

1997

Michael W. Hom v. Utah State Department of
Public Safety, a governmental agency; Cherie Ertel;
Douglas Bodrero; A. Roland Squire; Arthur
Hudachko; Bart Blackstock; and John Does 1
through 10 : Reply Brief

Utah Court of Appeals

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

MICHAEL W. HOM,	:	
	:	
Plaintiff/Appellant,	:	REPLY BRIEF OF APPELLANT
	:	
vs.	:	
	:	
UTAH STATE DEPARTMENT OF PUBLIC	:	Appeal No. 970592-CA
SAFETY, a governmental agency;	:	
CHERIE ERTEL; DOUGLAS BODRERO;	:	
A. ROLAND SQUIRE; ARTHUR HUDACHKO;	:	
BART BLACKSTOCK; and JOHN DOES	:	
I through X;	:	Priority No. 15
	:	
Defendants/Appellees.	:	

APPEAL FROM THE JUDGMENT AND ORDER OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE STEVEN HENRIOD PRESIDING

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Michael W. Hom, the Appellant herein, by and through his counsel, L. Zane Gill of the Law Office of L. Zane Gill, P.C., respectfully submits the following brief in reply to the Appellees' Brief.

ARGUMENT

I. THE APPELLANT'S PERCEIVED HANDICAP DISCRIMINATION CLAIM WAS TIMELY FILED, THEREFORE, THE TRIAL COURT IMPROPERLY DISMISSED APPELLANT'S HANDICAP DISCRIMINATION CLAIM.

This Court should reverse the trial court's order dismissing the Appellant's perceived handicap discrimination claim. The Appellant timely filed his perceived handicap discrimination claim as the statute of limitations was tolled pursuant to the discovery rule.

It is a well established principle that "[g]enerally, a cause of action accrues 'upon the happening of the last event necessary to complete the cause of action.'" *Berenda v. Langford*, 914 P.2d 45, 50 (Utah 1996) (quoting *Myers v. McDonald*, 635 P.2d 84, 86 (Utah 1981)). Nevertheless, "in certain instances, the discovery rule 'may operate to toll the period of limitations until the discovery of facts forming the basis for the cause of action.'" *Id.* 50-51 (quoting *Walker Drug Co. v. La Sal Oil Co.*, 902 P.2d 1229, 1231 (Utah 1995) (citation omitted)). As previously noted, there are three circumstances when the discovery rule applies. "The discovery rule applies when mandated by statute, when a defendant has concealed a plaintiff's cause of action, or when exceptional circumstances exist." *Id.* at 51 (citation omitted). Finally, it is critical to note that

if the discovery rule does apply, "'the limitations period does not begin to run until discovery of facts forming the basis for the cause of action.'" *Id.* (quoting *O'Neal v. Division of Family Services*, 821 P.2d 1139, 1143 (Utah 1991) (citation omitted)). Thus, in this case the statute of limitations would not begin to run until the Appellant had learned of the facts comprising his perceived handicap discrimination claim which was in July and August of 1994.

In this case, the Appellant maintains that the discovery rule should apply to prevent the running of the statute of limitations pursuant to the concealment and exceptional circumstances exceptions. However, before the Court may consider these exceptions, the party seeking protection of the discovery rule must make an initial showing that the party "did not know and could not reasonably have discovered the facts underlying the cause of action in time to commence an action within that period." *Walker Drug Co., Inc. v. La Sal Oil Co.*, 902 P.2d 1229, 1231 (Utah 1995) (citation omitted).

A. Hom Did Not Know, Nor Could He Have Reasonably Discovered The Facts Underlying His Discrimination Cause Of Action.

The Appellees have argued that Hom should have discovered the facts supporting this cause of action prior to the running of the statute of limitations. Brief of Appellees at 30. The Appellees proffer a laundry list of events which they contend should have led Hom to discover that he was perceived as having a mental disability. The Appellees note that Hom recognized his

deteriorating relationship with his co-workers. Brief of Appellant at 11. However, the deterioration of Hom's relationship with his colleagues was directly linked to Hom's participation in the RFP process. R. 552-56, 527, 532-34. Hom objected to the illegal actions taken by his co-worker's and insisted on strict compliance with the mandates of Utah law. Hom's co-workers, however, had another agenda and Hom was only complicating that agenda. Thus, it is not unreasonable for Hom not to perceive his deteriorating relationship with his colleagues as an indication that he was being perceived as mentally disabled.

Next, the internal affairs investigation that was conducted regarding Hom was the direct result of complaints about him by Appellee Ertel and the goings on in the RFP Committee. R. 508, 548-554. Ertel did not like Hom objecting to her actions during the RFP process. In fact, Hom was very unhappy with Ertel changing his work product without his permission and with Ertel's participation in activities that Hom considered to be illegal. This caused dissension among these two individuals. This conflict between Hom and Ertel did not put Hom on notice that he was perceived as having a mental disability by his supervisors and peers. In fact, it is unreasonable to assume that mere antagonism between co-workers would lead one to believe that he was being perceived as having a disability.

In addition, the fact that Hom was being overworked and was suffering from the subsequent stress and pressure of this

exertion, does not mean that he should have known that he was being perceived as having a mental disability. Merely because one may experience stress and pressure from work does not mean that others perceive that individual as having a mental disability. It certainly is not unreasonable that this did not indicate to Hom that his supervisors were perceiving him as an individual with a mental disability.

The Appellees also maintain that Hom should have been aware of the Appellees' perception of a mental disability because he was banned from one of the floors in the building in which he worked. However, again, Hom perceived this ban as directly related to his objections to the illegalities that were taking place during the RFP process. Hom perceived that he was being retaliated against by those of whom he had complained. R. 503. Hom's belief in this regard was not unreasonable given the fact that prior to the RFP process he had a good relationship with his colleagues. R. 552-56. It was not until he started to point out the improprieties and the illegalities that were taking place during the RFP process that adverse actions were taken against Hom.

The Appellees further argue that Hom should have known that he was being perceived as mentally disturbed because Appellee Squire had tape recorded a conversation between Squire and Hom. It was not unreasonable for Hom not to take the tape recording as a cue that he was being perceived as having a mental handicap. The conversation that was taped took place after the disastrous

annual job run for which Squire wanted to lay total blame on Hom. Hom and Squire had had a disagreement over how to proceed during the annual job run. R. 511-12, 499-517. It simply does not warrant the conclusion that an employee would understand that he was being discriminated against on the basis of a perceived mental disability because his supervisor tape records a conversation between them. And in this case, it was not unreasonable that Hom did not reach such a conclusion.

As to the revocation of Hom's security clearance, again, it was not unreasonable for Hom to believe that this took place as retaliation for his vigorous participation in the RFP process or in retaliation for the circumstances surrounding the failed annual job run. By this time, many adverse actions were being taken against Hom. It was not unreasonable for Hom to believe that the revocation of his security clearance was just another action being taken against him for his participation in the RFP process.

Finally, when Hom met with Townsend he was trying to secure information to process his grievance. R. 514-15. Townsend tried to dissuade Hom from prosecuting the grievance. R. 515. Townsend, on the other hand, claims that he reassured Hom that he would do all he could to assist Hom but that any information needed to be obtained from Townsend. R. 603. It is during this meeting that Townsend claims Hom cried. According to the Appellees, this fact is supposed to have made Hom aware that he was being perceived as mentally disturbed. However, Townsend did

not refer Hom to counseling or help despite the existence of a program for such assistance. R. 618. If Townsend had done so, it would have been reasonable for Hom to know that he was being perceived as mentally disabled.

None of the facts presented in the Appellees' laundry list would establish that Hom knew of the pertinent facts underlying his perceived handicap discrimination cause of action. Nor does this laundry list establish that Hom should have discovered the underlying facts prior to the running of the statute of limitations. Moreover, even if these items had led Hom's counsel to question Appellees during their depositions with regard to a potential claim for disability discrimination, the facts underlying the cause of action were not discovered until that time. "The limitations period is postponed only by belated discovery of key facts and not by delayed discovery of legal theories." *Anderson v. Dean Witter Reynolds, Inc.*, 920 P.2d 575, 579 (Utah Ct. App. 1996) (citations omitted). Hom did not discover the facts underlying this cause of action until the deposition testimony was secured in the summer of 1994.¹

¹ The Appellees also argue that the three reasons given for Hom's termination should have put him on notice that he was being terminated because of a perceived mental disability. However, the three reasons given for Hom's termination (that Hom was a security threat, that Hom had committed perjury, and that Hom had been insubordinate), make no reference to the Appellees' belief that Hom was mentally disturbed. See R. 492-93, 494-98. Moreover, given the constant retaliation that Hom had suffered, it was logical for him to understand that the reasons given were tied to that retaliation and not that they were the result of illegal discrimination against him.

Based on the foregoing, it is evident that Hom has established the requisite threshold for consideration of the fraudulent concealment and exceptional circumstances prongs of the discovery rule.

B. The Appellees Concealed Hom's Discrimination Cause Of Action.

The discovery rule should be applied in this case because the Appellees concealed Hom's discrimination cause of action.² Here, the Appellees took affirmative steps to conceal the facts underlying Hom's cause of action for perceived handicap discrimination. "In such a situation, a plaintiff can avoid the full operation of the discovery rule by making a prima facie showing of fraudulent concealment and then demonstrating that given the Defendant's actions, a reasonable plaintiff would not have discovered the claim earlier." *Berenda v. Langford*, 914 P.2d at 51 (citations omitted). This

requires a determination of (i) when a plaintiff would reasonably be on notice to inquire into a defendant's wrongdoing despite the defendant's efforts to conceal it; and (ii) whether a plaintiff, once on notice, would reasonably have, with due diligence, discovered the facts forming the basis of the cause of action despite the defendant's efforts to conceal those facts.

Id. at 52. As the *Berenda* court noted, such a determination is not as simple as it seems.³ *Id.*

² The Appellees failed to address the "exceptional circumstances" prong of the discovery rule. The Appellant would direct the Court's attention to his principle brief for argument on this point.

³ The want of simplicity in these circumstances warrants a reversal of summary judgment on this issue in this case:

Here the Appellees did affirmatively conceal that one of the motivating factors for the adverse actions against Hom was a perceived mental disability. No reference was made to any such perception in the notice of termination. R. 492-93, 494-98. Further, no indication of this discrimination was made evident in the Appellant's discovery responses filed in the companion federal case. Moreover, the discovery responses were served upon the Appellants on November 15, 1991. See Addendum to Brief of Appellant. The Appellants did not file their responses to those discovery requests until May 15, 1993, more than one and one-half years later! Further, the answers were only filed after Hom sought the assistance of the court via a motion to compel. These answers did not set forth the facts which would support Hom's cause of action, despite the fact that Hom requested that all reasons for his termination be disclosed. This concealment took place despite the fact that the perceived mental disability was a motivating factor, if not one of the primary reasons, for Hom's termination. R. 363, 494-98, 552-554, 588, 605. Hom then started the process to take the depositions of the critical

When a defendant has concealed a plaintiff's cause of action, the questions of when a plaintiff should reasonably begin inquiring about the defendant's wrongdoing and whether, once on notice, the plaintiff has acted with reasonable diligence to discover the facts forming the basis of the cause of action are all highly fact-dependent legal questions. ... we explicitly acknowledge that weighing the reasonableness of the plaintiff's conduct in light of the defendant's steps to conceal the cause of action necessitates the type of factual findings which preclude summary judgment in all but the clearest of cases.

Berenda v. Langford, 914 P.2d at 53-54.

witnesses in the federal case. Hom attempted to take the critical depositions in November of 1993. See Letter from L. Zane Gill to Mark Ward dated October 12, 1993 attached in an Addendum hereto. The depositions did not take place at that time in order to accommodate the Appellees and their counsel. When the depositions did take place, Hom finally discovered the illegal discrimination on the part of the Appellees. At this point in time, Hom was put on inquiry that one of the grounds for his termination was a perception that he was mentally disabled. This was in July and August of 1994. After completing further investigation, Hom filed his amended complaint on March 6, 1995 adding a claim for perceived handicap discrimination. This cause of action was lodged with the court less than one year after its discovery. Thus, once put on notice of the possible existence of a cause of action for perceived handicap discrimination, *i.e.* "circumstances sufficient to put a reasonable person on inquiry[,] " Hom was diligent in getting the matter before the Court.⁴ *Anderson v. Dean Witter Reynolds, Inc.* 920 P.2d at 579

⁴ Hom's diligence is demonstrated by his efforts to move his federal litigation forward. See Addendum to Brief of Appellant. Hom timely filed his lawsuit. Hom submitted discovery requests. Hom took the depositions of the critical witnesses. Hom obtained a default judgment against the Appellees. If anyone is to blame for the delay in the discovery of the facts underlying Hom's discrimination cause of action, it is the Appellees themselves. The Appellees took more than two years to file an answer to Hom's complaint. The Appellees took an inordinate amount of time to respond to Hom's discovery requests. The Appellees failed to disclose all of the reasons for Hom's termination. It was the Appellees' lack of diligence in this matter that prevented Hom from learning the truth about his termination. Hom should not be punished for the lack of perseverance on the part of Appellees.

(citations omitted).

The trial court committed error when it found that the discovery rule did not apply to toll the running of the statute of limitations in this case. Hom did not know, nor could he have discovered the facts underlying his discrimination cause of action in order to commence the action within the statutory time period. The Appellees concealed that they perceived Hom as having a mental disability. The Appellees further concealed that this perception was one of the grounds for Hom's termination. Hom only learned of the true motivations for his termination during the deposition testimony of critical witnesses in July and August 1994. Upon being put on notice, Hom investigated and promptly amended his complaint. Therefore, this Court should reverse the trial court's entry of summary judgment against Hom on this issue.

II. THE TRIAL COURT IMPROPERLY DISMISSED THE APPELLANT'S CLAIMS FOR BREACH OF CONTRACT BECAUSE THE EMPLOYMENT RELATIONSHIP WAS CONTRACTUAL IN NATURE.

It is Hom's contention that he was employed by the State of Utah pursuant to an express contract the terms and conditions of which were supplied by statute and rules and regulations. These written instruments comprise the express terms of Hom's employment relationship with the State of Utah. Thus, because Hom's relationship is contractual rather than statutory, a six year statute of limitations applies. Hom's breach of contract claim and his breach of the implied covenant of good faith and fair dealing claim were timely filed within that six year period.

The Appellees make reference to other jurisdictions who have considered the issue now pending before this Court. The cases cited by the Appellees indicate that these jurisdictions have concluded that public service employment is statutory and not contractual. However, as noted by all parties involved, this precise issue has not been determined by the courts of this state.

It is the Appellant's contention that a finding that the nature of the relationship between the State and its civil service employees as contractual would be logical and premised upon existing precedent. See e.g. *Thurston v. Box Elder County*, 892 P.2d 1034 (Utah 1995) (affirming finding that the County had breached its employment **contract** with Thurston); *Newcomb v. Ogden City Public School Teachers' Retirement Comm'n*, 243 P.2d 941 (Utah 1952) (recognizing that statutes and ordinances become part of the employee's **contract** of employment, i.e. that they are incorporated as terms and conditions of the contract of employment between the public employer and the public employee). Therefore, the Appellant respectfully requests that the Court, in its careful consideration, rule that the character of the relationship between a public employer and its "civil service" employees is contractual in nature.

III. APPELLEES CANNOT RAISE EXHAUSTION OF ADMINISTRATIVE REMEDIES AS AN ALTERNATIVE GROUNDS FOR AFFIRMING THE DISMISSAL, GIVEN THE FAILURE OF THE APPELLEES TO PRESERVE THE ISSUE FOR APPEAL.

The Appellees raise the issue of the Appellant's failure to exhaust his administrative remedies in their Brief of Appellees.

See Brief of Appellees footnotes 3, 6, and page 25. This issue was not raised before the Court below, and therefore, this Court is precluded from reviewing the Appellees' failure to exhaust argument.

It is a well established principle of law that "a party must raise an objection in an earlier proceeding or waive its right to litigate the issue in subsequent proceedings." *Brinkerhoff v. Schwendiman*, 790 P.2d 587, 589 (Utah Ct. App. 1990). In order "[t]o preserve a substantive issue for appeal, a party must first raise the issue before the trial court." *Hart v. Salt Lake County Comm'n*, 945 P.2d 125, 129 (Utah Ct. App. 1997). Such issues must be raised before the trial court as it is the "proper forum in which to commence thoughtful and probing analysis" of issues. *State v. Bobo*, 803 P.2d 1268, 1273 (Utah Ct. App. 1990). In fact, by failing to raise the issue below, the Appellees' have "denie[d] the trial court 'the opportunity to make any findings of fact or conclusions of law' pertinent to the claimed error." *State v. Brown*, 856 P.2d 358, 360 (Utah Ct. App. 1993) (quoting *LaBaron & Assoc. v. Rebel Enter.*, 823 P.2d 479, 483 n. 6 (Utah Ct. App. 1991)).

The principle of preservation for appeal has been examined at length by Utah's appellate courts. Two examples can be found in *Condas v. Condas*, 618 P.2d 491 (Utah 1980) and *Hart v. Salt Lake County Comm'n*, 945 P.2d 125 (Utah Ct. App. 1997). In *Condas*, certain statements of deceased witnesses were admitted at trial. On appeal, the party opposing the admission of these

statements argued that the other party had failed to offer proof at trial that the witnesses were unavailable to testify. The Court rejected this argument and found that because the party had failed to object to the admission of the statements at trial, that the party had therefore waived its right to challenge the issue on appeal. *Condas v. Condas*, 618 P.2d at 495.

In *Hart*, the County raised an issue on appeal that was not sufficiently presented to the trial court. In *Hart*, the County argued on appeal that it did not owe a duty to Hart under the public duty doctrine. Hart argued that the issue had not been preserved for appeal and therefore could not be considered by the Court. The County, however, argued that it had preserved the issue by objecting to a particular jury instruction.⁵ In ruling that the County had not preserved the issue for appeal, the Court of Appeals noted that the County had objected to the jury instruction on the basis insufficient evidence. "Such an objection is not sufficiently specific to raise the County's argument that it did not owe Hart a duty because such an objection would not raise the issue 'to a level of consciousness such that the trial judge could consider it.'" *Hart v. Salt Lake County Comm'n*, 945 P.2d at 130-31 (quoting *State v. Brown*, 856 P.2d 358, 361 (Utah Ct. App. 1993) (citations omitted)).

⁵ The jury instruction specifically dealt with Hart's allegations of negligence against the County and with what the jury must find in order to return a verdict in favor of Hart. *Hart v. Salt Lake County Comm'n*, 945 P.2d at 130.

With these principles and cases in mind, it is clear that this Court should not consider the Appellees' failure to exhaust claim. The Appellees' have not demonstrated where in the record they preserved this issue below.⁶ Further, the Appellees have not stated any basis for considering an unpreserved issue. See UTAH R. APP. P. 24(a)(5)(B). Thus, the Court should not consider the Appellees' exhaustion argument as an alternative grounds to affirm the dismissal of the Appellant's complaint.

IV. APPELLEES CANNOT ASSERT FAILURE TO FILE A NOTICE OF CLAIM AS GROUNDS FOR AFFIRMING THE DISMISSAL BELOW.

In footnote 9 of their Brief of Appellees, the Appellees assert an alternative ground for affirming the dismissal below. The Appellees argue that the Appellant's claims are barred by the Utah Governmental Immunity Act. See UTAH CODE ANN.. §§ 63-30-1 et seq. This argument is two pronged. First, the Appellees maintain that the Appellant failed to file a Notice of Claim. This simply is not accurate. Not only did the Appellant file a

⁶ The Appellees make a token mention of exhaustion in their reply memorandum in support of their motion for summary judgment. However, this mention does not refer to the Appellant's case nor does it rise to the level necessary that the trial court was afforded the opportunity to rule on the issue. In order for the trial court to have been afforded the opportunity to rule on this issue, several things must be demonstrated. "First, the issue must be raised in a timely fashion. ... Second, the issue must be specifically raised, ... such that the issue is sufficiently raised to a 'level of consciousness' before the trial court[.] ... Third, the party must introduce to the trial court 'supporting evidence or relevant legal authority; to support its argument.'" *Hart v. Salt Lake County Comm'n*, 945 P.2d at 130 (citations omitted).

The Appellees did not accomplish any of these requirements and this court should decline to further address the Appellees' exhaustion argument.

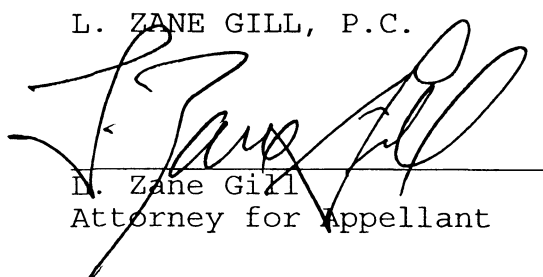
Notice of Claim, but said Notice of Claim was specifically denied by the State of Utah. R. 1087-1111, 1086. Second, the Appellees argue that immunity has not been waived as to the circumstances of this case. As with the Appellees' exhaustion argument, this argument was not preserved for appeal. See Point III *supra*. The parties never briefed this issue.⁷ Thus, this Court should decline to consider this issue in any fashion whatsoever.

CONCLUSION

Based upon the foregoing and on the arguments presented in the Brief of Appellant, the Appellant respectfully requests that this Court reverse the decision of the trial court and that this Court remand this case back to the trial court for a trial on the merits.

DATED AND RESPECTFULLY SUBMITTED this 6th day of March, 1998.

L. ZANE GILL, P.C.



D. Zane Gill
Attorney for Appellant

⁷ In fact, it was not until shortly before trial in this case that the Appellees deemed the employment relationship in this case to be statutory rather than contractual. Indeed, the Appellees had acknowledged that the Appellant's employment relationship with the Department of Public Safety was contractual. Thus, there was never a question of whether immunity had been waived or not.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT was served, via first class mail, postage prepaid, upon the following:

Debra J. Moore, Esq.
Assistant Attorney General
Jan Graham
Utah Attorney General
Attorneys for Appellees
P.O. Box 140856
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114-0856

DATED this 6th day of March, 1998.


D. Zane Gillette

ADDENDUM

FAX TRANSMITTAL FORM

Law Office of L. Zane Gill
215 South State Street, Suite 545
Salt Lake City, Utah 84111
Telephone:(801) 355-2600

FAX: (801) 355-2606

TO: J. Mark Ward

FROM: L. Zane Gill



DATE: October 12, 1993

SUBJECT: Hom v. Squires et all - Deposition Schedule

FAX SENT TO THIS NUMBER: 530-4916

Message:

I have tried to reach you and you have tried to get back to me. At least with this message you will know what I want.

I propose to take the following depositions at the times and dates indicated. Call me to adjust schedules. I will be on my honeymoon from Friday, October 15, 1993 through Monday, October 25, 1993. As for your taking Mr. Hom's deposition, he is very concerned that his taking any time during the normal work week will cost him his job. He is in New Mexico and might be able to come to Salt Lake on a weekend to have his depo taken. I can work with that if it is OK with you.

We will most likely need to submit a stipulation or letter to the judge to make him aware that we are spilling over the discovery cut off date.

Michael Hom v. Squires et al.

Deposition List

Notice Only:

1.	Roland Squires	4hrs	4
2.	Art Hudachko	4hrs	5
3.	Douglas Bordrero	4hrs	6

Subpoena:

1.	Rich Townsend	2hrs	7
2.	Judy Sorensen (?)		?
3.	Sheri Stark	2hrs	9
4.	Cheri Ertel	4hrs	1
5.	Bart Blackstock	3hrs	8
6.	Harold Carpenter (?)		?
7.	Kuang-Po Lee	4hrs	2
8.	Dan Taylor	2hrs	3

3 1/2 days

Available Days:

November 3	Ertel am Lee pm
November 4	Taylor am Squires am
November 5 pm	Hudachko
November 8	Bordrero am Townsend pm Blackstock pm
November 9	Stark am

November 10

November 11

November 12

TRANSMISSION VERIFICATION REPORT

TIME: 10/12/1993 13:09
NAME: CASTLE GILL OFFICE
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TEL : 8015311818

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