time I talked to her was --
12 in any detail about her lip would have been the end of June.
13 I talked to her once on the phone between April and -- the
14 end of April and June.

15 Q. Now, didn't she leave for surgical intervention
16 during June? Do you recall?

17 A. I don't recall whether it was May or June, I
18 really don't.

19 Q. Was she gone for some time?

20 A. As far as I know, she was. I found out she was
21 gone after she had left and had the surgery.

22 Q. Because you're not there every day?

23 A. No.

24 Q. So, in any event, you had one conversation with
25 her by telephone either in May or June?