

1997

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2

 Part of the [Law Commons](#)

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

Debra J. Moore, Esq.; Assistant Attorney General; Jan Graham; Utah Attorney General; Attorney for Appellees.

L. Zane Gill; Attorneys for Appellant.

L. Zane Gill, No. 3716 LAW OFFICE OF L. ZANE GILL, P.C. Attorneys for Appellant 1926 East 3900 South Salt Lake City, Utah 84124 Telephone: (801) 272-7900 Facsimile: (801) 272-7740

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

Recommended Citation

Brief of Appellant, *Hom v. Utah State Department of Public Safety*, No. 970592 (Utah Court of Appeals, 1997).
https://digitalcommons.law.byu.edu/byu_ca2/1135

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

IN THE UTAH COURT OF APPEALS

MICHAEL W. HOM,

Plaintiff/Appellant,

vs.

UTAH STATE DEPARTMENT OF PUBLIC
SAFETY, a governmental agency;
CHERIE ERTEL; DOUGLAS BODRERO;
A. ROLAND SQUIRE; ARTHUR
HUDACHKO, BART BLACKSTOCK; and
JOHN DOES I through X;

Defendant/Appellees.

:
:
: BRIEF OF APPELLANT
:
:
:
:
:
:
: Appeal No. 970592-CA
:
:
:
:
: Priority No. 15
:
:
:

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

L. Zane Gill, No. 3716
LAW OFFICE OF L. ZANE GILL, P.C.
Attorneys for Appellant
1926 East 3900 South
Salt Lake City, Utah 84124
Telephone: (801) 272-7900
Facsimile: (801) 272-7740

**UTAH COURT OF APPEALS
BRIEF**

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

UTAH
DOCUMENT
K F U
50
.A10
DOCKET NO. 970592-CA

FILED

NOV 14 1997

COURT OF APPEALS

MICHAEL W. HOM,

VS.

Defendant/Appellees.

Priority No. 15

L. Zane Gill, No. 3716
LAW OFFICE OF L. ZANE GILL, P.C.
Attorneys for Appellant
1926 East 3900 South
Salt Lake City, Utah 84124
Telephone: (801) 272-7900
Facsimile: (801) 272-7740

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

PARTIES TO THE PROCEEDINGS

All parties to this proceeding are set forth in the caption of this appeal.

TABLE OF CONTENTS

<u>PRIOR OR RELATED</u> <u>APPEALS</u>	1
<u>STATEMENT OF</u> <u>JURISDICTION</u>	1
<u>ISSUES PRESENTED FOR</u> <u>REVIEW</u>	1
I. WHETHER THE TRIAL COURT COMMITTED ERROR WHEN IT FOUND THAT MR. HOM'S EMPLOYMENT RELATIONSHIP WITH THE UTAH DEPARTMENT OF PUBLIC SAFETY WAS STATUTORY RATHER THAN CONTRACTUAL.....	1
II. WHETHER THE TRIAL COURT COMMITTED ERROR WHEN IT HELD THAT THE DISCOVERY RULE DID NOT APPLY TO MR. HOM'S PERCEIVED HANDICAP DISCRIMINATION CLAIM.....	2
III. WHETHER THE TRIAL COURT COMMITTED ERROR WHEN IT FOUND THAT MR. HOM MAY BE COLLATERALLY ESTOPPED FROM ASSERTING A CLAIM FOR PERCEIVED HANDICAP DISCRIMINATION BECAUSE IT DID NOT "RELATE BACK" TO THE DATE OF FILING OF THE ORIGINAL COMPLAINT.....	2
IV. WHETHER THE TRIAL COURT COMMITTED ERROR WHEN IT RULED THAT THERE WAS NO COVENANT OF GOOD FAITH AND FAIR DEALING INHERENT IN THE EMPLOYMENT RELATIONSHIP BETWEEN THE PARTIES.....	3
<u>DETERMINATIVE CONSTITUTIONAL AND STATUTORY</u> <u>PROVISIONS</u>	3
<u>STATEMENT OF THE</u> <u>CASE</u>	4
<u>Nature of the Case</u>	4
<u>Course of Proceedings and Disposition by the District Court</u> <u>Below</u>	4
<u>Statement of Relevant</u> <u>Facts</u>	6

<u>SUMMARY OF</u>	
<u>ARGUMENT</u>	23
<u>ARGUMENT</u>	24
I. BECAUSE MR. HOM'S EMPLOYMENT RELATIONSHIP WITH THE STATE OF UTAH IS CONTRACTUAL RATHER THAN STATUTORY, THE TRIAL COURT COMMITTED ERROR BY DISMISSING HIS BREACH OF CONTRACT CLAIM.....	25
A. <u>The Nature Of The Employment Relationship Between The Parties Is Contractual,NotStatutory</u>	25
B. <u>Because Mr. Hom's Employment Contract With The Department Is Founded Upon A Written Instrument, The Applicable Statute Of Limitations Is Six Years</u>	31
II. THE TRIAL COURT ERRED IS DISMISSING MR. HOM'S PERCEIVED HANDICAP DISCRIMINATION CLAIM UNDER §504 OF THE REHABILITATION ACT.....	34
A. <u>Because The Discovery Rule Applies To The Facts Of This Case, The Statute Of Limitations Was Tolled And Mr. Hom's Rehabilitation Act Claim Was Timely Asserted</u>	34
B. <u>Mr. Hom's Rehabilitation Act Claim Is Not Barred By The Doctrine of Collateral Estoppel</u>	40
C. <u>Mr. Hom's Perceived Handicap Discrimination Claim Is Meritorious And Should Be Considered By The Trial Court</u>	43
III. BECAUSE MR. HOM'S RELATIONSHIP WITH HIS EMPLOYER WAS CONTRACTUAL RATHER THAN STATUTORY, THE TRIAL COURT COMMITTED ERROR WHEN IT DISMISSED HIS CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.....	47
<u>CONCLUSION</u>	49

CERTIFICATE OF

SERVICE.....49

ADDENDUM.....50

Determinative Constitutional and Statutory Provisions

Docket from *Hom v. Squire, et al.* Case No. 91-C-1016W,
United States District Court, Central Division, State of Utah

TABLE OF AUTHORITIES

Case law:

<i>Anderson v. Dean Witter Reynolds, Inc.</i> , 920 P.2d 575 (Utah Ct. App. 1996).....	36
<i>Anderson v. Douglas & Lomason Co.</i> , 540 N.W.2d 277 (Iowa 1995) ..	28
<i>Association for Retarded Citizens in Colorado v. Frazier et al.</i> , 517 F. Supp. 105 (D.C. Colo. 1981).....	47
<i>Bennett v. Marshall Public Library</i> , 746 F. Supp. 671 (W.D. Mich. 1990).....	28
<i>Brehany v. Nordstrom, Inc.</i> , 812 P.2d 49 (Utah 1991).....	48
<i>Brigham Young University v. Paulsen Construction Co.</i> , 744 P.2d 1370 (Utah 1987).....	32
<i>Chambliss/Jenkins Assocs. v. Forster</i> , 650 P.2d 1315 (Colo. Ct. App. 1982).....	34
<i>City of Terre Haute v. Brighton</i> , 450 N.E.2d 1039 (Ind. Ct. App. 1983).....	49
<i>Cook v. Zions First National Bank</i> , 919 P.2d 56 (Utah Ct. App. 1996).....	48
<i>Department of Health and Rehabilitative Services v. Boyd</i> , 525 So.2d 432 (Fla. Ct. App. 1988).....	28
<i>Doe v. Colantti</i> , 454 F. Supp. 621 (E.D.Pa. 1978), <i>aff'd</i> , 592 F.2d 704 (3rd. Cir. 1979).....	47
<i>Doe v. Region 13 Mental Health-Mental Retardation Comm'n</i> , 704 F.2d 1402, <i>rehearing denied</i> , 709 F.2d 712 (5th Cir. 1983).....	47
<i>Doe v. New York University</i> , 666 F.2d 761 (2d Cir. 1981).....	46
<i>Driggs v. Utah Teachers' Retirement Board</i> , 142 P.2d 657 (1943).....	31, n.11
<i>Dubois v. Grand Central</i> , 872 P.2d 1073 (Utah Ct. App. 1994).....	3
<i>Ellis v. Utah State Retirement Board</i> , 757 P.2d 882 (Utah Ct. App. 1988).....	31, n.12

<i>Fashion Place Inv., Ltd. v. Salt Lake County</i> , 776 P.2d 941 (Utah Ct. App. 1989).....	1
<i>Geraghty v. Township of Berkeley Heights</i> , 613 A.2d 497 (N.J. Super. 1990).....	28
<i>Glover v. Boy Scouts of America</i> , 923 P.2d 1383 (Utah 1996).....	24
<i>HCA Health Services of Utah, Inc. v. St. Mark's Charities</i> , 846 P.2d 476 (Utah Ct. App. 1993).....	34
<i>Henning v. Village of Mayfield</i> , 610 F. Supp. 17 (N.D. Ohio 1985).....	46
<i>Hom v. Squire</i> , 81 F.3d 969 (10th Cir. 1996).....	42
<i>Juab County Dept. of Pub. Welfare v. Summers</i> , 426 P.2d 1 (Utah 1967).....	32
<i>K&T, Inc. v. Koroulis</i> , 888 P.2d 623 (Utah 1994).....	24
<i>Klinger v. Kightly</i> , 791 P.2d 868 (Utah 1990).....	35
<i>Mackey v. Cleveland State University et al.</i> , 837 F. Supp. 1396 (N.D. Ohio 1993).....	47
<i>Macris & Associates, Inc. v. Images & Attitude, Inc.</i> , 941 P.2d 636 (Utah Ct. App. 1997).....	25, 41
<i>Manning v. City of Hazel Park</i> , 509 N.W.2d 874 (Mich. Ct. App. 1994).....	28
<i>McKean v. McBride</i> , 884 P.2d 1314 (Utah Ct. App. 1994).....	48
<i>Merrell v. Bay County Metropolitan Trans. Auth.</i> , 707 F. Supp. 289 (E.D. Mich. 1989).....	28
<i>Myers v. McDonald</i> , 635 P.2d 84 (Utah 1981).....	36
<i>Ness v. Glasscock</i> , 781 P.2d 137 (Co. Ct. App. 1989).....	28
<i>Newcomb v. Ogden City Public School Teachers' Retirement Commission</i> , 243 P.2d 941 (Utah 1952).....	30-31, n. 10.
<i>Nish Noroian Farms v. Agricultural Labor Relations Bd.</i> , 677 P.2d 1170 (Cal. 1984).....	34
<i>Peterson v. Browning</i> , 832 P.2d 1280 (Utah 1992).....	48

<i>Piacitelli v. Southern Utah State College</i> , 636 P.2d 1063 (Utah 1981).....	26, 27, 28 n. 7
<i>Republic Group, Inc. v. Won-Door Corp.</i> , 883 P.2d 285 (Utah Ct. App. 1994).....	3
<i>Sanderson v. First Security Leasing Co.</i> , 844 P.2d 303 (Utah 1992).....	25, 48, n. 21
<i>School Board of Nassau County v. Arline</i> , 107 S.Ct. 1123 (1987).....	47
<i>Selvae v. J.J. Johnson & Associates</i> , 910 P.2d 1252 (Utah Ct. App. 1996).....	2, 43
<i>Sevy v. Security Title Co.</i> , 857 P.2d 958 (Utah Ct. App. 1993).....	35, 38, 39, 40, n. 15, 41, 43
<i>State of Utah ex rel Baker v. Intermountain Farmers Association</i> , 668 P.2d 503 (Utah 1983).....	33
<i>Timm v. Dewsnap</i> , 851 P.2d 1178 (Utah 1993).....	3, 41
<i>Thorn v. Bloomfield Hills Board of Education</i> , 513 N.W.2d 230 (Mich. Ct. App. 1994).....	28
<i>Thurston v. Box Elder County</i> , 835 P.2d 165 (Utah 1992).....	24, 26, n.5, 29, n.9, 30
<i>Thurston v. Box Elder County</i> , 892 P.2d 1034 (Utah 1995).....	28, 29, 29, n. 9
<i>Ward v. Intermountain Farmers Association</i> , 907 P.2d 264 (Utah 1995).....	33
<i>Warren v. Provo City Corp.</i> , 838 P.2d 1125 (Utah 1992).....	37, 37, n. 14, 39
<i>Welsh v. City of Tulsa, Oklahoma</i> , 977 F.2d 1415 (10th Cir. 1992).....	45, 46
<i>West v. Thompson Newspapers</i> , 835 P.2d 179 (Utah Ct. App. 1992).....	1
<i>Western Farm Credit Bank v. Pratt</i> , 860 P.2d 376 (Utah Ct. App. 1993).....	49, n. 23
<i>Woodland Theatres, Inc. v. ABC Intermountain Theatres, Inc.</i> , 560 P.2d 700 (Utah 1977).....	33
<i>Verhoef v. Aston</i> , 740 P.2d 1342 (Utah Ct. App. 1987).....	34

Yeazell v. Copins, 402 P.2d 541 (Utah 1965).....31, n. 12

Statutes:

29 U.S.C. § 701, *et seq.*, *The Rehabilitation Act of 1978*
.....22, 35, 41

29 U.S.C. § 704.....4

29 U.S.C.A. § 706(8)(B).....46

UTAH CODE ANN. §§ 67-16-1 *et seq.*.....26, n. 4

UTAH CODE ANN. § 67-19-6 (1953), *as amended*.....29

UTAH CODE ANN. § 67-19-18 (1953), *as amended*.....4, 27

UTAH CODE ANN. § 78-12-23 (1953), *as amended*.....4, 25, n. 2, 33

UTAH CODE ANN. § 78-12-25 (1953), *as amended*.....4

UTAH CODE ANN. § 78-12-26 (1953), *as amended*.....4, 25, n. 2, 33

UTAH R. CIV. P.
56(c).....24

UTAH ADMINISTRATIVE CODE, R477.....26, n. 4, 29

FED. R. CIV. P.15.....43

45 C.F.R. § 84.3(f).....47, 48

45 C.F.R. § 84.3(k).....47

45 C.F.R. § 84.4.....48

PRIOR OR RELATED APPEALS

Appellant states that there are no prior or related appeals in this case.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Rule 3 of the Utah Rules of Appellate Procedure as an appeal of right. The Utah Court of Appeals has jurisdiction pursuant to UTAH CODE ANN. §§ 78-36-11 (1953), *as amended*, and 78-2a-3 (1953), *as amended*.

ISSUES PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT COMMITTED ERROR WHEN IT RULED THAT MR. HOM'S EMPLOYMENT RELATIONSHIP WAS STATUTORY RATHER THAN CONTRACTUAL.

The trial court dismissed Mr. Hom's breach of contract claim, ruling that there was no express, written contract governing the employment relationship between the parties. R.1126. The trial court ruled further that the nature of the employment relationship between the parties was statutory rather than contractual. R. 1126. The trial court also held that there was no implied contractual relationship between the parties. R.1126. Whether a public employee's relationship with his employer is contractual or statutory is a question of law. Further, this appears to be a question of first impression in Utah. Because this issue presents a question of law, it should be reviewed for correctness. *West v. Thompson Newspapers*, 835 P.2d 179, 182(Utah Ct. App. 1992); *Fashion Place Inv., Ltd. v. Salt Lake County*, 776 P.2d 941 (Utah Ct. App. 1989). This issue was raised and preserved at the trial court in Mr. Hom's Complaint, Amended Complaint and Memorandum in Opposition to Defendants' Motion for Summary Judgment. R. 1-17, 215-240, and 470-621 respectively. Further, this issue was explicitly raised in

endants' Motion to Amend Answers to Complaint, Memorandum in support of Motion for Summary Judgment, and Reply Memorandum in support of Motion for Summary Judgment. R. 307-315, 316-343; 344-0, and 632-651 respectively. Finally, this issue was expressly reserved when it was ruled on by the trial court. R. 1126.

II. WHETHER THE TRIAL COURT COMMITTED ERROR WHEN IT HELD THAT THE DISCOVERY RULE DID NOT APPLY TO MR. HOM'S HANDICAP DISCRIMINATION CLAIM.

The trial court also dismissed Mr. Hom's perceived handicap discrimination claim (R.1126-1127) on the ground that Mr. Hom's claim is barred by the applicable four year statute of limitation because (1) there was no relation back, (2) the original complaint was not filed within four years from the time that the § 504 claim accrued, and (3) the discovery rule is not appropriate under the circumstances of this case. R. 1127. These issues present questions of law which this Court should review for correctness with no deference to the legal conclusions of the trial court. *Selvage v. J.J. Johnson & Associates*, 910 P.2d 1252, 1257 (Utah Ct. App. 1996). Mr. Hom responded to and raised the issues of "relation back" and discovery rule and its application in his Memorandum in Opposition to defendants' Motion for Summary Judgment. R. 470-621. Moreover, the trial court expressly ruled on this issue thereby preserving it. R. 1126-1127.

III. WHETHER THE TRIAL COURT COMMITTED ERROR WHEN IT FOUND THAT MR. HOM MAY BE COLLATERALLY ESTOPPED FROM ASSERTING A CLAIM FOR HANDICAP DISCRIMINATION BECAUSE IT DID NOT "RELATE BACK" TO THE DATE OF FILING OF THE ORIGINAL COMPLAINT.

The trial court found that Mr. Hom's perceived handicap discrimination claim did not relate back because he was collaterally estopped from raising this issue. R. 1127. While the order signed

by the trial court does not state collateral estoppel as the grounds for finding that the claim did not relate back, the argument initiated by the Defendants and responded to by Mr. Hom was based on the doctrine of collateral estoppel. R. 359, 488-489, 658. Whether or not the issue was precluded presents a question of law which this Court should review for correctness. *Timm v. Dewsnup*, 851 P.2d 1178 (Utah 1993). This issue was raised and argued by the parties in their respective briefs. R. 344-440, 470-621. The issue is preserved as it was ruled upon by the trial court. R. 1127.

IV. WHETHER THE TRIAL COURT COMMITTED ERROR WHEN IT RULED THAT THERE WAS NO COVENANT OF GOOD FAITH AND FAIR DEALING INHERENT IN THE EMPLOYMENT RELATIONSHIP BETWEEN THE PARTIES.

The trial court held that Mr. Hom's claim for breach of the implied covenant of good faith and fair dealing was dismissed because there was no contract governing the employment relationship between the parties. R. 1127. Whether or not a contract and therefore an implied covenant of good faith and fair dealing exists is a question of law. This Court should review the trial court's factual finding for correctness with no deference. *Republic Group, Inc. v. Won-Door Corp.*, 883 P.2d 285, 289 (Utah Ct. App. 1994); *Dubois v. Grand Central*, 872 P.2d 1073, 1078-79 (Utah Ct. App. 1994). This issue was raised and preserved in Mr. Hom's Complaint, Amended Complaint and Memorandum in Opposition to Defendant's Motion for Summary Judgment. R. 1-17, 215-240, and 470-621 respectively. Also, the trial court expressly ruled on this issue. R. 1127.

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

29 U.S.C. § 704¹ Nondiscrimination under Federal grants and programs;
promulgation of rules and regulations (See Addendum)

UTAH CODE ANN. § 67-19-18 Dismissals and demotions - Grounds -
Disciplinary action - Procedure - Reductions in force. (See Addendum)

UTAH CODE ANN. § 78-12-23 (1953), *as amended*. Within six years - Mesne
profits of real property - Instrument in writing. (See Addendum)

UTAH CODE ANN. § 78-12-25 (1953), *as amended*. Within four years. (See
Addendum)

UTAH CODE ANN. § 78-12-26 (1953), *as amended*. Within three years. (See
Addendum)

STATEMENT OF THE CASE

Nature of the Case

Mr. Hom's lawsuit regards issues surrounding the termination of
his employment with the Utah State Department of Public Safety.

Course of Proceedings and Disposition by the District Court Below

Mr. Hom filed his original complaint in the Third Judicial
District Court on March 21, 1994. The Defendants filed a Motion to
Dismiss Complaint on or about July 19, 1994. Mr. Hom filed a response
to the Defendants' Motion to Dismiss. On or about March 6, 1995, Mr.
Hom filed an Amended Complaint. The Defendant Utah Department of
Public Safety filed an Answer to the Amended Complaint on or about
March 15, 1995. The remaining Defendants filed their Answer to the
Amended Complaint on or about March 24, 1997. On or about March 24,
1997 the Defendant Department of Public Safety withdrew its Motion to
Dismiss. The trial in this case was set to begin on February 25,

¹ As it existed at the times relevant to Mr. Hom's termination from his employment at
the Department.

1997. On or about December 6, 1996, the Defendants filed a motion seeking leave to amend their answers to Mr. Hom's Amended Complaint. The Defendants' motion seeking leave to amend was granted and the Defendants filed their Amended Answers on or about December 30, 1996.

On or about December 6, 1996, the Defendants filed a Motion for Summary Judgment. Mr. Hom filed his memorandum in opposition on or about December 31, 1996. The Defendants filed their memorandum in reply on or about January 13, 1997. On February 10, 1997, Mr. Hom filed a motion seeking leave of the Court to amend his memorandum in response on the basis that a Notice of Claim had been properly filed. The Court did not expressly rule on Mr. Hom's motion. However, at the oral argument on the Defendants' Motion for Summary Judgment, the Court ruled that there was no written notice of claim filed. The Court granted the Defendants' Motion for Summary Judgment on February 14, 1997, and the Court's order was subsequently entered on March 5, 1997. Mr. Hom timely filed his Notice of Appeal on April 3, 1997.

On May 6, 1997, the Defendants filed a Motion to Transfer Mr. Hom's appeal to the Utah Supreme Court. The Motion to Transfer was granted May 7, 1997. The Utah Supreme Court then poured the case back over to the Utah Court of Appeals on October 15, 1997.

It also important to note the events which occurred in Mr. Hom's companion case filed in the United States District Court for Utah. Mr. Hom filed his original verified complaint in the United States District Court on September 26, 1991. The Defendants in that case filed a motion to dismiss on or about November 11, 1991. The parties stipulated to a dismissal of part of Mr. Hom's complaint. Mr. Hom submitted his Amended Verified Complaint on or about December 31, 1992. The Defendants eventually filed an answer to Mr. Hom's amended

verified complaint on or about May 26, 1993. The parties then engaged in substantial discovery.

On or about August 1, 1994, the Defendants filed a motion for summary judgment. Mr. Hom responded on September 6, 1994. At the Defendants request, supplemental briefing on the due process issues involved in the lawsuit was done by both parties. On October 11, 1994, Mr. Hom moved the court for leave to amend his verified complaint. The Defendants filed a memorandum in opposition to Mr. Hom's motion to amend. On or about November 18, 1994, the Court indicated it would deny Mr. Hom's motion to amend his complaint. On December 1, 1994, the Court granted the Defendants' motion for summary judgment. On December 8, 1994, the Court signed the order denying Mr. Hom's motion to amend his complaint. Mr. Hom then timely filed a notice of appeal to the Tenth Circuit Court of Appeals on December 20, 1994. The Tenth Circuit Court of Appeals rendered its decision in that matter on April 12, 1996. R. 411-416.

Statement of Relevant Facts

1. Mr. Hom's lawsuit is the result of his involuntary termination as a programmer/analyst from the Utah Department of Public Safety ("Department"). R. 363, 499, 518-19, 521.

2. Mr. Hom was an employee of the Department from May 20, 1985 through March 2, 1990 when he was finally terminated from his employment. R. 2, 518-19, 521.

3. The reasons enunciated for Mr. Hom's termination from the Department are (1) Mr. Hom was perceived to be a security threat, (2) Mr. Hom had committed perjury, and (3) Mr. Hom had been insubordinate. R. 492-93, 494-98.

4. Douglas Bodrero ("Bodrero") made the ultimate decision to

terminate Mr. Hom from his employment with the Department. However, Bodrero did not personally observe any misbehavior by Mr. Hom. R. 585-586.

5. On or about November 13, 1989, Brant Johnson, the Deputy Commissioner of Public Safety, sent a letter to Mr. Hom notifying him that Mr. Johnson intended to terminate his employment. This letter outlined the alleged reasons for Mr. Hom's termination as insubordination, malfeasance/non-feasance, perjury, and that Mr. Hom was a security risk. R. 492-93.

6. Mr. Johnson's decision to terminate Mr. Hom was based on the recommendation of A. Roland Squire ("Squire"), who was at that time the Director of Management Information Services. R. 430, 434-438, 494-98, 932-36.

7. When Mr. Hom began his employment with the Department, Arthur Hudachko ("Hudachko") was his immediate supervisor. R. 526-27, 964-65.

8. Prior to being hired by the Department, a complete and thorough background search and check was done on Mr. Hom. R. 520.

9. While employed with the Department, Mr. Hom received promotions. R. 2-3. Mr. Hom also received commendations for his efforts, dedication and perseverance as an invaluable employee of the Department. R. 542, 543, 544; 521-22, 523, 524, 524. Mr. Hom also received near perfect evaluations from Hudachko. However, Hudachko had also did at times counsel Mr. Hom to try and improve his political and people skills. R. 527.

10. One of Mr. Hom's job responsibilities was to be on call in the event that a programmer was needed to help solve any technical problem that may arise regarding the computer system for both the

Bureau of Criminal Investigation ("BCI") and the Driver's License Division of the Department. Mr. Hom was on uninterrupted call for these reasons for a period of four and one-half (4 $\frac{1}{2}$) years. R. 545.

11. In addition to being on call most of the time, Mr. Hom also served on a "Request for Proposal Committee" ("RFP committee") formed by the Department to select a vendor to provide computer software and/or hardware for the Driver's License Division. Mr. Hom was appointed as the technical subcommittee chairperson by Hudachko. R.499-502, 538.

12. Prior to being selected to perform on the RFP committee, Hudachko, Mr. Hom's supervisor at the time, had never given Mr. Hom any written discipline. R. 526-27.

13. At the time the RFP committee began to consider vendor bids for a new computer system, Bodrero was the Deputy Commissioner for the Department, and the RFP process was conducted pursuant to his guidance and supervision. R. 500.

14. Bart Blackstock ("Blackstock") of the Driver License Division of the Department was appointed to act as the chairperson of the RFP committee. Ertel, an employee of the Driver License Division, was appointed as the administrative subcommittee chairperson of the RFP committee. R. 500.

15. Mr. Hom and all other RFP committee members were aware of Utah law governing the bidding processes and procedures that must be utilized when seeking proposals such as those sought by the RFP committee in this instance. R. 500.

16. Mr. Hom's significant and regular work duties did not decrease after he was appointed to the RFP committee. As a result, Mr. Hom was faced with a huge increase in work. R. 528. Because Mr.

Hom had assumed additional work, he would sometimes work 20 hours or more a day trying to stay on top of his regular duties as well as his duties associated with the RFP committee. R. 507. This led to a "gentlemen's agreement" between Mr. Hom and Hudachko (Mr. Hom's supervisor at the time) whereby Mr. Hom would keep track of his overtime and Hudachko would make sure that Mr. Hom got his corresponding leave. R. 499-517; R. 529-530. This agreement, for informal resolution of compensatory time, led Mr. Hom to believe that he had an ally in Hudachko. R. 507-508.

17. Despite the demands of Mr. Hom's regular work duties, Mr. Hom continued to work diligently on the RFP committee. However, it was becoming obvious to Mr. Hom that the RFP process was a political quagmire. R. 506.

18. In an effort to recoup his significant unpaid compensatory time, Mr. Hom filed a grievance which resulted in him being awarded some 600 hours of compensatory time. By filing this grievance, Mr. Hom alienated Hudachko and others. The filing of a grievance was not the way that such things were done at the Department. R. 508, 529-531.

19. While serving on the RFP committee, Mr. Hom became aware of activities by certain committee members which were contrary to the mandates of Utah law, specifically the Utah Procurement Code (UTAH CODE ANN. §§ 63-56-1 *et al.*). R. 499-517. Mr. Hom was familiar with the Utah Procurement Code. Other problems of which Mr. Hom was aware were orders given by Bodrero leading to a manipulation of the vendor selection process. Also, Blackstock had a personal relationship with one of the bidders. R. 499-517. Mr. Hom told Blackstock and Hudachko of his concerns over the legality of the process. In

addition, the Mr. Hom engaged in further investigation regarding the proposal of one bidder (C.A.C.I.) which he felt was deficient in reporting its technical qualifications. R. 499-517.

20. The RFP process consisted of three phases. The first phase consisted of solicitation of bids for a partial solution. Following this, the RFP committee modified the "request for proposal" and solicited bids for a total solution. During this second phase, approximately 10 vendors remained on the vendor pool. R. 500-01; 529.

21. After the second phase, Ertel and others acted in an arbitrary manner in creating a false standard by which to eliminate some of the vendors. Mr. Hom strenuously objected to the standard of elimination chosen. Mr. Hom believed that the RFP committee could **not lawfully, under the Utah Procurement Code, eliminate vendors** merely because they had not disclosed their profit margins, especially when such a requirement was not requested in the original request for proposals. R. 501.

22. Despite Mr. Hom's strong objections and concerns regarding this method of vendor elimination, all of which were voiced in the RFP committee meetings, the RFP committee returned early from lunch and voted to use the false standard as a method for eliminating some of the vendors. Mr. Hom was not told to return early from lunch for such a vote. In fact, the vote purposely was taken in Mr. Hom's absence. R. 501-02. The vote cut the pool of vendor candidates from ten to six. Of the remaining six vendors, C.A.C.I. was still a candidate as were IBM and Digital, both of whom proposed on-site systems. R. 502.

23. The vendor, C.A.C.I., had submitted a bid with its profit

margins disclosed. Also, C.A.C.I had submitted a very detailed bid despite not having been in attendance at a meeting of the bidders where the details were discussed. R. 502, 505.

24. Mr. Hom, as he was required to do as the technical subcommittee chairperson, further investigated the proposal of C.A.C.I. C.A.C.I. had failed to disclose a list of its technical users. Through this investigation, it was discovered that the state of Wyoming was a technical user of the C.A.C.I. system. Mr. Hom told Blackstock of the problems which Wyoming had with the C.A.C.I. system. Blackstock became angry at Mr. Hom for doing the investigation of C.A.C.I.'s bid. Ertel was also angry about Mr. Hom's in-depth investigation. R. 502.

25. Mr. Hom told Blackstock and Hudachko that he was concerned with the legality of the RFP process. R. 505-06; 539-541. Despite the concerns about the legality and possible liability surrounding the RFP process expressed by Mr. Hom, Bodrero claims that he was not aware, until after Mr. Hom had filed his lawsuit, that Mr. Hom had made allegations of illegality in the RFP process. R. 593.

26. As a result of mounting tensions in the RFP Committee, Mr. Hom tendered a resignation to Blackstock, the Director of the Driver's License Division and the RFP Committee Chairperson. Blackstock refused Mr. Hom's resignation. R. 499-517.

27. Prior to serving on the RFP committee, Mr. Hom had a good working relationship with his co-workers. R. 552-506. However, due to his deteriorating relationship with the RFP committee members, Hudachko received several complaints about Mr. Hom from some of the RFP committee members. R. 527, 532-533, 534. Bodrero had also heard complaints about Mr. Hom from some members of the RFP committee. R.

582- 28. Mr. Hom maintains that these complaints tainted Bodrero's opinion about Mr. Hom. R. 504.

29. About this time, an internal affairs investigation was done on Mr. Hom. The internal affairs investigation was the result of complaints about Mr. Hom by Ertel. R. 508; 548-554.

30. While serving on the RFP committee, Mr. Hom learned that Bodrero, who was at the time a Deputy Commissioner of the Department of Public Safety, wanted a specific computer system. Bodrero wanted an on-site system. Bodrero lobbied the RFP committee during the procurement process for an on-site system. R. 500, 503, 591. Again, Mr. Hom perceived these lobbying efforts as illegal. R. 500, 503.

31. After this point, the vendor pool had decreased from ten vendors to six vendors. Bodrero asked Mr. Hom to do a one-on-one comparison and technical evaluation of two of the six vendors, IBM and Digital. R. 602. Mr. Hom again objected on the grounds of illegality under the Utah Procurement Code. R. 503. Despite his objections, Mr. Hom dutifully carried out Bodrero's request. R. 503. In fact, other vendors were also displeased and concerned with Bodrero's order for a one-on-one comparison and they voiced their concerns by filing grievances. R. 504.

32. Bodrero was displeased with Mr. Hom's objections to comparing only two of the vendors. Mr. Hom maintains that Bodrero was also displeased because of Mr. Hom's objections to Bodrero's lobbying efforts and the complaints received by Bodrero from some of the RFP committee members. R. 504.

33. Two vendors were ultimately selected for final consideration, IBM and Digital. A final report needed to be prepared. As part of his duties, Mr. Hom prepared the technical

section of the final report. In the final report, Mr. Hom noted that IBM did not have an approved security protocol and therefor was unacceptable. When Mr. Hom completed his section of the final report, he gave the report to Ertel and Jill Laws. Ertel and Laws made substantive changes to the report so that it stated that IBM did in fact have the appropriate security protocol. Mr. Hom again voiced his objections. R. 504, 505, 549-550. 34. When it came time for the final report to be presented to the decision making body, Mr. Hom was prevented from participating in making the presentation. Bodrero would not allow Mr. Hom to make the presentation. R. 505.

35. Bodrero claims that he was unaware of Mr. Hom's concerns regarding the legality of the RFP process and that he was also unaware that Mr. Hom had tried to resign from the RFP committee. R. 593.

36. Prior to the RFP process coming to a close, Mr. Hom went to Hudachko to take advantage of their "gentlemen's agreement" regarding the compensatory leave time. Because of the stress and pressure that had been put onto Mr. Hom as a result of being overworked, Mr. Hom felt like he was alone and had to finally stand up and do something for himself. R. 507, 508. The relationship between Mr. Hom and Hudachko began to deteriorate. R. 531-536. At this point, Mr. Hom filed a grievance to collect all of his overtime hours. R. 507, 508, 531-536.

37. Hudachko was not pleased that Mr. Hom had filed a grievance to collect his unpaid overtime. This grievance contributed to the decrease in communication between Mr. Hom and Hudachko. R.531-536. Hudachko threatened Mr. Hom's employment because of this grievance. R.508.

38. Also while the RFP process was ongoing, upon information and belief, Blackstock approached Fred Schwendiman ("Schwendiman"), the Director for the Driver's License Division of the Department, and complained about Mr. Hom's involvement and participation in the RFP process. R.503.

39. About this same time, Schwendiman banned Mr. Hom from the third floor of the building in which Mr. Hom worked. R.503. The fact that Mr. Hom had been banned from access to the third floor was an important issue considered by Bodrero when Bodrero decided to terminate Mr. Hom's employment. R.581-582. It is Mr. Hom's contention that he was banned from the third floor in retaliation for speaking out about the illegality of the actions of the RFP committee. R.503.

40. From November of 1988 through May of 1989, Mr. Hom was away from work using the compensatory time awarded to him as a result of his grievance. R.509. During this period, Mr. Hom would on occasion come into work for the purpose of attending staff meetings and receiving training. R.509.

41. Mr. Hom returned to work in May 1989 to begin training. R. 509. During Mr. Hom's absence, Mr. Hom did not do any work on the computer system for the Driver's License Division. R. 509; 555-556. Instead, another computer programmer/analyst, Kuang-Po-Lee, assumed the responsibilities with regard to the Driver's License computer system. R.510, 556-557.

42. While Mr. Hom was using his compensatory time, Squire became the Management Information Services Director. This occurred in March of 1989. Thus, Squire became Mr. Hom's new supervisor. R. 509, 430-431.

43. During Mr. Hom's absence from work, in response to legislative enactments, it was necessary for Lee to make certain changes to the Driver's License computer system. R.556-557. Mr. Hom did not have occasion to know these changes and modifications nor was Mr. Hom informed of any changes or modifications prior to supervising the "annual job run" in July, 1989. R. 527, 510.

44. The Driver's License Division of the Department conducted, during the summer months, a purging process of certain computer files. This is referred to as the "annual job run." R. 509.

45. Mr. Hom was informed that he would be the individual "on-call" to supervise the 1989 annual job run on a Thursday afternoon while Mr. Hom was in a training session. R. 510. The 1989 annual job run was to take place that following weekend beginning on Saturday morning. Mr. Hom did not have time to become acquainted with the changes and modifications which had been made to the system prior to the beginning of the annual job run. R. 510.

46. The individuals who were responsible for the annual job run, Blackstock and Squire, were aware that Mr. Hom had not had any hands-on experience with the Driver's License system for the previous ten months. Despite this knowledge, they assigned Mr. Hom to be in charge of the annual job run. R. 558.

47. The annual job run had been done once a year since 1977. Ertel, a driver's license employee and user of the system, had been present at all previous job runs. R. 509-510, 559. However, Ertel scheduled vacation during the 1989 annual job run. R. 559. Thus, Ertel would not be available if anything were to go wrong during the annual job run. Blackstock and Squire were aware that Ertel was not going to be available for the annual job run. R. 559. However, Mr.

Hom was not informed that Ertel was going to be unavailable. R. 510-511.

48. Bodrero claims that at the time of the annual job run he was not aware that Ertel had been allowed to take vacation the weekend of the annual job run. R. 597.

49. The annual job run, with one exception, had on all previous occasions had problems. R. 555-556. Thus, it was imperative that Ertel be available during the annual job run. R. 510, 511.

50. Blackstock and Ertel were the only two people at the time who could schedule the annual job run. Mr. Hom contends that Ertel's vacation was scheduled during the annual job run in retaliation for Mr. Hom having voiced his concerns during the RFP process and in retaliation for Mr. Hom having filed a grievance for his unpaid compensatory time. R. 499-517.

51. As expected, the 1989 annual job run did have problems. The problems required the attention and presence of Ertel. Mr. Hom attempted to contact Ertel and it was at that time that he learned that Ertel was out of town and unavailable to be of assistance to him. R. 510-513.

52. Mr. Hom contacted Squire after his failed attempts to contact Ertel and his continuous and exhausting efforts to correct the problems himself. Mr. Hom explained the situation to Squire. R. 511-512. Mr. Hom offered several alternative courses of action to Squire. Mr. Hom and Squire decided that the BCI would call Ertel's residence every hour and that the system would be put in browse mode so that police officer users could access necessary information. R. 511-512.

53. During this conversation, Squire asked Mr. Hom if he had

contacted Blackstock. Mr. Hom told Squire that he had not because there was nothing that Blackstock could do to help Mr. Hom. Any decisions that had to be made would necessarily involve budgetary considerations. Such a decision could not be made by Mr. Hom. R. 511-512. Moreover, Squire had on a previous occasion told Mr. Hom that decisions with budgetary implications needed to be made by Squire. R. 512. In addition, Squire had previously admonished Mr. Hom that any business contacts with the Driver's License Division were to be made by Squire. R. 499-517.

54. Ertel was finally located by the BCI. Ertel returned Mr. Hom's call. During this conversation, Mr. Hom stressed that Ertel needed to come in to work that evening (Sunday). R. 512. Ertel told Mr. Hom that the problem did not sound serious and that she would meet him early the next morning so that they could get the system operating at full capacity by 8:00 a.m. R. 512.

55. The following day, Mr. Hom arrived at work some time before 6:00 a.m. Mr. Hom recalls the time because he looked at the clock. Apparently the entry and security systems did not properly record his entry into the premises. R. 512-513.

56. Mr. Hom had entered the building through a computer door on the west side of the building. He inserted his access card and punched in his number as usual. R. 513. Mr. Hom then went downstairs to his secured office area. The door to Mr. Hom's office was already opened when he arrived. The log indicated that the door had been opened prior to 6:00 a.m. by the security guard. R. 513. Upon information and belief, Mr. Hom contends that the Honeywell access on the west side of the building had been disarmed prior to his entry into the building and therefore did not record his number

when he entered the building. R. 513. Shortly after Mr. Hom arrived, he logged onto the computer. Mr. Hom did not, at that time, log onto the IBM main frame computer so as to avoid a billing for his usage time. Mr. Hom eventually logged onto the IBM main frame computer at 7:05 a.m. R. 513.

57. Ertel did not arrive at work until after 8:00 a.m. She did not phone to tell Mr. Hom that she was going to be late until after 8:00 a.m. She left a message with the secretary. R. 513. Mr. Hom did not receive this message. R. 513. When Ertel finally did arrive, she and Mr. Hom were able to get the problems corrected and had the computer up and running at full capacity by 10:00 a.m. R. 513. 77 and 127.

58. On or about August 4, 1989, Squire issued a letter of intent to reprimand Mr. Hom contending that Mr. Hom had been insubordinate for failing to contact Blackstock as Squire had requested of Mr. Hom. R. 562-567. On or about August 17, 1989, Squire issued a letter of reprimand to Mr. Hom. R. 569-574. Mr. Hom submitted a response to Squire's letter of intent to reprimand. R. 569-574. Mr. Hom grieved Squire's letter of reprimand. R. 513.

59. Prior to the grievance hearing, Squire called Mr. Hom into his office and attempted to get Mr. Hom to swear to an oath of blind and irrational loyalty. Also, Squire sought an admission of total fault for the annual job run failure. Mr. Hom refused both of Squire's requests. R. 513-514. During this meeting, Mr. Hom explained to Squire that if he disagreed or had any problems with Squire's directives that Mr. Hom would explain the problem or disagreement and if Squire still insisted that Mr. Hom do something that Mr. Hom would obey. Mr. Hom explained to Squire that he would

not do anything that would be catastrophic to the system. This was not satisfactory to Squire. Squire tape recorded this conversation. R. 513-514.

60. The Appellees contend that during the grievance hearing, Mr. Hom committed perjury. R. 499-517. The Appellees' accusation of perjury is the result of their choosing to believe Ertel rather than Mr. Hom. However, Ertel testified during her deposition in this case differently than she testified at the grievance hearing. Despite Ertel's lack of candor, she has not been the subject of discipline for perjury. R. 499-517.

61. Bodrero was aware that Mr. Hom had been blamed for the failure of the annual job run and he considered this in determining whether to terminate Mr. Hom's employment with the Department. R. 597.

62. Mr. Hom still had unused compensatory time. Mr. Hom submitted a request for leave which was approved by Squire. When Mr. Hom was using this approved compensatory time, Squire telephoned him at home and wanted to know why Mr. Hom was not at work. Mr. Hom explained to Squire that Squire had approved his leave. Squire denied doing so. Mr. Hom came into work and was given no assignments that day. R. 514, 575-576.

63. Soon thereafter, Squire placed Mr. Hom on a two-week compensatory leave. As a result Mr. Hom was away from work from September 11 through September 29, 1989. When Mr. Hom returned to work, he discovered that his security code clearances had been revoked. No one told Mr. Hom in advance that his security clearance was going to be revoked. R. 514, 515. The revocation of his security clearance prevented Mr. Hom from doing his job. R. 514. Mr.

Hom was told that his security clearance was revoked as a result of an FBI recommendation and because he was considered to be a security risk. R. 515.

64. In October 1989, Mr. Hom was attempting to gather information for the processing of his grievance. He went to the BCI Department to assist him in that endeavor. R. 514-515.

65. The following day, Mr. Hom was summoned to a meeting with Richard Townsend ("Townsend"), the BCI chief. It is Mr. Hom's recollection that during this meeting, Townsend attempted to dissuade Mr. Hom from prosecuting his grievance. R. 515.

66. Townsend claims that he did not try to dissuade Mr. Hom from pursuing his grievance. In fact, Townsend claims that he reassured Mr. Hom that he would provide whatever assistance he needed for his grievance but that Mr. Hom would have to secure such material through Townsend. At this point, Mr. Hom broke down and began to cry uncontrollably. R. 603.

67. In Townsend's opinion, Mr. Hom was on a "downward spiral" and he had become "paranoid" and "kooky," and "was a distraught emotional mess." R. 605. Ertel and others also perceived a change in Mr. Hom's demeanor. R. 552-554. Ertel claims to have brought Hom's mental condition to the attention of Hom's superiors. R. 554.

68. Townsend warned Mr. Hom to work things out with Squire. R. 606.

69. Mr. Hom recalls being asked by Townsend if he had knowledge which could in effect bring the state to its knees. Mr. Hom remembers this question in the context of discussion regarding another employee. Mr. Hom contends that Townsend posed the question regarding the integrity of the system. R. 515.

70. Townsend recalls the discussion regarding "bringing the state to its knees" differently. According to Townsend, Mr. Hom made a comment about having knowledge to bring the state to its knees completely out of the blue. R. 614.

71. After the meeting between Mr. Hom and Townsend, Townsend did not take the comments allegedly made by Mr. Hom seriously because Mr. Hom had been so distressed during the conversation. R. 607-608.

72. Despite Townsend's beliefs and observations regarding Mr. Hom's mental state, he did not make a referral for counseling or help for Mr. Hom. R. 618.

73. Bodrero also noticed a change in Mr. Hom's behavior. R. 586-588. Bodrero, likewise, did not recommend that Mr. Hom utilize the employee assistance program. Bodrero believed that Mr. Hom had been offered help but that Mr. Hom had refused the help. R. 588.

75. Bodrero claims that he did not give an order restricting any of Mr. Hom's accesses to the state computer system. R. 589. Bodrero does not know if Townsend attempted to corroborate or confirm anything regarding the security risk issue prior to Mr. Hom being restricted. R. 590.

76. Following his termination, Mr. Hom exercised his rights under the Utah State Personnel Management Act and pursued a grievance. Although Mr. Hom's grievance was ultimately dismissed for failure to prosecute, this dismissal occurred while Mr. Hom's § 1983 lawsuit was pending before the United States District Court. R. 499-517.

77. Prior to filing his federal lawsuit, Mr. Hom duly filed his Notice of Claim on September 26, 1990. R. 1087-1111. The State of Utah acknowledged receipt of Mr. Hom's Notice of Claim and denied Mr.

Hom's claim on November 5, 1990. R. 1086.

78. Mr. Hom was diligent in the prosecution of his case before the United States District Court. During the course of discovery, Mr. Hom became aware of facts surrounding his termination which would support a claim for handicap discrimination under the Rehabilitation Act of 1973. 29 U.S.C. §§ 701 *et seq.* It was not until the depositions of Roland Squire, Arthur Hudachko, Richard Townsend, Cherie Ertel and Douglas Bodrero were taken that Mr. Hom became aware of facts supporting a claim for handicap discrimination. Prior to these depositions, Mr. Hom was totally unaware that he was perceived by the Appellees and others as having mental and emotional problems. There had been absolutely no inkling that this perception was a motivating factor in his dismissal. R. 363, 494-498. These depositions took place on July 12, 1994 (Bodrero); July 14, 1994 (Ertel and Townsend); and August 5, 1994 (Hudachko). R. 414.

79. After Mr. Hom's counsel had learned of the facts supportive of a claim for handicap discrimination and after thoughtfully considering their implications, Mr. Hom chose to file a motion to amend his complaint with the United States District Court to include a claim for perceived handicap discrimination under the Rehabilitation Act. The American's with Disabilities Act had not yet been enacted. R. 499-517.

80. The United States District Court ultimately denied Mr. Hom's motion seeking leave to amend his complaint to add a claim for perceived handicap discrimination. R. 417-419. The motion seeking leave to amend was denied on the grounds that it was too close to the trial date to allow such an amendment as it would be prejudicial to the Defendants in that case. The United State District Court did not

decide the merits of the perceived handicap discrimination claim. Nor did the United States District Court rule that the discovery rule did not apply under the facts of the case pending before it. R.418-419.

SUMMARY OF ARGUMENT

The trial court erred when it ruled that the nature of the employment relationship between Mr. Hom and the Department was statutory rather than contractual. While Mr. Hom's status as a public employee was defined by statute, the character of his employment relationship was based upon written instruments, including the State Personnel Management Act and its rules and regulations. Thus, Mr. Hom's claim for breach of his employment contract was *founded* upon a written instrument making the six year statute of limitations applicable. Moreover, Utah courts have traditionally treated the relationship between a public employee and his employer as contractual.

The trial court also erred when it dismissed Mr. Hom's claim for perceived handicap discrimination. The discovery rule should be applied to toll the statute of limitations. Mr. Hom was diligent in pursuing his federal lawsuit. It was the Appellees, not Mr. Hom, who were the cause of the delay in discovering the factual basis for the handicap discrimination claim. In addition, until Mr. Hom was finally able to secure the deposition testimony of certain witnesses, he had absolutely no idea that one of the motivating factors for termination was the perception by his employer and others that he was handicapped. Because the Appellees actively concealed the facts supporting the handicap discrimination claim from Mr. Hom, they should be estopped from defending against the claim on the basis of

the running of the limitations period. Moreover, because of the exceptional circumstances of this case, it would be unjust not to toll the statute of limitations. Mr. Hom's claim for handicap discrimination is meritorious.

Finally, the trial court erred when it dismissed Mr. Hom's claim for breach of the implied covenant of good faith and fair dealing. Because Mr. Hom's breach of contract claim is founded on a written instrument, his breach of the implied covenant claim is valid and is covered by the same limitations period as the breach of contract claim.

ARGUMENT

The granting of the Appellees' motion for summary judgment led to the dismissal of Mr. Hom's complaint against the Appellees in the trial court. "In reviewing a grant of summary judgment, we review the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Glover v. Boy Scouts of America*, 923 P.2d 1383, 1384 (Utah 1996) (quoting *Harline v. Barker*, 912 P.2d 433, 435 (Utah 1996) (citation omitted)). The court should "construe the evidentiary material submitted on the motion and all reasonable inferences to be drawn therefrom in a light most favorable to the party opposing the motion." *Thurston v. Box Elder County*, 835 P.2d 165, 166 (Utah 1992) (citations omitted). Moreover, "[s]ummary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law." *K&T, Inc. v. Koroulis*, 888 P.2d 623, 626-27 (Utah 1994) (citations omitted); UTAH R. CIV. P. 56(c). Finally, "[b]ecause summary judgment presents only questions of law, [the court] review[s] the trial court's determinations under a standard of

correctness, according no deference to the trial court's legal conclusions." *Macris & Associates, Inc. v. Images & Attitude, Inc.*, 941 P.2d 636, 639 (Utah Ct. App. 1997) (citation omitted); *Sanderson v. First Security Leasing Co.*, 844 P.2d 303, 306 (Utah 1992) (citations omitted). Here, the Court of Appeals should reverse the trial court's decision to grant summary judgment against Mr. Hom.

I. BECAUSE MR. HOM'S EMPLOYMENT RELATIONSHIP WITH THE STATE OF UTAH IS CONTRACTUAL RATHER THAN STATUTORY, THE TRIAL COURT COMMITTED ERROR BY DISMISSING HIS BREACH OF CONTRACT CLAIM.

A. The Nature Of The Employment Relationship Between The Parties Is Contractual, Not Statutory.

The trial court erred by dismissing Mr. Hom's breach of contract claim on the basis that Mr. Hom's employment relationship with the Department was statutory and not contractual. This is a premise which is not supported by fact or law. Whether a public employees relationship with his employer is statutory rather than contractual is an issue of first impression in Utah. Mr. Hom was a public employee pursuant to contractual terms and conditions which were often fleshed out by legislative enactment. Mr. Hom's employment relationship with the Department was governed by a written contract. Thus, the six year statute of limitations is applicable, rather than the three year statute of limitations relied upon by the trial court².

Mr. Hom was employed pursuant to a written contract whose terms and conditions were provided by statute³. Mr. Hom was employed pursuant to a contract whose express terms and conditions are

² See UTAH CODE ANN. §§ 78-12-26 (three years for actions arising out of liability created by the statutes of this state) and 78-12-23 (six years for actions founded upon an instrument in writing).

³ There is no question that Mr. Hom was a "public employee" and not a "public official."

supplied by statutory and regulative sources. Mr. Hom's status as an employee is created by statute. But, the relationship between Mr. Hom and his employer is contractual with the precise terms and conditions of that contractual relationship being found in various sources including the Department of Human Resources Management ("DHRM") Rules and Regulations⁴.

Prior to the enactment of the State Personnel Management Act (the "Management Act"), the relationship between the State, as an employer, and its employees was contractual. This relationship was similar to the nature of the employment relationship between a private employer and its employees. The enactment of the Management Act did not change the character of that relationship. The Management Act simply added a layer of protection to those individuals employed by the State⁵. The Management Act created uniformity, but it did not change the underlying basic contractual relationship between the State and its employees. The contractual relationship between Mr. Hom and the Department in this case is premised upon well established common law foundation of contractual relations between an employer and his employees, long recognized by Utah courts.

For example, in *Piacitelli v. Southern Utah State College*, 636 P.2d 1063 (Utah 1981), the Utah Supreme Court found that the terms and conditions of Piacitelli's employment were governed by the

⁴ See *State Personnel Management Act*, UTAH CODE ANN. §§ 67-16-1 et seq. and UTAH ADMINISTRATIVE CODE, R477.

⁵ See e.g. *Thurston v. Box Elder County*, 835 P.2d 165, 169 (Utah 1992) (if the employer's actions were allowed to nullify the requirements of the statutory state law, such action would "leav[e] employees subject to arbitrary treatment by their superiors.")

College's Personnel Manual⁶. Thus, the Court reasoned that they were "construing a contract, not declaring statutory or constitutional rights." *Id.*

Like the employer college in *Piacitelli*, here, the employer Department chose to promulgate rules and regulations governing its employment relationship with its employees, including Mr. Hom. In essence, the statutes and regulations adopted by the State of Utah constitute its employment manual. Because the State of Utah has chosen to establish and mandate these rules and regulations, it has undertaken certain contractual obligations, not the least of which is it cannot fire its employees without just cause. It should not make a difference that the State of Utah, as an employer, must so act through legislative enactment. UTAH CODE ANN. § 67-19-18. In addition, the rules and regulations promulgated by the State of Utah make numerous references to contracts and agreements between the employer and the employee. See R. at 620. Thus, the existence of the statutes and regulations governing the terms and conditions of Mr. Hom's employment are not mutually exclusive from that employment. Rather, they create the express terms and conditions of Mr. Hom's employment. These express terms and conditions were agreed to by Mr. Hom when he accepted his employment with the Department. Mr. Hom's employment relationship with the Department was contractual despite the fact that the terms which he seeks to enforce are subject to

⁶ The Court went on to note: "[t]his finding comports with the numerous holdings that an educational institution may undertake a *contractual* obligation to observe particular termination formalities by adopting procedures or by promulgating rules and regulations governing the employment relationship." *Id.* at 1066 (citations omitted) (emphasis added).

legislative change.⁷ This is classic example of a unilateral contract. See *Anderson v. Douglas & Lomason Co.*, 540 N.W. 2d 277 (Iowa 1995); *Thorn v. Bloomfield Hills Board of Education*, 513 N.W.2d 230 (Mich. Ct. App. 1994); *Manning v. City of Hazel Park*, 509 N.W.2d 874 (Mich. Ct. App. 1994); *Geraghty v. Township of Berkeley Heights*, 613 A.2d 497 (N.J. Super. 1990); *Merrell v. Bay County Metropolitan Trans. Auth.*, 707 F. Supp. 289 (E.D. Mich. 1989); *Department of Health and Rehabilitative Services v. Boyd*, 525 So.2d 432 (Fla. Ct. App. 1988); *Ness v. Glasscock*, 781 P.2d 137 (Co. Ct. App. 1989); and *Bennett v. Marshall Public Library*, 746 F. Supp. 671 (W.D. Mich. 1990).

Another example of the public employee/employer relationship being treated as contractual can be found in *Thurston v. Box Elder County*, 892 P.2d 1034 (Utah 1995) (*Thurston II*). In *Thurston*, the employee, a former county (i.e. public) employee, sought relief for a breach of employment contract with regard to a reduction in force. The trial court granted summary judgment against Mr. Thurston.⁸ On appeal, the Utah Supreme Court held that the County had not properly considered the statutory guidelines when creating its Manual as mandated by state law. Because the County had failed to comply with the statutory guidelines in formulating the contractual relationship

⁷ As is the case with any employer's employment manual. "The existence of such a contractual obligation does not preclude an employer's changing current procedures and regulations according to existing practices and procedures for amendment. Thus, it has been held that an employer's policy manual may give rise to employee contractual rights even where it "can be unilaterally amended by the employer without notice to the employee." *Toussaint v. Blue Cross and Blue Shield*, 408 Mich. 579, 615, 292 M.W.2d 880, 892 (1980) (non-educational employer). See also, *Knowles v. Unity College, Me.* 429 A.2d 220 (1981). *Piacitelli v. Southern Utah State College*, 636 P.2d at n.5.

⁸ The County argued that it had properly applied the provisions of its Manual in selecting Mr. Thurston as a candidate for termination pursuant to the reduction in force.

between it and its employees, the case was remanded for further consideration. *Id.* at 170.

On remand, the trial court "ruled that the Act governed the dispute and that the County had improperly considered factors beyond those enumerated in the Act in terminating Thurston. On that basis, the court held that the County had violated Thurston's due process rights and breached its employment contract with Thurston." *Thurston II*, 892 P.2d at 1035-36. The Utah Supreme Court affirmed that conclusion. *Id.* at 1039. Finally, in *Thurston II*, the Utah Supreme Court pointedly found that

Thurston's action is not based upon any statutory violation for which reinstatement is a prescribed remedy. Accordingly, the cases based upon statutory violations which Thurston cites are not persuasive on the appropriate remedy for his breach of contract action.⁹ As stated above, an order for reinstatement is permissible in a breach of employment contract action as an equitable remedy when damages are inadequate or unascertainable.

Id. at 1042. Thus, the highest court of this state has recognized and accepted the fundamental principle that the nature of the relationship between a public employee and his employer is contractual; not statutory.

As in *Thurston*, here, Mr. Hom is seeking relief for the breach of the employment contract with the Department. Also, like Box Elder County, here, the State of Utah was required to and did promulgate rules and regulations governing the employment relationship with its employees. See UTAH CODE ANN. § 67-19-6 (1953), *as amended*; UTAH ADMINISTRATIVE CODE R477. In addition, like the employment relationship

⁹ "As we noted in *Thurston I*, this case was brought as an action for breach of an employment contract, not as a request for judicial review of Thurston's grievance appeal. The termination of remedies in a review of administrative appeals is not based upon the same legal principles as those used to determine remedies in breach of contract actions." *Thurston II*, 892 P.2d at n. 3.

in *Thurston*, here the terms and conditions of Mr. Hom's employment were created by the Department of Human Resource Management rules and regulations, *i.e.* the manual, and by statute. The governing state statute in each case defines and establishes the basic terms and conditions of employment for merit covered employees. However, this does not make the relationship statutory in nature.

Finally, the nature of the employment relationship can also be gleaned from an examination of cases dealing with public employee pension plans. In *Newcomb v. Ogden City Public School Teachers' Retirement Commission*, 243 P.2d 941 (Utah 1952), the Utah Supreme Court recognized that a public employee's employment is a creature of contract whose terms are supplied by, and from time-to-time, modified by legislative enactments. As part of its analysis of the nature of a public employee's claim to enforcement of previously created retirement promises, the court stated:

The statute or ordinance becomes a part of the employee's contract of employment as though actually incorporated therein and the right to a pension becomes as much a part of the agreed compensation for the services of the employee as the monthly stipend, but it is deferred in payment until after his retirement.

With the acceptance by the plaintiffs of the defendant's offer, a contract was made which precluded the defendant from afterwards reducing in amount the pension to which the plaintiff became entitled for life, ... even though the grantor of the pension was the state and not a private corporation

Id. at 944.

There is no basis to distinguish the *Newcomb* decision from the facts of Mr. Hom's case. Both instances involve the incorporation of a statutory obligation into the employment relationship between a public employee and a public employer. In both cases the employer's

statutory obligation is read into the contractual employment relationship so as to provide an essential term of that contract. In both cases the power of the legislature to make necessary adjustments to the statute being read into the contract is recognized¹⁰. Clearly, if one Utah public employee has a contractual right to enforce the terms of the employment relationship supplied by statute, another should as well. It is inconsistent and illogical to argue that a statutory entitlement to a pension is qualitatively different than a statutory entitlement to "just cause" termination. It is equally illogical to claim that statutorily created pension rights are contractual in the nature of their enforcement but the right to "just cause" termination is not¹¹. The principle should likewise be applied to the present case.¹²

B. Because Mr. Hom's Employment Contract With The Department Is Founded Upon A Written Instrument, The Applicable Statute Of Limitations Is Six Years.

The trial court erred when it held that Mr. Hom's claim was

¹⁰ The *Newcomb* court continued, "as pensions granted to employees of the state or its municipalities are purely of statutory origin, the employees, in making contracts of employment under which the right to participate in the pension fund accrues, do so in contemplation of the reserved right of the Legislature to amend or to repeal the laws on which the pension systems are founded; and therefore the right to participate in the fund, even though arising from the contract, is based upon the anticipated continuance of existing laws." *Id.* at 946.

¹¹ The *Newcomb* court summed it up by stating: "This court in the *Driggs* case stated that when a person has accepted an offer of the State or of one of its agencies, and has met all the conditions thereof, the State or agency is bound to perform the contract the same as a private person must perform. That principle applies in this case." *Id.* at 947.

¹² The theory that the employment relationship between a public employee and his employer as espoused in *Newcomb* and *Driggs* was affirmed in *Ellis v. Utah State Retirement Board*, 757 P.2d 882 (Utah Ct. App. 1988). Once again, in the context of public employment, the Courts of this state ruled that: "Utah adheres to the contractual line of authority. Since *Driggs*, ... our supreme court has consistently held that the employee has this vested contractual right" See also *Yeazell v. Copins*, 402 P.2d 541 (Utah 1965).

controlled by the three year limitations period rather than the six year period governing claims founded on written instruments. In this case, Mr. Hom is employed pursuant to an express contract. This express contract is *founded* upon several written instruments. "[I]f the fact of liability arises or is assumed or imposed from the instrument itself, or its recitals, the liability is founded upon an instrument in writing." *Brigham Young University v. Paulsen Construction Co.*, 744 P.2d 1370, 1372 (Utah 1987) (quoting *Bracklein v. Realty Insurance Co.*, 80 P.2d 471, 476 (1938)).

Here, the liability Mr. Hom seeks to have redressed arises out of the express and written DHRM rules and regulations and the Management Act. These constitute the written employment contract between Mr. Hom and the Department. These constitute written instruments. Thus, the six year limitations period should apply.

Even if the Court were to find that Mr. Hom's claims arise under both a written instrument and a statutory scheme, the six year limitations period would apply. Under Utah law, if an agreement can be construed as both arising under contract and by statute, the longer period of limitation applies. *Juab County Dept. of Pub. Welfare v. Summers*, 426 P.2d 1 (Utah 1967)¹³.

Thus, the six year statute of limitations should apply to this

¹³ "If the transaction be in doubt as to whether it be one under a written contract or one created by a statute of this State, generally the one giving the longest period of limitation is to be preferred. See 1 C.J.S. *Actions* § 46, at page 1102, where the following language is found: "The action, in the case of doubt, should be construed to uphold it rather than to defeat it, as the court presumes the pleader's purpose is to serve his best interest. Accordingly, the action should ordinarily be so construed as to sustain the complaint if the allegations are sufficient to state a good cause of action in contract, but not in tort, or vice versa; and so as to sustain the jurisdiction if the court would have jurisdiction of the action in one form but not in the other; and so as to avoid the bar of the statute of limitations if the action would be barred in one form but not the other." [Emphasis added.] *Id.* at 3.

case. Moreover, under Utah case law, the three-year statute of limitations imposed by UTAH CODE ANN. § 78-12-26 is restricted mainly to situations involving claims involving workman's compensation or unemployment compensation. Both of which are statutorily created remedial schemes for which no alternative remedy exists. There are no reported cases in which a claim similar to that asserted by Mr. Hom has been subjected to the three-year period of limitations. To do so in this case would be contrary to the mandates of Utah law.

Under Utah law a contract claim based upon a written policy or bylaw is subject to the six-year period of limitations found in UTAH CODE ANN. § 78-12-23. In *State of Utah ex rel Baker v. Intermountain Farmers Association*, 668 P.2d 503 (Utah 1983) the court stated that an obligation created by a bylaw of IFA was subject to a six-year **statute of limitation. See also Ward v. Intermountain Farmers Association**, 907 P.2d 264 (Utah 1995). This is because the claim was *founded* upon a written instrument. As such, it was entitled to the six year statute of limitations. Here, Mr. Hom's contract claim is founded upon written instruments. As such, he too is entitled to the protections of the six year statute of limitations.

The contested portions of Mr. Hom's contract consist of the written provisions found in DHRM regulations and state statute. Mr. Hom has not alleged that his employment was covered by an "implied in law" contract on the issue of his right to a "just cause" termination. Mr. Hom's contract is express and it is written. The distinction is made clear in *Woodland Theatres, Inc. v. ABC Intermountain Theatres, Inc.*, 560 P.2d 700 (Utah 1977). "An implied covenant must rest entirely on the presumed intention of the parties as gathered from the terms as actually expressed in the written

instrument itself," *Id.* at 703. Thus, we are not dealing with an implied contractual term in this case. We are dealing with an express, written contract consisting of several documents. Wherever possible, multiple writings must be considered together when part of the same contract. *Verhoef v. Aston*, 740 P. 2d 1342, 1344 (Utah Ct. App. 1987); *Nish Noroian Farms v. Agricultural Labor Relations Bd.*, 677 P.2d 1170, 1175 (Cal. 1984); *HCA Health Services of Utah, Inc. v. St. Mark's Charities*, 846 P.2d 476 (Utah Ct. App. 1993). Also, when an agreement between parties is contained in more than one instrument, those instruments must be construed together as though they comprise a single document. *Chambliss/Jenkins Assocs. v. Forster*, 650 P.2d 1315, 1318 (Colo. Ct. App. 1982); *HCA Health Services of Utah, Inc. v. St. Mark's Charities*, 846 P.2d 476 (Utah Ct. App. 1993).

Because Utah courts have construed the employment relationship between a public employee and his employer as contractual, the trial court committed error when it found otherwise. The Management Act does not make Mr. Hom's relationship with the Department solely statutory. Rather, the Management Act simply defines Mr. Hom's status as a public employee. Further, the Management Act provides the mandate that the written employment contract, in the form of rules and regulations must be established. Thus, Mr. Hom's claims arise out of a written instrument and the six year statute of limitations should apply.

II. THE TRIAL COURT ERRED IN DISMISSING MR. HOM'S PERCEIVED HANDICAP DISCRIMINATION CLAIM UNDER §504 OF THE REHABILITATION ACT.

A. Because The Discovery Rule Applies To The Facts Of This Case, The Statute Of Limitations Was Tolloed And

Mr. Hom's Rehabilitation Act Claim Was Timely Asserted.

Mr. Hom sought to amend his verified complaint to add a claim for discrimination on the basis of a perceived handicap pursuant to Section 504 of the Rehabilitation Act of 1973. 29 U.S.C. §§ 701 *et seq.* The factual basis for Mr. Hom's perceived handicap discrimination claim was uncovered late in the course of pre-trial discovery during his federal lawsuit. Mr. Hom did not become aware of the factual basis for a perceived handicap discrimination claim until he had secured the depositions of Roland Squire, Arthur Hudachko, Richard Townsend, Cherie Ertel and Douglas Bodrero. These depositions were secured in July and August 1994. In this case, Mr. Hom was prevented from learning the facts supporting a claim for perceived handicap discrimination until the facts were revealed during the discovery process in Mr. Hom's federal lawsuit. Appellees' perception of Mr. Hom was never admitted in pleadings or discovery until disclosed under questioning by Mr. Hom's counsel. Thus, the "discovery rule" should apply to prevent the running of the applicable four year statute of limitations.

In Utah, "[w]hether the discovery rule applies to toll the statute of limitations is a question of law[.]" *Sevy v. Security Title Co.*, 857 P.2d 958, 961 (Utah Ct. App. 1993) (citing *Klinger v. Kightly*, 791 P.2d 868, 870 (Utah 1990)). The general rule is that "the limitation period begins to run when the last event necessary to complete the cause of action occurs. The discovery rule is an exception to the general rule, it delays the running of the limitation period until discovery of facts forming the basis for the cause of action." *Sevy v. Security Title Co. of So. Utah*, 902 P.2d

629, 634 (Utah 1995) (citations omitted) Thus, "the discovery rule operates to extend the time from which the limitations period begins to run." *Anderson v. Dean Witter Reynolds, Inc.*, 920 P.2d 575, 578 (Utah Ct. App. 1996) (citing *Walker Drug Co. v. La Sal Oil Co.*, 902 P.2d 1229, 1231 (Utah 1995)). "If the discovery rule applies, the applicable statute of limitations is held to have commenced running only at the time the plaintiff first knew or should have known of the facts giving rise to the cause of action." *Anderson*, 920 P.2d at 578 (citations omitted). It is Mr. Hom's contention that the discovery rule does apply in this case.

There are three situations in which the discovery rule applies: (1) in situations where the discovery rule is mandated by statute; (2) in situations where a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct; and (3) in situations where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action.

Anderson, 920 P.2d at 578 (citation omitted); accord *Klinger v. Kightly*, 791 P.2d 868, 872 (Utah 1990); *Myers v. McDonald*, 635 P.2d 84, 86 (Utah 1981)).

In this case the discovery rule should be applied pursuant to the second and/or third situation. In the present case, Mr. Hom did not know, nor could he have known that one of the motivations for his termination was the perception of his employer and others that he had a mental handicap. When Mr. Hom was terminated he was told that he was being terminated for three reasons, none of which would have led him to pursue a handicap discrimination claim. In fact, the Appellees would have been foolish to apprise Mr. Hom of this reason for his termination as it would have subjected them to liability for

handicap discrimination. Thus, they concealed this motivating factor. It was not until Mr. Hom had the opportunity to take the depositions of critical witnesses in his federal case that he learned that there was a perception that he was handicapped.

Here two of the three circumstances are applicable. First, pursuant to the "concealment" circumstance exception of the discovery rule, a defendant who misleads a plaintiff or "causes a delay in the bringing of a cause of action is estopped from relying on the statute of limitations as a defense to the action." *Warren v. Provo City Corp.*, 838 P.2d 1125, 1130 (Utah 1992)¹⁴. Thus, the plaintiff must demonstrate that he acted reasonably in not bringing the action during the limitations period.

Early in the course of the litigation, Mr. Hom, through interrogatories, asked the defendants to disclose all of their reasons for terminating Mr. Hom from his employment with the Department, both those disclosed to Mr. Hom and those withheld from Mr. Hom. In their response, Appellees did not indicate that they perceived the Mr. Hom as being mentally and/or emotionally disabled. Mr. Hom was completely unaware that the Appellees perceived him as having a handicap and that this perception was a basis for his termination. Discovery continued and finally during the course of deposition testimony of certain of the Appellees and several of their witnesses, Mr. Hom learned that he had been perceived as handicapped by Appellees. Thus, until the deposition testimony secured in the late summer of 1994, Mr. Hom was completely in the dark about certain

¹⁴ The concealment circumstance exception of the discovery rule "is essentially a form of equitable estoppel, whereby a defendant who causes a delay in the bringing of a cause of action is estopped from relying on the statute of limitations as a defense to the action." *Warren v. Provo City Corp.*, 838 P.2d at 1130 (footnote omitted).

facts surrounding his wrongful termination. Because this knowledge was solely within the control and province of the Appellees, there was absolutely no way that Mr. Hom could have known of the Appellees' discriminatory motives behind his termination and there was absolutely no way that a reasonable plaintiff in good faith could have brought suit within the statutory period.

Mr. Hom took reasonable steps to determine his causes of action against the Appellees for his wrongful termination. In his federal lawsuit, Mr. Hom sent out discovery requests. It took the defendants in that case, all of whom are Appellees herein, more than two years to file their responses. In addition, it took them two years to file an answer to Mr. Hom's federal complaint. Mr. Hom sought the assistance of the federal court on numerous occasions. It cannot be said that Mr. Hom was not diligent. Mr. Hom needed the responses to his discovery requests before he could thoughtfully and carefully depose Ertel, Bodrero, Hudachko, Squire and Townsend. The delay in finally learning of this illegal reason for his termination lies squarely on the shoulders of the Appellees. A copy of the Docket in the federal case is attached as part of the Addendum to this Brief. It indicates that the Appellees were to blame for any delay in Mr. Hom taking the depositions of the critical witnesses.

Second, the "exceptional circumstances" exception of the discovery rule also applies to toll the statute of limitations in this case. In order for the exceptional circumstances exception to apply, "the plaintiff must make an initial showing' that the plaintiff did not know of and could not reasonably have known of the existence of the cause of action in time to file a claim within the limitation period.'" *Sevy v. Security Title Co.*, 857 P.2d 958, 962

(Utah Ct. App. 1993) (quoting *Warren v. Provo City Corp.*, 838 P.2d 1125, 1129 (Utah 1992)).

There were no facts or indications during the statutory period which would have apprised Mr. Hom that he had been discriminated against based on a perceived handicap. Thus, the "threshold requirement" that Mr. Hom show that he did not know and could not have known of the existence of the cause of action until the limitations period lapsed, has been satisfied.

Once the threshold requirement is established, "then the reviewing court moves to the balancing test. The balancing test is [t]he ultimate determination of whether a case presents exceptional circumstances that render the application of a statute of limitations irrational or unjust" *Sevy*, 857 P.2d at 963 (quoting *Warren*, 838 P.2d at 1129). "[I]n applying the balancing test a court will balance the hardship the statute of limitations would impose on the plaintiff against any prejudice to the defendant resulting from difficulties of proof caused by the passage of time." *Sevy*, 857 P.2d at 963 (citations omitted).

Here the balancing test weighs in favor of tolling the statute of limitations. First, the Appellees have prevented Mr. Hom from learning that he was perceived as handicapped by the Appellees. The Appellees have discriminated against Mr. Hom in violation of federal statutory law. If the trial court's decision is allowed to stand, then the Appellees will have succeeded in avoiding the consequences of their blatant discrimination. If Mr. Hom is not allowed to pursue his claim for violation of his rights as guaranteed by the Rehabilitation Act, a message is sent to the Appellees that they can discriminate and get away with it as long as they conceal certain

facts and refuse to reveal them until the applicable statute of limitations has passed.

Second, there are no significant problems of proof for Appellees. During the depositions previously mentioned, it was brought to the fore that Mr. Hom was perceived as having a mental and/or emotional disability. Thus, the evidence and proof is still fresh in the Appellees memory.¹⁵ And if not, it has been memorialized in their depositions. Moreover, because Mr. Hom's handicap discrimination claim is based on "perception", it is not necessary for the Appellees to engage an expert to evaluate Mr. Hom's mental state then existing mental state, unless of course Appellees want to prove that Mr. Hom was in fact handicapped. In addition, because Mr. Hom's claim is based on the perception of the Appellees, no additional discovery is necessary. Thus, there is little, if any, inequity that will result to the Appellees if the discovery rule is applied.

B. Mr. Hom's Rehabilitation Act Claim Is Not Barred By The Doctrine of Collateral Estoppel.

The facts of this case do not support the conclusion of the trial court that Mr. Hom may be collaterally estopped from asserting his claim for perceived handicap discrimination under § 504 of the

¹⁵ In *Sevy v. Security Title Co.*, 857 P.2d 958 (Utah Ct. App. 1993), the Court stated that if the balancing test had been applied to the facts in the *Sevy* case, such application would create significant problems of proof for the defendant because the key witness had "no memory of the critical facts." *Id.* at 964 (emphasis in original). In the present case, defendants and their key witnesses all have memory of their perceptions of plaintiff's mental and emotional state. Thus, the balance is in plaintiff's favor and the statute of limitations should be tolled to allow Mr. Hom to state his claim for handicap discrimination.

Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*¹⁶ "Collateral estoppel, also referred to as issues preclusion, prevents relitigation of issues raised, litigated, and resolved in a previous action." *Macris & Associates, Inc. v. Images & Attitude, Inc.*, 941 P.2d 636, 639 (Utah Ct. App. 1997). At the trial court, the Appellees sought the application of collateral estoppel. In order to do so, it was necessary for them to establish four elements:

First, the issue challenged must be identical in the previous action and in the case at hand. Second, the issue must have been decided in a final judgment on the merits in the previous action. Third, the issue must have been competently, fully, and fairly litigated in the previous action. Fourth, the party against whom collateral estoppel is invoked in the current action must have been either a party or privy to a party in the previous action.

Id. (quoting *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1370 (Utah 1996)); *Sevy v. Security Title Co.*, 902 P.2d 629 (Utah 1995). The party who raises the defense of collateral estoppel has the burden of proof. *Timm v. Dewsnap*, 851 P.2d 1178, 1184 (Utah 1993). The Appellees failed to prove the existence of all four collateral estoppel requirements and the trial court committed error when it concluded that collateral estoppel applied to prevent Mr. Hom from maintaining his perceived handicap discrimination claim.

Because the Appellees did not establish the first two requirements of collateral estoppel, the trial court committed error in ruling that Mr. Hom's perceived handicap discrimination claim was

¹⁶ While not included in the actual order prepared by Appellees' trial counsel and entered by the Court, the Court noted in its ruling from the bench that the collateral estoppel doctrine may apply. R. at 1123.

barred by collateral estoppel from relating back¹⁷.

Initially, Mr. Hom's motion seeking leave to amend his complaint in the federal court was denied on the basis that the motion was untimely in that trial was two months away and would therefore be prejudicial to the defendants in that case. This was affirmed by the Tenth Circuit Court of Appeals. *Hom v. Squire*, 81 F.3d 969, 973 (10th Cir. 1996). Second, the federal court decision did not consider or reach the issue of equitable tolling under the "discovery rule."

The issue decided by the federal court was not identical to the one at hand due to the absence in this case of undue prejudice against the Defendants/Appellees. The primary ground cited by the federal court for a denial of the motion to amend is not a factor in **this case. Hence, there is no identity of issues. Moreover, the** refusal of the federal court to consider the issue of equitable tolling under the "discovery rule" restricted its ruling on the issue of "relation back" to the extent that the issue is different than that presented in this case¹⁸. In other words, had the federal court ruled that the discovery rule did not or could not apply to the facts presented, and if the federal court had not disposed of the issue pursuant to facts that do not exist in the present case, there would have been issue identity. Similarly, the federal court expressly

¹⁷ While Mr. Hom did seek approval from the United States District Court, pursuant to FED. R. CIV. P. 15 to amend his federal complaint to add a claim for handicap discrimination, the issue was not decided in such a way as to preclude the issue from consideration by the trial court.

¹⁸ "The court expressly declines to rule in the present context on the law concerning accrual and tolling of causes of action and how the law may or may not affect the validity of a handicap discrimination claim under the controlling statute of limitations. The present posture of the case does not present facts upon which to make such a ruling." R. 419.

declined to rule on the applicability of the "discovery rule" with regard to Mr. Hom's motion to amend, primarily because of the short time remaining before the trial date. Thus, the issue of "relation back" was not decided in a final adjudication on the merits.

Mr. Hom maintains that under Utah law, as illustrated in the *Selvage* case, *supra*, the full scope of the issue in the present case includes a determination on the merits of whether the "discovery rule" should apply. If the discovery rule does apply, then the running of the statute of limitation is tolled until such time as the discovery is made. *Sevy v. Security Title Co. of So. Utah*, 902 P.2d 629, 634 (Utah 1995) (citations omitted). Without a determination of that portion of the issue at hand, there cannot be an accurate decision on the sub-issue of Rule 15(c) relation back. Further, because the federal court skirted around the discovery rule issue, it gave an incomplete and qualitatively different decision on the issue of Rule 15(c) relation back. In sum, because of the overbearing weight of the undue prejudice issue caused by the imminent trial date, the federal court essentially decided a wholly different issue than the one presented in this case.

C. Mr. Hom's Perceived Handicap Discrimination Claim Is Meritorious And Should Be Considered By The Trial Court.

The depositions of three individuals, each a Defendant in this case, demonstrate that the Appellees perceived Mr. Hom as being mentally handicapped¹⁹.

¹⁹ Douglas Bodrero, the Appellee who made the ultimate decision to terminate Mr. Hom's employment, gave his deposition on July 12, 1994. Arthur Hudachko, one of Mr. Hom's direct supervisors, gave his deposition on August 5, 1994. Richard Townsend, who authored a memorandum accusing Mr. Hom of being a security risk, gave his deposition on July 14, 1994.

Mr. Hom was never informed that any action, adverse or otherwise, was taken against him because of a perceived handicap. In fact, the Appellees were careful to prevent Mr. Hom from learning that this was one of the motivations for his termination. To do otherwise would have been a direct admission that the law had been broken. Mr. Hom never considered himself to be handicapped. In short, there was no basis from which to learn that a perceived handicap had played any part in the decision to terminate Mr. Hom until mid-July 1994.

Prior to 1988, Mr. Hom had a very successful career with the Department. During his involvement with the RFP committee, Mr. Hom did two things which are important to this case: (1) he nearly worked himself to death trying to keep up with the demands of his job and the added responsibilities of the RFP committee work; and (2) he spoke out against what he perceived to be violations of Utah law dealing with the procurement process. When Mr. Hom saw that his admonitions about the law being violated were being ignored and causing him to be retaliated against rather than appreciated for his dedication, he decided to file a grievance for the unpaid overtime he had put in on the RFP committee work. From that point forward, Mr. Hom's career took a nose dive. Mr. Hom's grievance was resolved in his favor in late 1988. Within one year, by November 1989, Mr. Hom was being fired.

Mr. Hom challenged the illegal firing for the reasons which were apparent to him. However, during the course of discovery in his federal case, it became clear that his employer, his supervisors, and some of his co-workers perceived him as being emotionally or mentally handicapped. It also became clear that these people saw his

emotional and mental state deteriorate during the time he worked on the RFP committee. They saw a cause and effect relationship based on a "before and after" comparison of Mr. Hom's demeanor.

It also became clear during discovery in the federal case that the Appellees had programs intended and designed specifically to address such perceived problems. The Department, like any other Utah State government entity, has an Employee Assistance Program which can be used to deal with stress related employment issues. This program has been used with other employees who were perceived as suffering from emotional overload in the past. In addition, the Department has a "fitness for duty" procedure which had also been used in the past to determine if an employee was emotionally, mentally, or physically able to do his or her job.

Despite the congruence of perception that Mr. Hom was handicapped and the availability of programs and procedures to deal with such a problem, the Appellees chose not to give Mr. Hom the protections he was entitled to under the Rehabilitation Act of 1973

20 .

The Americans With Disabilities Act ("ADA") became law on July 26, 1992. Mr. Hom was fired in 1990. Prior to the ADA, the Rehabilitation Act of 1973 ("Act") covered handicap discrimination. The Act "prohibits programs receiving federal financial assistance from discriminating against handicapped persons solely because of that handicap." *Welsh v. City of Tulsa, Oklahoma*, 977 F.2d 1415, 1417 (10th Cir. 1992) (footnote omitted). There should be little

²⁰ Specifically, Hudachko, Townsend, Bodrero and Ertel stated that they perceived Mr. Hom as being handicapped. R. 524, 525-26, 527, 528, 519-23, 537, 538, 553, 554, 586, 587, 588, 606, 615-16, 618, 619.

question that a state police agency is an entity receiving federal financial assistance, making it subject to the mandates of the Act. *Henning v. Village of Mayfield*, 610 F. Supp. 17 (N.D.Ohio 1985) (finding that a police agency which receives federal funding renders the entire municipality subject to the mandate of the Rehabilitation Act). Moreover, according to 45 C.F.R. § 84.3(f), any state or political subdivisions such a recipient.

Mr. Hom also must demonstrate that he is handicapped. Under the Act, a handicapped person is defined as a person who "(I) has a physical or mental impairment which substantially limits on or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) *is regarded as having such an impairment*." 29 U.S.C.A. § 706(8)(B) (emphasis added). "`Major life activities' means `functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.'" *Welsh v. City of Tulsa*, 977 F.2d at 1417 (quoting 45 C.F.R. § 84.3(j)(2)(ii)). It is Mr. Hom's contention that he was discriminated against because the Appellees regarded him as having a mental impairment which substantially limited his ability to work, not only as a computer programmer, but in any capacity as an employee at all.

Based on the evidence, Mr. Hom asserted a prima facie case of handicap discrimination under the Act: (1) he was perceived as being a handicapped person, as the term is defined under the Act; (2) he was otherwise qualified to perform the duties assigned to him; (3) he was discriminated against; and (4) the discrimination was because of the perceived handicap. Mental or emotional illness is recognized as a handicapping condition. *Doe v. New York University*, 666 F.2d 761

(2d Cir. 1981); *Doe v. Colantti*, 454 F. Supp. 621 (E.D.Pa. 1978), *aff'd*, 592 F.2d 704 (3rd. Cir. 1979); *Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402, *rehearing denied*, 709 F.2d 712 (5th Cir. 1983).

It should also be noted, that if a handicapped person, as defined under the Act, is unable to perform all requirements of a job, he or she is still "otherwise qualified" and protected if any "reasonable accommodation" by the employer would enable the employee to perform those tasks. *School Board of Nassau County v. Arline*, 107 S.Ct. 1123, 1131 n.17 (1987); 45 C.F.R. § 84.3(k). Mr. Hom asserts that there were methods available to provide him with reasonable accommodation for this perceived handicap which were consciously ignored by the defendants.

In addition to the Department being liable, here the individual Appellees were sued in both a personal and representative capacity. In *Association for Retarded Citizens in Colorado v. Frazier et al.*, 517 F. Supp. 105 (D.C. Colo. 1981) an individual sued in his representative capacity was held a proper party in a § 504 action. According to this decision, applying Tenth Circuit precedent, each individual defendant was a "recipient" within the meaning of the definition at 45 C.F.R. §84.3(f). See, also *Mackey v. Cleveland State University et al.*, 837 F. Supp. 1396 (N.D. Ohio 1993). Thus, the individual Appellees are proper defendants in this action.

III. BECAUSE MR. HOM'S RELATIONSHIP WITH HIS EMPLOYER WAS CONTRACTUAL RATHER THAN STATUTORY, THE TRIAL COURT COMMITTED ERROR WHEN IT DISMISSED HIS CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

Because the character of the employment relationship is contractual and not statutory, the trial court committed error when

it dismissed Mr. Hom's claim for breach of the implied covenant of good faith and fair dealing²¹.

A claim based on a breach of the implied covenant of good faith and fair dealing gives rise to a claim for breach of contract. *Peterson v. Browning*, 832 P.2d 1280 (Utah 1992) (quoting *Beck v. Farmers Insurance Exchange*, 701 P.2d 795 (Utah 1985)). Mr. Hom maintains that his public agency employer (and its employees and agents) retained a power of sole discretion through the express employment contract discussed above, which obligated them to exercise that discretion reasonably and in good faith. Mr. Hom further maintains that given the circumstances of his termination, the Appellees acted contrary to a covenant of good faith and fair dealing and thereby breached the employment contract governing Mr. Hom's employment. See *Cook v. Zions First National Bank*, 919 P.2d 56 (Utah Ct. App. 1996); *Brehany v. Nordstrom, Inc.*, 812 P.2d 49 (Utah 1991).

According to *McKean v. McBride*, 884 P.2d 1314 (Utah Ct. App. 1994), any action based upon a written instrument, as in this case, can be brought within six years. In this case, the good faith claim is based on a specific written contract term which expressly holds the decision maker to a just cause standard. There is no basis to claim that the obligation to apply the just cause standard in good faith is somehow different in kind than any other provision of the employment contract. If any aspect of this contract is subject to

²¹ "[E]very contract is subject to an implied covenant of good faith, that implied covenant cannot be construed to establish new, independent rights or duties not agreed upon by the parties." *Sanderson v. First Security Leasing Co.*, 844 P.2d 303, 308 (Utah 1992) (citation omitted).

the six-year statute of limitations, all aspects of it are²².


Because the underlying contract in this case is founded upon written instruments, the applicable statute of limitations is six years²³ Thus, Mr. Hom's good faith and fair dealing was improperly dismissed.

CONCLUSION

Based on the foregoing and on the record herein, Mr. Hom respectfully requests that the Court reverse the decision of the trial court and remand this case back to the trial court where it may proceed to trial.

DATED AND RESPECTFULLY SUBMITTED this 13th day of November, 1997.

L. ZANE GILL, P.C.



L. Zane Gill
Attorney for Appellant

²² In *City of Terre Haute v. Brighton*, 450 N.E.2d 1039 (Ind. Ct. App. 1983) the following points are made which apply to the question at hand: (1) firefighters' relationship with the City is contractual; (2) the fireman's "tenure act" is part of their contract; (3) the "tenure act" establishes particular requirements for dismissal or demotion; (4) notwithstanding the statutory remedy provided by the "tenure act", a common law action in contract is still available; and (5) despite the argument of the public employer, the limitations period in the City's Tort Claims Act is not applicable.

²³ Generally, "a covenant of good faith and fair dealing inheres in most, if not all, contractual relationships." *St. Benedict's Dev. v. St. Benedict's Hospital*, 811 P.2d 194, 199-200 (Utah 1991). Under the covenant of good faith and fair dealing, each party to a contract impliedly promises not to "intentionally or purposely do anything which will destroy or injure the other party's right to receive the fruits of the contract." *Id.* at 199. A violation of this covenant gives rise to a claim for breach of contract. *Id.* at 200. Whether there has been a breach of contract is generally a "factual issue to be determined by [the fact finder] after consideration of all attendant circumstances and evidence...." *Western Farm Credit Bank v. Pratt*, 860 P.2d 376, 380 (Utah Ct. App. 1993).

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 1997, two (2) true and correct copies of the foregoing BRIEF OF APPELLANT were served, via first class mail, postage prepaid, upon the following:

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



A handwritten signature in black ink, appearing to read "L. Kane Hill", is written over a horizontal line.

Addendum

29 U.S.C. § 704¹ Nondiscrimination under Federal grants and programs; promulgation of rules and regulations (See Addendum)

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by and Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

UTAH CODE ANN. § 67-19-18 Dismissals and demotions - Grounds - Disciplinary action - Procedure - Reductions in force.

- (1) Career service employees may be dismissed or demoted:
 - (a) to advance the good of the public interest; or
 - (b) for just causes such as inefficiency, incompetency, failure to maintain skills or adequate performance levels, insubordination, disloyalty to the orders of a superior, misfeasance, malfeasance, or nonfeasance in office.
- (2) Employees may not be dismissed because of race, sex, age, physical handicap, national origin, religion, political affiliation, or other nonmerit factor including the exercise of rights under this chapter.

UTAH CODE ANN. § 78-12-23 (1953), *as amended*. Within six years - Mesne profits of real property - Instrument in writing.

An action may be brought within six years:

- (1) for the mesne profits of real property;
- (2) upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22.

UTAH CODE ANN. § 78-12-25 (1953), *as amended*. Within four years.

An action may be brought within four years:

- (1) upon a contract, obligation or liability not founded upon an instrument in writing; also on an open account for goods, wares, and merchandise, and for any

¹ As it existed at the times relevant to Mr. Hom's termination from his employment at the Department.

article charged on a store account also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received;

...

(3) for relief not otherwise provided for by law.

UTAH CODE ANN. § 78-12-26 (1953), *as amended*. Within three years.
An action may be brought within three years.

...

(4) for a liability created by the statutes of this state, other than for a penalty or forfeiture under the lease of this state, except where in special cases a different limitation is prescribed by the statutes of this state;

...

Proceedings include all events.

2:91cv1016 Hom v. Squires, et al

CLOSED APPEAL

9/26/91 1 Complaint filed; assigned to Judge Anderson. Filing fee pd 43297. (hm) [Entry date 09/27/91]

9/26/91 -- Summons(es) issued for A. Roland Squires, Arthur J. Hudachko (hm) [Entry date 09/27/91]

10/1/91 2 Memo of recusal by AJA (kp) [Entry date 10/04/91]

10/21/91 3 Case reassigned to Judge David K. Winder. cc: attys (kp) [Edit date 10/21/91]

10/28/91 4 Return of summons executed as to A. Roland Squires, Arthur J. Hudachko 10/23/91 Answer due on 11/12/91 for Arthur J. Hudachko, for A. Roland Squires (kp) [Entry date 10/29/91]

11/8/91 5 Motion by A. Roland Squires, Arthur J. Hudachko for leave to file over-length memo in support of motion to dismiss (tb) [Entry date 11/12/91]

11/12/91 6 Motion by A. Roland Squires, Arthur J. Hudachko to dismiss with prejudice for failure to state a claim upon which relief may be granted (tb) [Entry date 11/13/91]

11/13/91 7 Order granting [5-1] motion for leave to file over-length memo in support of motion to dismiss signed by DKW, 11/12/91, cc:attys (tb)

11/14/91 8 Memorandum by A. Roland Squires, Arthur J. Hudachko in support of [6-1] motion to dismiss with prejudice for failure to state a claim upon which relief may be granted (tb)

11/15/91 9 Certificate of service by Michael Hom for pltf's 1st/interrogs and req/prod/docs (tb) [Entry date 11/18/91]

12/2/91 10 Motion by Michael Hom to extend time to respond to def's motion to dismiss (tb) [Entry date 12/03/91]

12/2/91 11 Memorandum by Michael Hom in support of [10-1] motion to extend time to respond to def's motion to dismiss (tb) [Entry date 12/03/91]

12/2/91 12 Affidavit of L. Zane Gill (tb) [Entry date 12/03/91]

12/9/91 13 Motion by Michael Hom to amend [1-1] complaint (tb) [Entry date 12/10/91]

12/9/91 14 Memorandum by Michael Hom in support of [13-1] motion to amend [1-1] complaint (tb) [Entry date 12/10/91]

12/11/91 15 Memorandum by Michael Hom in opposition to [6-1] motion to dismiss with prejudice for failure to state a claim upon which relief may be granted (tb) [Entry date 12/12/91]

Proceedings include all events.
2:91cv1016 Hom v. Squires, et al

CLOSED APPEAL

12/12/91 16 Order of Reference, pursuant to 28:636(b)(1)(B) signed by
DKW, 12/12/91, cc:attys (tb)

12/13/91 -- Case referred to Judge Calvin Gould (mw)

12/13/91 17 Notice of Hearing: Motion hearing before CG set for 2:00
1/13/92 for [13-1] motion to amend [1-1] complaint (mw)

1/8/92 18 Stipulation by Michael Hom, A. Roland Squires, Arthur J.
Hudachko stip to continue hrg on Pla's Mot/amd cmplt
previously scheduled for 1/13/92; reset 2/11/92 at 2:00
p.m. (hm) [Entry date 01/09/92]

1/10/92 19 Order granting [18-1] stipulation motion stip to continue
hrq on Pla's Mot/amd cmplt previously scheduled for 1/13/92;
reset 2/11/92 at 2:00 p.m., Motion hearing set for 2:00
2/11/92 for [13-1] motion to amend [1-1] complaint signed
by RNB, 1/10/92, cc:attys (hm) [Entry date 01/13/92]

1/13/92 -- Case referred to Judge Ronald N. Boyce (hm)

1/27/92 20 Stipulation by Michael Hom, A. Roland Squires, Arthur J.
Hudachko stip to continue oral argument on pla' mot/amd
cmp (hm) [Entry date 01/28/92]

1/28/92 21 Amd Order granting [20-1] stipulation motion stip to
continue oral argument on pla' mot/amd cmp, Motion hearing
set for 10:30 2/18/92 for [20-1] stipulation motion stip to
continue oral argument on pla' mot/amd cmp signed by RNB,
1/28/92; cc:atty (hm) [Entry date 01/29/92]

2/4/92 22 Notice of Hearing filed : Motion hearing set for 2:30
2/13/92 for [13-1] motion to amend [1-1] complaint JUDGE:
RNB (hm) [Entry date 02/05/92]

2/18/92 23 Minute entry:, Motion hearing held for [13-1] motion to
amend [1-1] complaint granting [13-1] motion to amend
[1-1] complaint; Pla. moves court for voluntary dismissal
w/o prej.; Def. stipulates that cts. 2-6 may be dismissed
w/o prej.; Mr. Gill to prepare order ; Judge: RNB Court
Reporter: electronic Court Deputy: Kim Jones (kj)
[Entry date 02/20/92]

2/18/92 24 Amended complaint by Michael Hom , against :amends [1-1]
complaint; jury demand (hm) [Entry date 03/05/92]

3/16/92 25 Stipulation by Michael Hom, A. Roland Squires, Arthur J.
Hudachko stip to dismiss cnts II-VI w/o prej (hm)

3/18/92 26 Order granting [25-1] stipulation motion stip to dismiss
cnts II-VI w/o prej; granting [13-1] motion to amend [1-1]
complaint; denying [6-1] motion to dismiss w/o prej to
file a renewed mot/to dism based on remaining claims signed
by DKW, 3/18/92; cc:attys (hm)

Proceedings include all events.
2:91cv1016 Hom v. Squires, et al

CLOSED APPEAL

4/16/92 -- Transcript of Proceedings of motion to amend complaint before RNB for dates of 2/18/92 (hm)

9/22/92 27 Notice of Hearing filed : Initial Pretrial Conference set for 11:15 10/26/92 JUDGE: SA (hm)

10/26/92 28 Scheduling order signed by SA setting Joining of parties, amending of pleadings on 12/31/92 Deadline for filing of all motions 6/18/93 Discovery cutoff 5/28/93 Attorney conference by 9:00 9/15/93 Final Pretrial Conference for 8:00 9/22/93 Jury Trial for 9:00 10/4/93; cc:attys (hm) [Entry date 10/27/92]

12/31/92 29 Amended complaint by Michael Hom against Douglas Bordrero :amends [24-1] amended complaint; jury demand (hm) [Entry date 01/11/93]

4/20/93 30 Certificate of service of 1st req for prod/docs by Michael Hom (hm) [Entry date 04/21/93]

4/21/93 31 Certificate of service of 1st req for prod/docs by Michael Hom (hm) [Entry date 04/22/93]

4/27/93 32 Motion by Michael Hom for default judgment against Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero, to compel discovery (hm) [Entry date 04/28/93]

4/27/93 33 Memorandum by Michael Hom in support of [32-1] motion for default judgment against Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero, [32-2] motion to compel discovery (hm) [Entry date 04/28/93]

5/5/93 34 Memorandum by Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero in opposition to [32-1] motion for default judgment against Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero, [32-2] motion to compel discovery (hm) [Entry date 05/06/93]

5/11/93 35 Notice of Hearing filed : Motion hearing set for 9:30 5/20/93 for [32-1] motion for default judgment against Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero, set for 9:30 5/20/93 for [32-2] motion to compel discovery JUDGE: RNB; cc:attys (hm) [Entry date 05/12/93]

5/12/93 36 Reply by Michael Hom to response to [32-1] motion for default judgment against Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero, [32-2] motion to compel discovery (hm) [Entry date 05/13/93]

5/13/93 37 Affidavit of L. Zane Gill (hm) [Entry date 05/14/93]

5/14/93 38 Answer by Arthur J. Hudachko, A. Roland Squires to 12/4/91 amended complaint (hm) [Entry date 05/17/93]

5/18/93 39 Motion by Michael Hom to strike [38-1] complaint answer (hm)
[Entry date 05/19/93]

5/19/93 40 Memorandum by Michael Hom in support of [39-1] motion to
strike [38-1] complaint answer (hm)

5/19/93 41 Memorandum by Arthur J. Hudachko, A. Roland Squires in
opposition to [32-1] motion for default judgment against
Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero,
[32-2] motion to compel discovery (hm)

5/19/93 42 Certificate of service of ans to pla's 1st interrog and req
for prod/docs by Arthur J. Hudachko, A. Roland Squires (hm)

5/20/93 -- Motion in open court by Arthur J. Hudachko, A. Roland
(kj) Squires, Douglas Bordrero , to set aside default judgment

5/20/93 43 Minute entry:, Motion hearing [0-0] motion to set aside
default judgment, [39-1] motion to strike [38-1] complaint
answer, held for [32-1] motion for default judgment against
Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero,
held for [32-2] motion to compel discovery; scheduling
order deadlines: setting Discovery deadline on 11/1/93
Deadline for filing of all motions by 12/15/93 Final
Pretrial Conference for 8:00 4/4/94 Jury Trial for 9:00
4/18/94; granting [0-0] motion to set aside default
judgment, mooting [39-1] motion to strike [38-1] complaint
answer, granting [32-1] motion for default judgment against
Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero,
granting [32-2] motion to compel discovery; outstanding
discovery due w/in 30 days; Answer from Mr. Bordrero due
w/in 15 days ; Judge: RNB Court Reporter: electronic Court
Deputy: Kim Jones (kj)

5/20/93 44 Response by Arthur J. Hudachko, A. Roland Squires to
[39-1] motion to strike [38-1] complaint answer (hm)

5/20/93 44 Motion by Arthur J. Hudachko, A. Roland Squires to strike
[29-1] amended complaint (hm)

5/20/93 45 Acknowledgement of service as to Douglas Bordrero c/o J.
Mark Ward 5/20/93 Answer due on 6/9/93 for Douglas Bordrero
(hm) [Entry date 05/21/93]

5/20/93 46 Answer by Arthur J. Hudachko, A. Roland Squires, Douglas
Bordrero to 12/31/92 amended complaint (hm)
[Entry date 05/21/93]

- 5/25/93 47 Order mooting [44-1] motion to strike [29-1] amended complaint, granting [0-0] motion to set aside default judgment Dfts Squires and Hudachko's dflt is entered; however, the dfts motion to set aside dflt is granted and the dflt is set aside provided dfts shall ans w/i 10 days of this order, mooting [32-2] motion to compel discovery, Dft Douglas Bodrero will accept process and an answer will be made. scheduling order deadlines: setting Discovery deadline on 11/1/93 Deadline for filing of all motions by 12/15/93 Final Pretrial Conference for 8:00 4/14/94 before DKW; 5 day (12 Person) Jury Trial for 9:00 4/18/94 Other outstanding discovery due from dfts shall be answered w/o 30 days of this order signed by RNB, 5/25/93; cc:attys (hm) [Entry date 05/26/93]
- 5/27/93 48 Acknowledgement of service as to Douglas Bordrero by J. Mark Ward 5/26/93 Answer due on 6/15/93 for Douglas Bordrero (hm)
- 5/27/93 49 Answer by Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero to amended complaint (hm)
- 5/27/93 50 Certificate of service of ans to 2nd req for prod/docs and 1st interrog and req for prod/docs by Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero (hm)
- 10/29/93 51 Motion by Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero to compel pla to ans dfts' 1st interrog and req for prod/docs (hm)
- 11/1/93 52 Notice of Hearing filed: Motion hearing set for 10:00 11/16/93 for [51-1] motion to compel pla to ans dfts' 1st interrog and req for prod/docs JUDGE: RNB (bn) [Entry date 11/02/93]
- 11/12/93 53 Certificate of service 1st req for adm by Michael Hom (hm) [Entry date 11/15/93]
- 11/16/93 54 Minute entry:, Motion hearing held for [51-1] motion to compel pla to ans dfts' 1st interrog and req for prod/docs granting [51-1] motion to compel pla to ans dfts' 1st interrog and req for prod/docs. Face to face conf under Rule 204(g) is to occur no later than 12-3-93. Pla is to be present at the conf or to be accessible by phone to answer questions. Dft to prepare order. ; Judge: Ronald N. Boyce Court Reporter: Electronic Court Deputy: Sharon K. Spratley (ss) [Entry date 11/17/93]
- 12/6/93 55 Notice by Michael Hom to take deposition of UT Dept of Public Safety, 12/23/93. (hm) [Entry date 12/07/93]
- 12/6/93 56 Motion by Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero to continue trial at least 3 months beyond present setting (hm) [Entry date 12/07/93]

Proceedings include all events.
2:91cv1016 Hom v. Squires, et al

CLOSED APPEAL

12/6/93 57 Notice by Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero to take deposition of Michael Hom, 1/8/94 (hm) [Entry date 12/07/93]

12/13/93 58 Notice of Hearing filed : Motion hearing set for 2:00 12/28/93 for [56-1] motion to continue trial at least 3 months beyond present setting JUDGE: RNB; cc:attys (hm)

12/14/93 59 Notice by Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero to take deposition of Michael Hom, 1/29/94 (hm)

12/14/93 60 Second Motion by Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero to compel ans to 1st interrog and req for prod/docs (hm)

12/14/93 61 Return of service of subpoena duces tecum as to D. Douglas Bodrero commissioner of UT State Dept of Public Safety c/o Carolyn Davis executed 12/6/93. (hm) [Entry date 12/15/93]

12/20/93 62 Notice of Hearing filed by defendant Arthur J. Hudachko, defendant A. Roland Squires, defendant Douglas Bordrero : Motion hearing set for 2:00 12/28/93 for [60-1] motion to compel ans to 1st interrog and req for prod/docs JUDGE: RNB (sh) [Entry date 12/21/93]

12/20/93 63 Order mooting [51-1] motion to compel pla to ans dfts' 1st interrog and req for prod/docs. Parties to have an informal disc cnf pursuant to rule 204-1(g) US Dist Court Rules. Cnf to be a face to face cnf between cnsl. Pla Michael Hom is to personally participate in this cnf, either in person or by phone. Cnf to take place no later than 12/3/93. If parties are unable to resolve their differences at this cnf, concerning pla's responses to dfts' disc requests, then dfts may bring an appropriate motion to compel signed by RNB, 12/20/93; cc:attys (hm) [Entry date 12/22/93]

12/22/93 64 Certificate of service of supp ans to 1st interrog by Michael Hom (hm) [Entry date 12/23/93]

Proceedings include all events.
2:91cv1016 Hom v. Squires, et al

CLOSED APPEAL

12/28/93 65 Minute entry: Motion hrg held - granting [60-1] motion to compel ans to 1st interrog and req for prod/docs. Pltf ordered to submit dmg calculations by 1/18/94 or be subj to sanctioins. Cnsl to prepare a form for the pltf to sign under penalty of perjury re the dmg calculations. Granting [56-1] motion to continue trial at least 3 months beyond present setting, scheduling order deadlines: setting Discovery deadline on 5/1/94 Deadline for filing of all motions by 6/1/94 Final Pretrial Conference for 8:00 9/7/94 before Judge Winder Jury Trial for 9:00 9/26/94, 5 days, before Judge Winder. Mr. Ward to submit an order reflecting the ruling of the crt on the mots; Judge: Ronald N. Boyce Court Reporter: Electronic Court Deputy: Kathryn Shauklas (kp)

12/28/93 66 Motion by Michael Hom for Joinder RE: [56-1] motion to continue trial at least 3 months beyond present setting (ce) [Entry date 12/29/93]

12/28/93 66 Motion by Michael Hom to continue trial (ce) [Entry date 12/29/93]

1/18/94 67 Certificate of service by Michael Hom re 2nd Suppl Answers to Defs' 1st Set of Interrogs mailed to cnsl on 1/17/94. (kp) [Entry date 01/19/94]

4/6/94 68 Motion by Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero to compel pla to submit to a depo at a date & time fixed by crt (ce) [Entry date 04/07/94]

4/6/94 69 Memorandum by Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero in support of [68-1] motion to compel pla to submit to a depo at a date & time fixed by crt (ce) [Entry date 04/07/94]

4/11/94 70 Memorandum by Michael Hom in opposition to [68-1] motion to compel pla to submit to a depo at a date & time fixed by crt (kj) [Entry date 04/12/94]

4/12/94 71 Notice of Hearing filed : Motion hearing set for 10:30 4/28/94 for [68-1] motion to compel pla to submit to a depo at a date & time fixed by crt JUDGE: RNB. cc: atty (ce)

4/28/94 72 Minute entry:, Motion hearing held for [68-1] motion to compel pla to submit to a depo at a date & time fixed by crt granting [68-1] motion to compel pla to submit to a depo at a date & time fixed by crt. Depo of pla is to be taken on 5/14/94. Dft to prepare order. ; Judge: Ronald N. Boyce Court Reporter: electronic Court Deputy: Sharon K. Spratley (ss) [Entry date 04/29/94]

5/2/94 73 Return of service executed re subp served on records custodian of Utah Dept of Public Safety c/o J. Francis Valerga, 4/26/94 (ce) [Entry date 05/03/94]

Proceedings include all events.
2:91cv1016 Hom v. Squires, et al

CLOSED APPEAL

[Entry date 10/12/94]

10/11/94 91 Memorandum by Michael Hom in opposition to [89-1] supplemental support memorandum re due process issues in supp of dfts mot/sum jgm AND memo in support of [90-1] motion to amend [1-1] complaint (ce) [Entry date 10/12/94]

10/14/94 92 Notice of Hearing filed : Motion hearing set for 2:00 10/31/94 for [90-1] motion to amend [1-1] complaint JUDGE: RNB (sh) [Entry date 10/17/94]

10/18/94 93 Reply brief RE: [91-1] opposition/support memorandum filed by A. Roland Squires, Douglas Bordrero (cs) [Entry date 10/19/94]

10/25/94 94 Notice of Hearing filed : Motion hearing set for 8:00 11/22/94 for [84-1] motion for summary judgment dismiss the amd cmp w/prej JUDGE: DKW. cc: atty (ce)

10/25/94 95 Motion by Michael Hom to use investigative internal affairs file as evidence at trial (ce) [Entry date 10/26/94]

10/25/94 96 Memorandum by Michael Hom in support of [95-1] motion to use investigative internal affairs file as evidence at trial (ce) [Entry date 10/26/94]

10/28/94 97 Memorandum by Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero in opposition to [90-1] motion to amend [1-1] complaint (ce)

10/28/94 98 Notice of Hearing filed : Motion hearing set for 2:00 11/18/94 for [95-1] motion to use investigative internal affairs file as evidence at trial JUDGE: RNB. cc: atty (ce) [Entry date 10/31/94]

10/31/94 99 Minute entry:, Motion hearing held for [90-1] motion to amend [1-1] complaint Pltf rep by Zane Gill; dft rep by Mark Ward. After hrg arguments from cnsl, further briefing is requested. Pltf brief is due 11/10/94 and resp is due 11/16/94 - [90-1] motion to amend [1-1] complaint taken under advisement ; Judge: RNB Court Reporter: electronic Court Deputy: Michelle Peart (mp) [Entry date 11/03/94]

11/1/94 -- Transcript of Proceedings for dates of 9/8/94 re final pretrial conf held before DKW (ce) [Entry date 11/03/94]

11/10/94 100 Supplemental Memorandum RE: [90-1] motion to amend [1-1] complaint filed by Michael Hom (ce) [Entry date 11/14/94]

11/10/94 100 Reply by Michael Hom to response to [90-1] motion to amend [1-1] complaint (ce) [Entry date 11/14/94]

11/15/94 101 Reply brief of dfts RE: [100-1] supp memo of pla's re mot/amd cmp (ce) [Entry date 11/16/94]

- 11/16/94 102 Response by UT Dept Pub Safety to [95-1] motion to use investigative internal affairs file as evidence at trial (ce) [Entry date 11/17/94]
- 11/18/94 103 Minute entry:, Motion hearing held for [95-1] motion to use investigative internal affairs file as evidence at trial, pla rep by Zane Gill, dft rep by Mark Ward; motion argued; Crt granting in part, denying in part [95-1] motion to use investigative internal affairs file as evidence at trial; Mr. Gill to prepare order; Crt advised cnsl that it was denying [90-1] motion to amend [1-1] complaint; Mr. Ward to prepare order ; Judge: RNB Court Reporter: electronic Court Deputy: Kim Jones (kj)
- 11/22/94 104 Minute entry:, Motion hearing held for [84-1] motion for summary judgment dismiss the amend complaint with prejudice. Pla rep by L. Zane Gill. Def rep by Mark Ward. Args of cnsl heard. [84-1] motion for summary judgment dismiss the amend complaint with prejudice taken under advisement ; Judge: David K. Winder, Court Reporter: Raymond Fenlon, Court Deputy: Catherine Hollstein (ch)
- 12/1/94 105 Memorandum Decision granting [84-1] motion for summary judgment dismiss the amend complaint with prejudice signed by DKW, 12/1/94. cc: atty (ce)
- 12/1/94 106 Judgment for Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero against Michael Hom signed by DKW, 12/1/94. Pla's amend complaint dismiss with prejudice. All parties to bear own atty fees/costs. cc: atty (ce)
- 12/1/94 -- Case closed (ce)
- 12/1/94 -- CASE NO LONGER REFERRED TO Judge Ronald N. Boyce (ce)
- 12/1/94 107 Return of service executed re subp served on Dan Taylor, 11/28/94; Ken Schwartz, 11/23/94; Ron Stringham, 11/29/94; Kwang-Po Lee, 11/21/94; Judy Sorensen, 11/21/94; Phil Clingenpeel, 11/21/94; Cheri Ertel, 11/22/94; Robert W. Gardiner, 11/22/94; Richard Townsend, 11/23/94; Thomas Bielen, 11/22/94; Yolanda Stout, 11/22/94 - all served c/o Judy Montague-Gill (ce) [Entry date 12/02/94]
- 12/2/94 -- Proposed order from Arthur J. Hudachko, A. Roland Squires, Douglas Bordrero re: denying pla's motion/amend complaint (ce) [Entry date 12/05/94]
- 12/8/94 108 Order denying [90-1] motion to amend [1-1] complaint signed by RNB, 12/8/94. cc: atty (ce) [Entry date 12/09/94]
- 12/20/94 109 Notice of appeal by Michael Hom; Fee Status: pd #64302. Appeals to the USCA for the Tenth Circuit from the jgm entered on 12/1/94 and order entered on 12/8/94. (rb)

Proceedings include all events.
2:91cv1016 Hom v. Squires, et al

CLOSED APPEAL

[Entry date 12/21/94]

12/21/94 110 Notice of appeal and certified copy of docket to USCA:
[109-1] appeal pkts sent to cnsl. (rb)