

1995

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GINA COOK,

Plaintiff and Appellant,

vs.

ZIONS FIRST NATIONAL BANK,

Defendant and Appellee.

CASE NO. ~~950320~~ ^{950750-CA}

ARGUMENT PRIORITY
CLASSIFICATION 15

BRIEF OF THE APPELLANT

Appeal from a Summary Judgment of the
Third Judicial District Court for
Salt Lake County, State of Utah
Honorable David S. Young

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JURISDICTIONAL STATEMENT

By Order of the Utah Supreme Court, this case was poured-over to the Utah Court of Appeals on November 6, 1995. This Court has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2-2(3) (Supp. 1995) and Utah R. App. P. 3.

STATEMENT OF ISSUES

I. Whether the trial court erred in finding no genuine issue of material fact as to the existence of an express or an implied compensation contract between Gina Cook ("Mrs. Cook") and her employer Zions First National Bank ("Zions") when Mrs. Cook was employed in consideration for certain compensation which included the ability and flexibility to take earned leave for needed medical care.

This issue was preserved in the trial court. See, *inter alia*, Record ("R"). at 251-52; 304-05; 308; 332-33; 334; 437-39; 474-81; 510; 515-16; 524-25. The standard of review for summary judgment is Rule 56(c) of the Utah Rules of Civil Procedure. Summary judgments are reviewed for correctness. Palmer v. Hayes, 892 P.2d 1059, 1061 (Utah App. 1995).¹

II. Whether the covenant of good faith and fair dealing exists within the confines of employment compensation contracts, and assuming that it does, whether the trial court erred in finding

¹ See also the section on Applicable Law, *infra*.

no genuine issue of material fact as to Zions' performance under that implied covenant when Mrs. Cook repeatedly requested the opportunity to use her earned sick leave to determine if the lump on her lip was cancerous, and Zions denied her requests and by its conduct, prevented her from so doing.

This issue was preserved in the trial court. See, *inter alia*, R. at 252-53; 307-11; 324-25; 349-48; 474-81; 521; 524; 527-30; 534-35; 567. The standard of review for summary judgment is Rule 56(c) of the Utah Rules of Civil Procedure. Summary judgments are reviewed for correctness. Palmer, 892 P.2d at 1061.

III. Whether the trial court erred by resolving factual disputes against Mrs. Cook and by relying on issues neither raised by Zions nor properly considered in a Motion for Summary Judgment.

This issue was preserved in the trial court. See, *inter alia*, R. at 60-86; 302-366; 386-435; 474-81; 493-95; 493-95; 474-81; 544-46. The standard of review for summary judgment is Rule 56(c) of the Utah Rules of Civil Procedure. Summary judgments are reviewed for correctness. Palmer, 892 P.2d at 1061.²

CONSTITUTIONAL PROVISION AND DETERMINATIVE STATUTES

None.

² Mrs. Cook is not pursuing her claim for intentional infliction of emotional distress on appeal.

STATEMENT OF THE CASE

I. Nature of the Case

This is an action brought by Mrs. Cook as the result of Zions' breach of her employment compensation contract. Mrs. Cook claims that Zions breached her contract, which specifically included the right to paid sick leave, by refusing to allow her time off for medical treatment when she needed and requested it.

II. Course of the Proceedings

The Complaint was filed on September 14, 1994 in the Third Judicial District Court for Salt Lake County. (R. at 2.) Mrs. Cook demanded a jury, and tendered the appropriate fee on September 28, 1994. (R. at 31.) Zions served its Answer on October 11, 1994, (R. at 34), and ten days later, on October 21, 1994, filed a Motion for Summary Judgment. (R. at 60.) In its accompanying memorandum, Zions raised several issues claiming, in pertinent part, that "there is no express employment contract", that "Utah law does not recognize a breach of an implied-in-fact contract outside of the termination context" and that "an implied covenant of good faith and fair dealing is not recognized in the employment context under Utah law." (R. at 63-64; 386-87.)

III. Disposition of the Trial Court

Judge David Young accommodated lengthy oral argument on March 10, 1995, (R. at 572-97) and April 21, 1995. (R. at 508-71.) On

June 8, 1995, the trial court ruled against Mrs. Cook in a Memorandum Decision, attached hereto as Addendum "A". (R. at 474.) Final judgment, granting summary judgment against Mrs. Cook and dismissing her action on the merits and with prejudice, was entered on July 14, 1995. (R. at 490.) Notice of Appeal was filed on July 18, 1995. (R. at 496.)

STATEMENT OF FACTS

I. General Background:

1. Mrs. Cook was hired by Zions in May, 1988. (R. at 65; 95; 250.)

2. During her full-time employment at Zions, the terms and conditions of Mrs. Cook's compensation, including sick leave, have not changed, although she has received regular pay increases for merit and promotion. (R. 250-51; 304.)

3. Mrs. Cook has not been terminated by Zions, where she remains employed. (R. at 95; 250-51; 304.)

II. Facts Presented to the Trial Court in Opposition to Zions' Factual Claims That Mrs. Cook Had No Contract Providing for Compensation in Exchange for Her Services to the Bank:

4. In May 1988, prior to her acceptance of Zions' offer of employment, Mrs. Cook met with Joyce Misdom, the manager of the department in which Mrs. Cook was to be employed. During that meeting, Ms. Misdom advised her that after an initial 90-day waiting period, Mrs. Cook would automatically earn credits for

"involuntary leaves of absence from work," which would entitle her to a certain number of paid sick days, depending on whether she worked part or full time. (R. at 437.)

5. While Mrs. Cook was considering Zions' employment offer, another representative of the bank met with Mrs. Cook and again explained the terms of Zions' compensation package which included paid leaves of absences for sick days. During that meeting, Mrs. Cook was again told that she would earn and be entitled to use paid sick leave as part of her compensation. (R. at 437.)

6. Mrs. Cook accepted employment at Zions based on its offer of employment compensation. (R. at 438).

7. Zions' employment offer, as communicated by Ms. Misdom and the other bank representative, was memorialized in a written agreement. (R. at 437-38.) That document, entitled "Employment Benefits Disclosure and Pay Agreement" (hereinafter "Employment Agreement"), is attached hereto as Addendum "B". (R. at 438; 441.)

8. After Mrs. Cook had received an explanation of her compensation from Ms. Misdom and the other bank representative, she and Ms. Misdom signed the Employment Agreement on July 28, 1988. (R. at 438; 441.)

9. The Employment Agreement lists both Mrs. Cook's initial salary and earned benefits, including involuntary paid leaves of

absence³ for which she would become automatically eligible as part of her compensation package. Specifically, with respect to sick leave, the Employment Agreement states:

Involuntary Absences 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.

(R. at 438; 441.)

10. The flexibility of being able to take paid sick leave was a significant part of Mrs. Cook's compensation package, and was an important inducement to her in accepting Zions' employment offer.

(R. at 438-39.)

11. Because Zions' compensation package included paid sick leave, Mrs. Cook was willing to work at an hourly rate lower than the rate she received from her former employer. (R. at 438.)

12. Since accepting its employment offer, Mrs. Cook has continued to rely on Zions' representations to provide paid sick leave, and has for years earned and used the benefit of paid sick leave. (R. at 251-52; 304-06; 308; 439.)

13. It was Mrs. Cook's understanding from Zions' course of dealing, representations and practices, that, as a full-time employee, she would receive paid sick leave in partial

³ Zions' use of the phrase "involuntary leaves of absences" in its Employment Agreement, (R. at 441), is synonymous with the terms "sick leave", "sick days" and "short term leave" in the record. See, *inter alia*, R. at 326; 332-33; 335-37; 344-45; 351-53.

consideration for her service to the bank. (R. at 251-52; 436-37; 439.)

14. Consistent with its practices, Mrs. Cook's Employment Agreement and her understanding of her sick leave benefits, Zions also has a written policy regarding sick leave which is maintained by supervisors and not distributed to employees. (R. at 351-52; 391.)

III. Facts Presented to the Trial Court Based on Zions' Admissions:

15. Zions' employees earn sick leave as part of their compensation. (R. at 332-33.)

16. Employees who take sick leave are paid at their normal hourly or salaried rate, with standard taxes and withholdings deducted from the sick leave compensation. (R. at 326.)

17. Full time employees earn the right to be paid for sick leave and can accumulate eight hours a month for a maximum of 12 days a year. (R. at 325-26; 334-35; 344; 351-53.)

18. Pay stubs given to Mrs. Cook by Zions confirm its policy of providing Mrs. Cook with earned sick leave. (R. at 321.)

19. Zions maintains a schedule of the number of hours to which an employee is entitled for sick leave, based on how long they have worked. (R. at 335; 345; 351.)

20. At the beginning of 1994, Mrs. Cook had earned 249.76 hours of sick leave. (R. at 336.)

21. As an employer, Zions provides sick leave in order to be competitive and to promote the health of its employees. (R. at 325.)

22. Zions' policy and practice is to allow its employees time off to obtain necessary medical attention, diagnosis and treatment before treatable health problems become serious or life threatening. (R. at 471-72.)

23. Zions publishes an official newsletter known as "Newsbreak", which is disseminated regularly to employees. (R. at 323 and 348.)

24. Zions' September 20, 1994 Newsbreak states in pertinent part that "[t]he health and welfare of employees are important to Zions Bancorporation. Zions policies provide employees with adequate time to seek needed medical treatment." (R. at 349.) (Emphasis added.) A copy of the Newsbreak article is attached hereto as Addendum "C".

25. The Newsbreak article is an accurate statement of the bank's position, (R. at 348; 435), and "depicts [Zions' policy] very well." (R. at 411.)

26. Zions' employees are required to notify their departmental supervisors of their need to take sick leave for scheduled medical procedures. (R. at 327.)

27. Zions' employees are also required to obtain approval from their supervisors before they can use sick leave for scheduled medical treatment. (R. at 344; 471-72.)

IV. Facts Presented to the Trial Court Regarding the Material Breach of Mrs. Cook's Compensation Agreement:

28. In a January, 1994 staff meeting, Gaylene Kenney ("Ms. Kenney"), Mrs. Cook's departmental manager, (R. at 306; 330; 389), stated that she did not want anyone to take time off during the next several months because of an increased workload in the department caused by the department's conversion to a new computer system, and Zions' acquisition of another bank. (R. at 252; 309; 355).

29. Because of the demands placed on her as a result of the conversion to the new computer system and the bank acquisition, Mrs. Cook was required to work extensive overtime in the first few months of 1994. (R. at 252; 309.)

30. By the beginning of 1994, a lump had appeared on Mrs. Cook's lip. The lump was obvious and could readily be seen by co-workers. (R. at 308; 340-41; 356-57; 361.)

31. Ms. Kenney also knew of the lump because she could see it on Mrs. Cook's lip. (R. at 308; 340-41.)

32. On January 29, 1994, Mrs. Cook requested one hour off on February 1, 1994 to have the lump on her lip removed. (R. at 252; 309; 362.)

33. Mrs. Kenney approved the request for one hour. (R. at 338-39; 362.)

34. Mrs. Cook went to her doctor's appointment on February 1, 1994. However, at that time, her doctor decided that the procedure would take a full day and would need to be done in a hospital. Therefore, because only a one hour office appointment had been scheduled, Mrs. Cook's doctor did not remove the lump. (R. at 252; 309.)

35. After returning to work, Mrs. Cook approached Ms. Kenney, and requested one day off for the in-hospital surgical procedure to remove the lump on her lower lip as directed by her doctor. (R. at 252; 309.)

36. That request, and several other requests for the necessary time off made during the first week of February, 1994 and in the following months, were denied. (R. at 252; 309-10.)

37. Mrs. Cook did not take a day off without Ms. Kenney's permission because she feared that she would be terminated for violating Zions' policy and Ms. Kenney's directive. (R. at 343.)

38. During February, March and April, 1994, Mrs. Cook continued to make numerous requests to Ms. Kenney to use one day of her earned sick leave for the medical procedure. (R. at 252-53; 309-10.)

39. Ms. Kenney denies that these requests were made. (R. at 341; 390; 433-34; 475; 546.)

40. The surgical procedure was eventually undertaken on May 20, 1994 with Ms. Kenney's approval. (R. at 253.)

41. On May 31, 1994, Mrs. Cook was notified that she had a form of aggressive, malignant melanoma. (R. at 253-54; 310.)

SUMMARY OF ARGUMENT

In 1988, Mrs. Cook and Zions signed an Employment Agreement in which Zions expressly agreed to compensate her with the earned benefit of sick leave. Based on that agreement and Zions' policies and practices, Mrs. Cook's sick leave accrued at the rate of one day for every month she worked as a full time employee. For several years, Mrs. Cook earned, requested and received her sick leave as part of her compensation. Prior to her denied requests for time off, Zions had not changed or disclaimed either Mrs. Cook's contract or Zions' existing policy and practice of compensating its employees with accrued sick leave for needed medical treatment. This practice continued until the first several months of 1994 when Mrs. Cook's supervisor denied her requests for one day of sick leave to undergo an in-hospital procedure to remove and biopsy a lump on her lip. During those months, Mrs. Cook's supervisor required her to work extensive overtime as the result of an exceptionally heavy work load in Mrs. Cook's department.

As of January 1, 1994 Mrs Cook had 249.76 accrued and unused hours of earned sick leave. Zions, however, requires its employees to obtain approval before taking time off for scheduled medical treatment. Although the sore on Mrs. Cook's lower lip did not heal and continued to worsen in February, March, April and May of 1994, Mrs. Cook's repeated requests for a single day of sick leave were continually denied. Not being able to jeopardize her job and health insurance and *not* knowing whether she had a serious problem, Mrs. Cook continued to work while pressing her supervisor for permission for a day off work for the surgery.

When Zions finally allowed Mrs. Cook time off on May 20, 1994, her physicians found an aggressive form of skin cancer which had metastasized and invaded her lymph nodes. Mrs. Cook's physicians have informed her that her condition is terminal. Zions' refusal to allow Mrs. Cook time off work caused a critical and significant delay in her cancer treatment, resulting in the progression of the cancer and the loss of any opportunity to prevent that progression.

Zions has admitted that the purpose of its policy and practice of allowing employees time off work for medical procedures is to allow them to obtain necessary medical attention before health problems become serious or life threatening. The terms of Mrs. Cook's compensation contract were breached by Zions' refusals to allow her time off when she requested it. Based on Zions' own

statement, that "Zions policies provide employees with adequate time to seek needed medical treatment," (R. at 349), it has also breached the implied covenant of good faith and fair dealing which exists in Utah and operates *within* the parameters of all contracts, including contracts providing for employment compensation.

ARGUMENT

I. Applicable Law under Rule 56(c) of the Utah Rules of Civil Procedure.

Summary judgment is only proper when "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P 56(c); Republic Group, Inc. v. Won-Door Corp., 883 P.2d 285 (Utah App. 1994). When reviewing an order granting summary judgment, the evidence and all inferences that may be reasonably drawn from the evidence must be liberally construed in favor of the party opposing the motion. Republic Group, 883 P.2d at 289. The non-movant is required only to demonstrate that there is a material issue of fact, not that its case is more persuasive than the movant's. Lamb v. B&B Amusements, 869 P.2d 926 (Utah 1993). Any doubts as to whether the non-moving party has established an issue of material fact must be resolved in favor of the non-movant. Butterfield v. Okudo, 831 P.2d 97, 107 (Utah 1992). The determination of whether the moving party is entitled to a judgment is a question of law, and given this view of the evidence, is reviewed for correctness. Palmer, 892 P.2d at

1061; Kleinert v. Kimball Elevator Co., 854 P.2d 1025, 1027 (Utah App. 1993). No deference is accorded to the trial court's conclusion that the facts are not in dispute or to the trial court's legal conclusions based on those facts. Kitchen v. Cal Gas Co., 821 P.2d 458 (Utah App. 1991), cert. denied, 879 P.2d 476 (Utah 1994). Summary judgment is generally considered to be a drastic remedy which requires strict compliance with Rule 56 of the Utah Rules of Civil Procedure. Timm v. Dewsnap, 851 P.2d 1178, 1181 (Utah 1983). Accordingly, summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

II. The Trial Court Erred in Finding No Genuine Issue of Material Fact as to the Existence of an Express or an Implied Compensation Contract Between Mrs. Cook and Her Employer, Zions.

In its Motion For Summary Judgment, Zions claimed it has no contract with its employee, Mrs. Cook. Zions stated in absolute terms that it "does not enter into any individual employment agreements with its employees and did not do so with respect to plaintiff." (R. at 65.) The trial court, adopting a misdirected employment-at-will analysis, agreed, ruling that

The first cause of action for 'Breach of Express Employment Contract' must be and the same is dismissed because there is no employment contract between the

parties. Utah law presumes that any employment contract with no specified term as to duration is an 'at-will' relationship. Berube v. Fashion Center, Ltd., 771 P.2d 1033, (Utah 1989). Nothing in evidence can be shown to have changed the initial 'at-will' relationship. Even in cases where an 'at-will' employee has no right of action against its employer for breach of employment contract upon being *discharged*, (Brehany v. Nordstrom, Inc., 812 P.2d 49 [Utah 1991]) in this case, since there has been *no discharge*, there exists an even stronger reason to disallow an [sic] suit for Breach of Contract. The Plaintiff remains employed yet wishes to maintain her lawsuit for breach of contract while going to work every day and continuing to receive employee benefits and income.

R. at 478.) (Emphasis in original.) The trial court's analysis and conclusion were wrong. The fact that Mrs. Cook may be employed at-will is not relevant to her claims that Zions breached her contractual right to take time off work when necessary for illness or needed medical treatment. The central issue before the trial court and on appeal is whether a reasonable jury could find an employment contract for certain compensation, including, in part, the right to request and receive paid sick leave, regardless of whether that contract could be terminated by either party.

A. Significant Facts in the Record Support Mrs. Cook's Claim That She Had a Contract for Compensation Which Included Paid Sick Leave.

The claim that Mrs. Cook had an agreement with Zions to provide services in exchange for compensation was strongly supported by the evidence before the trial court and therefore should have been decided by the finder of fact. The record

demonstrates that Zions offered Mrs. Cook employment which she accepted in consideration for certain compensation and which included the ability and flexibility to take involuntary leaves of absence when needed for medical care. (R. at 251-52; 305; 332-33; 437-39.)

Prior to beginning employment, Zions informed Mrs. Cook that as part of her compensation, she would automatically earn credits for involuntary leaves of absence from work, and would therefore be entitled to a certain number of paid sick days. (R. at 437.) Based on the employment offer made by Zions' representatives, which was memorialized by the Employment Agreement, Mrs. Cook accepted employment. (R. at 438; 441; Addendum "B".) The *flexibility* which involuntary paid sick leave offered was a significant part of Mrs. Cook's compensation package, and was an important inducement to her in accepting Zions' employment offer. (R. at 438-39.)

Since accepting Zions' offer, Mrs. Cook has relied on its agreement to provide paid sick leave, and on several occasions, has used that sick leave. (R. at 251-52; 304-06; 308; 439.) Pay stubs given to Mrs. Cook by Zions regularly documented Zions' policy of providing her earned sick leave which was treated as normal compensation, subject to withholdings, taxes, etc. (R. at 321; 326; 351.)

Mrs. Cook's understanding from Zions' course of dealings, representations and practices, was that she would receive paid sick leave in partial consideration for her service to the bank. (R. at 439.) Mrs. Cook's sick leave was not a mere gratuity; it was part of the bargained-for compensation she was to receive for the services she rendered. The evidence makes it clear that an express contract had been entered into by the parties, and moreover, that the contract had been performed and confirmed by their conduct through a course of dealing lasting several years. An integral part of that contract included Mrs. Cook's ability and flexibility to request and receive earned sick leave when needed.

B. The Relationship Between an Employer and an Employee Is Contractual Regardless of Whether That Relationship Is Terminable At-Will.

The trial court noted that Mrs. Cook and Zions have an "at-will" relationship, and then somehow concluded that since Mrs. Cook had not been terminated, there could be no action for breach of contract. (R. at 478.) The concept of "employment at-will" *does not, and has never meant* that there is no employment contract between an employer and its employee; it simply means that the employment contract has no specific duration, and is terminable at the will of either party. The Supreme Court in Berube stated: "The at-will rule, after all, is merely a rule of *contract construction* and not a legal principle . . . The rule creates a presumption that

any employment contract which has no specified term of duration is an at-will relationship." Berube, 771 P.2d at 1044. (Emphasis added; internal citation omitted.)

It belies the obvious to state that an employer and its employees have no contract. At the very least, employees report for work each day, in exchange for compensation.⁴ An employer-employee relationship is necessarily based on an agreement that, in exchange for services rendered by the employee, the employer will timely pay wages and provide earned benefits. Whether the employment relationship is for a definite period or terminable at-will, that obligation continues, unless modified by the parties, until the relationship is terminated. In Johnson v. Morton Thiokol, 818 P.2d 997 (Utah 1991), the Supreme Court stated that

an employer's promise of employment under certain terms and for an indefinite period constitutes both the terms of the employment contract and the employer's consideration for the employment contract. The employee's performance of service pursuant to the employer's offer constitutes both the employee's acceptance of the offer and the employee's consideration for the contract.

Johnson, 818 P.2d at 1002, citing Corbin, Corbin on Contracts, §21 (1963). (Emphasis added.)

⁴ See, e.g., Utah Code Ann. §§ 34-21-1 and 34-28-1 et seq. (1994) which provide for attorneys' fees and other remedies in actions for compensation earned but not timely paid.

Zions' claim that it had no contract with Mrs. Cook and that, therefore, her earned sick leave cannot be compensation pursuant to an employment contract, is contrary to both Utah law and general legal principles governing employment relationships. An employee's compensation is not necessarily limited to salary, but will include any other benefits that are an integral part of the employee's contemplated compensation. These benefits may include sick leave. Accord Auclair v. Allstate Ins. Co., 392 A.2d 1193, 1196 (N.H. 1978); Jeannot v. New Hampshire Personnel Comm'n, 392 A.2d 1193, 1196 (N.H. 1978) (sick leave benefits are an integral part of the contemplated compensation); Christian v. County of Ontario, 399 N.Y.S.2d 379, 381 (N.Y. Sup. Ct. 1977) (sick leave benefits are generally considered to be a part of an employee's overall compensation); City of Orange v. Chance, 325 S.W.2d 838, 841 (Tex. Ct. App. 1959) (the fact that a part of an employee's compensation is called "sick leave" is of no material fact); Vangilder v. City of Jackson, 492 S.W.2d 15, 17 (Mo Ct. App. 1973) (sick leave benefits are generally considered to be a part of the employee's overall compensation, earned during the period of his employment and forming a part of his employment contract); and Logue v. City of Carthage, 612 S.W.2d 148, 150 (Mo. Ct. App. 1981) (sick leave benefits are to be considered compensation for services and are not to be viewed as a bonus or an arbitrary award). Thus, even

assuming Mrs. Cook is employed at-will, her earned sick leave benefit is not a mere gratuity, but constitute compensation for the services she has rendered.

C. Mrs. Cook's Express Contract Could Also Be Viewed as an Implied Contract Created by the Parties' Course of Dealings.

Zions' position is that an employer's long history of providing compensation, including the benefit of sick leave, in consideration for services performed by an employee could not, as a matter of law, create an implied contract requiring compensation for the services previously performed. Specifically, Zions argues that "[b]ecause plaintiff's implied-in-fact contract claim does not involve termination issues, her cause of action is not recognized under Utah law and must be dismissed." (R. at 71).⁵ Zions undertook an extensive effort to cite employment-at-will and wrongful termination cases to the trial court. (R. at 71; 393-98.) By so doing, Zions has confused the nature of Mrs. Cook's claims and

⁵ As set forth on pages 17-18 *supra*, the "at-will" nature of Mrs. Cook's employment with Zions simply means that her employment contract does not have a specific duration. To allege that because this case does not involve termination issues, she therefore has no contract, either express or implied, is patently incorrect and misleading. Situations of employment at-will are simply "employment contracts [that] are terminable at the will of either party . . .". Gilmore v. Salt Lake Area Community Action Program, 775 P.2d 940, 942 (Utah App., 1989), cert. denied, 789 P.2d 33 (Utah 1990). (Emphasis added.) Since neither Zions nor Mrs. Cook sought to terminate her employment before the contract breach occurred, the "at-will" nature of that employment contract is irrelevant.

obtained a ruling which would, if affirmed, eliminate an employer's obligation to pay and otherwise compensate its employees after the employees have performed their assigned duties in reliance on the employer's promise of compensation.

The Utah Supreme Court in Berube specifically held that the parties' course of dealing may establish an implied contractual term, stating that "[t]he conclusion that [an implied in fact] promise exists may arise from a variety of sources, including the conduct of the parties, announced personnel policies, practices of that particular trade or industry, or other circumstances which show the existence of such a promise." Berube, 771 P.2d at 1044. Berube further held that "continued performance of the employee's duties is adequate consideration for . . . an implied contract provision." Berube, 771 P.2d at 1044. In addition to the Employment Agreement and Zions express representations, all of the possible sources of an implied contract listed in Berube exist in the instant case.

These facts demonstrate that the parties agreed that the ability to take paid sick leave, when needed and as accrued, was part of the compensation agreed to be provided to Mrs. Cook in connection with her employment with Zions.

This Court has defined an implied contract as "a tacit promise, one that is inferred in whole or in part from expressions

other than words on the part of the promisor." Allstate Enter., Inc. v. Heriford, 772 P.2d 466, 468 (Utah App. 1989) (Citing Corbin, *supra* at §§ 17 and 38). Even assuming, *arguendo*, that the document referred to herein as the Employment Agreement is not a binding written agreement between the parties, it is at the very least evidence of a tacit agreement between the parties concerning compensation in the form of paid sick leave. This Court held in Diston v. EnviroPak Medical Products, Inc., 893 P. 2d 1071, 1075 (Utah App. 1995), that "the lack of a written agreement does not mean that there was no enforceable agreement."

Addressing the issue of implied contracts in general, this Court has defined the

elements of such a contract as being: (1) the defendant requested the plaintiff to perform work; (2) the plaintiff expected the defendant to compensate him or her for those services; and (3) the defendant knew or should have known that the plaintiff expected compensation. See Kintz v. Read, 626 P.2d 52, 55 (Wash. App. 1981); See also Restatement (Second) of Contracts Sec. 5 comment (a) (1981) (providing that terms of promise or agreement are those expressed in language of parties or implied in fact from other conduct).

Davies v. Olson, 746 P.2d 264, 269 (Utah App. 1987). In reliance on Zions' employment offer, Mrs. Cook worked for several years accruing sick leave and receiving it when needed, until February, 1994. Throughout her employment, Zions has maintained an accounting of the amount of involuntary sick leave which Mrs. Cook accrued and used. These facts and all inferences therefrom,

construed in Mrs. Cook's favor, demonstrate the existence of an implied contract under the standard set forth in Davies.

D. Whether or Not a Term of Compensation Represents a Contractual Right Between an Employer and an Employee Depends on Whether That Term Is Definite.

"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 from the courts' perspective in terms of whether it can be enforced." Diston, 893 P.2d at 1075 (holding that an oral agreement for compensation evidenced in part by a letter of intent was reached and therefore enforceable between the parties.) In this case, the contract term providing for paid sick leave was functionally definite because it was performed by the parties for several years until February, 1994. Zions has admitted that its employees earn sick leave as part of their compensation (R. at 332-33); and that full time employees earn the right to use sick leave and can accumulate eight hours a month for a maximum of twelve days a year. (R. at 325; 334; 344.) In Mrs. Cooks' case, at the beginning of 1994, she had 249.76 hours of unused and available sick leave. (R. at 336-37.) The agreement providing for earned sick leave was definite and understood by the parties, and was in fact performed by them for many years.

The second requirement set forth in Diston relates to enforceability. In Diston this Court cited with approval Bunnell

v. Bills, 13 Utah 2d 83, 86, 368 P. 2d 597, 600 (1962), where the Utah Supreme Court held that "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." Diston also cited the Restatement *supra* at § 33, which provides that "[t]he terms of the contract are reasonably certain if they provide a basis of determining the existence of a breach and for giving an appropriate remedy." Diston 893 P. 2d at 1075-76. Thus, as long as the agreement is definite enough to allow the finder of fact to determine whether one party has breached it, and to award some kind of reasonable damages to the wronged party, the contract is not void for indefiniteness.⁶ Therefore, the contract for compensation between Mrs. Cook and Zions is enforceable because, in addition to being performable, the obligation of the parties was sufficiently definite for the trier of fact to determine its terms, the existence of a breach and an appropriate remedy.

1. **Zions Breached a Definite Agreement with Mrs. Cook Which Allowed Her to Request and Use Sick Leave When Needed.**

⁶ "Once a defendant has been shown to have caused a loss, he should not be allowed to escape liability because the amount of the loss cannot be proved with precision . . . Consequently, the reasonable level of certainty required to establish the amount of a loss is generally lower than that required to establish the fact or cause of a loss." Cook Assoc., Inc. v. Warnick, 664 P.2d 1161, 1166 (Utah 1983) (Internal citations omitted.)

In order to determine the existence of a breach and an appropriate remedy, it is crucial to understand what was actually bargained for by the parties. Mrs. Cook entered into her employment with Zions in part because of the flexibility offered by paid sick leave. This was a significant part of Mrs. Cook's compensation package, and was an important inducement to her. (R. at 438.) In fact, Mrs. Cook was willing to work at an hourly rate lower than what she received from her former employer because Zions' compensation package included paid sick leave. (R. at 438-39.) Because paid sick leave and the ability to use it when needed is of great value to its employees, Zions, like many other employers, offers its employees paid sick leave in order to be competitive and to promote the health of its employees. (R. at 325.)

Zions clearly knew the importance of sick leave as it related to Mrs. Cook's health when it offered her employment. Ms. Misdorn, an officer of the bank and the representative who signed Mrs. Cook's Employment Agreement, testified as follows:

Q. So, the bank's sick day or short leave of absence policy is designed, is it not, to be used by employees who need to schedule medical treatment?

A. Yes.

Q. And the purpose of allowing them to be able to schedule medical treatment would be so they can resolve medical problems before they become more serious?

MS. BAAR: Objection, assumes facts not in evidence.

MR. HOOLE: Let's let her answer the question.

THE WITNESS: I would think so, yes.

Q. (By Mr. Hoole) In any event, as a supervisor, would it be your practice to allow your subordinates time off if they needed medical care in order to avoid a situation becoming more serious?

A. Yes.

Q. And would you use the bank's policy for that?

A. Yes.

Q. Is it your understanding that that's what the policy is for?

A. Yes.

. . .

Q. Okay. Is it your understanding that if an employee is not allowed time off for medical care that the employee['s] situation may become more serious?

A. Yes.

Q. Potentially life-threatening?

MS. BAAR: Objection. Same objection.

THE WITNESS: Potentially it could be.

Q. (By Mr. Hoole) In any event, the policy is designed to prevent that type of thing from happening?

MS. BAAR: Same objection. Also, lack of foundation.

THE WITNESS: I would think so, yes.

(R. at 471-72.)

In the Employment Agreement, Zions described sick leave as "Involuntary".⁷ (R. at 441; Addendum "B".) This indicates Zions' intent to grant Mrs. Cook the right to request and receive sick leave *when required*. Mrs. Cook's ability to request time off for medical care was the very essence of Zions' sick leave policy and the bargain between the parties. A breach of contract is nonperformance of a legal duty when due under a contract. Restatement, *supra* at § 235(2). Obviously, sick leave, once earned, is due when an employee is sick or in need of medical care.

In this case, what was bargained for and agreed by the parties was the ability to receive sick leave when needed. When Zions prevented Mrs. Cook from taking one day off work through most of February, March, April and May of 1994 in order to have a lump on her lip removed and biopsied it breached a performable and enforceable term of her employment compensation agreement. Given the performability of Mrs. Cook's compensation agreement, Zions' breach, and the trial court's ability to enforce the contract, the issue becomes whether a reasonable jury, properly instructed in the law, could determine an appropriate remedy.

⁷ Webster's New World Dictionary defines "involuntary" as: "a) not done of one's own free will; not done by choice; b) unintentional; accidental; c) not consciously controlled; automatic." Webster's New World Dictionary, 742 (2d College Ed., 1984.) The word "involuntary" in this context, strongly suggests the right to request and use sick leave when needed.

2. Mrs. Cook Is Entitled to an Appropriate Remedy Based on Those Damages Reasonably Foreseeable or Within the Reasonable Contemplation of the Parties at the Time They Entered into the Employment Compensation Contract.

In reliance on Beck v. Farmers Ins. Exch., 701 P.2d 795 (Utah 1985), the Utah Supreme Court in Berube, 771 P.2d at 1050, stated that plaintiffs who prevail in employment cases may recover damages for general and consequential injuries resulting from the breach of an employment contract. Berube further stated that

[b]oth general and consequential damages are available for contract breaches, and consequential damages are 'those reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made.' Beck v. Farmers Ins. Exch., 701 P.2d at 801. Of course, '[t]he foreseeability of any such damages will always hinge upon the nature and language of the contract and the reasonable expectations of the parties.' Id. (Citing J. Calamari & J. Perillo, Contracts § 14-5, at 523-25 (2d ed. 1977.))

Berube, 771 P.2d at 1050.

This Court, in Heslop v. Bank of Utah, 839 P.2d 828, 840 (Utah App. 1992), noted that "Beck envisioned a broad range of recoverable damages for breach of the covenant of good faith and fair dealing in a first-party insurance contract.⁸ Similarly,

⁸ In Beck, the Supreme Court held that "[a]lthough the policy limits define the amount for which the insurer may be held responsible in performing the contract, they do not define the amount for which it may be liable upon a breach." Beck, 701 P.2d at 801. Accordingly, the Court noted that

[i]n an action for breach of a duty to bargain in good faith, a broad range of recoverable damages is conceivable, particularly given the unique nature and

Berube envisioned a broad range of recoverable damages in an implied-in-fact contract of employment . . .". Heslop, 839 P.2d at 840. In Heslop this Court reasoned that "[t]erminated employees, like injured insurance claimants, find themselves in a particularly vulnerable position once the employer breaches the employment agreement."⁹ Heslop, 839 P.2d at 840. This same reasoning should apply in this instance where Zions breached its contractual duty by not allowing Mrs. Cook one day off for a surgical procedure, thus putting her in the dilemma of obtaining the requested medical treatment only if she were willing to risk losing her employment and health insurance. Zions has admitted that the purpose of allowing employees time off work for medical procedures is to help its employees obtain necessary medical attention, diagnosis and

purpose of an insurance contract. An insured frequently faces catastrophic consequences if funds are not available within a reasonable period of time to cover an insured loss; damages for losses well in excess of the policy limits, such as for a home or a business, may therefore be foreseeable and provable.

Beck, 701 P.2d at 802. The Court further found "no difficulty with the proposition that, in unusual cases, damages for mental anguish might [also] be provable." Beck, 701 P.2d at 802. As a result of Zions' denying Mrs. Cook's requests for time off for necessary medical treatment, Mrs. Cook has suffered emotional distress, marked changes in her normal life and is currently in a struggle to save her life. (R. at 254.)

⁹ There is no reason why Berube's analysis of consequential damages for breaches of implied-in-fact contracts should not be equally applicable in the context of express employment agreements.

treatment before health problems become serious or life threatening. (R. at 325; 471-472.) Jury questions therefore exist on the issues of whether there is a contract, whether that contract was breached, and what are the foreseeable general and consequential damages flowing from that breach.

E. Zions Cannot Retroactively Disclaim Mrs. Cook's Earned Compensation.

Zions has taken the position that any employment agreement between it and Mrs. Cook relating to compensation was *retroactively* disclaimed by an employee handbook. Zions states that

the handbook clearly and conspicuously states that employees should understand that neither party has entered into any employment contract, express or implied . . . By [the words of this disclaimer], Zions clearly disclaimed any intent to enter into an express or implied employment contract with its employees. Under these circumstances, no contract could exist.

(R. at 400-01.) However, Zions' disclaimer argument is fatally flawed. It is undisputed that Mrs. Cook did not receive any handbook until April 8, 1994. (R. at 251; 306.) A copy of the Employee Handbook Signature page, signed by Mrs. Cook and dated April 8, 1994, is attached hereto as Addendum "D". (R. at 346.)

In Hamilton v. Parkdale Care Center, Inc.,⁷⁵ Utah Adv. Rep. 32 (Utah App. October 12, 1995) (a wrongful termination case where, at the commencement of employment, the employee received and acknowledged a copy of the employer's handbook and at-will disclaimer), this Court observed that "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." Hamilton, 275 Utah Adv. Rep. at 33. Although Hamilton was an at-will case, it is instructive here.

First, since no handbook was given to Mrs. Cook until April 8, 1994, no disclaimer could have been "clear or conspicuous", as required by Hamilton, before that time.¹⁰ By April 8, 1994, Mrs. Cook's requests for sick leave had already been repeatedly denied. Therefore, any disclaimer in the handbook is irrelevant.

Second, Zions' disclaimer claim is fundamentally unfair and without merit. Zions, through its handbook, cannot retroactively disclaim earned compensation, nor should it be able to change, disclaim or revoke sick leave after it has vested and been requested. In Logue, the Missouri Court of Appeals held that an employer's act of changing the terms of its sick leave policy could not act to strip an employee of the benefits which had accrued to him prior to such alteration. Logue, 612 S.W.2d at 151. Here the

¹⁰ The trial court ignored the requirement that a disclaimer be conspicuous, and stated that although she did not know and was not aware of the disclaimer, Mrs. Cook was nevertheless somehow charged with knowledge of its contents, stating that "[e]ven though Ms. Cook denies receiving the handbook until April 8, 1994 she certainly knows before receipt and after that such a book contains only 'guidelines' for company and employee relations and expectations and cannot be construed to create greater contractual liability." (Citation and footnote omitted; Emphasis added) (R. at 479.)

record is clear that Zions has never even attempted to change the terms of Mrs. Cook's sick leave. (R. at 250-51; 304.) The handbook's statement of Zions' sick leave policy, rather than changing that policy, simply confirms the compensation agreement and practices Mrs. Cook had already relied on for six years. (R. at 116-17.) Moreover, the Employment Agreement states that only "[u]pon termination of employment [will sick leave] . . . benefits . . . be forfeited." (R. at 441; Addendum "B".)

Third, any purported disclaimer in an employment manual is ineffective in retroactively refuting the essence of the employment relationship itself, i.e., the existence of a contract related to compensation for services rendered. As stated in Kirberg v. West One Bank, 872 P.2d 39, 40 (Utah App. 1994), disclaimers can be modified by an expressed or implied agreement. See Perry v. Sindermann, 408 U.S. 593, 603, (1972) (employer's de facto and written policies may create an employment contract even where a policy manual states the contrary). Agreements regarding an employee's compensation are not the types of promises an employer should be able to retroactively disclaim. Nevertheless, a review of the handbook disclaimer, (R. at 106), shows that what Zions is attempting to avoid is an employee's ability to rebut the at-will presumption, not an employee's right to receive compensation.

Zions' claim that the handbook disclaimer allows it to void all of its obligations to its employees would operate as a fraud upon the employees. Once Mrs. Cook earned and accrued sick leave by performing her duties as an employee of Zions, Zions cannot deny her that compensation under the guise of an "at-will" disclaimer. Nor could Zions rely on that disclaimer to refuse to give an employee earned salary, health insurance, life insurance, vacation pay, pension funds, or any other form of compensation, once that compensation is due to an employee. The at-will nature of employment allows an employer to *prospectively* change the terms of that employment, or to terminate the relationship altogether, but it does not allow an employer to deny compensation already due.

III. The Covenant of Good Faith and Fair Dealing Exists Within the Confines of All Contracts, Including Employment Compensation Agreements.

Zions argued to the trial court that "in the employment context, an implied covenant of good faith and fair dealing is not recognized under Utah law." (R. at 71.) To support this representation, Zions cited three cases: Brehany, 812 P.2d at 49; Heslop, 839 P.2d at 828; and Loose v. Nature-All Corp., 785 P.2d 1096 (Utah 1989). Notwithstanding Zions' misstatement of the law, both the Utah Supreme Court and this Court have held that the covenant of good faith and fair dealing *does* exist within the

confines of all contracts, including employment contracts.¹¹ The Utah Supreme Court in Heslop, citing Brehany which in turn cited Loose, stated that "every contract is subject to an implied covenant of good faith." Heslop, 839 P.2d at 840 (Emphasis added). In Dubois v. Grand Central, 872 P.2d 1073 (Utah App. 1994), citing Heslop and Brehany, this Court specifically stated that "[n]one of these cases have held that there is not an implied covenant of good faith and fair dealing in either at-will or other sorts of employment contracts." Dubois, 872 P.2d at 1078. The Dubois court clearly reaffirmed the concept that the "implied covenant [of good faith and fair dealing] protects an employee from denial of rights under the contract . . . ". Dubois, 872 P.2d at 1078-79.¹²

The cases cited by Zions simply provide that the implied covenant of good faith and fair dealing does not limit an employer's right to terminate an otherwise at-will employee, not that the implied covenant of good faith does not exist. Zions misconstrued Brehany, Helsop and Loose as extinguishing any implied

¹¹ See e.g. Olympus Hills Center, Ltd. v. Smith's Food, 889 P.2d 445 (Utah App. 1994, cert. denied, 899 P.2d 1231 (Utah 1995) and the cases cited therein.

¹² Zions would have us believe that this Court in Dubois was unable to interpret the relevant decisions of the Utah Supreme Court, arguing that the Dubois opinion must "give way to the higher authority of the Supreme Court." (R. at 404.) However, it is clear that Dubois and the Utah Supreme Court's decision cited therein are consistent in holding that the implied covenant of good faith and fair dealing exists in all contracts.

covenant of good faith in the employment context may have misled the trial court.

The covenant of good faith and fair dealing arises because "contracting parties, hard as they may try, cannot reduce every understanding to a stated term." Olympus Hills, 889 P.2d at 450. Therefore, "[t]he good faith question often arises because a contract is an exchange expressed imperfectly and projected into an uncertain future. Contract parties rely on the good faith of their exchange partners because detailed planning may be ineffectual or inadvisable." Steven J. Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 Har. L.Rev. 369, 371 (1980).

Although the covenant of good faith and fair dealing exists within every contract, the Heslop decision correctly held that the "covenant cannot be construed 'to establish new, independent rights or duties not agreed upon by the parties.'" Heslop, 839 P.2d at 840, citing Brehany, 812 P.2d at 55. Mrs. Cook has not sought to use the implied covenant of good faith to establish new, independent contractual rights or duties. Her claim is that Zions has violated its obligation of good faith and fair dealing in its performance of her employment agreement by repeatedly denying necessary time off for diagnostic medical treatment.

Because Zions requires its employees to notify their departmental supervisors of the need to take sick leave for medical

procedures, (R. at 327), and requires them to obtain approval before they can schedule medical treatment, (R. at 344; 471-72), Zions has reserved for itself, rightly or wrongly, limited discretion to approve sick leave. To the extent Zions exercised discretion by denying Mrs. Cook sick leave, it had an obligation to do so in good faith, for the covenant of good faith limits "the exercise of discretion in performance conferred on one party by the contract." Burton, *supra*, at 372-73. The covenant of good faith and fair dealing may thus "be used to protect a 'weaker' party from a 'stronger' party." Burton, *supra*, at 383.¹³

Although Zions did require Mrs. Cook to obtain approval before taking time off for scheduled medical treatment, (R. at 344; 471-72), the limit of its discretion in denying her requests was clearly set forth in its Newsbreak statement: "Zions policies provide employees with adequate time to seek needed medical treatment." (R. at 349; Addendum "C".) (Emphasis added.) In this statement, Zions' has admitted that it should have allowed Mrs. Cook "adequate time to seek needed medical treatment", but despite her repeated requests, unfortunately did not. Therefore, a trier

¹³ The covenant of good faith and fair dealing is mutual. Just as employees could abuse their right to sick leave and lose their employment, conversely, an employer could abuse its discretion by denying sick leave to the injury of its employee, for which the employer would be liable under the covenant of good faith and fair dealing.

of fact could find that Zions acted in a manner that, by its own standard, violated the covenant of good faith and fair dealing.

IV. The Trial Court Erred By Not Finding Genuine Issues of Material Fact as to Zions' Performance under the Implied Covenant of Good Faith and Fair Dealing.

Mrs. Cook claims that Zions acted in bad faith by preventing her from using one day of her earned sick leave for nearly four months. This Court has held that "good faith and fair dealing are fact sensitive concepts, and whether there has been a breach of good faith and fair dealing is a factual issue, generally inappropriate for decision as a matter of law." Republic, 883 P.2d at 281. See also Western Farm Credit Bank v. Pratt, 860 P.2d 376, 380 (Utah App. 1993), cert. denied, 879 P.2d 266 (Utah 1994) (whether a party has breached the covenant of good faith and fair dealing is generally a factual issue to be determined by the fact finder, not an issue subject to resolution as matter of law); Corbin, *supra* at § 654B (if a dispute exists concerning a duty of good faith as to why contractual parties did what they did, there is a question of fact for the fact finder). Whether Zions did in fact breach its duty under the covenant of good faith and fair dealing is a factual issue which should be decided by a trier of fact.

V. The Trial Court Erred by Resolving Factual Disputes Against Mrs. Cook and by Relying on Issues Neither Raised by Zions Nor Properly Considered in a Motion for Summary Judgment.

A. The Trial Court Failed Use a Proper Rule 56 Analysis.

The Tenth Circuit, consistent with Utah law, has held that

[w]hen applying [the Rule 56(c)] standard, we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. [Citation omitted.] If there is no genuine issue of material fact in dispute, then we next determine if the substantive law was correctly applied by the district court.

Hirase-Doi v. U.S. West Communications, Inc., 61 F.3d 777, 781 (10th Cir. 1995).¹⁴ The trial court did not apply this standard.

Rather than deciding whether factual issues exist as to the formation and performance of the contract under the Rule 56 standard, the trial court erred by construing facts against Mrs. Cook, and then using those misconstrued facts to draw invalid legal conclusions. For example, in its Memorandum Decision, the trial court held that Mrs Cook's "claim that she was denied the opportunity to utilize her accrued sick leave is without verification in the facts." (R. at 479.) The trial court made

¹⁴ Reference to federal cases and the federal advisory committee notes is pertinent to give meaning and effect to the Utah rules. Hansen v. Heath, 852 P.2d 977, 979 (Utah 1993). When interpreting the Utah Rules of Civil Procedure, Utah courts will look to the express language of the Utah Rules and, to the extent that they are similarly worded, to the Federal Rules and cases interpreting them. First Security Bank of Utah Nat'l Ass'n v. Conlin, 817 P.2d 298, 299 (Utah 1991).

this conclusion notwithstanding the obvious factual dispute involving Mrs. Cook's claims that she made several requests for time off which were denied, and Zions' claim that no such requests or denials ever occurred. The trial court clearly interpreted facts *against* Mrs. Cook, instead of in her favor.

B. The Trial Court Erred in Raising the Issue of Mitigation of Damages.

Without specifically ruling on the issue of mitigation of damages, the trial court's decision seems to rely on Mrs. Cook's "failure" to take the day off without her supervisor's permission. (R. at 480.) The record indicates that Mrs. Cook's delay in seeking medical treatment was not voluntary. She feared that she would be terminated in accordance with Zions' policies if she blatantly disregarded her supervisor's directive to remain at work during a period of time when her workload was exceptionally heavy. Not knowing whether she had a medical problem, Mrs. Cook acted reasonably under the circumstances by maintaining her employment and insurance while continuing to make requests for time off.

In ruling that Mrs. Cook should simply have refused to delay her surgery, the trial court made a factual determination that she failed to mitigate the damages caused by Zions' breach. The issue of mitigation of damages was improperly considered by the trial court, because not only is mitigation a factual question, it was not raised by Zions in support of its Motion for Summary Judgment.

It is well settled that a "[p]laintiff's duty to make reasonable efforts to mitigate damages does not extend to subjecting oneself to undue risk and expense . . . whether efforts were reasonable or potential risk and expense were undue are questions of fact . . .". Gates v. City of Tenakee Springs, 822 P.2d 455, 460 (Alaska 1991) (Citations omitted). See also, Massey Ferguson, Inc. v. Stowe, 686 P.2d 604 (Wyo 1984). Accord Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896 (Utah 1989) (financial burden can be an excuse for failure to mitigate); Mildon v. Bybee, 375 P.2d 458, 461 (Utah 1962) ("the objective commercial reasonableness of mitigation efforts is a fact question . . .")

Finally, Mrs. Cook has not been deposed nor allowed the opportunity to testify. Therefore, the facts related to mitigation are not yet fully known and should not have considered below.

CONCLUSION

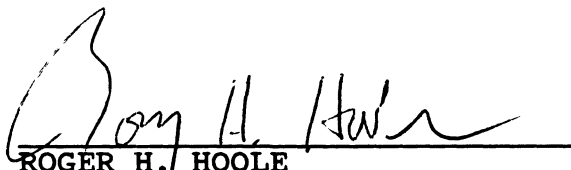
Mrs. Cook has alleged that she bargained for, and entered into an agreement with Zions which allowed her paid sick leave when needed. Zions has denied that they made any agreement, express or implied. The trial court, instead of construing the facts indicating the existence of an express or implied agreement in favor of Mrs. Cook, relied on the at-will nature of their relationship and ruled that no employment agreement existed as a matter of law. The court further found that the implied covenant

of good faith and fair dealing does not exist within employment compensation contracts.

Construing all facts, and all inferences in favor of Mrs. Cook, there is ample evidence for a reasonable jury to find that the parties entered into a binding agreement concerning compensation which was breached in bad faith, causing damages. Therefore, Zions was not entitled to summary judgment. The judgment granted in Zions' favor must be overturned and this case remanded for a determination of factual issues.

DATED this 27th day of November, 1995.

HOOLE & KING, L.C.

A handwritten signature in black ink, appearing to read "Roger H. Hoole", is written over a horizontal line.

ROGER H. HOOLE

PAUL M. KING

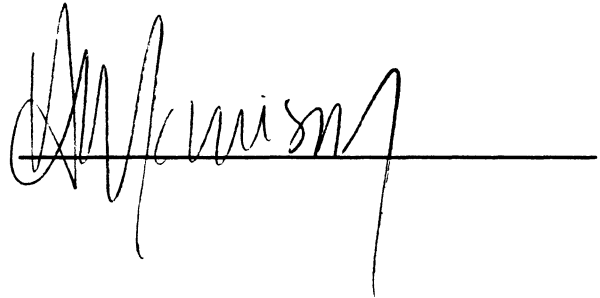
HEATHER E. MORRISON

Attorneys for Plaintiff and Appellant

CERTIFICATE OF SERVICE

**This is to certify that on the 27th day of November, 1995,
four copies of the foregoing were hand-delivered to the following:**

**Lois A. Baar
Parsons, Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111**

A handwritten signature in dark ink, appearing to read "M. J. Morrison", is written over a horizontal line. The signature is stylized with a large initial "M" and a long, sweeping tail.

Tab A

JUN 8 1995

SALT LAKE

By _____

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

GINA COOK

Plaintiff,

vs.

ZIONS FIRST NATIONAL BANK

Defendant.

**MEMORANDUM
DECISION**

CASE # 940905799

This matter came before the Court on a second oral Argument of Counsel as to the Defendant's "Motion to Compel Arbitration and Stay Court Proceedings or in the Alternative for Summary Judgment Dismissing Plaintiff's Case." The matter was first argued March 10, 1995 but due to the Court's lengthy calendar on that date, Counsel for plaintiff was concerned as to the adequacy of time to present the Plaintiff's position and also thereafter was concerned that they needed to provide the Court with supplemental material. The matter was set for further argument April 21, 1994 , at 9:00 A.M. The Plaintiff was represented by Roger Hoole, who argued the case, and by Heather Morrison and Paul King. The Defendant was represented by Lois Baar, who argued the case, and Michael Zody.

The Court heart the arguments of Counsel, took the matter under advisement, and herein renders its

MEMORANDUM DECISION.

The single issue in the case is whether there is a legal basis for the Plaintiff to blame Zions Bank for the consequences of the Plaintiff not obtaining a medical day off as authorized by the Bank's medical leave policy and as accrued to the Plaintiff through her

length of employment. Ms. Cook claims the bank failed to allow her time for medical leave for surgery to remove and biopsy a growth in her lip. The bank disputes it.

The factual setting is as follows:

1. Plaintiff was employed by Zions bank in May of 1988 at a rate of \$6.00 per hour. She has thereafter received appropriate increases in compensation.

2. While Plaintiff was initially a part-time employee, she later accepted full-time employment. She was entitled to accrue for medical absence, while working part-time at over twenty (20) hours per week, one-half (1/2) day per month; and, while working full-time she accrued one (1) day per month. There is no dispute she had accrued sufficient time to cover her absence for the surgery.

3. Plaintiff was hired as an "at-will" employee and remains employed at this time.

4. On January 29, 1994, Plaintiff requested and was authorized to take "...one hour of time off" to visit her doctor on February 1, 1994 to have "...the lump on my lip removed."¹

5. The time was granted, the appointment was met, but the Doctor "...decided

¹ See the Affidavit of Gina Cook signed January 20, 1995, and Exhibit 12 attached to "Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment." The court notes that on Exhibit 12 was the further authorization to see Dr. Griffith regarding an allergy appointment apparently scheduled and rescheduled by the plaintiff. The combined appointments occupied the time from 8:30 A.M. to 12:00 P.M.

that the procedure would take a full day and would need to be done in a hospital."

6. Ms. Cook returned to work and requested a "...full day off for surgery."

7. Ms. Cook claims she was denied that time off due to the heavy work requirements imposed upon her and her department during the first few months of 1994. In fact she states that she asked for additional help in the department and a reduction of the "overtime" requested but each request was denied by the bank.

8. Ms. Cook alleges she made further requests for the medical leave which requests were denied.

9. On May 20, 1994, the surgery was scheduled, the growth was removed and a biopsy was performed.

10. On May 31, 1994 the biopsy revealed "...a form of aggressive, malignant melanoma."

11. On June 2, 1994 a second surgery was performed requiring removal of additional portions of flesh on Ms. Cook's chin and lower lip.

12. Ms. Cook remained off work for ten and one-half (10 1/2) weeks thereafter from May 31, 1994 through August 8, 1994.

13. Apparently Ms. Cook's entire absence was compensated and she remains employed to this date. The surgery has not seemed to resolve the difficulties and Ms. Cook may now be facing a terminal illness.

Zions Bank, relevant to its "Motion...for Summary Judgment Dismissing Plaintiff's

Complaint,"² alleges the following facts:

1. Plaintiff was employed in May of 1988 and Zions does not enter into any individual employment agreements with its employees and did not do so with Ms. Cook.
2. In February of 1994 Zions issued a "handbook" containing the company policy guidelines regarding attendance, short term absences, and long term absences. The handbook contains a disclaimer as to creating any express or implied obligations for either the Bank or its employees.
3. The handbook advises employees that they are hired as, and remain "at will" employees.
4. The handbook contains some of the "...policies, procedures, benefits and other pertinent information..." to "...serve as a valuable reference"³ to employees.

Ms. Cook's "Complaint (Jury Trial Demanded)" alleges the following Counts:

1. Breach of Express Employment Contract.
2. Breach of Implied-In-Fact Employment Contract.
3. Breach of Implied Covenant of Good Faith and Fair Dealing.

² The motion was titled, "Motion to Compel Arbitration and Stay Court Proceedings or in the Alternative for Summary Judgment Dismissing Plaintiff's Case." The request to compel arbitration was withdrawn March 10, 1995 at the initial oral argument on the matter.

³ see Exhibit A to defendant's "Memorandum in support of Motion to Compel Arbitration and Stay Court Proceedings or in the Alternative for Summary Judgment Dismissing Plaintiff's Case."

4. Intentional Infliction of Emotional Distress.

Based upon the foregoing, the Court finds and rules as follows:

1. The first cause of action for "Breach of Express Employment Contract" must be and the same is dismissed because there is no employment contract between the parties. Utah law presumes that any employment contract with no specified term as to duration is an "at-will" relationship. Berube v. Fashion Center, Ltd., 771 P.2d 1033, (Utah 1989) Nothing in evidence can be shown to have changed the initial "at-will" relationship. Even in cases where an "at-will" employee has no right of action against its employer for breach of employment contract upon being discharged, (Brehany v. Nordstrom, Inc., 812 P.2d 49 [Utah 1991]) in this case, since there has been no discharge, there exists an even stronger reason to disallow an suit for Breach of Contract. The Plaintiff remains employed yet wishes to maintain her lawsuit for breach of contract while going to work every day and continuing to receive employee benefits and income.

2. The second cause of action for "Breach of Implied-in-Fact Employment Contract" must be and the same is dismissed because the basis for such a claim is too remote and speculative to give rise to a contractual agreement.

Within the company "handbook" is contained the statement, "This booklet is not intended to be an official policies and procedures manual, nor is it intended to create any express or implied contractual obligations on the part of Zions Bancorporation or its employees."

The court can see no basis to claim that assurances were made to Ms. Cook to cause her to change her understanding as to her "at-will" employment. Even though Ms. Cook denies receiving the handbook until April 8, 1994⁴ she certainly knows before receipt and after that such a book contains only "guidelines" for company and employee relations and expectations and cannot be construed to create greater contractual liability. (See Hodgson v. Bunzl Utah, Inc., 844 P.2d 331, [Utah 1992])

In addition, there can be no cause of action when the employee remains, as she does here, employed by the Bank. The cases of Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989) and Kirberg v. West One Bank, 872 P.2d 39 (Utah Ct. App. 1994) each relate to claims associated with termination which has not occurred in this case. It seems particularly distasteful to allow an employer and employee to be in litigation with each other while they must continue to work together daily. Perhaps that is, in part, the reason that other agencies deal with such work related claims as Workmen's Compensation, etc.

3. The third cause of action for "Breach of Implied Covenant of Good Faith and Fair Dealing" must be and the same is herein dismissed. The Plaintiff's claim that she was denied the opportunity to utilize her accrued sick leave is without verification in the facts. She received ten and one-half (10 1/2) weeks paid leave when the second surgery was

⁴ Affidavit of Gina Cook paragraph 8 states, "...I was not given a copy of said employment handbook until April 8, 1994, nor did I ever receive a copy of any earlier employee handbook. The Employee Handbook was received and the Signature Page was signed by me on April 8, 1994."

performed June 2, 1994. The seeming basis of her claim is that she was asked by the bank to delay the surgery due to pressures at work. She simply could have refused to do so. She could simply have set the surgery earlier, informed her supervisor she was taking the time off, for the surgery and then done so. Had the bank terminated her for such a request, the case would be quite different. Can or should an employer, when both the employer and employee are admittedly unaware of the gravity of the employee's health, be subject to suit for failing to deal fairly and in good faith when the employee requests time for medical care? The employee bears the primary responsibility to know and understand her own health. She knew her family medical history and the occurrences of cancer therein. The fact that she allowed herself to delay the surgery cannot now be the responsibility of her employer. No one denied her any claims made...indeed, her only present claim is they denied her request for time off to attend the surgery. The facts of the case don't support that denial just because she did not schedule the surgery until May 20, 1994.

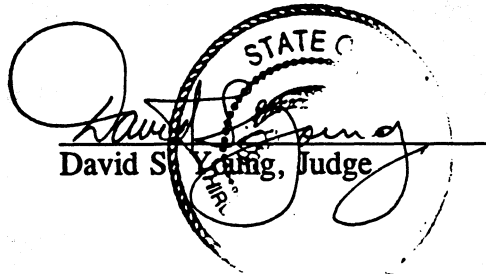
4. The fourth cause of action for "Intentional Infliction of Emotional Distress" cannot lie before this court but must be a part of an action, if any, under Workmen's Compensation. Munteer v. Utah Power and Light Company, 823 P.2d 1055 (Utah 1991) Employers are shielded from liability for work related injuries unless their conduct was intended in some way to be injurious. In this case, since neither the employer nor the employee knew of the gravity of the medical condition, it cannot be contended that the employer knew of and/or intended the "injurious act." Lantz v. National Semiconductor

Corp., 775 P.2d 937, (Utah App. 1989) The earliest anyone knew of the "malignant melanoma" was May 31, 1994.

The Plaintiff's present medical condition is tragic and can only cause one to feel empathy and compassion. Unfortunately, it was she or her physician who should have acted sooner...not her employer. An employer is entitled to say that the demands of work are busy and that they need help...and employees are entitled to say that their medical needs pre-empt the employers work, and then schedule their appointments appropriately. Had that occurred this case would not be before the court.

Ms. Baar is requested to prepare an order consistent herewith and with her pleadings on file herein. If other facts or law are deemed appropriate for inclusion, consistent herewith, they may be presented.

Dated, June 8, 1995.


David S. Young, Judge

Tab B

ZIONS BANCORPORATION and SUBSIDIARIES
Employment Benefits Disclosure and Pay Agreement

I. Salary Administration

- A. Bi-weekly pay periods -- 26 pay periods per calendar year
- B. Time cards completed by all non-exempt employees (non-supervisory employees)
- C. Each employee will be evaluated in 6 months and 12 months after initial hiring and at least once each year thereafter.
- D. Pay Rate: \$ 12.00 per hour/per month (circle one)
- E. Pay Commences: 5-31-88
- F. Normal Workplace: 235C
- G. Working Status: PT Select full-time, part-time, or temporary.

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 1000 hours per year
- 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, cashiers 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 Instalment 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.

Note: Insurance Plans C, D & E are subject to waiting period of 60 days. The insurance forms must be completed at least by the 31st day after eligibility; otherwise, a medical exam may be necessary to become eligible.

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.

Date: 8-23-88

[Signature]
- Employee's Signature

[Signature]
Official Witness

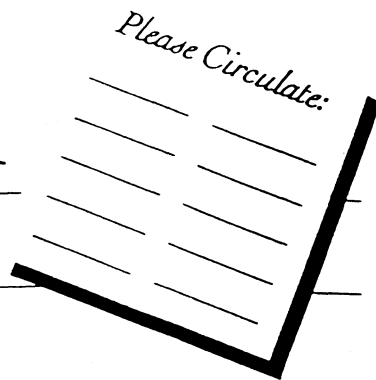
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Tab C

Newsbreak

ZIONS WEEKLY NEWS UPDATE

Vol. 2, No. 38
September 20, 1994



ZIONS BANK RESPONDS TO LAWSUIT

Several news stories have appeared on television and in newspapers during the past few days regarding a lawsuit filed by a Zions Bank employee. The lawsuit alleges that Zions Bank prevented the employee from taking time off work to obtain appropriate medical care, resulting in a severe medical problem. Zions Bank issued a statement, expressing sympathy for our employee and for her family.

She has developed a difficult medical problem. However, after investigating the claims contained in her lawsuit, Zions First National Bank categorically denies that her failure to seek timely medical attention was caused by Zions Bank. The Company believes that neither Zions Bank nor any of its managers have prevented her from seeing a doctor.

The health and welfare of employees are important to Zions Bancorporation. Zions policies provide employees with adequate time to seek needed medical treatment.

ZIONS ANNOUNCES FORMATION OF ZIONS EMPLOYEE SERVICE TEAM ("ZEST")

Harris Simmons, President and CEO, announced yesterday the formation of the new Zions Employee Service Team, or "ZEST" for short.



Zions Employee Service Team

Zions employees who participate in ZEST will have many opportunities throughout the year to help individuals in need and to serve their communities. "Zions employees have a great tradition of helping their neighbors," said Mr. Simmons. "Zest will help to identify needs, alert interested Zions employees, and organize the manpower to help meet those needs. In this way, more Zions employees can involve themselves in truly making a difference in our communities. That's what ZEST is all about."

Bret D. Passey, manager of the Layton Antelope Drive office, has been named as chairman of ZEST. According to Bret, "Employees can participate in a variety of ZEST projects, including the annual Paint-a-Thon, donations to needy families, and other charitable and community-oriented events. We'll keep everyone informed about opportunities to participate in ZEST projects."

The purpose of ZEST is to allow more Zions employees to participate in community service projects. Because many branches and departments organize their own service projects, the formation of ZEST will allow more involvement in those projects by other Zions employees. Watch for ZEST announcements in Teller and Newsbreak

EMPLOYEE HANDBOOK SIGNATURE PAGE

We are providing you with a copy of Zions Employee Handbook to assist you in understanding Zions' employee benefits and important policies and procedures. This Handbook is an important tool to refer to, as questions arise.

To insure that you do not miss the opportunity to participate in the employee benefits which suit you, please read the employee benefits leaflets in the inside of the back cover of the Handbook. These leaflets explain, among other things, enrollment deadlines.

A summary of various policies and procedures are found on the numbered pages of the Handbook. See your Branch or Department Manager for full details of policies and procedures.

Please understand that this Handbook is subject to change and that change in policies may supersede, modify or eliminate the policies in this booklet.

We hope the Handbook will be of assistance to you. Please sign below acknowledging receipt of the Handbook and your understanding of its significance to your employment.

Gina Cook
PRINT NAME

4/8/94
DATE SIGNED

Gina Cook
EMPLOYEE SIGNATURE

1/90

ZB000403